

**IN THE KARNATAKA REAL ESTATE APPELATE TRIBUNAL,
BENGALURU**

DATED THIS THE 20th DAY OF SEPTEMBER, 2021

PRESENT

HON'BLE SRI B SREENIVASE GOWDA, CHAIRMAN

AND

HON'BLE SRI K P DINESH, JUDICIAL MEMBER

AND

HON'BLE SRI P S SOMASHEKAR, ADMINISTRATIVE MEMBER

APPEAL NO. (K-REAT) 359/2020

BETWEEN:

M/s S.J.R.Prime Corporation Pvt.,Ltd.,
7th Floor, # 1 Industrial Layout,
Koramangala 7th Block,
Bengaluru -560095.

Represented by its Authorised Representative,
Komala Reddy,

...APPELLANT

(By Sri. Vasusena for M/S Shetty & Hegde Associates)

AND

1. Smt. Archana Patil,
318, 18th G Main,
6th Block, Koramangala,
Bengaluru-560095

2. Real Estate Regulatory Authority,
Ground floor, Silver Jubilee Block,
Unity Building, CSI compound,
3rd Cross, Mission Road,
Bengaluru-560 027.

Represented by its Secretary.

...RESPONDENTS

(By Ms. Kanchana Patil-GPA holder for
R.1-party-in-person
R-2 RERA -served unrepresented)

This Appeal is filed under Section 44(1) of the Real Estate (Regulation and Development) Act, 2016, before this Tribunal praying to set aside the order dated 7th November 2018 passed in CMP/180703/0000996 by respondent No.2-Adjudicating Officer, RERA.

This appeal, coming on for orders, this day, Hon'ble Chairman delivered the following:

J U D G M E N T

This appeal has been preferred by a promoter of a real estate project on 10.11.2020 challenging the impugned order dated 7th November, 2018 passed by the learned Adjudicating Officer in complaint NO.CMP/180703/0000996 directing the appellant to return the entire amount received from the 1st respondent-allottee with interest at the rate of 10.25% per annum with effect from 1st May, 2017.

2. Challenging the very same order, the 1st respondent-allottee also filed an appeal seeking direction to the promoter to return his amount with interest from the date of respective payments.

3. Since the appellant/promoter has not deposited 30% of the amount ordered to be paid to the 1st respondent/allottee, the registry has assigned FR No.171/2020 to the appeal preferred by the promoter.

4. On perusal of the records, it is seen that initially the appellant has deposited a sum of Rs.6,70,202/- on 20.01.2021 and another sum of Rs.6,70,201/- on 29.07.2021 totally amounting to Rs.13,40,403/-. Still the appellant is required to deposit a sum of Rs.4,40,672/- towards 30% of pre-deposit amount as contemplated under proviso to sub-section (5) of Section 43 of the RERA Act. To enable the appellant to deposit the said amount the matter has been adjourned from time to time by granting sufficient time.

5. On 08.09.2021 the learned counsel for the appellant has filed a memo of undertaking stating that the appellant is ready and willing to deposit the remaining amount on 13.09.2021. Accordingly, the matter was adjourned to 17.09.2021. Even on the said date, the appellant has failed to deposit the amount in compliance/in terms of the undertaking given by the appellant. However, with a view to afford one more opportunity, the matter was adjourned to today (20.09.2021) as a last chance to deposit the amount. On 08.09.2021, the learned counsel for appellant has filed two memos. One memo relating to filing of WP FR No. 13757 of 2021 challenging the impugned order passed by the Adjudicating Officer and also challenging the orders dated 08.07.2021 and 29.07.2021 passed by this Tribunal, by which, this Tribunal has directed the appellant/promoter to deposit the total amount payable to the allottee on or before 26.07.2021, failing which, the appeal

will be listed on 25.08.2021 for dismissal of the appeal". On perusal of the writ papers, it is seen that the same is at the stage of scrutiny and no interim order of stay has been granted by the Hon'ble High Court, as fairly submitted by the learned counsel for the appellant.

6. When the matter is called today, Sri.Vasusena, learned counsel appearing for appellant submits that due to financial constraints, appellant is unable to deposit the amount and again he seeks some more time to deposit the amount.

