

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

(K-REAT) FR NO. 28/2021

DATED THIS THE 1st DAY OF DECEMBER 2021

BETWEEN

Air Force Naval Housing Board
Having its office at Air Force Station Race Course,
New Delhi-110 003,
Represented by its Director General,
Through Asst. Manager (legal),
Mr. Bhupinder Kumar

APPELLANT

AND

1. The Adjudicating Officer,
The Karnataka Real Estate Regulatory Authority,
Second Floor, Silver Jubilee Block,
Unity Building, CSI Compound,
3rd Cross, Mission Road,
Bengaluru-560 027.
2. The Under Secretary,
The Karnataka Real Estate Regulatory Authority,
Second Floor, Silver Jubilee Block,
Unity Building, CSI Compound,
3rd Cross, Mission Road,
Bengaluru-560 027.
3. K.V Aiyappa
Varsha Apartment,
Flat No. 209, Ernamkulam,
Kerala-682 020.

RESPONDENTS

Hon'ble Judges/Coram

HON'BLE JUSTICE B SREENIVASE GOWDA, CHAIRMAN

AND

HON'BLE K P DINESH, JUDICIAL MEMBER

AND

HON'BLE P S SOMASHEKAR, ADMINISTRATIVE MEMBER

Counsels:

(By Sri Ramachandar Desu, Advocate for Appellant)

(R1-RERA served, unrepresented)

(R2- under Secretary RERA served, unrepresented)

(Sri Basava Kiran G.R & Sri Vardhan Shenoy K Advocates for R3)

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 25.06.2019 passed in Complaint No.CMP/190416/0002587 by respondent No.1-Adjudicating Officer.

This Appeal, coming on for pronouncement of orders this day, the Hon'ble Judicial Member, delivered the following:

J U D G M E N T

The appellant who is a promoter of a Real Estate project known as "Jalavayu Towers Mysuru" has preferred this Appeal on 26.03.2021 challenging the order dated 25th June, 2019 passed in Complaint No. CMP/190416/0002587 by the learned Adjudicating

Officer – 1st Respondent. The operative portion of the impugned order reads thus:

1. The complaint filed by the complainant bearing No. CMP/190416/0002587 is allowed.
2. The developer is hereby directed to discharge the bank loan with interest, EMI and any other incidental charges and to get NOC.
3. The developer is also directed to return the amount of Rs.10,29,353/- received from the consumer within 60 days. If not, from 61st day it will carry simple interest @ 10.75% p.a till the realization of entire amount.

2. This Tribunal by its considered order dated 24.09.2021 dismissed IA.II filed by the appellant under section 44(3) R/W Section 43(5) and 44(6) of the Act and directed the appellant to deposit the balance amount of Rs.8,90,964/- claimed by the 3rd Respondent and challenged by the Appellant. The Appellant has been granted two weeks further time to deposit the balance amount and the matter was listed on 08.10.2021. On 08.10.2021 the learned counsel for the appellant filed IA.III seeking further time to comply the order dated 24.09.2021 and accordingly further time was granted to the appellant by partly allowing IA.III by listing the matter on 22.10.2021. On 22.10.2021 the learned counsel for the appellant

filed IA.IV seeking two more weeks time to comply the order and time was further extended till 15.11.2021.

3. On 15.11.2021 there was no representation on behalf of the appellant and the learned counsel for 3rd Respondent opposed the further grant of time. The appellant has been granted sufficient time to deposit the balance amount from 24.09.2021 to 15.11.2021 but the appellant has failed to comply the order. There was no submission on behalf of the appellant on 15.11.2021. Learned counsel for 3rd Respondent prayed for dismissal of the appeal for non-deposit of the total amount payable to allottee as per the impugned order.

4. Submission of the learned counsel for 3rd Respondent is placed on record. Hence, the case was posted for pronouncement of orders on 26.11.2021.

5. Before advertng to the question of law it is relevant to mention certain admitted facts of the case. That the appellant in the present appeal is a promoter and has filed appeal under Section 44(1) of the Act. It is also not in dispute that the appellant has made payments by cheque through RTGS in favour of 3rd Respondent pursuant to the order of the Adjudicating Officer dated 25.06.2019. Admittedly proviso to Section 43(5) of the Act is applicable to the appellant being a promoter.

6. The first contention of the appellant is that under proviso 6 of Section 44 the Appellate Tribunal can suo-moto call for records for the purpose of examining the legality or propriety or correctness of any order of the Authority or the Adjudicating officer or disposing of appeal and the appellant need not comply with proviso 5 of Section 43 of the Act. Admittedly appellant has filed the appeal under Section 44 of the Act. Under Section 44 there are 6 sub-Section covering different subjects for different purposes. Sub-Section 1 to 5 of Section 44 is to be read in consonance with Section 44. Sub-Section 1 of 44 speaks about an appeal arising out of any direction or order or decision of the Authority or the Adjudicating Officer. Further proviso to Section 43(5) of the Act contemplates that any person aggrieved by any direction or decision or order made by the authority or by an Adjudicating Officer under this Act may prefer an appeal before the appellate Tribunal having jurisdiction over the matter.

