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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO.2008 OF 2022

CCI Projects Pvt. Ltd. ...Petitioner
Versus
Union of India and Ors. ...Respondents

WITH
WRIT PETITION (LODGING) NO.13777 OF 2022

CCI Projects Pvt. Ltd. ...Petitioner
Versus
Union of India and Ors. ...Respondents

WITH
WRIT PETITION (LODGING) NO.13781 OF 2022

CCI Projects Pvt. Ltd. ...Petitioner
Versus
Union of India and Ors. ...Respondents

Mr.Vineet Naik,Senior counsel a/w Mr.Mayur Khandeparkar, Mr.Chirag Kamdar, Mr.Abir Patel and Ms.Lavina Bhargava i/b Wadia Ghandy and Co for the Petitioner in all petitions.

Mr. Rui Rodgrigues a/w Mr. Ajinkya Jaibhave for Respondent No.1-Union of India in WP No. 2008/2022.

Ms.Vinodini Srinivasan i/b Mr.Avinash Pawar for R.Nos.3,4, 6 to 17,19 to 49, and 53 in WP No.2008 OF 2022.

Ms.Vinodini Srinivasan i/b Mr.Avinash Pawar for R.Nos.3 and Ms.Mahalakshmi Ganapathy a/w Ms.Anisha Didwania for R.Nos.3 and 4 in WP (L) No.13781 OF 2022.

CORAM : REVATI MOHITE DERE & MADHAV J. JAMDAR, JJ.
DATED : 6TH MAY 2022

ORDER (PER MADHAV J. JAMDAR, J.):

1. The issue involved in all these Petitions is common, and, therefore, by this common order all the Petitions are being disposed of.

2. The Petitioner is a Developer/Promoter of real estate project known as "Wintergreen" situated at Borivali, Western Express, Mumbai, Maharashtra (said project) having RERA registration. The Petitioner in Writ Petition No.2008 of 2022 is seeking following substantive reliefs :

> "(a) That this Hon'ble Court be pleased to issue a Writ of certiorari or any other appropriate writ, order or direction quashing and/or setting aside the Impugned Orders dated 15th December, 2021 and 4th March, 2022 and the directions contained therein for the Petitioner to deposit 100% amount

as a pre-condition to hearing the appeals enlisted at Exhibits L and M thereto.

b) That this Hon'ble Court be pleased to issue a writ of mandamus or any other appropriate writ, order or direction directing the Respondent No. 2 to entertain the appeals enlisted at Exhibit "K" hereto by allowing the Petitioner to deposit 30% (or any reasonable percentage) of the amounts stated in the Orders dated 15th December 2021 & 4th March 2022 (Exhibits L & M), or such other reasonable percentage as this Hon'ble Court deems fit based on the facts and circumstances of the present case."

3. By the orders which are impugned in the above Writ Petitions, the Maharashtra Real Estate Appellate Tribunal, Mumbai directed deposit of entire amount as per the orders passed by the Member, MahaRERA, Mumbai in compliance of provisions of section 43(5) of the Real Estate (Regulation and Development) Act, 2016 (for short "said Act").

4. It is the contention of the Petitioner that the flat purchasers filed complaints before the Maharashtra Real Estate Authority ("Authority") under section 31 of the said Act against the Petitioner alleging delay in

handing over possession of the respective flats and inter alia claiming interest for such alleged delay in possession. By certain common orders, the Authority directed the Petitioner to pay interest to said flat purchasers. The operative part of one such common order is reproduced hereinbelow:-

> “ ORDER
>
> 1. The respondents shall pay the interest at the rate of 9% p.a. on the amount of consideration paid till the date of possession from those date/s and they shall pay the interest at the same rate from the dates of the subsequent payments of consideration till handing over the possession of the flats to the complainants with completion/occupancy certificate.
>
> 2. The respondents shall also pay each complainant Rs. 20,000/- towards the cost of his/her complaint.
>
> 3. The parties are permitted to adjust their respective claims and pay the balance.
>
> 4. The respondent shall issue credit note if any amount is adjusted against the amount which is due to it.
>
> 5. The payments shall be subject to moratorium period specified by this Authority from time to time.”

The Authority in some cases have also directed payment of penalty.

5. The Petitioner challenged the said order by way of 51 Appeals filed before the Maharashtra Real Estate Appellate Tribunal ("Appellate Tribunal"). The Appellate Tribunal by the impugned orders passed in each of the Appeals directed the Petitioner to deposit 100% of the amount in the said orders as a pre-condition for entertaining the said Appeals. For ready reference one such order is reproduced hereinbelow :-

> "Appellant is directed to deposit the entire amount as per impugned order in compliance of proviso to section 43(5) of RERA, before the next date.
>
> Appellant submits that the impugned order is passed without jurisdiction and therefore there is no liability for deposit.
>
> Stand over to 14.01.2022 for compliance as per above directions."

