

**IN THE HIGH COURT AT CALCUTTA
(Ordinary Original Civil Jurisdiction)
ORIGINAL SIDE**

Present:

The Hon'ble Justice Krishna Rao

IA No. GA 3 of 2022

In

CS No. 57 of 2022

Smt. Rita Banerjee & Anr.

Versus

S.E. Builders & Realtors Limited

Mr. Suman Kumar Dutt, Sr. Adv.

Mr. Rajarshi Dutta

Mr. A.P. Agarwalla

... For the plaintiffs.

Mr. Siddhartha Banerjee

Mr. Subir Banerjee

Mr. Abhishek Baran Das

Mrs. Srijoni Chongdar

... For the defendant.

Hearing Concluded On : 27.11.2024

Judgment on : 05.12.2024

Krishna Rao, J.:

1. The defendant has filed the present application being G.A. No. 3 of 2022 in C.S. No. 57 of 2022 under Section 8 of the Arbitration and Conciliation Act, 1996 for referring the parties to the instant suit to arbitration in terms of Clause 26 of the General Terms and Conditions entered between the parties
2. The plaintiffs have filed the suit against the defendant for recovery of a sum of Rs. 62,99,393/- along with interest. The defendant is the subsidiary of the Bengal Ambuja Housing Development Limited, who is a joint venture company of the West Bengal Housing Board and Ambuja Neotia Group. After going through the advertisements made by the defendant, the plaintiffs became interested in the said project and contacted the defendant's representative. On 24th April, 2016, the plaintiffs have jointly applied for allotment of Apartment No. 07 in the project of the defendant having built up area of 4046 Sq. Ft. Type - G on the 22nd floor of Tower No.1.
3. The defendant has provided an application to the plaintiffs, hence the plaintiffs have duly signed the said application and also made payment of Rs.10,00,000/- by way of cheque on 20th April, 2016. General Terms and Conditions of the Agreement for allotment of an apartment in the said project was also provided to the plaintiffs. On 28th April, 2016, the defendant has also made over provisional allotment of the apartment to the plaintiffs and the total sale consideration of the said apartment was

fixed at Rs. 2,73,07,620/-. Time to time as per the demand of the defendant, the plaintiffs have paid an aggregate amount of Rs. 94,15,028/- till 22nd November, 2017 being the part sale consideration of the apartment.

4. Due to the demand for installment amount at a regular-intervals by the defendant which is contrary to the representations made by the defendant prior to application for allotment causing financial difficulties to the plaintiffs and the plaintiffs were facing serious difficulties and inconvenience in arranging for payments of the instalment amounts at short notice, the plaintiff no. 1 approached the defendant with a request for cancellation of the provisional allotment of the apartment. The plaintiffs, by e-mails dated 15th June, 2018; 8th July, 2019; 19th July, 2019; 22nd August, 2019; 30th January, 2020 and 13th February, 2020 requested the defendant to arrange for the refund of the part consideration paid by the plaintiffs to the defendant.
5. The defendant by an email dated 15th February, 2020, informed the plaintiffs that the plaintiffs shall be entitled to refund of a sum of Rs. 31,15,635/- only out of the total amount of Rs. 94,15,028/- after the resale or re-allotment of the said apartment. The defendant informed the plaintiffs that a sum of Rs. 31,95,159/- would be deducted towards cancellation charges of GST and Service tax.
6. As the deduction of Rs. 62,99,393/- was illegal and contrary to law, the plaintiffs have lodged a complaint to the West Bengal Housing

Industrial Regulation Authority under Section 31 of the West Bengal Housing Industry Regulation Act, 2017 but no date was fixed for hearing of the complaint of the plaintiffs. In the meantime by a letter dated 20th February, 2021, the defendant send a cheque of Rs. 31,15,635/- after deducting the alleged applicable charges stating that the plaintiffs have no right, tittle or interest against the apartment. After several correspondences between the parties, the plaintiffs have accepted the amount of Rs. 31,15,635/- without prejudice to the rights of the plaintiffs to recover the entire consideration along with interest.

