Highlights:

Real Estate Brief

- Supreme Court: That fresh environmental clearance must for expansion beyond limits approved by prior environmental clearance;
- Karnataka RERA issues the Karnataka RERA Bank Account Directions 2019;
- Kerala RERA issues a public notice dated 22.02.2020 to promoters of real estate projects; and
- Maharashtra Real Estate Appellate Tribunal, Mumbai overturns MahaRERA order by directing the promoter to pay to the buyer.

Litigation Brief

- Counter-claim: Whether the language of Order 8 Rule 6A of CPC is mandatory in nature?

RERA Brief

➲ SUPREME COURT: That fresh environmental clearance must for expansion beyond limits approved by prior environmental clearance;

In the matter of *Keystone Realtors Private Limited* ***("Appellant")*** *and Shri. Anil V Tharthare & Ors* ***("Respondent"),*** *Hon'ble Supreme Court held that fresh environmental clearance is must for expansion beyond limits approved by prior environmental clearance:*

FACTS:

1. The Appellant is the project proponent of a residential redevelopment in Mumbai. The Appellant received a commencement certificate to carry out the development and errect a building situated at the property. When the construction commenced, the total construction area was 8,720.32 square metres. The ambit of the project was expanded, and the constructed area was increased to 32,395.17 square metres and then to 40,480.88 square meters. As a result of this expansion the Appellant sold 16 additional flats.
2. Under the Environmental Impact Assessment Notification (EIA Notification), an Environmental Clearance was necessary if the total construction area exceeded 20,000 square metres. Hence, the Appellant applied for an Environmental Clearence (EC) under the EIA Notification, which was granted by EIA authority on the recommendation of the State Expert Appraisal Committee (SEIAA) on May'2013.
3. The Appellant informed the Environment Department of the Government of Maharashtra, on further increasing the construction area of the project would stand enhanced to 40,480.88 square meteres. Instead of applying for a fresh Environmental Clearence, the Appellant sought an 'amendment' to the Environmental Clearence it had obtained on May' 2013 to reflect the increase in total construction area. It obtained clearence for the expansion of the project by merely amending the prior EC which was granted by the State Environment Impact Assessment Authority.
4. The civil appeal arose from an order of the Principal Bench of the National Green Tribunal (NGT), in its order the NGT held that the increase in the total construction area of the Appellant's project was an "expansion" under a notification (bearing number S.O. 1533) dated 14 September 2006 of the Ministry of Environment and Forests. The NGT on its examination had found that the Appellant had undertaken "expansion", without complying with the regulatory procedure as laid out in Paragraph 2 of the EIA Notification without complying with the regulatory procedure prescribed. The Appellant was directed to deposit an amount of Rs. One Crore with the Central Pollution Board.

ISSUE:

Whether the 'amended' EC dated March'2014 granted by the SEIAA without following the procedure stipulated in para 7(ii) of the EIA notification valid?

HELD:

- The State Level Environment Impact Assessment Authority for Maharashtra granted an 'amendment' to the EC dated May'2013 on the ground that there was only a marginal increase in the built up and construction area.
- The Hon'ble Supreme court observed that the Schedule to the EIA Notification classifies potential projects into Category "A" and Category "B" based on their size and potential environmental impact. Category "A" projects require project proponents to secure an EC from the Ministry of Environment, Forests and Climate Change. Category "B" projects require project proponents to secure an EC from the SEIAA, based on the recommendations of the SEIAA.
- Where a project falls within the parameters stipulated in the Schedule, paragraph 2 of the EIA Notification provides that no construction work shall begin unless an EC is granted in regard to three types of activity: (i) new projects or activities provided in the Schedule, (ii) expansion or modernisation of existing projects or activities provided in the Schedule, and (iii) changes in the product mix in existing manufacturing units provided in the Schedule beyond the specified range. Clause (ii) of paragraph 2 of the EIA Notification stipulates that a project proponent shall require an EC prior to the start of construction in the case of an "expansion". Clause (ii) uses the phrase

"expansion...beyond the limits specified for the concerned sector". the above language in clause (ii) is further qualified by the phrase "that is, projects or activities which cross the threshold limits given in the Schedule after expansion or modernisation." A plain reading of the second half of clause (ii) of paragraph 2 would indicate that it applies to cases where a project was initially below the threshold limits stipulated in the Schedule but after the proposed expansion, would breach the threshold limits. Clause (ii) of paragraph 2 of the EIA Notification therefore would not appear to cover a case where a project had already crossed the lower threshold limit set out in the Schedule and the expansion does not cross the upper limit stipulated by the Schedule.

