

**BEFORE THE WEST BENGAL REAL ESTATE APPELLATE TRIBUNAL
KOLKATA - 700 075**

APPEAL NO. WBREAT/APPEAL No. – 03/2023

- Present: 1. Shri Gour Sundar Banerjee
Hon'ble Judicial Member
2. Shri Subrat Mukherjee
Hon'ble Administrative Member

M/s JALAN BUILDERS PRIVATE LIMITED

Marbel Arch, 2nd floor, 236 B,
AJC Bose Road, Kol – 700 020

..... Appellant

Vs.

SMT SWAPNA ROY AND SHRI PRABUDDHA KUMAR ROY

Flat No. 1C-9/10, Thakurpukur Co-Op Housing
Society Ltd.(Phase-1), 263, M.G. Road,
P.S. Haridevpur, Kolkata – 700 104.

..... Respondent

Order No. 03 dated 21/07/2023

The record is placed before the Bench for order which arose out of admission hearing of the instant Appeal in presence of both sides. This defective Appeal has been filed on 10/07/2023 by **JALAN BUILDERS PRIVATE LIMITED** (hereinafter “the applicant / promoter) challenging the order dated 11.04.2023 passed by West Bengal Real Estate Regulatory Authority U/s 44 of the RERA Act 2016 (hereinafter “the Act’), in complaint case No. WBREERA/COM(PHYSICAL) – 000028/2023. Perused the office note sheets which indicates that the Applicant filed the Memorandum of Appeal within limitation period along with the DD No. 518722 dated 01/07/2023 of Rs. 1,000/- (Rupees one thousand) only, in favour WBREAT. But there is a defect namely – non compliance of the mandatory provisions of section 43(5) of the Act 2016.

Let us see what section 43(5) of the act 2016 states.

Section 43(5) of the act 2016 states that any person aggrieved by any direction or decision 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 30 per cent of the penalty or such highest 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.**

Now let us see the rulings of Hon'ble Court in this regard.

Hon'ble Allahabad High Court in second Appeal No. 364 of 2018, Radicon Infrastructure and Housing Private Ltd. Vs. Karan Dhyani, framed the following issues regarding complete compliance of the provisions of section 43(5) of the Act, it is observed in Para 15 as under “the reason this court has framed the additional substantial question of law is to give a quitus to the issue with record to the meaning purport an application of the proviso to section (5) of section 43 in the facts and circumstances of the case, so that the case does not get unnecessarily lingered before the first Appellate Tribunal on this issue”. The Hon'ble Court further observed, “ the Court is of the view that as per the said proviso the Appellate Tribunal can require either the penalty or portion thereof or the total amount to be paid to the allottee including interest and compensation imposed on him to be deposited before the Appeal is heard for being entertained, i.e. for being admitted for consideration or it can require the promoter Appellant to deposit both meaning thereby, the penalty as well as the total amount refund hereinabove. **With regard to the penalty the Appellate Tribunal has to determine whether 30 percent of penalty imposed or such a higher percentage as it may determine is to be deposited, but “when it gives 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 passed on ‘determine’ appears to have been vested in the Appellate Tribunal by the legislature the object appears to be to protect the interest of the consumer once at the adjudication had been made by the Regulatory Authority”.**

Hon'ble Madras High Court while examining the validity the provisions of section 43(5) of the Act 2016 in W.P. No. 29933 of 2019 and WMP No. 29844 of 2019 (T. Chitty Babu Vs. Union of India) observed in Para 27 that an Appeal can be instituted by a Ministerial Act of its presentation and physical filing in the office of the Appellate Authority **but it cannot be entertained unless the pre deposit has been made and no order can be passed by Appellate Tribunal by either issuing a notice or such a incompetent Appeal or otherwise and it can only be entertained and then heard,** provided the aggrieved party, in the present case petitioner **deposit the**

amount as per the provision of section 43(5) of the 2016 Act unless there is an order of the High Court of the Apex Court otherwise.

