A.F.R.

Court No. - 38

Case :- RERA APPEAL DEFECTIVE No. - 6 of 2021

Appellant :- Air Force Naval Housing Board Air Force Station
Respondent :- U.P. Real Estate Regulatory Authority And Another
Counsel for Appellant :- Ashish Kumar Singh,Ajay Kumar Singh

Hon'ble Saumitra Dayal Singh,J.

1. Heard Sri Ashish Kumar Singh, learned counsel for the appellant and Sri Wasim Masood, learned counsel for the Uttar Pradesh Real Estate Regulatory Authority (RERA in short).

2. The present appeal has been filed against the order passed by the Real Estate Appellate Tribunal (Tribunal in short) in Appeal/Misc. Case No.360 of 2019 dated 28.02.2020 whereby the Tribunal has dismissed that appeal filed by the appellant, under Section 44(2) of the Real Estate (Regulation & Development) Act, 2016 (hereinafter referred to as the 'Act'). Since the appellant's appeal before the Tribunal had been dismissed at the preliminary stage, it was not entertained due to lack of payment of higher amount of pre-deposit directed by the Tribunal. Principally, that issue appears to be an issue between the appellant and the Tribunal, affecting the right of appeal of the appellant without examination on merits. Hence, the present appeal has been heard and decided at the fresh stage itself, without notice to the claimant respondent.

3. Undisputedly, the above-described appeal came to be filed by the appellant against the order of the RERA, dated 10.04.2019 whereby penalty @ MCLR + 1% w.e.f. 01.07.2012 was imposed on the appellant. It may also not be disputed that, at the time of filing the aforesaid appeal, the appellant furnished a demand draft for an amount of Rs.6,33,000/- towards 30% of the penalty amount awarded by the RERA. Further, it appears that there is no dispute to the computation of 30% of the disputed demand of penalty. By an order dated 28.01.2020, the Tribunal required the appellant to deposit the balance amount i.e. the entire amount of penalty awarded by the RERA as a pre-condition to maintain the appeal. For convenience, the relevant part of the order dated 28.01.2020 is quoted below:

> *"From perusal of the order sheet, it is clear that the Applicant has not complied with the provisions of Section 43(5) of the Act in legal sense.*
>
> *Applicant is directed to deposit the balance amount, if any, towards Section 43(5) of the Act, in the light of observation laid down by Hon'ble High court Lucknow Bench, "in Second Appeal No. 364 & 367 of 2018 (Radicon Infrastructure & Housing Private Limited vs. Karan Dhyani), decided on 26.7.2019." by the date fixed.*
>
> *Put up on 28.02.2020 for compliance of Section 43(5) of the Act."*

4. Thereafter the matter was listed before the Tribunal on 28.02.2020 whereupon the Tribunal passed the below quoted order:

> *"From the perusal of order sheet, it is quite clear that on the last date applicant was directed to deposit the balance amount towards Section 43(5) of the Act, in the light of observation laid down by the Hon'ble Allahabad High Court, Lucknow bench, "in Second Appeal No. 364 & 367 of 2018 (Radicon Infrastructure & Housing Private Limited vs. Karan Dhyani),*

decided on 26.7.2019, but today counsel for the applicant stated that applicant is not in a position to deposit the balance amount in the light of order dated 28.01.2020, hence the instant case is dismissed due to non compliance of Tribunal's order dated 28.01.2020.

From the perusal of order sheet, it also transpires that cost amount Rs. 1,000/- has been imposed on 03.01.2020 and the same has not been deposited so far in the Tribunal's fund.

Applicant's counsel assured that he will deposit the cost amount during the course of day. After deposit the cost amount the file shall be put up before me today at 4:00 p.m."

5. The Tribunal has relied on the observations made by the Lucknow Bench of this Court in ***Second Appeal No.364 of 2018 (Radicon Infrastructure And Housing Private Limited Vs. Karan Dhyani)*** and ***Second Appeal No. 367 of 2018 (Radicon Infrastructure And Housing Private Limited Vs. Dhaneshwari Devi Dhyani)***, decided on 26.07.2019, to require the appellant to deposit the entire amount of disputed penalty as a condition to maintain the appeal.