- However, clause (ii) of paragraph 2 must be read with paragraph 7(ii) of the EIA Notification. Paragraph 7(ii) lays down the exact procedure to be followed by a project proponent in the case of an expansion. Two crucial points must be noted with respect to paragraph 7(ii). First, it uses the phrase, "expansion with increase in production capacity beyond the capacity for which prior environment clearance has been granted". Second, the qualifying language referring to breaching the threshold limits "after expansion" is absent. An "expansion" can occur even after the grant of an EC when the project first crossed the lower limit stipulated in the threshold and it is not necessary for the project to breach the upper limit after the expansion. Therefore, the Court accepted on close reading of paragraph 7(ii) the interpretation put forth by the Respondent – that even after obtaining an EC if the project is expanded beyond the limits for which the prior EC was obtained, a fresh application would need to be made even if the expansion is within upper the limit prescribed in the Schedule.
- The Court accepted the contention of the Respondent that if clause (ii) of paragraph 2 does not cover a case where the expansion is within the limits stipulated by the Schedule, a project proponent may incrementally keep increasing the size of the project area over time resulting in a significant increase in the project size without an assessment of the environmental impact resulting from the expansion. Such an outcome would defeat the entire scheme of the EIA Notification which is to ensure that any new or additional environmental impact is assessed and certified by the relevant regulatory authorities.
- In the present case, the lower limit of Entry 8(a) of the Schedule is a built up area of 20,000 square metres and the upper limit is 1,50,000 square metres. It cannot be doubted that the environmental impact of a construction of 1,50,000 square metres is drastically more than construction of 20,000 square metres. The Court held that if the Appellant's argument was to be accepted in totality, a project proponent could potentially secure an EC for constructing 20,000 square metres and by "amendment" steadily increase the area of construction up to 1,50,000 square metres without submitting an updated Form 1 or any substantive review by the SEAC.
- The Court held that this court could not adopt an interpretation of the EIA Notification which would permit, incrementally or otherwise, project proponents to increase the construction area of a project without any oversight from the Expert Appraisal Committee or the SEAC, as applicable. It is true that there may exist certain situations where the expansion sought by a project proponent is truly marginal or the environmental impact of such expansion is non-existent. However, it is not for this Court to lay down a bright-line test as to what constitutes a "marginal" increase and what constitutes a material increase warranting a fresh Form 1 and scrutiny by the Expert Appraisal Committee. If the government in its wisdom were to prescribe that a one-time "marginal" increase (e.g. 5% or 10%) in project size, within the threshold limit stipulated in the Schedule, could be subject to a lower standard of scrutiny without diluting the urgent need for environmental protection, conceivably this Court may give effect to such a provision. This would be subject to any challenge on the ground of their being a violation of the precautionary principle. However, as the EIA Notification currently stands, an expansion within the limits prescribed by the Schedules would be subject to the procedure set out in paragraph 7(ii).

CONCLUSION:

- The Appellant did not comply with the procedure set out under paragraph 7(ii) of the EIA Notification but rather sought an "amendment" to the EC. The third respondent did not require the appellant to submit an updated Form 1 nor was the proposal processed and evaluated by the fourth respondent. The "amendment" to the EC dated 13 March 2014 does not discuss the potential environmental impact of the increase in construction area, but merely records that the construction area now stands at 40,480.88 square metres. The procedure set out under paragraph 7(ii) of the EIA Notification exists to ensure that where a project is expanded in size, the environmental impact on the surrounding area is evaluated holistically considering all the relevant factors including air and water availability and pollution, management of solid and wet waste and the urban carrying capacity of the area. This was not done in the case of the appellant's project. It was not open to the third respondent to grant an "amendment" to the EC without following the procedure set out in paragraph 7(ii) of the EIA

Notification. Appeal dismissed and upheld the order of NGT.

