BEFORE THE TAMIL NADU REAL ESTATE APPELLATE TRIBUNAL (TNREAT)

(Tamil Nadu, Puducherry, Andaman & Nicobar Islands)

Under the Real Estate (Regulation And Development) Act, 2016

Dated: 17.04.2024

Coram : Hon'ble Mr.Justice M.Duraiswamy, Chairperson
Mr.R.Padmanabhan, Judicial Member

Appeal (SR) No.103 of 2024

M/s. Jain Housing & Constructions Ltd.
represented by its Partner
Sandeep Mehta ... Appellant

Vs.

Inselli Park Owners Association
represented by its Secretary,
Arun Dhanaraj ... Respondent

Prayer: Appeal has been filed under Section 44(1) of the Real Estate (Regulation and Development) Act, 2016 to set aside the order dated 15.12.2023 in C.No.400 of 2019 passed by the TNRERA and to dismiss the complaint.

For Appellant : Mr. S.Kamalesh Kannan

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ORDER

Challenging the order passed in C.No.400 of 2019 dated 15.12.2023 on the file of the TNRERA, the promoter, viz., M/s.Jain Housing and Constructions Limited has filed the above appeal.

2. The TNRERA, while disposing of the complaint, directed the promoter to reimburse a sum of Rs.35,12,114/- along with the maintenance charges due and payable by them from 01.01.2019 at the rate of Rs.3.05 per sq.ft. per month for 350 unsold flats in the real estate project and further to pay future maintenance charges as payable by the members of the complainant at such varied rates till completion of the project and sale in respect of the unsold flats.

3. The appellant has filed the above appeal without depositing the pre-deposit as contemplated under Section 43(5) of the Act. As per Section 43(5), any person aggrieved by any direction or decision or order made by the Authority or by an Adjudicating Officer under the 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 percent 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

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including interest and compensation imposed on him, if any, or with both, as the case may be, before the said appeal is heard.

4. Mr.S.Kamalesh Kannan, learned counsel for the appellant submitted that the findings rendered by the TNRERA are erroneous and therefore, the appellant is not liable to make the pre-deposit under Section 43(5).

5. The submission made by the learned counsel for the appellant cannot be accepted for the reason that the Hon'ble Supreme Court in the judgment reported in **(2021) 18 Supreme Court Cases 1 [Newtech Promoters & Developers Private Limited Vs. State of Uttar Pradesh and others]**, has categorically held that the provisions of Section 43(5) are mandatory in nature and the same cannot be waived or modified in any manner. It is appropriate to extract the relevant paragraphs of the said judgment, which reads as follows:

> "...
>
> 78. To safeguard the interests of the parties, on being decided by the regulatory authority/adjudicating officer, it is always subject to appeal before the Tribunal under Section 43(5) provided condition of pre-deposit being complied with can be further challenged in appeal before the High Court under Section 58 of the Act and, thus, the legislature has put reasonable restriction and safeguards at all stages.....
>
> **Question no. 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?**

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120. Before we examine the challenge to the proviso to Section 43(5) of the Act of making pre-deposit for entertaining an appeal before the Tribunal, it may be apposite to take note of Section 43(5) of the Act, 2016. Section 43(5) reads as follows:—

> **"43. Establishment of Real Estate Appellate Tribunal-**
> (1) - (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."

121. 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 % 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.

122. 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.

123. The 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% 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 predeposit 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.

124. 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 2016 Act. This classification between consumers and promoters is based upon the intelligible differentia between the rights, duties and obligations cast upon the allottees/homebuyers 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.

125. 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.

126. It may further be noticed that under the present real estate sector which is now being regulated under the provisions of the 2016 Act, the complaints for refund of the amount of payment which the allottee/consumer has deposited with the promoter and at a later stage, when the promoter is unable to hand over possession in breach of the conditions of the agreement between the parties, are being instituted at the instance of the consumer/allotee demanding for refund of the amount deposited by them and after the scrutiny of facts being made based on the contemporaneous documentary evidence on record made available by the respective parties, the legislature in its wisdom has intended to ensure that the money which has been computed by the Authority at least must be safeguarded if the promoter intends to prefer an appeal before the Tribunal and in case, the appeal fails at a later stage, it becomes difficult for the consumer/allottee to get the amount recovered which has been determined by the Authority and to avoid the consumer/allottee to go from pillar to post for recovery of the amount that has been determined by the Authority in fact,

belongs to the allottee at a later stage could be saved from all the miseries which come forward against him.

127. 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.

