IN THE KARNATAKA REAL ESTATE APPELLATE TRIBUNAL, BENGALURU

DATED THIS THE DAY OF 30th JUNE, 2022

PRESENT

HON'BLE JUSTICE B SREENIVASE GOWDA, CHAIRMAN

AND

HON'BLE K P DINESH, JUDICIAL MEMBER

AND

HON'BLE P S SOMASHEKAR, ADMINISTRATIVE MEMBER

FR No. (K-REAT) 44/2022

BETWEEN

M/s GM Infinite Dwelling (India) Private Limited
Having its corporate office at #No-6,
GM Pearl, 1st Stage BTM Layout,
Bengaluru – 560 068.
Represented by its Authorized Signatory
Gulam Mukthiar :**APPELLANT**

(Sri. Rohit C.V for M/s Ayana Legal, Advocate)

AND:

1. The Secretary
   Real Estate Regulatory Authority Karnataka,
   Having Office at:
   2nd Floor, Silver Jubilee Block,
   Unity Building, CSI Compound,
   3rd Cross, Mission Road,
   Bengaluru-560 027.

2. Syed Asheer Moahamed
   S/o Syed Noor Mohamed,
   Aged about 42 years,
   Residing at:
   G6, Sri Nandhi Samudri Apartments,
   Vijayashree Layout, Kodichikkananhalli,
   Bommanahalli,
   Bengaluru – 560 076. **:RESPONDENTS**

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 30.12.2020 passed in Complaint No.CMP/200219/0005477 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 "GM Infinite Silver Spring Field" has preferred this Appeal on 28.05.2022 challenging the order dated 30.12.2020 passed in Complaint No. CMP/200219/0005477 by the learned Adjudicating Officer, directing the promoter to pay delay compensation to the allottee on the amount paid by him.

2. This is a case of awarding interest for every month of delay in delivering possession of the apartment to the allottee. In view of mandatory requirement of proviso to Section 43(5) of the Act, the appellant is required to deposit the total amount payable to the allottee as per the impugned order before the appeal is heard.

3. The promoter has filed this appeal on 28.05.2022. At the time of scrutiny, the office has raised certain objections including non-deposit of total amount payable to the allottee, as ordered by the learned Adjudicating Officer. Time has been granted to the appellant on two occasions viz., on 08.06.2022 and 28.06.2022 to comply the office objections. By order dated 28.06.2022, while granting time up

to 30.06.2022 for compliance of office objections, it was made clear that if the appellant fails to deposit the amount, the appeal will be dismissed for non-deposit of total amount.

4. When the matter is called today, Sri. Rohith C.V, for M/s Ayana Legal, leaned counsel for the appellant submits that since the learned Adjudicating Officer has no jurisdiction to pass the impugned order, the appellant is not required to deposit the total amount as contemplated under proviso to sub-section-(5) Section 43 of the RERA Act. Further, he submits that due to financial instability, the appellant-promoter is not in a position to deposit the entire amount.

5. That proviso to sub-section (5) of Section 43 of the Real Estate (Regulation and Development) Act, 2016 (for short the Act) contemplates pre-deposit by a promoter while filing an appeal. In this regard, we deem it just and proper to refer to the latest decision of the Hon'ble Supreme Court of India on this aspect of the matter in the case of **M/s NEWTECH** (supra), wherein, in paragraphs 136 & 137, it has 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."

6. A Division Bench of the Punjab-Haryana High Court in the case of Janta Land Promoters Private Ltd., Vs. Union Of India And Others, decided on 16th October, 2020 {CWP No. 8548 of 2020 and other connected matters}, following the dictum in an earlier decision of the Division Bench of the same court in M/s. Landmark Apartments Pvt. Ltd. v. Union of India, held as follows:

"17. Yet another DB of this Court has in a judgment dated 6th October, 2020 in CWP Nos. 14623 and 14689 of 2020 (M/s. Landmark Apartments Pvt. Ltd. v. Union of

India), came to the same conclusion viz., that it cannot be held that the condition of pre-deposit, as set out in the proviso to Section 43 (5) of the Act, is either illegal or onerous, thereby rendering the appeal illusory. The DB has also rejected the further contention that where the ground of appeal was that the order of the Authority was itself without jurisdiction since the complaint would lie only before the AO, the condition of pre-deposit would not apply. The Court in this regard has affirmed the view expressed by the learned Single Judge of this Court in Janta Land Promoters Pvt. Ltd. v. Abhimanyu Singh Vinayak, 2020 (1) RCR (Civil) 160, holding that even in a case where "the Appellate Authority proceeds to decide the appeal on the ground of maintainability of the proceeding before the RERA Authority, that will also amount to hearing and taking a decision in the appeal" and that "the promoter would be liable to deposit the pre-requisite amount as per proviso to the Section 43 (5) of the Act".

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Further, in paragraph 85 of the said Judgment, it is held that:

"Even where according to the party aggrieved the Authority lacked jurisdiction to decide the complaint, it would be for the Appellate Tribunal to decide that issue in light of the legal position explained in this judgment on the respective adjudicatory powers of the Authority and the AO. In such event too, for the purposes of the appeal before the Appellate Tribunal the making of the pre-deposit in terms of the Act would be mandatory".

From the above, it is clear that even to consider the submission of the learned counsel for the appellant that the impugned order passed by learned Adjudicating Officer is without jurisdiction, appellant is required to make statutory deposit as contemplated under proviso to Sub-Section (5) of Section-43 of the Act, which is mandatory and condition precedent.

7. Despite granting sufficient time, the appellant-promoter has failed to comply with the office objections including deposit of statutory amount to entertain the appeal. Further, in view of the submission made by the learned counsel that due to financial constraints the promoter is not in a position to deposit the amount, we do not see any ground to grant further time.

8. In view of the law laid down by the Hon'ble Apex court in the Newtech Developers Pvt. Ltd., and the decision of the Division Bench of the Punjab and Haryana Court in the case of Janta Land Promoters Pvt. Ltd., (supra) and also having regard to the submission made by the learned counsel for the appellant that due to financial constraints, the appellant is unable to deposit the total amount as ordered by the learned Adjudicating Officer in compliance of proviso to Section 43(5) of the Act, we pass the following:

O R D E R

1) Appeal is dismissed for non-depositing of the total amount payable to the allottee as per the impugned order, as contemplated under proviso to Section 43(5) of the RERA Act;

2) In view of dismissal of the Appeal, the 2nd respondent-allottee is at liberty to recover the amount awarded to him in the impugned order by initiating appropriate proceedings against the appellant-promoter.

3) In view of dismissal of the Appeal, all pending I.As. if any, stand rejected, as they do not survive for consideration.

4) 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