IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

SECOND APPEAL (ST.) NO.92626 OF 2020
WITH
INTERIM APPLICATION NO.92628 OF 2020

M/s Renaissance Infrastructure through its Partners
And Others ... Appellants/Applicants
Versus
Shri Parth B. Suchak
And Another ... Respondents

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Mr. Prasad S. Dani, Senior Advocate i/b Mr. Sachin Pawar for the Appellants/Applicants.

Mr. Rubin Vakil a/w Mr. Prashant Ghelani, Mr. Ankul Kalal and Mr. Vinay Shingada i/b Markand Gandhi & Co. for Respondent No.1.

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CORAM : S.C. GUPTE

DATE : 25 SEPTEMBER 2020

(Oral Judgment)

. Heard learned Counsel for the parties.

2 This second appeal is from dismissal of an appeal preferred under Section 44 of the Real Estate Act for non-compliance with a pre-deposit order passed by RERA Appellate Tribunal. Respondent No.1 was the original complainant before the adjudicating officer-RERA, whereas the Appellant was the respondent-promoter in the

complaint, and who had challenged the order of the adjudicating officer before the Appellate Tribunal.

3 It was the case of the complainant that he had purchased six plots of land together with pre-engineered steel portal framed rectangular building, termed as 'warehousing building', from the respondent promoter under an agreement for sale dated 10 December 2009. It was submitted that possession of the suit premises was to be handed over to the complainant-allottee on or before 9 March 2010. It was submitted that since the possession was not so handed over, as per Condition No.4 of the agreement, the promoter was liable to compensate the complainant for loss of rent, which was agreed at the rate of Rs.10/- per sq. ft. per month. This compensation, according to the complainant, worked out to Rs.5.04 Crores, calculated upto 30 June 2018, that is to say, after the grace period of six months of the agreed date of possession and till the time of filing of the complaint (i.e. for about 80 months). The Adjudicating Officer, by his order dated 20 March 2019, ordered the Appellant herein to pay compensation to the complainant-allottee from 9 September 2010 and till handing over possession of the warehousing building at the rate of Rs.6,30,000/- per month in addition to the direction for handing over possession of the plots with the warehousing building and execution of conveyance in favour of the applicants. This order was carried by the Appellant herein before the Appellate Tribunal, who, by its orders dated 9 January 2020 and 24 January 2020, after considering the

application of the Appellant-promoter herein for waiver of pre-deposit, as per proviso to sub-section (5) of Section 43 of the Real Estate Regulation and Development Act 2016 ("Act"), ordered the Appellant to deposit 50 per cent of the amount computed as per the impugned order before the Appellate Tribunal as a condition for entertaining the appeal. Since this amount was not deposited by the Appellant herein, the appeal was dismissed by the Appellate Tribunal by its final order dated 20 March 2019. These three orders are the subject matter of challenge in the present second appeal.

4 Mr. Dani, learned Senior Counsel appearing for the Appellant, submits that the Appellant was not liable to make any pre-deposit under the proviso to Section 43 (5) of the Act. Learned Counsel urges three grounds in support of his submission. Firstly, it is submitted that the Appellant is not a promoter, since the agreement between the parties, which gave rise to the complaint, was not an agreement for sale, but an agreement in lieu of the Respondent's share in the partnership of the Appellant. It is submitted that Respondent No.1 was an erstwhile partner in the Appellant firm and upon his retirement, the agreement of 10 December 2009 was executed in lieu of his share in the partnership. Mr. Dani, secondly, submits that the original claim of the Respondent was pre-mature and devoid of merit. Learned Counsel, thirdly, submits that the order is in the nature of liquidated damages and the adjudicating officer had no jurisdiction to order such damages.

5 None of the grounds urged by Mr. Dani bears on the liability of the Appellant herein to make a pre-deposit under the proviso of sub-section (5) of Section 43 of the Act. The Appellant has been developing plots of land and entered into an agreement for allotment and sale of six plots within the project, together with a constructed building, to Respondent No.1 herein. Under this agreement, termed as "agreement for sale", the Appellant was bound to hand over possession of the suit premises to the Respondent within an agreed period and execute a conveyance in respect of the same. *Prima facie* this agreement is nothing, but an agreement for sale between a promoter and an allottee. It may be that the allottee was an erstwhile partner of the promoter firm and the agreement was executed with a view to satisfy the allottee's claim towards his share in the partnership upon his retirement. That does not, however, make the agreement any the less an agreement for sale. Afterall, consideration of an agreement for sale, instead of money, may well be any valuable consideration, including satisfaction of the allottee's share in the promoter's partnership. It is nevertheless an instance of allotment and sale of constructed premises with land, its consideration being satisfaction of the allottee's claim in the business and assets of promoter partnership. The project is very much a real estate project; it is being developed by the Appellant as a promoter; and the Respondent is an allottee, to whom plots of land together with a building have been allotted and agreed to be sold (free-hold or lease-hold) or otherwise transferred by the promoter. *Prima facie* all

ingredients of promotership of the Appellant are satisfied in the present case and there is no reason why its appeal before the Appellate Tribunal should not be treated as an appeal filed by a promoter.

6 The two other grounds urged by Mr. Dani also do not support his case against pre-deposit under the proviso to sub-section (5) to Section 43 of the Act. Whether the original complaint before the adjudicating officer was premature and whether damages/compensation awarded by the adjudicating officer were within his jurisdiction, are but matters of merit in the appeal. These matters, even if some of them may go to the root of the order impugned in the appeal, do not call for dispension of pre-deposit under the proviso to sub-section (5) of Section 43, which is mandatory.

7 There is, in the premises, no infirmity in the impugned orders passed by the Appellate Tribunal. The orders do not give rise to any substantial question of law for the consideration of this court. The Second Appeal is, accordingly, dismissed.

8 In view of the dismissal of the second appeal, the Interim Application does not survive and is disposed of.

9 The Appellant is given four weeks' time to pay the amount ordered by the adjudicating authority, RERA. Though the attachment

shall continue during this period of four weeks, no sale of attached property shall be conducted by the Tehsildar in execution.

10 Mr. Dani applies for stay of the impugned order. Since the Appellant is given four weeks' time to pay, with directions to the executing authority not to go ahead with the sale for this period of four weeks, no separate order of stay is necessary.

11 Needless to add that if the amount is not paid within four weeks, the Tehsildar may proceed with the sale of the attached property.

12 This order will be digitally signed by the Personal Assistant of this Court. All concerned will act on production by fax or email of a digitally signed copy of this order.

(S.C. GUPTE, J.)