(2021) 10 OHC CK 0047

In the Orissa High Court

Case No : Writ Petition (Civil) Nos.36241, 36243 36245,36502, 36509, 36514, 36519, 36522, 36526,36529, 36532, 36537, 36540,36544, 34744, 36949 Of 2020

M/s. Hi Tech Edifice Pvt. Ltd.,Khurda APPELLANT

Vs

Union Of India And Others RESPONDENT

Date of Decision : 07-10-2021

Acts Referred:

Constitution of India, 1950 — Article 226, 227
Real Estate (Regulation and Development) Act, 2016 — Section 43(5)

Citation : (2021) 10 OHC CK 0047

Hon'ble Judges : S.K. Mishra, J;Savitri Ratho, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

S.K.Mishra, J

1. In these bunch of Writ Petitions, M/s. Hi Tech Edifice Pvt. Ltd.,Khurda-Petitioner in all these Writ Petitions (hereinafter referred to as "the Petitioner" for brevity) has prayed to declare the proviso to Sub-Section (5) of Section 43 of the Real Estate (Regulation and Development) Act, 2016(hereinafter referred to as" the Act, 2016" for brevity) to be ultra vires of the Constitution of India and to quash the orders dated 7.9.2020 passed by the learned Odisha Real Estate Appellate Tribunal in OREAT Appeal Nos.5(T)/2020/09/(RE)/2018, 40(T)/2020/24/2019, 04(T)/2020/8 RE (2018), order dated 14.9.2020 passed in OREAT Appeal No.64(T)/2020/48/2019, order dated 21.9.2020 passed in OREAT Appeal No.14(T)/2020/18 (RE)/2018, order dated 23.9.2020 passed in OREAT Appeal No.85(T)/2020/20/2018, order dated 09.9.2020 passed in OREAT Appeal No.06(T)/2020/10 RE/2018, order dated 28.9.2020 passed in OREAT Appeal No.32(T)/2020/16/2019, order dated 14.9.2020 passed in OREAT Appeal No.57(T)/2020/41/2019, order dated 28.9.2020 passed in OREAT Appeal No.30(T)/2020/14/2019, order dated 23.9.2020 passed in OREAT Appeal No.15(T)/2020/19 RE/2018, order dated 28.9.2020 passed in OREAT Appeal

No.31(T)/2020/15/2019, order dated 07.9.2020 passed in OREAT Appeal No.38(T)/2020/22/2019, order dated 07.9.2020 passed in OREAT Appeal No.39(T)/2020/23/2019, order dated 09.9.2020 passed in OREAT Appeal No.07(T)/2020/11 (RE) /2018 and order dated 23.9.2020 passed in OREAT Appeal No.93(T)/2020/28/2019.

2. The Petitioner is a Real Estate Developer and a Registered Company. Various Complaint Cases were initiated against the Petitioner before the Odisha Real Estate Regulatory Authority, Bhubaneswar (hereinafter referred to as the "Authority" for brevity), which were allowed. In these cases, the private Opposite Parties have complained about the delayed delivery of the Apartment they have booked with the Petitioner.

The Authority in Complaint Case No.95/2018 directed the Respondent No.1-Petitioner to refund payment of Rs.9,81,750/-(Rupees Nine Lakhs Eighty One Thousand Seven Hundred Fifty) along with interest of 10.35% to the complainant -Mr. Debasis Sen (Opposite Party No.4 in W.P.(C) No.36241/2020).

The Authority in Complaint Case No.227/2018 directed the Respondent No.1-Petitioner to refund payment of Rs.9,42,900/- (Rupees Nine Lakhs Forty Two Thousand Nine Hundred) along with interest of 10.5% to the complainant -Ms. Simadree Pradhan (Opposite Party No.4 in W.P.(C) No.36243/2020).

The Authority in Complaint Case No.82/2018 directed the Respondent-Petitioner to refund payment of Rs.6,68,250/-(Rupees Six Lakhs Sixty Eight Thousand Two Hundred Fifty) along with interest of 10.35% to the complainant-Mr. Tapas Mohapatra (Opposite Party No.4 in W.P.(C) No.36245/2020).

