

**In the High Court at Calcutta
Constitutional Writ Jurisdiction
Appellate Side**

The Hon'ble Justice Sabyasachi Bhattacharyya

W.P.A. No. 27117 of 2023

with

W.P.A. No. 27120 of 2023

Janapriyo Real Estate Pvt. Ltd. and another

Vs.

The State of West Bengal and others

For the petitioners	:	Mr. Soumya Majumdar, Mr. Pratip Mukherjee, Mr. Sudip Basu, Ms. Dibyanjona Das
For the State	:	Ms. A. Chakraborty
For the WBRERA	:	Mr. N.C. Bihani, Mr. P.B. Bihani
Hearing concluded on	:	06.12.2023
Judgment on	:	15.12.2023

Sabyasachi Bhattacharyya, J:-

1. The challenge thrown in both the writ petitions is against an order passed by the Appellate Authority under Section 43 of the Real Estate (Regulation and Development) Act, 2016 (for short, “the RERA Act”) directing the petitioners to deposit the full principal amount and interest in terms of Section 43 (5) of the said Act for preferring an appeal. In default, the appeal has been directed to stand dismissed.
2. The petitioners argue that the expression “or” in the proviso to sub-section (5) of Section 43 of the RERA Act applies both to the preceding and succeeding parts of the said proviso. The preceding part speaks

about the penalty payable by the appellant and the succeeding part about the total amount to be paid by the allottee including interest and compensation. It is argued that the expression “at least 30%.... or such higher percentage as may determined by the Appellate Tribunal” applies both to penalty and the principal along with interest and compensation, alternatively.

3. Learned counsel places the provisions of Section 18 of the RERA Act, under which the order of the first forum was passed directing the petitioners/promoters to return the amount received by them with interest.
4. It is pointed out that the adjudication has been made under Section 31 which contemplates decision by an Authority or Adjudicating Officer. Section 71 speaks about the power to adjudicate, *inter alia*, under Section 18 with regard to compensation.
5. Learned counsel for the petitioner seeks to highlight Section 70 of the RERA Act which also contemplates compounding of offences, thereby arguably mitigating the rigour of the penalties.
6. It is contended that the impugned order of the Appellate Authority is unreasoned with regard to whether a percentage of the principal and interest are payable or the entire amount. Without so adjudicating, despite the point having been urged by the petitioners, the Appellate Authority directed payment of the entire amount which according to the petitioners is illegal and *de hors* the provisions of the law.
7. The second question which has been raised by the petitioners is about which is the relevant stage of depositing such amount – at the very

outset before entertaining the appeal or before the appeal is heard finally. Learned counsel for the petitioners argues that the proviso to Section 43(5) speaks both about the appeal not being “entertained” and the payment being made before the appeal is “heard”. It is argued that if a harmonization is to be effected between the two concepts, it is necessarily to be construed that the payment can be made at any time before the final adjudication of the appeal or at least before the final hearing of the appeal.

8. Learned counsel for the respondents submits that the issue raised now by the petitioners was already decided by a previous order of a co-ordinate Bench of this Court when the petitioners came up in appeal against a similar order of the Appellate Authority. The learned Single Judge having finally decided that the petitioners are to pay the entire principal and interest, the said issue cannot be reopened now.
9. Insofar as the time of payment is concerned, it is argued that the payment as contemplated under Section 43(5) is to be made immediately upon preferring the appeal for it even to be entertained. Rule 17 of the West Bengal Real Estate (Regulation and Development) Rules, 2021 (in brief, “the Rules”) fixes the rate of interest at the Prime Lending Rate of the State Bank of India + 2%. Hence, it is argued that there was no scope of further adjudication in the matter.
10. Insofar as the language of the proviso to Section 43(5) is concerned, learned counsel argues that the language of the Section is clear. The discretion of the Appellate Authority, as also held by the previous co-ordinate Bench, is only to increase the percentage of penalty to more

than 30% if it so opines and nothing more. Insofar as the principal including interest and compensation is concerned, there is no such discretion on the Authority to direct payment of only a percentage thereof. Hence, the respondents pray for dismissal of the writ petition.

