

MAHARASHTRA REAL ESTATE
APPELLATE TRIBUNAL UNDER
MahaRERA Act

No.AT005000000000008

Jitendra Jagdish Tulsiani
501, Tanish Apartments
Next to Joy Vila, 19th Road,
Khar (West), Mumbai 400 052

.. Appellant/s

V/s.

1. M/s. Lavasa Corporation Ltd. & Anr.
Hicon House, 11th Floor,
247 Park, Lal Bahadur Shastri Marg,
Vikhroli (West), Mumbai 400083
2. Real Estate Regulatory Authority
SRA Administrative Building,
Bandra (East), Mumbai 400 051.

.. Respondents

Adv. Shri. K.K.Ramani appeared for the Appellant.

Advocate Shri Kaustav Talukdar alongwith Shri Ruturaj Bankar, M/s. Lex Legal and Partners appeared for Respondent.

CORAM :Hon'ble Shri K. U. CHANDIWAL, J.
Heard on : 14th and 15th March, 2018
Dictated/Pronounced on: 15th March, 2018
Transcribed on : 16th March, 2018

-:ORAL JUDGMENT:-

- 1) Heard finally.
- 2) The appellant has questioned legality and correctness of order dt. 15.1.2018 recorded by Ld. Member and Adj. Officer, MahaRERA Authority, whereby the complaint was dismissed for want of jurisdiction. The Ld. Member formulated a question "Whether lessee can file a complaint under The Real Estate (Regulation and Development) Act, 2016 (RERA Act) against a lessor is the most important issue involved in this complaint."



3) The Appellant as complainant had invoked its jurisdiction in terms of Section 18 of the RERA Act. There is no controversy about the project of the Respondent Lavasa Corpn. or that the Appellant entering into an agreement with Lavasa on 4th April 2014. That the appellant has paid premium amt. of Rs.43,77,600/- in the time schedule as prescribed in the agreement between the parties.

4) The Ld. Counsel for Lavasa says registration of its project with the Authority by itself will not bestow a jurisdiction or a right in the Appellant to file a complaint under the RERA Act. According to Ld. Counsel, the RERA Act contemplates a concept of buyer and the provisions of RERA will not be triggering owing to no title to the Appellant as a buyer. The Id. Counsel agrees that there was no defence raised to the point of jurisdiction and there cannot be an estoppel against the law. The Id. Counsel in order to emphasize his point itself will not stop raising the issue of jurisdiction, which according to him exhaustively dealt with the Agreement, which comprehensively incorporate nature of a tenancy and a landlordship between Lavasa and the Appellant.

5) The Ld. Counsel for the Appellant, says that pursuant to the agreement the entire premium is released the possession of the apartment was to be handed over, in time schedule.

Promoter registered the project on 28.07.2017 and extended the date of possession as 31.12.2020. The Id. Counsel for the appellant pointed out to the provision of sec. 2(d) of the RERA Act which according to him only provides an exclusion in the event of rent. He has emphasized his point and placed reliance on the judgements of Hon'ble Supreme Court; and Income Tax Appellate Authorities.

1. (1972) SC 80, - Commissioner of Income Tax Assam Vs. The Panbari Tea Co. Ltd.
2. (2014) 146 ITD 694 (Mum) Income Tax Officer (TDS) -3-5 Vs. Wadhwa & Associates Realtors (P) Ltd.
3. Order in Writ Petition No. 9028 of 2011- M/s New India Construction Corporation & Others Vs. Savani Cooperative Housing Society Ltd. And Ors.
4. (1985) 156 ITR 497 (SC) - Saroj Agarwal Vs. Commissioner of Income Tax, UP.
5. AIR 1957 521 Lilavati Bai Vs St. of Bombay.
6. (1996) 85 Taxman 375 (SC) Commissioner of Income Tax Vs. Narang Dairy Products.



6) After hearing both the side, perusal of the documents, and browsing the provisions of RERA Act, following points arise for consideration:

- a) Whether the order under challenge dt. 15.1.2018, dismissing the complaint on the point of jurisdiction calls for interference ?


My finding to the aforesaid point is that the order dtd. 15.1.2018 calls for interference and it is accordingly set aside. The matter is remanded to the Member and Adjudicating Officer, MahaRERA, Mumbai, for the following reasons :

7) The Agreement to which repeated reference was given by the Ld. Counsel for Respondent is not a controversy. Only the point of interpretation needs to be addressed. The right of termination which has been harped upon repeatedly will have to be construed in tune with the terms incorporated inbuilt in Agreement. If there was a breach of payment as scheduled in para 6 of the agreement, the consequences were to follow in clause 8 of the Agreement. No such eventuality emerges in the present case. It is well established that if a pipeline is damaged or if any structural changes are made by the allottee or the customer under the law of construction (under Town Planning & Building Construction), it is impermissible as it will be causing nuisance to other occupants in the apartment. Hence this restricted clause was put in acceleration.

8) Clause 'S' is not of a general character and will not by itself draw an inference that it has restricted the customer from user.

9) Indeed the agreement provides right of assignment in the customer and also leasing the property only with a rider that it should be for residential purposes and the allottee should be communicated. Even under the present situation, almost all the tenants in a Cooperative Housing Society are necessarily required to inform to the society and also to local Police, as a mandate is incorporated by the State Authority. Consequently it can't be said that such eventuality in the Agreement restricts or inhibits the right of customer / appellant. There should be an harmonious construction of any document which equally applies statutorily. The author of the Agreement naturally was Lavasa and the Appellant as a customer was required to sign on dotted lines. He has indeed no say to alter any of the clauses as were put forward by Lavasa. His intention was to have a peaceful accommodation at the fag end of his life and to have smooth sailing by residing at Hill station developed with a dream of a township by Lavasa. However, the very deadline of handing of possession is utterly breached and a time schedule of appellant for a dream house has been frustrated.