The Authority in Complaint Case No.111/2018 directed the Respondent No.1-Petitioner to refund payment of Rs.7,25,500/-(Rupees Seven Lakhs Twenty Five Thousand five Hundred) along with interest of 10.5% to the complainants -Mr. Parimal Chandra Samaddar and Mrs. Meera Samaddar (Opposite Party Nos.4 and 5 in W.P.(C) No.36502/2020).

The Authority in Complaint Case No.105/2018 directed the Respondent No.1-Petitioner to refund payment of Rs.6,98,750/-(Rupees Six Lakhs Ninety Eight Thousand Seven Hundred Fifty) along with interest of 10.35% to the complainant -Mr. Subash Chandra Maiti (Opposite Party No.4 in W.P.(C) No.36509/2020).

The Authority in Complaint Case No.226/2018 directed the Respondent No.1-Petitioner to refund payment of Rs.6,45,600/-(Rupees Six Lakhs Forty Five Thousand Six Hundred) along with interest of 10.5% to the complainant-Mr. Gyan Ranjan Pradhan (Opposite Party No.4 in W.P.(C) No.36514/2020).

The Authority in Complaint Case No.96/2018 directed the Respondent No.1-Petitioner to refund payment of Rs.5,58,000/-(Rupees Five Lakhs Fifty Eight Thousand) along with interest of 10.35% to the complainant -Mr. Amit Das (Opposite Party No.4 in W.P.(C) No.36519/2020).

The Authority in Complaint Case No.109/2018 directed the Respondent No.1-Petitioner to refund payment of Rs.7,98,500/-(Rupees Five Lakhs Fifty Eight Thousand) along with interest of 10.5% to the Complainant-Mrs. Bijayani Devi (Opposite Party No.4 in W.P.(C) No.36522/2020).

The Authority in Complaint Case No.122/2018 directed the Respondent No.1-Petitioner to refund payment of Rs.5,34,850/-(Rupees Five Lakhs Thirty Four Thousand Eight Hundred Fifty) along with interest of 10.5% to the complainant - Mrs. Namita Sahu (Opposite Party No.4 in W.P.(C) No.36526/2020).

The Authority in Complaint Case No.125/2018 directed the Respondent No.1-Petitioner to refund payment of Rs.7,42,750/-(Rupees Seven Lakhs Forty Two Thousand Seven Hundred Fifty) along with interest of 10.5% to the complainant - Mr. Banamali Swain (Opposite Party No.4 in W.P.(C) No.36529/2020).

The Authority in Complaint Case No.106/2018 directed the Respondent No.1-Petitioner to refund payment of Rs.6,54,600/-(Rupees Six Lakhs Fifty Four Thousand Six Hundred along with interest of 10.35% to the complainant -Kintali Sridhar (Opposite Party No.4 in W.P.(C) No.36532/2020).

The Authority in Complaint Case No.124/2018 directed the Respondent No.1-Petitioner to refund payment of Rs.6,21,500/-(Rupees Six Lakhs Twenty One Thousand Five Hundred) along with interest of 10.5% to the complainant -Mr. Damodar Behera (Opposite Party No.4 in W.P.(C) No.36537/2020).

The Authority in Complaint Case No.224/2018 directed the Respondent No.1-Petitioner to refund payment of Rs.3,97,125/-(Rupees Three Lakhs Ninety Seven Thousand One Hundred Twenty Five) along with interest of 10.5% to the complainant -Mr. Sankar Sebak Dey (Opposite Party No.4 in W.P.(C) No.36540/2020).

The Authority in Complaint Case No.123/2018 directed the Respondent No.1-Petitioner to refund payment of Rs.7,98,000/-(Rupees Seven Lakhs Ninety Eight Thousand) along with interest of 10.5% to the complainant -Mr. Rabindra Nath Dash (Opposite Party No.4 in W.P.(C) No.36544/2020).

The Authority in Complaint Case No.90/2018 directed the Respondent No.1-Petitioner to refund payment of Rs.10,01,885/-(Rupees Ten Lakhs One Thousand Eight Hundred Eighty Five) along with interest of 10.35% to the complainant -Mr. Devi Prasanna Mohanty (Opposite Party No.4 in W.P.(C) No.34744/2020).

