

**Appeal No.60/2019.**

M/s Ansal Housing Ltd  
Regd.office at 606,6<sup>th</sup> Floor, Indra Prakash  
21 Barakhamba Road, New Delhi. ...Appellant.

Versus

Sushil Kumar Batra S/o Sh Gulshan Kumar Batra  
R/o House No.5, Navneet Nagar,  
Civil Lines, Ambala City (Haryana). ....Respondent.

**Appeal No.63/2019.**

M/s Ansal Housing Ltd.  
Regd.office at 606,6<sup>th</sup> Floor, Indra Prakash  
21 Barakhamba Road, New Delhi-110001. ....Appellant.

Versus

Sh Narain Dass Sardana S/o Sh Sunder Dass Sardana  
R/o House No.1998, Sector-13,  
Urban Estate, Karnal (Haryana). ..... Respondent.

**Coram: Justice Darshan Singh(Retd), Chairman  
Sh Inderjeet Mehta, Member(Judicial)  
Sh Anil Kumar Gupta,Member(Technical)**

Present: Sh Surjeet Bhadu, Ld counsel for the appellant/applicant in both the appeals.

Sh Vineet Sehgal, Advocate, Ld counsel for the respondent in appeal No.60/2019.

Sh Himanshu Raj, Advocate, Ld counsel for the respondent in appeal No.63/2019.

**ORDER**

This order of ours shall dispose of the applications filed by the appellant/applicant in both the appeals mentioned above for waiver of the condition of pre-deposit as required under the proviso to section 43(5) of the Real Estate (Regulation

& Development) Act, 2016 (hereinafter called the Act). Applications filed in both the appeals are being taken together as common questions of law and facts are involved therein.

2. The respondent Sh Sushil Kumar Batra (in appeal No.60/2019) who was complainant before the Ld Real Estate Regulatory Authority (hereinafter to be referred as Authority) had filed the complaint before the Authority for refund of entire amount alongwith requisite interest. Sh Narain Dass Sardana the respondent in appeal No.63/2019 had filed complaint for grant of relief of refund of amount deposited by him alongwith interest and compensation. However, during the proceedings before the Ld Authority, the right to seek compensation was kept reserved for moving the separate application before the Adjudicating Officer and the complaint was pursued before the Authority for fulfilment of the obligations by the promoter as per the provisions of the Act vide statement dated 26.6.2018. In both the cases, Ld Authority vide impugned orders dated 31.10.2018 (in appeal No.60/2019) and dated 26.7.2018 (in appeal No.63/2019) directed the appellant promoter to refund the amount deposited by the respondent alongwith interest at the prescribed rate.

3. Aggrieved with the aforesaid orders, promoter appellant has preferred the present appeals. Alongwith the appeals, the appellant promoter has moved an application for waiver of the condition of pre deposit as required under the proviso to section 43(5) on the ground that the appellant is passing through very difficult conditions and is trying its best to deliver the units in the project to the allottees who have posed faith in the appellant/applicant. It is further pleaded that the Appellate Authority has inherent powers to waive the condition of pre deposit. It is further pleaded if the pre deposit is

ordered it will cause undue hardship on the applicant's financial situation which would in turn hamper the construction activities. It is pleaded that the applicant has a strong prima facie case and impugned order is not sustainable and deserves to be set aside on the ground taken in the accompanying appeal.

4. Notice of these applications were given to the respondents. The respondents have not filed any written reply to the application moved by the appellant for the waiver of the condition of pre-deposit. However, they have orally opposed the application.

5. We have heard Sh Surjeet Bhadu, Advocate, Ld counsel for the appellant/applicant, Sh Vineet Sehgal, Ld counsel for the respondent in appeal No.60/2019 and Sh Himanshu Raj, Ld counsel for the respondent in appeal No.63/2019.

6. Sh Himanshu Raj, Ld counsel for the appellant has also filed written submissions.

7. We have also carefully gone through the record of the case.

8. Ld counsel for the applicant/appellant contended that the impugned orders passed by Ld Authority are wholly without jurisdiction. Ld Authority has no jurisdiction/powers to award the relief of refund alongwith interest which exclusively falls within the jurisdiction of the Adjudicating Officer. In order to buttress his contentions, he has drawn our attention to the provisions of section 71 of the Act and rules 28 & 29 of the Haryana Real Estate (Regulation & Development) Rules, 2017 (hereinafter called the Rules). He contended that the Ld Authority is only competent to impose penalty due to violation of the provisions of the Act, Rules and regulations made thereunder. The Ld Authority has no jurisdiction to deal with the violations of the terms and conditions of the agreement to sell. Thus, he contended that the order passed by the Ld Authority is totally without

jurisdiction, so the applicant/appellant has strong prima facie case. This Tribunal is fully competent to waive the condition of pre deposit by exercising the inherent powers. To support his contentions he relied upon case Maruti Suzuki India V/s Union of India & others CWP No.12922/14 decided by the division bench of Hon'ble High Court on October 27, 2016.

