(2025) 06 SHI CK 0728

In the High Court Of Himachal Pradesh

Case No : MSA Nos.4,5, 6 Of 2022

Himland Executive Residences (Himland Housing (P) Ltd.) APPELLANT

Vs

Gaj Raj Sahrawat And Others RESPONDENT

Date of Decision : 24-06-2025

Acts Referred:
Himachal Pradesh Land Revenue Act, 1953 — Section 163, 163A, 169

Citation : (2025) 06 SHI CK 0728

Hon'ble Judges : Vivek Singh Thakur, J;Bipin Chander Negi, J

Bench : Single Bench

Advocate : I.D. Bali, Hitesh Bali, Anup Rattan, Seema Sharma

Final Decision : Dismissed

Judgement

Jyotsna Rewal Dua, J

1. All these appeals are interlinked and interconnected, hence have been taken up together for disposal, however, for the sake of convenience, facts from MSA No.4 of 2022 are being referred to .

This miscellaneous second appeal has been preferred under Section 58 of the Real Estate (Regulation and Development) Act, 2016 (in short 'the Act') against the orders dated 13.05.2022 and 01.06.2022 passed by the learned Haryana Real Estate Appellate Tribunal, Chandigarh (exercising power conferred by Section 43(1), (2) and (4) of the Act for Himachal Pradesh also). Under the mpu ned order dated 13.05.2022, learned Appellate Tribunal granted the appellant time to comply with the proviso to Section 43(5) of the Act by depositing the entire amount payable to the respondent-allottee as adjudged by the Real Estate Regulatory Authority (RERA) Himachal Pradesh alongwith 30% of the amount of penalty imposed by RERA on or before 30.05.2022. Upon failure of the appellant to comply with the aforesaid order despite grant of sufficient opportunity, its appeal was dismissed by the learned Appellate Tribunal under the second impugned order dated 01.06.2022.

2. Following facts emerge from the joint submissions made for the parties: -

2(i). The appellant-Company is engaged in the business of Real Estate Development. For developing group housing project over the land situated in Damrog, District Solan, HP, the appellant got i s project registered under the provisions of the Act. The said egistration of the project was valid till 10.05.2024. According to the appellant, its aforesaid housing pr ject consisted of three blocks, i.e. Blocks 'A', 'B' and ' '; 80% of the construction in Block-A was completed by constructing 36 flats; Construction of Blocks-B and C could not start.

2(ii). Respondent No.1 lodged a complaint on 31.03.2021 before Real Estate Regulatory Authority (RERA), Himachal Pradesh with the allegation that he had booked a specific flat in Block-A and had paid an advance amount of Rs.70,000/- on 31.05.2006 by cheque at the time of submitting the application form. That he had made total payment of Rs.8,90,500/- against total cost of Rs.14,00,000/-. The remaining amount was to be paid at the time of offer of possession by the appellant. Complainant's grievance was that possession had not been handed over to him. He sought refund of the amount paid by him alongwith interest, besides claiming compensation under several heads.

2(iii). RERA, Himachal Pradesh adjudicated the complaint on 06.09.2021 and issued following directions:-

"21. Relief:-

Keeping in view he abovementioned facts, this Authority in exercise of power vested in under various provisions of the Act issues the following orders/ directions:

"i. The Complaint is allowed and the Respondent promoters are directed to refund a sum of Rs. Eight Lakh and Ninety Thousand (Rs. 8,90,000/-). along with interest at the BI highest marginal cost of lending rate plus 2% as prescribed under Rule 15 of the Himachal Pradesh Real Estate (Regulation & Development) Rules, 2017. The present highest M LR of SBI is 7.3 % hence the rate of interest would be 7.3 %+2 % i.e.9.3%. It is clarified that the interest shall be payable from the dates on which different payments were made by the Complainant to the respondent till date the amount and interest thereon is refunded .

ii. The refund along with interest is to be paid by the respondent promoter to the complaint within 60 days from the date of this order.

iii. That in view of Section 61 of the Act which prescribes the maximum penalty that could be imposed for the contravention of any other provision of the Act other than Section 3 and 4, as five percent of the total cost of the project. The Authority, considering all facts of the case, deems appropriate to impose a penalty of Rs. Three Lakh in case the respondent promoter fails to comply with the present order/directions passed by this Authority within stipulated period of sixty days.

iv. It is further ordered that no withdrawal from the bank account of the projects to be made till payment as ordered is made to the complainant and penalty is deposited into the account of Authority. Further, there shall not be any alienation of any movable and immovable assets of this project till compliance of this order.

v. The respondent promoter is directed to intimate the details of their bank accounts pertaining to this project within fifteen days.

vi. The complainant shall be at liberty to approach the Adjudicating Officer for compensation under Section 71 of the Act ibid."