6. We have heard Mr. Vineet Naik, learned Senior Counsel appearing for the Petitioner and Ms.Vinodini Srinivasan, learned counsel appearing for some of the flat purchasers. It is the contention of Mr. Naik that section 43(5) of the said Act gives discretion to the Appellate Tribunal regarding

deposit of the amount. He submitted that section 43(5) provides that at least 30% of the amount as directed by the Authority be deposited, however, the Appellate Tribunal has directed deposit of entire amount without recording any reasons. Therefore, he submitted that the impugned order is contrary to section 43(5) of the said Act. He submitted that in many other matters the Appellate Tribunal has directed deposit of much lesser amount. He submitted that remedy of the statutory Appeal is being denied to the Petitioner by directing 100% deposit of the amount awarded by the Authority. He submitted that the project is completed and possession of flats is already handed over to the flat purchasers and the order awarded is only with respect to compensation for the delay caused and, therefore, in fact the complaints should have been dismissed. He submitted that by the impugned orders the Petitioner, who is a Developer/Promoter has been put in a very unfair position. He submitted that no reasons are given while passing the impugned orders. He submitted that when the Appellate Tribunal has directed 100% deposit, the reasons should have been recorded why no relaxation or concession is denied to the Petitioner.

7. On the other hand Mr. Vinodini Srinivasan, learned counsel

submitted that the Writ Petitions are not maintainable as the Petitioner has also filed the Review Petitions before the Appellate Tribunal. She submitted that even otherwise the Petitioner has alternative and efficacious remedy by way of filing the Second Appeal in this Court under section 58 of the said Act. She submitted that section 43(5) is in two parts. In case of directions to pay penalty then atleast 30% amount is required to be deposited. She submitted that if authority directs payment of any other amount to the allottee, then the entire amount is required to be deposited before the Appeal is entertained. She submitted that this expressly includes interest and compensation. She submitted that pre-deposit of the entire amount of interest/compensation is therefore mandatory and pre-condition before entertaining such Appeal. She relied on the judgment of the Supreme Court in the matter of ***Newtech Promoters and Developers Pvt. Ltd. vs. State of Uttar Pradesh and Others*** reported in ***2021 SCC Online SC 1044.*** She therefore submitted that the Writ Petitions be dismissed with costs.

8. Mr. Naik, learned Senior Counsel appearing for the Petitioner in rejoinder submitted that the said case of *Newtech Developers & Promoters Pvt. Ltd.* (supra) only contemplates the case where the order of refund with

interest and compensation is passed and not for mere interest. He submitted that in the present case, the flat purchasers are handed over possession of the flats and there is only delay in handing over the possession and therefore the present case is of different nature. He submitted that the deposit contemplated under the proviso to section 43(5) of the said Act is for purpose of securing claims of the flat purchasers and same can be secured by various modes and need not be only by deposit of money. As far as maintainability of the Petitions are concerned, he submitted that the impugned orders are not speaking orders and that no reasons are given for directing 100% deposit. He therefore submitted that the Writ Petitions are maintainable as there is violation of principles of natural justice.

9. Mr. Naik, learned senior counsel submitted that there are a total of 173 complaints filed by the flat purchasers, out of which about 69 are settled and 83 are pending for hearing before the Authority and 19 are pending for conciliation. He submitted that there are total 112 Appeals before the Appellate Tribunal, out of which 42 Appeals are settled and in 53 cases the order directing the deposit as per section 43(5) of the said Act has been passed and the same are challenged by filing present Writ Petitions

and 17 Appeals are pending for hearing. He submitted that the Petitioner is trying to settle the dispute with all the flat purchasers.

10. He also relied on the order passed by the Uttarakhand High Court in Writ Petition No.963 of 2015 in the case of *Dakshinanchal Vidyut Vitran Nigam Ltd and Anr. Vs Union of India and Others* wherein, the Petitioner was granted relief by directing that the bank guarantee be provided for 50% of the amount and for balance 50% security other than bank guarantee to the satisfaction of the Court below was granted.

11. Before considering the rival contentions it is necessary to set out section 43(5) of the said Act, which reads thus:

> **"43. Establishment of Real Estate Appellate Tribunal**
>
> (1) …
>
> (2) …
>
> (3) …
>
> (4) …
>
> (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."
>
> (Emphasis added)

12. The issue involved in the present Petitions is completely covered by the said judgment in *Newtech Promoters and Developers Pvt. Ltd.* (supra). In paragraph 31 of the said judgment the questions emerging for consideration of Supreme Court were set out. Question No.4 is relevant for this case and the same is reproduced hereinbelow for ready reference:-

> "4. Whether the condition of pre-deposit under proviso to section 43(5) of the Act for entertaining substantive right of appeal is sustainable in law ?"