9. On the other hand, Sh Himanshu Raj, Advocate, Ld counsel for the respondent in appeal No.63/2019, contended that no plea has been raised by the appellant in the application that the Ld Authority has no jurisdiction to grant relief of refund. Thus, the contentions raised by Ld counsel for the appellant on the issue of jurisdiction cannot be considered. He further contended that the appellant promoter is passing through the difficult financial condition is not a ground to waive the condition of pre deposit.

10. He further contended that the Ld Authority is fully competent to grant refund alongwith interest or only the interest to the allottee if the promoter fails to hand over the possession of the unit to the allottee as per terms & conditions of the agreement to sell. He contended that as per section 11 sub section 4 of the Act it is the duty or the responsibility of the promoter to fulfil all the obligations, responsibilities and functions under the provisions of the Act, Rules and regulations made thereunder or to the allottee as per the agreement for sale. The functions of the Ld Authority are enshrined under section 34(f) of the Act. As per section 34(f), the Authority is competent to ensure the compliance of the obligations casted upon the promoters.

11. He further contended that as per the provisions of section 38 the Ld Authority has powers to impose penalty or interest with regard to any contraventions/obligations casted



upon the promoters. He has vehemently contended that in rule 28 (2)(d)(i) of the Rules it is provided that the Authority can pass such orders including imposition of penalty in case it is found that the promoter has contravened the provisions of the Act. He contended that the functions of the Authority provided u/s 34(f), the powers of the Authority u/s 38 alongwith obligations of the promoter u/s 11(4)(a) of the Act has to be read harmoniously with rule 28 of the Rules. As per section 11(4) of the Act it is the responsibility of the promoter to comply with the obligations casted upon him as per the Act, Rules and regulations and terms & conditions of the agreement. He contended that the Authority has to ensure the compliance of the obligations u/s 34(f) of the Act and if the promoter fails to comply with the said obligations then the Authority has powers to impose interest as well as penalty including the refund. He contended that word **“including”** mentioned in the Rule 28(2)(d)(i) confers the discretionary powers on the Authority to impose penalty alongwith any other reliefs as it deem fit including the relief of refund and interest. He has also relied upon the cases U.P.Zila Parishad Karamchari Sangh, Banda V. State of U.P.(Allahabad (D.B.): 2002(3) UPLBEC 2569 and case P.Kasilingam V. PSG College of Technology, AIR 1995 SC 1395 to contend that the use of word “includes” in the statutory provision will enlarge the meaning of preceding word and it is by way of extension.

12. He further contended that as per section 71(1) of the Act, the Adjudicating Officer can only deal with the cases wherein there is claim for grant of compensation. Adjudicating Officer can award the compensation and interest for violation of the provisions of sections 12,14, 18 & 19 of the Act.



13. He contended that the wordings of section 18 makes it clear that where the complainant has demanded only refund alongwith interest and no compensation, then the Authority is competent to deal with the complaints in view of sections 18 and 38 of the Act and rule 28 of the Rules. He further contended that the powers of the Authority and the Adjudicating Officer are overlapping. Both the Authority as well as Adjudicating Officer have powers to grant refund alongwith interest for the violation of the terms and conditions of agreement for sale and the provisions of the Act.

14. He further contended that as per section 13 of the Act, a promoter cannot receive more than 10% of the cost of the unit without first entering into a written agreement for sale. He contended that if the promoter violates the aforesaid condition then allottee becomes entitled for the award of the refund alongwith interest. He contended that the Authority can pass an order of refund under various provisions of the Act and Rules. He specifically referred to Section 13(1) and 13(2) of the Act. He reiterated his contentions that whenever the compensation has not been demanded by the allottee in the complaint, in that eventuality the complaint can be adjudicated upon by the Authority. By mentioning his own illustrations in his written arguments referring to the provisions of section 18, 31, 38 & 61 read with rule 28 of the Rules he had pleaded that the Authority can grant the relief of refund alongwith interest on demand by the allottee and can also impose penalty on the promoter. He contended that in case Sandeep Mann & others V/s Real Estate Regulatory Authority, Punjab & others, appeal No.53 of 2018 decided on 27<sup>th</sup> February, 2019 the Hon'ble Appellate Tribunal Punjab has not dealt with all the probable legal propositions, so this judgment is not exhaustive one.