7. The plaintiffs have not received any notice of any proceeding from the West Bengal Housing Industrial Regulation Authority, the plaintiffs have filed the present suit.
8. Mr. Siddhartha Banerjee, Learned Advocate representing the defendant submits that the dispute in the instant case revolves around the contract entered between the parties pertaining to the residential unit in the form of provisional letter of allotment and the General Terms and Conditions signed by both the parties. He submits that in the provisional letter of allotment specifically mentioned that the residential unit had been allotted subject to the stipulations contained in the General Terms and Conditions of the Contract.
9. Mr. Banerjee submits that pursuant to the provisional letter of allotment, the residential unit was provisionally allotted to the plaintiffs and simultaneously General Terms and Conditions of the Contract had

also been handed over to the plaintiffs and after going through the said document and upon understanding the scope, purports, contents and meaning thereof, the plaintiffs have voluntarily put their signatures in the General Terms and Conditions. He submits that the existence and enforceability of the Contract had never been disputed by the plaintiffs.

- 10.** Mr. Banerjee submits that Clause 26 of the General Terms and Contract specifically provided for resolution of all the disputes and differences between the parties through arbitration. He submits that in the plaint, the plaintiffs had admitted that the existence and the binding effect of the General Terms and Conditions. He submits that the disputes raised in the instant suit are covered under the arbitration clause of the General Terms and Conditions of the Contract and the disputes sought to be raised in the suit is arbitrable in nature.
- 11.** Mr. Suman Kumar Dutt, Learned Senior Advocate representing the plaintiffs submits that in terms of Section 2(c) of the Real Estate (Regulation and Development) Act, 2016, Agreement for Sale means an agreement entered between the promotor and the allottee. Section 13 of the Act casts an obligation on the promoter not to take deposit or advance without first entering into Agreement for Sale. He submits that Rule 9 of the West Bengal Real Estate (Regulation and Development) Rules, 2021 provides that the Agreement for sale shall be in the form as per Annexure 'A' for the purpose of Sub-Section (2) of Section 13 of the Act of 2016. He submits that Section 13(2) of the Act of 2016 provides that the Agreement for sale referred in Section 13(1) shall be in such

form as may be prescribed. He submits that the agreement of the present suit is not in consonance with the statutory form of agreement provided under Rule 9 of the 2021 Rules.

- 12.** Mr. Dutt submits that the defendant has entered into an agreement and incorporated Clauses of Arbitration, which is contrary to and in derogation of the provisions of the Act of 2016. He submits that the provisions of the Act of 2016 contained in Chapter VIII thereof provides for various punishment/ penalties, if a party contravenes any of the provisions of the Act of 2016.

He submits that apart from the remedies in civil law, the Act of 2016 also provides for remedies under the criminal law, as would be evident from the provisions contained in Sections 59 to 70 of the Act of 2016.

- 13.** There is no dispute with respect to the provisional letter of allotment and execution of General Terms and Conditions of the Contract between the parties. The defendant relied upon Clause 26 of the General Terms and Conditions of the Contract which reads as follows:

“26. JURISDICTION AND ARBITRATION:

- A. The acceptance of Provisional Allotment Letter by the Allottee shall be subject to these terms and conditions and shall be binding on the Allottee. The legal relationship between the Allottee and the COMPANY shall be governed by the laws of India.*
- B. All disputes or differences relating or arising out of or in connection with the Provisional Allotment read with the Terms and Conditions contained herein,*

shall be mutually discussed and settled between the parties.