By the aforesaid order, RERA allowed the complaint and directed the appellan / promoter to refund to respondent No.1 a sum of Rs.8,90,00/- (Rupees Eight Lakh Ninety Thousand only) along with interest. The rate of interest applied was 7.3% + 2%, i.e. 9.3% (highest marginal cost of lending rate as per SBI Guidelines plus 2% as per Rule 15 of the Himachal Pradesh Real Estate (Regulation and Development) Rules, 2017). The interest was held payable from the dates on which different payments were made by respondent No.1 to the appellant till the actual date of payment and refund of interest thereon. The appellant was further directed to refund the above amount alongwith interest to respondent No.1 within 60 days from the date of the order. Further, in view of Section 61 of the Act, penalty of Rs.3 Lakh was imposable upon the appellant upon its failure to comply with the order within the stipulated period of 60 days. RERA, Himachal Pradesh also ordered that no withdrawal from appellant's bank account of the projects would be allowed till payment in terms of the order is made by it to respondent No.1 and penalty is deposited into the account of the Authority (RERA). Appellant was further restrained from alienating its movable and immovable assets of the project till compliance of the order. Appellant was also directed to furnish the details of its bank accounts per aining to the project within 15 days.

2(iv) Against the aforesaid order dated 06.09.2021, passed by the RERA, Himachal Pradesh, the appellant instituted WP No.7152 of 2021 (CWP Nos. 7153 & 7154 of 2021 in the other two appeals) before this Court, which was dismissed as withdrawn on 17.11.2021 as under:-

" Learned counsel for the petitioner(s), states that she is under instructions not to press these petitions. Her statement is taken on record. Consequently, the instant potions are dismissed as not pressed, so also the pending application(s), if any."

2(v) Subsequently, the appellant preferred appeal under Section 44 of the Act alongwith three applications viz (i) application for condonation of delay in refiling the appeal; (ii) Condonation of delay in filing the main appeal and; (iii) Waiver of condition of pre-deposit as required under proviso to Section 43(5) of the Act.

The applications moved by the appellant came up for consideration before the learned Tribunal on 13.05.2022. The appellant urged before the learned Tribunal that under direction No. iv of the impugned order dated 06.09.2021, RERA had restrained it from withdrawing from its bank acc unt, it had also been restrained from alienating its asse s till compliance of the impugned order; There was no other project of the appellant. The appellant had no source to raise funds to make pre-deposit, hence, condition of pre-deposit be waived in its favour.

Learned Tribunal did not find any substance in the contentions of the appellant. It held that no provision n the Act empowers the Tribunal to alter/waive/modify the

conditions of pre-deposit. That M/s Technimont Pvt. Ltd. Vs. State of Punjab (2021) 12 SCC 477 categorically holds that the Appellate Tribunal has no jurisdiction to waive the condition of pre-deposit. Union Bank of India Vs. Rajat Infrastructure Pvt. Ltd and others (2020) 3 SCC 770 and Kotak Mahindra Bank Pvt. Limited Vs. Ambuj A. Kasliwal & Ors (2021) 3 SCC 549 were also relied upon on the same proposition.

Learned Appellate Tribunal also considered the decision rendered by the Division Bench of Punjab & Haryana High Court in Ramprastha Promoters and Developers Pvt. Ltd. Vs. Union of India and Ors 2022 (2) R.RC.R (Civil) 652, CWP No.6688 of 2021 decided on 30.01.2022, which in turn had relied upon the law laid down in M/s Newtech Promoters & Developers Pvt. Ltd. Vs. State of UP & Ors.Etc. (2021) 18 SCC 1 to hold that Sec ion 43(5) mandates a pre-deposit for preferring an appeal. It is only under Article 226 of Constitution of India, a High Court exercising its jurisdiction in an appr priate case, can alter/modify/waive the requirement of mandatory pre-deposit. After considering the factual & legal pleas urged by the appellant and considering that even after expiry of the period allowed under the impugned order passed by the RERA on 06.09.2021, the requisite amount had not been deposited by the appellant-promoter as also the other factors governing the issue, the learned Tribunal dismissed the application filed by the appellant for waiver of condition of pre-deposit with costs of Rs.50,000/-. In the interest of justice, the appellant was granted time to comply with the proviso to Section 43(5) of the Act by depositing whole of the amount payable to the respondent-allottee as adjudged by the RERA in the impugned order, which had become due as on the date of filing of the appeal alongwith 30% of the amount of penalty imposed by the RERA on or before 30.05.2022. Operative paragraphs from the impugned order passed by the learned Tribunal n 13.05.2022 (Annexure A-9) read as under:-

"18. Thus, keeping in view our aforesaid discussion, the application filed by the appellant for waiver of the condition of pre-deposit is hereby dismissed with Rs.50,000/- as costs. The costs be deposited with the Himachal Pradesh State Legal Services Authority, Shimla.

