

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

DATED THIS THE DAY OF 13th DECEMBER ,2021

PRESENT

HON'BLE JUSTICE B SREENIVASE GOWDA, CHAIRMAN

AND

HON'BLE K P DINESH, JUDICIAL MEMBER

AND

HON'BLE P S SOMASHEKAR, ADMINISTRATIVE MEMBER

APPEAL (K-REAT) NO. 276/2020

BETWEEN:

M/s Shrivision Towers Private Limited
No. 192, 2nd Main, T.Chowdaiah Road
Sadashivanagar
Bengaluru-560 080.

.. APPELLANT

(By Sri Nirupan Gowda for M/s JSM Law Partners, Advocate)

AND

1. Karnataka Real Estate Regulatory Authority
2nd Floor, Silver Jubilee Block,
Unity Building, CSI Compound,
Bengaluru-560 027.
Represented by its Secretary
2. Kumar Sidhartha
No. 40/43, 8th Main
4th Cross, Sadashiva Nagar
Bengaluru-560 080.
3. Sharmily Siddhartha
Residing at No. 2088
Sobha Premises
Green Glen Layout,
Bellandur
Bengaluru-560103.

...RESPONDENTS

(R1-RERA served, unrepresented)
(R2 & R3 served, unrepresented)

(R.3 impleaded vide court order dated 30.11.2021)

This Appeal is filed under Section 44 of the Real Estate (Regulation and Development) Act, 2016, before this Tribunal to set aside the impugned order dated 28.08.2019 passed in Complaint No. CMP/190408/0002590 passed by respondent No.1.-Adjudicating Officer.

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

J U D G M E N T

The appellant who is a promoter of a Real Estate project known as "SHRIRAM GREEN FIELD-PHASE I" has preferred this Appeal on 26.02.2020 challenging the order dated 28.08.2019 passed in Complaint No. CMP/190408/0002590 by the learned Adjudicating Officer – 1ST Respondent. The operative portion of the impugned order reads thus:

“ಮೇಲೆ ಚರ್ಚಿಸಿದ ಕಾರಣಗಳಿಗಾಗಿ ಫಿರ್ಯಾದು ಸಂಖ್ಯೆ: CMP/190408/0002590 ಅನ್ನು ಭಾಗಶಃ ಮಂಜೂರುಗೊಳಿಸಿದೆ.

1. ಡೆವಲಪರ್ ಇವರು ಫಿರ್ಯಾದುದಾರರಿಗೆ ಜುಲೈ 2018 ರಿಂದ ಎಲ್ಲಾ Amenities ಒಳಗೊಂಡಂತೆ Occupancy Certificate ಪಡೆದುಕೊಂಡು ನಿಯಮಾನುಸಾರ ಸ್ವಾಧೀನ ಕೊಡುವ ದಿನಾಂಕದವರೆಗೆ ಫ್ಲಾಟ್ ಅನ್ನು ಖರೀದಿಸುವ ನಿಮಿತ್ತ ಕೊಟ್ಟಿರುವ ಹಣಕ್ಕೆ ಜುಲೈ 2018 ರಿಂದ ಸ್ವಾಧೀನ ಕೊಡುವ ದಿನಾಂಕದವರೆಗೆ ವಾರ್ಷಿಕವಾಗಿ ಶೇಕಡಾ 10.75% ರಷ್ಟು ಸರಳ ಬಡ್ಡಿಯನ್ನು Delay Compensation ಅಂತ ಪರಿಹಾರವನ್ನು ನೀಡತಕ್ಕದ್ದು.
2. ವ್ಯಾಜ್ಯದ ಖರ್ಚು ಅಂತ ಫಿರ್ಯಾದುದಾರರಿಗೆ ಡೆವಲಪರ್‌ರವರು ರೂ.5,000/-ಗಳನ್ನು ಕೊಡತಕ್ಕದ್ದು.”

2. By reading of the above impugned order it is clear that in view of delay on the part of the promoter in delivering possession of the flat to the allottees in accordance with the agreement entered

between them, the promoter was directed to pay delay compensation to the allottee by way of interest till he obtains Occupancy Certificate and delivers possession by providing all amenities. As such it is a simple case of payment of compensation for delay in delivering possession of the flat.

3. The appellant has preferred this appeal on 26.02.2020, and, in part compliance of proviso to Section 43(5) of the RERA Act, has deposited 30% of the delay compensation awarded by the learned Adjudicating Officer with this Tribunal, payable to the allottees, as per the impugned order on 05.08.2020. Accordingly, the appeal has been entertained.

4. That after service of notice to all the respondents, on 11.11.2021, this Tribunal admitted the appeal and directed the office to secure records from RERA and to list the appeal on 30.11.2021.