11. The first question which arises is whether the present issues are barred by *res judicata*.
12. After the initial order was passed by the first authority directing payment of the principal amount received by the petitioners/promoters along with penalty, the concerned appeal was preferred. In the appeal, *vide* order dated September 26, 2023 the Appellate Authority directed the payment of the principal amounts of Rs. 44,08,600/- and Rs. 11,07,000/- respectively along with interest. It was also observed that non-compliance of the direction on the part of the petitioners would result in the case (read “appeal”) being automatically dismissed for non-compliance of the order.
13. Against the said order, the petitioners preferred WPA No. 25784 of 2023, which was decided *vide* order dated November 2, 2023. Certain observations of the said order are germane. The learned Single Judge clearly found that there is no stipulation in Section 43(5) or its proviso that an appeal can be preferred only by depositing 30% of the penalty. The Tribunal was within its powers to direct the petitioners to submit such sum of money. Moreover, it was observed, it is not the question of maintainability of the original complaint that was in issue there. The Tribunal had kept the issue of maintainability of the appeal

pending. Upon such observations, the Co-ordinate Bench found no illegality in the impugned order and dismissed the writ petition.

14. Thus, the learned Single Judge, upon considering Section 43(5) and its proviso, reiterated that the appeal shall not be entertained without the promoter first having deposited with the Appellate Tribunal at least 30% or higher percentage as decided by the Tribunal, in respect of the penalty.
15. The arguments advanced by the petitioners then were primarily that 30% of the entire sum may be deposited by an appellant and payment of higher sums cannot be an automatic outcome, although there is also a provision for payment of higher sums. It was also contended that such order should not have been passed as the question of maintainability of the appeal itself was kept pending.
16. Coming back to the present impugned order, it was precisely the same as the previous order which had been challenged. By the impugned order dated November 7, 2023, the Appellate Authority reiterated the initial order dated October 10, 2023 which had been assailed in the previous writ petition and affirmed by the writ court. It was also repeated that non-payment would automatically entail dismissal of the appeal for non-compliance.
17. The writ petitioners are, thus, barred by the principle of *res judicata* in re-agitating the same issue again. Although some of the arguments made here were not recorded to have been advanced then, the principle of constructive *res judicata* sets in.

- 18.** However, a small window of contention remains for the petitioners insofar as the interpretation of the proviso to Section 43(5) is concerned, since it is arguable as to whether there can be a concession or *res judicata* on a pure question of law or legal interpretation. Hence, while deprecating the conduct of the petitioners in repeating the nature of the challenge in the present writ petition, this Court will be shirking its duty if it does not adjudicate on the questions now raised.
- 19.** We have to keep in our mind that in the present case, the petitioners/promoters have only been directed to return the amount received by them along with interest, within the purview of Section 18(1)(b) of the RERA Act.
- 20.** Section 31 of the said Act contemplates that a complaint may be filed with the Authority or the Adjudicating Officer. Here, the complaint was made before the Authority. The scope of appointment of an Adjudicating Officer only arises in case compensation is required to be adjudged. Section 21(1) of the RERA Act provides that for the purpose adjudging compensation under Sections 12, 14, 18 and 19, the Authority shall appoint in consultation with the Appropriate Government, one or more judicial officer as deemed necessary who is or has been a District Judge, to be an Adjudicating Officer for holding an enquiry in the prescribed manner.
- 21.** Since in the present case no compensation has been awarded or adjudged, the question of the matter being relegated to an Adjudicating Officer did not arise.

- 22.** Here, it is to be noted that the petitioners have been directed to pay the principal amount received along with interestsimpliciter. Neither any compensation nor penalty was awarded.
- 23.** Rule 17 of the Rules leaves no manner of doubt regarding the rate of the interest. The rate of interest payable under Sections 12, 14, 18 and 19 as the case may be, according to Rule 17, shall be the prime lending rate of the State Bank of India + 2%. Hence, there remains no scope of adjudication either by the Appellate Authority or this Court on such score. Insofar as the principal amounts of Rs. 44,08,600/- and Rs. 11,07,000/- respectively in the two matters are concerned, the same has been finally adjudicated and has not been challenged in the present writ petitions. Thus, the question of compensation does not arise at all.
- 24.** The statute envisages certain components of the award which can be made by the Authority or the Adjudicating Officer.
- 25.** The first component is the principal amount received by the promoter, the second is the interest payable thereon. The first component is to be decided on the facts of the case and the second in terms of Rule 17 of the Rules.
- 26.** The third component which comes in is compensation as contemplated in Section 18(1)(b), for which an Adjudicating Officer may be appointed under Section 71 of the RERA Act. Section 72 of the said Act clearly enumerates the factors to be taken into account by the Adjudicating Officer such as the amount of disproportionate gain or unfair advantage, loss, repetitive nature of default, etc.