- C. *Disputes which cannot be settled amicably shall be finally decided and resolved by arbitration in accordance with the provisions of the Arbitration and Conciliation Act, 1996 and any subsequent amendments thereto. The matters requiring arbitration will be referred to a sole arbitrator to be appointed by the COMPANY at Kolkata only. The proceedings of the arbitration shall be conducted in English and shall be construed as a domestic arbitration under the applicable laws.*
- D. *All disputes/issues arising out of this GTC will be subject to the exclusive jurisdiction of Courts at Kolkata.”*

The objection raised by the plaintiffs that the General Terms and Conditions entered between the parties is in violation of Rule 9 of the West Bengal Real Estate (Regulation and Development) Rules, 2021 which provides that for the purpose of sub-section (2) of Section 13, the Agreement for Sale shall be in the form as per Annexure ‘A’ and as per Annexure ‘A’, there is no Clause for Arbitration. The defendant has relied upon *italic* part of Clause 33 of Annexure ‘A’ of Rule 9 which reads as follows:

“33. DISPUTE RESOLUTION

All or any disputes arising out or touching upon or in relation to the terms and conditions of this Agreement, including the interpretation and validity of the terms thereof and the respective rights and obligations of the Parties, shall be settled amicably by mutual discussion, failing which the same shall be settled through the Adjudicating Officer appointed under the Act.

[Please insert any other terms and conditions as per the contractual understanding between the parties, however, please ensure that such

additional terms and conditions are not in derogation of or inconsistent with the terms and conditions set out above or the Act and the Rules and Regulations made thereunder.]”

Section 71 of the Act of 2016 provides for Power to adjudicate which reads as follows:

“71. Power to adjudicate. — (1) *For the purpose of adjudging compensation under sections 12, 14, 18 and section 19, the Authority shall appoint, in consultation with the appropriate Government one or more judicial officer as deemed necessary, who is or has been a District Judge to be an adjudicating officer for holding an inquiry in the prescribed manner, after giving any person concerned a reasonable opportunity of being heard:*

Provided that any person whose complaint in respect of matters covered under sections 12, 14, 18 and section 19 is pending before the Consumer Disputes Redressal Forum or the Consumer Disputes Redressal Commission or the National Consumer Redressal Commission, established under section 9 of the Consumer Protection Act, 1986 (68 of 1986), on or before the commencement of this Act, he may, with the permission of such Forum or Commission, as the case may be, withdraw the complaint pending before it and file an application before the adjudicating officer under this Act.

(2) *The application for adjudging compensation under sub-section (1), shall be dealt with by the adjudicating officer as expeditiously as possible and dispose of the same within a period of sixty days from the date of receipt of the application:*

Provided that where any such application could not be disposed of within the said period of sixty days, the adjudicating officer shall record his reasons in writing for not disposing of the application within that period.

(3) *While holding an inquiry the adjudicating officer shall have power to summon and enforce the attendance of any person acquainted with the facts*

and circumstances of the case to give evidence or to produce any document which in the opinion of the adjudicating officer, may be useful for or relevant to the subject matter of the inquiry and if, on such inquiry, he is satisfied that the person has failed to comply with the provisions of any of the sections specified in sub-section (1), he may direct to pay such compensation or interest, as the case may be, as he thinks fit in accordance with the provisions of any of those sections.”

The contention of the defendant that as per the *Italic* provision in Clause 33 of Annexure ‘A’ (Agreement), the defendant has incorporated Clause of Arbitration being Clause 26 of the General Terms and Conditions of the Contract which was duly signed by the plaintiffs voluntarily and with the knowledge of the Arbitration Clause and thus at this stage, the plaintiffs cannot say that the General Terms and Conditions of the Contract is illegal.

Section 88 of the Act of 2016 reads as follows:

“88. Application of other laws not barred
— *The provisions of this Act shall be in addition to, and not in derogation of, the provisions of any other law for the time being in force.”*

14. Section 13(2) of the 2016 Act provides that an Agreement for Sale to be entered into between the promoter and the intending purchaser in such form as may be prescribed. The expression “Prescribed” has been defined under Section 2(zi) of the 2016 Act which means prescribed by rules made under this Act. The West Bengal Real Estate (Regulation and Development) Rules, 2021 were framed under the Act of 2016 and as per Rule 9 of the said Rules, requires an Agreement for Sale to be

executed in the form as per 'Annexure-A' of the said Rules. Annexure 'A' is the prescribed format of the Agreement for Sale to be entered between the promoter and the prospective parties. In Clause 33 of the prescribed form of the agreement, there is an insertion in *italic* in brackets wherein the parties are at liberty to incorporate any other terms and conditions as per the contractual understanding between the parties provided such additional terms and conditions are not in derogation of or inconsistent with the terms and conditions set out in the agreement or in the Act or the Rules and Regulations made thereunder.

