Spelendor Land Base Ltd.
Vs.
Shri Parasram Industries Pvt Ltd.
CM.Nos. 765, 766 and 767 of 2023
In Appeal No. 346 of 2023

Argued by: Mr. Aman Arora, Advocate along with
Mr. Prateek Singh, Advocate,
Mr. Archit Rana, Advocate,
for the appellant.

Mr. Akshat Mittal, Advocate,
for the respondent.

Accompanying appeal has been filed against the order passed by the Authority at Gurugram for setting aside cancellation of the unit allotted to the allottee; with further direction to the promoter to pay interest at the prescribed rate for every month of delay from the due date of possession till grant of occupation certificate plus (+) two months, within a period of 90 days; further directing the respondent to issue a revised statement of accounts after adjustment of the interest for the delayed period with a similar liability on the allottee to pay interest @ 10.60% in case of default in timely payment of instalments.

2. Present application has been moved by the applicant-appellant (Spelendor Land Base Ltd.) stating therein that no amount in lieu of pre-deposit needs to be deposited for entertaining the instant appeal in view of calculation sheet furnished by the appellant in its cross claim. It is claimed that the order is in the nature of cross decree, thus, if adjustment as shown in the calculation sheet is made, requirement of pre-deposit as contained in proviso to Section 43(5) of the Act would be obviated.

3. Reply has been filed on behalf of the allottee wherein it has been stated that pre-deposit is mandatory in nature. No exemption therefrom is envisaged by the Act nor can any rebate be given to the promoter qua the quantum of pre-deposit.

4. Learned counsel for the appellant has vehemently contended that he is not liable to make any pre-deposit in view of grounds taken in the application and calculation sheet annexed therewith. This apart, he has referred to Order 21 Rules 18 and 19 of Code of Civil Procedure (CPC) to contend that adjustment of cross claims as shown in the calculation sheet has to be made.

5. Learned counsel for the respondent has rebutted the aforesaid plea and reiterated the stand taken in the reply. He has relied upon the judgment reported as *M/s Newtech Promoters and Developers Pvt. Ltd. v. State of UP and others etc. 2022 (1) RCR (Civil) 357* to contend that pre-deposit is *sine qua non* for entertaining an appeal under the Act. As per him, calculation made by the appellant himself cannot be a basis for adjustment/waiver of the amount of requisite pre-deposit.

6. I have heard learned counsel for the parties and have given careful thoughts to the facts of the case.

7. At the outset, it is necessary to refer to Section 43(5) of the Act, which 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, in any, or with both, as the case may be, before the said appeal is heard.*

8. Aforesaid provision for subject matter of interpretation in Newtech's case (supra). A plea was advanced therein that the right of appeal cannot remain dependent on fulfilment of pre-deposit, which is otherwise onerous on the builder as this condition has been incorporated for the builders alone, thus, discriminatory in nature. A promoter, who is in financial distress may be incapable of depositing the full computed amount, thus, making his right to file appeal nugatory.

9. Hon'ble Supreme Court considered this plea and held as under:-

> *"125. The submission in the first blush appears to be attractive but is not sustainable in law for the reason that a perusal of scheme of the Act makes it clear that the limited rights and duties are provided on the shoulders of the allottees under Section 19 of the Act at a given time, several onerous duties and obligations have been imposed on the promoters i.e. registration, duties of promoters, obligations of promoters, adherence to sanctioned plans, insurance of real estate, payment of penalty, interest and compensation, etc. under Chapters III and VIII of the Act 2016. This classification between consumers and promoters is based upon the intelligible differentia between the rights, duties and obligations cast upon the allottees/home buyers and the promoters and is in furtherance of the object and purpose of the Act to protect the interest of the consumers vis–a–viz., the promoters in the real estate sector. The promoters and allottees are distinctly identifiable, separate class of persons having been differently and separately dealt with under the various provisions of the Act.*
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> *126. Therefore, the question of discrimination in the first place does not arise which has been alleged as they fall under distinct and different categories/classes.*

127. It may further be noticed that under the present real estate sector which is now being regulated under the provisions of the Act 2016, the complaint for refund of the amount of payment which the allottee/consumer has deposited with the promoter and at a later stage, when the promoter is unable to hand over possession in breach of the conditions of the agreement between the parties, are being instituted at the instance of the consumer/allotee demanding for refund of the amount deposited by them and after the scrutiny of facts being made based on the contemporaneous documentary evidence on record made available by the respective parties, the legislature in its wisdom has intended to ensure that the money which has been computed by the authority at least must be safeguarded if the promoter intends to prefer an appeal before the tribunal and in case, the appeal fails at a later stage, it becomes difficult for the consumer/allottee to get the amount recovered which has been determined by the authority and to avoid the consumer/allottee to go from pillar to post for recovery of the amount that has been determined by the authority in fact, belongs to the allottee at a later stage could be saved from all the miseries which come forward against him.

128. At the same time, it will avoid unscrupulous and uncalled for litigation at the appellate stage and restrict the promoter if feels that there is some manifest material irregularity being committed or his defence has not been properly appreciated at the first stage, would prefer an appeal for re– appraisal of the evidence on record provided substantive compliance of the condition of pre–deposit is made over, the rights of the parties inter se could easily be saved for adjudication at the appellate stage."

10. This Bench does not find any substance in the plea of the appellant to seek adjustment/waiver from making pre-deposit by claiming that impugned order is in the nature of a cross-decree.

11. In my considered view, the plea is entirely misconceived. A perusal of the record shows that complaint before the Authority was preferred by the allottee and the promoter merely rebutted the claim. No counter claim or complaint was filed by the promoter.

12. It is, thus, inexplicable as to how the said order can be termed cross claim in the absence of counter claim. In any case, the provisions of Order 21 Rules 18 and 19 of the CPC are not attracted to the instant case as same relate to execution in case of cross decrees and cross claims under same decree. Besides the provisions of the special enactment i.e. RERA Act have to be kept in mind while dealing with such a issue. There is no room for doubt that pre-deposit is condition precedent for entertaining the appeal preferred by the builder/promoter under the Act.

13. The calculation sheet submitted by the appellant along with application is merely a document issued post decree. Calculations made therein by the promoter himself, which includes heads such as Fire Fighting Charges (FFC) per square feet, Common Area Maintenance (CAM) charges, Electricity Meter Charges, Building Insurance, IFMS etc. cannot be taken as gospel truth as same would depend upon final adjudication of the appeal.

14. Present is not a case where builder can claim adjustment on the ground that he has deposited the decreetal amount or part thereof before the Executing Court. His reliance is only on the calculation sheet submitted by him wherein several demands have been raised. Registry has, however, calculated the amount of pre-deposit on the basis of directions contained in the order passed by the Authority. Same comes to Rs.12,56,193/- in the instant appeal. The appellant is seeking waiver/exemption therefrom which is not permissible.

15. Undoubtedly, allottee has also posed a challenge to the same order as impugned by the promoter wherein notice has been issued. Said appeal has been entertained as there is no obligation on the allottee to make any pre-deposit except the appeal fee.

16. CM No.767 of 2023 is dismissed being devoid of merits. Thus, appeal, cannot be entertained.

17. Ordered accordingly.

18. Copy of this order be sent to the parties, their counsel and the Authority, Gurugram.

19. File be consigned to the records.

Announced

15.05.2024

Justice Rajan Gupta
Chairman
Haryana Real Estate Appellate Tribunal

Manoj Rana