19 However, in the interest of justice the appellant is granted time to comply with the proviso to Section 43(5) of the Act by depositing the requisite amount i.e. whole of the amount payable to the respondent-allottee as adjudged by the learned Authority in the impugned order and has become due as on the date of

filing the present appeal alongwith 30% of the amount of penalty imposed by the learned Authority, on or before 30.05.2022.

20. Now to come up on 31.05.2022 for seeing the compliance of this order and further appropriate proceedings."

On the next date, two applications were moved on behalf of the appellant before the learned Tribunal. The first was to seek adjournment on account of appellant's having engaged a new counsel and second was to allow the appellant to operate the Bank account and to deal with its project property for arranging the funds for complying with the conditions of pre-deposit in terms of Section 43(5) of the Act. The application for adjournment was dismissed as not pressed. Learned Tribunal dismissed sec nd application of the appellant on the ground hat he appellant had not stated in its affidavit that no other account was maintained by it; The appellant had not even attached statement of account of the acc unts f the project to show that there was sufficient balance in the accounts for meeting the requirements of Section 43(5) of the Act; The appellant had not even mentioned in its affidavit that it had no property except the project property for raising the funds. Learned Tribunal concluded that application had been moved only for delaying the matter. Accordingly, it was dismissed on 01.06.2022. Since, the directions given in the previous order dated 13.05.2022 had not been complied with by the appellant, its appeal was also dismissed under the same order on 01.06.2022.

In the aforesaid background, the appellant has instituted the present appeals by taking recourse to Section 44 of the Act.

3. Learned counsel for the appellant contended that:- learned appellate Tribunal had erred while passing impugned order on 13.05.2022, whereunder apart from directing it to deposit 30% of the amount of penalty imposed on it by RERA, the appellant was also directed to deposit whole of the amount payable to the respondent-allottee as adjudged by the RERA in its order dated

6. 09.2021; After depositing 30% of the penalty amount, the learned Tribunal was req ired to carry out the exercise for determining the amount to be deposited by the appellant before hearing its appeal. Whereas, in the instant case, the learned Tribunal besides ordering deposit of 30% of t e penalty amount, had given simultaneous directions n the impugned order dated 13.05.2022 to the appellant to deposit entire amount of compensation adjudged by RERA without hearing the appellant on the issue; There had been no real determination of the issue, i.e. amount to be deposited by the appellant for hearing of its appeal. Hence, proviso to Section 43(5) of the Act had not been followed in letter and spirit by the Appellate Tribunal. Learned counsel submitted that the appellant is ready and willing to deposit 30% of the penalty amount before the Appellate Tribunal whereafter the Appellate Tribunal be directed to reconsider & determine the issue as to requirement of pre-deposit, if any, for hearing of appellant's appeal on merits.

Learned Senior Counsel for the respondent-allottee opposed the plea. It was submitted that the appellant had moved an application for waiver of condition of pre-deposit giving its reasons and justification in support of the prayer. The reasons did not find favour with the Tribunal. In view of the settled legal position, learned Tribunal directed the appellant to deposit 30% of the amount of penalty imp sed by the RERA and also held that entire amount payable by the appellant to the respondent-allottee as directed by RERA, is required to be deposited by t e appellant before hearing of its appeal. Accordingly, even though, the appeal of the appellant was not competent for want of deposit of 30% of the penalty amount, learned Tribunal granted time till 30.05.2022 to the appellant to comply with the order dated 13.05.2022. Since the appellant failed to comply with the direction, its appeal was dismissed vide subsequent order dated 01.06.2022.

