IN THE KARNATAKA REAL ESTATE APPELLATE TRIBUNAL,

BENGALURU

DATED THIS THE 10th DAY OF FEBRUARY, 2023

PRESENT

HON'BLE SRI JUSTICE B SREENIVASE GOWDA, CHAIRMAN

AND

HON'BLE SRI K P DINESH, JUDICIAL MEMBER

AND

HON'BLE SRI P S SOMASHEKAR, ADMINISTRATIVE MEMBER

FR NO. (K-REAT)33/2023

BETWEEN:

1. M/s Software Engineers & Doctors
   Housing Co-operative Society Ltd.,
   (a society registered under the
   Karnataka Co-operative societies Act, 1959),
   Earlier at No.514, 2nd Cross,
   5th Main, Amarjyothi Layout (West Wing),
   Domlur, Bangalore-560 071.
   Presently having its office at #422,
   1st Floor, 5th Main, Amarjyothi Layout (West Wing),
   Domlur, Bangalore-560 071.
   Rep. by its Secretary
   Sri Nagaraja G.C.,

2. Sri. K. Harikrishna,
   son of late Sri. K.C. Deve Gowda,
   aged about 50 years,

3. Sri Nagaraja G.C
   Son of Sri. Chikkappa G.B.,
   Aged about 40 years,

4. Smt. Charulatha Jain,
   Wife of late Sri P. Sanjeev,
   Aged about 53 years.

5. Sri K.V. Srinadha Varma,
   Son of Sri K. Venkateshwara Raju,
   Aged about 46 years,

Earlier at No.514, 2nd Cross,
5th Main, Amarjyothi Layout (West Wing),
Domlur, Bangalore-560 071,

Present Address:
#422, 1st Floor, 5th Main,
Amarjyothi Layout (West Wing),
Domlur, Bangalore-560 071. **:APPELLANTS**

(By Sri D ManMohan for Sri C.G Gopalaswamy, Advocate)

AND

1. The Karnataka Real Estate Regulatory Authority,
   Office at: No.1/14, 2nd Floor, Silver Jubilee Block,
   Unity Building Backside, CSI compound,
   3rd Cross, Mission Road,
   Bengaluru-560 027
   Rep. by its Secretary.

2. Sri Ajay Kumar,
   S/of late Sri P.V. Sivan Nair,
   Aged about 53 years,
   R/at 485 B, 16th Cross,
   Ideal Homes Township,
   Rajarajeshwarinagar,
   Bangalore-560 098. **:RESPONDENTS**

This Appeal is filed under Section 44 of the Real Estate (Regulation and Development) Act, 2016 before the Tribunal to set aside the common order dated 17.11.2022 in CMP/UR/200902/0006499 passed by the Authority, RERA Respondent No.1.

This appeal coming on for orders this day on I.A. I for waiver of pre-deposit of statutory amount as mandated under proviso

to sub-section (5) of Section 43 of the Act, the Chairman, made the following:

O R D E R

The appellant who is a promoter of a Real Estate project known as ”OAK DALE GREENS” has preferred this Appeal challenging the common order dated 17.11.2022 passed in Complaint No. CMP/UR/200902/0006494 and connected matters by the Authority– 1st Respondent. The operative portion of the impugned order reads thus:

> " In exercise of the powers conferred under Section 31 of the Real Estate (Regulation and Development) Act, 2016, the complaint bearing No. (1) CMP/UR/200902/0006494, (2) CMP/UR/200902/0006499, (3) CMP/UR/200903/0006497, (4) CMP/UR/200904/0006508, (5) CMP/UR/200903/0006507, (6) CMP/UR/200904/0006500 are hereby allowed.
>
> 1. Respondent is directed to pay the amount as mentioned in para21, column No.3 above towards refund with interest calculated at 9% from 21/10/2009 to 30/04/2017 and MCLR + 2% from, 01/05/2017 till 16/09/2022 to the complainants within 60 days from the date of this order. The interest due from 17/09/2022 up to the date of final payment will be calculated likewise and paid to the complainants. The complainants are at liberty to initiate action for recovery in accordance with law if the respondent fails to pay the amount as per the order of this Authority.
>
> 2. Respondent is directed to get his project registered under RERA as it is an ongoing project.”

2. From a perusal of the 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 into between

them, the promoter was directed to refund the amount paid by the allottee with interest as stated supra.

3. This is a case of refund. As per proviso to section 43(5) of the Act, the appellant-promoter while preferring the appeal with this Tribunal has to deposit the entire amount payable to the allottee as per the impugned order in compliance with the mandatory requirement of proviso to Section 43(5) of the RERA Act, before the appeal is entertained. Instead, along with the appeal, the appellant filed an application-I.A.I under Section 44(6) of the Act, 2016, R/W Section 151 of the CPC, 1908 praying this Tribunal to waive pre-deposit of statutory amount as mandated under proviso to sub-section (5) of Section 43 of the RERA Act.

