

(2022)07ILR A54
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 05.07.2022

BEFORE

THE HON'BLE ABDUL MOIN, J.

RERA Appeal No. 26 of 2022

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RERA Appeal No. 27 of 2022

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RERA Appeal No. 8 of 2022

U.P. Awas Evam Vikas Parishad, Lucknow
...Appellant

Versus

Nishta Bhatnagar **...Respondent**

Counsel for the Appellant:
Shikhar Srivastava, Satya Prakash

Counsel for the Respondent:

A. RERA Appeal- Real Estate (Regulation and Development) Act, 2016 - Section 58-possession of the flat was to be given within 30 months from the date of allotment-the possession has only been given on 12.12.2017 after substantial delay and after the sale deed executed on 18.08.2017-taking into consideration the said default on the part of the appellant and the categoric provision of Section 18(3) of the Act, 2016, the Authority has awarded compensation in the shape of interest- Mere fact that the respondent accepted terms of conveyance deed and took possession of the flat cannot deprive the respondent from claiming compensation for the failure on the part of the promoter/appellant herein to discharge the obligations-The authority as well as the Tribunal have proceeded to grant compensation in terms of provisions contained in Section 71 r/w 72 of the Act 2016-The Court finds no substantial question of law involved. (Para 1 to 29)

The appeal is dismissed.(E-6)

List of Cases cited:

1. Sir Chunilal Vs Mehta & Sons Ltd. Vs Century Spg. & Mfg. Co. Ltd. (1962) SC 1314
2. Hero Vinoth Vs Seshammal (2006) 5 SCC 545
3. Santosh Hazari Vs Purushottam Tiwari (2001) 3 SCC 179
4. Ramchandra Vs Ramalingam (1963) AIR SC 302
5. Nazir Mohamed Vs J. Kamala & ors. (2020) AIR SC 4321

(Delivered by Hon'ble Abdul Moin, J.)

1. This is an application for condonation of delay in filing the appeal supported with affidavit.
2. Heard Shri Shikhar Srivastava, learned counsel for the appellant.
3. The reasons indicated in the affidavit filed in support of the application are sufficient.
4. Accordingly, the application is allowed and delay in filing the appeal is hereby condoned.

Order on memo of main appeal

1. Heard Shri Shikhar Srivastava, learned counsel for the appellant.

2. Learned counsel for the appellant contends that the issue involved in RERA APPEAL No. - 26 of 2022, RERA APPEAL No. - 27 of 2022 and RERA APPEAL No. - 8 of 2022 are the same. As such, the Court proceeds to hear all the appeals together. For convenience, facts of RERA APPEAL No. - 26 of 2022 are being taken.

3. The instant appeal has been filed under Section 58 of Real Estate (Regulation and Development) Act, 2016 (hereinafter referred as 'Act 2016') against the order dated 09.03.2022 passed by the Uttar Pradesh Real Estate Appellate Tribunal, Lucknow (hereinafter referred as 'Tribunal') in Appeal No. 85 of 2020 in re: U.P. Awas Vikas Evam Parishad vs Nishtha Bhatnagar.

4. The appeal has been filed by framing the following substantial questions of law which for the sake of convenience are reproduced below:

"(i) Whether a complaint by an allottee can be entertained under the provisions of Section 71 of Real Estate (Regulation and Development) Act, 2016 after the execution of a sale deed and handing over of possession by the Promoter including the appellant as defined under Section 2(zk) of the Real Estate (Regulation and Development) Act, 2016, to the allottee?

(ii) Whether delay interest on the deposited amount can be given to allottees, once they have accepted the terms of the conveyance deed and taken possession of the flat/residential unit without any protest?

(iii) Whether the allottee is entitled to interest, if he has been handed over possession of the flat with delay, but on the agreed commercial price?

(iv) Whether the allottee would be entitled to interest w.e.f. the date of enforcement of Act or from the proposed date of completion of project?"

5. Section 58 of the Act 2016 restricts the right of second appeal on the grounds specified in Section 100 of Code of Civil Procedure, 1908. Section 100 of the Code of Civil Procedure, 1908 reads as follows:

"100. Second Appeal.-

(1) Save as otherwise expressly provided in the body of this Code or by any other law for the time being in force, an appeal shall lie to the High Court from every decree passed in appeal by any Court subordinate to the High Court, if the High Court is satisfied that the case involves a substantial question of law.