4. Heard learned counsel for the parties on both sides and considered the case file.

4(i) Section 44 of the Act entitles any person aggrieved by any direction or decision or order made by the Authority by an adjudicating officer under the Act, to prefer an appeal before the Appellate Authority having jurisdiction over the matter. The proviso to Section 43(5) of the Act states that an appeal filed by the petitioner shall not be entertained by the Appellate Tribunal without the promotor's first having deposi ed with the Appellate Tribunal at least 30% of the penalty or such higher percentage as may be determined by the Appellate Tribunal or the total am unt to be deposited/paid by it to the allottee including interest and compensation imposed on him, if any, or with the both as the case may be, before the said appeal is filed. Section 43(5) reads as under:-

"43(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."

Thus appeal filed before the Appellate Tribunal is required to be accompanied with at least 30% of the amount of penalty imposed by RERA. The Appellate Tribunal can also direct the promotor to deposit such higher percentage of penalty amount or the total amount to be paid to the allottee by the prom t r, including interest and compensation imposed upon i , if any, or with both before hearing the appeal.

4(ii). In the instant case, admittedly, appeal preferred by the appellant was not accompanied with any amount whatsoever. Even 30% of the amount of penalty imposed upon it by RERA was not deposited alongwith the appeal. Learned

Appellate Tribunal, therefore, was not even required to consider the appeal or the applications preferred alongwith it. Deposit of 30% of the amount of penalty ordered by RERA is a condition precedent mandated upon the promotor to be complied with at time of filing of the appeal. The appellant, in the instant case failed to comply with this mandatory condition. Its appeal and consequently the applications filed in it were legally not competent.

4(iii). The appellant alongwith its ill maintained appeal had also moved three applications. One of them was with a prayer for waiving in entirety the condition of pre-deposit in terms of proviso to Section 43(5) of the Act. The appellant presented its justification and reasons for waiving the condition of pre-deposit. Learned Appellate Tribunal after hearing the petitioner held that it was beyond its competence to waive the condi ion of pre-deposit in view of proviso to Section 43(5) of the Act as settled by several pronouncements of the Hon'ble Apex Court, notably M/s Techimont Pvt. Ltd2, Uni n Bank of India3 , Kotak Mahindera Bank Pvt. Ltd4 and M/s Newtech Promoters & Developers Pvt. Ltd 6 .

Taking note of the fact that the appellant had not deposited even 30% of the amount of penalty imposed by RERA, that it had failed to deposit the amount even beyond the period stipulated by RERA in the impugned order dated 06.09.2021 and after not agreeing with the reasons and justifications given by the appellant, learned Tribunal directed the appellant to deposit the entire amount of compensation ordered by RERA, though penalty amount was reduced to 30% as condition of pre-deposit in terms of proviso to Section 43(5) for hearing its appeal on merits. The said order was passed after hearing the appellant. Learned Tribunal in the impugned order determined the amount to be deposited by the appellant for hearing its appeal. The Tribunal exercised the jurisdiction vested in it. The order passed by the learned Tribunal cannot be said to be suffering from any error of jurisdiction. The contention of the appellant that amount to be dep sited f r hearing of its appeal has not been determined, is fallacious. The amount stood determined.

4(iv). The argument that exercise for determining the amount to be dep sited for hearing of appeal should have been carried out separately and not while considering appellant's application for waiver of condition of pre-deposit, cannot be countenanced. It was for the appellant to have complied with the mandatory and statutory condition of pre-deposit of 30% of the penalty amount imposed upon it by RERA. It did not. The appellant simply filed the appeal and prayed through an application for complete waiver of condition of pre-deposit. Such kind of appeal and application, even though not maintainable, were considered by the learned Appellate Tribunal. Besides holding that mandatory condition of pre-deposit cannot be waived, learned Tribunal in its order dated 13.05.2022 considered facts of the case and also determined the amount to be deposited by the appellant in order to proceed with hearing the appeal. There was no embargo upon the learned Appellate Tribunal to determine the amount to be deposited by the appellant at the stage of considering its application for waiver of condition of pre-deposit. The said determination under order dated 13.05.2022 was with due hearing given to the appellant and was in consonance with proviso to Section 43(5) of the Act. The appellant was directed under this order to comply with mandatory condition of dep sit f 30% of the penalty imposed upon it by RERA and also to deposit entire compensation/liability as determined by RERA under order dated 06.09.2021. The Appellate Tribunal granted time to appellant for the said purpose. The appellant failed to comply with directions, hence, its appeal was dismissed on 01.06.2022.

4(v). Even though in this miscellaneous appeal, this Court is not exercising the jurisdiction under Article 226 of Constitution of India as it is an appeal preferred under Section 58 of the Act, yet some orders passed in this appeal for testing the bonafides of the appellant may be noticed.