7. Smt. Kanchana Patil, the GPA holder of 1st respondent-allottee strongly opposes granting further time to the appellant for depositing the amount and she submits that despite granting sufficient time, the appellant has failed to deposit the total amount payable to the 1st respondent-allottee and with an ulterior motive, the appellant is protracting the proceedings before this Tribunal and she prays for dismissal of the appeal and release of the amount of Rs.13,40,403/- deposited by the appellant in favour of the allottee. She further submits that the appeal filed by the 1st respondent-allottee seeking enhancement of the compensation may be heard finally.

8. Having regard to the fact that another appeal filed by the allottee has already been admitted and having regard to the fact

that the appellant has deposited substantial amount, the appeal was admitted on 21.06.2021 and thereafter, it was adjourned from time to time so as to enable the appellant to deposit the remaining amount.

9. Despite granting sufficient time, the appellant has neither deposited the amount nor made an attempt to adhere to his own memo of undertaking filed by before the Court and thereby failed to comply with proviso to sub-section (5) of Section-43 of the Act.

10. Before advertng to proviso to sub-Section(5) of Section 43 of the Real Estate (Regulation and Development) Act, 2016 (for short the Act) which contemplates pre-deposit by a promoter while filing an appeal, we deem it just and proper to refer to the latest decisions and law declared by the Hon'ble Supreme court of India on this aspect of the matter.

11. The Hon'ble Supreme court in the case of TECNIMONT PVT. LTD.(formerly known as Tecnimont ICB Private Limited) Vs. STATE OF PUNJAB AND OTHERS reported in 2019 SCC Online SC 1228, in Civil Appeal No. 7358/2019 and connected matters preferred by the assessee as well as State of Punjab challenging the validity of Judgment and order dated 23.12.2015 passed by the Hon'ble High Court of Punjab and Haryana at Chandigarh in Civil

Writ Petition No. 26920 of 2013 and connected matters, raising questions about the validity of Section 62(5) under the Punjab Value Added Tax Act, 2005, while considering the decision of the Hon'ble High Court on question (c)- "whether the first appellate authority in its right to hear appeal has inherent powers to grant interim protection against imposition of such a condition for hearing of appeals on merits?" wherein it was held that –"partial or complete waiver will be granted only in deserving and appropriate cases where the first appellate authority is satisfied that the entire purpose of the appeal will be frustrated or rendered nugatory by allowing the condition of pre-deposit to continue as a condition precedent to the hearing of the appeal before it. Therefore, the power to grant interim protection/injunction by the first appellate authority in appropriate cases in case of undue hardship is legal and valid..." , has broadly classified into two categories the principles laid down in the decisions of its court in the cases of (i) *The Anant Mills Co., Ltd v.State of Gujarat* (ii) *Seth Nand Lal v. State of Haryana* (iii) *Vijay Prakash D Mehta Vs Collector of Customs (Preventive), Bombay* (iv) *Shyam Kishore Vs Municipal Corporation of Delhi*, (v) *Gujarat Agro Industries Co. Ltd. Vs Municipal corporation of the city of Ahmadabad*, (vi) *State of Haryana Vs Maruti Udyog Ltd.* (vii) *Government of Andhra Pradesh Vs P. Laxmi*

Devi (Smt), (viii) Har Devi Asnani Vs state of Rajasthan (ix) S E Graphites Private Limited Vs State of Telangana:

“(a) Under the first category are the cases where the concerned statutory provision, while insisting on pre-deposit, itself gives discretion to the Appellate Authority to grant relief against the requirement of pre-deposit if the appellate Authority is satisfied that insistence on pre-deposit would cause undue hardship to the appellant. The decisions in this category are *The Anant Mills Co. Ltd*, *Vijay Prakash D Mehta*, *Gujarat Agro Industries Co. Ltd.*, *Maruti Udyog Ltd*.

(b) On the other hand, the decisions in said *Seth Nand Lal*, *Shyam Kishore*, *P. Laxmi Devi*, *Har Devi Asnani*, and *S E Graphites* dealt with cases where the statute did not confer any such discretion on the Appellate Authority and yet the challenge to the validity of such provisions was rejected.