Mr. Dutt submits that Clause contained in Clause 33 of the prescribed form of agreement is fallacious and misconceived and Clause 26 of the General Terms and Conditions is void and contrary to Clause 33 of the prescribed form of agreement and the same cannot be implemented.

The provisions of Section 88 of the Act of 2016 are in addition to and not in derogation of the provisions of any other law for the time being in force. At the same time as per Section 89 of the Act of 2016, the provisions of this Act shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force.

Considering the above, this Court did not find illegality in incorporating Clause of Arbitration in the General Terms and Conditions by the defendant.

15. Mr. Dutt relied upon the judgment in the case of **Army Welfare Housing Organization and Another Vs. Col. R. Ganesan** reported in **2021 SCC OnLine Mad 16554** and submitted that when the issues governed by the special Statute including criminal matters, the same is non arbitrable. In paragraphs 29 and 30 the said report, the Madras High Court held as follows:

“29. The statement of objects and reasons shows that this Act is enacted for establishing the Real Estate Regulatory Authority for regulation and promotion of real estate sector and to ensure sale of plot, apartment or building, as the case may be, in an efficient and transparent manner and to protect the interest of consumers in the real estate sector and to establish a Real Estate Appellate Tribunal to hear the appeals from the decisions, directions or orders of the Real Estate Regulatory Authority. It is to ensure greater accountability towards consumers and would significantly reduce frauds and delays as also current high transaction cost. It attempts to balance the interest of consumers and promoters by imposing certain responsibilities on both.

30. Thus, this Act has provisions for registration of real estate project and real estate agents, definitions of the functions and duties of promoters, rights and duties of allottees, establishment of Real Estate Regulatory Authority and Real Estate Appellate Tribunal, defining their functions and powers and importantly providing penalties for the offences committed under the Act. Sections 59 to 69 of the Real Estate (Regulation and Development) Act, 2016 deals with the offences, penalties and adjudication. Section 70 deals with compounding of offences. Certainly arbitrators cannot impose penalty and imprisonment.”

Mr. Banerjee relied upon the judgment in the case of **Priyanka Taksh Sood and Others Vs. Sunworld Residency Pvt. Ltd. and**

Another reported in **2022 SCC OnLine Del 4717** wherein the Delhi High Court held that:

“40. From the foregoing, it is thus clear that the remedy available under the A&C Act is in addition to the remedies available under other special statutes and the availability of alternative remedies is not a bar to the entertaining of a petition filed under the A&C Act. But once elected, then the other remedy will not lie in respect of the same dispute. Hence, once a RERA proceeding is initiated, an application under Section 8 of the Act would not lie. However, in the instant case, Respondent has not initiated any proceeding under RERA, hence election of remedy of arbitration is not barred.”

Mr. Banerjee relied upon the judgment in the case of **Pallab Ghosh and Another Vs. Simplex Infrastructures Limited** reported in **2024 SCC OnLine Gau 751** wherein the Guwahati High Court held that :

“32. As held by the Supreme Court in the case of Vidya Drolia (supra), the DRT Act is a complete Code in itself and recovery of money is provided under Chapter-V of the DRT Act, after the procedure under Chapter-IV of the DRT Act has concluded. The recovery of money is automatic as soon as the order of the Tribunal or the Appellate Tribunal is made under the DRT Act. However, the same is not the case with respect the RERA Act. The recovery of money under the RERA Act has to be made under Section 40 as an arrear of land revenue and Section 40 does not come into play automatically, until and unless the appropriate procedure is adopted, based upon the order of the adjudicating officer or the authority concerned.

