

**IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH**

RERA Appeal no.6 of 2020 (O&M)

Date of Decision: 06.03.2020

Shri Mohan Singh

...Petitioner

Versus

Haryana Real Estate Regulatory Authority, Gurugram

....Respondent

CORAM: HON'BLE MR. JUSTICE AMOL RATTAN SINGH

Present:- Mr. Gaurav Tyagi, Advocate, for the appellant.

Amol Rattan Singh, J. (Oral)

By this appeal, the appellant challenges the order passed by the Haryana Real Estate Appellate Tribunal, Chandigarh (in short “the Tribunal”), dated 03.01.2020, also seeking that this court may pass any other order that it may deem fit, necessary and just.

The aforesaid order of the learned Tribunal, dated 03.01.2020, had been passed on an application filed by the appellant, seeking “dispensation with the condition of pre-deposit of the penalty imposed by the Haryana Real Estate Regulatory Authority”, (in short “the Authority”), vide its order dated 19.06.2019, that order having been challenged before the learned Tribunal by the present appellant.

2. The waiver of the pre-deposit was in fact a waiver in respect of what is stipulated in the proviso to sub-section (5) of Section 43 of the Real Estate (Regulation and Development) Act, 2016 (in short “the Act”), the provision itself, i.e. Section 43, providing for the establishment of the Real Estate Appellate Tribunal, before which an appeal may be preferred against the order of the Authority/Adjudicating Officer.

Sub-Section (5) of Section 43 of the Act, alongwith the proviso thereto, reads as follows:-

“(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.

Explanation:- For the purpose of this sub-section “person” shall include the association of allottees or any voluntary consumer association registered under any law for the time being in force.”

3. The Tribunal, after considering the application, first observed that as per the said provision, unless at least 30 % of the penalty imposed upon the appellant is deposited (or any such higher percentage as may be determined by the Tribunal), an appeal cannot be heard.

It is also seen that the contention raised by the learned counsel for the appellant before that forum, was that the appellant was dealing with plots below an area of 500 sq. mtrs. and consequently, the provisions of the Act were not applicable, with the appellant also not being either a real estate agent or a promoter.

However, the application was dismissed on the ground that whether the appellant was a real estate agent or a promoter was a question touching on the merits of the case, and if those issues were adjudicated upon at the stage of the application itself, seeking a waiver of the pre-deposit amount, it would virtually amount to entertainment of the appeal, which was

not permissible in terms of the aforesaid proviso.

Having said that, the Tribunal went on to further hold that the appellant had described himself as a developer, and had admitted to being a builder, and therefore, in the *prima facie* view of the Tribunal, the admissions so made would imply that the appellant was covered by the definition of a 'promoter', and consequently would be liable to comply with the condition imposed by the proviso.

A judgment of the Supreme Court in **Tecnimont Pvt. Ltd. v. State of Punjab and others**, (Civil Appeal no.7358 of 2019, arising out of SLP (Civil) no.27072 of 2016), was also referred to by the Tribunal, to hold that an appellate Tribunal had no jurisdiction to waive off the condition of a pre-deposit, in the absence of any specific provision of waiver in the Act. Still further, it was observed that the only discretion given to the Tribunal, as per the said provision, was as to whether the pre-deposit amount should be to the extent of 30% of the penalty imposed, or of any higher percentage.

Consequently, granting the appellant time to make a deposit of 30% of the penalty amount, (the penalty imposed by the Authority being Rs.1 crore), the application was dismissed.

4. When this petition had initially come up for hearing on 14.02.2020, learned counsel for the appellant had submitted that the appellant was neither a promoter in terms of clause (zk) of Section 2 of the Act, nor even a real estate agent in terms of clause (zm) thereof.

He had further submitted that the ongoing construction as had been advertised by the appellant/his firm, was also not a real estate project as defined in clause (zm) of Section 2, because each building that was being advertised to be sold, was on plots as were less than 500 sq. mtrs. each, with

clause (a) of sub-section (2) of Section 3 of the Act, specifically stipulating that where the land proposed to be developed does not exceed five hundred square metres, or the number of apartments proposed to be developed does not exceed eight, inclusive of all phases, no registration of a project would be required in the first place.

5. Learned counsel had also pointed to the explanation to sub-section (2) of Section 3, which reads as follows:-

“Explanation- For the purpose of this section, where the real estate project is to be developed in phases, every such phase shall be considered a standalone real estate project, and the promoter shall obtain registration under this Act for each phase separately.”

The contention therefore was that the appellant only having advertised in respect of plots of less than 500 sq. mtrs. each, on which a particular construction was being made (with him today submitting that it is not the appellant who was making such construction), therefore he would not fall within the ambit of the Act at all and therefore, even the notice issued by the Authority was wholly erroneous and without jurisdiction, and consequently the Tribunal should have allowed the waiver of the pre-deposit stipulated to be paid.

