RESERVED JUDGMENT

BENCH-1

THE U.P. REAL ESTATE APPELLATE TRIBUNAL,
AT
LUCKNOW.

APPEAL NO. 01/2019

Brijendra Singh ………………Appellant.

Versus

M/S GarvBuildtech Private Limited ……………Respondent.

(Complaint No. 1020172285)

Hon'ble Mr. Justice (Dr.) D. K. Arora, Chairman.
Hon'ble Mr. Rajiv Misra, Administrative Member.

1. This appeal has been preferred under Section 44(1) of the Real Estate (Regulation and Development) Act, 2016 ('Act 2016') by Sri Brijendra Singh ('appellant') against the order dated 06.12.2018 passed by theReal Estate Regulatory Authority, Lucknow ('Regulatory Authority') in Complaint No. 1020172285 whereby the application of the appellant for rectification in the order of the Regulatory Authority was rejected.

2. The facts of the case, in brief, are that on 30.09.2010 the appellant purchased a plot, measuring 750 square yards, from M/S Omax Limited through its authorized signatory Sri Kishori Lal Goyal and an agreement thereof was executed between the appellant and M/S Omax Limited.

   2.1 The appellant paid Rs.12,00,000/- for purchase of the said plot and as per agreement the respondent had to deliver possession of the plot and execute the sale deed, after developing the plot, within 24 months.

   2.2 When the respondent did not give any information regarding status of the said plot even after expiry of the stipulated period then the appellant visited the office of the respondent and asked for delivery of possession of the plot and execution of the sale deed but no satisfactory reply was given to him and he was misbehaved with.

2.3 Thereafter the appellant sent so many applications to the respondent, even then he was not given possession of the plot in question. Being aggrieved the appellant sent a notice to the respondent on 14.04.2016 through his counsel for delivery of possession of the plot.

2.4 On being called by the officers of M/S Omax Limited and on being given assurance to deliver possession of plot by them to the appellant, the appellant visited the office of the respondent on 11.06.2016 where again he was misbehaved with and the possession of the plot was not given to him. The appellant lodged a report of the said incident at Police Station Gomti Nagar, Lucknow, but no action was taken by the police. Then he sent an application to the Senior Superintendent of Police, Lucknow but no action was taken by the police.

2.5 Thereafter the appellant moved an application under Section 156(3) Cr.P.C. before the Chief Judicial Magistrate, Lucknow on 30.07.2016 praying for directing the police to lodge F.I.R. against the respondent. The said application was dismissed on 30.01.2017.

2.6 Aggrieved by the order dated 30.01.2017 passed by the Chief Judicial Magistrate, Lucknow, the appellant filed a Revision No. 78/2017 before the Sessions Judge, Lucknow which is still pending.

2.7 The respondent sent a letter to the appellant on 04.03.2017 demanding money for the said plot to which the appellant sent reply on 18.03.2017 asking the respondent to apprise the appellant of the present status and development of the plot and denied to pay any additional amount without knowing the status of the plot in question.

2.8 When no reply was received from the respondent, the appellant again sent a letter dated 29.03.2017 to the respondent asking the respondent to give information regarding status and development of the plot in question but no information was given by the respondent.

2.9 The appellant had made payment towards the cost of the plot in question after taking loan and the plot was needed by the appellant.

2.10 On 22.09.2017 the appellant sent application to the Hon'ble Chief Minister of Uttar Pradesh, Chairman RERA Lucknow, Director General of Police, Lucknow, Minister of Urban Development, Secretary LDA, Principal Secretary Urban Development and other officers but no action was taken. Thereafter again on 09.11.2017 the appellant sent application to the aforesaid authorities.

2.11 The appellant received a letter dated 22.02.2018 wherein the Joint Secretary, RERA had directed the appellant to file complaint on the website of the RERA.

2.12 The RERA decided complaint (no. 1020172285) of the appellant on 09.03.2018 directing the appellant to apply before Builder if the appellant wants to take refund of deposited amount with interest.

2.13 As the appellant did not want to take refund of deposited amount, he did not apply before the Builder instead he moved an application on 19.04.2018 for development of his plot. The appellant received a notice dated 29.10.2018 directing him to appear before Bench No. 2 of RERA on 01.11.2018 at 2.30 P.M. The appellant appeared before the RERA on 01.11.2018 and thereafter again on 06.12.2018. The application of the appellant dated 19.04.2018 was dismissed by the RERA on 06.12.2018.

