

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 20.03.2020

CORAM :

The Hon'ble Mr.A.P.SAHI, THE CHIEF JUSTICE
and
The Hon'ble Mr.JUSTICE SENTHILKUMAR RAMAMOORTHY

W.P.No.29933 of 2019
and W.M.P.No.29844 of 2019

T.Chitty Babu ... Petitioner

-vs-

1.Union of India
Rep. By the Secretary,
Dept. of Law and Justice, 4th Floor,
A-Wing, Shastri Bhawan,
New Delhi, Delhi 110 001.

2.K.Deepa ... Respondents

Petition filed under Article 226 of the Constitution of India praying for issue of Writ of Declaration to declare that the Proviso to Section 43 (5) of the Real Estate (Regulation and Development) Act, 2016, insofar as it reads, "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 appeal is heard" as unconstitutional.

For Petitioner : Mr.Mani Sundargopal

For Respondents : Mr.G.Rajagopalan,
Addl. Solicitor General,
assisted by
Mr.C.V.Ramachandramoorthy
for R-1

: Ms.R.Ramya for R-2

ORDER

(Order of the Court was made by The Hon'ble Chief Justice)

The petitioner, who is a Promoter of real estate, has come up questioning the validity of Sub-section (5) of Section 43 of the Real Estate (Regulation and Development) Act, 2016,

whereunder a right of appeal to a Promoter is pre-conditioned by the deposit of total amount to be paid to an allottee of an apartment as may have been determined by the Authority/Adjudicating Officer under the Act, before entertaining the appeal and it being heard by the Appellate Tribunal.

2.The challenge to the validity of the provision has been occasioned on account of an order passed by the Adjudicating Officer on 17.09.2019. The second respondent had paid a booking advance under a Memorandum of Agreement dated 06.06.2012 for purchase of a flat being constructed by the petitioner in a project named as 'January'. The total sale consideration settled between the parties was Rs.48,47,400/- towards which the second respondent complainant advanced a sum of Rs.28,33,440/-. The flat was to be delivered within thirty months with a grace period of 90 days. The complaint was filed claiming that the flat is not complete and the complainant was put to heavy losses on account of such delay of the project, therefore, a relief was prayed for, alleging violation of Section 18 of the Act by moving an application before the Competent Authority under Section 71 read with Section 72 of the said Act.

3.The Competent Authority is the Adjudicating Officer as defined under Section 2 (a) of the Act, appointed by the Real Estates Regulatory Authority established under Sub-section (1) of Section 20, in consultation with the appropriate Government, who is or has been a District Judge as provided for in Section 71 (1) of the 2016 Act.

4.The Adjudicating Officer has proceeded to hold that the complainant had availed of a loan facility and on account of non-delivery of the flat, she was entitled to the refund of the amount together with interest and on the delay having been occasioned by the petitioner, 9% of the amount paid was fixed towards compensation for mental agony and inconvenience together with litigation expenses of a sum of Rs.25,000/-. The said order dated 17.09.2019 is not under challenge.

5.The limited challenge in this writ petition is to the validity of Sub-Section (5) of Section 43 on the ground that it is an onerous condition and the deposit of the total amount of compensation makes the right of appeal illusory, inasmuch as if a promoter is called upon to muster the resources for making payment of the total amount in the manner aforesaid, and if a number of complaints are entertained resulting in award of compensation, as has been done above, on complaints which are otherwise untenable in the eyes of law then a promoter will never be able to avail the remedy of appeal, as he would be burdened with payment of any amount being awarded as compensation, which can be absolutely disproportionate, an outcome of a perverse conclusion as in the present case or excessive or inflated amounts or for a host of other reasons that would ultimately render the right of appeal ineffective. For this, various

submissions have been advanced with the aid of judgments at the bar.

6. Apart from the condition being an onerous one, it is urged that placing such a condition violates Article 14 of the Constitution of India and also violates the right of the petitioner to carry on his trade and profession thereby impinging upon his fundamental right guaranteed under Article 19 (1)(g) of the Constitution of India.

