

MAHARASHTRA REAL ESTATE APPELLATE TRIBUNAL

**APPEAL NO. 0006000000010492
ALONGWITH
APPEAL NO. 0006000000010493
ALONGWITH
APPEAL NO. 0006000000010494
ALONGWITH
APPEAL NO. 0006000000010495**

Avarsekar Realty Pvt. Ltd.)
Plot 695/697, 64C, Sitaladevi Temple Road,)
Mahim.)... Appellant/s.

Vs.

L & T Financial Consultants Limited,)
Registered office at Mount Poonamallee)
Road, Manapakkam,)
Chennai-600 089.)... Respondent/s.

Mr. Pulkit Sharma Advocate, for the Appellant.

Mr. Yash Mehta, Advocate for the Respondent.

CORAM : SUMANT M. KOLHE, (MEMBER J.)

DATE : FEBRUARY 01, 2019.

COMMON ORAL JUDGMENT:

1. All the four Appeals are directed against the common order passed by adjudicating officer, Mumbai in four complaints whereby the present appellant is directed to pay in each complaint Rs.5,28,00,000/- along with interest at the rate of 8.0 % per annum from the date of filing of complaint till actual realization.

2. The appellants are the Promoters. As per Section 43 (5) of RERA Act, Appeal filed by the Promoter shall not be entertained without Promoter first having deposited the amount as per the order of the Tribunal

in view of Proviso of Section 43(5) of the RERA Act.

3. Section 43(5) of RERA Act 2016 reads as under :-

"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 30% 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."

4. Appellants had made an application for exemption of compliance of abovementioned proviso of Section 43 Sub-section 5 of RERA Act. As per the order dated 13.12.2018 passed by this Tribunal, Appellants were directed to deposit 40% amount with MahaRERA in view of the order dated 22.05.2018 passed by Ld. adjudicating officer of MahaRERA, Mumbai. Thus, the request of exemption for compliance of proviso of Section 43 Sub-Section 5 of RERA Act was not granted and moreover, Appellants were directed to comply the order regarding deposit of the amount as mentioned above in each Appeal. Appellants were allowed to deposit the amount up to 11.01.2019 and all the Appeals were kept for compliance and final hearing 17.01.2019.

5. On 17.01.2019 Advocate Mr. Pulkit Sharma appeared for Appellant in second session and matter was adjourned till 21.01.2019 as per his request. When the matter was called on 21.01.2019 the Ld. Advocate for the Appellants fairly conceded that the Appellants have not complied with the order dated 13.12.2018 of this Tribunal regarding deposit of 40% amount with MahaRERA. However, he submitted that proviso of Section 43 Sub-section 5 is not mandatory but, it is directory even though the word 'shall' is used in the said proviso. According to him non-compliance of proviso of Section 43(5) of RERA Act will not result in dismissal of the Appeals.

6. He relied on following case laws to substantiate his submission :-

1) (2006) 13 Supreme Court Cases 345.

The Hon'ble Apex Court while considering Section 35-F of Central Excise Act 1944 observed that in case of pre-deposit for hearing of Appeal where relief of stay or relief of dispensation with is sought, then the Court is required to balance the consideration of undue hardship to assess and "safe guarding of interest of revenue" and Petitions for stay should not be disposed off in routine matter. Unmindful of the consequences flowing from the order requiring the assess to deposit full or part of the demand.

2) (2009) 161 DLT 528 Delhi High Court.

The Hon'ble High Court while dealing with Section 19 of Foreign Exchange Regulation Act 1973 observed that if sustainability of adjudicating order is itself in doubt then, dispensation on the ground of undue hardship should be granted while allowing the waiver of pre-deposit.

3) (1998) Supreme Court Cases 104 ELT 325 Delhi High Court.

The Hon'ble High Court while considering the matter under Section 113 of Custom's Act 1962 observed that, whenever a case for penalty is not prima facie exists then, the valuable right of Appeal being heard and decided on merit may be denied to the party for non-compliance of deposit of penalty.