12. The Hon’ble Supreme court, in para 29, considering the scope of Section 151 CPC as observed in (i) *PADAM SEN v STATE OF UTTAR PRADESH*-{AIR 1961 SC 218- paras 8 & 9}, (ii) *MANOHAR LAL CHOPRA v SETH HIRALAL* {AIR 1962 SC 527} and (iii) *RAM CHAND AND SONS SUGAR MILLS (P) LTD. V KANHAYALAL BHARGAVA* {AIR 1966 SC 1899} and observations made in respect of powers exercisable under section 482 Cr.P.C in *NAIN SINGH v. KOONWARJEE* {(1970)1 SCC 732} and *SOORAJ DEVI v. PYARE LAL*-{(1981)1 SCC 500}, has held as follows:

“ 29. If the inherent power the existence of which is specifically acknowledged by provisions such as Section 151 of CPC and Section 482 of the Cr.P.C. is to be read with the limitation that exercise of such power cannot be undertaken for doing that which is specifically prohibited, same limitation must be read into the scope and width of implied power of an appellate authority under a statute. In any case the principle laid down in *Matajog Dobej* states with clarity that so long as there is no express inhibition, the implied power can extend to doing all such acts or employing such means as are reasonably necessary for such execution. The reliance on the principle laid down in *Kunhi* cannot go to the extent, as concluded by the High court, of enabling the appellate Authority to override the limitation prescribed by the statute and go against the requirement of pre-deposit. The High court was clearly in error in answering question(c).”

13. Further, the Hon'ble Supreme court in the case of UNION BANK OF INDIA v. RAJAT INFRASTRUCTURE PRIVATE LIMITED AND OTHERS –reported in (2020)3 SCC 770 -while dealing with Section 18 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, following its earlier ruling in the case of NARAYAN CHANDRA GHOSH v UCO BANK (2011)4 SCC 548 has held:

“...there was an absolute bar to the entertainment of an appeal under Section 18 of the Act unless the condition

precedent, as stipulated, is fulfilled i.e., unless the borrower makes with appellate Tribunal, a pre-deposit..”

14. Recently, the Hon’ble Supreme court in the case of KOTAK MAHINDRA BANK PRIVATE LIMITED v AMBUJ A KASLIWAL AND OTHERS –(2021)3 SCC 549, while dealing with Section 21 of the Recovery of Debts and Bankruptcy Act, 1993 held that:

“.....The High court does not have the power to waive the pre-deposit in its entirety, nor can it exercise discretion which is against the mandatory requirement of the statutory provision as contained in Section 21 of the said Act.”

Further, in the same Judgment, while referring to Section 18 of the SARFAESI Act, it has held:

“ ..We have no hesitation in holding that deposit under the second proviso to Section 18(1) of the Act being a condition precedent for preferring an appeal under the said section, the Appellate Tribunal had erred in law in entertaining the appeal without directing the appellant to comply with the said mandatory requirement.”

15. Now we would like to refer to proviso to Section 43(5) of the Act which mandates that where a promoter files an appeal with the Appellate Tribunal, it shall not be entertained, without the promoter first having deposited with the Appellate Tribunal at least thirty percent, of the penalty, or such higher percentage as may be

determined by the Appellate Tribunal, or the total amount to be paid to the allottee including interest and compensation imposed on him, if any, or with both, as the case may be, before the said appeal is heard.

16. By careful reading of the above proviso it is clear that pre-deposit is mandated under the following three categories of appeals to be filed by a promoter :

I CATEGORY:

When promoter prefers an appeal challenging any direction or order or decision of the Authority imposing penalty under Sections 59, 60, 61, 62, 63 and 64 of Chapter VII of the Act for contravention of provisions of Section 3, 4, other provisions of the Act, Sections 9 and 10 of the Act and for failure to comply with the orders of the authority and the appellate Tribunal respectively.