(2) An appeal may lie under this Section from an appellate decree passed ex parte.

(3) In an appeal under this section, the memorandum of appeal shall precisely state the substantial question of law involved in the appeal.

(4) Where the High Court is satisfied that a substantial question of law is involved in any case, it shall formulate that question.

(5) The appeal shall be heard on the question so formulated and the Respondent shall, at the hearing of the appeal, be allowed to argue that the case does not involve such question:

Provided that nothing in this Sub-section shall be deemed to take away or abridge the power of the Court to hear, for reasons to be recorded, the appeal on any other substantial question of law, not formulated by it, if it is satisfied that the case involves such question."

6. Thus, it is apparent that keeping in view Section 100 of the CPC read with Section 58 of the Act 2016 the second appeal can only be filed where a substantial question of law is involved meaning thereby that the existence of substantial question of law is the sine qua non for the exercise of jurisdiction under Section 58 of the Act 2016.

7. The principles for deciding when a question of law becomes a substantial question of law, have been enunciated by a Constitution Bench of Hon'ble the Apex Court in the case of **Sir Chunilal V. Mehta & Sons Ltd. v. Century Spg. & Mfg. Co. Ltd.** reported in AIR 1962 SC 1314, where the Apex Court held as under:

"The proper test for determining whether a question of law raised in the case is substantial would, in our opinion, be whether it is of general public importance or whether it directly and substantially affects the rights of the parties and if so whether it is either an open question in the sense that it is not finally settled by this Court or by the Privy Council or by the Federal Court or is not free from difficulty or calls for discussion of alternative views. If the question is settled by the highest court or the general principles to be applied in determining the question are well settled and there is a mere question of applying those principles or that the plea raised is palpably absurd the question would not be a substantial question of law."

8. In the case of **Hero Vinoth v. Seshammal** reported in (2006) 5 SCC 545, Hon'ble the Apex Court referred to and relied upon **Chunilal v. Mehta and Sons (supra)** and other judgments and summarised the tests to find out whether a given set of questions of law were mere questions of law or substantial questions of law. The relevant paragraphs of the judgment of the Apex Court in **Hero Vinoth (supra)** are set out hereinbelow:

21. The phrase "substantial question of law", as occurring in the amended Section 100 Code of Civil Procedure is not defined in the Code. The word substantial, as qualifying "question of law", means of having substance, essential, real, of sound worth, important or considerable. It is to be understood as something in contradistinction with-technical, of no substance or consequence, or academic merely. However, it is clear that the legislature has chosen not to qualify the scope of "substantial question of law" by suffixing the words "of general importance" as has been done in many other provisions such as Section 109 of the Code or Article 133(1)(a) of the Constitution. The substantial question of law on which a second appeal shall be heard need not necessarily be a substantial question of law of general importance. In *Guran Ditta v. Ram Ditta* AIR 1928 PC 172 the phrase substantial question of law as it was employed in the last Clause of the then existing Section 100 Code of Civil Procedure (since omitted by the Amendment Act, 1973) came up for consideration and their Lordships held that it did not mean a substantial question of general importance but a substantial question of law which was involved in the case. In *Sir Chunilal* case AIR 1962 SC 1314 the Constitution Bench expressed agreement with the following view taken by a Full Bench of the Madras High Court in *Rimmalapudi Subba Rao v. Noony Veeraju* AIR 1951 Mad 969 (*Sir Chunilal* case AIR 1962 SC 1314).

When a question of law is fairly arguable, where there is room for difference of opinion on it or where the Court thought it necessary to deal with that question at some length and discuss alternative views, then the question would be a substantial question of law. On the other hand if the question was practically covered by the decision of the highest court or if the general principles to be applied in determining the question are well settled and the only question was of applying those principles to the particular fact of the case it would not be a substantial question of law.

9. To be "substantial", a question of law must be debatable, not previously settled by the law of the land or any binding precedent, and must have a material bearing on the decision of the case and/or the rights of the parties before it, if answered either way.

10. To be a question of law "involved in the case", there must be first, a foundation for it laid in the pleadings, and the question should emerge from the sustainable findings of fact, arrived at by Courts of facts, and it must be necessary to decide that question of law for a just and proper decision of the case.