KARNATAKA RERA:

Karnataka RERA issues the Karnataka RERA Bank Account Directions 2019:

Vide circular dated 07.01.2020 and in exercise of the powers conferred under section 25 and 37 of the Real Estate (Regulation and Development) Act, 2016, and as the Karnataka Real Estate Regulatory Authority ("**KRERA**" or "**Authority**") having considered it necessary in the interest of on-time delivery of any plot, apartment or building and for the purpose of ensuring the non-diversion of project funds, KRERA has issued the Karnataka RERA Bank Account Directions, 2019 ("**Directions**"):

- Under the Directions, as per Para 3 with respect to General Guidelines, it provides that the RERA Bank Account to be opened in accordance with the provisions of section 4(2)(l)(D) of the Act. The Authority further recommends that the amount withdrawn from the RERA Bank Account shall be utilized for the purpose of completion of the same Real Estate Project. However, there is no restriction on the amount which is withdrawn, provided it is in accordance with the provisions of the Act, Rules and Directions.
- Under the Directions, as per Para 4, the RERA Bank Account so mentioned is to be maintained for each of the registered projects of the promoter, details of which are to be submitted with the project registration application. Further under the Directions, as per Para 5, the promoter is to deposit 70% of the amount collected/realized from the Allottees in the RERA Bank Account.
- Under the Directions, as per Para 6, has outlined extensively the procedure to be followed by the promoter in case of withdrawals made from the account. Such procedure requires certification by an architect, engineer and chartered accountant in practice and is to be proportionate to the percentage of completion of the project. The templates for the certificates have been appended to the act as Form 1,2 and 3 respectively.
- The promoter is further required to get his accounts audited within 6 months after the end of every financial year and is also to produce a report on statement of accounts on project fund utilization and withdrawal by promoter as provided under form 4. The application for change in the RERA Bank Account is appended as form 6 and also Para 8 highlights the necessary steps required to make the change.
- Under the Directions, Para 9 elucidates upon the powers of the Authority over the RERA Bank Account. Upon revocation of registration, the Authority may direct the bank holding the RERA Bank Account to freeze or de-freeze the said account, to facilitate the remaining development works in accordance with the provisions of sections 7(4)(c) and 8 of the Act.

KERALA RERA:

Kerala RERA issues a public notice dated 22.02.2020 to promoters of real estate projects:

- **Clarification on ongoing project:**
  Chapter II of the Real estate (Regulation and Development) Act ("**Act**") mandates that all ongoing projects for which completion certificate has not been issued have to be registered with the Real Estate Regulatory Authority. However, neither the Act nor the Kerala Real Estate (Regulation and Development) Rules, 2018 define an 'ongoing project'. Thus now all the project that have already received permit from the local authority prior to 01.01.2020 (date of official launching of K-RERA), but has not obtained the occupancy certificate shall be considered as an 'ongoing project'.
- **Clarification on allottable parking spaces:**
  As per Section 2(n)(iii) of the Act, open parking areas shall be considered as 'cpmmon areas' and hence the promoter shall not allot such areas to individual allottees. Additionally the interest of allottees, in addition to garage, other covered parking spaces such as basement parking, stilt parking and mechanized parking arrangements will also be considered as parking space allottable by the promoter.
- **Clarification on registration of projects that have obtained occupancy certificate based on partial completion certificate:**
  The Authority, vide a public notice in December,2019, clarified that the real estate projects that have obtained occupancy certificate do not require registration under RERA. The Kerala Municipality Building Rules/ Kerala Panchayat Building Rules have provisions for partial completion certificate and to occupy a building before its completion. In the context of real estate projects requiring registration with Kerala RERA, so as to protect the interest of the

allottees, it is also clarified that partially completed building, which have obtained occupancy certificate based on partial completion certificate as per provisions of the Kerala Municipality Rules/ Kerala Panchayat Building Rules are registrable under the Real Estate (Regulation and Development) Act, 2016.

