IN THE HIGH COURT OF BOMBAY AT GOA

WRIT PETITION NO.252 OF 2019.

GOA REAL ESTATE AND CONSTRUCTION PVT. LTD.., REP. THR. ITS AUT. REP., COL. MANJIT SINGH NIRANJAN ...Petitioner.

VS

STATE OF GOA, THR. CHIEF SECRETARY AND 4 ORS. ... Respondents.

Shri J. Supekar and S. Sayed, Advocates for the petitioner.

Shri D. Shirodkar, Addl. Govt. Advocate for the respondent nos. 1 & 2.

Shri S. Desai, Advocate for the respondent nos. 4 & 5.

Coram: DAMA SESHADRI NAIDU, J.

Date: 15th March 2021

ORAL ORDER:

The petitioner is a builder/developer under the Real Estate (Regulation and Development) Act 2016 ("RERA Act"). The Act calls him a 'Promoter'. The respondent nos.4 and 5 are the prospective purchasers; the Act calls them 'Allottees'. And the dispute concerns the purchase or non-purchase of a flat. It was because of the delay either in construction on the promoter's part or in payment on the allottees' part. That is the bone of contention.

2. In 2011, when the promoter proposed to construct an apartment of flats, he negotiated with the prospective purchasers to sell the flats yet-to-be-constructed. Then, the allottees came forward and paid about Rs.20 lakh as an advance, out of total sale consideration of about Rs.66 lakhs. According

to the promoter's counsel, the allottees purchased a plot from the promoter on an earlier occasion. The construction commenced in 2012.

3. The promoter contends there was no upper time-limit agreed upon for completing the construction. On the other hand, the allottees contend the period for completion was two years six months. The allottees gather this time frame from what is said to be an unsigned letter from the promoter. The fact remains that the flat came to be completed in 2017.

4. But before the flat could get completed, the allottees seem to have protested with the promoter that there had been a delay. After an exchange of e-mails, the allottees allegedly agreed to buy another flat in lieu of the one they had paid the advance for.

5. Under the above circumstances, the promoter pleads that despite agreeing to pay the balance sale consideration for the newly opted flat, the allottees did not honour their word. So, the petitioner is said to have issued a final notice to the allottees, demanding balance sale consideration and interest as a penalty. There is, however, a controversy on two counts: Has the promoter defaulted by not completing the construction and by not delivering the original flat to the allottees on time? Or, have the allottees violated their later undertaking to pay the balance sale consideration and buy the second flat? Of course, Shri Shivam Desai, the learned counsel for the allottees, disputes the modified contract. He, in fact, denies it.

6. In the above factual backdrop, on 28.5.2018, the allottees complained to the third respondent—the Interim Authority, Goa RERA- about the delay and the deficiency in the promoter's delivering the first flat.

7. After hearing the parties, the learned Authority passed the impugned order, dated 31.10.2018. The ruling is to the effect that there was a delay of seven years in the promoter's completing the project, that is from 2011 to 2018. The allottees shall be allowed to withdraw the booking because of this delay. So the promoter was directed to repay the advance amount along with statutory interest in three months. According to the Authority, the promoter assigned no reasons for the delay in completing the flat. As a result, the Authority imposed a penalty of Rs.2 lakhs on the promoter.

8. Aggrieved, the promoter has filed this Writ Petition.

Submissions:

Petitioner:

9. Shri J. Supekar, the learned counsel for the petitioner, assailed the order on two grounds: (i) By law, the Authority has ceased to hold office when he passed that order, which, thus, has become *ultra vires* of that Authority. (ii) The order is non-speaking, offending the principles of natural justice.

10. To elaborate, Shri Supekar has drawn my attention to Section 20 of the RERA. He has particularly emphasized the third proviso to that section. That provision, according to him, illumines the legislative intent behind section 20. Shri Supekar has taken me through the frequently asked questions (FAQs), which, according to him, the very Government answered. The FAQs, published along with the Rules under RERA, have responded to certain anticipated queries from the public. He has drawn my attention to questions 4, 8, and 55 and the respective answers to those questions.

11. On the merits, Shri Supekar points out that the order, though by a quasi-judicial authority, is laconic—without reasons. Save the last paragraph, which is the operating portion, the rest of the impugned order, according to him, only extracts the rival submissions. In the alternative, Shri Supekar requires this Court to remand the matter to the newly constituted, regular RERA Authority.

