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IN THE HIGH COURT OF ORISSA AT CUTTACK

WRIT APPEAL No. 821 of 2020

(An appeal under Article 4 of the Orissa High Court Order 1948 read with Clause 10 of the Letter's Patent Act arising out of the order dated 09.11.2020 passed in W.P.(C) No. 4114 of 2014)

Dr. Kari Benu Gopal Patro **Appellant**

-versus-

State of Odisha and others **Respondents**

Appeared in this case by Video Conferencing Mode:

For Appellant : Dr J.K Lenka, Advocate

For Respondents : Mr. A.K. Nanda, AGA

CORAM:

**THE CHIEF JUSTICE
JUSTICE SAVITRI RATHO**

**JUDGMENT
09.07.2021**

Savitri Ratho, J.

1. The appellant was one of the ten petitioners in W.P. (C) No. 4114 of 2014 which has been dismissed by the learned Single Judge by judgment dated 09.11.2020.

2. By the impugned judgment, the learned Single Judge has dismissed the writ petition inter alia holding that the issue being one of contract which had not been concluded by valid acceptance and the pricing policy being an executive policy, the

Court should refrain from exercising jurisdiction under Article 226 of the Constitution of India of judicial review. The learned Single judge has however directed that the money paid should be returned to the petitioners as early as possible.

3. We have heard Dr. J.K.Lenka, learned counsel for the appellant and perused the impugned judgment and the averments in the writ petition, rejoinder, additional affidavit and the appeal memo.

4. The writ petition had been filed for quashing the demand notice vide Annexures-14 series and 15 series issued by the Berhampur Development Authority (in short "the BDA") and the resolution dated 18.4.2013 vide Annexure 18 and direct the BDA to hand over possession of the land/building to the petitioners.

5. The grievance of the appellant and the other petitioners in the writ application was that the BDA was not proceeding with the Housing Project, Vivek Vihar Stage – II though initiated since 2008 though the petitioners have already deposited the requisite amount as demanded by the BDA. Instead of providing houses under Housing Project, Vivek Vihar Stage-II, it demanded more than ten times of the actual amount (the rate fixed in the brochure) for the land only.

6. The case of the writ petitioners was that in order to provide houses to the lower middle class people in the name of Vivek Vihar Housing Project was taken up and the first phase work was taken up and completed successfully. In the year 2008 the BDA published a scheme for 'Vivek Vihar Stage-II Housing Project' near Ambapua Level Crossing. As per the Scheme the BDA offered seven categories of house i.e. EWS, LIG, MIG-I,

HIG (S)-I, HIG(S)-II HIG-(D) and subsequently three more categories were added to the Scheme. The petitioners being of lower middle income group of the society wanted a house within the BDA area for their residential abode and obtained copy of the brochure. The following four categories of plots were indicated therein:

(i) for MIG-I category, the plot size was fixed as 1500 sqft (30*50) out of which 960 sq ft. was the built up area and the cost was Rs.7.5 lacs for plot and building.

(ii) for MIG-II category the plot size was fixed as 1500 sqft. Out of which 1019 sqft. was the built up area and the cost of the plot and building was fixed at Rs.8,00,000/-,

(iii) for HIG-I category, the plot size was fixed as 2400 sqft out of which 1407 sqft. was the built up area and the cost of the plot and house was fixed at Rs.11.65 lacs, and

(iv) for HIG-II category, the plot size was fixed as 2400 sqft. out of which 1462 sqft was the built up area and the cost of the plot and house was fixed at Rs.11.95 lacs.

7. The appellant had deposited Rs 20,000/- by way of demand draft with the application form on 22.01.2008 and subsequently deposited Rs 2,00,300/- on 07.06.2008. The first phase of the scheme was completed successfully and delivery of possession was given to the applicants as per the price quoted in the brochure. However, the second phase for which the petitioners had applied got delayed. After the petitioners applied under the R.T.I Act, on 28.12.2012, the BDA intimated them that due to nonparticipation of the contractors in the tender process and non availability of solid concrete bricks, the

project could not be taken up. But thereafter, the petitioners received demand notices from the BDA in December 2013 for an amount that was ten times the price fixed in the brochure initially only for the land, though in the brochure the price has been fixed for both land and building.