7. It is also submitted that the right of appeal in the present case under Section 71 is the first opportunity given to contest the matter on merits before an appropriate Tribunal, inasmuch as the Adjudicatory Officer only enjoys limited powers and even otherwise, has been appointed by the State Government, who does not perform essentially a judicial function and therefore, the forum of the Adjudicatory Officer is not the forum of first adjudication. Consequently, when an appeal is provided for, this opens the first opportunity to contest the matter on merits and hence, keeping in view the provisions of Sections 21, 22, 43 and 71 of the 2016 Act, the outcome is that the Adjudicating Officer presiding over a non-judicial forum and appointed by a non-judicial Authority, the violation of fundamental rights due to the onerous condition on such parameters is available for challenge questioning the validity of the proviso to Sub-section (5) of Section 43 of the 2016 Act. To substantiate the submissions, learned counsel has laid stress on the judgment of the Delhi High Court in the case of Gagan Makkar and Anr. vs. Union of India, (2012) 192 DLT 186, where the challenge was to the provision of appeal in a matter arising out of a property tax imposed by the Delhi Municipal Corporation and it was held that the provision for deposit of the entire amount before the appeal is heard is an onerous condition rendering the right of appeal illusory and the said provision was struck down as being ultra vires. The judgment of the Delhi High Court and other similar matters arising out of the action taken by the Bombay Municipal Corporation in a case decided by the Bombay High Court are under consideration before the Apex Court, where interim orders have been passed continuing the interim orders that were made available by the High Court.

8. Learned counsel has also invited the attention of the Court to the case of Seth Nand Lal and Ors. vs. State of Haryana and Ors., 1980 (Supp) SCC 574, to contend that in that case the validity was upheld because the amount imposed was a meagre amount and the said case was, therefore, distinguished by the Delhi High Court in the case of Gagan Makkar (supra) on the ground that the impositions made by the Delhi Municipal Corporation were not meagre and was a huge amount. Learned counsel pointed out that the Delhi High Court has observed that a safety valve clause should be made available and therefore, the same being absent in the provision presently under challenge with

no discretion to the Appellate Tribunal to waive any amount required to be deposited, the same also deserves to be struck down for the same reasons.

9. Learned counsel has further invited the attention of the Court to the case of Shyam Kishore vs. Municipal Corporation of Delhi, (1993) 1 SCC 22, that has also been referred to in the judgment in the case of Gagan Makkar (supra), to substantiate his submissions. Learned counsel has also placed before us copies of the judgments of the Bombay High Court and the Calcutta High Court, namely, M/s. Elora Construction Company vs. The Municipal Corporation of Greater Bombay and Ors., AIR 1980 Bom 162 and Chatter Singh Baid and Ors. vs. Corporation of Calcutta and Ors., AIR 1984 Cal 283, to urge that the said judgments were delivered on their own facts, but had not delved into the validity of such a provision where the total amount had to be deposited as being an onerous condition.

10. Learned counsel for the petitioner has also invited the attention of the Court to a judgment of a learned Single Judge of this Court in the case of Immanuel vs. The Special Deputy Collector, Tirunelveli, 2000 1 L.W. 708, to urge that such a power deserves to be possessed by the Adjudicatory Officer, as it is ancillary for the purpose of making the provisions workable, where it was held that the power to grant an interim relief is incidental to the power of appeal being exercised by the Appellate Tribunal.

11. Explaining the word 'entertained' with the aid of the judgment in the case of Shyam Kishore (supra), learned counsel has also invited the attention of the Court to the judgment of the Supreme Court in the case of M/s. S.E. Graphites Private Limited vs. State of Telangana and Ors., (Civil Appeal No. 7574 of 2014), decided on 10.07.2019.

12. Countering the said submissions raised on behalf of the petitioner, the learned Additional Solicitor General, contends that the contention that the right of appeal is the first adjudicatory forum is absolutely incorrect, inasmuch as under Section 71(1), the Authority, in consultation with the appropriate Government, appoints the Adjudicating officer, who is or has been a District Judge. Thus, the argument advanced that the Authority as defined under Section 22 constitutes of persons having no experience in adjudication is futile, inasmuch as the Selection Committee, consists of the Chief Justice of High Court or his nominee, which selects the Chair Person and Members of the Authority, who, in consultation with the State Government appoint an Adjudicatory Officer. In this view of the matter, the argument being advanced that the forum itself may not be constitutionally ordained is misconceived.