Respondents 4 and 5:

12. On the other hand, Shri Shivam Desai, the learned counsel for the respondent nos. 4 and 5, submits that section 20, though it has employed the expression "shall", is only directory or permissive. Especially under the scheme of RERA, it cannot be read as mandatory. According to him, a quasi-judicial authority cannot be unseated either by implication or by default.

13. As to the FAQs, Shri Desai has pointed out that hypothetical answers the government provided to anticipated questions cannot reveal the legislative intent. And that legislative intent must be gathered only from the language used in the statute and from nowhere else. At any rate, he has submitted that without challenging the Government's order that continued the Authority's tenure beyond the period fixed under section 20, the promoter cannot challenge the impugned order, which is only a consequential one. Here, even otherwise, the *de facto* doctrine applies. To support his contentions, he has relied on *Gokaraju Rangaraju v. State of Andhra Pradesh* [1] and *M/s B P. Khemkar Pvt. Ltd v. Birendra Kumar*;[2]

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1 AIR 1981 SC 1473

2 AIR 1987 SC 1010

14. As to the merits, Shri Desai submits that the third respondent Authority has considered all the aspects and rendered the order. That order justly directs the promoter to return the advance money along with statutory interest. In this context, he points out that the respondent nos. 4 and 5 are senior citizens who invested their retiral benefits but have still been struggling to get an abode.

15. About the modified arrangement—that is, the allottees agreeing to buy an alternative flat by paying the balance sale consideration—Shri Desai insists there is no such contract. In the alternative, he has submitted that it an idea not formalised into a contract. At any rate, according to him, it is a disputed fact. In the end, he has underlined that indisputably there is a delay on the petitioner's part in completing the first flat.

Third Respondent:

16. Shri D. Shirodkar, the learned Addl. Govt. Advocate, has adopted the submissions advanced by Shri Desai on the jurisdictional question. He has rightly refrained from joining the issue on the merits. Besides, he has also drawn my attention to section 30, which, according to him, cures any defect in the composition of the authority. So the order rendered by the supposedly defective Authority still remains valid and binding.

17. Heard Shri J. Supekar, the learned counsel for the petitioner; Shri S. Desai, the learned counsel for the respondent nos. 4 and 5; and Shri D. Shirodkar, the learned Addl. Govt. Advocate for the respondent nos. 1 and 2.

Discussion:

Interpretative Intricacies and the Invalidity of the Order:

18. First, the technical objection: Did the third respondent have the authority and jurisdiction to act as the Authority under the Goa RERA Act when he passed the impugned order?

19. Section 20 of the RERA Act deals with establishing and incorporating the Real Estate Regulatory Authority. And the provision reads:

> 20. Establishment and incorporation of the Real Estate Regulatory Authority.—
>
> (1) *The appropriate Government shall, within a period of one year from the date of coming into force of this Act, by notification, establish an Authority to be known as the Real Estate Regulatory Authority* to exercise the powers conferred on it and to perform the functions assigned to it under this Act:
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> Provided that the appropriate Government of two or more States or Union territories may, if it deems fit, establish one single Authority:
>
> Provided further that the appropriate Government may, if it deems fit, establish more than one Authority in a State or Union territory, as the case may be:
>
> *Provided also that until the establishment of a Regulatory Authority under this section, the appropriate Government shall, by order, designate any Regulatory Authority or any officer preferably the Secretary of the department dealing with Housing, as the Regulatory Authority for the purposes under this Act:*
>
> Provided also that after the establishment of the Regulatory Authority, all applications, complaints or cases pending with the Regulatory Authority designated shall stand transferred to the Regulatory Authority so established and shall be heard from the stage such applications, complaints or cases are transferred.
>
> (2) The Authority shall be a body corporate by the name aforesaid having perpetual succession and a common seal, with the power, subject to the provisions of this Act, to acquire, hold

> and dispose of property, both movable and immovable, and to contract, and shall, by the said name, sue or be sued.
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> (italics supplied)

20. Indeed, the statutory mandate is clear: Once the Act comes into force, in one year thereafter, the Government shall establish the Real Estate Regulatory Authority. That authority exercises the powers and performs the functions assigned to it under this Act. The third Proviso to section 20, however, provides a window of exemption: Until the Government establishes —that is, appoints—the Regulatory Authority, it shall designate any [other] Regulatory Authority or "any officer preferably the Secretary of the department dealing with Housing", as the Regulatory Authority.