MAHARASHTRA REAL ESTATE APPELLATE TRIBUNAL, MUMBAI ("TRIBUNAL")

➲ In the matter of Mrs. Sunita Gunjal ("**Appellant**") v/s M/s Radius & Deserve Builders LLP ("**Respondent**") before the Tribunal, the Tribunal overturns MahaRERA order by directing the promoter to pay to the buyer:

FACTS:

1. The Respondent advertised booking of flats in its project located at Chembur, Mumbai It offered purchasers furniture voucher worth of Rs. 1,50,000/- and rent at the rate of Rs. 10,000/- p.m. for 12 months after possession. The Appellant attracted by the offer booked the flat, upon confirmation of booking Appellant paid amount towards the flat plus service tax of Rs.39,9691- in the months of April/May 2016.
2. Due to ill health and on knowing that 10% of the flat cost will be forfeited in case of cancellation, the Appellant being worried of difficulty in paying balance amount requested the Respondent to cancel the flat in 2016. However, on being provided further information by the Respondent that execution of allotment letter and agreement for sale will be in December 2016 and date of possession will be 2020, the Appellant dropped the plan for cancellation and continued with the booking.
3. After persistent follow ups by the Appellant when the Respondent shared agreement for sale on 12.01.2018, the Appellant noticed that Respondent had unilaterally changed the earlier date of possession therein from December, 2020 to December 2024. The Appellant questioned the revised date and wrote to Respondent to retain the earlier date of possession in the agreement or else refund her amount. A reminder was also sent.
4. In response to a request purportedly made by Appellant vide letter dated 19.02.2018 the Respondent conveyed its acceptance for cancellation of booking on 22.02.2018 and refund of the balance amount after deducting/ forfeiting an amount towards brokerage. A legal notice was sent by Appellant to Respondent on demanding total refund of the amount paid till date for misrepresentations and breach of trust by the Respondent, the Respondent agreed to refund the entire amount within a period of 6 to 9 months
5. Though Appellant was ready to accept refund of entire amount paid by her, the Respondent was found reluctant to do so immediately. The Appellant therefore filed the complaint with the Authority seeking refund of amount with applicable interest as the Respondent was not giving possession of the flat in December 2020 as agreed at the time of booking.
6. The Authority after considering the submissions of the Parties observed that as the Appellant had cancelled the booking due to her personal reasons and the agreed date of possession i.e. December, 2020 has not yet lapsed, the Appellant cannot seek interest from Respondent on booking amount paid by her. The Authority finally passed the impugned order whereby the Respondent was directed to refund the booking amount to the Appellant by deducting government charges and to inform the Appellant the details of such deducted taxes.

ISSUE:

The Appeal was filed before the Tribunal on the following grounds:

- *That the Authority failed to consider that it was the Respondent who backed out on its assurance and commitment of delivering possession by December 2020 by changing the date of possession as communicated in draft agreement sent on 12.01.2018.*
- *That the Authority erred in not considering the misrepresentation on the part of Respondent on account of which the Appellant was entitled to withdraw from the project and get refund of the entire paid amount with the applicable interest under Sec. 12 of the Act.*
- *That the impugned order was passed without considering the facts and circumstances of the case and wrongly holding that the Appellant was not entitled to seek interest on amount paid by her as the date of possession i.e. December, 2020 is not yet over.*

OBSERVATIONS:

- The documents and submissions tendered on record reveal that after having been lured by the attractive offer made in the advertisement the Appellant booked the flat in April 2016. There is no dispute that the Appellant made the requisite payments as demanded towards the consideration of the flat. The fact is not in dispute that she had once cancelled the booking owing to her personal reasons in August 2016, which was subsequently revoked after the Respondent persuaded her in a meeting on 20.08.2016.
- It is observed that conduct of Respondent has been one of avoidance and reluctance in providing the necessary details as per its commitments to complete the transactions. Communications mentioned showed that it was on persistent follow ups by the Appellant

that the Respondent supplied the details regarding date of possession as December, 2020 vide its letter dated 30.08.2016 and later agreement for sale on 12.01.2018 with date of possession revised to December, 2024 as against the date of December, 2020 committed earlier.

- There are no reasons assigned for changing the date of possession within a period of less than 2 years from the booking. This change was effected unilaterally without prior information or consent of the Appellant.
- In view of the above observations, the Tribunal held that there was no doubt that Respondent has committed violations with respect to obligations of the promoter regarding veracity of the advertisement or prospectus under Section 12 of the Real Estate Regulatory Authority Act 2016 ("Act"), by not adhering to the date of possession and by making changes in the area and price of the flat contrary to the representations made at the time of booking. Therefore, the Respondent is liable for action as per Section 12 of the Act.
- The Tribunal further held that the Respondent cannot expect her wait for possession till 2024 for no fault of her. The Authority ought to have appreciated that cancellation even if done by the Appellant was not on her own volition but was solely triggered by the Respondent by changing the date of possession without assigning any reasons therefor. As the respondent failed to give possession by December, 2020 the Appellant was entitled to cancel the booking and seek refund of her amount with interest.