128. There are multiple statutes which provide a condition of pre-deposit of a stipulated statutory amount to be deposited before an appeal is entertained by an appellate forum/tribunal for reappraisal of facts and law at the appellate stage and it has been examined by this Court as well. Proviso to Section 18 of SARFAESI Act, 2002 of the Act which provides pre-deposit is as follows:

> **"18. Appeal to Appellate Tribunal (1)* * ***
>
> Provided further that no appeal shall be entertained unless the borrower has deposited with the Appellate Tribunal fifty per cent of the amount of debt due from him, as claimed by the secured creditors or determined by the Debts Recovery Tribunal, whichever is less:
>
> Provided also that the Appellate Tribunal may, for the reasons to be recorded in writing, reduce the amount to not less than twenty-five per cent of debt referred to in the second proviso."

129. The intention of the legislature appears to be to ensure that the rights of the decree-holder (the successful party) is to be protected and only genuine bona fide appeals are to be entertained. While interpretating Section 18 of SARFAESI Act, this Court in Narayan Chandra Ghosh v. UCO Bank, [(2011) 4 SCC 548 : (2011) 2 SCC (Civ) 362] observed as under:—

"8. It is well settled that when a statute confers a right of appeal, while granting the right, the legislature can impose conditions for the exercise of such right, so long as the conditions are not so onerous as to amount to unreasonable restrictions, rendering the right almost illusory. Bearing in mind the object of the Act, the conditions hedged in the said proviso cannot be said to be onerous. Thus, we hold that the requirement of pre-deposit under sub-section (1) of Section 18 of the Act is mandatory and there is no reason whatsoever for not giving full effect to the provisions contained in Section 18 of the Act. In that view of the matter, no court, much less the Appellate Tribunal, a creature of the Act itself, can refuse to give full effect to the provisions of the statute. We have no hesitation in holding that deposit under the second proviso to Section 18(1) of the Act being a condition precedent for preferring an appeal under the said section, the Appellate Tribunal had erred in law in entertaining the appeal without directing the appellant to comply with the said mandatory requirement."

130. In *Har Devi Asnani v. State of Rajasthan*, [(2011) 14 SCC 160 : (2012) 4 SCC (Civ) 801] the validity of proviso to Section 65(1) of the Rajasthan Stamp Act, 1998 came up for consideration in terms of which no revision application could be entertained unless it was accompanied by a satisfactory proof of payment of 50% of the recoverable amount. Relying on the earlier decisions of this Court including in State *of A.P. v. P. Laxmi Devi* [(2008) 4 SCC 720] the challenge was repelled and the view expressed in P. Laxmi Devi [(2008) 4 SCC 720] was repeated *in Har Devi Asnani* [(2011) 14 SCC 160 : (2012) 4 SCC (Civ) 801] wherein this Court held as under:—

"27... '29.In our opinion in this situation it is always open to a party to file a writ petition challenging the exorbitant demand made by the registering officer under

the proviso to Section 47-A alleging that the determination made is arbitrary and/or based on extraneous considerations, and in that case it is always open to the High Court, if it is satisfied that the allegation is correct, to set aside such exorbitant demand under the proviso to Section 47-A of the Stamp Act by declaring the demand arbitrary. It is well settled that arbitrariness violates Article 14 of the Constitution vide Maneka Gandhi v. Union of India [(1978) 1 SCC 248]. Hence, the party is not remediless in this situation.' as observed in State *of A.P. v. P. Laxmi Devi* [(2008) 4 SCC 720]"

131. At the same time, Section 19 of the Consumer Protection Act, 1986 prescribes a condition for pre-deposit which provides that an appeal shall not be entertained unless 50% of the amount awarded by the State Commission or Rs.35,000 whichever is less is deposited before the National Consumer Disputes Redressal Commission (NCDRC). This Court while placing reliance on *State of Haryana v. Maruti Udyog Ltd.[(2000) 7 SCC 348],* in *Shreenath Corpn. v. Consumer Education and Research Society [(2014) 8 SCC 657 : (2014) 4 SCC (Civ) 598]* held that such a condition is imposed to avoid frivolous appeals.

"7. Section 19 of the Consumer Protection Act, 1986 deals with the appeals against the order made by the State Commission in exercise of its power conferred by sub-clause (i) of clause (a) of Section 17 and the said section reads as follows:

"19. Appeals.—Any person aggrieved by an order made by the State Commission in exercise of its powers conferred by sub-clause (i) of clause (a) of Section 17 may prefer an appeal against such order to the National Commission within a period of thirty days from the date of the order in such form and manner as may be prescribed:

Provided that the National Commission may entertain an appeal after the expiry of the said period of thirty days if it is satisfied that there was sufficient cause for not filing it within that period:

Provided further that no appeal by a person, who is required to pay any amount in terms of an order of the State Commission, shall be entertained by the National Commission unless the appellant has deposited in the prescribed manner fifty per cent of the amount or rupees thirty-five thousand, whichever is less."

