BEFORE THE ODISHA REAL ESTATE APPELLATE TRIBUNAL: CUTTACK.

Appeal Case No. 4 (RE) of 2018

(Arising out of order of learned Odisha Real Estate Regulatory Authority, Bhubaneswar, in Complaint Case No. 61/2018, disposed of on dt. 05.06.2018)

Present : **Smt. Suchismita Misra**, **Chairman**
Shri Subrat Mohanty, 2nd Judicial Member
&
Shri Rabindra Ku. Pattnaik, Accounts Member-III

Tapan Choudhury,
Flat No. 206, Kabita Enclave,
Near Swarnauri, Opposite Kanan Vihar
Phase 2, Patia, Bhubaneswar, Odisha. . . . Appellant

- V e r s u s –

M/s. Unitech Limited,
Unit No.39, PS- Mancheswar-25,
Mouza- Gadakana, Dist. Khurda. . . . Respondent

For the Appellant … Mr. Bibhuti Pattnayak, Advocate
For the Respondent … Mr. S. Mohanty, Advocate

Date of hearing: 16.01.2019 **** Date of order: 17.01.2019

O R D E R

This appeal is directed against the order passed by the Odisha Real Estate Regulatory Authority, Bhubaneswar (in short, "RERA") on 05.06.2018 in Complaint Case No. 61/2018.

2. The facts as revealed from the record are as follows:-

The complainant Tapan Choudhury had filed a complaint case before the RERA seeking a direction that the respondent- M/s. Unitech Limited be directed to handover possession of the case house to him with penal interest, compensation and cost of litigation in the

circumstances that he (the complainant) had entered into an agreement with the respondent for allotment of one Office Unit bearing No. 0307 measuring an area of 1401 sqft. located on the third floor of the project called "Integrated Commercial Complex, Bhubaneswar-I" developed by the respondent at Gadakana, Unit No. 39, District- Khurda. As per the agreement, the consideration amount of the said Unit was fixed at `1,00,99,995.00 with further stipulation that possession of the said Unit would be delivered to the complainant within 36 months from the date of execution of agreement or approval of the building plan/other statutory approval whichever is later subject to "force majeure" circumstances i.e. especially one that prevents someone from fulfilling a legal obligation and payment of dues including stamp duty and registration charge. In compliance of the said agreement the complainant paid a sum of `56,96,790.00 upto 05.08.2014. Then subsequently on 01.09.2014 the complainant had another agreement with the respondent changing his original option to have the Office Unit No. 0307 for a Retail Unit No. 0005 on the ground floor measuring an area of 732 sqft. having its consideration money fixed at `1,03,57,800.00. As a result of this subsequent agreement between the parties a fresh payment schedule was also agreed upon between them and the payments already made by the complainant under the previous agreement amounting to `56,96,790.00 was adjusted upto certain installments under the new agreement between

them while the stipulation for delivery of possession of the new Unit remained fixed as before i.e. with same terms and conditions as in their earlier agreement. Under such circumstances, the possession of the Unit in question was to be delivered to the complainant by 28.02.2015. However, as the respondent failed to deliver possession as per the terms and conditions of their agreement the complainant putforth his grievance before the RERA of Odisha seeking a direction to the respondent to deliver the possession of the Unit allotted in his favour as early as possible with interest @ 14% per annum w.e.f. 28.02.2015 and compensation of `5,00,000.00 as well as cost of the litigation.

The respondent had appeared before the RERA and filed his written statement denying all the allegations advanced against him by the complainant. The respondent specifically averred in its counter that in view of the subsequent agreement dated 04.09.2014 between the parties the earlier agreement dated 01.04.2012 between them lost its force even though the payment already made by the complainant to the respondent under the previous agreement was adjusted towards payment schedule of the subsequent agreement. As per their second agreement possession of the 'Unit' was to be delivered to the complainant within 36 months from the date of agreement or approval of building plan/other statutory approvals whichever is later subject to payment of all dues including registration charges and stamp duty and circumstances of "force majeure". In the said proceeding, the respondent also took a plea that the development work of its project was delayed due to certain issues beyond

his control but despite those impediments he carried on with construction work and expected that the project would likely to be completed within six months. He further contended that the demand for interest and tax is according to the terms of agreement dated 04.09.2014 and the complainant cannot question the same. The complainant has cleared his dues upto third installment only excluding the booking amount of `56,96,790.00 and still he is to pay some more installments towards the Unit proposed for delivery in his favour. In such circumstances, the complainant could claim for compensation only in terms of Clause 4(c) of the agreement dated 04.09.2014 after he clears all dues in respect of the agreed Unit. After hearing the submissions advanced by both the parties respectively and on perusal of the agreements executed between them and examining their terms and conditions pertaining to their agreements, the RERA, Odisha came to a conclusion that as the respondent failed to complete the project within the stipulated period as per subsequent agreement dated 04.09.2014 between the parties which expired on 03.09.2017, the respondent violated the provisions of Sec. 18 of the Real Estate (Regulation & Development) Act, 2016 (in short, "RERD Act") for which he is liable to pay interest for delay in handing over the possession. The RERA had also decided that since the stipulated date of delivery of possession under the new agreement is 03.09.2017, the respondent is also liable to pay interest on the amount deposited by the complainant till that date i.e. 03.09.2017 and then taking into account the provisions as envisaged u/R. 16 of the Odisha Real Estate (Regulation & Development)