15. He further referred to section 14 alongwith section 38 of the Act to contend that Adjudicating Officer has no powers to grant refund for violation of section 14 of the Act. Thus, he contended that the allottee can file complaint with the Authority under section 11(4) and section 14(3) read with rule 28 of the Rules for the demand of refund alongwith interest.

16. Ld counsel for respondent in appeal No.63/2019 has also mentioned in the written submissions with respect to the powers of the Authority/Adjudicating Officer viz-a-viz granting interest to the allottees which is not the issue involved in the present case. Mr Himanshu Raj, Ld counsel for the respondent in appeal No.63/2019 finally contended that there is no prohibition to the Ld Authority to grant the relief of refund alongwith interest wherein the provisions of the Act or the Rules as well as the terms & conditions of the agreement have been violated by the promoter. He contended that in this case also, the appellant promoter has failed to deliver the possession within the stipulated period, so the Ld Authority has legally held respondent/allottee entitled for refund of amount deposited by him alongwith interest.

17. Sh Vineet Sehgal Ld counsel for the respondent in appeal No.60/2019 has also fully endorsed the contentions raised by Sh Himanshu Raj, Advocate. In addition to that, he contended that in case of Sushil Kumar Batra, the appellant promoter has also violated the provisions of section 12 of the Act by giving the incorrect information regarding his licence and assignment of the right as a developer which certainly makes the respondent entitled to claim refund alongwith interest. Thus, Ld counsel for respondents pleaded that the application moved by the appellant promoter is without any substance. The appellant

should comply with the provisions of proviso to section 43(5) of the Act to get his appeal entertained/heard.

18. We have duly considered the aforesaid contentions raised by the Ld counsel for the parties.

19. The appellant promoter has moved the application for seeking waiver of condition of pre deposit as required under the proviso to section 43(5) of the Act.

20. Before proceeding further, it will be pertinent to deal with the preliminary contention raised by Ld counsel for the respondent that the plea of jurisdiction has not been raised in the application. In para No.8 of the application (Para No.7 in Appeal No.63/2019), the appellant/applicant has mentioned that the applicant has a prima facie strong case and impugned order is not sustainable and deserves to be set aside on the grounds taken in the accompanying appeal, meaning thereby the grounds of appeal can also be looked into for the disposal of the present applications. In para No. 1(c) ( in Appeal No.63/2019 para No. 1(d)) of the preliminary grounds in grounds of appeal, the appellant/applicant has categorically mentioned that order is bad in law due to the fact that Ld Authority does not have powers to order refund. It is further pleaded that there is no provision in the Act/Rules which empowers the Ld Authority to exercise the powers of refund. With these averments in the grounds of appeal, the applicant/appellant has categorically challenged the jurisdiction of Ld Authority to grant relief of refund. So this plea raised by Ld counsel for respondent is without any substance.

21. Relevant portion of Section 43 of the Act reads as under:-

**“ 43. Establishment o Real Estate Appellate Tribunal.-**

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(1).....

(2).....

(3).....

(4).....

(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 percent of the penalty or such higher percentage as may be determined y 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.”*

22. As per the aforesaid provision of law where a promoter files an appeal with the Appellate Tribunal it shall not be entertained without the promoter first having been deposited 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 amount to be paid to the allottee including the interest and compensation imposed on him, if any, or with both, as the case may be, before the said appeal is heard. Thus, the deposit of money as provided in proviso to section 43(5) of the Act, is a condition precedent for entertainment of the appeal and for the hearing of the appeal on merits. It is also to be noted that in this provision it has not been specifically mentioned that the Tribunal can waive completely or partially the condition of pre-deposit.