33. In view of the above, there is a difference in the mode of recovery of money envisaged under the DRT Act and the RERA Act. In so far as recovery of money is to be done under the Arbitration and Conciliation Act, an execution case would have to be filed in terms of the provisions of

the Arbitration and Conciliation Act before the District Judge, which is somewhat akin to following the appropriate procedure prescribed under the RERA Act for recovery of money.

39. *In the present case, the petitioners have opted for arbitration, as per the arbitration clause, for settling the dispute between them. In view of the above reasons, this Court is of the view that the arbitration clause which had been agreed to by the parties for resolution of their disputes can be chosen by the petitioners for deciding the present dispute, instead of taking recourse to the RERA Act.”*

The plaintiffs have lodged a complaint on 7th October, 2020 before the West Bengal Housing Industrial Regulation Authority under Section 31 of the West Bengal Housing Industry Regulation Act, 2017 which is the Housing Industry Regulatory Authority under Section 20 of the said Act for appropriate relief. It is the case of the plaintiffs that even after receipt of the complaint, the authority has not taken any action by fixing a date for hearing of the complaint filed by the plaintiffs and hence the plaintiffs have filed the present suit. At the time of hearing, the defendant has produced a Notification issued by the Government of West Bengal in exercise of power conferred under Sub-Section (1) of Section 20 of the Real Estate (Regulation and Development) Act, 2016 by appointing an Authority to be known as the West Bengal Real Estate Regulatory Authority with immediate effect. The plaintiffs although have made complaint to the authority but have not pursued the same before the concern authority and filed the present suit on the ground that no date was fixed for hearing by the Authority.

16. In the case of ***Imperia Structures Ltd. Vs. Anil Patni and Another*** reported in **(2020) 10 SCC 783**, the Hon'ble Supreme Court held as follows:

“24. Before we consider whether the provisions of the RERA Act have made any change in the legal position stated in the preceding paragraph, we may note that an allottee placed in circumstances similar to that of the complainants, could have initiated the following proceedings before the RERA Act came into force:

(A) If he satisfied the requirements of being a “consumer” under the CP Act, he could have initiated proceedings under the CP Act in addition to normal civil remedies.

(B) However, if he did not fulfil the requirements of being a “consumer”, he could initiate and avail only normal civil remedies.

(C) If the agreement with the developer or the builder provided for arbitration:

(i) in cases covered under Clause (B) hereinabove, he could initiate or could be called upon to invoke the remedies in arbitration.

(ii) in cases covered under Clause (A) hereinabove, in accordance with law laid down in Emaar MGF Land Ltd. v. Aftab Singh, he could still choose to proceed under the CP Act.

26. *It is, therefore, required to be considered whether the remedy so provided under the RERA Act to an allottee is the only and exclusive modality to raise a grievance and whether the provisions of the RERA Act bar consideration of the grievance of an allottee by other fora.*

27. *Section 79 of the RERA Act bars jurisdiction of a civil court to entertain any suit or proceeding in respect of any matter which the Authority or the adjudicating officer or the Appellate Tribunal is empowered under the RERA*

Act to determine. Section 88 specifies that the provisions of the RERA Act would be in addition to and not in derogation of the provisions of any other law, while in terms of Section 89, the provisions of the RERA Act shall have effect notwithstanding anything inconsistent contained in any other law for the time being in force.