13. The discussion on said question is from paragraphs 122 to 138 in the said Judgment. Certain paragraphs out of the same are very important and therefore reproduced hereinbelow for ready reference:

> "123. 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.**
>
> 124. The plea advanced by the learned counsel for the appellants

is that substantive right of appeal against an order of authority/adjudicating officer cannot remain dependent on fulfilment of pre-deposit which is otherwise onerous on the builders alone and only the builders/promoters who are in appeal are required to make the pre-deposit to get the appeal entertained by the Appellate Tribunal is discriminatory amongst the stakeholders as defined under the provisions of the Act.

125. Learned counsel further submits that if the entire sum as has been computed either by the Authority or adjudicating officer, is to be deposited including 30 per cent of the penalty in the first place, the remedy of appeal provided by one hand is being taken away by the other since the promoter is financially under distress and incapable to deposit the full computed amount by the authority/adjudicating officer. The right of appreciation of his defence at appellate stage which is made available to him under the statute became nugatory because of the onerous mandatory requirement of pre-deposit in entertaining the appeal only on the promoter who intends to prefer under section 43(5) of the Act which according to him is in the given facts and circumstances of this case is unconstitutional and violative of Article 14 of the Constitution of India.

126. The submission in the first blush appears to be attractive but is not sustainable in law for the reason that **a perusal of scheme of the Act makes it clear that the limited rights and duties are**

provided on the shoulders of the allottees under section 19 of the Act at a given time, several onerous duties and obligations have been imposed on the promoters i.e. registration, duties of promoters, obligations of promoters, adherence to sanctioned plans, insurance of real estate, payment of penalty, interest and compensation, etc. under Chapters III and VIII of the Act 2016. **This classification between consumers and promoters is based upon the intelligible differentia between the rights, duties and obligations cast upon the allottees/home buyers and the promoters and is in furtherance of the object and purpose of the Act to protect the interest of the consumers** vis-a-viz, the promoters in the real estate sector. **The promoters and allottees are distinctly identifiable, separate class of persons having been differently and separately dealt with under the various provisions of the Act.**

127. Therefore, the question of discrimination in the first place does not arise which has been alleged as they fall under distinct and different categories/classes.

129. 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 re-appraisal of the evidence on record provided substantive compliance of the condition of pre-deposit is made over, the rights of the parties**

inter se could easily be saved for adjudication at the appellate stage.

136. To be noticed, **the intention of the instant legislation appears to be that the promoters ought to show their bona fides by depositing the amount so contemplated.**

137. 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. **<u>It is neither an absolute right nor an ingredient of natural justice,</u>** 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 fulfilment of pre-condition**, if any, against the order passed by the Authority in question.

138. 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."
>
> (Emphasis added)

14. Thus, the submissions made by Mr. Naik, learned senior counsel appearing for the Petitioner are completely covered by the judgment of the Supreme Court.

15. Mr. Naik, learned senior counsel appearing for the Petitioner submitted that atleast sometime be granted for making deposit. He submitted that the Petitioner is ready and willing to deposit 100% amount if period of five months is granted. He submitted that till deposit of entire amount the Petitioner is ready and willing to give security.

16. Ms. Vinodini Srinivasan, learned counsel after taking instructions agreed for oral proposal of senior counsel appearing for the Petitioner. In view of this on the last occasion we directed the Petitioner to file an Affidavit. Accordingly, affidavit dated 6th May 2022, has been filed. The contents of the said Affidavit are very relevant and therefore, paragraph

Nos.3 to 7 and 11 are reproduced hereinbelow for ready reference :-

> “3. The Petitioner has filed the present Petitions challenging a total of 53 Orders passed on 15th December 2021, 4th March 2022, and 19th April, 2022 respectively by which Respondent No. 2 has directed the Petitioner to deposit the entire amount awarded towards interest, penalty and costs as per the various orders impugned before Respondent No. 2 in compliance of the proviso to Section 43 (5) of the Real Estate (Regulation and Development) Act, 2016.
>
> 4. I say that in aggregate, the amount ordered to be deposited by the Petitioner is Rs. 19,37,92,720/- (being Rs. 18,17,32,720/- towards interest, Rs. 1,10,00,000/- towards penalty and Rs. 10,60,000/- towards costs).
>
> 5. The Petitioner undertakes, without prejudice to its rights and contentions, to deposit with this Court the following amounts within four weeks from the date of this Order:
>
> i. Rs. 10,60,000/- being the amount of costs awarded;
>
> ii. Rs. 33,00,000/- being 30% of the amount of

penalty awarded, and

iii. Rs. 5,07,00,000/- being towards interest awarded.