13. Learned Additional Solicitor General further submits that

there are several other enactments like the Workmen's Compensation Act, where the entire amount has to be deposited. He submits that appeal is not a common law right and is only a statutory right where any such pre-condition is a reasonable imposition. He contends that the petitioner has nowhere been able to lay down any foundation in the entire writ petition as to how he is being prejudiced except for a bald allegation that he will have no financial resources and the pre-deposit would be an onerous condition. The learned counsel submits that the petitioner is a builder with huge projects as is evident from the narration of facts in the affidavit filed by him in support of the writ petition and also evident from the narration of facts as contained in the affidavits filed on behalf of answering respondents. No material has been placed nor pleaded to show that the petitioner is facing any distress or any form of indigency. Thus, the very foundation that the condition is onerous is not based on any facts which could go to demonstrate that the petitioner is virtually experiencing any such financial constraints to make the pre-deposit. The petitioner has not filed any material on record to establish the same and therefore, a mere allegation cannot be made the basis for raising a challenge to the vires of the provisions.

14. He has further urged that the various provisions of the Act came to be challenged before the Bombay High Court in the case of Neelkamal Realtors Suburban Pvt. Ltd. and Anr. vs. Union of India, decided on 06.12.2017, where the provisions have been held to be valid and consequently, there being no invalidity in the provision under challenge, the same also deserves to be taken into account for dismissing the writ petition. It is also urged that the Adjudicating Officer is governed by the factors, which are to be taken into account as provided for under Section 72 of the 2016 Act and therefore, the contention that perversity and disproportionality may give rise to an abuse of power of the Adjudicating Officer causing prejudice to promoters is a fallacious argument. He has then invited the attention of the Court to the case of Seth Nand Lal (supra) to urge that while conferring a right of appeal, the legislation can limit the said right to be exercised by placing reasonable restrictions. He submits with the aid of another judgment in the case of Gujarat Agro Industries Co. Ltd. vs. Municipal Corporation of the City of Ahmedabad and Ors., (1999) 4 SCC 468, to urge that a right of appeal is neither an absolute right nor an ingredient of natural justice. He has also invited the attention of the Court to other judgments to substantiate his submissions.

15. We may further point out that the learned counsel for the petitioner has also placed before us the judgment of the Apex Court in the case of M/s. Tecnimont Pvt. Ltd. vs. State of Punjab and Ors., (Civil Appeal No. 7358 of 2019), decided on 18.09.2019, where a condition of 25% pre-deposit for hearing the appeal was challenged as onerous, harsh and unreasonable. Another question as to whether the Appellate Authority had an

inherent power to grant an interim order was also raised. While answering the said questions, the Apex Court held that the High Court could not have culled out a power of granting interim protections and therefore, if the statute did not make any prescription, the Appellate Authority could not have exercised such powers. On the issue of pre-deposit, the High Court upheld the provision and while relying on the judgment in the case of Shyam Kishore (supra), it went on to hold that the condition of 25% pre-deposit was not onerous, harsh or unreasonable, but in paragraph 18 proceeded to hold that in case of extreme hardship, a writ petition could be an appropriate remedy.

16. We have considered the submissions raised by the learned counsel for the parties and what we find is that the words used in Section 43(5) are somewhat more explicit as against the other statutes, which were under consideration in the judgments cited at the bar. For this, we may extract Section 43 (5) hereunder:-

" 43.(5) 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:

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 thirty per cent 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. "

17. A perusal of the Section would indicate that when it comes to the filing of an appeal by the promoter, the preemptive words used are "it shall not be entertained" followed ultimately by "before the said appeal is heard". These two phrases, therefore, leave no room for doubt that entertaining of the appeal itself is injuncted. However, while considering as to what is the meaning of the word "entertained", one has to refer to the judgment in the case of Shyam Kishore (supra), where the Supreme Court was considering a right of appeal against the levy of assessment of tax under the Delhi Municipal Corporation Act. Section 170 of the said Act provides that no appeal shall be heard or determined unless the amount, if any in dispute in the appeal, has been deposited by the appellant. The said judgment took notice of the judgment in the case of Ganga Bai vs. Vijay Kumar, (1974) 2 SCC 393, where it was held that a right of suit is distinct from a right of appeal. There is an inherent right in every person to bring a suit of civil nature, but the right of appeal inheres in no one and therefore, an appeal for its maintainability must have the clear authority of law. The

judgment also took notice of the decision of the Apex Court in *Anant Mills Co. Ltd. vs. State of Gujarat*, (1975) 2 SCC 175, where it was a case of entertainment of an appeal by a person who had not deposited the amount of tax and who had not been able to demonstrate undue hardship, which, in that case, arose out of his own omission and default and then, held that such a provision would not be violative of Article 14 of the Constitution of India. It was further held that it was open to the legislature to impose an accompanying liability upon a party upon whom a legal right is conferred or to prescribe conditions for the exercise of the right. The same being valid, no violation of Article 14 was discernible. However, the said case turned on the point that a disability or a disadvantage arising out of the party's own default or omission cannot be taken to be a differentiation so as to attract Article 14 of the Constitution of India.