On 15.12.2023, taking note of the submissions made for the appellant that in case it is permitted to sell certain flats at Solan, then it would be in a position to liquidate its entire liability towards the respondents, following order was passed:-

"Learned counsel the appellants submits that without Reference to the respective c ntention of the parties, the appellants prays that in case the appellants is permi ed o sell certain flats at Solan, then, the appellants shall be in a position to liquidate its liability.

Learned co nsel appearing for the respondents submits that he may be granted some time to have instructi ns in the matter.

List on 27.12.2023."

In furtherance of the above direction, further order passed on 04.01.2024 is as under:-

"Learned counsel appearing for the appellant submits that without touching the merits of the issue, at this stage, interest of justice would be served in case the appellant is permitted to sell certain flats of their at Solan without touching the four flats, which have been allotted to the respondents so that the sale amount received therefrom can be used to liquidate the liability of the appellants qua the respondents.

Mr. Vijay K. Arora, learned counsel for the respondents submits that in case the appellant is permitted to sell certain flats of its, then, the sale proceed thereof be ordered to be deposited with the Registry of this Court. Ordered accordingly. Pending further orders, the appellant is permitted to sell its flats at Solan except the four allotted to the respondents and the sale proceeds thereof shall be deposited with the Registry of this court.

Now, list for further consideration on 22.04.2024."

On 22.04.2024, submissions were made for the appellant that it was still making endeavour to sell the flats to the prospective buyers, but the attachment of the property reflected in the revenue rec rd was coming in the way of selling the property o he prospective buyers. To ease out the diffic lty pointed out by the appellant, following order was passed:-

"Learned counsel for the appellants submits that in terms of order dated 04.01.2024, the appellants are making endeavour to sell the flats to the prospective buyers, but as attachment order stands passed vis-a-vis the property in issue by RERA, which is being reflected in the revenue record, therefore, the prospective buyers are not being granted loan by the bank.

Accordingly, he submits that the charge as is reflected in the revenue record, be ordered to be removed from the same, except for four flats allotted to the respondents. This Court is of the considered view that as the charge stands created on the basis of order passed by RERA and as pursuant to order dated 04.01.2024, RERA has shown indulgence in favour of the appellants to enable them the sale of the remaining flats, the appellants would be well advised to approach RERA itself to seek necessary modification etc. qua the order of allotment.

Now, as prayed for, list on 23.05.2024."

On 23.05.2024 it was apprised that the appellant had approached RERA for removing red entries (attachment) in the revenue record. The red entries were accordingly ordered to be removed by the RERA in November 2024.

On 10.01.2025, learned c unsel for the appellant submitted that the p evious orders passed in the matter were not complied with in their letter and spirit and the appellant had been able to deposit only an amount of Rs. 2.5 lacs each in these four appeals. Since the appellant's liability exceeded way beyond the amount deposited by it, hence, following order was passed on 10.01.2025 and these matters were ordered to be listed for hearing.

"Learned counsel for the appellants submits that though the previous orders have not been complied with in their letter and spirit, however, appellants have deposited amount of Rs.2.5 lacs each in these four appeals. Learned counsel for the appellants submits that the appellants would be in a position to deposit some more amount, approximately Rs.20 lacs in all by March, 2025.

2. Learned Senior Counsel for the respondents objects to the above submissions and submits that the orders passed in these matters from time to time have not been complied with by the appellants despite grant of repeated opportunities. The proposed deposit of Rs. 20 lacs by learned counsel for the appellants by 20. 03.2025 is way short of their liability, which runs in crores alongwith interest. He further submits that the -2- present matters are not even maintainable in view of Section 43 (5) of the Real Estate Regulatory Authority, Act and the law laid down in M/s Newtech Promoters and Developers Pvt. Ltd Vs. State of UP & Ors Etc. Civil Appeal N (s) . 6745-6749 of 2021, decided on 11.11.2021.

List these mat ers for consideration during third week of March, 2025."

The above orders make it evident that the appellant has even failed to demonstrate its bonafide in clearing its liabilities towards the respondent-allottee despite grant of several opportunities by the Court in the instant appeals, even though the said opportunities were not required to be afforded to the appellant in appeals arising out of the orders passed by the RERA and the Appellate Tribunal in exercise of appellate jurisdiction under the Act.

No other point was urged.

In view of above discussion, the impugned orders passed by the learned Appellate Tribunal on 13.05.2022 and 01.06.2022 cannot be said to be suffering from any illegality. These appeals fail and are accordingly dismissed. All pending miscellaneous application(s), if any, to stand disposed of.