

SUMMARY NOTE

Judgment title – Experion Developers Private Limited vs. State of Haryana and others. (and other connected matters)

Decided by – High Court of Punjab and Haryana at Chandigarh.

Coram – S. Muralidhar, J. and Avneesh Jhingan, J.

Decided on – 16.10.2020

ISSUES:

1. Whether the proviso to Section 43 (5) of the Real Estate Regulation and Development Act, 2015 ('the Act') and correspondingly the order passed by the Real Estate Appellate Tribunal ('Appellate Tribunal') rejecting the prayer of the some Petitioners for waiver of pre deposit for entertaining the appeal against the order of Real Estate Regulatory Authority ('Authority') or Adjudicating Officer ('AO') is constitutionally valid?
2. Whether Rules 28 and 29 of the Haryana Real Estate (Regulation and Development) Rules, 2017 ('Haryana Rules') as well as forms CRA and CAO as amended by Haryana Real Estate (Regulation and Development) Amendment Rules, 2019 notified on 12.09.2019 ('Haryana Amendment Rules 2019') are ultra vires the Act? What is the scope and jurisdiction of the Authority and the AO, respectively, in relation to complaints under the Act?
3. Whether the Act is applicable retroactively to 'ongoing' Projects?

FACTS:

Forty Four (44) Writ Petitions were filed under Article 226 of the Constitution, raising several issues of law concerning the interpretation of the provisions of the Act as well as Haryana Rules. The matters were connected and heard at length by the Hon'ble High Court.

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ISSUE I: Challenge to the proviso to Section 43 (5) of the Act

The Hon'ble Court relied on the decision of the Apex Court in *M/s. Technimont Pvt. Ltd. vs. State of Punjab* which held that - "the right to appeal is the creature of a statute and therefore, is and can be made conditional upon fulfilling certain conditions by the statute itself and therefore, any requirement of fulfillment of a condition imposed by the statute itself before a person can avail the remedy of appeal is a valid piece of legislation. The Appellate Authority does not have the inherent powers to waive the limitation or precondition prescribed by the statute for filing an appeal as the inherent incidental or implied powers vested in the Appellate Authority cannot be invoked to render a statutory provision nugatory." Negating the plea that requiring only the promoters who are in appeal to make the pre deposit as a condition to entertaining their appeal was discriminatory, the Hon'ble Court relied on the decision of the Division Bench of this Hon'ble High Court in *M/s. Lotus Realtech Pvt. Ltd. vs. State of Haryana* wherein it was held that the Act makes it apparent that the promoters and Allottees form two distinctly identifiable separate class of persons. The condition of pre-deposit imposed upon the promoters is inconsonance with and in furtherance of the object and purpose of the Act which seeks to eradicate fraud and delays resorted to by the promoters. The Hon'ble Court also placed reliance on *M/s. Landmark Apartments Pvt. Ltd. vs. Union of India* which came to the conclusion that it cannot be held that the condition of pre-deposit is either illegal or onerous, thereby rendering the appeal illusory. The Landmark Apartments case (supra) has also rejected that where the ground of appeal was that the order of the Authority lacked jurisdiction since the complaint would lie only before the AO, the condition of pre-deposit would not apply.

The Hon'ble Court held that the Appellate Tribunal is not obliged to proceed to 'entertain' or hear an appeal that has been filed before it, if the promoter, who has filed such appeal, fails to comply with the direction for making the pre-deposit in terms of the proviso to Section 43 (5) of the Act. Where the Appellate Tribunal rejects the plea of the

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Appellant for waiver of pre-deposit, it grants one more opportunity to the Appellant to make the pre-deposit within reasonable time failing which it will proceed to dismiss the appeal. However, there cannot be indefinite postponement of the date by which the pre-deposit has to be made, otherwise it would defeat the very object of the Act. The Hon'ble Court rejected the request of Petitioners to be granted further time beyond the date as stipulated by the Appellate Tribunal or where the appeals have been rejected on account to failure to make the pre deposit.

Discretionary jurisdiction under Article 226 – The Hon'ble Court noted that in *M/s. Technimont Pvt. Ltd. (supra)*, the Apex Court had observed that the power of High Court under Article 226 of the Constitution, in rare cases of genuine hardship, to waive the requirement of pre-deposit either wholly or in part, continued. The Court observed that no satisfactory case of 'genuine hardship' has been made out in these Writ Petitions. It was observed that in none of the cases, the Authority can be held to have exercised a jurisdiction that it lacked and its orders cannot be said to be without jurisdiction. Therefore no interference of the High Court under Article 226 is warranted under these circumstances.

ISSUE II: Challenge to amended Rules 28 and 29 of the Haryana Rules

With regards to various arguments of the Petitioners, the Hon'ble Court observed the following:

1. The Petitioners argued that the requisite qualifications for being appointed as an AO compared with the qualifications for being member of Authority shows that it is only AO who is intended to undertake the adjudicatory functions. The Hon'ble Court negated the plea of the Petitioner that in the absence of Chairperson and Members of the Authority not mandatorily being required to have legal/judicial background from variety of other fields, no adjudicatory function can be entrusted to the Authority. The Court observed that there is no mandatory requirement for the Authority to have a judicial member who has the qualifications of judicial officer.