HELD:

- That Respondent will not deliver possession by December 2020 and has indulged in misrepresentations made out as above attracting the provisions of Section 12 of the Act. The Tribunal held that the Appellant is fully entitled to refund of the amounts paid with interest.
- Therefore the findings of the Authority to refund only the principal amount with deduction of government taxes was not found to be sustainable and the impugned order was set aside.

Litigation Brief

➲ *Counter-claim: Whether the language of Order 8 Rule 6A of CPC is mandatory in nature?*

In **the matter of:** Ashok Kumar Kalra **Vs.** Wing Cdr. Surendra Agnihotri (Decided by Supreme Court of India at New Delhi)

Issue:

1. Whether Order VIII Rule 6A of the CPC mandates an embargo on filing the counter-claim after filing the written statement?

2. If the answer to the aforesaid question is in negative, then what are the restrictions on filing the counter-claim after filing of the Written Statement?

FACTS:

- The Special Leave Petition was filed assailing the Order passed by High Court of Judicature at Allahabad. The Three Bench Judge of the Apex Court had to decide whether the language of Order 8 Rule 6A of the Civil Procedure Code is mandatory in nature.

- A dispute had arisen between the Petitioner and Respondent No.1 concerning performance of Agreement to Sell. Respondent No.1 filed the suit for specific performance against the Petitioner before the Trail Court. Petitioner herein filed a written statement and subsequently, a counter-claim, in the same suit.

- The Trial Court rejected the objections concerning filing of the counter-claim after filing of the written statement and framing of issues. The order of the Trial Court was challenged before the High Court, wherein, the High Court allowed the Appeal and quashed the counter-claim.

Arguments and Court's Observations:

- The Petitioner put forth that the intent behind Order 8 Rule 6A of the CPC is to avoid multiplicity of proceedings, therefore, no specific statutory bar has been imposed upon Court's jurisdiction to entertain a counter-claim in the same suit, except the limitation under the provision which provides that the cause of action in the counter-claim must arise either before or after the filing of the suit but before the Defendant has delivered his defense.

- The Respondent contented that the language of the statute and the scheme of the Order dictate that the counter-claim has to be a part of the written statement. They further submitted that Order 8 Rule 6A(1) requires that the cause of action for a counter-claim should arise before the filing of the written statement, therefore, the counter-claim, or the grounds on which it is based, should also find mention in the written statement.

- Relying about the *Salem Advocate Bar Association, T.N. vs. Union of India,* the court contended that harmonious reading of Rules 6A, 9 and 10 of Order 8 as well as Order 6 of Rule 17, CPC, the Court has discretion to allow the filling of the written statement, as long as the same is within the limitation prescribed under the Limitation Act. The court further contended that that the counter-claim, or the grounds it is based on cannot necessarily find mention in the written statement owing to: 1) It is possible that at the time of filing of the written statement, the Defendant is unaware of the facts giving rise to the to the cause of action for the counter claim; and 2) It can only be limited to cases where both the written statement and the counter-claim are filed simultaneously. In instances where the counter-claim is filed as a subsequent pleading, Rule 6B cannot be said to be applicable.

- The court also observed that the purpose of the provision enabling filing of counter claim is to avoid multiplicity of proceeding, if the consequence of permitting a counter claim either by way of amendment or by way of subsequent pleading would be prolonging the trial or complicating the smooth flow of the proceedings then the court would be justified in not permitting a belated counter-claim. The court further took into consideration an outer limit for filing the counter-claim, which is pegged till the issues are framed. The court in such cases have the discretion to entertain filing of the counter-claim, after evaluating certain factors like – Period of delay, prescribed limitation period for the cause of action, reason for delay, Defendant's assertion of his right, similarity of cause of action between the main suit and the counter-claim, cost of fresh litigation, injustice and abuse of process, prejudice to the opposite party and facts and circumstances of each case. However, the aforesaid list of factors is not exhaustive.

- Thus, it was held that the Court, in its discretion, may allow a counter claim to be filed after the filing of the written statement but till framing of issues. However, only in exceptional circumstances, a counter-claim may be permitted to be filed after a written statement till the stage of commencement of recording of the evidence.

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