11. Whether a question of law is a substantial one and whether such question is involved in the case or not, would depend on the facts and circumstances of each case. The paramount overall consideration is the need for striking a judicious balance between the indispensable obligation to do

justice at all stages and the impelling necessity of avoiding prolongation in the life of any lis. This proposition finds support from **Santosh Hazari v. Purushottam Tiwari (2001) 3 SCC 179**.

12. In a Second Appeal, the jurisdiction of the High Court being confined to substantial question of law, a finding of fact is not open to challenge in second appeal, even if the appreciation of evidence is palpably erroneous and the finding of fact incorrect as held in **Ramchandra v. Ramalingam AIR 1963 SC 302**. An entirely new point, raised for the first time, before the High Court, is not a question involved in the case, unless it goes to the root of the matter.

13. The principles culled out from the aforesaid judgements of Hon'ble the Apex Court relevant for this case may be summarised as follows:

(i) An inference of fact from the recitals or contents of a document is a question of fact, but the legal effect of the terms of a document is a question of law. Construction of a document, involving the application of any principle of law, is also a question of law. Therefore, when there is misconstruction of a document or wrong application of a principle of law in construing a document, it gives rise to a question of law.

(ii) The High Court should be satisfied that the case involves a substantial question of law, and not a mere question of law. A question of law having a material bearing on the decision of the case (that is, a question, answer to which affects the rights of parties to the suit) will be a substantial question of law, if it is not covered by any specific provisions of law or settled legal principle emerging from binding precedents, and, involves a debatable legal issue.

(iii) A substantial question of law will also arise in a contrary situation, where the legal position is clear, either on account of express provisions of law or binding precedents, but the Court below has decided the matter, either ignoring or acting contrary to such legal principle. In the second type of cases, the substantial question of law arises not because the law is still debatable, but because the decision rendered on a material question, violates the settled position of law.

(iv) The general Rule is, that High Court will not interfere with the concurrent findings of the Courts below. But it is not an absolute rule. Some of the well-recognised exceptions are where (i) the courts below have ignored material evidence or acted on no evidence; (ii) the courts have drawn wrong inferences from proved facts by applying the law erroneously; or (iii) the courts have wrongly cast the burden of proof. A decision based on no evidence, does not refer only to cases where there is a total dearth of evidence, but also refers to case, where the evidence, taken as a whole, is not reasonably capable of supporting the finding.

14. The aforesaid principles of law have already been considered by Hon'ble the Apex Court in the case of **Nazir Mohamed vs J. Kamala and others** reported in **AIR 2020 SC 4321**.

15. Now the Court proceeds to see whether the four "substantial" questions of law, as have been framed by the appellants, are invoked "substantially" or not so as to invoke the jurisdiction of this Court. For this purpose facts of the case may also have to be indicated which are as follows.

16. From perusal of the appeal it comes out that the respondent had booked a "2BHK + STUDY" type of flat with the U.P. Awas Evam Vikas Parishad (hereinafter referred as 'Parishad') and paid a booking amount of Rs 1.81 lakhs in terms of scheme floated by the Parishad in the year 2012.

17. It is claimed that the respondent was allotted a flat in Mandakini Enclave vide a letter dated 27.09.2013. The Parishad thereafter demanded certain amount towards allotted flat and fixed the price of the flat at Rs. 37.50 lakhs. The respondent claims to have submitted the aforesaid amount. It is admitted that the possession of the flat was supposed to be given within 30 months from the date of allotment as per clause 9.1 of the brochure. It is only by means of letter dated 12.04.2017, a copy of which is at page 152 of the appeal, that the respondent has been asked to deposit an amount of Rs 5.87 lakhs so that the registration of the apartment can be done. Admittedly, the amount has been deposited in July 2017, the registration was done on 18.08.2017 and the possession has been given on 12.12.2017.

18. It is submitted that after having received the possession and after registration was done the respondent has filed a Complaint Case before the U.P. Real Estate Regulatory Authority (hereinafter referred to as "Authority") claiming refund of certain excess amount, refund of interest, compensation for delayed possession alongwith advocate fee and court fee. The complaint was registered as complaint no. 9201817572 in re: Smt Nishtha Bhatnagar vs U.P. Awas Evam Vikas Parishad and the Authority concerned vide order dated 31.01.2019, a copy of which is annexure 1 to the appeal, allowed the complaint and has directed the Parishad to pay interest on the total amount of Rs 37.50 lakh till the date of possession of the apartment. The interest has been directed to be paid at the rate of MCLR + 1%.