6. The present appeal has been pressed on the following question of law:

"Whether deposit of entire disputed demand of penalty is a condition precedent to maintain the appeal against penalty, under Section 44(2) of the Real Estate (Regulation & Development) Act, 2016?"

7. Learned counsel for the appellant would submit, undisputedly, the appellant is a zero-profit organization, registered as a society of retired personnel of the Indian Air Force and the Indian Navy. It exists and operates only for the purpose of providing affordable housing to the members of the Indian Air Force and the Indian Navy and the widows of such personnel.

8. In the context of the order impugned in the present

appeal, it has been submitted, Section 43(5) of the Act does not mandate pre-deposit of the entire disputed demand of penalty as a pre-condition to maintain an appeal under Section 44(2) of the Act. Also, the decision of this Court in Second Appeal Nos.364 of 2018 and 367 of 2018 does not lay down as a proposition of law that the entire disputed demand of penalty must be deposited before an appeal is entertained or maintained under Section 44 of the Act.

9. Thus, learned counsel for the appellant would submit that the Tribunal has completely misread the law and/or mis-applied itself to reach a very harsh conclusion that the appeal filed by the appellant was not maintainable because the appellant did not deposit the entire disputed demand of penalty.

10. Learned counsel for the RERA would submit that the right of appeal granted under Section 34 of the Act is circumscribed and conditioned by Section 43(5) of the Act. According to him, there is no right vested in the appellant to maintain its appeal by depositing 30% of the disputed penalty. The Tribunal could determine a higher amount and, as has been done in the present case. The right of appeal would arise only upon deposit of that higher amount. Since the appellant did not make the necessary deposit, the Tribunal has rightly dismissed its appeal.

11. Having heard learned counsel for the parties and having perused the record, it appears that the controversy revolves around the interpretation to be

given to Section 43 (5) of the Act. That provision of law reads as below:

> *"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 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."*

12. In ***Garikapatti Veeraya* v. *N. Subbiah Choudhury* AIR 1957 SC 540** the Supreme Court considered the nature and extent of the right of appeal and held:

> *"23. From the decisions cited above the following principle clearly emerge:*
>
> *(i) That the legal pursuit of a remedy, suit, appeal and second appeal are really but steps in a series of proceedings all connected by an intrinsic unity and are to be regarded as one legal proceeding.*
>
> *(ii) The right of appeal is not a mere matter of procedure but is a substantive right.*
>
> *(iii) The institution of the suit carries with it the implication that all rights of appeal then in force are preserved to the parties thereto till the rest of the career of the suit.*
>
> *(iv) The right of appeal is a vested right and such a right to enter the superior court accrues to the litigant and exists as on and from the date the lis commences and although it may be actually exercised when the adverse judgment is pronounced such right is to be governed by the law prevailing at the date of the institution of the suit or proceeding and not by the law that prevails at the date of its decision or at the date of the filing of the appeal.*
>
> *(v) This vested right of appeal can be taken*

away only by a subsequent enactment, if it so provides expressly or by necessary intendment and not otherwise."

13. Then, in ***Nahar Industrial Enterprises Ltd. v. Hong Kong and Shanghai Banking Corp.*, (2009) 8 SCC 646**, while dealing with the issue pertaining to the provisions of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993, it has been reiterated and elaborated as below:

*"**Vested right of appeal***

***125.**Another aspect of the matter also cannot be lost sight of. A plaintiff of a suit will have a vested right of appeal. The said right would be determined keeping in view the date of filing of the suit. Such a right of appeal must expressly be taken away. An appeal is the "right of entering a superior court, and invoking its aid and interposition to redress the error of the court below" and "though procedure does surround an appeal the central idea is a right".*

***126.**The right of appeal has been recognised by judicial decisions as a right which vests in a suitor at the time of institution of original proceedings. The Privy Council in Colonial Sugar Refining Co.v.Irving[1905 AC 369 : (1904-07) All ER Rep Ext 1620 (PC)] noted that: (AC p. 372)*

"… To deprive a suitor in a pending action of an appeal to a superior tribunal which belonged to him as of right is a very different thing from regulating procedure."

