

**IN THE KARNATAKA REAL ESTATE APPELLATE TRIBUNAL,
BENGALURU**

DATED THIS THE 23rd DAY OF JUNE, 2023

PRESENT

HON'BLE SRI K P DINESH, JUDICIAL MEMBER

AND

HON'BLE SRI P S SOMASHEKAR, ADMINISTRATIVE MEMBER

APPEAL (K-REAT) NO. 01/2023

BETWEEN:

Guru R
S/o Raj Mohan R
Aged about 39 years,
R/at No.218, 4th A Main,
4th Block, 4th Stage,
Basaveshwarnagar,
Bengaluru – 560 079

:APPELLANT

(Appellant Party-in-person)

AND

1. Skygold Properties Pvt Ltd
Rep by Akash A Suvarna,
Managing Director,
42/A, 2nd Block, 3rd Stage,
Basaveshwarnagar,
Bengaluru – 560 079.
2. Karnataka Real Estate Regulatory Authority
Office at Ground Floor, No.1/14,
Silver Jubilee Block,
Unity Building, CSI Compound,
3rd Cross, Mission Road,
Bengaluru-560 027
Represented by its Secretary.

:RESPONDENTS

(R.1- Notice served-Absent

Smt P.J for Sri.Robert D'Souza Advocate for R.2 –RERA-present)

This Appeal is filed under Section 44 of the Real Estate (Regulation and Development) Act, 2016, before this Tribunal to set aside the order dated 19.09.2022 (replaced by rectification order dated 12.01.2023) in complaint No. CMP/201202/0007200 passed by the Karnataka Real Estate Regulatory Authority, Bengaluru-Respondent No.2.

This appeal coming on for pronouncement of judgment this day, Hon'ble Administrative Member delivered the following:

JUDGMENT

The above appeal is preferred by the allottee, against the impugned order dated 19th September 2022 (replaced by rectification order dated 12.01.2023) of the K-RERA in CMP/201202/0007200 directing the 1st respondent-promoter to pay the entire amount paid by the complainant towards refund with interest within 60 days from the date of the order etc.,

2. For the sake of convenience, hereinafter, the appellant, the 1st respondent and the 2nd respondent are referred to as 'the Allottee' 'the promoter' and 'the Authority', respectively.

BRIEF FACTS OF THE CASE:

3. The appellant being desirous of owning a flat in the project "Skygold Elegance", approached the promoter to purchase flat bearing N A-102 constructed on Municipal No. 85/6-1 situated at Chokkanahalli within BBMP limits and had entered into an agreement of sale dated 18.08.2015 with the promoter. That as per the terms of the sale agreement the promoter was required to complete the construction of the apartment and handover the possession of the apartment on or before April 2016, after obtaining occupancy certificate. In spite of promise made in the agreement of sale, the

promoter failed to secure the occupancy certificate within the prescribed period and hand over possession of the flat to the allottee. As there was a delay in completion of the project, the allottee filed a complaint bearing No.CMP/190808/0003534 before the Adjudicating Officer seeking delay compensation and execution of the sale deed.

4. As could be seen from the pleadings of the appeal memo and the annexures thereto, the learned Adjudicating Officer, after hearing the parties, by order dated 20th January 2020 allowed complaint No.CMP/190808/0003534 and passed an order, the operative portion of which reads as follows:

- a. "The Complaint filed by the complainant bearing No.CMP/190808/0003534 is hereby allowed in part.
- b. The developer is hereby directed to pay @9%p.a. on the total amount paid as on August 2016 till 30.04.2017
- c. The developer is hereby directed to pay @ 2% above the MCLR of SBI on the total amount paid by the complainant from 01.05.2017 till 10.09.2019.
- d. The complainant is hereby directed to tender amount payable to the developer and the developer is hereby directed to execute sale deed within 60 days from this date.
- e. The developer is hereby directed to pay Rs.5,000/- as cost of the petition."