18. The Apex Court then considered the provisions of the Delhi Municipal Corporation Act, namely Section 170 aforesaid and decided the same in the light of the judgment in the case of *Seth Nand Lal* (supra). In paragraph 14 of the judgment in the case of *Shyam Kishore* (supra), the Apex Court held as under:-

"41. On behalf of the Corporation, it is contended that the words "heard and determined" used in S. 170(b) are comprehensive enough to cover not merely the final hearing of an appeal on merits but also its preliminary hearings to find out whether the appeal is in time (S. 170(a)), whether the disputed tax has been paid along with the appeal [Section 170(b)1, whether the appeal is otherwise defective or to dismiss the appeal straightaway if it is found defective in any of those respects. It is, however, contended by the learned counsel for the appellant that the opening part of S. 170 that 'no appeal shall be heard or determined under S. 169 unless' bars merely the final determination or hearing of the appeal and not any other stage of the hearing of appeal including the preliminary/admission stage of the appeal. It will be noticed that so far as S. 169(1) is concerned, it provides only for the forum i.e. the Court where the appeal to be filed and the procedure is provided in S. 457 of the Act, namely the procedure of suit as far as it can be made applicable. Once there is a provision like S. 170(b) of the Act, a question arises, could any interim reliefs be granted at the admission stage or at any point of time before the final determination of or decision on the appeal. "

While further proceeding to elaborate on it, the Apex Court in paragraphs 44 and 45 held as under:-

"44. It seems to us the words of Section 170(b) are capable of a broader interpretation. A perusal of Section 170 shows that the section uses three

different expressions "heard or determined", "brought" and "admitted" in relation to an appeal and some significance is to be attached to the use of the expression "heard or determined". In like situations, other statutes such as the one considered by this Court in *Lakshmiratan Engineering Works Ltd. v. Assistant CST* [AIR 1968 SC 488 : (1968) 1 SCR 505 : 21 STC 154] and those contained in certain other enactments like the Bombay and Calcutta Municipal Acts specifically prohibit the very entertainment of the appeal if the tax is not paid. When the D.M.C. Act has carefully avoided the use of that word, we must give full effect to the differential wording. Also, the absence of a language in clause (b) of the proviso similar to that in clause (a) - which indicates that an appeal filed beyond the period of limitation will not stand admitted unless the delay is condoned - also warrants an inference that the payment of disputed tax is not a condition precedent to the entertainment or admission of the appeal. In the present statutory context, it sounds plausible to say that such an appeal can be admitted or entertained but only cannot be heard or disposed of without pre-deposit of the disputed tax. Such an interpretation will provide some much-needed relief from the harshness of the provision. These are not days in which the calculation of the property tax is simple and uncomplicated; the determination of the annual value of the property, except when based on the actual rent received from the property, involves various subjective factors and, not unoften, there is a wide gulf between the tax admitted to be due and the tax demanded. Sometimes, to compel the assessee to pay up the demanded tax for several years in succession might very well cripple him altogether. This apart, an assessee may not be able to deposit the tax while filing the appeal but may be able to pay it up within a short time, or at any rate, before the appeal comes on for hearing in the normal course. There is no reason to construe the provision so rigidly as to disable him from doing this. Again, when an appeal comes on for hearing, the appellate judge, in appropriate cases, where he feels there is some great hardship or injustice involved, may be inclined to adjourn the appeal for some time to enable the assessee to pay up the tax. Though it will not be expedient or proper to encourage adjournment of an appeal, where it is ripe for hearing otherwise, only on this ground and as a matter of course, an interpretation which leaves some room for the exercise of a judicial discretion in this regard, where the equities of the case deserve it, may not be inappropriate. The appellate judge's incidental and ancillary powers should not be curtailed except to the