- 27.** The fourth component which comes in is not envisaged under Sections 12, 14, 18 and 19 directly but is provided for in Chapter VIII of the RERA Act, covering Sections 59 to 72. The said Chapter deals with offences, penalties and adjudication. The term “penalty” finds place in the said provisions. Sections 59, 60, 61, 63 and 64 specifically provide for failure on the part of the promoter, the others dealing with failure of real estate agents and allottees respectively.
- 28.** If we focus on the nature of the penalty imposed in the above provisions, we find that the same generally varies between 5% and 10% of the estimated cost of the Real Estate project. As opposed to the cost of the amount received by the promoter in respect of a particular apartment, plot, building as the case may be under Section 18(1)(b), the estimated cost of the entire Real Estate project as determined by the Authority is palpably higher. Even 5 to 10% of the same would be a huge amount compared to the cumulative amount of the principal amount to be refunded + interest + compensation as provided in Section 18(1)(b).
- 29.** Seen in such perspective, the expression “or” in the proviso to Section 43(5) can be rationally construed to disjunct 30% or higher of “penalty” on the one hand and the total amount to be paid to the allottee including interest and compensation on the other. Hence, a rational interpretation of the proviso would go against the contention of the present petitioners, insofar as it is more logical that the promoter, if preferring an appeal, has to deposit either 30% or more (as decided by the Appellate Tribunal) of the penalty or, alternatively,

the total amount payable to the allottee for the particular apartment, plot, etc. including interest and compensation. Thus, the conjunction “or” distinguishes between the two.

- 30.** Even from a linguistic perspective, on a plain reading of the language of the proviso to Section 43(5) it is clear that a complete sense of the phrase terminates before the expression “or” inasmuch as the promoter has to deposit at least 30% of the penalty or such higher amount as may be determined by the Appellate Tribunal. The portion following the expression “or”, that is, the total amount to be paid to the allottee including interest and compensation, has no connection or interdependence with the previous portion of the sentence. If the two were inter-linked, it would be more appropriate that the expression “or such higher percentage as may be determined by the Appellate Tribunal” would be placed at the very end, including within its fold penalty as well as total amount to be paid to the allottee including interest and compensation. Having been placed as it is, the complete sense of the expression is culminated before the preposition “or”, giving an option to the promoter to deposit 30% or higher as fixed by the Tribunal of the penalty on the one hand and total amount payable to the allottee with interest and compensation on the other.
- 31.** That apart, the mode of adjudication of compensation is clearly delineated in Section 71 and has been left to the Adjudicating Officer to assess. Thus, if at the premature juncture of entertaining the appeal, the Appellate Authority, without even going into the merits of the matter, is given the discretion of fixing a percentage regarding

compensation, it would be prejudging the main issues involved in the appeal and cannot be a valid construction of the proviso. In any event, the total amount to be paid to the allottee and the interest are fixed sums within the contemplation of Section 18(1)(b), read with Rule 17 of the Rules. Thus, clubbing the two with compensation would leave little discretion to the Appellate Tribunal to decide the percentage, whether 30% or more.

- 32.** However, insofar as penalty is concerned, considering the huge amount of the penalty in terms of the estimated cost of the entire Real Estate Project, a discretion might validly be left with the Appellate Authority to decide the pre-conditional percentage of payment of the same.
- 33.** Thus, seen from such perspective as well, the only interpretation which is possible to be lent to the proviso is that the option is on the promoter to deposit 30% of the penalty or such higher percentage as determined by the Appellate Tribunal at the outset or the total amount returnable to the allottee including interest and compensation.
- 34.** The next question which arises is, what is the time when such payment is to be made – at the inception or before final hearing.
- 35.** The expression “before the said appeal is heard” makes it clear that it has to be before the commencement of the hearing. However, the first part of the proviso clearly stipulates that the appeal shall not be “entertained” without the deposit, which means that no interim orders can be passed in connection with the appeal or any date for hearing of

the appeal can be fixed for any practical purposes unless the deposit is made.