2. The Court stated that it is not correct to equate the powers of the Authority with that of the AO as they operate in different sphere. The scope of the adjudicatory powers of the AO is limited to determine compensation and interest in the event of violation of Sections 12, 14, 18 and 19 of the Act. The question of compensation arises only in relation to the failure of the promoter to discharge his obligations. Therefore, in a complaint for compensation or interest in terms of Section 71 of the Act, the complainant would be the allottee and the Respondent would be the promoter. However, the powers of the Authority to inquire into complaints are wider in scope. Under Section 31 of the Act, a complaint before the Authority can be against any promoter/allottee/real estate agent, as the case maybe. The powers or adjudication are vested only with the Authority and not with the AO. Further, the power and scope of the functions of the Authority are not limited to determining penalty or interest. The wide range of powers conferred on Authority can be evident from Section 31, 34 (f), Section 35, 36 and 37. The Power to issue interim orders and power to issue directions under Section 36 and Section 37 respectively are not available to AO.
3. The Court observed that the expression 'interest' as used in Section 18 of the Act is a pre-determined rate, as may be fixed by the government and is distinct from the interest by way of compensation that has to be computed by the AO in terms with Section 71 (3) keeping in view the factors outlined in Section 72 of the Act. When it comes to the question of seeking relief of compensation or interest by way of compensation, the AO alone has the power to determine it. Further, on reading Section 71 and 72 of the Act, it is explicit that the AO has to adjudge the 'quantum of compensation'.
4. The Court discussed that Section 71 (1) has to be read with Section 88 of the Act. It is not mandatory for a person who has filed a complaint before consumer fora to have his complaint transferred to the AO, as both the remedies can be pursued

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simultaneously. However, if the complaint is withdrawn from the consumer fora to come to the AO, the scope of the relief would be limited to the compensation or interest. For remaining relief, such person will have to go to the Authority.

5. The Court reiterated that if a complainant is seeking only compensation or interest by way of compensation simpliciter with no other relief, then the complainant would straightaway file a complaint before AO. The complaint will be filed in form CAO and will be referable to Rule 29 of the Haryana Rules. The AO in such instance would proceed to determine the violations under Section 12, 14, 18 and 19 of the Act. Therefore, no question of inconsistent order would arise. If, however, a single complaint is filed seeking combination of reliefs with one of the reliefs being relief of compensation and payment of interest, then in such instance, the complaint will be first examined by the Authority which will determine if there is a violation of provisions of the Act. If the Authority comes to an affirmative conclusion regarding the violations, then for the limited purpose of adjudging the quantum of compensation or interest, refer the complaint to AO for that limited purpose, who will proceed to determine the quantum of compensation or interest as per factors outlined under section 72 of the Act. Therefore, the powers of the Authority under Section 31 read with Sections 35 to 37 of the Act will not overlap the functions of the AO under Section 71 of the Act.
6. The Hon'ble Court noted that Rules 28 and 29 of Haryana Rules as amended seek to give effect to the harmonized construction of the provisions of the Act concerning the powers of the Authority and of the AO. The amended Rule 28 (1) of the Rules, in so far as it requires the Authority to first determine violations of the Act and then if it finds existence of such violations to refer the matter to the AO only where there is prayer for compensation and interest by way of compensation. Rule 29 of the Haryana Rules is also consistent with this clear delineation of the adjudicatory powers of the Authority and the AO respectively, therefore Rules 28 and 29 or the amendments to Forms CRA and CAO are not ultra vires of the Act.

The Hon'ble Court has taken the position that as long as the complaint yet to be decided as on date of the notification of Haryana Amendment Rules 2019 will now be decided consistent with the procedure outlined under amended Rules 28 and 29. Therefore, if the pending or future complaint seeks only compensation or interest by way of compensation, and no other relief, it will be examine only by AO. If the pending or future complaint seeks reliefs other than the aforementioned, then the complaint will have to be examined by the Authority. If combination of reliefs is sought in a pending or future complaint, then it will be examined first by the Authority and if the Authority finds any violation of Section 12, 14, 18 and 19, and if the complaint is by Allottee, then for determining the quantum of compensation, such complaint will be referred by Authority to AO in terms of amended Rule 28 of the Haryana Rules.

ISSUE III: Retroactive application of the Act to 'ongoing Projects'

Relying on Bombay High Court's decision in *Neelkamal Realtors Suburban Pvt. Ltd. vs. Union of India*, the Court held that there is nothing unreasonable and arbitrary in making the provisions of the Act applicable to all ongoing projects. The legislature was conscious of the impact the Act would have on ongoing projects, i.e. those for which a CC has yet not been received by the promoter. A collective reading of Section 3 with Section 2 (o) and 2 (zn) indicate that care was taken to specify which projects will stand exempted. Therefore, without satisfying the requirements under Section 2 (a) and 2 (c) of the Act, a promoter cannot avoid registration of an 'ongoing project'. If it is the case of a promoter that the CC has been deliberately delayed then such issue will be examined the by AO, the Authority or the Appellate Tribunal.

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