

**THE U.P. REAL ESTATE APPELLATE TRIBUNAL
AT
LUCKNOW**

Appeal No. 157 of 2019

(Earlier Misc. Case No. 198/2019)

M/s S. V. P. Builders India Ltd. Vs. Neha Sharma

(Complaint No. 1201928564)

&

Appeal No. 350 of 2019

M/s S. V. P. Builders India Ltd. Vs. Virendra Kumar Jain

(Complaint No. 1201929937)

&

Appeal No. 351 of 2019

M/s S. V. P. Builders India Ltd. Vs. Neha Jain

(Complaint No. 1201929952)

&

Appeal No. 353 of 2019

M/s S. V. P. Builders India Ltd. Vs. Saurabh Suri

(Complaint No. 3201932942)

Hon'ble Mr. Justice (Dr.) D. K. Arora, Chairman.
Hon'ble Mr. Rajiv Misra, Administrative Member.

1. These four appeals, namely– 157/2019, 350/2019, 351/2019 & 353/2019 have been filed in the Tribunal between May 2019 and December 2019 by M/s S. V. P. Builders India Ltd. (hereinafter referred to as the “applicant/promoter”) challenging various orders passed by the U.P. Real Estate Regulatory Authority (hereinafter referred to as the “Regulatory Authority”) under Section 44 of the Real Estate (Regulation and Development) Act 2016 (hereinafter referred to as “the Act”) without full compliance of the provisions of Section 43(5) of the Act 2016.
 - 1.1 All these appeals have been filed by Dr. Azhar Ikram, Advocate on behalf of the applicant/promoter.

1.2 These four appeals have been clubbed together and are being disposed off by a combined order, as the issue involved in all these cases is about non compliance of the statutory provisions of Section 43(5) of the Act and the applicant/promoter is the same namely M/s S. V. P. Builders India Ltd.

2. For the sake of convenience Appeal No. 157/2019 is taken as the leading case.

2.1 A perusal of the record of Appeal No. 157/2019 (the leading case) indicates that the case was filed in the Tribunal on 30.05.2019 challenging the order dated 15.04.2019 passed by the Regulatory Authority.

2.2 From 30.05.2019 till the end of December 2019, the case was put up before the Tribunal 10 times but the appellant deposited only a sum of Rs. 70,380/- in part compliance of provisions of Section 43(5) of the Act.

2.3 During the year 2020, the case was put up 12 times before the Tribunal i.e. on 07.01.2020, 20.01.2020, 23.01.2020, 20.02.2020, 02.03.2020, 15.06.2020, 02.07.2020, 19.08.2020, 02.09.2020, 07.10.2020, 05.11.2020, 24.11.2020 & 16.12.2020.

2.4 On 16.12.2020, the Tribunal while listing the case for 11.01.2021 observed that in the meantime, appellant would make complete compliance of the provisions of Section 43(5) of the Act in the light of observations made by Hon'ble High Court, Lucknow Bench in *Second Appeal No. 364/2018 (Radicon Infrastructure and Housing Private Ltd. Vs. Karan Dhyani)* and *Second Appeal No. 367 of 2018 (Radicon Infrastructure & Housing Private Limited vs. Dhaneshwari Devi)*, decided on 26.07.2019.

2.5 On 11.01.2021, Dr. Azhar Ikram, learned counsel for the appellant prayed for and was granted two weeks' and no more time to make complete compliance of the provisions of Section 43(5) of the Act and the case was listed for 04.02.2021.

2.6 On 04.02.2021, on the request of Dr. Azhar Ikram, learned counsel for the appellant, a weeks' and no more time was granted for making complete compliance of the provisions of Section 43(5) of the Act. It was made clear that if complete compliance of the provisions of

Section 43(5) of the Act was not made by the next date of listing, the appeal would be dismissed for non-compliance of the provisions of Section 43(5) of the Act. The case was listed for 18.02.2021.

- 2.7** On 18.02.2021, Dr. Azhar Ikram, learned counsel for the appellant requested for listing this case on 02.03.2021. Learned counsel for the appellant was directed to ensure complete compliance of the provisions of Section 43(5) of the Act by the next date of listing.
- 2.8** On 02.03.2021, the appellant was directed to make complete compliance of the provisions of Section 43(5) of the Act by the next date of listing. It was made clear that if complete compliance of the provisions of Section 43(5) of the Act was not made by the next date of listing, the appeal would be dismissed for non complete compliance of the provisions of Section 43(5) of the Act, as Section 44(5) of the Act mandates the Tribunal to make an endeavour to dispose off the appeal within 60 days from its receipt. The case was listed for 12.03.2021.
- 2.9** On 12.03.2021, Shri Akash Tewari, Advocate, holding brief of Dr. Azhar Ikram, learned counsel for the appellant submitted that during the course of day, remaining amount towards the complete compliance of the provisions of Section 43(5) of the Act will be deposited in the Registry and the case was listed for 01.04.2021.
- 2.10** On 27.03.2021, a Demand Draft of Rs. 3,13,257/- alongwith C.A. Certificate dated 25.02.2021, issued by M/s Piyush Makkar and Company, Chartered Accountants, Ghaziabad (UDIN:- 21079490AAAAAE1325), was filed by the learned counsel for the appellant, in which the compensation payable for delayed possession as calculated by the Chartered Accountant was shown as Rs. 7,61,235/-.
- 2.11** Thereafter, the case could not be put up before the Tribunal due to judicial functioning of the Tribunal remained suspended on account of second wave of COVID-19 pandemic.
- 2.12** The case was next put up before the Tribunal on 08.09.2021 when Shri Manish Singh, learned counsel for the appellant requested for listing of the case on 21.09.2021.