19. Being aggrieved the Parishad filed an Appeal no. 85 of 2020 in re: U.P. Awas Evam Vikas Parishad vs Nishtha Bhatnagar before the Tribunal. The Tribunal vide the impugned order dated 09.03.2022 has upheld the order of the Authority and hence the present second appeal.

20. The Court has gone through the appeal filed by the Parishad with assistance of Shri Sikhar Srivastava, learned counsel appearing for the appellant and the alleged substantial questions of law.

21. Following the principles of law laid down by Hon'ble the Apex Court in the judgments referred above, it is apparent that none of the "substantial" questions of law as have been framed by the appellant, fall within the ambit of being "substantial" questions of law. The reason for the same is that the "substantial" questions of law as have been framed in the instant Second Appeal are specifically covered by the specific provisions of law as per the interpretation given by Hon'ble the Apex Court and do not involve any debatable legal issue. Even otherwise the learned Tribunal has not ignored or acted contrary to the legal principles or has violated the provisions of the Act 2016 rather the same have been followed scrupulously. Learned Tribunal has also not ignored any material evidence or has drawn wrong inference or cast the burden of proof on the appellants herein as would be apparent from the perusal of the impugned judgment.

22. However, as the appeal has been filed and learned counsel for the appellant has vehemently argued on the aforesaid questions, as such the Court proceeds to answer the said questions as formulated by the appellant.

23. As regards the question of law no. 1 which is:

"(i) Whether a complaint by an allottee can be entertained under the provisions of Section 71 of Real Estate (Regulation and Development) Act, 2016 after the execution of a sale deed and handing over of possession by the Promoter including the appellant as defined under Section 2(zk) of the Real Estate (Regulation and Development) Act, 2016, to the allottee?"

24. Learned counsel for the appellant is unable to indicate anywhere from the Act 2016 that there is a bar per which a complaint cannot be filed after the possession has been taken. No case law to the said effect has been produced by learned counsel for the appellant and hence considering that there is no bar under the Act 2016 either restraining or refraining the allottee from filing of complaint after taking possession, the Court does not find any question of law involved in this regard.

25. As regards question no. 2 which is:

"Whether delay interest on the deposited amount can be given to allottees, once they have accepted the terms of the conveyance deed and taken possession of the flat/residential unit without any protest?"

and question no. 3 which is:

"Whether the allottee is entitled to interest, if he has been handed over possession of the flat with delay, but on the agreed commercial price?"

the same are linked to each other and as such are being dealt together.

26. A perusal of the order passed by the Authority as well as the Tribunal would indicate that the authority as well as the Tribunal have proceeded to grant compensation in terms of provisions contained in Section 71 read with Section 72 of the Act 2016. Even otherwise Section 18(3) of the Act 2016 categorically provides that if the promoters fail to discharge any other obligation imposed on him under this Act or the rules or regulations thereunder or in accordance with the terms and conditions of the agreement for sale, **he shall be liable to pay such compensation to the allottees, in the manner as provided in the Act.**

27. Admittedly, as per the brochure, the possession of the flat was to be given within 30 months from the date of allotment. Admittedly, the possession has only been given on 12.12.2017 after substantial delay and after the sale deed executed on 18.08.2017. Taking into consideration the said default on the part of the appellant and the categorical provision of Section 18(3) of the Act 2016, the Authority has awarded compensation in the shape of interest. Mere fact that the respondent accepted terms of conveyance deed and took possession of the flat cannot deprive the respondent from claiming compensation for the failure on the part of the promoter/appellant herein to discharge the obligations. As such, this Court does not find any question of law involved with regard to questions no. (2) and (3).

28. As regards question no. 4 which is:

"Whether the allottee would be entitled to interest w.e.f. the date of enforcement of Act or from the proposed date of completion of project?"

no substantial argument has been raised by learned counsel for the appellant. Even otherwise the learned Authority as well as learned Tribunal has categorically indicated that the amount of interest which is to be paid would be from the date of deposit of the aforesaid amount. Thus the Court does not find any question of law involved with regard to question no. 4 also.

29. Considering the aforesaid, the Court does not find any merit in the appeal. Accordingly the appeal is **dismissed.**
