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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Date of decision: 05.12.2024

\+ RERA APPEAL 7/2024

UMANG REALTECH PVT LTD.....Appellant

Through: Mr. J. Sai Deepak, Sr. Adv. with Mr. Arpit Dwivedi and Ms. Manmeet Nagpal, Advs.

versus

MRS DAPHNE REITA RAJAN SHARMA & ANR.

.... Respondents

Through: Mr. Shivendra Singh, Adv. for R-1.

CORAM:
HON'BLE MR. JUSTICE NAVIN CHAWLA
HON'BLE MS. JUSTICE SHALINDER KAUR

NAVIN CHAWLA, J. (ORAL)

1. This appeal has been filed by the appellant under Section 58 of the Real Estate (Regulation & Development) Act, 2016 (in short, 'RERA'), challenging the Order dated 04.03.2024, passed by the learned Real Estate Appellate Tribunal, dismissing the application filed by the appellant herein by which the appellant had offered the attachment of a flat in lieu of the requisite pre-deposit as mandated under Section 43(5) of the RERA.

2. The learned Senior Counsel for the appellant submits that the learned Tribunal has failed to appreciate that, in terms of the Order dated 20.08.2019, passed by the learned National Company Law

Tribunal, Principal Bench, New Delhi (in short, 'NCLT'), in CP No. IB-1564(PB)/2018 titled ***Rachna Singh & Anr. vs. Umang Realtech Pvt. Ltd.***, while admitting the application filed under Section 7 of the Insolvency and Bankruptcy Code, 2016 (in short, 'IBC'), a moratorium has been granted for any claim against the appellant company. He submits that, therefore, insisting on a pre-deposit under Section 43(5) of the RERA would, in fact, be contrary to the spirit of the order passed by the learned NCLT.

3. He further submits that the appeal, having been filed by the Interim Resolution Professional (in short, 'IRP'), in fact, cannot be considered as an appeal filed by a 'Promoter' and, therefore, the rigours of Section 43(5) of the RERA would not be applicable.

4. The learned Senior Counsel for the appellant submits that, in any case, the spirit of Section 43(5) of the RERA is fulfilled by the appellant offering a security against the pre-deposit requirement. He submits that the appellant is facing a financial crunch and the purpose of the RERA is only to secure the respondents, and the interest of the respondents would be fully secured by offering a security by the appellant.

5. On the other hand, the learned counsel for the respondents submits that the order dated 20.08.2019, passed by the learned NCLT, has been explained by the learned National Company Law Appellate Tribunal (in short, 'NCLAT') by way of its Order dated 04.02.2020, passed in Company Appeal (AT) (Insolvency) No. 926 of 2019, titled ***Flat Buyers Association Winter Hills – 77, Gurgaon vs. Umang Realtech Pvt. Ltd. through IRP & Ors.*** The learned NCLAT clarified

that the insolvency proceedings against the appellant are confined to the particular development project at Gurugram and it shall have no effect on the other projects being carried out by the appellant. He submits that, therefore, the benefit of the Order dated 20.08.2019 passed by the learned NCLT cannot be obtained by the appellant to seek exemption from complying with the provisions of Section 43(5) of the RERA, especially, in view of the Judgment of the Supreme Court in ***New Tech Promoters and Developers Pvt. Ltd. vs. State of Uttar Pradesh & Ors.***, (2021) 18 SCC 1.

6. In rejoinder, the learned Senior Counsel for the appellant insists that the Order dated 04.02.2020, passed by the learned NCLAT does not, in any manner, revoke the moratorium that has been issued by the learned NCLT *vide* its Order dated 20.08.2019, which is as against the appellant company and not against one particular project being undertaken by the appellant company. He further reiterates that in any case, once the appellant is offering the security of a flat to the respondents, the purpose of Section 43(5) of the RERA is met.

7. We have considered the submissions made by the learned counsels for the parties.

8. Section 43(5) of the RERA reads as under:-

> *"(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 atleast 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.*

9. In ***New Tech Promoters and Developers Pvt. Ltd. (supra)***, the Court upheld the above provision by observing as under:-

> *"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-à-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 reappraisal 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.