8. The petitioners made representations to the BDA ventilating their grievances stating that earlier decision was to allot land with houses and now they were offering only houses at enhanced rate. Earlier, had been decided to make allotment as per lottery and now BDA had decided to allot through auction which was in violation of the terms in the brochure.

9. The decision to enhance the rate of houses was purportedly taken by the Valuation Committee as per information provided under the RTI Act by the BDA on 13.1.2014. This decision has been challenged on the ground that it was unilateral and had overlooked the previous aspects of the matter, overlooking the bench mark valuation of the locality.

10. BDA filed a counter affidavit stating, *inter alia*, that it had conceptualized a group housing scheme consisting of independent houses in the name and style of Vivek Vihar at Amabapua, a prime location in Brahmapur City and the petitioners were some of the applicants for allotment of different category of houses in the said housing scheme. The BDA had published tender notice inviting applications from eligible contractors for construction of the housing complex in question, but there was no response from the contractors. On account of the high rate of inflation, BDA could not have constructed or delivered to the applicants the proposed houses at the price stated in the brochure published eight years ago, even though some of the houses were constructed through the

contractors within a reasonable period. So the authorities had decided not to construct any houses and to work out an alternative procedure of closing the Vivek Vihar Scheme and provide plots only the applicants who express the explicit intention of purchasing the lands of different sizes at the price fixed by the authority.

11. The stipulations in the brochure made it clear that the cost of the house so fixed at that time was provisional and tentative. It was stated that the cost of the house may increase depending upon various factors including the rise of the cost of the land, cost of construction, the expenditure incurred in providing various infrastructural facilities. In Clause-18 of the brochure, it was stated that any additional cost arising out of special infrastructural development and escalation shall be paid by the allottees before execution of the lease cum sale deed in their favour and in case the allottees fail to pay the dues, the allotment shall be liable for cancellation.

12. As the construction was delayed, it had been decided to work out an alternative scheme and bring an end to the impasse for which a meeting had been convened and in the said meeting it was decided to close the process of construction of the proposed houses and provide only plots to the applicants of different categories, i.e. MIG-I, MIG-II in favour of 67 applicants and HIG(s) and HIG (D) in favour of 63 applicants at the price recommended by the valuation committee. This decision was placed before the Government in H & UD Department for approval of the revised rate.

13. On receipt of the approval from the Government, notice was issued to the applicants asking them to state their willingness for depositing the enhanced rate fixed after deducting/

adjusting the earlier deposit made by the applicants. But the petitioners neither expressed their willingness nor deposited the enhanced cost. Three applicants had deposited Rs 35 lakhs each and had been handed over possession of their houses which had been initially constructed.

14. The BDA denied that experts were not consulted or bench mark valuation was revised. It was stated that all options were explored and the price of the plots compatible with the bench mark valuation was fixed. There was no lack of bonafides and there was no arbitrariness in the exercise of discretionary power by the BDA. The action of BDA being reasonable did not warrant any interference by this Court in exercise of the jurisdiction under Articles 226 and 227 of the Constitution of India.

15. A rejoinder was filed by the petitioners, more or less reiterating their contentions in the writ petition and further stating that some applicants had been allotted houses and plots while the petitioners were discriminated against .

16. Respondents No 2 and 3 had filed a further affidavit in July 2017 showing the allotment of different category of houses to 12 applicants and allotment of plots to six applicants who had paid the price at the revised rates in 2013 annexing a statement, copies of some lease deeds and the copy of the bench mark valuation in respect of the lands in the area.