21. The Act came into force on 1st May 2017. From then on, until 15th October 2019, an *ad hoc* Regulatory Authority had been functioning in terms of the third Proviso to section 20 of the RERA Act. But as per section 20(1), a regular regulatory authority must have been appointed in one year—that is, by 1st May 2018. Instead, the Government continued the interim Authority up to 16th October 2019, when the Government of Goa constituted the Real Estate Regulatory Authority. That means, from May 2017, an interim authority was functioning as the Regulatory Authority for over one year. That authority passed the impugned order on 31.10.2018—beyond one year from the date of his appointment.

22. So, by the petitioner's reckoning, as section 20 (1) of the RERA Act employs the expression "shall", the Regulatory Authority must have been appointed in one year. But the interim Authority, as provided under the third Proviso, continued beyond one year. Therefore, the impugned order, dated

31.10.2018, is *ultra vires* of the interim Authority, who has ceased to hold office from 1st May 2018. So goes the petitioner's argument.

Will 'Shall' ever reveal Legislative Will?

23. 'Modal verbs' are verbs of volition. They speak of intention, not of event. 'Shall' is one such verb. It speaks of obligation. But it does not stop at that. It is, as Garner would have it, a chameleon-hued word, causing endless confusion. In legal parlance, it is a legislative landmine. Even in ordinary parlance, in its use, this word divides the English and the Americans semantically, as the Atlantic does them, physically. India stands somewhere in this semantic middle, it seems. Let us confine to the Legislature.

24. Bennion in his *Statutory Interpretation*[3], under "Section 10", deals with the "mandatory and directory requirements". According to the learned author, in ascertaining the effect of a person's failure to comply with the relevant requirement, we must determine whether the legislature intended that requirement to be mandatory or merely directory. For this purpose, it may be relevant for us "to consider whether the person affected and the person bound are the same, and whether the thing done under the enactment is beneficial or adverse to the person affected". Bennion notes that if the requirement is held to be mandatory, a person's failure to comply with it will invalidate the thing done under the enactment unless in its discretion, the court otherwise directs. On the contrary, if the requirement is held to be merely directory, a person's failure to comply with it will not invalidate the thing done under the enactment. And "the law will be applied as nearly as

3Francis Bennion, Bennion on Statutory Interpretation, 5 ed., LexisNexis, (First Indian Reprint, 2010), p.44

may be as if the requirement had been complied with". In the end, Bennion clarifies: "In the case of failure to carry out a mandatory duty, the court has a discretion as to whether to enforce the duty".

25. To elaborate on the above propositions, Bennion says that if a statue imposes a requirement, the court charged with the task of enforcing the statute "needs to decide what consequence Parliament intended should follow from a failure to implement the requirement". This is an area, according to the learned author, where legislative drafting has been deficient. Drafters find it easy to use the language of command. They say that a thing 'shall' be done. Too often, they fail to consider the consequence when it is not done. In this context, Bennion quotes Millett LJ in *Petch v Gurney (Inspector ofTaxes)*[4]. According to Millett LJ, the difficulty arises from the common practice of the legislature of stating that something "shall" be done (which means that it "must" be done) without stating what are to be the consequences if it is not done.

26. Blackstone, Commentaries on the Laws of England, has said that it is but lost labour to say, "do this, or avoid that," unless we also declare, "this shall be the consequence of your non-compliance."[5].

27. Then, Bennion reckons, what is not thought of by the drafter is not expressed in the statute. Yet the courts are forced to reach a decision. It would be draconian to hold that in every case, failure to comply with the relevant requirement invalidates the thing done. So the courts' answer, where

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4[1994] 3 All ER 731 at 736

5Oxford: The Clarendon Press, 1st edn, 1765-1769) 157; as quoted by Bennion.

the consequences of the breach are not spelt out in the statute, has been to devise a distinction between mandatory and directory duties.

28. But there is no rule of thumb in this matter. According to Bennion, "No universal rule can be laid down ... It is the duty of courts of justice to try to get at the real intention of the legislature by carefully attending to the whole scope of the statute to be construed."[6].