The Authority in Adjudication Case No.5/2018 directed the Respondent-Petitioner to refund payment of Rs.1,00,000/-(Rupees One Lakh) along with interest of 10.35% to the complainant -Mr. Tapas Mohapatra (Opposite Party No.4 in W.P.(C) No.36949/2020).

Such orders were challenged in appeal before the Real Estate Appellate Tribunal (hereinafter referred to as " the Tribunal" for brevity) in different OREAT Appeals and the learned Tribunal has passed orders as mentioned in the first paragraph.

3. Without averting to all the facts because of the limited nature of the challenge to the order impugned on factual aspect, the essential facts of the case may be stated as follows:

It is the case of the Petitioner that it could not complete the project in time due to the default on the part of the allottee to deposit the amount as per the agreement. In fact, it was also specifically directed by the Authority that both the parties shall comply with the terms of the agreement and further that the allottee shall pay the remaining amount for completion of the project. Even though the Petitioner completed the project in due compliance of the order of the Authority, the allottee has not complied with the order. Hence the delay in completion of the project cannot be attributed solely to the default on the part of the Petitioner.

4. The Petitioner asserts that Proviso to Sub-Section (5) of Section 43 of the Act, 2016 is vague and arbitrary inasmuch as it provides for three different, disproportionate and illusory modes of calculation of the amount to be deposited in the Appellate Tribunal by the promoter, as a precondition for the appeal to be entertained by the Tribunal. It is further submitted that the provision leaves an unbridled power in the hands of the Authority in that regard.

5. The Petitioner further asserts that Sub-Section (5) of Section 43 of the Act, 2016 of the Act and the Proviso thereto indicates that even though any person aggrieved by any direction or decision or order made by the Authority or by an adjudicating Officer under the Act, 2016 can prefer an appeal before the Tribunal having jurisdiction over the matter, but only the promoter has been held liable to pre-deposit the amount for his appeal to be entertained. It further transpires that Proviso for three different and disproportionate modes of calculation of the amount to be deposited in the Tribunal by the promoter, as a precondition for the appeal to be entertained by the Tribunal. It is seen that where the order appealed against imposes a penalty, the promoter is required to deposit at least 30% of the penalty amount or such higher amount as may be directed by the Tribunal but where the appeal is against any other order which involves the payment of an amount to the allottee, then the promoter is required to deposit 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. The promoter is required to deposit the whole amount before the appeal is heard. Therefore, it is prayed on behalf of the Petitioner that the foresaid provision is ultra vires of the Constitution.

6. In this case, the Union of India has not filed any counter affidavit. In course of hearing, it is stated by the learned Counsel appearing for the Union of India that that the matter is covered by the Division Bench judgment of the Punjab and Haryana High Court in the case of Experion Developers Pvt. Ltd. v. State of Haryana and others; CWP No.38144 of 2018 dated 16th October, 2020 and other similar matters and the Division Bench Judgment of the Madras High Court in the case of T.Chitty Babu v. Union of India and another; W.P. No.29933 of 2019 and

W.M.P.No.29844 of 2019.

7. The Opposite Party No.3 has filed a counter affidavit with a prayer to remove the name of Respondent No.3 from the Writ Petition with regard to the substantive averments made by the Petitioner. Opposite Party No.3 at Paragraphs- 4 and 5 of the counter affidavit has put forth its case, which are quoted herein below:-

"4. That the contents of Paras no.13 and 14 elaborate the arbitrary nature of the Provision to Sub-Section (5) of Section 43 of the Real Estate (Regulation and Development) Act, 2016. It is most humbly submitted, without prejudice, that the Answering Respondent is a body which voices the concerns of the industry whilst promoting transparency and ethics amongst real estate stakeholders. It is submitted that real estate industry has been in the grip of a slowdown and it facing acute liquidity crunch over the past few years. Across the counter, many projects have been delayed and/or stalled due to lack of liquidity. Subsequently, the sector was also hit by Covid-19 pandemic and is still reeling under legacy issues. It is submitted that the above provision fails to balance the interests of the promoters and the homebuyers. The provision confers an illusory right to appeal to the promoter as it casts an onerous burden as a prerequisite for filing an appeal before the Real Estate Appellate Tribunal.