28. *On plain reading of Section 79 of the RERA Act, an allottee described in Clause (B) stated in para 24 hereinabove, would stand barred from invoking the jurisdiction of a civil court. However, as regards the allottees who can be called “consumers” within the meaning of the CP Act, two questions would arise; (a) whether the bar specified under Section 79 of the RERA Act would apply to proceedings initiated under the provisions of the CP Act; and (b) whether there is anything inconsistent in the provisions of the CP Act with that of the RERA Act.*

30. *On the strength of the law so declared, Section 79 of the RERA Act does not in any way bar the Commission or Forum under the provisions of the CP Act to entertain any complaint.*

31. *Proviso to Section 71(1) of the RERA Act entitles a complainant who had initiated proceedings under the CP Act before the RERA Act came into force, to withdraw the proceedings under the CP Act with the permission of the Forum or Commission and file an appropriate application before the adjudicating officer under the RERA Act. The proviso thus gives a right or an option to the complainant concerned but does not statutorily force him to withdraw such complaint nor do the provisions of the RERA Act create any mechanism for transfer of such pending proceedings to authorities under the RERA Act. As against that the mandate in Section 12(4) of the CP Act to the contrary is quite significant.*

32. *Again, insofar as cases where such proceedings under the CP Act are initiated after the provisions of the RERA Act came into force, there is nothing in the RERA Act which bars such initiation. The absence of bar under Section 79 to the initiation of proceedings before a fora which cannot be called a civil court and express saving under*

Section 88 of the RERA Act, make the position quite clear. Further, Section 18 itself specifies that the remedy under the said section is “without prejudice to any other remedy available”. Thus, the parliamentary intent is clear that a choice or discretion is given to the allottee whether he wishes to initiate appropriate proceedings under the CP Act or file an application under the RERA Act.

33. *It was, however, urged that going by the objective or the purpose for which the RERA Act was enacted and considering the special expertise and the qualifications of the Chairpersons and Members of the Authority (Section 22) and the Appellate Tribunal (Section 46), such authorities alone must be held entitled to decide all issues concerning the Project registered under the RERA Act. It was submitted that if the allottees were to be permitted to initiate parallel proceedings before the fora under the CP Act, the financial drain on the promoter would render completion of construction an impossibility and, therefore, the RERA Act in general and Section 89 in particular be construed in such a way that all the issues pertaining to the project concerned be decided only by the authorities under the RERA Act. Even with acceptance of such interpretation, the allottees would still be entitled to approach the authorities under Section 18 of the RERA Act.*

34. *It is true that some special authorities are created under the RERA Act for the regulation and promotion of the real estate sector and the issues concerning a registered project are specifically entrusted to functionaries under the RERA Act. But for the present purposes, we must go by the purport of Section 18 of the RERA Act. Since it gives a right “without prejudice to any other remedy available”, in effect, such other remedy is acknowledged and saved subject always to the applicability of Section 79.*

35. *At this stage, we may profitably refer to the decision in Pioneer Urban Land & Infrastructure Ltd. v. Union of India, where a Bench of three Judges of this Court was called upon to consider the provisions of the Insolvency and Bankruptcy Code, 2016, the RERA Act and other legislations*

including the provisions of the CP Act. One of the conclusions arrived at by this Court was:

“100. RERA is to be read harmoniously with the Code, as amended by the Amendment Act. It is only in the event of conflict that the Code will prevail over RERA. Remedies that are given to allottees of flats/apartments are therefore concurrent remedies, such allottees of flats/apartments being in a position to avail of remedies under the Consumer Protection Act, 1986, RERA as well as the triggering of the Code.”

36. *We, therefore, reject the submissions advanced by the appellant and answer the questions raised in para 28 hereinabove against the appellant.”*

- 17.** In the case of **Gujarat State Civil Supplies Corporation Limited Vs. Mahakali Foods Private Limited (Unit 2) and Another** reported in **(2023) 6 SCC 401**, the Hon’ble Supreme Court held that:

“45. There cannot be any disagreement to the proposition of law laid down in various decisions of this Court, relied upon by the learned counsel for the buyers that the Court has to read the agreement as it is and cannot rewrite or create a new one, and that the parties to an arbitration agreement have an autonomy to decide not only on the procedural law to be followed but also on the substantive law, however, it is equally settled legal position that no agreement entered into between the parties could be given primacy over the statutory provisions. When the Special Act i.e. the Msmed Act, 2006 has been created for ensuring timely and smooth payment to the suppliers who are the micro and small enterprises, and to provide a legal framework for resolving the dispute with regard to the recovery of dues between the parties under the Act, also providing an overriding effect to the said law over any other law for the time being in force, any interpretation in derogation thereof would frustrate the very object of the Act.”

