

HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

CWP-17133-2020 (O&M)

Date of decision:16.02.2021

Nirmal Singh

....Petitioner

V/s.

State of Punjab and others

.....Respondents

**CORAM: HON'BLE MS. JUSTICE RITU BAHRI
HON'BLE MRS. JUSTICE ARCHANA PURI**

Present: Mr. Amitabh Tewari, Advocate for the petitioner.

Mr. Pradeep S. Bajwa, Advocate for respondent No.3.

Ritu Bahri, J.

CM-1060-CWP-2021

Application is allowed and Annexures A-1 to A-6 are taken on record.

CWP-17133-2020

The petitioner is seeking writ of mandamus directing respondent No.2 to entertain the appeal of the petitioner without pre-deposit as mandatory under Section 43(5) of the Real Estate Regulatory Authority Act, 2016 (hereinafter referred to as 'RERA Act').

The petitioner in the present case is a promoter who started real estate project in the Name and Style of Thakurji Estates at Village Muradpur & Nangli, Tehsil and District Amritsar in 11.35 Acres land. A certificate of registration bearing No. ACA/ADA/ASR/1778/R-17 dated 22.06.2011 was allotted to the petitioner which was valid upto 22.06.2016 (Annexure P-1). Thereafter license No. LDC/ADA/2011/8 dated 17.11.2011 was issued to the petitioner for setting up real estate Project

Thakurji Estate. The said license was valid upto 16.11.2014 and the colony had to be developed within this period. Vide *ex-parte* order dated 11.07.2019 (Annexure P-4), respondent No. 1 imposed a penalty of ₹1.25 Crore on the petitioner for violating Section 3 of the RERA Act. The petitioner came to know about this order in the first week of November 2019 and immediately approached RERA, Punjab by way of filing review application on 21.11.2019. The review application was dismissed vide order dated 28.01.2020 (Annexure P-5).

Learned counsel for the petitioner has argued that as per Section 43(5) of the RERA Act, the Promoter has to pre-deposit atleast 30% of the amount of penalty imposed by the Authority. i.e. ₹38,00,000/- to get the appeal heard. He has referred to an order passed by this Court in the case of ***M/s. Lotus Realtech Pvt. Ltd. V/s. State of Haryana and others, CWP-15205-2020***, decided on 23.09.2020 (Annexure P-6) in which the petitioner was challenging the constitutional validity of the proviso to Section 43(5) of RERA Act. The Division Bench of this Court held that High Court could examine the issue of pre-deposit keeping in view genuine hardship of an aggrieved person as per Hon'ble the Supreme Court judgment passed in ***M/s. Technimont Pvt. Ltd. (formerly known as Technimont ICB Private Ltd.) V/s. State of Punjab and others*** 2019 AIR SC 4489. He further argued that the Division Bench though in ***M/s. Lotus Realtech Pvt. Ltd. 's case (supra)*** did not extend benefit of reduction in pre-deposit, however held that High Court could examine the issue of pre-deposit under Article 226 of the Constitution of India.

He has further referred to an order dated 04.04.2019 (Annexure P-7) passed by Maharashtra Real Estate Regulatory Authority, Mumbai

whereby complaint was made that the respondent had not procured Occupation Certificate and there was violation of Section 3 of RERA Act. The complaint was disposed of by observing that on the date when the Act came into force, no construction was going on and the building had been occupied by the allottees since 2012-13. Hence, the project could not be treated as ongoing project and merely Occupation Certificate had not been procured, would not itself construe violation of Section 3 of the Act.

He has further argued that in the case of the petitioner, there were 128 plots in the entire colony and they were sold out and possession had been taken by the plot owners since 2014. The list issuing allotment of plots has been placed on record as Annexure P-3. He, while referring to list of allottees (Annexure P-3) has argued that before 16.11.2014 the entire colony was set up and the *ex-parte* order dated 11.07.2019 (Annexure P-4) has been wrongly passed for violation of Section 3 of the RERA Act. He, while referring to written statement filed by the respondents, has further argued that the judgment in the case of ***Experion Developers Pvt. Ltd. V/s. State of Haryana, CWP-38144-2018***, decided on 16.10.2020 (Annexure R-3/1) was given by the Division Bench of this Court in which vires of Section 43 have been challenged. However the operation of this judgment was stayed by Hon'ble Supreme Court in ***M/s. Sana Realtors Pvt. Ltd. V/s. Union of India and others, SLP (C) No. 13005-2020*** vide order dated 05.11.2020 (Annexure A-5). In the case of ***Janta Land Promoters Private Limited & Others V/s. Union of India & Others, CWP-10087-2020***, reported vide 2020 (4) RCR (Civil) 845, the Division Bench held that a single member of the Authority cannot validly pass orders on the complaint under the Act (Annexure R-3/2). Aggrieved with this judgment, the Punjab