In civil Appeal numbers 6745-6749 of 2021 arising out of SLP (civil No. (s)3711-3715 of 2021) in the case of Newtech Promoters and Developers Pvt. Ltd. Vs State of UP and others, etc. **Hon'ble Apex Court**, while examining the question – **“whether the condition of the pre deposit under provision to section 43(5) of the Act for entertaining substantive of Appeal is sustainable in Law?**, has been pleased to observe in page 88 and 89, Para 135, 136 that the intention of the instant legislation appears to be the promoters ought to show their bonafides by depositing the amount so contemplated. It is indeed the right of Appeal (Para 136) 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 principle of which must be followed in all judicial and Quasi Judicial litigations and it is always be circumscribed with the condition of grant at the given time, it is open for the legislature in its wisdom to enact a law that no Appeals shall lie or **it may lie on fulfilment of precondition**, if any, against the order passed by the Authority in question”.

It is further observed by **Hon'ble Apex Court** in Para 137, **“That in our 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 home buyers / allottees for refund and determined in the first place by the Competent Authority, if legislature in its wisdom intended to ensure that money once determining 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 U/s 43(5) of the Act, in no circumstances can be said to be onerous as prayed for or in violation of Article 14 or 19(1) (g) of the Constitution of India”.**

So in view of this discussion and judgments of the Hon'ble Court, it can safely be said that **pre-deposit under section 43(5) of Act, 2016 is mandatory before institution of any appeal under this Act.**

In the instant case vide impugned order No” 2 dated: 11.04.2023 passed by Ld. WBRERA Authority in complaint no: WBRERA/COM(PHYSICAL)-000028/2023, the petitioner (**JALAN BUILDERS PRIVATE LIMITED**) was directed to refund the principal amount of Rs. 26,79,412/- (Twenty six lakh seventy nine thousand four hundred

twelve minus GST amount and the registration fee, if already paid) + interest @ S.B.I Prime landing rate+2% to the complainant (respondent) but no penalty is imposed.

So in this case the Petitioner (JALAN BUILDERS PRIVATE LIMITED) is to comply the mandatory provision of section 43(5) of act 2016 by depositing the entire Principal money + Interest by Demand Draft of Rs 26,79,412/- minus GST & Registration fees + interest till the date of filing Appeal on 10/07/2023 in favour of West Bengal Real Estate Appellate Tribunal, Kolkata within 07.08.2023 so that this case may be entertained and heard.

It may be mentioned that Ld. Advocate for the petitioner will have to submit the certificate regarding calculation of the interest at the time of depositing Demand Draft and he is also to submit the receipt of payment of GST and Registration Fee. It may be mentioned that though respondent filed an affidavit along with calculation sheet of interest but as the case is in pre-admission stage, the Bench will rely on the calculation sheet of the Ld. Advocate / Legal Representative of Appellant.

Be it mentioned that in the event of compliance by depositing the above stated amount by Demand Draft, the Secretary in-charge of West Bengal Appellate Tribunal shall ensure deposit of such Demand Draft in the Account of this Appellate Tribunal with direction upon the Branch Manager of the concerned Bank (where the account of this office is lying) to encash the amount of said Demand Draft immediately and to deposit the same in any short terms' interest bearing scheme and the said amount shall lie in that scheme until further order received from this end. Bank Manager is also to be directed to mention the condition of **“Premature withdrawal as per order of Court”** on the FD certificate.

It may further be mentioned that non-compliance of direction of this Tribunal on the part of JALAN BUILDERS PRIVATE LIMITED, this case will automatically be dismissed for non- compliance of the order of this Tribunal.

Let a copy of this order be sent by e-mail to the petitioner **JALAN BUILDERS PRIVATE LIMITED**, O.P./ respondent, Secretary in-charge of this Tribunal and WBRERA Authority. Inform all concerned as usual.

Written & Dictated.

Shri Gour Sundar Banerjee
Judicial Member
West Bengal Real Estate
Appellate Tribunal

Shri Subrat Mukherjee
Technical/Administrative Member
West Bengal Real Estate Appellate
Tribunal