6. At that stage, this court had directed the learned counsel to place on record the sanctioned plans of the properties in question, as also the advertisement made by him/his firm, leading to the notice issued on 04.06.2019 by the Authority, (with the Authority invoking jurisdiction under Section 3(1) of the Act).

It had also been noticed, as recorded in that order, that such notice had been issued on the following grounds:-

“Ref: (i) Advertisement published by M/s EmEss Developers in the

“Hindustan Times” newspaper on 26.05.2019 for the real estate project namely Heritage Royale, Sector 56, Gurugram (copy enclosed).

(ii) Pamphlet/hand bill/publication brochure as enclosed regarding real estate project 'Heritage Royale' Sector 56 Gurugram.”

Thereafter the learned counsel had filed an application to comply with the aforesaid order, upon which notice of motion had been issued by this court on February 24, 2020, returnable today (in this appeal).

It was also recorded in the said order that the learned counsel had contended that simply because in the advertisement (as issued by the appellant/his firm), the houses being sold were described as “Heritage Royale”, that would not “take away the fact that the houses were actually being constructed on 5 individual plots of less than 500 sq. mtrs. each, as had been purchased by the individual owners thereof, from M/s Ansal Bildwell Ltd., and consequently, simply because the appellant was advertising the plots, it did not make it into a single project being developed by a promoter.

7. Notice of motion having been issued, it is seen that in fact it is only the Haryana Real Estate Regulatory Authority, Gurugram, which is the sole respondent in the appeal, and though as per the report of the Registry, that the Authority has been served of such notice, none appears for it.

Even that being so, it is to be noticed again that the impugned order is only one dismissing the application of the present appellant seeking a waiver of pre-deposit of the statutory amount required to be deposited as per the provisions of Section 43(5) of the Act.

8. Today, learned counsel for the appellant has also pointed to sub-section (3) of Section 44 of the Act, which reads as follows:-

“(3) On receipt of an appeal under sub-section (1), the Appellate Tribunal may after giving the parties an opportunity of being heard, pass such orders, including interim orders, as it thinks fit.”

His contention therefore is that as the aforesaid provision in fact empowers the appellate tribunal, to pass even an interim order, the Tribunal wholly erred in holding that it did not have any power to allow the application thereby waiving the condition of a pre-deposit, prior to hearing of the appeal.

He has further submitted that the judgment of the Supreme Court, as has been referred to by the Tribunal in **Tecnimonts'** case (supra), is not applicable to the present case, because that was in the context of the statutory provisions contained in the Punjab Value Added Tax Act, 2005, whereas the present appeal obviously is in the context of the Act of 2016 and therefore, with the provision contained in sub-section (3) of Section 44 thereof being very much existent, the two situations are not *pari materia* to each other.

9. Having considered the aforesaid arguments, I find myself unable to agree with the learned counsel, firstly for the reason that an appeal being heard only upon a specific amount being deposited prior thereto, is obviously a statutory provision with no provision existent for a waiver thereof; and therefore, unless it could be shown that the order passed by the Authority was wholly without or beyond the jurisdiction of that Authority, (in which case also it would further need to be seen as to whether on that ground alone the pre-deposit can be waived off or not), in the present case, it has not been pointed out in any manner to this court that the Authority was without jurisdiction *ab initio*, to even issue notice to the appellant, pursuant to which the order was passed by it, as has been impugned before the Tribunal.

Therefore, whether or not the authority exercised such jurisdiction correctly or erroneously, is a matter that the learned Tribunal would go into and naturally adjudicate upon, once it comes to hear the appeal of the appellant.

10. As regards the contention of learned counsel that the judgment of the Supreme Court in *Tecnimonts'* case is not applicable, it is to be noticed that that case was one arising from a judgment of a Division Bench of this court, in which this court had formulated the following three questions, as arose in terms of Section 62 of the PVAT Act, 2005:-

“(a) Whether the State is empowered to enact Section 62(5) of the PVAT Act?

(b) Whether the condition of 25% pre-deposit for hearing first appeal is onerous, harsh, unreasonable and, therefore, violative of Article 14 of the Constitution of India?

(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?”

In the present case, we are obviously concerned with only the third question, i.e. question “(c)”, which was considered and dealt with by the Supreme Court in the last part of the aforesaid judgment.

11. After upholding the judgment of this court as regards the first two questions formulated, thereafter, as regards question “(c)”, their Lordships, after referring to previous judgments on the issue, eventually observed as follows:-

“29. If the inherent power the existence of which is specifically acknowledged by provisions such as Section 151 of the CPC and Section 482 of the Cr.P.C. is to be read with 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 Dobe* 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).

30. As stated in *P. Laxmi Devi and Har Devi Asnan*, in genuine cases of hardship, recourse would still be open to the concerned person. However, it would be completely a different thing to say that the Appellate Authority itself can grant such relief. As stated *Shyam Kishore* any such exercise would make the provision itself unworkable and render the statutory intendment nugatory.