Rules, 2017 (in short, "ORERD Rules") which provides a fixed rate of interest payable by either party in the event of default ordered interest @ 10.35% per annum compounded quarterly on the amount already deposited by the complainant by the date 03.09.2017 till delivery of the possession by the respondent is to be paid to the complainant by the respondent. Similarly, the RERA also held the complainant liable to pay interest for his default in making payment of one installment as per demand dated 10.11.2017 to the respondent for the period of default w.e.f. that date till 10.05.2018 at the same rate of interest i.e. 10.35% per annum compounded quarterly. The RERA, however, did not allow the complainant's prayer for compensation on the ground that he has not chosen to withdraw from the project itself but still intends to take delivery of possession of the case house.

3. Being aggrieved with the said order, the complainant preferred appeal before this Tribunal challenging the findings of RERA in this matter. He submitted before this forum that the authority (RERA) below did not apply judicial mind about the rate of interest to be given to the complainant-appellant even though the property being a commercial complex as per the agreement the appellant is entitled to get interest @ 12.5% instead of interest @ 8.5% with addition of 2% more therein as envisaged u/R. 16 of the ORERD Rules because the nationalized Banks are realizing interest @ 12.5% on the loan availed by the customer in respect of commercial complex. Apart from that the RERA did not allow the complainant to get compensation from the respondent due to delay in

delivery of possession of the allotted Unit in his favour which has not been done even as yet. Therefore, compensation in this regard should have also been awarded in his favour in the interest of justice.

In reply, learned Counsel appearing on behalf of the respondent-promoter filed its objection denying the assertions made by the complainant-appellant and specifically contended that this appeal is not maintainable since the appellant has not challenged the order dated 05.06.2018 passed by learned RERA u/S. 18 of the RERD Act and he only challenged the rate of interest which have been awarded by RERA to be paid to him in connection his agreement. He also quoted the provision envisaged u/R. 16 of ORERD Rules and apprised the Court that in the instant case learned RERA had taken care to find out the highest marginal cost of lending by the State Bank of India at that relevant time and then added 2% on it while awarding interest in favour of the complainant. Therefore, there is no merit in this appeal since no anomaly is there in the order of RERA for which the same is to be interfered with in this appeal.

4. In support of their respective contentions, learned Counsel for the appellant filed certain documents including the agreement between the parties to apprise this Tribunal that the Unit agreed to be taken by him being a part of commercial complex he (the appellant-complainant) is required to pay back the loan amount to the Bank with commercial rate of interest which is much higher than the rate of interest fixed for other domestic purposes. Therefore, the complainant is supposed to get back interest from the respondent-promoter at the same rate of

interest which he pays in course of refunding the loan amount to the Bank. However, despite opportunity given to him he could not file any document from which it can be gathered that there is a distinction in the rate of interest in respect of loans for commercial purpose or domestic purpose advanced by the Banks. The complainant rather took the assistance of this Tribunal to collect certain information from the State Bank of India regarding the rate of interest and ultimately as per the letter received from Asst. General Manager, State Bank of India, Cuttack Branch, Cuttack, it could be gathered that there is no such distinction in marginal cost of lending rate both for domestic and commercial and the rate of interest appeared to have remained within the range of 8.20% to 8.75% at present. As the appellant failed to provide cogent and correct information regarding the actual commercial rate of interest which is absolutely relevant for determination of the issue advanced by him in this appeal we find there is no reason to come to a conclusion that the rate of interest fixed by the RERA is wrong and as such it requires to be enhanced since it is found from Rule 16 of the ORERD Rules that the rate of interest payable by the promoter to the allottee or by the allottee to the promoter, as the case may be, shall be the State Bank of India highest marginal cost of lending rate plus 2% and further there is also a proviso to this rule to the effect that in case the State Bank of India marginal cost of lending rate is not in use, it would be replaced by such bench mark lending rate which the State Bank of India may fix from time to time for lending to the general public. Curiously enough in the instant case the appellant has not

filed any document to prove that he has been paying more interest to the Bank i.e. more than 10.35% for availing his loan either from the State Bank of India or any other Bank in order to purchase this particular Unit from the respondent.

5. In the aforesaid circumstances, as discussed in the foregoing paragraphs we find absolutely no infirmity in the impugned order and as such the same is upheld.

6. In the result, the appeal is dismissed with no order as to cost.

Dictated & Corrected by me,

Sd/-
(Smt. Suchismita Misra)
Chairman

Sd/-
(Smt. Suchismita Misra)
Chairman

I agree,

Sd/-
(Subrat Mohanty)
2nd Judicial Member

I agree,

Sd/-
(Rabindra Ku. Pattnaik)
Accounts Member-III