10) The Respondent Lavasa by its conduct of filing reply did not object to the point of jurisdiction and additionally getting its project registered



with the RERA Authority estopped in law in terms of sec. 115 of the Evidence Act. The conduct of Lavasa naturally made it believe to the customer / the Appellant that there was no bar to jurisdiction with the MahaRERA Authority. Again when the registration is caused on 28th July 2017 in the Schedule, the property or the apartment, where the Appellant has booked the flat is included. There is no exclusion at the time of registration of specific property in the Hill Station – the township of Lavasa. In the absence of such exclusion it is not open for Lavasa now to canvass that the point of jurisdiction raised by the Ld. Adjudicating Member was just.

11) Section 18 of the Act contemplates as under:

18(1)(a) In accordance with terms of Agreement for Sale or as the case maybe, duly completed by the date specified therein, the term "as the case may be", necessarily interdict to the agreement which is subject of controversy. It means, depending on circumstances. The statement in the Section equally applies to two or more alternatives. Such Agreement in the situation cannot be by-passed or alleged to be a Rent Agreement. This is supported by overall effect of Agreement, referring Appellant to be a customer and not a tenant.

12) Section 31 of the Act deals with filing of complaint. It conceives "Any aggrieved person" may file a complaint with the Authority or the Adjudicating Officer for any violation or contravention of provisions of this Act and Regulation, against any Promoter, allottee or real estate agent as the case may be. Thus the cumulative effect of Sec. 18, Sec. 2(d) and Sec. 31 of RERA Act brings into in encompass the appellant herein. This is because even if the exclusion of respondent are for the sake accepted, however, within the terms indicated "any aggrieved person", the Appellant shall certainly fit as a person who has been adversely affected and hence Appellant has right and the availability of Forum with the Authority.

13) In fact the legal position has been succinctly explained by Hon'ble Lordships of Bombay High Court when several Writ Petitions were filed which were questioning virus of the very Act, by order dtd. 6th Dec. 2017 (W.P. No.2737 of 2017) Neelkamal V/s. Union of India. Their Lordships have observed in the said judgement "RERA Act relates to the development of buildings / projects and sale of flats therein. The statute does not interfere with any ownership rights of the owner or developer of the property. RERA regulates the development of Real Estate Project in respect of constructions which are not completed wherein Occupation Certificate have not been obtained on the date of commencement of provisions of RERA." It was further observed that harmonious and balanced construction of the provisions shall suffice the purpose. Hence, it would do harm in case individual provisions of this nature and their clauses are considered in isolation and by separating them from one another.

14) Sec. 105 of the Transfer of Property Act contemplates a lease of immovable property to be a transfer of right to enjoy immovable property for a certain time or in perpetuity in consideration of price paid or promised. In the

instant case, the terms are for 999 yrs. with an annual rental of Re.1/- . The annual rental is of no consequence as the Agreement itself provides a deposit of Rs.50,000/- by the Appellant for meeting with exigencies. Consequently, it informs that there can't be in perpetuity any breach any payment or deposit of rentals. The amt. of Rs.43,77,600/- was accepted as premium naturally to provide freehold rights to the Appellants to enjoy the property subject to restrictions under the Development Control Authority or the Regulatory Authority of a township or the Hill Station Rules however that by itself would not tantamount to squeeze the rights of the Appellant to enjoy the property absolutely or to invoke the jurisdiction of RERA.

15) It is curious that before initiation of complaint, Frequently Asked Question (FAQ) was raised by the Appellant or on his behalf and in response to FAQ 6 the Authority has answered in affirmative to have jurisdiction in terms of Sec. 2(d) with the Authority in respect of long term lease. In the matter of Saroj Agarwal Supreme Court has warned that "Too hypertechnical or legalistic approach should be avoided in looking at a provision which must be equitably interpreted and justly administered." The Hon. Ld. Judges in their group of matters Neelkamal have again indicated that the concept of the RERA Act needs to be adhered to in its letter and spirit. Even if Lavasa is a township involving various types of transaction including providing for sale for Villas or Hotels however that by itself will not exclude the transactions entered into with the Appellant from the rigor of applicability of RERA Act and in particular registration by the Respondent Lavasa itself, submitting to jurisdiction of RERA Authority.

16) Lavasa has recorded in its Income Tax Returns that cost of purchase of land to the extent of one per cent is accounted as fixed assets and remaining is accounted as stock in trade. There is difference between premium and rent.

In the light of above discussions, the point is answered accordingly and the Order under challenge is set aside.

ORDER

- 1) Appeal is partly allowed.
- 2) It is held that the Adjudicating Member of MahaRERA has the jurisdiction to entertain the complaint of the Appellant on its merits.
- 3) Both the Ld. Advocates have urged that the matter be heard by Adjudicating Member at Mumbai only.
- 4) The matter is remanded to the Ld. Adjudicating Member, Mumbai to decide the complaint on its own merits after affording opportunities to both sides.


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5) No expression or opinion is indicated about the entitlement of the complainant for relief in terms of Sec. 18 or otherwise. The parties to appear before the Authority (Adjudicating Member) presiding over at Mumbai on 27th March 2018.

6) No costs.

Dictated and pronounced in open Court today.

Place: Mumbai
Dated: 15th March, 2018


(K. U. CHANDIWAL, J.)
President,
Maharashtra Revenue Tribunal,
Mumbai
& I/c. Maharashtra Real Estate
Appellate Tribunal, (MahaRERA),
Mumbai