- 18.** The allegation of the plaintiffs in the present suit that the defendant has no right or authority in law to withhold the money paid by the plaintiffs to the defendant towards part consideration of the flat. The defendant already sold or taken steps for sale of the said property and realized or about to realize the entire consideration thereof. The defendant cannot make wrongful gain at the cost of the plaintiffs. The Clause in the General Terms and Conditions permitting the defendant to withhold payment on the garb of applicable charges is contrary to law and cannot be given effect to.

Section 18 of the Act of 2016 stipulates that if the promoter itself fails to complete or is unable to give possession of an apartment, plot or building in accordance with the terms of the agreement for sale, the promoter would be liable, on demand from the allottees, to return the amount received by him in respect of that apartment, plot or building, with interest at such rate, as may be prescribed. In the instant case, the plaintiffs wanted to walk out of the agreement on the ground that the defendant has violated the agreement.

Section 31 of the Act of 2016 provides for filing of complaints with the authority or the adjudicating officer. In paragraph 12 of the plaint, the plaintiffs have categorically averred that prior to institution of the suit, the plaintiffs have made complaint before the adjudicating authority.

Section 79 of the Act of 2016 specifically excludes the jurisdiction of every civil court to entertain any suit or proceeding in respect of any

matter, which the authority or the adjudicating officer or the Appellate Tribunal constituted under the Act of 2016 is empowered to determine. The Hon'ble Supreme Court in the case of ***Imperia Structures Ltd. (Supra)*** held that on plain reading of the Section 79 of the RERA Act, an allottee would stand barred from invoking the jurisdiction of a civil court.

19. In the case of ***Gujarat State Civil Supplies Corporation Limited (Supra)***, the Hon'ble Supreme Court while setting aside the order passed by the High Court held that the Facilitation Council shall have the jurisdiction to proceed with reference made by the party in respect of the dispute covered under Section 17 of the Msmed Act, 2006 despite the existence of an independent arbitration agreement between the parties.
20. In the present case, it is admitted that the plaintiffs have made complaint before the West Bengal Housing Regulation Authority on 7th October, 2020 under Section 31 of the Act and without proceeding the same, the plaintiffs have filed the present suit. It is also admitted that under the General Terms of Conditions entered between the parties under Clause 26, there is a Clause of Arbitration on the basis of which the defendant has filed the present application for referring the parties to arbitration. The contention of the plaintiffs that in Chapter VIII of the Act of 2016 provides for punishment/penalties and the arbitrator cannot impose punishment and penalty. The plaintiffs have filed the suit for a decree for a sum of Rs. 62,99,393/- with interest but have

not prayed for any punishment and penalty, thus the contention of the plaintiffs does not stand.

- 21.** Considering the above, it is clear that the remedy available under the Arbitration and Conciliation Act, 1996 is in addition to the remedies available under other special statutes and the availability of alternative remedies is not a bar to the entertaining of a petition under the Arbitration and Conciliation Act, 1996. But once elected, then the other remedy will not lie in respect of the same dispute.

The plaintiffs have initially made complaint being Complaint No. COM000518 dated 7th October, 2020 before the West Bengal Housing Industrial Regulation Authority under Section 31 of the Act and the said complaint is still pending before the concern authority. Thus the plaintiffs elected remedy under Section 31 of the Act of 2016, the plaintiffs cannot file the suit for recovery of money and the parties cannot be referred to arbitration.

- 22.** In view of the above, the suit being **C.S. No. 57 of 2022** filed by the plaintiffs and the application filed by the defendant being **G.A. No. 3 of 2022** are **dismissed**. The dismissal of the suit will not create any hindrance to the plaintiffs to take appropriate steps before the concern authority to proceed with the complaint filed by the plaintiffs on 7th October, 2020.

(Krishna Rao, J)