***127.**When a person files a civil suit his right to prosecute the same in terms of the provisions of the Code as also his right of appeal by way of first appeal, second appeal, etc. are preserved. Such rights cannot be curtailed, far less taken away except by reason of an express provision contained in the statute. Such a provision in the statute must be express or must be found out by necessary implication".*

(emphasis supplied)

14. Relevant to the issue of deposit of the disputed demand as a pre-condition to maintain an appeal under the FEMA, in ***Raj Kumar Shivhare v. Directorate of Enforcement*, (2010) 4 SCC 772**, the Supreme Court considered the effect of statutory restrictions placed on the right to appeal and observed as under:

*"**19.**The word "any" in this context would mean*

"all". We are of this opinion in view of the fact that this section confers a right of appeal on any person aggrieved. A right of appeal, it is well settled, is a creature of statute. It is never an inherent right, like that of filing a suit. A right of filing a suit, unless it is barred by statute, as it is barred here under Section 34 of FEMA, is an inherent right (see Section 9 of the Civil Procedure Code) but a right of appeal is always conferred by a statute. While conferring such right a statute may impose restrictions, like limitation or pre-deposit of penalty or it may limit the area of appeal to questions of law or sometime to substantial questions of law. Whenever such limitations are imposed, they are to be strictly followed. But in a case where there is no limitation on the nature of order or decision to be appealed against, as in this case, the right of appeal cannot be further curtailed by this Court on the basis of an interpretative exercise".

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…..

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29.*By referring to the aforesaid schemes under different statutes, this Court wants to underline that the right of appeal, being always a creature of a statute, its nature, ambit and width has to be determined from the statute itself. When the language of the statute regarding the nature of the order from which right of appeal has been conferred is clear, no statutory interpretation is warranted either to widen or restrict the same."*

15. Reading Section 43 (5) of the Act strictly, the first conclusion that may be safely drawn is, no appeal may be filed by a *'promoter'* against the order of the RERA imposing penalty unless a minimum of 30% of the demand of penalty is pre-deposited by such *'promoter'*. There is absolutely no discretion vested in the Tribunal to reduce that amount below the statutorily defined minimum of 30% of the penalty imposed by the RERA. That condition is absolute. It has also been met, in the facts of this case.

16. Second, a discretion is vested in the Tribunal to determine an amount more than 30% of the penalty - to be deposited as a condition to maintain such appeal by a *'promoter'*. The legislature has referred to the same as such higher percentage "as may be determined by the Appellate Tribunal."

17. Thus, in the first place, in the event of an appeal being filed by a *'promoter'* against an order of the RERA, imposing penalty, such appellant must necessarily deposit 30% of the penalty imposed as a pre-condition to maintain that appeal. There can be no exception to the same. Neither that percentage or amount can be reduced by the Tribunal nor an appeal filed without deposit of that amount be entertained by the Tribunal.

18. If the Tribunal were to require a particular 'promoter'-appellant to deposit an amount that be more than 30% of the penalty amount imposed by the RERA in the order impugned before the Tribunal, as a pre-condition to maintain its appeal, it would have to first determine the same. The word 'determine' is not defined under the Act. In ***Ashok Leland Ltd. v. State of Tamil Nadu And Another, (2004) 3 SCC 1***, while considering the meaning to be given to the word 'determination' appearing in paragraph nos.94, 95 & 96, the Supreme Court observed as under:

> *"94.The word "determination" must also be given its full effect, which presupposes application of mind and expression of the conclusion. It connotes the official determination and not a mere opinion of (sicor) finding.*
>
> *95.In Aiyar, P. Ramanatha:Law Lexicon, 2nd Edn., it is stated:*
>
> *"Determination or order.—The expression 'determination' signifies an effective expression of opinion which ends a controversy or a dispute by some authority to whom it is*

> *submitted under a valid law for disposal. The expression 'order' must have also a similar meaning, except that it need not operate to end the dispute. Determination or order must be judicial or quasi-judicial.Jaswant Sugar Mills Ltd.v.Lakshmi Chand[AIR 1963 SC 677, 680] (Constitution of India, Article 136)."*
>
> *96.In Black's Law Dictionary, 6th Edn., it is stated:*
>
> *"A 'determination' is a 'final judgment' for purposes of appeal when the trial court has completed its adjudication of the rights of the parties in the action.Thomas Van Dyken Joint Venture v. Van Dyken[90 Wis 236, 279 NW 2d 459, 463] ."*