extent specifically precluded by the statute. We see nothing wrong in interpreting the provision as permitting the appellate authority to adjourn the hearing of the appeal thus giving time to the assessee to pay the tax or even specifically granting time or instalments to enable the assessee to deposit the disputed tax where the case merits it, so long as it does not unduly interfere with the appellate court's calendar of hearings. His powers, however, should stop short of staying the recovery of the tax till the disposal of the appeal. We say this because it is one thing for the judge to adjourn the hearing leaving it to the assessee to pay up the tax before the adjourned date or permitting the assessee to pay up the tax, if he can, in accordance with his directions before the appeal is heard. In doing so, he does not and cannot injunct the department from recovering the tax, if they wish to do so. He is only giving a chance to the assessee to pay up the tax if he wants the appeal to be heard. It is, however, a totally different thing for the judge to stay the recovery till the disposal of the appeal; that would result in modifying the language of the proviso to read: "no appeal shall be disposed of until the tax is paid". Short of this, however, there is no reason to restrict the powers unduly; all he has to do is to ensure that the entire tax in dispute is paid up by the time the appeal is actually heard on its merits. We would, therefore, read clause (b) of Section 170 only as a bar to the hearing of the appeal and its disposal on merits and not as a bar to the entertainment of the appeal itself.

45.If the provision is interpreted in the manner above suggested, one can steer clear of all problems of constitutional validity. The contention on behalf of the Corporation to read the provision rigidly and seek to soften the rigour by reference to the availability of recourse to the High Courts by way of a petition under Articles 226 and 227 in certain situations and the departmental instructions referred to earlier does not appear to be a satisfactory solution. The departmental instructions may not always be followed and the resort to Articles 226 and 227 should be discouraged when there is an alternative remedy. A more satisfactory solution is available on the terms of the statute itself. The construction of the section approved by us above vests in the appellate authority a power to deal with the appeal otherwise than by way of final disposal even if the disputed tax is not paid. It enables the authority to exercise a judicial discretion to allow the payment of the disputed tax even after the appeal is filed but, no doubt, before the appeal is taken up for actual

hearing. The interpretation will greatly ameliorate the genuine grievances of, and hardships faced by, the assessee in the payment of the tax as determined. Though an assessee may not be able to acquire an absolute stay of the recovery of the tax until the dispute is resolved, he will certainly be able to get breathing time to pay up the same where his case deserves it. If this interpretation is placed on the provision, no question of unconstitutionality can at all arise."

Ultimately, the rules were held to be intra vires.

19. The main thrust of the argument of the learned counsel for the petitioner is based on the judgment in the case of Gagan Makkar (supra) rendered by the Delhi High Court. We may, therefore, now revert to the same. We agree that the views expressed in the said judgment that the judgment in the case of Shyam Kishore (supra) had not been called upon to answer the question of whether a prior payment of tax to the filing of appeal would be constitutional or not. To this effect, we may extract paragraph 20 as under:-

"20. Therefore, it is clear that the Supreme Court, in view of the construction it placed on Section 170 (b) was not required to answer the question of whether the requirement of paying tax prior to the filing of an appeal would be constitutional or not. However, the Supreme Court expressed a desire that suitable amendment should be made in the said Act in the following words:-

"46. We only wish that the statute itself is soon amended to make this position clear. After all, under the D.M.C. Act, the appellate authority is a high judicial officer, being the District Judge, and there is no reason why the Legislature should not trust such a high judicial officer to exercise his discretion in such a way as to safeguard the interests of both the Revenue and the assessee. We think that, until this is done, the provision requires a liberal interpretation so as to preserve such interests and should not be so rigidly construed as to warrant the throwing out of an appeal in limine merely because the tax is not paid before the appeal is filed."

20. The Delhi High Court then proceeded to distinguish the case of Gujarat Agro Industries (supra) and then referred to Mardia Chemicals Ltd. vs. Union of India, (2004) 4 SCC 311. It also referred to other decisions and then in paragraphs 27, 28