II CATEGORY:

When promoter prefers an appeal challenging any direction or order or decision of the Adjudicating Officer directing him to return the amount of the allottee including interest and compensation imposed on him, if any, or with both as the case may be for having failed to complete the project or is unable to give possession of an apartment, flat or building to the allottee in accordance with the terms of the

agreement for sale or, as the case may be, duly completed by the date specified therein; or due to discontinuance of his business as a developer on account of suspension or revocation of the registration under this Act or for any other reason, as contemplated under Sections 12,14,18 and 19 of the Act, where an allottee wishes to withdraw from the project.

III CATEGORY:

When promoter prefers an appeal challenging any direction or order or decision of the Adjudicating Officer directing him to pay compensation with or without interest or with both for delay in delivering possession of the apartment, flat or building in accordance with the terms of the agreement for sale or, as the case may be, duly completed by the date specified therein; or due to discontinuance of his business as a developer on account of suspension or revocation of the registration under this Act or for any other reason as contemplated under Sections 12, 14, 18 & 19 of the Act, where an allottee does not intend to withdraw from the project, but wishes to continue.

17. In all the above three categories of appeals to be preferred by a promoter, the Tribunal cannot entertain the appeal without the promoter first having deposited with the appellate

Tribunal atleast 30% of the penalty imposed/amount ordered to be refunded/compensation awarded in the order impugned in the appeal.

18. In case of I category of appeals against the order of penalty imposed by the Authority, after the appeal is entertained by the Tribunal on deposit of 30% of the penalty, the promoter may be asked to deposit such higher percentage of penalty as may be determined by the appellate Tribunal, before the appeal is heard.

19. Whereas in case of II and III categories of appeals, the Tribunal after having entertained the appeal on deposit of 30% of the amount as ordered by the learned Adjudicating officer, cannot take up the appeal for hearing without the promoter depositing the total amount ordered to be refunded/paid to the allottee including interest and compensation imposed on him, if any, or with both as the case may be as per the order impugned in the appeal, by excluding the amount if any already deposited.

20. Under II category of appeals, it is the amount of the allottee which the promoter is directed to return to the allottee on account of his failure to complete the project and deliver possession of the flat in accordance with the agreement.

21. Under III category of appeals, it is on account of delay on the part of the promoter in completing the project and delivering

possession of the flat to the allottee in accordance with the terms of the agreement, the promoter is directed to compensate the allottee by paying delay compensation with or without interest on the amount received by him towards sale consideration.

22. Thus, under categories II and III, no discretion is given to the Tribunal under proviso to Section 43(5) of the Act to waive the pre-deposit of the amount awarded by the learned Adjudicating officer in the order impugned in the appeal and take up the appeal for hearing.

23. In the light of the law laid down by the Hon'ble Apex court and in view of the submission made by the learned counsel for the appellant that the appellant is unable to deposit the remaining 70% of the compensation amount as ordered by the learned Adjudicating Officer in the compliance of proviso to Section 43(5) of the Act, we pass the following:

O R D E R

- (i) The appeal is dismissed for non-deposit of total compensation amount payable to 1st respondent-allottee as contemplated under proviso to sub-section (5) of Section-43 of the RERA Act;
- (ii) The Registry is directed to release the amount deposited by the appellant at the time of filing the appeal, in favour of the 1st respondent-allottee along with interest, if any,

accrued thereon by issuing banker's cheque or demand draft in the name of Respondent No.1-allottee and the cheque/DD may be handed over to the GPA holder of Respondent No.1-allottee, after following the due procedure.

- (iii) The Registry shall place a copy of the order passed in this appeal and also the original records of RERA in the connected Appeal K-REAT No. 14/2020 filed by the 1st respondent-allottee for enhancement of compensation;
- (iv) It is made clear that the amount deposited by the appellant-promoter in this appeal and ordered to be released in favour of the allottee shall be adjusted/deducted while considering the appeal preferred by the 1st respondent-appellant in appeal No K-REAT 14/2020, in the event the appellant therein succeeds in her appeal;
- (v) The Registry shall comply with the provisions of Section 44 (4) of the Act.

There is no order as to costs.

**Sd/-
HON'BLE CHAIRMAN**

**Sd/-
HON'BLE JUDICIAL MEMBER**

**Sd/-
HON'BLE ADMINISTRATIVE MEMBER**