23. But the question regarding waiver of pre condition of deposit in other Acts having analogous provisions of law came for consideration before the different division benches of Hon'ble High Court in some cases. It will be advantageous to refer the said cases. In case **Punjab State Power Corporation Ltd V/s State of Punjab and others 2016 (2) RCR(Civil) 559** the validity of section 62 sub section 5 of the Punjab Value Added Tax Act 2005 was in question wherein 25% of the amount of the tax, penalty and interest was required to be paid for entertainment of the appeal. The division bench of our Hon'ble High Court laid down as under:-

*“It is, thus, concluded that even when no express power has been conferred on the first appellate authority to pass an order of interim injunction/protection, in our opinion, by necessary implication and intendment in view of various pronouncements and legal proposition expounded above and in the interest of justice, it would essentially be held that the power to grant interim injunction/protection is embedded in Section 62(5) of the PVAT Act. Instead of rushing to the High Court under Article 226 of the Constitution of India, the grievance can be remedied at the stage of first appellate authority. As a sequel, it would follow that the provisions of Section 62(5) of the PVAT Act are directory in nature meaning thereby that the first appellate authority is empowered to partially or completely waive the condition of pre-deposit contained therein in the given facts and circumstances. It is not to be exercised in a routine way or as a matter of course in view of the special nature of taxation and revenue laws. Only when a strong prima facie case is made out will the first appellate authority consider whether to grant interim protection/injunction or not. Partial or complete waiver will be granted only in deserving and appropriate cases where the first appellate authority is satisfied that the entire purpose of the appeal will be frustrated or rendered nugatory by allowing the condition of pre-deposit to continue as a condition precedent to the hearing of the appeal before it. Therefore, the power to grant interim protection/injunction by the first appellate authority in appropriate*



*cases in case of undue 25 of 28 CWP No. 23368 of 2015[26] hardship is legal and valid. As a result, question (c) posed is answered accordingly.”*

24. The same principle of law has been laid down by another division bench of Hon’ble High Court in case **Maruti Suzuki India Ltd V/s Union of India & others (Supra)**. Again the same legal position has been reiterated in case **M/s Mahesh Kumar Singla & others V/s Union of India & others CWP No.23368/15 decided on March 27, 2017. In Mahesh Kumar Singla’s case**, the writ petition was filed for quashing section 19 of the Micro Small and Medium Enterprises Development Act 2006 containing a pre condition of deposit of 75% of the adjudicated amount for entertaining the appeal for setting aside the decree. After considering the entire legal position and previous cases, the division bench of Hon’ble High Court laid down as under:-

*“Consequently, while upholding the validity of Section 19 of the 2006 Act, it has to be held that the requirement of pre-deposit thereunder is not mandatory and the Court would be empowered to waive, either partially or completely, the requirement of pre-deposit in the same circumstances and conditions as explained in detail in the Punjab State Power Corporation Ltd’s case (supra).*

*As held in the Punjab State Power Corporation Ltd’s case this power is not to be exercised in a routine manner or as a matter of course. The Court will consider the question of grant of interim protection/injunction only when a strong prima facie case is made out. Partial or complete waiver will be granted only in deserving and appropriate cases where the Court is satisfied that the entire purpose of the appeal would be frustrated or rendered nugatory because of the condition of pre-deposit for hearing the appeal.”*

25. Thus, in the cases referred above the division benches of our Hon’ble High Court has taken a consistent view that the requirement of pre deposit is not mandatory and the Court/Appellate Tribunal has inherent powers to partially and completely waive the

condition of pre deposit. But this power should not be exercised in a routine way or as a matter of course. It can only be exercised if a strong prima facie case is made out. The partial or complete waiver will be granted only in deserving and appropriate cases where the Appellate Authority is satisfied that the entire purpose of the appeal will be frustrated or rendered nugatory by allowing the condition of pre deposit to continue as a condition precedent to hear the appellant. Keeping in view the aforesaid principle we have to examine the case in hand.

26. The basic contention raised by Ld. counsel for appellant/applicant is that the Ld Authority has no jurisdiction/power under the Act/Rules and regulations to order the refund of the amount deposited by the allottee. He has contended that this power vests only with the Adjudicating Officer.