and 29, ruled as under:-

"27. In the backdrop of these legal principles - can it be said that the proviso to Section 169 (1) of the DMC Act imposes a condition so harsh or onerous as to make the right of appeal granted under Section 169 (1) illusory ? We have seen that in Anant Mills (supra), the provision in question [section 406(2)(e) of the Bombay Provincial Municipal Corporation Act, 1949] had a proviso which permitted the appellate authority to dispense with the requirement of pre-deposit of the tax claimed from the appellant in cases of hardship. In Seth Nand Lal (supra), the Supreme Court upheld such a provision, inter alia, because of the 'meagre' amount of pre-deposit that was required under the Act in question. Once again, in Vijay Prakash D. Mehta (supra), the Supreme Court upheld the validity of Section 129 E of the Customs Act, 1962 which also contained a proviso enabling the appellate authority to dispense with the pre-deposit of tax or penalty. A similar provision was considered in Gujarat Agro Industry (supra) though in that case, the power to dispense with the pre-deposit was limited to 25% of such amount. In Shyam Kishore (supra), the Supreme Court interpreted Section 170(b) of the DMC Act in such a way as to avoid the issue of constitutional validity. However, it observed that the validity of a condition, which makes the right of appeal illusory, may need careful consideration in an appropriate case.

28. In its present avatar, Section 169(1) gives a conditional right of appeal. The condition being that before the filing of the appeal, the full amount of the property tax is required to be paid. There is no provision for dispensation of this condition, in full or in part, by the appellate authority on the appellant showing and establishing hardship. In this way, it is different to the cases considered in Anant Mills (supra), Vijay Prakash D. Mehta (supra) and Gujarat Agro Industries (supra) all of which, to some degree, involved provisions which had a 'safety valve' clause, as it were, for dispensation of the pre-deposit amount. And, in Seth Nand Lal (supra), which had a peremptory provision without such a clause, the Supreme Court held the provisions to be valid because the pre-deposit amount was a 'meagre' amount. The Constitution Bench after reiterating the principle that the legislature could impose conditions on the right to appeal provided the conditions were not so unreasonable or onerous to render the right illusory, found that the meagre amount of pre-deposit was neither an unreasonable nor onerous condition.

29. Here, the property tax amount may run into lakhs of rupees and, therefore, cannot be regarded as meagre. As such, we are of the opinion that the proviso to Section 169(1) of the DMC Act imposes an onerous and unreasonable condition of paying the full amount of the property tax before the filing of an appeal. Such a provision renders the right of appeal illusory. It is true that the legislature need not have given a right of appeal at all. But, the legislature, having decided, in its wisdom, to give a right of appeal cannot make it illusory by imposing such an onerous or unreasonable condition as to amount to a deprivation of that very right which it intends to give. Neither can the possible property tax amounts be considered meagre nor is there any provision for dispensation, whether full or partial, so as to ease the harshness of the proviso to Section 169(1) of the DMC Act. Therefore, we have no alternative but to hold that the said proviso is an onerous condition and to strike it down as being violative of Article 14 of the Constitution of India."

21. In the case of M/s.S.E.Graphites Private Limited (supra), the Apex Court came to a conclusion that the provision therein was not a provision of pre-deposit at the stage of filing or institution or presentation of an appeal and held as under in paragraph 9:-

"9. Suffice it to observe that, stricto sensu, the said proviso is not a provision of pre-deposit at the stage of filing, institution or presentation of the appeal as such; but is a provision stipulating payment of tax dues as a prerequisite or sine qua non for consideration of appeal on merits or otherwise and/or for condonation of delay in filing the same, as the case may be, for the first time. If we may say so, it is also to impose fetter on the Appellate Authority from admitting the appeal for consideration on merits.

It is well recognized that filing, institution or presentation of appeal in the office of the Appellate Authority is an independent event than the appeal being taken up for consideration "for the first time" for being admitted on merits or otherwise and/or for condonation of delay in filing it, as the case may be. There is no reason to interpret the stated proviso in any other manner lest, inevitably, it would result in rewriting the same and entail in doing violence to the legislative intent. Presumably, this Court in M/s. Innovatives Systems (Civil Appeal No.2230/2015, decided on 23.02.2015), and other decisions rendered following the same, therefore, was persuaded to allow the appeal preferred by the assessee and to relegate

the parties before the Appellate Authority for consideration of the appeal for admission on merits."

Thus, the aforesaid judgment is also of no avail in the present case.