2.13 On 21.09.2021, the Tribunal observed that the appellant has not made complete compliance of the provisions of Section 43(5) of the Act as per office report. Dr. Azhar Ikram, learned counsel for the appellant submitted that he may be granted three days' time to ensure complete compliance of the provisions of Section 43(5) of the Act. Appreciating the request of learned counsel for the appellant, three days' and no more time was granted for making complete compliance of the provisions of Section 43(5) of the Act, failing which the appeal would be dismissed for non-compliance and the case was listed for 27.09.2021.

2.14 The position is similar in the other three appeals namely Appeal No. 350/2019, 351/2019 and 353/2019, which were filed in November and December 2019. Despite repeated listing of the cases before the Tribunal, and time sought repeatedly by the learned counsels for the appellant, the complete compliance of the provisions of Section 43(5) of the Act has not been made. The summary of these 4 appeals is as follows:-

Summary based on preliminary check of cases

S. No.	Case No. Complaint No.	Order by	Order date	Direction	Calculation of amount payable on account of delayed possession (as per C.A. Certificate) (Rs.)	Amount Deposited under Section 43(5) (Rs.)	Remarks
1	157/2019 (Earlier Misc. Case. No. 198/2019)	Regulatory Authority	15.04.2019	For execution of Conveyance Deed and giving possession. As per Agreement up to 30.04.2016. From 01.05.2016 till OC/CC or offer of possession (whichever is later), interest @ MCLR+1%.	7,61,235/=	3,83,637/=	Incomplete compliance of Section 43(5) of the Act.
	1201928564						
2	350/2019	Regulatory Authority	19.09.2020	For execution of Conveyance Deed and giving possession. As per Agreement Rs.5/sq.ft. per month for period from 30.05.2015 upto 30.04.2016 and interest @ MCLR+1% from 01.05.2016 till the date of obtaining OC/CC.	5,48,750/=	1,64,625/=	-Do-
	1201929937						
3	351/2019	Regulatory Authority	19.09.2019	For execution of Conveyance Deed and giving possession. As per Agreement Rs.5/sq.ft. per month for period from 30.05.2015 upto 30.04.2016 and interest @ MCLR+1% from 01.05.2016 till the date of obtaining OC/CC.	11,08,596/=	6,35,860/=	-Do-
	1201929952						
4	353/2019	Regulatory Authority	30.09.2019	For execution of Conveyance Deed and giving possession. As per Agreement, till the coming into force of the RERA Act. And thereafter interest @ MCLR+1% for delayed period.	5,55,608/=	4,79,840/=	-Do-
	3201932942						

2.15 Today, i.e. on 27.09.2021, Dr. Azhar Ikram, learned counsel for the appellant was present and submitted that the appellant is not in a position to fully comply with the provisions of Section 43(5) of the Act in all the 4 cases. Therefore, the Tribunal may pass appropriate orders.

2.16 It is our considered view that the appellant/promoter has to make complete compliance of the provisions of Section 43(5) of the Act by depositing the total amount of interest to be paid to the complainant/respondent as per the relevant orders passed by the Regulatory Authority.

3. At this stage we examine the provisions of Section 43(5) of the Act, which read as follows :-

Section 43(5) of the Real Estate (Regulation and Development) Act, 2016

“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 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”.

From the plain reading of Section 43(5) of the Act, it is clear that if a promoter wishes to file an appeal before the Appellate Tribunal, the promoter shall first deposit the required amount before its appeal is entertained or heard by the Tribunal.