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... ...

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."*

10. In the present case, the learned Senior Counsel for the appellant has submitted that, in view of the moratorium issued by the learned NCLT *vide* its Order dated 20.08.2019, a special exemption should be granted to the appellant from making the mandatory pre-deposit for the appeal filed before the Real Estate Appellate Tribunal. We are unable to agree with the said submission.

11. The learned NCLAT, by a subsequent Order dated 04.02.2020, has clarified the effect of the order passed by the learned NCLT and the scope of the moratorium that has been issued in the following terms:-

> *"21. In Corporate Insolvency Resolution Process against a real estate, if allottees (Financial Creditors) or Financial Institutions/Banks (Other Financial Creditors) or Operational Creditors of one project initiated Corporate Insolvency Resolution Process against the Corporate Debtor (real estate company), it is confined to the particular project, it cannot affect any other project(s) of the same real estate company (Corporate Debtor) in other places where separate plan(s) are approved by different authorities, land and its owner may be different and mainly the allottees (financial creditors), financial institutions (financial creditors, operational creditors are different for such separate project. Therefore, all the asset of the company (Corporate Debtor) are not to be maximized. The asset of the company (Corporate Debtor - real estate) of that particular project is to be maximized for balancing the creditors such as allottees, financial institutions and operational creditors of that particular project. Corporate Insolvency Resolution Process should be project basis, as per approved plan by the Competent*

> *Authority. Any other allottees (financial creditors) or financial institutions/ banks (other financial creditors) or operational creditors of other project cannot file a claim before the Interim Resolution Professional of other project and such claim cannot be entertained.*
> *So, we hold that Corporate Insolvency Resolution Process against a real estate company (Corporate Debtor) is limited to a project as per approved plan by the Competent Authority and not other projects which are separate at other places for which separate plans approved. For example - in this case the Winter Hill - 77 Gurgaon Project of the 'Corporate Debtor' has been place of Corporate Insolvency Resolution Process. If the same real estate company (Corporate Debtor herein) has any other project in another town such as Delhi or Kerala or Mumbai, they cannot be clubbed together nor the asset of the Corporate Debtor (Company) for such other projects can be maximised."*

12. The learned NCLAT has, therefore, clarified that the Insolvency Resolution Process is only with respect to one of the projects being undertaken by the appellant company, which, we are informed, is not the same as the one which is the subject matter of the proceedings before the Real Estate Appellate Tribunal. The appellant, therefore, cannot seek any benefit of the moratorium that has been issued by the learned NCLT for seeking an exemption from making the pre-deposit in terms of Section 43(5) of the RERA.

13. As far as the plea of learned Senior Counsel for the appellant that the appeal, having been filed by the IRP, cannot be considered to have been filed by the 'Promoter' is concerned, we again do not find any merit. The IRP is representing the company itself, that is, the 'Promoter' and therefore, is to be considered as a 'Promoter' for the purposes of the appeal and the application of provisions of Section 43(5) of the RERA.

14. We also do not find any merit in the submission of the learned senior counsel for the appellant that as the appellant is offering security of a flat, it should be granted an exemption from making the pre-deposit in terms of Section 43(5) of RERA. As noted hereinabove, the condition of making a pre-deposit as a pre-condition for the hearing of the appeal has been upheld by the Supreme Cour. The said provision does not leave any scope for granting an exemption from making the pre-deposit and instead accepting a security.

15. We, therefore, find no merit in the present appeal. The same is, accordingly, dismissed.

16. The learned Senior Counsel for the appellant, at this stage, prays that at least an exemption be granted from making a deposit of the entire penalty amount as a pre-condition for the appeal. This aspect has not been considered by the learned Real Estate Appellate Tribunal, and therefore, we need not comment at this stage. It shall be open to the appellant to seek appropriate relief in this regard before the learned Real Estate Appellate Tribunal.

NAVIN CHAWLA, J

SHALINDER KAUR, J

DECEMBER 5, 2024/ss/sk/DG

Click here to check corrigendum, if any