19. In the context of Section 43(5) of the Act, the Tribunal must form its opinion on the facts and material before it - why a higher percentage of the disputed penalty be deposited by a *'promoter'*-appellant as a condition to entertain its appeal. Undoubtedly, this would involve exercise of judicial discretion. In comparable situations arising under fiscal statutes, the concept of pre-deposit, pre-exists. There, (as enabled by the statute), discretion is often bestowed on the appeal authority/Tribunal to waive, either in part or in whole, the condition of pre-deposit. In those situations, the Courts have consistently opined in favour of such discretion being exercised on brief reasons being disclosed while exercising such a discretionary power - as to existence or otherwise of *prima-facie* case, financial hardship, and irreparable injury.

20. However, as noted above, under section 43(5) of the Act, no discretion has been vested with the Tribunal to waive the requirement to deposit of 30% of the penalty amount as a pre-condition to maintain an appeal against a penalty order. In fact, a discretion has been vested in

the Tribunal to be exercised against the appellant before it, that too at the first/preliminary stage of entertainment of the appeal. When exercised, it would place an extra restriction on the right of appeal being exercised by an aggrieved *'promoter'/*appellant before the Tribunal.

21. If exercised routinely and not in exceedingly rare and demanding circumstances, that discretion exercised may lead to denial to an aggrieved *'promoter'/*appellant, its statutory right of appeal or it may render it completely illusory. Plainly, in the context of the Act, the appeal before the Tribunal is the first and the only appeal on facts. The further appeal to this Court is an appeal on substantial question/s of law. Thus, the Tribunal may never place a condition so onerous or burdensome, on the appellant before it, as may shut out the only remedy of appeal on fact, available under the Act.

22. The judicial discretion thus vested on the Tribunal must be exercised with extreme care and it must not appear to have been exercised on whims or fancies. It may be exercised only in extreme cases. Only by way of illustration, that discretion may be exercised where it appears to the Tribunal, even on a *prima facie* basis, that the penalty imposed by RERA is too less/insignificant to the infraction found or that the appellant before it is a repeat or habitual or wilful offender or the facts appear to involve large scale infractions of the law, by way of an organised activity. In such and other cases, for which judicially sound reasons may be recorded as may compel or commend to the Tribunal to require a

particular appellant to deposit an amount higher than the statutory pre-defined limit of 30% of the penalty.

23. Unless careful application of mind is first made by the Tribunal to the facts of the individual case and unless the Tribunal records specific reasons to determine the higher amount required to be deposited by the *'promoter'*-appellant, to maintain its appeal against the order imposing penalty passed by the RERA, the entire exercise made by the Tribunal may be questioned as arbitrary or unreasoned. That would be wholly undesirable and an avoidable course in the context of the quasi-judicial power exercised by the Tribunal.

24. In exercising its power, the Tribunal may always remain cognizant of the real purpose for which it exists being to deliver justice by adjudicating the appeals brought before it, on merits. Normally, the legislature provides a right of appeal without a condition of pre-deposit. However, in financial matters, the modern legislative trend has been to provide for a minimum deposit as a pre-condition to maintain the appeal. Unless the orders of the Tribunal requiring pre-deposit at higher rates (30% of penalty) are informed with reasons, such practice, if allowed, would amount to taking away the right of appeal before the Tribunal, by an order passed by the Tribunal that has been vested with the jurisdiction to decide such appeals on merits. It would be a uniquely odd process and result, factually and jurisprudentially. The appellant in that situation may end up being pre-judged by the Tribunal.

25. Therefore, in addition to the above, in each case where it proposes to enhance the pre-deposit amount, the Tribunal would also be obliged to consider the *prima facie* merits, the financial hardship (of the *'promoter'*-appellant) and the question of irreparable loss or hardship that may be claimed by such *'promoter'*-appellant, if it were to be compelled to deposit any amount higher than 30% of the penalty awarded by the RERA, as a condition to maintain its appeal against the penalty order.

26. Consequently, the power of the Tribunal to direct pre-deposit in excess of 30% of the penalty, under section 43(5) of the Act is found to be purely discretionary, to be exercised with extreme caution, in rare cases, by way of an exception and not routinely.