4. The above appeal is filed on 30/01/2023. After scrutiny, the office has raised several objections including non-deposit of total amount payable to the allottee as per the impugned order in compliance of proviso to Section 43(5) of the Act. On 07.02.2023, the appeal was listed for orders regarding non-compliance of office objections. At the request of learned counsel for the appellant the matter was adjourned to this 10th day of February, 2023.

5. Today, the learned counsel for the appellant has filed a memo praying that in the event of this Tribunal declining to grant prayer sought in I A.No.I seeking waiver or dispensation of statutory deposit,

the Tribunal may kindly be pleased to order attaching site Nos. 34, 37, 38, 39, which are formed as per the 1st Layout plan and site Nos. 46 & 47 which are formed as per the 2nd Layout plan or in the alternative by creating charge in favour of the allottees, pending disposal of the appeal. The leaned counsel further submits that even if some time is granted, they are not in a position to deposit the amount and they will deposit the amount as and when they receive money. The Memo is taken on record.

6. The Hon'ble Supreme court of India in the case of M/s. NEWTECH PROMOTERS AND DEVELOPERS PVT. LTD., Vs. STATE OF UP & OTHERS ETC., ***reported in 2021 SCC ONLINE SC 1044,*** in paras 122, 127 & 128 held as follows:

> " 122. It may straightaway be noticed that Section 43(5) of the Act envisages the filing of an appeal before the appellate tribunal against the order of an authority or the adjudicating officer by any person aggrieved and where the promoter intends to appeal against an order of authority or adjudicating officer against imposition of penalty, the promoter has to deposit at least 30 per cent of the penalty amount or such higher amount as may be directed by the appellate tribunal. **Where the appeal is against any other order which involves the return of the amount to the allottee**, **the promoter is under obligation to deposit with the appellate tribunal the total amount to be paid to the allottee which includes interest and compensation imposed on him, if any, or with both, as the case may be,** before the appeal is to be instituted.
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> xx xx xx

127. It may further be noticed that under the present real estate sector which is now being regulated under the provisions of the Act 2016, the complaint for refund of the amount of payment which the allottee/consumer has deposited with the promoter and at a later stage, when the promoter is unable to hand over possession in breach of the conditions of the agreement between the parties, are being instituted at the instance of the consumer/allotee demanding for refund of the amount deposited by them and after the scrutiny of facts being made based on the contemporaneous documentary evidence on record made available by the respective parties, **the legislature in its wisdom has intended to ensure that the money which has been computed by the authority at least must be safeguarded if the promoter intends to prefer an appeal before the tribunal and in case, the appeal fails at a later stage, it becomes difficult for the consumer/allottee to get <u>the amount recovered which has been determined by the authority and to avoid the consumer/allottee to go from pillar to post for recovery of the amount that has been determined by the authority in fact, belongs to the allottee at a later stage</u> could be saved from all the miseries which come forward against him**.

128. At the same time, it will avoid unscrupulous and uncalled for litigation at the appellate stage and restrict the promoter if feels that there is some manifest material irregularity being committed or his defence has not been properly appreciated at the first stage, **would prefer an appeal for reappraisal of the evidence on record provided substantive compliance of the condition of predeposit is made over, the rights of the parties inter se could easily be saved for adjudication at the appellate stage**".

{emphasis supplied}

7. Further in paragraphs 136 & 137 of the said Judgment, the Hon'ble Supreme court 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."

8. That having regard to the Object and Reasons of the RERA Act which was introduced to ensure greater accountability towards consumers to significantly reduce frauds and delays against the home buyers and the law laid down by the Hon'ble Apex court in the case of NEWTECH PROMOTERS particularly the phrase in paragraph 127 that

"**the amount recovered <u>which has been determined by the authority</u> and to avoid the consumer/allottee to go from pillar to post for recovery of the amount that has been <u>determined by the authority</u> in fact, belongs to the allottee at a later stage"** compliance of the mandatory provision of proviso to Section 43(5) of the Act by the appellant is a must.

{emphasis supplied}

9. This Tribunal in catena of cases, observing that in view of the law laid down by the Hon'ble Supreme court in the case of M/s. NEWTECH PROMOTERS AND DEVELOPERS PVT. LTD.(supra) has held that the appellant in order to maintain the appeal is required to deposit the entire amount payable to the allottee as per the impugned order.

10. In view of the foregoing paragraphs and the submission of the leaned counsel that even if some time is granted, they are not in a position to deposit the amount and they will deposit the amount as and when they receive money, we do not see any reason to grant the relief sought in IA.I and Memo. Accordingly, IA.I and Memo are rejected. Consequently, appeal is also liable to be dismissed.

11. Accordingly, we pass the following:

<u>O R D E R</u>

1) I.A.I filed by the appellant for waiver of pre-deposit of the amount awarded by the Authority and Memo are rejected;

2) Consequently, Appeal is dismissed for non-deposit of statutory amount as mandated under proviso to sub-section (5) of Section 43 of the Act;

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.

Sd/-
HON'BLE CHAIRMAN

Sd/-
HON'BLE JUDICIAL MEMBER

Sd/-
HON'BLE ADMINISTRATIVE MEMBER