5. The allottee submits that after the order passed by the learned Adjudicating officer, in spite of repeated requests made to the promoter to comply with the above order, the promoter failed to do so. Thereafter, the allottee submits that he filed an application before the learned Adjudicating

officer for enforcement of Judgment passed in the above complaint, which is duly acknowledged by the office of K-RERA on 19.06.2020. Further, on 09.09.2020, the allottee filed Memo of calculation based on the above order and prayed for a direction to the promoter to execute the sale deed and to pay compensation. On the said Execution petition, the learned Adjudicating Officer, issued notice to the promoter with a direction to appear before the learned Adjudicating Officer on 1.10.2020 and case was adjourned to 2.11.2020.

6. When things stood thus, the allottee submits that the learned Adjudicating officer, instead of proceeding with the Execution petition, forced the allottee to file a fresh complaint before the Authority. Accordingly, the allottee filed a fresh complaint bearing No. CMP/201202/0007200 praying for a direction to the promoter to refund the entire amount with interest and compensation. The learned Adjudicating officer, in view of the Judgment of the Hon'ble Supreme Court in the case of M/S NEWTECH PROMOTERS AND DEVELOPERS PVT. LTD., Vs. STATE OF U P AND OTHERS- forwarded the complaint to the Authority-2nd respondent. However, during the pendency of the complaint before the Authority the appellant-allottee appears to have made an application dated 15th June, 2022 (Annexure-F) for amending the prayer seeking delay compensation and for execution of sale deed. The application was taken on record by the Authority and also recorded in the order sheet and permitted the allottee to amend the prayer.

7. The allottee appeared in person and the promoter appeared through their counsel before the Authority and submitted their written submissions. The Authority, after hearing the parties and perusing the written submissions and documents, passed an order on 19th September 2022 and the operative portion of the said order reads thus:

“In exercise of the powers conferred under Section 31 of the Real Estate (Regulation and Development) Act, 2016, the complaint bearing No: CMP/UR/201202/0007200 (amended vide order dated 12.01.2023) is hereby allowed.

2. Respondent is directed to pay the entire amount paid by the complainant towards refund with interest within 60 days from the date of this order, calculated from 9% 06.07.2014 to 30.04.2017 and MCLR of SBI + 2% per annum commencing from 01.05.2017 till the entire realization, failing which the complainant is at liberty to enforce the said order in accordance with law.
3. Further, the complainant is directed not to enforce the award passed in CMP/190808/0003534 for delay compensation and cannot proceed further for enforcement of the order for delay compensation when he has been awarded with refund of amount with interest in the present complaint. Therefore, the complainant is not entitled for delay compensation and he shall forego his right to enforce the award passed in CMP/190808/0003534.

No order as to cost.”

8. Aggrieved by the said order the appellant-allottee has preferred this appeal praying to set aside the impugned order.

9. Before adverting to the submissions of the allottee, it needs to be noted that after filing the appeal, on the office raising objection with regard to the discrepancy in the complaint number mentioned in the impugned

order and the appeal memo, the allottee made an application dated 05.01.2023 inviting the attention of the Authority to rectify the complaint Number which was mentioned as complaint No.CMP/UR/0000007200 in the impugned order to be corrected as CMP/201202/0007200. After hearing, the Authority in exercise of powers under Section 39 of RERA Act has rectified the error in mentioning complaint number and passed a fresh order, wherein at para 2A it is observed as follows:

"The complainant Mr. Guru R. had moved an application dated 05.01.2023 inviting attention of the Authority to rectify the complaint No.0000007200 instead of 0007200.

(a) The complaint No. is shown as CMP/UR/201202/0000007200 instead of CMP/201202/0007200.

The application has been verified and it is found necessary to rectify the order dated 19th September 2022.

(i) This rectification is done within two years from the date of the original judgment i.e. of 19th September 2022.

(ii) Here in this case, the complainant has preferred an appeal before the Hon'ble Karnataka Real Estate Appellate Tribunal in case No. 1/2023 against the orders passed by RERA in the judgment dated 19th September 2022. The Hon'ble Appellate Tribunal has directed the complainant to resubmit the corrected certified order copy with proper case number to the court by 13.1.2023. Perused the directions of Hon'ble Appellate Tribunal to carry out corrections in complaint no. CMP/UR/201202/0000007200. Accordingly it is carried out as CMP/201202/0007200 instead of CMP/UR/201202/0000007200.