Real Estate Regulatory Authority filed **SLP(C) No. 13192-2020** (Annexure A-4) and no interim stay was granted by Hon'ble Supreme Court. He has further argued that since the issue with respect to validity of vires of Section 43 is pending before Hon'ble the Supreme Court, the petitioner's appeal be heard without insisting upon deposit of 30% of the penalty as imposed vide impugned order dated 11.07.2019 (Annexure P-4).

Learned counsel for respondent No.3 has vehemently argued that the impugned order was passed on 11.07.2019 (Annexure P-4). However present writ petition has been filed on 02.10.2020 when the limitation to file writ petition against the order dated 11.07.2019 had expired. He has vehemently argued that the orders dated 11.07.2019 and 28.01.2020 have been rightly passed and the petitioner cannot file appeal as period of limitation has already expired as per Section 44(2) of the RERA Act. The petitioner deliberately chose not to appear before respondent No. 3 in the first instance and appeared only at the time of filing review proceedings. The provisions of Section 43(5) of the RERA Act are mandatory and filing of an appeal is not a right and condition can be imposed for entertaining appeal. Division Bench in ***Experion Developers' case (supra)*** and ***Janta Land Promoters Private Limited and Others's case (supra)*** (Annexures R-3/1 and R-3/2) has upheld the vires of Section 43(5) of the RERA Act.

Heard learned counsel for the parties.

The first question for consideration in the present case is whether petitioner can file appeal against order dated 11.07.2019 (Annexure P-4) and whether it is within limitation?

At the very outset, reference can be made to Supreme Court

order dated 23.03.2020 passed in *Suo Motu Writ Petition (Civil) No.3 of 2020* (Annexure A-2). Hon'ble the Supreme Court has taken *Suo Motu* cognizance of the situation arising out of the challenge faced by the country on account of Covid-19 virus and resultant difficulties faced by the litigants in filing petitions/applications/suits/appeals/all other proceedings within the period of limitation and ensured that litigants do not have to come physically to file such proceedings and ordered that limitation in all such proceedings shall stand extended w.e.f. 15/03/2020 till further orders.

In *M/s. SS Group Pvt. Ltd. V/s. Aaditiya J. Garg & Anr., Civil Appeal No.4085-2020* (Annexure A-3) decided on 17.12.2020, the Hon'ble Supreme Court held that the period of limitation had been extended and order dated 23.03.2020 (Annexure A-2) was still operative. For all intents and purpose, till 17.12.2020, limitation stood extended.

The petitioner has approached this Court on 02.10.2020 after the review application dismissed on 28.01.2020. Hence his case cannot be rejected on the ground of limitation. Further the issue with respect to validity of vires of Section 43 of the Act is pending before Hon'ble the Supreme Court (Annexures A-4 and A-5).

Another thing to be observed in the present case is that the petitioner has completed the project wayback in 2014 for allotment of plots and all the plots were allotted in the year 2014 as reflected in the list (Annexure P-3) placed on record. The RERA Act came into force in 2016.

The only question to be considered by the Appellate Tribunal is that was there any violation of Section 3 of RERA Act as the registration of the project was not done within time?

In the present case, since the registration of the project was not

done as per the above said provision, vide order dated 11.07.2019 (Annexure P-4) penalty of ₹1.25 Crore was imposed under Section 59 of the RERA Act by fixing the value of land at ₹2,000/- per sq. yd. in the year 2011-12 and the total cost of the project at ₹16.22 Crores.

A perusal of impugned order dated 11.07.2019 (Annexure P-4) further shows that notices had been issued to the petitioner and no response was received to these notices. He was asked to appear personally or through his representative on 09.07.2018 and service through publication in “The Tribune” newspaper was also made on 02.09.2018 and thereafter he was proceeded against *ex-parte*. Another important point to be noted is that while dismissing the review application on 28.01.2020 (Annexure P-5), it had been observed that after coming into force of RERA Act, there was no advertisement for sale of plots even that could not be sufficient ground to exempt from registration under the Act and only on account of not taking the Completion Certificate, it was held that there was violation of Section 3 of the Act.