17. Referring to the decisions of the Hon'ble Supreme Court and this Court in **Saubhagya Ranjan Kanungo v. Smt. Prafulata Mohapatra 2007 (Supp.-1) OLR 811, Tarsem Singh v. Sukhminder Singh AIR 1998 SC 1400, Sri Narayan Gosain represented by Prafulla Kumar Nayak v. The**

Collector, Cuttack 60 (1985) CLT 514 and **B. Rajamani v. Mrs. Azhar Sultana 2005 (2) C.C.C. 696 (A.P.)**, the learned Single Judge held that there appeared to be no concluded contract between the petitioners and the BDA as a valid contract cannot be constituted by the act of one party and that there must be a valid offer and valid acceptance by the parties.

18. Referring to the decisions rendered in **Bareilly Development Authority v. Ajai Pal Singh AIR 1989 SC 1076**, **Satrughna Nayak v. State of Orissa 82 (1996) CLT 907** and **Smt. Kaberi Banerjee v. Orissa State Housing (decision dated 20.11.2000 in OJC No.1216 of 1998)**, the learned Single Judge further held that the price fixed in the brochure are tentative which is subject to change and Annexure-1 and Annexure-2 (advertisement and brochure respectively) reveal that the cost of the unit of houses were tentative which were subject to increase depending upon different factors like change of increase construction materials, labour cost, rise in the price of land etc.

19. The decisions rendered in **Premji Bhai Parmar v. Delhi Development Authority (1980) 2 Supreme Court Cases 129**, and **Baldev Singh Dhanij v. Chandigarh Housing Board, Chandigarh 1990 Punjab and Haryana 41 (check)** were also referred to and discussed. The learned Single Judge further held that pricing policy is an executive policy and unless there is a pleading of unreasonableness and arbitrariness on the part of the development authority, it is not open for judicial review under Article 226 of the Constitution of India and on examination of the pleadings found that the allegation of arbitrary and whimsical action of the BDA had not been substantiated and on the other hand found that good reason had been shown by BDA for non completion of the works within

the stipulated time which was lack of response to the tender floated for construction works for which it was decided to transfer the plots of different sizes in favour of the intending buyers who express the explicit intention to purchase the lands of 13 different sizes at the price fixed by them.

20. In this writ appeal, the appellant has averred that he has deposited the balance cost pursuant to order dated 21.01.2015 of this Court which was not considered by the Single Judge and that WP (C) No. 3761 of 2014 and WP (C) No. 5193 of 2014 , WP (C) No. 9269 of 2015 and WP (C) No. 14823 of 2015 challenging the action of the BDA in enhancing the rate in the same housing project are still subjudice before this Court and interim order of status quo is still in force. He has however challenged the order of the learned Single Judge, primarily on the following grounds:

a) The finding that the price was enhanced because of rise in construction materials, labour costs etc is not tenable in view of the stand of the BDA that they had decided to close the construction process and provide only plots.

b) The learned Single Judge failed to appreciate that the benchmark valuation of the locality was very poor.

c) The cases cited by the learned Single Judge were not applicable and it was wrong to hold that contract had not been concluded by a valid acceptance as the appellant had deposited Rs 2 lakhs which was the balance amount of initial demand pursuant to direction of the Court and had deposited the initial cost of Rs 1 lakh as per clause 5 of the brochure at the time of submission of application which exceeded the cost of Rs 1,35,000/- and that BDA had kept the initial cost for 5

years though 18 years months was stipulated for completion of the contract.

d) The decision to demand ten times the amount was arbitrary and whimsical and done without consulting experts and without holding field enquiry.

e) The finding that the pricing policy being an executive policy should not be interfered in exercise of jurisdiction under Article – 226 of the Constitution was erroneous when the demand draft of the appellant had been accepted and retained for years together.

f) As BDA had allotted plots in other categories in Vivek Vihar Phase – II after accepting initial demand, not doing so in case of the appellant was illegal arbitrary and discriminatory.