5. That without prejudice, in Para No.15 it is submitted that the Provision to Sub-Section (5) of Section 43 of the Act creates an anomaly in as much as the proviso requires the promoter, who is filing an appeal against an order directing payment to the homebuyers, to deposit the whole of the money including interest and compensation without there being any distinction as to whether the allottee wishes to withdraw from the project on account of discontinuance or wishes to take the flat with the entitlement of interest as per the Proviso to Section 18(b) of the Act. It is submitted that the anomaly thus created needs to be addressed by a court of competent jurisdiction in the interest of justice."

8. Now two questions arise in these Writ Petitions;

(1) whether the order passed by the learned Tribunal is factually liable to be set aside and

(2) whether the provision of Sub-Section (5) of Section 43 of the Real Estate (Regulation and Development) Act, 2016 is ultra vires.

Sub-Section (5) of Section 43 of the Real Estate (Regulation and Development) Act, 2016 is quoted below:

"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 at least 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 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. It is not disputed by the Parties that in the mean while the judgments of two High Courts have already dealt with the matter. In the case of T.Chitty Babu v. Union of India and another; W.P. No.29933 of 2019 and W.M.P.No.29844 of 2019, the Hon'ble High Court of Madras has referred to various judgments, i.e. in the cases of Gagan Makkar and Anr. Vs. Union of India; (2012) 192 DLT 186, Seth Nand Lal and Ors vs. State of Haryana and Ors., 1980 (supp) SCC 574, Shyam Kishore vs. Municipal Corporation of Delhi, (1993) 1 SCC 22, M/s. Elora Construction Company vs. The Municipal Corporation of Greater Bombay and Ors., AIR 1980 Bom 162, Chatter Singh Baid and Ors. Vs. Corporation of Calcutta and Ors., AIR 1984 Cal 283, Immanuel vs. The Special Deputy Collector, Tirunelveli, 2000 1 L.W. 708, M/s. S.E. Graphites Private Limited vs. State of Telangana and Ors.; Civil Appeal No.7574 of 2014, decided on 10.7.2019, Gujarat Agro Industries Co. Ltd., vs. Municipal Corporation of the City of Ahmedabad and Ors.; (1999) 4 SCC 468, M/s.Tecnimont Pvt. Ltd. vs. State of Punjab and Ors., (Civil Appeal No.7358 of 2019, decided on 18.9.2019, Ganga Bai vs. Vijay Kumar; (1974) 2 SCC 393, Anant Mills Co. Ltd. vs. State of Gujarat; (1975) 2 SCC 175, Mardia Chemicals Ltd. vs. Union of India; (2004) 4 SCC 311 and came to the finding that the words "it shall not be entertained" occurring in the proviso to Sub-Section (5) of Section 43 of the 2016 Act, is a preliminary injunction. This prevents even the presentation of an appeal. The Clause "before the said appeal is heard" ultimately is a final injunction to the process of appellate exercise of jurisdiction. Conjointly this clearly shuts out even the presentation or physical filing of an appeal before the Appellate Authority, as the total amount to be deposited as against compensation is a sine qua non. The Hon'ble High Court of Madras held that the provision to be intra vires and the appellate forum is not illusory and the condition of pre-deposit cannot be termed as onerous.

10. In the case of Experion Developers Pvt. Ltd. v. State of Haryana and others; CWP No.38144/2018 and other similar cases decided on 16th October, 2020, the Hon'ble High Court of Punjab and Haryana has also referred to various judgments, i.e. in the case of M/s. Technimont Pvt. Ltd. v. State of Punjab; AIR 2019 SC 4489, in the cases of Union of India v. R. Gandhi, President, Madras Bar Association (2010) 11 SCC 1 and State of Gujarat v. Utility Users Welfare Association; (2018) 6 SCC 21, in the case of Neelkamal Realtors Suburban Pvt. Ltd. v. Union of India, 2018 (1) RCR (Civil) 298, in the case of Venkataramana Devaru v. State of Mysore; AIR 1958, 895, in the case of State of Rajasthan v.