7. At the outset I would like to point out that the facts and circumstances of the case laws (2009) 161 DLT and (1998) 104 ELT 325 are quite different then the facts and circumstances of the present Appeals before me. Moreover, dispensation to deposit the amount in Court may be granted if sustainability of the impugned order is itself in doubt and moreover in absence of case made out for penalty waiver should be granted to deposit the penalty as party may lost the valuable right of contesting the Appeals on merit. The issues involved in the said case laws have no nexus with the present matter under Section 43 Sub-section 5 of RERA Act 2016 before me. The Hon'ble Apex Court has given some guidelines while exercising the discretionary jurisdiction regarding pre-deposit that in case of Appeal the Court is required to observe balance of "undue hardship to assess" and "safe guarding the interest of revenue."

8. The Ld. Advocate for the Respondent argued that Proviso of Section 43 Sub-section 5 of RERA Act 2016 is mandatory in nature and moreover consequences for non-compliance of the said proviso are also clearly given in the said provision. According to him the word 'shall' used in Section 43 Sub-section 5 regarding pre-deposit for hearing the Appeal is mandatory and it is obligatory on the part of the Promoter to follow the said provision and there is no discretion left with the Court or the Tribunal as far as compliance of the said provision is concerned.

9. RERA Act 2016 is made applicable on 01.05.2017. It is one of the land mark legislation. The objects of this Act are as under :-

i) To establish Real Estate Regulatory Authority for regulation and promotion of Real Estate Sector.

ii) To ensure efficiency and transparency in sale of plot, apartment, building or Real Estate Sector.

iii) To safeguard the interest of the customers.

iv) To provide speedy adjudicating mechanism for redressal of grievances (Real Estate Authority and Adjudicating Officer).

v) To provide Appellate Tribunal to hear the Appeals, against decisions, orders and directions of authority or adjudicating officer.

vi) Accountability towards Allottee and to protect their interest.

vii) Introduce symmetry of information between Promoter and Allottee and imposing some responsibility on both Promoters and Allottees. Though the Real Estate Sector was grown up it was unregulated from perspective of consumer protection and existing consumer protection laws were curative and not preventive. Over all growth of Real Estate Security was affected due to absence of professionalization and standardization.

10. To bring transparency and fair play and to reduce frauds and delays in transactions is also object of RERA Act. We can gather the intention of legislature in enacting RERA Act 2016 in view of the objects mentioned above. MOFA Act was and is in existence pertaining to the subject matter of Real Estate Sector. However, MOFA Act was not sufficient to achieve the objects as mentioned above and hence, RERA

2016 was enacted.

11. While implementing the various provisions of RERA Act 2016 it is always necessary to keep in mind the objects of the Act that are to be achieved by implementing the provisions of the said Act.

12. Every project to be launched is required to be registered. Every incomplete project on day of application of RERA Act is also required to be registered under RERA Act and such project is governed by provisions of RERA Act. It cannot be ignored that prescribed format of agreement for sale is given under the said Act and Rules and Regulations framed there under. It is mandatory for Promoter and Allottees to enter into an agreement for sale in the said prescribed format. The most important clause which must be mentioned in an agreement for sale is the date on which the possession of unit is to be handed over to the purchaser and date of completion of project. Such agreement is required to be registered. There are some obligations required to be observed by Promoters which are given in Chapter 3 of RERA Act 2016. Similarly, some rights and duties of Allottees are also mentioned and required to be observed by Allottees as per Chapter 4 of the RERA Act 2016. Consequences for not following and complying the provisions of RERA Act 2016 are also given. In fact Chapter 8 is specifically prepared in respect of offences and penalties as well as adjudication. The Hon'ble Bombay High Court has laid down in Writ Petition No. 2737 of 2017 **Nilkamal Realtors Vs. Union of India** that;

“ Under the provisions of Section 18, the delay in handing over the possession would be counted from the date mentioned in the agreement for sale entered into by the promoter and the allottee prior to its registration under RERA.

Under the provisions of RERA, the promoter is given a facility to revise the date of completion of project and declare the same under Section 4. The RERA does not contemplate rewriting of contract between the flat purchaser and the promoter."

"Under the provisions of Section 4(2)(1)(D), the promoter would deposit 70% of the amount realized for the real estate project from the allottees in a separate account which means that 30% of the amount realized by the promoter from the allottees will be retained by him. In such case, if the promoter defaults to hand over possession to the allottee in the agreed time limit or the extended one, then the allottee shall reasonably expect some compensation from the promoter till the handing over of possession. In case the promoter defies to pay the compensation, then the same would amount to unjust enrichment by the promoter of the hard earned money of the allottees which he utilized. Such provisions are necessary to be incorporated because it was noticed by the Select Committee and the Standing Committee of the Parliament that huge sums of money collected from the allottees were not utilized fully for the project or the amounts collected from the allottees were diverted to other sectors than the concerned project."