(iii) No substantive part of the order is amended

(iv) The Authority's judgment dated 19th September 2022 is declared Non Est and replace by this order dated 12/01/2023."

A perusal of the above order shows that there is no substantive change in the earlier order dated 19.09.2022 passed by the Authority and

only correction is carried out by rectifying the complaint number. In respect of remaining portion of the order, the rectification order is replica of the order dated 19.09.2022 passed earlier. The appellant, with the permission of the Tribunal, has annexed the certified copy of the rectified order to this appeal memo.

10. The allottee appeared as party-in-person. Respondent No.1 though served with notice, remained unrepresented. Respondent No.2-RERA though represented by a counsel, did not advance any argument.

11. The allottee submits that Authority failed to consider the memo dated 15.06.2022 filed for amendment of the complaint which is produced at Annexure-F. The Authority without applying its mind and appreciating the documents placed on record has passed the impugned order 19.09.2022 (replaced by rectification order dated 12.01.2023) which is arbitrary, discriminatory in nature and non-application of mind. The allottee further submits that when a memo is filed for amendment of the prayer for delay compensation and to execute the sale deed instead of refund of the entire amount with interest, the Authority without considering the said memo, has passed the impugned order directing the promoter to refund the entire amount paid by the allottee with interest. As such the impugned order is illegal and liable to be set aside.

12. In view of the above submissions of the allottee, the point that arises for our consideration is:

I) Whether the impugned order (replaced by order dated 12.01.2023) passed by the Authority in complaint No. CMP/201202/0007200 is sustainable in law?

II) What order?

Point No.I

13. As could be seen from the records, the order dated 20.01.2020 passed by the learned Adjudicating Officer in complaint No. CMP/190808/0003534 was not challenged by either of the parties and the same has attained finality. Furthermore, the allottee had also filed execution petition for enforcement of the said order and the learned Adjudicating Officer had issued notice on the said execution petition to the promoter and had heard the matter on two occasions. Thereafter, instead of proceeding with the execution petition, it is alleged that the allottee was forced to file a fresh complaint and the same was placed before the Authority. Thereafter, the Authority, after hearing the parties on the fresh complaint bearing No.CMP/201202/0007200, by order dated 19.09.2022 (replaced by order dated 12.01.2023) directed the promoter to refund the entire amount to the allottee with interest. This is *per se* illegal and opposed to the principles of *res-judicata*.

14. When once the learned Adjudicating Officer has passed an order and that order was not challenged by any of the parties and had attained finality, the Authority could not have entertained a fresh complaint for the same cause of action and passed a different order. The Authority also failed

to notice that the execution petition filed by the allottee was pending before the Adjudicating officer. On this ground also, the impugned order is not sustainable.

15. Further, it is the case of the allottee that he had filed a Memo for amending the prayer in the complaint and the Authority, without hearing the allottee and passing an order on the said Memo has disposed of the complaint itself. When the appellant has filed a Memo for amending the prayer in the complaint, without affording an opportunity to the appellant, the Authority ought not to have passed the impugned order, which is violative of the principles of natural justice.

16. At this stage, the allottee submits that in the event of this Tribunal allowing the appeal and setting aside the impugned order of the Authority, the Tribunal may direct the Authority to proceed with the execution petition which is pending before the Authority and dispose of the same expeditiously.

17. It is needless to say that if the execution proceedings are pending before the Authority, the Authority shall consider the same in accordance with law and dispose of the same as expeditiously as possible.

Accordingly, we answer Point No.(I) in the negative.

18. For the forgoing reasons, we pass the following:

ORDER

(i) Appeal is allowed;

- (ii) The impugned order dated 19.09.2022 (replaced by rectification order dated 12.01.2023) passed by the Authority in CMP/201202/0007200, is set aside;
- (iii) Appellant is at liberty to pursue the execution petition pending before the Authority;
- (iv) In view of disposal of the Appeal, all pending I.As. if any, stand rejected, as they do not survive for consideration;
- (v) The Registry shall comply with the provisions of Section 44 (4) of the Act and return the records to RERA, if any.

There is no order as to costs.

**Sd/-
HON'BLE JUDICIAL MEMBER**

**Sd/-
HON'BLE ADMINISTRATIVE MEMBER**

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