29. The first step is to decide whether the consequences of the breach are spelt out in the statute. If they are, there is usually no need to ask whether the duty is mandatory or directory because the question does not arise. If the consequences are not spelt out, the interpreter's task is always to scrutinise the Act and determine, in the light of its particular provisions, the legal consequence most likely to have been intended for breach of the duty[7].

30. In *State of UP v. Manbodhan Lal Shrivastava*, the Supreme Court has approved Crawford's comment[8]: Whether a statute is mandatory or directory depends upon the intent of the Legislature and not upon the language in which the intent is clothed. The meaning and intention of the Legislature must govern, and these are to be ascertained not only from the phraseology of the provision but also by considering its nature, its design, and the consequences which would follow from construing it the one way or the other.

6(n.3) p.47

7Ibid, p.48

8Crawford, Statutory Construction, p.516 (as quoted in *Manbodhan Lal Shrivastava*)

31. Another mode of showing a clear intention that the provision enacted is mandatory is by clothing the command in a negative form. As stated by Crawford, prohibitive or negative words can rarely, if ever, be directory. And this is so even though the statute provides no penalty for disobedience[9].

32. Using the word 'shall', according to G. P. Singh, raises a presumption that the particular provision is imperative. However, this *prima facie* inference about the provision being imperative may be rebutted by other considerations such as the object and scope of the enactment and the consequences flowing from such construction. Therefore, there are numerous cases where the word 'shall' has been construed as merely directory.[10] (450)

33. Often, different provisions of an enactment employ the expression 'shall', and regarding some, the legislative intent is clear. Then, the word 'shall' in relation to them must be given "an obligatory or a directory meaning" depending on the intent.[11] (452) The use of the word 'shall' with respect to one matter and use of the word 'may' with respect to another matter in the same section of a statute will normally indicate that the word 'shall' imposes an obligation, whereas the word 'may' confers a discretionary power. But that by itself is not decisive. The court may regard the context and consequences and conclude that the part using 'shall' is a directory.[12]

9G. P. Singh, Principles of Statutory Interpretation, LexisNexis, 14th ed., p.446

10. Ibid, P.450

11 Ibid,P.452

12 Ibid, P.453

34. Section 20 of the RERA Act mandates that the Government "shall" establish an Authority to be known as the Real Estate Regulatory Authority. That establishment is to happen in one year from the date the Act comes into force. The Proviso speaks of an interim arrangement: Until the Regulatory Authority under this section is established, the Government "shall" designate any other officer, preferably the Secretary of the Department dealing with Housing, as the Regulatory Authority.

35. Here, the Proviso does not say "until one year". Nor does it say "until one year or until the Government establishes the Regulatory Authority, whichever is earlier". Instead, it says that "until the establishment of a Regulatory Authority under this section, the appropriate Government shall, by order, designate … any officer". Both the principal provision and the proviso use the expression "shall". Which "shall" shall prevail? The answer lies in the legislative intent.

36. Then, what is legislative intent?

37. Plainly, it cannot mean we should be looking at the actual subjective intentions of all those involved—the Minister, the MPs, the Lords, the drafters, the bill team—because those intentions cannot be practically ascertained, and, in any event, they are most unlikely to coincide other than at a very general and unhelpful level. We might say that the intention in question is objective, not subjective[13]. According to Lord Nicholls[14], the phrase is a shorthand reference to the intention which the

13Andrew Burrow's *Thinking about Statutes, Interpretation, Interaction, Improvement*, Cambridge University Press, ed. 2018 (The Hamlyn Lectures 2017)

14R v. Sec of State for the Environment, Transport and the Regions, ex parte Spath Holme Ltd., [2001] 2 AC 349, 397

court reasonably imputes to Parliament regarding the language used. It is not the subjective intention of the minister or other persons who promoted the legislation. Nor is it the subjective intention of the draftsman, or of individual members or even of a majority of individual members of either House. These individuals will often have widely varying intentions.

38. Lord Hoffman has more succinctly stated in *R (Wilkinson) v. IRC*[15] that the legislative intention is the "interpretation which the reasonable reader would give to the statute read against its background."