21. In our considered opinion, none of these grounds have any merit so as to warrant interference with the impugned order. The learned single judge has correctly held that the reason for not proceeding with the construction was neither unreasonable nor arbitrary and the reasons were bonafide. It cannot be disputed that price of construction as well as the price of the land will escalate with the passage of time. Therefore no fault could be found with the BDA for dropping the construction of the houses and instead offering the plot only, albeit at a higher price. A writ court exercising jurisdiction under Article – 226 of the Constitution neither has the expertise nor the jurisdiction to decide what should be the correct price of a plot of land or house. The contention that applicants in other categories were allotted houses which is discriminatory, in our view does not have any merit as those applicants are not similarly situated as the appellant and the BDA in its counter affidavit and further affidavit has given the circumstances of allotment of those

houses and plots and the details of the applicants who had been allotted houses and plots after making payment of the revised cost in 2013. The writ petition has rightly been dismissed and we find no ground to interfere with the same.

22. In this context, the observations of the Hon'ble Supreme Court in the case of **Shelly Lal v. Union of India 2021 SCC OnLine SC 222** are apposite and hence extracted below:

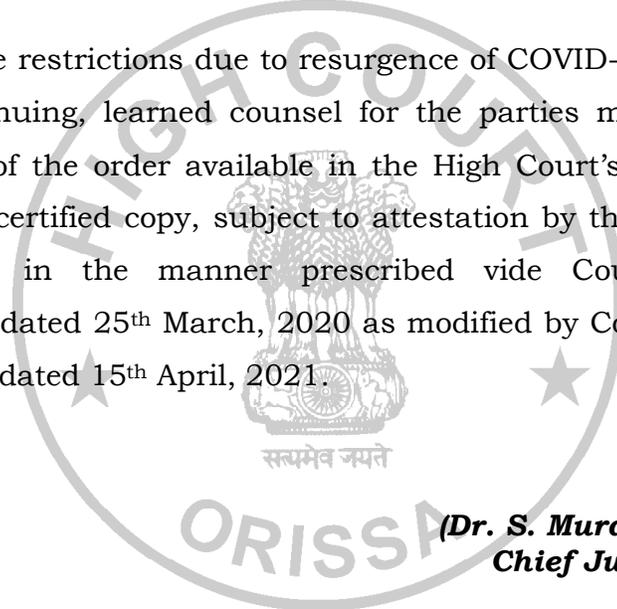
" 5. Several provisions of law confer statutory rights on purchasers of real estate and invest them with remedies enforceable at law. These include the Consumer Protection Act, 1986, the Real Estate (Regulation and Development) Act, 2016 and the Insolvency and Bankruptcy Code, 2016. Parliament has enacted a statutory regime to protect the rights of purchasers of real estate and created fora which are entrusted with decision-making authority.

6. A decision of a public authority which is entrusted with a public duty is amenable to judicial review. But it is quite another hypothesis to postulate that the decision making authority should be taken over by the court. The latter is impermissible. It would be inappropriate for this Court to assume the jurisdiction to supervise the due completion of a construction project especially in facts such as those presented in the present case. This will inevitably draw the court into the day to day supervision of the project, including financing, permissions and execution - something which lies beyond the ken of judicial review and the competence of the court. The court must confine itself to its core competencies which consist in the adjudication of disputes amenable to the application of legal standards. We, consequently, leave it open to the petitioners to pursue the remedies available in law.".....

23. The learned Single Judge has directed for refund of the deposited amount. Considering the fact that that the amounts deposited by the appellant towards cost of the house has been retained by the BDA for all these years, liberty is granted to the appellant to file an application before the BDA to refund the amount paid by the appellant along with interest. In case it is aggrieved by the decision of the BDA, it is open to the appellant to challenge it in the appropriate forum.

24. The appeal is dismissed, with the liberty as aforementioned but in the circumstances, with no order as to costs.

25. As the restrictions due to resurgence of COVID-19 situation are continuing, learned counsel for the parties may utilize a printout of the order available in the High Court's website, at par with certified copy, subject to attestation by the concerned advocate, in the manner prescribed vide Court's Notice No.4587, dated 25th March, 2020 as modified by Court's Notice No.4798, dated 15th April, 2021.


(Dr. S. Muralidhar)
Chief Justice

(Savitri Ratho)
Judge

Bichi