

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

**DATED THIS THE 1<sup>ST</sup> DAY OF 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. 46/2021**

**BETWEEN**

Karnataka Postal & Telecom Employees  
Housing Co-operative Society Ltd.,  
(Rep. by its Secretary/CEO-Mr. M.N. Mahesh)

**APPELLANT**

(By M/s Hande Associates, Advocates)

**AND**

1. Mr. Ajay Agarwal  
S/o Rajeshwar Aggarwal, Aged 53 years,  
Residing at No.1398, Muninagappa Layout,  
Chowdappa Garden, 4<sup>th</sup> Cross,  
Kavalbyra Sandra Post  
Bengaluru-560 032.

2. Karnataka Real Estate Regulatory Authority  
No. 1/4, Ground Floor, Silver Jubilee Block,  
Unity Building, CSI Compound,  
3<sup>rd</sup> Cross, Mission Road,  
Bengaluru-560 027.

Represented by its Secretary

**RESPONDENTS**

(Sri Ajay Agarwal, R.1.party-in-person)  
(R1-RERA served, unrepresented)

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 15<sup>th</sup> December, 2020 passed in Complaint No.CMP/UR/190624/0003377 passed by respondent No.2-Adjudicating Officer.

This Appeal, coming on for pronouncement of 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 "Sandesh Nagar-2" has preferred this Appeal on 15.06.2021 challenging the order dated 15<sup>th</sup> December, 2020 passed in Complaint No. CMP/UR/190624/0003377 by the learned Adjudicating Officer – 2<sup>nd</sup> Respondent. The operative portion of the impugned order reads thus:

1. The complaint filed by the complainant bearing No. CMP/UR/190624/0003377 is hereby allowed.
2. The developer is hereby directed to pay the delay compensation in the form of simple interest commencing from due date @ 9% p.a. till April 2017 and simple interest @ 2% above the MCLR of SBI till the possession is delivered by obtaining the occupancy certificate.
3. The developer is also hereby directed to pay Rs.5000/- as cost of the petition.
4. The complainant may file memo of calculation as per this order after 60 days in case the developer has failed to comply with the same to enforce the order.

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 allottee 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 delivers possession, as such it is a simple case of payment of compensation for delay in delivering possession of the flat.

3. The appellant while preferring this appeal, in part compliance of proviso to Section 43(5) of the RERA Act, has deposited certain amount with this Tribunal, payable to the allottee, as per the impugned order. Accordingly the appeal has been entertained.

4. That on 20.09.2021 this Tribunal admitted the appeal and granted time to the appellant up to 15.10.2021 to deposit the total compensation amount payable to the allottee as per the impugned order by excluding the amount if any, already deposited and in the event of appellant depositing the total amount, office was directed to list the appeal for argument, or else to list the appeal for dismissal on 19.10.2021.

5. On 19.10.2021, neither the appellant nor his counsel was present. However, as a last chance the appeal was adjourned to 16.11.2021 as the appeal cannot be taken up for final hearing and be

heard without the promoter first having depositing the total amount payable to the allottee as per the impugned order.

6. Even on 16.11.2021, the appellant failed to deposit the total amount and the learned counsel appearing for appellant/promoter sought further time to deposit the total amount. The 1<sup>st</sup> Respondent who appears as party-in-person prayed for dismissal of the appeal for non-deposit of the total amount payable to him as per the impugned order.

7. Their submissions are placed on record.

8. 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.

9. 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.

10. 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 Dobby* 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)."

11. 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 Securitization 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.."

12. 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.”

13. 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.

14. 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 Authority/Adjudicating Officer directing 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 Authority/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.

15. 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.

16. Whereas in case of II and III categories of appeals, the Tribunal cannot entertain the appeal without the promoter first depositing the total amount ordered to be refunded or awarded delay compensation by way of interest payable to the allottee including compensation & interest imposed on him, if any, or with both as the case may be as per the order passed by the Authority/Adjudicating Officer impugned in the appeal.

17. 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.

18. 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.

19. 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 Authority/Adjudicating officer in the order impugned in the appeal and entertain the appeal.

20. Further, the the Hon'ble Supreme court in its latest Judgment 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 para 137, 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."

21. In view 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:

**ORDER**

- 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) 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 allottee-Respondent No.1, after the appeal period is over, on furnishing necessary documents and by following due procedure.
- 3) In view of dismissal of the Appeal, the allottee is at liberty to recover the balance amount awarded to him 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**

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