27. We have given our thought/consideration to the contentions raised by the Ld counsel for the parties on this aspect of the case. Section 11(4) of the Act provides that the promoter shall be liable to fulfil the obligations, responsibilities and functions under the provisions of the Act, Rules and regulations made thereunder or to the allottee as per the agreement for sale. The Authority has been invested with the powers u/s 34(f) to ensure the compliance of the obligations casted upon the promoter under this Act, Rules and regulations made thereunder but the terms and conditions of the agreement are missing from this provision. Moreover, section 11(4) of the Act deals with the fulfilment of the obligations, responsibilities and functions and it does not convey that the Authority will have the powers to grant refund. Ld counsel for respondent has also referred to section 38 of the Act but as per this section the Authority has powers only to impose penalty or interest and the refund nowhere figures therein. He has also referred to rule



28(2)(d)(i) of the Rules and contended that the Authority can pass such order including imposition of the penalty. The word “**such order**” mentioned in this rule will mean the order or directions which falls within the competency of the Authority in connection with the contravention of the provisions of the Act or the Rules and the regulations made thereunder. Again this rule does not depict that the Authority will have the powers to grant refund. The word “**including imposition of penalty**” used in this rule will also mean that in addition to the other directions/orders within the competency of the Authority, it can also impose the penalty. But again this provision does not confer any power on the Authority to award the relief of refund.

28. We also do not find any substance in the contentions raised by Ld counsel for the respondents that the powers of the Authority and the Adjudicating officer to grant the refund are over-lapping. This contention is totally contrary to the scheme of the Act and the Rules. Rule 28 of the Rules categorically provides that the Authority will have the jurisdiction to entertain the complaints for any violation of the Act/Rules and regulations made thereunder **save** as those provided to be adjudicated by the Adjudicating Officer. In view of this rule, both the Authority and the Adjudicating Officer have the different sphere/jurisdiction and it cannot be over-lapping.

29. Ld counsel for the respondents could not point out any provision in the Act or the Rules and the regulations made thereunder that for violation of section 13 of the Act the Authority will have the jurisdiction to award the relief of refund. The self serving illustrations mentioned by Ld counsel for the respondent in his written arguments cannot be made a ground to arrive at any such conclusion, which does not flow from the plain wordings of the provisions in the Act and the Rules.

30. This Tribunal while disposing of a bunch of 19 appeals, the leading appeal being appeal No.06/2018 titled as Sameer Mahawar V/s M.G. Housing (P) Ltd in its order dated 2.5.2019, by taking into consideration the relevant provisions of the Act i.e. sections 11(4), 12, 14, 18, 19, 31, 34(f), 37, 38 & 71 of the Act read with rules 28 & 29 of the Rules concluded as under:-

“(i) That violations and causes of actions arising out of the same bundle of facts/rights giving rise to the multiple reliefs shall be placed before one and the same forum for adjudication in order to avoid the conflicting findings.

(ii) The complaints for the grant of relief of compensation can only be adjudicated by the adjudicating officer as per the provisions of section 71 of the Act and rule 29 of the Rules.

(iii) Similarly, if compensation is provided as a part of the multiple reliefs alongwith refund/return of investment with interest flowing from the same violation(s) and causes of action, the complaints have to be placed before the Adjudicating Officer exercising the powers under sections 31, 71(1) read with rule 29 of the Rules as only the Adjudicating Officer is competent to deal with the relief of compensation.

31. In view of aforesaid order, the complaints dealing with the relief of refund alongwith interest can only be entertained and adjudicated by the Adjudicating Officer and the Ld Authority has no jurisdiction to grant the relief of refund.

32. Consequently, the impugned orders of refund alongwith interest passed by the Authority in these cases are without jurisdiction.



**HRYREAT**  
**CHANDIGARH**

**HARYANA REAL ESTATE APPELLATE TRIBUNAL, CHANDIGARH.**

**हरियाणा भू-संपदा अपीलीय न्यायाधिकरण, चंडीगढ़।**

**SCO NO 50-51, THIRD FLOOR, NEAR TAJ HOTEL, SECTOR-17-A, CHANDIGARH.**

33. As the impugned orders are without jurisdiction, so the applicant/ appellant has strong prima facie case in its favour. This Tribunal is satisfied that the entire purpose of filing the present appeal shall be frustrated by ordering the appellant to first deposit the awarded amount as a pre condition for the entertainment of the present appeal. The cases in hand are the deserving cases where the appellant is entitled for the complete waiver of the condition of pre deposit as the impugned order being prima facie without jurisdiction.

34. Thus, keeping in view our aforesaid discussion, the applications moved by the appellant in both the appeals mentioned above for waiver of the condition of pre-deposit are hereby allowed.

35. Copy of this order be also placed on the record of the appeal No.63/2019 titled as M/s Ansal Housing Ltd V/s Narain Dass Sardana.

Announced  
Dated 3.5.2019

( Justice Darshan Singh (Retd)  
Chairman,

(Inderjeet Mehta)  
Memnber(Judicial)

(Anil Kumar Gupta)  
Member(Technical)