Gopi Kishan Sen; AIR 1992 SC 1754, in the case of CIT v. Hindustan Bulk Carriers; (2003) 3 SCC 57, in the case of Securities and Exchange Board of India v. Classic Credit Ltd.; (2018) 13 SCC 1, in the case of K.Kapen Chako v. The Provident Investment Company (P) Ltd.; (1977) 1 SCC 593, in the cases of Suhas H. Pophale v. Oriental Insurance Co. Ltd.; (2014) 4 SCC 657 and Purbanchal Cables and Conductors Pvt. Ltd. v. Assam State Electricity Board; (2012) 7 SCC 464 and came to the following conclusions:-

(i) The challenge to the constitutional validity of the proviso to Section 43(5) of the Act is rejected.

(ii) The order of the Appellate Tribunal declining to grant the Petitioners further time to make the pre-deposit beyond the date as stipulated by the Appellate Tribunal or where the appeals have been rejected on account of the Petitioners failure to make the pre-deposit as directed, are hereby affirmed.

(iii) In the facts and circumstances of the individual cases, no grounds have been made out to persuade this Court to exercise its writ jurisdiction under Article 226 of the constitution to grant any relief in respect of waiver of pre-deposit. In none of the cases is the Court satisfied that a case of 'genuine hardship' has been made out.

(iv) On the interpretation of the provisions of the Act, the conclusions in this judgment on the scope of jurisdiction of the Authority and the AO respectively, and given the prayers in the individual complaints from which these writ petitions arise, 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. No interference under Articles 226 is warranted on that score.

(v) As regards the merits of the order of Authority the remedy of an appeal before the Appellate Tribunal is in any event available. Even where according to the party aggrieved the Authority lacked jurisdiction to decide the complaint, it would be for the Appellate Tribunal to decide that issue in light of the legal position.

(vi) A collective reading of the provisions makes it apparent that when it comes to refund of the amount, and interest on the refund amount, or directing payment of interest for delay delivery of possession, or penalty and interest thereon, it is the Authority which has the power to examine and determine the outcome of a complaint.

11. The Hon'ble High Court of Punjab and Haryana further held that as the Writ Petitions were pending for some time and interim orders had been passed in many of them, where the Petitioner's appeal already stands dismissed by the Appellate Tribunal for a failure to make the pre-deposit as directed, and that order is challenged in the Writ Petition, the Court as a one time measure, permits the Petitioner to make the pre-deposit in terms of proviso to Section 43 (5) of the Act before the Appellate Tribunal within a specified date. Upon making of the

pre-deposit within the time granted, the Appellate Tribunal will proceed to hear the appeal and when the appeal has been dismissed will recall its order dismissing the appeal, restore the appeal to file and proceed to dispose of the appeal on merits, which will include examining the validity of the order of the Authority. On failure of the Petitioners to make the pre-deposit within the time as granted by the Court, the order of the Appellate Tribunal dismissing the appeal will stand affirmed without any further recourse to the Court and dismissed all the Writ Petitions.

12. The Petitioner has challenged the proviso to Section 43 (5) of the Act as vague and arbitrary. We are of the opinion that it is misconceived. Section 43 of the Act provides for three modes of calculation of the amount to be deposited in the Appellate Tribunal by the promoter as a precondition for the appeal to be entertained by the Appellate Tribunal. The intention of the legislature behind providing three different modes for calculating the amount to be deposited in the Appellate Tribunal before entertaining appeal depends on facts of each case. The facts may vary from case to case and hence it is not necessary or advisable to provide a strait jacket formula for every case. The Hon'ble Supreme Court while examining the similar point vide its judgment in the case of M/ s.Tecnimont Pvt. Ltd.(Formerly known as Tecnimont ICB Private Limited) Vs. State of Punjab and Ors., 2019 AIR (SC) 4489 in paragraph-9 was pleased to observe that a condition of pre deposit imposed by legislature in their wisdom cannot be considered to be unconstitutional not being un reasonable or onerous.

