

Court No. - 7

Case :- SECOND APPEAL No. - 3 of 2021

Appellant :- K2n Infra India Pvt. Ltd. Thru Authorized Signatory

Respondent :- Kunal Arora

Counsel for Appellant :- Abhishek Khare, Aahuti Agarwal, Saumya

Hon'ble Mrs. Sangeeta Chandra, J.

This Appeal has been filed challenging the order dated 03.11.2020 passed by the Appellate Tribunal in Appeal (Defective) No.392 of 2020 (***K2N Infra India Pvt. Ltd. Vs. Kunal Arora***).

It has been submitted by the learned counsel for the appellant that the appellant had approached the Tribunal against the order passed by the RERA on 28.02.2020 wherein RERA had found that there was no delay in giving over possession of the shop in question to the allottee, but had found the cancellation of allotment by the builder to be vitiated on the ground that the amount of registration that was deposited by the allottee, had not been returned to the allottee by the builder while issuing order of cancellation. The RERA in its order dated 28.02.2020 had observed that the cancellation having been set aside the allotment in favour of the complainant shall be deemed to be restored possession of the shop in question, shall be given by the builder latest by 31.03.2020 after receiving the admissible amount and after receipt of allottee and the completion certificate from the allottee, and observed that in case any interest is charged for delayed payment by the builder from the allottee then the builder shall refund the same to the allottee on default of giving possession on the date as mentioned in the order of RERA at MCLR+1%. The said order of RERA did not impose any monetary liability on the builder as it was conditional in nature and the appellant admittedly had not taken any interest on delayed payment from the allottee as the date of handing over possession as per the order dated 28.02.2020 was 31.03.2020 which has later on, been extended generally for all builders in view of the COVID-19 situation by the RERA itself.

It has been submitted by the learned counsel for the appellant that an application for waiver of the condition of WWW.LAWTREND.IN

pre-deposit as given in Section 43 (5) of the Act was made to the Tribunal and it was also submitted before the Tribunal that since the complainant had not paid any amount to the builder there was no question of payment of any interest also and therefore there was no occasion for refund of such amount. However, the Tribunal has observed on the basis of various judgments of the Supreme Court and of this Court that it has no discretion in so far as waiver of the condition of the pre-deposit under Section 43 (5) is concerned and has dismissed the Appeal. It has been submitted by the learned counsel for the appellant that no doubt the RERA has no discretion under law to waive of pre-deposit where RERA had imposed monetary liability but the Tribunal cannot insist upon the payment making of pre-deposit where no monetary liability in terms of penalty or interest has been passed upon the builder.

Learned counsel for the appellant has placed reliance upon the orders passed by this Court in Second Appeal No.289 of 2019 (**M/S Radhey Krishna Techo Build Pvt. Ltd. Vs. Presiding Officer Real Estate Appellate Tribunal and another**) dated 19.11.2019 and the judgment and order dated 26.07.2019 (**Radicon Infrastructure and Housing Private Limited Vs. Dhaneshwari Devi Dhyani**) and the order dated 15.01.2019 passed in Second Appeal No.122 of 2019 (**Air Force Naval Housing Board Vs. Union of India and others**).

The impugned order of the Tribunal dated 03.11.2020 passed by the Appellate Tribunal in Appeal (Defective) No.392 of 2020 (**K2N Infra India Pvt. Ltd. Vs. Kunal Arora**) shall remain stayed till the next date of listing.

The appellant has made out a prima facie case to show interference.

The Appeal is admitted on the following substantial question of law.

(1) Whether the Appellate Court has erred in Law and misinterpreted the provision of Section 43 (5) of the REAL ESTATE (REGULATION & DEVELOPMENT) ACT, 2016 in the light of the order dated 28.02.2020 passed by the learned RERA Authority?

(2) Whether since the provision of the Section 43 (5) of the REAL ESTATE (REGULATION &

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DEVELOPMENT) ACT, 2016 mandates a pre-deposit at least 30% of the penalty, interest or compensation and the Authority has not imposed any penalty, interest or compensation upon the appellant, how can a compliance of pre-deposit can be made by the Appellant?

(3) Whether the Appellate Tribunal was correct in rejecting the Appeal of the Appellant without hearing the Application for Waiver of Pre-deposit in compliance of Section 43 (5) of the Act, in such matters where there is no penalty or compensation imposed by the RERA Authority?.

Issue notice to the opposite party.

The appellant shall take steps within one week.

The office shall indicate the matter to be listed in the **first week of March, 2021.**

Order Date :- 11.1.2021

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