2.14 Aggrieved against the order dated 06.12.2018 passed by the Regulatory Authority, the present appeal has been filed by the appellant.

3. The appellant has challenged the order dated 06.12.2018 passed by the Regulatory Authority, on the following grounds:--

(a) The Regulatory Authority has passed the impugned order against the principles of law.

(b) The Regulatory Authority erred in not considering the documentary and oral evidence on record.

(c) The Regulatory Authority erred in passing the impugned order without applying its judicial mind.

(d) The appellant always demanded the plot purchased by him which has not been given to him by the respondent.

(e) In Section 11(3) of the Act 2016, there is provision to give information regarding the plot, but no information was given to the appellant.

(f) The appellant has suffered monetary loss as well as mental harassment. The Regulatory Authority has erred in not giving compensation for the same.

(g) It is not justifiable to compel the appellant to leave his plot and take refund.

(h) The appellant never prayed for rectification in the order dated 09.03.2018. The Regulatory Authority has erred in mentioning the word rectification in its order dated 06.12.2018.

(i) The Regulatory Authority has erred in not giving a clear finding regarding documentary and oral evidence.

(j) The order dated 06.12.2018 passed by the Regulatory Authority is liable to be set aside as the Regulatory Authority has not considered the provisions of Sections 11,12,13,14,17,18 and 19 of the Act, 2016.

(k) The impugned order dated 06.12.2018 is against the law and has been passed without applying judicial mind and the same is liable to be set aside.

4. The appellant has prayed for setting aside the impugned order dated 06.12.2018, compensation for monetary loss and mental agony and delivery of the plot in question.

5. The respondent filed its preliminary objection dated 15.10.2019 stating that the complaint of the appellant has been decided on 09.03.2018 by the

Regulatory Authority which has not been challenged before any court of law. After passing of more than 7 months the appellant filed an application for rectification of the order dated 09.03.2018, in the month of October, 2018 and on 06.12.2018 the application for rectification has been dismissed on the ground that there is no error in the order dated 09.03.2018. In the present appeal the appellant has challenged the order dated 06.12.2018 instead of challenging the original order dated 09.03.2018 deliberately and intentionally for the reason that it has become time barred as per provisions of the Act, 2016. There is no relevancy of rectification order without challenging the original order. There is no legal provision to challenge the rectification order only without challenging the original order. The plot of the appellant has been cancelled on 22.01.2019 and information to this effect has already been sent to the appellant and the respondent is ready to refund the deposited amount.

6. In the rejoinder affidavit/reply to the preliminary objection of the respondent, the appellant denied the averments made in the preliminary objection and reiterated the averments made in the appeal. The appellant further stated that he does not want to get his money back nor did he ever demand money from the respondent. After passing of the order dated 09.03.2018 the appellant neither moved any rectification application before the Regulatory Authority nor orally requested for rectification of the order dated 09.03.2018. The respondent had sent a letter dated 18.04.2018 to the appellant asking him to apply for getting his money back. The appellant vide his letter dated 19.04.2018 intimated the respondent that he is not willing to take his money back, instead he wanted to take possession of the plot. The respondent sent a letter dated 22.01.2019 along with cheques to return back the amount to the appellant. The appellant returned the said cheques.

7. Heard Sri Sushil Kumar Sharma, learned counsel for the appellant and Sri V. K. Singh Bisen, learned counsel for the respondent and perused the record.

8. The averment of the appellant is that he had purchased a plot measuring 750 sq. yards from M/s Omax Limited on 30.09.2010 by paying an

amount of Rs. 12,00,000/- and as per the agreement, the respondent had to deliver the possession of the plot and execute the sale-deed after developing the same within 24 months. It appears that the developed plot could not be given by the respondent to the appellant within the time prescribed in the agreement, which compelled the appellant to raise his grievance before the different forums and appellant also filed an application under Section 156(3) Cr.P.C. before the Chief Judicial Magistrate, Lucknow on 30.07.2016 and on rejection of the same the appellant preferred a revision, which appears to be still pending.