27. Coming to the facts of this case, the Tribunal has not recorded any special reasons as were necessary and has thus not 'determined' the amount to be deposited as a pre-condition to maintain the appeal. Then, the decisions of this Court relied upon by the Tribunal are wholly distinguishable. In Second Appeal No. 367 of 2018, Radicon Infrastructure **(supra)**, the following questions of law had been framed:

> *"(1) Whether in the light of Section 43(1) read with proviso to said Section, the Designated Appellate Tribunal can continue to function even after the period of one year from the date of coming into force the Real Estate (Regulation and Development) Act, 2016 ?*
>
> *(2) Whether the appointment of the Chairperson and three whole time members of the Appellate Tribunal under Section 45 of the Real Estate (Regulation and Development) Act 2016 have the effect of establishment of an Appellate Tribunal under Section 43(1) of the Real Estate*

(Regulation and Development) Act, 2016 ?

(3) Whether order passed by the Designated Appellate Tribunal as provided under proviso to Section 43(5) of the Real Estate (Regulation and Development) Act, 2016 could have been passed even after it became coram non judis ?

28. Those questions had been answered by the learned Single Judge, vide judgment dated 26.7.2019 and the appeal dismissed. Inasmuch as, it is plainly apparent that the question of law framed in that appeal were different, the decision of the same has no bearing on the question involved in the present case. Insofar as Second Appeal No. 364 of 2018, Radicon Infrastructure **(supra)** is concerned, an additional question of law was framed by the Court, to the following effect :

"Whether the appellate tribunal while passing an order in terms of the proviso to sub-section 5 of Section 43 has any discretion to allow the deposit of a lesser portion of the total amount to be paid to the allottee including interest and compensation imposed on him or the entire amount, as such has to be deposited without any discretion in this regard with the appellate tribunal to reduce the same and whether in view of the use of the word determined by the appellate tribunal in the first part of the proviso is indicative of requirement of application of mind by the appellate tribunal ?"

29. That additional question was answered in the negative. Specific to the issue of penalty to pre-deposit viz-a-viz penalty imposed, it was observed as under :

"With regard to the penalty the appellate tribunal has to ''determine' whether 30% of the penalty imposed or such a higher percentage as it may determine is to be deposited, but when it comes to the deposit of the total amount to be paid to the allottee including interest and compensation under the orders of the regulatory authority or adjudicating officer, no such discretion based on a 'determination' appears to have been

vested in the Appellate Tribunal by the legislature."

30. Thus, the view taken by this Court in the aforesaid decision is only to the effect that the minimum deposit to maintain an appeal against the penalty, would be 30% of the penalty amount. For deposit of any higher amount, a determination would have to be made by the Tribunal. The Court made a distinction in the statutory conditions requiring pre deposit to be made with respect to the disputed demand of penalty (where a minimum 30% was required to be deposited and a higher deposit required if the Tribunal so determined) and other amounts that may be awarded by the RERA where no such discretion exists. Therefore, those amounts may have to be deposited in entirety.

31. Therefore, even in that earlier decision of this Court, it was not laid down by way of a rule that the appellant deposits the entire amount of penalty as a pre-condition to maintain its appeal. The Tribunal has clearly misconstrued, both the statutory provision as well as the decisions of this Court passed in Second Appeal Nos. 364 of 2018 and 367 of 2018. Accordingly, the question of law is answered in the negative i.e. in favour of the appellant.

32. Consequently, the order dated passed by the Tribunal dated 28.02.2020 is set aside. Normally, the matter would have been remanded to decide the application under section 43(5) of the Act, afresh, however, since it has already been observed, that no special circumstance had been recorded or noted by the

Tribunal and the appellant had already deposited 30% of the disputed demand of penalty, in the facts of the present case, since the status of the appellant is also claimed to be that of a zero-profit society existing solely for the object of providing affordable housing to the personnel of the Indian Air Force and Indian Navy and the widows of such personnel, it appears just that the appeal be heard and decided by the Tribunal on its own merits, against the deposit of 30% of the disputed demand of penalty.

33. According the appeal is **allowed**.

Order Date :- 16.3.2021
S.Chaurasia/SA