4. The Hon’ble Apex Court in the case of *M/s Tecnimont Pvt. Ltd. Vs. State of Punjab & others*, Civil Appeal No. 7358 of 2019, SLP (c) No. 27072 of 2016, had an occasion to examine the judgment and order of Punjab and Haryana High Court wherein an issue regarding validity of

Section 62(5) of the Punjab Value Added Tax Act, 2005 (hereinafter referred to as “the PVAT Act”) which provides that no appeal shall be entertained, unless such appeal is accompanied by satisfactory proof of the prior minimum payment of twenty-five per cent of the total amount of additional demand created, penalty and interest, if any, was involved. The Hon’ble Punjab and Haryana High Court framed an issue “Whether the condition of 25% pre-deposit for hearing first appeal is onerous, harsh, unreasonable and, therefore, violative of Article 14 of the Constitution of India?” Examining the issue in detail the Hon’ble Apex Court while relying upon the decision in the case of *Shyam Kishore (1993)1 SCC 22* wherein the Hon’ble Apex Court was pleased to observe that any such exercise would make the mandate of the provisions itself unworkable and render the statutory intendment nugatory, observed that the High Court rightly held Section 62(5) of the PVAT Act to be legal and valid and the condition of 25% of pre-deposit not to be onerous, harsh, unreasonable and violative of Article 14 of the Constitution of India.

5. The Hon’ble Allahabad High Court in Second Appeal No. 364 of 2018, *Radicon Infrastructure and Housing Private Limited Vs. Karan Dhyani*, framed the following issue regarding compliance of the provisions of Section 43(5) of the Act:-

“Whether the appellate tribunal while passing an order in terms of the provision to sub-section 5 of Section 43 has any discretion to allow the deposit of a lesser portion of the total amount to be paid to the allottee including interest and compensation imposed on him or the entire amount, as such has to be deposited without any discretion in this regard with the appellate tribunal to reduce the same and whether in view of the use of the word determined by the appellate tribunal in the first part of the proviso is indicative of requirement of application of mind by the appellant tribunal?”

After examining the provisions of Section 43(5) of the Act the Hon’ble Allahabad High Court answered the same as under:--

“The reason this Court has framed the additional substantial question of law is to give a quietus to the issue with regard to the meaning purport and application of the proviso to sub-section (5) of Section 43 in the facts and circumstances of the case, so that the case does not get unnecessarily lingered before the first appellate tribunal on this issue.”

“The Court is of the view that as per the said

proviso the appellate tribunal can require either the penalty or portion thereof or the total amount to be paid to the allottee including interest and compensation imposed on him to be deposited before the appeal is heard for being entertained, i.e. for being admitted for consideration or it can require the promoter appellant to deposit both, meaning thereby, the penalty as well as the total amount referred hereinabove. With regard to the penalty the appellate tribunal has to 'determine' whether 30% of the penalty imposed or such a higher percentage as it may determine is to be deposited, but when it comes to the deposit of the total amount to be paid to the allottee including interest and compensation under the orders of the regulatory authority or adjudicating officer, no such discretion based on a 'determination' appears to have been vested in the Appellate Tribunal by the legislature. The word 'as the case may be' following the words 'or with both' are a reference to the deposit either of penalty or the total amount or both as the facts of the case may require. These words have no independent application to the second part of the proviso requiring the deposit of the total amount. The object appears to be to protect the interest of the consumer once an adjudication had been made by the Regulatory Authority. In this view of the matter the order of the Tribunal passed in the present case, where no penalty has been imposed upon the appellant under Chapter-VIII of the Act, 2016, to deposit the total amount imposed by the Regulatory Authority, does not suffer from any error. As regards the contention of the appellant that the word penalty mentioned in the proviso should be used in general terms to include any monetary condition imposed by the Regulatory Authority in its judgment, it is not acceptable for the simple reason that a specific provision has been made for the imposition of penalty under the Act, 2016 in Chapter-VIII with the heading 'Offences, Penalty and Adjudication'. Section 60, 61, 62, 63, 64 65, 66, 67 and 68 relate to penalties which can be imposed under the Act. These are penalties with reference to specific acts or omissions. The words "at least 30% penalty" in the proviso to Section 43(5) obviously refer to penalties mentioned under Chapter-VIII of the Act, 2016. Learned counsel for the appellant does not dispute the fact that no penalty has been imposed upon the appellant under these provisions, therefore to say that the conditions imposed by the Regulatory Authority are penal in nature, as such the first part of the proviso to sub-section 5 of Section 43 would apply amounts to strained reasoning. It would amount to reading something into the provision which the legislature has not provided nor intended. This plea is rejected. Question no. 4 framed above, is answered accordingly."