9. Further submission of appellant is that he received a letter dated 04.03.2017 from the respondent demanding money and in response of the same the appellant vide letter dated 18.03.2017 asked the respondent to apprise the present status and development of the plot and he also denied to pay any additional amount without knowing the status of the plot in question, appellant further sent a reminder on 29.03.2017. The complaints made to various authorities by the appellant were referred to the RERA and the Joint Secretary, RERA vide letter dated 22.02.2018 informed the appellant to file complaint on the website of the RERA. It appears that in pursuance of the same appellant filed a complaint before the RERA, which was registered as Complaint No. 1020172285. The Nominated Officer heard both the parties on 09.03.2018 and finding that plot could not be given to the appellant in time, therefore he directed that if the appellant wants his money back along with interest, he should approach the Promoter with an application and the Promoter will return the money as per the terms of the agreement.

10. The order dated 09.03.2018 of the Nominated Officer of the RERA was not challenged and the appellant approached the RERA for amendment of the order dated 09.03.2018 for directing the respondent to provide the possession of the plot. The matter was heard on 06.12.2018 by the Single Member of the RERA and the request of appellant was rejected vide impugned order dated 06.12.2018 on the ground that such an amendment is not possible under the provisions of Section 39 of the Act of 2016.

11. From the perusal of the impugned order dated 06.12.2018, it is evident that the request of the appellant for correction in the earlier order and

amendment in the direction, for providing plot was considered in the presence of respective parties under the provisions of Section 39 of the Act of 2016 and the same was rejected vide order dated 06.12.2018 on the ground that desired amendment in the order is not possible under the provisions of Section 39 of the Act of 2016. The appellant challenged the order dated 06.12.2018, whereby his application for rectification of order dated 09.03.2018 was rejected, without challenging the original order dated 09.03.2018, therefore, the only issue which is required to be considered about the legality and validity of the order dated 06.12.2018 passed under the provisions of Section 39 of the Act of 2016.

12. On examination, we found that Section 39 of the Act empowers the Regulatory Authority to rectify its order. Section 39 of the Act, 2016 reads as under:

> ***"Rectification of Orders***
> *The Authority may, at any time within a period of two years from the date of the order made under this Act, with a view to rectifying any mistake appeared from the record, amend any order passed by it, an shall make such amendments, if the mistake is brought to its notice by the parties.*
>
> *Provided that no such amendment shall be made in respect of any order against which an appeal has been preferred under this Act:*
>
> *Provided further that the Authority shall not, while rectifying any mistake apparent from record, amend substantive part of its order passed under the provisions of this Act."*

13. On examination, we found that the provisions of Section 39 of the Act, 2016 empowers the Regulatory Authority to rectify any mistake apparent from the record, amend any order passed by it either *suo-motu* or make such amendment, if, the mistake is brought to its notice by the parties at any time within a period of two years from the date of order made under the provisions of Act, 2016.

14. Further proviso to Section 39 of the Act, 2016 bars the Regulatory Authority to make any substantive amendment in its order while rectifying any mistake apparent from the record.

15. Thus the Regulatory Authority is mandated to make amendment in any order passed by it with a view to rectify any mistake apparent on record, without any substantive amendment, if a mistake is noticed by the Regulatory Authority or brought to its notice by the parties at any time within a period of two years from the date of order made by it.

16. On examination of the issue, we are of the considered view that the rectification/amendment sought by the appellant in the order dated 09.03.2018 was beyond the purview of the provisions of Section 39 of the Act, 2016 because the provision of Section 39 empowers the Regulatory Authority to rectify any mistake apparent from the record, amend any order passed by it, and shall make such amendment, if the mistake is brought to its notice by the parties, within a period of two years from the date of the order made under the Act, 2016,but simultaneously Section 39 of the Act of 2016 bars the Regulatory Authority to amend substantive part of its order, while rectifying any mistake apparent from record. The amendment sought by the appellant was from the directions seeking refund from the respondent to direction for providing of the plot in question. The amendment falls in the category of substantive amendment of the order. The remedy open for the appellant was to challenge the order dated 09.03.2018 instead of filing rectification application. The appellant had the opportunity to challenge the order dated 09.03.2018 along with order dated 06.12.2018 passed under Section 39 of the Act, 2016, but the appellant on its own volition chose to challenge only order dated 06.12.2018 passed under Section 39 of the Act, 2016.