- 36.** We have to keep in mind, the expression “or with both” has also been used in the proviso to Section 43(5), meaning thereby that in a case where the first forum has directed return of the amount received, including or not including interest and compensation, penalty might also have been imposed under Chapter VIII on the promoter. If both are imposed, the expression “or with both, as the case may be” comes into play. Then the promoter has to deposit the returnable principal amount along with interest and compensation as well as the percentage of the penalty which is payable. For deciding such percentage, as per the proviso, the default is 30% of the penalty. However, discretion has been conferred on the Appellate Tribunal to decide whether an even higher percentage of penalty is to be deposited.
- 37.** Thus, we find that in the event there is a question of imposition of penalty under Chapter VIII, the Appellate Tribunal has a small window of discretion regarding the percentage, which varies between 30% and above. Hence, at least one date has to be fixed by the Tribunal in the appeal for deciding such issue.
- 38.** If the pre-deposit under the proviso was to be made even before the appeal is registered and taken on record, there would not be any scope for the Tribunal to decide the percentage. Thus, the expression “entertained” in the proviso cannot be equated with “registered”. After the appeal being registered formally, one date will be fixed for the

Appellate Tribunal to look into the issue as to whether any penalty has been imposed and, if so, whether the pre-appeal deposit is to be 30% or above.

- 39.** Such discretion, however, is not vested in the Appellate Tribunal, nor is there any scope of doing so, with regard to the second part of the proviso that is the principal amount payable to the allottee including interest and compensation, which is to be paid in full. Thus, on the first date, the Appellate Authority will pass necessary directions quantifying the amount to be deposited by the promoter/appellant. The logical corollary would be that unless such payment is made, the appeal cannot be taken up further, either for hearing or for passing interlocutory orders. That would be the only harmonious construction possible between the expressions “shall not be entertained” and “before the said appeal is heard” as used in the proviso.
- 40.** In the event the deposit is not made, there would not be any occasion for the appeal to be heard further or any order to be passed in the appeal and it would be a wastage of time and resources for the Tribunal and for all concerned to keep the appeal pending on the roster indefinitely. Thus, an automatic dismissal may entail for non-payment by the appellant even after getting the opportunity to pay. Such a rider may thus be incorporated in the first order of the Appellate Tribunal.
- 41.** Considering the present case in the above context, there is no room for any discretionary order being passed by the Appellate Tribunal

regarding the quantum of the pre-conditional deposit for preferring the appeal, since no penalty has been imposed on the petitioners.

- 42.** The Appellate Tribunal had its task laid down clear-cut before it as per the provisions of Section 18(1)(b), read with Section 43(5) of the RERA Act in conjunction with Rule 17 of the Rules and accordingly directed the appellants/petitioners to deposit the entire principal amounts of Rs. 44,08,600/- and 11,07,000/- respectively along with interest. Quite correctly, the Appellate Forum also directed that in default of payment of the amount by the appellants, the appeal would stand automatically dismissed for non-compliance. In fact, previously such an opportunity was given which was not availed of by the petitioners as they preferred a writ petition challenging the same. After the said order was affirmed by the writ court on the previous occasion, the present opportunity was given again. Hence, the Appellate Tribunal was perfectly justified in passing the impugned order dated November 7, 2023.
- 43.** Thus, there is no scope of interference. However, in view of the pendency of the present challenge, a last opportunity ought to be given to the petitioners to deposit the amount as directed in the impugned order.
- 44.** Accordingly, WPA No. 27117 of 2023 and WPA No. 27120 of 2023 are dismissed on contest without any order as to costs, thereby affirming the order of the Appellate Tribunal directing the petitioners to deposit the principal amounts payable to the allottee to the tune of Rs. 44,08,600/- and 11,07,000/- respectively along with interest. Such

amounts shall be deposited by the petitioners in connection with each of the appeals which are the subject-matters of challenge in the two writ petitions, including the interest component, latest by January 10, 2024; in default, the concerned appeals shall stand automatically dismissed.

- 45.** Urgent certified server copies, if applied for, be issued to the parties upon compliance of due formalities.

(Sabyasachi Bhattacharyya, J.)