5. On 30.11.2021, this Tribunal allowed I.A.II for impleading and permitted the appellant to implead the wife of Respondent No.2 as Respondent No.3 in the appeal and holding that the appellant has not deposited the total amount payable to the allottees as per the impugned order in compliance of proviso to Section 43(5) of the Act, passed an order as under:

"Since this is an appeal preferred by the promoter, without compliance of proviso to sub-section (5) of Section

43 of the RERA Act and in view of the recent Judgment of the Apex Court in the case of M/s New Tech Promoters and Developers Pvt Ltd-vs-State of UP and others (2021 SCC OnLine SC-1044), without depositing the entire amount payable to the allottees as ordered by the learned Adjudicating Officer, the present appeal filed by the promoter cannot be taken up for hearing.

However, with a view to afford one more opportunity to the promoter, the appellant is granted time finally up to 08.12.2021 for depositing the entire amount after deducting the amount already deposited. In the event of appellant depositing the entire amount office to list the appeal for arguments. In the event appellant failing to deposit the amount within the stipulated time, Registry shall list the appeal for dismissal on 13.12.2021”.

6. Even today, the appellant has failed to deposit the total amount and the learned counsel appearing for appellant/promoter sought further time to deposit the total amount.

7. That as per Section 44(1) of the Real Estate (Regulation and Development) Act, 2016 (for short, the Act), the appropriate Government or the competent authority or any person aggrieved by any direction or order or decision of the Authority or the Adjudicating Officer may prefer an appeal to the Appellate Tribunal.

8. Whereas Proviso to Section 43(5) of the Act 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 atleast 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.

9. 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 RERA 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 RERA and the appellate Tribunal respectively.

II CATEGORY:

When promoter prefers an appeal challenging any direction or order or decision of the RERA 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 contravention of the provisions of 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 RERA 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 such as structural defect or any other defect in workmanship, quality or provision of services or any other obligations of the promoter as per the agreement for sale, as contemplated under Sections 12,14,18 and 19 of the Act, where an allottee does not intend to withdraw from the project, but wishes to continue.

10. In case of I category of appeals against the order of penalty imposed by the RERA, 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.

11. 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 RERA, 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 deducting the amount already deposited.

12. 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.

13. 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, the promoter is directed to compensate the allottee by paying compensation with or without interest on the amount received by him towards sale consideration.

14. Thus, under categories II and III, no discretion is given to the Tribunal under proviso to Section 43(5) of the Act to permit the promoter to deposit lesser amount than what is awarded by the RERA in the order impugned in the appeal.

15. In the latest decision of the Hon'ble Supreme court of India in the case of M/s NEWTECH PROMOTERS AND DEVELOPERS PVT. LTD Vs. STATE OF U.P AND OTHERS (Civil Appeal Nos.6745-6749 of 2021) DD 11.11.2021, wherein, in paragraphs 136 & 137, it is held as follows:

"136. It is indeed the right of appeal which is a creature of the statute, without a statutory provision, creating such a right the person aggrieved is not entitled to file the appeal. It is neither an absolute right nor an ingredient of natural justice, the principles of which must be followed in all judicial and quasi-judicial litigations and it is always be circumscribed with the conditions of grant. At the given time, it is open for the legislature in its wisdom to enact a law that no appeal shall lie or it may lie on fulfillment of precondition, if any, against the order passed by the Authority in question.

137. In our considered view, the obligation cast upon the promoter of pre-deposit under Section 43(5) of the Act, being a class in itself, and the promoters who are in receipt of money which is being claimed by the home buyers/allottees for refund and determined in the first place by the competent authority, if legislature in its wisdom intended to ensure that money once determined by the authority be saved if appeal is to be preferred at the instance of the promoter after due compliance of pre-deposit as envisaged under Section 43(5) of the Act, in no circumstance can be said to be onerous as prayed for or in violation of Articles 14 or 19(1)(g) of the Constitution of India."

16. In view of non-compliance of the mandatory provision of proviso to Section 43(5) of the Act by the appellant and the law laid down by the Hon'ble Apex court, we pass the following:

ORDER

- 1) Appeal is dismissed for non-depositing of the total amount payable to the allottees as per the impugned order as contemplated under proviso to Section 43(5) of the RERA Act.
- 2) The Registry is hereby directed to release the amount deposited by the appellant with this Tribunal while preferring the Appeal in part compliance of proviso to Section 43(5) of the Act,

along with interest, if any, accrued thereon, by issuing either a cheque or DD in favour of the allottees-Respondents 2 & 3, after the appeal period is over, on furnishing necessary documents and by following due procedure.

- 3) In view of dismissal of the Appeal, the allottees are at liberty to recover the balance amount awarded to them under of the impugned order by initiating appropriate proceedings against the promoter.
- 4) In view of dismissal of the Appeal, all pending I.As. if any, stand rejected, as they do not survive for consideration.
- 5) The Registry is hereby directed to comply with Section 44(4) of the RERA Act and return the records of the RERA, if received.

Sd/-
HON'BLE CHAIRMAN

Sd/-
HON'BLE JUDICIAL MEMBER

Sd/-
HON'BLE ADMINISTRATIVE MEMBER