On plain reading of the aforesaid Section 19, we find that the second proviso to Section 19 of the Act relates to "pre-deposit" required for an appeal to be entertained by the National Commission.

* * *

9. The second proviso to Section 19 of the Act mandates pre-deposit for consideration of an appeal before the National Commission. It requires 50% of the amount in terms of an order of the State Commission or Rs.35,000, whichever is less for entertainment of an appeal by the National Commission. Unless the appellant has deposited the pre-deposit amount, the appeal cannot be entertained by the National Commission. A pre-deposit condition to deposit 50% of the amount in terms of the order of the State Commission or Rs.35,000 being condition precedent for entertaining appeal, it has no nexus with the order of stay, as such an order may or may not be passed by the National Commission. The condition of pre-deposit is there to avoid frivolous appeals."

132. Similarly, under Section 19 of the Micro, Small and Medium Enterprises Development Act, 2006, any appellant, other than the supplier, is required to make a pre-deposit of 75% to maintain an appeal against any decree, award or order

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made either by the Micro and Small Enterprises Facilitation Council or by any institution or centre providing alternate dispute resolution services to which a reference is made by the Council. Section 19 reads as follows:

> "**19.** ***Application for setting aside decree, award or order.***—No application for setting aside any decree, award or other order made either by the Council itself or by any institution or centre providing alternate dispute resolution services to which a reference is made by the Council, shall be entertained by any court unless the appellant (not being a supplier) has deposited with it seventy-five per cent of the amount in terms of the decree, award or, as the case may be, the other order in the manner directed by such court:
>
> Provided that pending disposal of the application to set aside the decree, award or order, the court shall order that such percentage of the amount deposited shall be paid to the supplier, as it considers reasonable under the circumstances of the case, subject to such conditions as it deems necessary to impose."

133. Similarly, the condition of pre-deposit has been examined recently by this Court in *Tecnimont (P) Ltd.* v. *State of Punjab* [(2021) 12 SCC 477] , where the validity of Section 62(5) of the Punjab Value Added Tax Act, 2005 (PVAT) which imposes a condition of 25% of pre-deposit for hearing of first appeal has been upheld. Section 62(5) of the PVAT Act reads as follows:

> "**62.** ***First appeal.*** — (1) (4) * * *
>
> (5) No appeal shall be entertained, unless such appeal is accompanied by satisfactory proof of the prior minimum payment of twenty-five per cent of the total amount of tax, penalty and interest, if any."

134. 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.

135. 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. It is neither an absolute right nor an ingredient of natural justice, 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 precondition, if any, against the order passed by the Authority in question.

136. 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 homebuyers/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 Article 14 or Article 19(1)(*g*) of the Constitution of India.

...

141. The upshot of the discussion is that we find no error in the judgment [*Newtech Promoters & Developers (P) Ltd.* v. *State of U.P.*, 2021 SCC OnLine All 858] impugned in the instant appeals. Consequently, the batch of appeals is disposed of in the above terms. However, we make it clear that if any of the appellant intends to prefer appeal before the Appellate Tribunal against the order of the Authority, it may be open for him to challenge within 30 days from today provided the appellant(s) comply with the condition of pre-

deposit as contemplated under the proviso to Section 43(5) of the Act which may be decided by the Tribunal on its own merits in accordance with law. No costs."

6. On a reading of the judgment of the Apex Court, it is clear that if any appellant intends to prefer an appeal before the Appellate Tribunal against the order of the Authority, they must comply with the condition of pre-deposit as contemplated under the proviso to Section 43(5) of the Act.

7. The learned counsel for the appellant submitted that the promoter was not in receipt of any money, which is being claimed by the home-buyer/allottee for refund and determined in the first place by the Competent Authority.

8. However, the TNRERA has categorically directed the promoter to refund the amount as aforesaid, which is being challenged by the promoter in this appeal.

9. When the Authority had given a categorical finding with regard to the payment of the amounts, the promoter is bound to comply with the provisions of Section 43(5). The submissions made by the learned counsel for the appellant are against the ratio laid down by the Hon'ble Supreme Court.

10. In such view of the matter, we are of the considered view that the appeal preferred by the promoter, challenging the order passed in C.No.400 of 2019 dated 15.12.2023 on the file of the TNRERA without

complying with the provisions of Section 43(5) of the Act, is not maintainable. Accordingly, the appeal in Appeal (SR) No.103 of 2024 is rejected.

Sd/- xxxx
CHAIRPERSON

Sd/- xxxx
JUDICIAL MEMBER

Copy to

1. The TNRERA.

2. Inselli Park Owners Association,
   represented by its Secretary,
   Arun Dhanaraj,
   B-Block, Ground Floor, Jain Inseli Park,
   Old Mahabalipuram Road, Padur,
   Chennai - 600 103.

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