6. The Petitioner shall deposit the balance amount of interest awarded, being Rs. 13,10,32,720/- within a period of five months from the date of this Order.

7. In the meantime, and till such further deposit as stated in paragraph 6 is made, the Petitioner shall not create any third party right, title or interest, nor shall it part with possession, in respect of the following four (4) shop premises situated at the Arcade, Rivali Park, Off Western Express Highway, Magathane, Borivali, Mumbai.

i. Shop No. 1 admeasuring Carpet Area of 1,906 sq. feet and having a Ready Reckoner Value of Rs. 4,29,86,750/-;

ii. Shop No. 2 admeasuring Carpet Area of 1,513 sq. feet and having a Ready Reckoner Value of Rs. 3,41,14,123/-;

iii. Shop No. 4 admeasuring Carpet Area of 1,513 sq. feet and having a Ready Reckoner Value of Rs.

3,41,14,123/-;

iv. Shop No. 5 admeasuring Carpet Area of 1,513 sq. feet and having a Ready Reckoner Value of Rs. 3,41,14,123/-

11. I submit that in the event that the Petitioner fails to deposit the entire amount of Rs. 18,60,92,720/- within the time agreed, the Appeals that are subject matter of these petitions shall automatically stand dismissed without further reference to Court.

17. Ms. Srinivasan, learned counsel appearing for some of the flat purchasers on instructions from her clients submitted that they are agreeable to the said arrangement as reflected in the said affidavit. She submitted that the statement made in paragraphs 5 to 7 of the said Affidavit are in the nature of an undertaking and be accepted as such. She submitted that if the statements made in paragraph 5 and 7 of the affidavit are breached then also consequences set out in the affidavit shall be attracted.

18. Before concluding this order it is required to be stated that in some of

the cases the Authority has directed payment of penalty. The aggregate of said penalty amount is Rs.1,10,00,000/-. Section 43(5) of the said Act contemplates deposit of at least 30% of the penalty or such higher percentage as may be determined by the Appellate Tribunal. Mr. Vineet Naik, the learned Senior Counsel is right in his submission as regards deposit of this amount as without recording any reasons, the Appellate Tribunal has directed payment of 100% of even the penalty amount. The Appellate Tribunal should have recorded reasons for directing deposit of Rs.77,00,000/- (i.e. 70% of the penalty amount). The total amount directed to be deposited is more than 19 crores and the said amount of Rs.77,00,000/- forms less than 4% of the said amount. However, we are not going into the said issue.

19. In view of the contents of Affidavit dated 6th May 2022 of the Petitioner, we pass the following order :-

(i) The impugned orders of the Appellate Tribunal directing 100% deposit of the amount directed to be paid by the Authority are confirmed.

(ii) The Petitioner in all Petitions are granted period of five months to deposit total aggregate amount of Rs.19,37,92,720/- before the Appellate Tribunal in the following manner :-

(a) To deposit within four weeks from today an amount of Rs.5,50,60,000/-.

(b) The balance amount of Rs.13,87,32,720/- to be deposited within five months from today.

In the event, the Petitioner commits default of clause (a) or clause (b) the appeals pending before the Appellate Tribunal would stand dismissed.

(iii) The Petitioner shall not create any third party right, title or interest nor shall part with possession in respect of the shops which are mentioned in paragraph 7 of the said Affidavit dated 6th May 2022.

(iv) In the event, the Petitioner is desirous of selling aforesaid four shops or any of them, then the Petitioner is at liberty to take out appropriate Interim Application.

(v) In the event, the Petitioner settles with any of the flat purchasers who are parties to the aforesaid Petitions before completion of the said period of five months, the Petitioner is at liberty to take out Interim Application for modification of this order.

(vi) The statement in affidavit dated 6th May 2022, particularly in paragraph Nos. 5 to 7 are accepted as an undertaking to this Court.

(vi) The Appellate Tribunal is requested to defer the hearing of appeal initially after 3rd June 2022 to verify whether the Petitioner has complied with clause no.(ii) (a) and thereafter to 17th October 2022, to verify whether the Petitioner has complied with clause no.(ii) (b).

(vii) The Writ Petitions are disposed of accordingly.

(ix) All concerned to act on an authenticated copy of this order.

MADHAV J. JAMDAR, J. **REVATI MOHITE DERE, J.**