7. Provided 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 30% 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 or compensation imposing on him, if any, or with both, as the case may be, before the said appeal is heard.

8. The combined reading of Section 43(5) and 44(1) of the Act implies that both provisions are harmonious with each other and has to be read as such. Hence, the present appeal filed by the appellant is only under Section 44(1) of the Act. Hence, the proviso to Section 43(5) is applicable to the appeal filed under Section 44(1) of the Act. Coming to Section 44(6) it is abundantly clear that Section 44(6) speaks about the appeal under Section 44(1) and Section 44(6) is to be read along with Section 44(1) of the Act. The Section 44(6) cannot be read in isolation with Section 44(1) for a simple reason that in sub-Section 6 of Section 44 word **"such appeal"** is used. We emphasize the word "disposing of such appeal" occurring in Section 44(6) of the Act relates to an appeal filed under Section 44(1) of the Act. The legislature intend of using the word **"such appeal"** in Section 44(6) refers to an appeal under Section 44(1) only otherwise legislature would not have congested the word **"such appeal"** in Section 44(6) of the statute. Hence, we are not incline to accept the argument of the learned counsel for Appellant that appeal under the sub-Section 6 of the Section 44 is independent of section 44(1) of the Act. Sub-Section 6 of Section 44 is in addition and subservient to Section 44(1) of the Act. Accordingly the contention of the appellant that present appeal is under sub-Section 6 of 44 and exempted from pre-deposit under Section 43(5) of the Act is not acceptable.

9. The other limb of argument of the learned counsel for the appellant is that it has already made payments on 31.10.2019 pursuant to the order passed by the Adjudicating Officer dated 25.06.2019 in compliance of the said order and there is a **"deemed compliance"** of proviso to Section 43(5) of the Act. The learned counsel for 3rd Respondent vehemently opposed the contention of the appellant counsel relying on the Judgment of the Hon'ble Apex Court in ***M/s Kotak Mahindra Bank Pvt. Ltd Vs. Sri Ambuj A Kasliwal and Another*** in Civil Appeal No.538 of 2021 decided on 16th February 2021, The issue regarding the compliance of proviso to Section 43(5) of the Act in an appeal filed by the promoter is concern the law is almost settled. The issue has been set at rest by the Judgment of the ***Hon'ble Apex Court in Technimont Pvt Ltd Vs. State of Punjab*** in AIR SC 4489, ***Union Bank of India Vs. Rajatha Infrastructure Pvt. Ltd*** (decision dated 2nd March 2020, in CA No. 1902 of 2020), Hon'ble High Court of Allahabad in case of ***M/s Radicon Infrastructure an Housing Pvt Ltd Vs. Karan Dhyani*** reported in 2019 SSC Online All 4454. Hence, statutory deposit contemplated under proviso to Section 43(5) of the Act in an appeal filed by the promoter is mandatory.

10. IA.II filed by the appellant in the present appeal is for **"deemed compliance"** of the order dated 25.06.2019 in view of the payments made by the appellant dated 31.10.2019 to the 3rd

Respondent. No doubt appellant has produced the documents regarding the payment made to the 3rd Respondent on 31.10.2019 but the question for consideration in the appeal is whether by such payment there is a full and final settlement of the amount due as per the order dated 25.06.2019. According to the 3rd Respondent he has sent email application to Adjudicating Officer for enforcement of balance amount due under the order dated 25.06.2019 amounting to Rs.8,90,964/- and the Adjudicating Officer passed the impugned order dated 17.08.2020 for recovery of the said amount from the appellant. The appellant is questioning the legality of the said order in the present appeal. So the vexed question to be determined in the appeal is whether the amount already paid by the appellant satisfies the order dated 25.06.2019 or the balance amount of Rs.8,90,964/- as claimed by the 3rd Respondent is still due. So the above issue is the merit of the case which the Tribunal has to go into after hearing the appeal. Under the circumstance it cannot be said that there is a **"deemed compliance"** of the order dated 25.06.2019 by the appellant at this stage. Hence, we are of the considered view that the appellant has to deposit the disputed amount stated in the impugned order in compliance of proviso to Section 43(5) of the Act. Accordingly, point No.1 is answered in the negative.

11. 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.

12. 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.

13. 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.

14. 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.

15. 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.

16. 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.

17. 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."

In view of the foregoing reasons we proceed to 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) In view of dismissal of the Appeal, the allottee is at liberty to recover the amount awarded to him under the impugned order by initiating appropriate proceedings against the 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**

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