This Court is not expressing any opinion on the merits of this case, however keeping in view that limitation to file appeal has been extended by Hon'ble the Supreme Court vide afore-mentioned judgments (Annexures A-2 and A-3), the petitioner who has sold all the plots wayback in 2014 and has not sold any plot after coming into force of the RERA Act as noticed by the Authority itself while passing order dated 28.01.2020 in review application (Annexure P-5), his case to reduce pre-deposit under Section 43(5) of the RERA Act for the purpose of entertaining the appeal, is made out.

Reference at this stage can be made to Hon'ble the Supreme

Court judgment passed in *M/s. Technimont's case (supra)* whereby the petition under Article 226 is held to be maintainable and the High Court could examine the issue of pre-deposit keeping in view genuine hardships.

The relevant portion of the said judgment is as under:-

“23. In respect of powers exercisable under Section 482 of the Cr.P.C., 1973 it was observed in *Sooraj Devi v. Pyare Lal and Another* (1981) 1 SCC 500, “Now it is well settled that the inherent power of the Court cannot be exercised for doing that which is specifically prohibited by the Code.” The principle was followed in *Simrikhia v. Dolley Mukherjee and Chhabi Mukherjee and Another* (1990) 2 SCC 437 and in *State v. K. V. Rajendran and Others* (2008) 8 SCC 673.

24. 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., 1973 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 Dobey* 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).

25. As stated in *P. Laxmi Devi* and *Har Devi Asnani*, 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 in *Shyam Kishore* any such exercise would make the provision itself unworkable and render the statutory

intendment nugatory.”

The Supreme Court in the above said case held that the Appellate Tribunal could not reduce the condition of pre-deposit before hearing the appeal. However, the High Court while exercising powers under Article 226 could examine the issue of pre-deposit keeping in view the genuine hardships of the litigant. A Division Bench of this Court while examining the case of *M/s. Lotus Realtech Pvt. Ltd.'s case (supra)* (Annexure P-6), whereby prayer was made to do away with pre-deposit before hearing the appeal, held that as per the judgment of Hon'ble Supreme Court in *M/s. Technimont Pvt. Ltd.'s case (supra)*, the High Court under Article 226 of the Constitution of India can interfere in exceptional circumstances. In para-14 of the judgment rendered in *M/s Technimont Pvt. Ltd. (supra)* quoted above, the Supreme Court has quoted an illustrative instance of prejudice or hardship on account of exorbitant demand by way of an example that was given in *Writ Petition (C) No. 212 of 2014 decided on 16.04.2019 Nokia India Pvt. Ltd. V/s. State of Chattisgarh* and another giving an hypothetical situation requiring pre-deposit of duty of ₹1 Crore for filing an appeal in respect of a dispute involving a property of ₹10 Lacs. Similarly, in the case of *Hardevi Asnani V/s. State of Rajasthan and others (2011) 14 Supreme Court Cases 160*, it has been held by the Supreme Court that the High Court can entertain a petition permitting bypassing of the remedy of appeal requiring pre-deposit only after examining and satisfying itself that the case is an exceptional one involving genuine hardship.

In the present case, the petitioner, who is promoter, had sold out and given possession of 128 plots in the entire colony to the plot owners in 2014. The list of allotted plots has also been placed on record as

Annexure P-3 and none of the allottees was given delayed possession of the plot. Therefore, this Court while exercising powers under Article 226 of the Constitution of India, is reducing the condition of pre-deposit of 30% of the penalty for hearing the appeal under Section 43(5) of the Act.

Hence, writ petition is being allowed and direction is being given to the Appellate Tribunal to entertain the appeal of the petitioner after the petitioner deposits 15% i.e. ₹18,75,000/- of the penalty amount i.e. ₹1.25 Crore. The petitioner will deposit the same for entertaining his appeal within a period of 15 days from the date of receipt of certified copy of this order.

(RITU BAHRI)
JUDGE

16.02.2021
Divyanshi

(ARCHANA PURI)
JUDGE

Whether speaking/reasoned:	Yes/No
Whether reportable:	Yes/No