22. The argument of the learned counsel for the petitioner that the appeal under Section 43(5) of the 2016 Act is the forum of first Adjudication Officer does not appeal to us, inasmuch as the Adjudicatory Officer has been given limited powers, but while adjudicating the same, he is guided by Section 72. The Adjudicatory Officer is of the rank of a District Judge. The argument that the Regulatory Authority does not consist of persons having a judicial background is of no avail, inasmuch as at the first instance itself the Adjudicatory Officer being of the rank of a judicial officer has ample powers before whom the promoters while contesting the complaint have all the opportunity to establish their claim either way with full opportunity to the parties to rely on whatever evidence is permissible. Thus, the appeal provision is the second stage of adjudication, which, therefore, cannot be a stage where violation of fundamental rights can be urged.

23. In the instant case, there is a further right of appeal before the High Court, after the decision of the Appellate Tribunal, in terms of Section 58 of the 2016 Act. This, however, is in terms of Section 100 of the Code of Civil Procedure, 1908, namely, giving rise to a substantial question of law.

24. Having considered all the judgments and the provisions in question, we find that the words "it shall not be entertained" occurring in the proviso to Sub-Section (5) of Section 43 of the 2016 Act, is a preliminary injunction. This prevents even the presentation of an appeal. The Clause "before the said appeal is heard" ultimately is a final injunction to the process of appellate exercise of jurisdiction. Conjointly, to our mind, this clearly shuts out even the presentation or physical filing of an appeal before the Appellate Authority, as the total amount to be deposited as against compensation is a sine qua non. The justification for the same by the respondents is to prevent any form of exploitation, as the promoter or the builder is in a far more dominant position financially or otherwise and the allottee being pitted against such dominants require protection of his life time savings in such investments. It is in order to protect the interest of an allottee that such stringent conditions were necessarily required after it was experienced that promoters and builders had been enriched themselves at the cost of individuals who were made to run to Courts and fight long drawn litigations to recover their priced investments. This being a laudable object to our mind is a reasonable approach because it ensures refund of the amount as well as compensate the allottee proportionately. Such a provision will also act as a deterrent

to promoters and builders not to withhold the money of the investors against their wishes in the event of violation of the terms of an agreement and would substantially put on guard all promoters and builders to ensure timing precision and the expected levels of accuracy in construction. This object in no way prejudices the promoters or the builders, but only seeks to protect an allottee from any form of exploitation or hardship that may be faced by an allottee in the event he does not get his due return as per the terms of the agreement.

25. The argument that there might be orders indicating disproportionate compensation or an amount that may be an outcome of perverse calculation is a speculative argument. On the facts of the present case, 9% of the amount has been awarded as compensation. This had no nexus with the object of securing the investments which is the own money of the allottee. The purpose of awarding of compensation is, as stated above, to prevent any exploitation of the allottee or the undue enrichment of the promoter adopting an attitude of harassment. The guidelines are provided for in Section 72 of the 2016 Act and therefore, there cannot be a presumption of arbitrariness or excessive calculation of compensation so as to strike down the Rule itself. This would depend on facts from case to case. Such a condition, therefore, cannot be said to be unreasonable, keeping in view the purpose which is to secure the own investment of the allottee, coupled with an amount to compensate him in the event the default is found of the promoter. This is not an exaction of a tax against property or such other modes which were involved either in the case of Gagan Makkar (supra) or the other cases that have been referred to herein above. Looking to the purpose for which this provision has been made, it appears to us that the responsibility cast on a promoter or a builder is being made onerous to fulfill such a purpose. The promoter or a builder, even if required to pay any lesser percentage, can very well raise the same argument that any amount fixed would still be either excessive or perverse. This, therefore, cannot be a ground to declare a provision ultra vires. A deposit being heavy by itself in the present case cannot be a ground to declare the provision onerous inasmuch as, as already indicated above, it is the own investment of the allottee which is sought to be secured with certain amount of compensation. This distinguishing feature, therefore, is a different scenario from that as involved in the case of Gagan Makkar (supra), where it was compulsory exaction of a tax on assessment. In the instant case, it is a quasi-judicial adjudication about the personal investment of the allottee and therefore, does not stand on the same footing as that of a property tax assessed by an Authority.