39. Justice Kirby writing in 2002 said, '[I]t is unfortunately still common to see reference ...to the "intention of Parliament". I never use that expression now. It is potentially misleading[16]. Sir John Laws[17] accepts that we can refer to the purpose, rather than the intention, of the Legislature. He therefore welcomes the modern movement of purposive interpretation but does not see that as helpfully underpinned by reference to Parliamentary intention.

40. We must, as far as possible, gather the legislative intent within the four corners of the very legislation we are trying to interpret—understand. In no statute can we treat any provision as a stand-alone, self-containing, and self-revealing provision. An enactment brings to life a legislative scheme

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15[2006] 1 All ER 529

16Justice Michael Kirby, 'Towards a Grand Theory of Interpretation: The Case of Statutes and Contracts' (2002) Statute Law Review 95, 98 (as quoted by Andrew Burrows)

17(2016) 132 Law Quarterly Review 159 (as quoted by Andrew Burrows)

or vision narrated in sections as if they were chapters in a story. They are interconnected. Here, what finds hidden in section 20, perhaps, stands revealed in section 30.

41. Section 30 of the RERA Act declares that no act or proceeding of the Authority shall be invalid merely by reason of "(a) any vacancy in, or any defect in the constitution of, the Authority; or (b) any defect in the appointment of a person acting as a Member of the Authority; or (c) any irregularity in the procedure of the Authority not affecting the merits of the case".

42. I reckon section 20, read with section 30, reveals the legislative intent: It is desirable for the Government to appoint the Real Estate Regulatory Authority in one year. Until that appointment happens, it can have an interim arrangement. If the regular appointment does not happen in one year and, by that, if the interim authority continues beyond one year, it cannot be fatal. "Any defect in the constitution" or "any defect in the appointment" of the Authority stands condoned or cured under section 30 of the Act.

The Frequently Asked Questions (FAQs):

43. True, in answer to a couple of questions under the "FAQs", the Government may have expressed its desire that it should be appointing a competent authority in one year. That is the Government's best intention or inclination, but that answer does not have the legislative force. Nor can we treat that as the Government's interpretation of section 20. Interpretation is in the judicial domain.

44. I, therefore, hold that section 20, especially, read with section 30, of the Act does not render the third respondent an incompetent authority after the initial one year. Thus, the order impugned does not suffer from the lack of *vires*.

The Disputed Facts:

45. On the second issue, I may note that facts are disputed. That said, the third respondent, in the impugned order, did observe that in 2017 the respondents 4 and 5 agreed to buy another flat. It was not the one they had paid the advance for. It seems respondents 4 and 5 also agreed to pay the balance sale consideration for that newly chosen flat. The third respondent has further recorded the petitioner's version that they did not pay the amount as promised; instead, they chose to approach the third respondent and seek a refund, based on the original agreement.

46. In conclusion, the third respondent has held that there was a delay and that respondents 4 and 5 are entitled to a refund. But the order does not even remotely refer to the impact of the alternative contention the petitioner has advanced: the altered terms of the agreement between the parties. If there were any such agreement, it might amount to novation of the contract. I, nevertheless, hasten to add that the learned counsel for respondents 4 and 5 denies any such altered agreement.

47. Contentious may be the issue, but the third respondent has not addressed that issue, though he has referred to it in the impugned order. Much hinges on it. So, the impugned order misses out on a very vital aspect of adjudication. Its consideration may have materially altered the outcome, too, either way.

48. Under these circumstances, I set aside the impugned order and remand the matter to the successor authority of the third respondent, that is Goa RERA.

49. The learned counsel for both parties have agreed that the parties will appear on a particular date before the Goa RERA. This will avoid the delay and will further enable the Authority to proceed with the remanded matter. On instructions, Shri Shirodkar, the learned Addl. Govt. Advocate, informs me that the Authority requires at least six weeks for disposing of the matter now being remanded.

50. Out of abundant caution. I also clarify that whatever observations I have made in this disposition, they are meant to serve the limited purpose of answering the issues before me. Those observations, if any, will not impinge on the Goa RERA's jurisdiction to decide the matter afresh.

With the above observations, I dispose of the writ petition. Both the parties will appear before the learned Goa RERA on 24.3.2021 at 3.00 p.m., without any further notice on that day. Once they appear, the learned Goa RERA may fix a further date for disposal as per his convenience.

DAMA SESHADRI NAIDU, J.

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