(Emphasis applied in the present order only).

Consequently, while upholding the decision of this court as regards questions (a) and (b), what was held by it as regards question (c), was set aside by the Supreme Court.

12. Though learned counsel has submitted that the said observations were in the context of PVAT Act, 2005, whereas in the present case, sub-section (3) of Section 44 of the Act empowers the Tribunal to pass even an interim order, I still find myself unable to agree with him, in view of the fact that that vide the impugned order itself, the Tribunal has in fact expressed a *prima facie* opinion (even though it may be based on an admission of the appellant), that he is a promoter, and has held that whether or not he actually is one (or a real estate developer) in respect of whom the provisions of the Act would apply, or not apply, and whether or not they would also apply on account of individual plots of 500 sq. mtrs. being involved, would be questions to be considered upon appraising the evidence led. Therefore, obviously, a *prima facie* opinion has been formed by the Tribunal, after which it has declined to allow the application for waiver of a pre-deposit.

Having said that, of course the Tribunal has also held, primarily, that it has no jurisdiction or power to do so, in the face of the statutory provision, seen with the ratio of the judgment of the Supreme Court in *Tecnimonts'* case.

13. Learned counsel has also submitted before this court that simply

because the appellant has made an erroneous admission at any stage by describing himself to be a real estate agent/developer, that was no reason for the Tribunal to not actually apply its judicious mind to the issue and thereafter come to a conclusion as to whether or not the appeal deserves to be heard upon a waiver of the pre-deposit.

14. That contention is also to be rejected, because as regards the jurisdiction of the Tribunal, to waive the 'pre-deposit', whether correctly or erroneously, it had formed an opinion, that the question of whether or not the appellant was a developer, or any other person to whom the Act would apply (or not), would be a matter to be seen only upon hearing the merits of the case, in my opinion, it did not err in holding that the pre-deposit could not be waived, even on the merits of the case (subject to hearing the appeal *in extenso*).

15. In fact, other than on the issue of jurisdiction of the appellate Tribunal or of this court, to direct waiver of pre-deposit, even on the merits what has been held by the Tribunal in the impugned order, I do not disagree with that Forum, in view of the fact that once the appellant himself had admitted (whether rightly or wrongly) that he/his firm was a developer/real estate agent, and pamphlets had been distributed showing that the houses to be constructed were a project by the name of 'Heritage Royale', whether or not it was an erroneous description of it being a project, or whether it was only individual houses advertised as such, naturally would be a matter that could be considered wholly on the merits thereof, before the Tribunal.

Hence, simply on a contention made that the issuance of pamphlets and a brochure, showing the houses to be a single project, was a mistake, that cannot be accepted at face value without the appeal being heard

in detail by the Tribunal, which in fact would naturally be a hearing of the appeal on merits, a statutory pre-deposit being made.

Thus, in my opinion, that was not possible for the Tribunal to do, not only on the ground of lack of jurisdiction, but also on the merits of the contention (as regards the waiver of pre-deposit).

16. It needs however to be noticed that as regards the ratio of the judgment of the Supreme Court in *Tecnimonts'* case, sub-section (3) of Section 63 of the Punjab Value Added Tax Act, 2005, reads as follows:-

“(3). The Tribunal may, on an application made by the appellant, order the stay of the recovery of the amount involved, subject to the payment of minimum twenty five per cent of the amount and fulfillment of such other conditions, as it may deem necessary.”

Hence, very obviously the Tribunal under that Act specifically has been debarred from ordering any stay of the minimum pre-deposit required to be made prior to hearing of an appeal.

Under the Act of 2016, in the present case, no doubt learned counsel is correct that no similar bar is contained in sub-section (3) of Section 44 of the Act, yet, the Tribunal as also this court, having *prima facie* at least found that the petitioners' contention as regards the merits of the case cannot be determined without actually hearing the appeal itself in detail, the question of a waiver a 'pre-deposit' would not arise, as already held hereinabove.

To repeat, this court would also hold that subject to an order being shown to be void *ab initio* due to lack of jurisdiction with the Authority, waiver of a pre-deposit could not be considered by the Tribunal in appeal (as has been held by it), as that would defeat the statutory provision of a pre-deposit itself (unless, to again repeat, a complete lack of jurisdiction with the

Authority to pass an order could be shown), which in the present case obviously is not so, as the order passed by the Authority has not been shown to be without jurisdiction, but is only alleged to be in erroneous exercise of its jurisdiction.

17. Consequently finding no merit in the appeal, it is dismissed.

However, nothing stated hereinabove, or in any other order passed in this appeal, will be taken to be an observation of this court on the merits of the case of the appellant but only and wholly in the context of whether or not the appellant is required to make a pre-deposit prior to hearing of his appeal by the Tribunal.

06.03.2020
vcgarg/dinesh

(AMOL RATTAN SINGH)
JUDGE

Whether reasoned/speaking: Yes
Whether reportable: Yes