26. There is, however, one question which has to be answered, namely, there is no discretion left in the Appellate Authority at all to modify the terms of deposit and the statute requires a total deposit of the entire amount of compensation. The issue of

safety valve being provided in a statute, as discussed in the judgment of Gagan Makkar (supra), has to be taken notice of. As observed by the Apex Court in the case of M/s.Tecnimont Pvt. Ltd. (supra), we cannot read into the hands of the Appellate Authority any discretionary power in this regard. But, at the same time, we find the observation made therein in paragraph 18 that in case of extreme hardship, a writ petition could be an appropriate remedy. To this extent, it is open to an aggrieved person, including the petitioner, to explore the possibility of raising a challenge for exercise of any such discretion in a writ petition. But, then, that is not an issue for us to finally pronounce upon, and would depend as and when such an option is exercised by the petitioner. There are no pleadings in the present writ petition to assume that any prejudice has been caused to the petitioner on account of any financial crisis being faced by him nor is there any material to assume that the petitioner is experiencing any indigency so as to meet this contingency of deposit. It will be open to the petitioner to plead this in appropriate proceedings, but the same is not a ground for us in the absence of any material to strike down the provision as onerous.

27.We may, however, clarify that an appeal can be instituted by a ministerial act of its presentation and physical filing in the office of the Appellate Authority, but it cannot be entertained unless the pre-deposit has been made. We also clarify that no orders can be passed by the Appellate Authority by either issuing a notice on such an incompetent appeal or otherwise and it can only be entertained and then heard, provided the aggrieved party, in the present case the petitioner, deposits the amount as per the provision of Section 43(5) of the 2016 Act unless there is an order of the High Court or the Apex Court otherwise.

28.We, therefore, hold the provision to be intra vires subject to the above and we, further, declare that the appellate forum is not illusory nor can the condition of pre-deposit be termed as onerous.

The Writ Petition is, accordingly, disposed of, subject to the observations herein above. No costs. Consequently, W.M.P.No.29844 of 2019 is closed.

Sra

Sd/-
Assistant Registrar

//True copy//

Sub Assistant Registrar

To

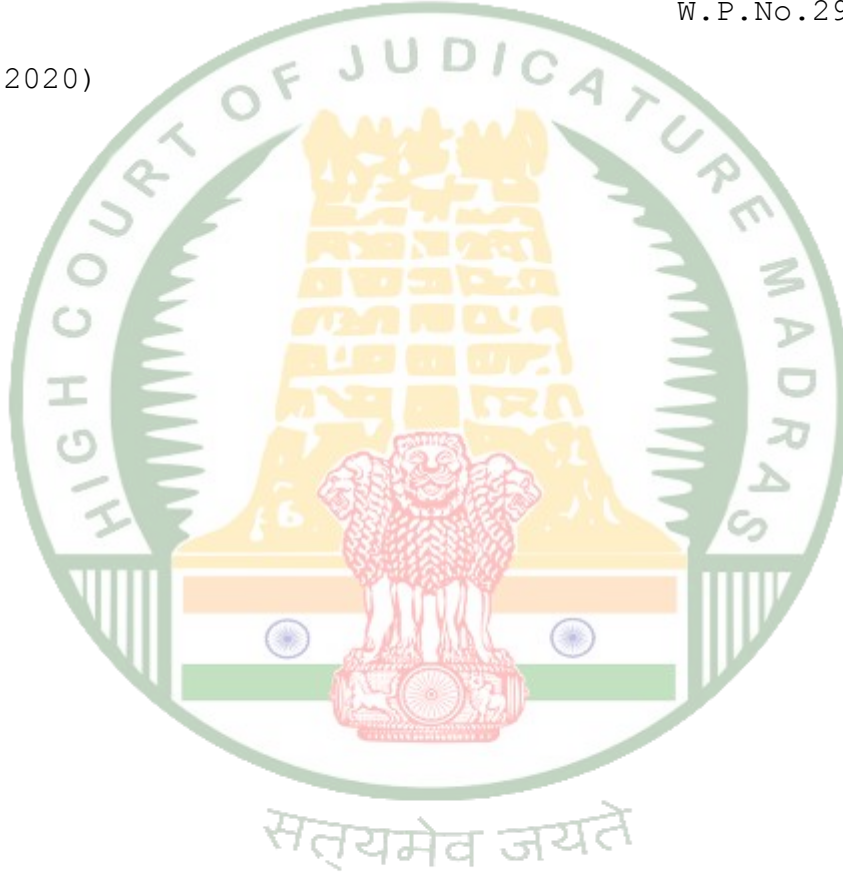
1.The Secretary
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+1cc to M/s R.Ramya, Advocate SR.No.24392

+1cc to Mr.Mani Sundaragopal, Advocate SR.No.24590

W.P.No.29933 of 2019

GMR (CO)
mst(28/05/2020)



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