"Section 18(1)(b) lays down that if the promoter fails to complete or is unable to give possession of an apartment due to discontinuance of his business as a developer on account of suspension or revocation of the registration under the Act or for any other reason, he is liable on demand to the allottees, in case the allottee wishes to withdraw from the project, without prejudice to any other remedy available, to return the amount received by him in respect of that apartment with interest at such rate as may be prescribed in this behalf including compensation. If the allottee does not intend to withdraw from the project he shall be paid by the promoter interest for every month's delay till handing over of the possession. The requirement to pay interest is not a penalty as

the payment of interest is compensatory in nature in the light of the delay suffered by the allottee who has paid for his apartment but has not received possession of it. The obligation imposed on the promoter to pay interest till such time as the apartment is handed over to him is not unreasonable. The interest is merely compensation for use of money."

The enactment of RERA 2016 is beneficiary and in the interest of public at large. It is specifically mentioned by their Lordships that inspite of paying huge amount of life earning for purchase of house, there was delay for years together for delivery of possession of house to the purchaser.

13. On the backdrop of above observations of their Lordships in Nilkamal Judgment and the intention of the legislation in enacting RERA Act 2016 in addition to old MOFA Act for regulation and development of the Real Estate Sector, we will have to consider the proviso of Section 43 Sub-section 5 of RERA Act 2016.

13.1 Whenever Appeal is preferred by Promoter under Section 44 of RERA Act 2016, as per the proviso, the Appeal of the Promoter shall not be entertained unless the Promoter first deposited at least 30% of 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 not or with both as case may be before the said Appeal is heard.

14. So making deposit as per the order of the Appellate Tribunal in view of the Proviso of Section 43 Sub-section 5 of RERA Act 2016 is condition precedent for hearing the Appeal. The word 'entertain' is used

in the said proviso has the meaning of 'admitting to consideration'. In fact dictionary meaning of the word 'entertain' is 'admit to consideration'. Appeal is judicial examination of the decision by a higher Court of the decision of an inferior Court. Since the Appeal is judicial examination, the admission of Appeal for consideration is required to be seen on account of expression of entertain in the said proviso.

15. As far as mandatory or obligatory nature and directory nature of any provision or statute is concerned, I would like to point out that no universal rule can be laid down as to whether mandatory enactments shall be considered directory only or obligatory with an implied nullification for disobedience. It is the duty of courts of justice to try to get at the real intention of the Legislature by carefully attending to the whole scope of the statute to be considered. The Hon'ble Supreme Court has pointed out on many occasions that the question as to whether a statute is mandatory or directory depends upon the intent of the Legislature and not upon the language in which the intent is clothed. The meaning and intention of the Legislature must govern, and those are to be ascertained not only from the phraseology of the provision, but also by considering its nature, its design and the consequences which would follow from construing it the one way or the other.

15.1 Thus, in view of the above discussion I am of the opinion that proviso of Section 43 Sub-section 5 of RERA Act 2016 regarding deposit of amount on the part of Promoter while filing an Appeal with the Appellate Tribunal is obligatory and Promoter must make compliance of the said obligation and the said proviso is mandatory.

16. Since Appellants have not complied with the mandatory

proviso of Section 43 Sub-section 5 of RERA Act 2016 and failed to perform the obligation under RERA Act 2016, all the four Appeals stand disposed off for want of compliance of proviso of Section 43 Sub-section 5 of RERA Act 2016. In the result I pass the following order.

ORDER

1. The Appeal No. 0006000000010492, Appeal No. 0006000000010493, Appeal No. 0006000000010494 and Appeal No. 0006000000010495 stand disposed of for non-compliance of proviso of Section 43 Sub-section 5 of RERA Act, 2016.
2. No order as to costs.
3. Original judgment is kept in Appeal No. 0006000000010492 and copy is maintained in other Appeals.

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01-02-19

[SUMANT M. KOLHE, J.]

MEMBER,

Maharashtra Real Estate
Appellate Tribunal, (MahaRERA)
Mumbai.