13. In this case, only the 3rd order of pre deposit condition, which is based on sound principle of law, is challenged. The allottee deposited money which is required to be deposited by pre deposit conditional order. It is quite reasonable. A concessional provision must be construed not in a narrow and constricted sense but in a wide and liberal manner so as to anticipate take into account of changing conditions and objectives. In this connection, we rely upon the observations of the Hon'ble Supreme Court in the case of M. Nagaraj and Ors v. Union of India and Ors., 2007 AIR SC 71 at Paragraph-19, which is extracted below:-

"19. Constitution is not an ephermal legal document embodying a set of legal rules for the passing hour. It sets out principles for an expanding future and is intended to endure for ages to come and consequently to be adapted to the various crisis of human affairs. Therefore, a purposive rather than a strict literal approach to the interpretation should be adopted. A Constitutional provision must be construed not in a narrow and constricted sense but in a wide and liberal manner so as to anticipate and take account of changing conditions and purposes so that constitutional provision does not get fossilized but remains flexible enough to meet the newly emerging problems and challenges."

14. Moreover, the right to appeal is neither an absolute right nor it is an ingredient of natural justice. The right to appeal is a statutory right and it can be circumscribed by the conditions in the grant. The right to appeal can be

conditional or qualified. The pre-deposit provision is based on the basic structure and aims and objectives of the Act. We rely upon the reported case of Government of Andhra Pradesh and Ors. v. Smt. P. Laxmi Devi; 2008 AIR SCW 1826.

15. It is also settled principle of law that when a statute confers a right of appeal, while granting a right the legislature can impose conditions for the exercise of such right, so long as the conditions are not onerous as to amount to unreasonable restrictions rendering the right almost illusory. Bearing in mind the object of the Act the conditions hedged in the said proviso we are of the opinion that the proviso is not onerous (Narayana Chandra Ghosh v. UCO Bank and Ors., AIR 2011 SC 1913 relied upon).

16. In the case of Kotak Mahindra Bank Pvt. Ltd. V. Ambuj A. Kasliwal and Ors., AIR 2021 SC 1041, the Hon'ble Supreme Court had came to the conclusion that while granting the right of appeal the legislature can impose condition for the exercise of such right. So long as conditions are not so onerous as to amount to unreasonable restrictions rendering the right almost illusory. A provision cannot be held to be unconstitutional being unreasonable and arbitrary. The admitted amount received from the allottee should be kept in deposit as condition precedent because the further right of the allottee to get compensation and penalty will be considered at the time of final hearing of the appeal. As such the right of the allottee will be protected and the proceeding will be finalized at an early date.

17. In view of such settled principles of law and in view of the fact that the provision of sub-section (3) provides for deposit of amount which is already calculated by the Authority in a quasi judicial proceeding after taking into consideration all the materials available on record, a condition imposing a pre deposit by the promoter is not unreasonable or onerous. It is also not arbitrary. It is not the case of the Petitioner that the Appellate Tribunal without considering the materials on record directs a pre deposit in fact there has been adjudication of the same which is challenged before the Appellate Tribunal and the Appellate Tribunal shall not entertain the appeal unless at least 30% of the penalty or such higher percentage as may be determined by the Appellate Tribunal or the total amount is paid to the allottee including interest or compensation is deposited before the appeal is heard.

18. So in the ultimate analysis, we are of the opinion that Sub-Section (5) of Section 43 of the Real Estate (Regulation and Development) Act, 2016 is not arbitrary, unreasonable or onerous requiring the same to be declared ultra vires.

19. Coming to the first question we have formulated in this case whether the order passed by the learned Tribunal is factually liable to be set aside, we are of the opinion that in a proceeding of writ of certiorari, interim orders should not be casually interfered with. Moreover, no substantial ground has been made by the Petitioner to come to a conclusion that the orders passed by the learned Tribunal

are factually unwarranted requiring interference in a writ of certiorari.

20. In that view of the matter the Writ Petitions are devoid of any merit and are therefore dismissed.

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