17. The issue regarding maintainability of the appeal against rejection order of review petition was examined by the Hon'ble Supreme Court in the case of ***Municipal Corporation of Delhi Vs. Yashwant Singh Negi***, reported in (2013)2 SCR 550 and it was held that any one aggrieved by the decree or order of the Tribunal or Court shall have to challenge within the time stipulated by law, the original decree and not the order dismissing the review petition because on dismissal of review petition the principle of merger does not apply. The relevant paras 3 and 4 of the aforesaid judgment read as under:--

> *"3. We find ourselves unable to agree with the views expressed by this Court in Eastern Coalfields Limited (supra). In our view, once*

the High Court has refused to entertain the review petition and the same was dismissed confirming the main order, there is no question of any merger and the aggrieved person has to challenge the main order and not the order dismissing the review petition because on the dismissal of the review petition the principle of merger does not apply. In this connection reference may be made to the Judgment of this Court in Manohar S/o Shankar Nale and others v. Jaipalsing S/o Shivlalsing Rajput and others (2008) 1 SCC 520 wherein this Court has taken the view that once the review petition is dismissed the doctrine of merger will have no application whatsoever. This Court in DSR Steel (Private) Limited v. State of Rajasthan and others (2012) 6 SCC 782 also examined the various situations which might arise in relation to the orders passed in review petitions. Reference to paragraphs 25, 25.1, 25.2 and 25.3 is made, which are extracted below for ready reference:

"25. Different situations may arise in relation to review petitions filed before a court or tribunal.

25.1. One of the situations could be where the review application is allowed, the decree or order passed by the court or tribunal is vacated and the [pic] appeal/proceedings in which the same is made are reheard and a fresh decree or order passed in the same. It is manifest that in such a situation the subsequent decree alone is appealable not because it is an order in review but because it is a decree that is passed in a proceeding after the earlier decree passed in the very same proceedings has been vacated by the court hearing the review petition.

25.2. The second situation that one can conceive of is where a court or tribunal makes an order in a review petition by which the review petition is allowed and the decree/order under review is reversed or modified. Such an order shall then be a composite order whereby the court not only vacates the earlier decree or order but simultaneous with such vacation of the earlier decree or order, passes another decree or order or modifies the one made earlier. The decree so vacated reversed or modified is then the decree that is effective for the purposes of a further appeal, if any, maintainable under law.

25.3. The third situation with which we are concerned in the instant case is where the revision petition is filed before the Tribunal but the Tribunal refuses to interfere with the decree or order earlier made. It simply dismisses the review petition. The decree in such a case suffers neither any reversal nor an alteration or modification. It is an order by which the review petition is dismissed thereby affirming the decree or order. In such a contingency there is no question of any merger and anyone aggrieved by the decree or order of the Tribunal or court shall have to challenge within the time stipulated by law, the original decree and not the order dismissing the *review petition. Time taken by a party in diligently pursing the remedy by way of review may in appropriate cases be excluded from consideration while condoning the delay in the filing of the appeal, but such exclusion or condonation would not imply that there is a merger of the original decree and the order dismissing the review petition."*

4. We are in complete agreement with the principle laid down by this Court in DSR Steel (Private) Limited (supra) and applying the 3rd situation referred to therein in paragraph 25.3, we are inclined to dismiss this special leave petition. We find force in the contention made by the learned senior counsel appearing for the respondent that this SLP is not maintainable, since the main order was not challenged but only the order passed in the review petition alone was challenged in this SLP. Hence, the SLP is, therefore, not maintainable and the same is dismissed."

18. While agreeing with the preliminary objection of the learned counsel for the respondent regarding maintainability of the present appeal and submission that there is no relevancy of the rectification without challenging the original order, in the facts and circumstances of the case, we do not find any illegality or perversity in the impugned order dated 06.12.2018 of the Regulatory Authority in rejecting the application for rectification of the order dated 09.03.2018. Further, we have restrained ourselves from examining the legality and validity of the order dated 09.03.2021 passed in Complaint No. 1020172285 of the appellant as the same is not under challenge in the present appeal.

19. Accordingly, the **appeal is dismissed.** No order as to costs.

20. Let the original record be sent back to the U.P. Real Estate Regulatory Authority.

(Rajiv Misra) **(D.K.Arora)**

Dated: August 24, 2021
Shakir