6. **Hon'ble Madras High Court** while examining the validity of the provisions of Section 43(5) of the Act of 2016, in **W.P. No. 29933 of 2019**

and W.M.P. No. 29844 of 2019 (T. Chitty Babu Vs. Union of India & Ors.) upheld the said provision to be intra vires and further declared that the Appellate Forum is neither illusory nor can the condition of pre-deposit be treated as onerous. The relevant paras (Nos. 5, 15, 17, 24, 26, 27 & 28) are being reproduced as follows:-

“5. The limited challenge in this writ petition is to the validity of Sub-Section (5) of Section 43 on the ground that it is an onerous condition and the deposit of the total amount of compensation makes the right of appeal illusory, inasmuch as if a promoter is called upon to muster the resources for making payment of the total amount in the manner aforesaid, and if a number of complaints are entertained resulting in award of compensation, as has been done above, on complaints which are otherwise untenable in the eyes of law then a promoter will never be able to avail the remedy of appeal, as he would be burdened with payment of any amount being awarded as compensation, which can be absolutely disproportionate, an outcome of a perverse conclusion as in the present case or excessive or inflated amounts or for a host of other reasons that would ultimately render the right of appeal ineffective. For this, various submissions have been advanced with the aid of judgments at the bar”.

*“15. We may further point out that the learned counsel for the petitioner has also placed before us the judgment of the Apex Court in the case of **M/s. Tecnimont Pvt. Ltd. vs. State of Punjab and Ors., (Civil Appeal No. 7358 of 2019)**, decided on 18.09.2019, where a condition of 25% pre-deposit for hearing the appeal was challenged as onerous, harsh and unreasonable. Another question as to whether the Appellate Authority had an inherent power to grant an interim order was also raised. While answering the said questions, the Apex Court held that the High Court could not have culled out a power of granting interim protections and therefore, if the statute did not make any prescription, the Appellate Authority could not have exercised such powers. On the issue of pre-deposit, the High Court upheld the provision and while relying on the judgment in the case of **Shyam Kishore** (supra), it went on to hold that the condition of 25% pre-deposit was not onerous, harsh or unreasonable, **but in paragraph 18 proceeded to hold that in case of extreme hardship, a writ petition could be an appropriate remedy**”.*

“17. A perusal of the Section would indicate that when it comes to the filing of an appeal by the promoter, the preemptive words used are “it shall not be entertained” followed ultimately by “before the said appeal is heard”. These two phrases, therefore, leave no room for doubt that entertaining of the appeal itself is injuncted. However, while considering as to what is the meaning of the word

“entertained”, one has to refer to the judgment in the case of *Shyam Kishore* (supra), where the **Supreme Court** was considering a right of appeal against the levy of assessment of tax under the Delhi Municipal Corporation Act. Section 170 of the said Act provides that no appeal shall be heard or determined unless the amount, if any in dispute in the appeal, has been deposited by the appellant. The said judgment took notice of the judgment in the case of *Ganga Bai vs. Vijay Kumar*, (1974) 2 SCC 393, where it was held that a right of suit is distinct from a right of appeal. There is an inherent right in every person to bring a suit of civil nature, but the **right of appeal inheres in no one and therefore, an appeal for its maintainability must have the clear authority of law**”.

“24. Having considered all the judgments and the provisions in question, we find 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, to our mind, 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 justification for the same by the respondents is to prevent any form of exploitation, as the promoter or the builder is in a far more dominant position financially or otherwise and the allottee being pitted against such dominants require protection of his life time savings in such investments. It is in order to protect the interest of an allottee that such stringent conditions were necessarily required after it was experienced that promoters and builders had been enriched themselves at the cost of individuals who were made to run to Courts and fight long drawn litigations to recover their priced investments. This being a laudable object to our mind is a reasonable approach because it ensures refund of the amount as well as compensate the allottee proportionately. Such a provision will also act as a deterrent to promoters and builders not to withhold the money of the investors against their wishes in the event of violation of the terms of an agreement and would substantially put on guard all promoters and builders to ensure timing precision and the expected levels of accuracy in construction. This object in no way prejudices the promoters or the builders, but only seeks to protect an allottee from any form of exploitation or hardship that may be faced by an allottee in the event he does not get his due return as per the terms of the agreement”.

“26. There is, however, one question which has to be answered, namely, there is no discretion left in the Appellate Authority at all to modify the terms of deposit

*and the statute requires a total deposit of the entire amount of compensation. The issue of safety valve being provided in a statute, as discussed in the judgment of **Gagan Makkar** (supra), has to be taken notice of. As observed by the Apex Court in the case of **M/s. Tecnimont Pvt. Ltd.** (supra), we cannot read into the hands of the Appellate Authority any discretionary power in this regard*”.

“27. We may, however, clarify that an appeal can be instituted by a ministerial act of its presentation and physical filing in the office of the Appellate Authority, but it cannot be entertained unless the pre-deposit has been made. We also clarify that no orders can be passed by the Appellate Authority by either issuing a notice on such an incompetent appeal or otherwise and it can only be entertained and then heard, provided the aggrieved party, in the present case the petitioner deposits the amount as per the provision of Section 43(5) of the 2016 Act unless there is an order of the High Court or the Apex Court otherwise”.

“28. We, therefore, hold the provision to be intra vires subject to the above and we, further declare that the appellate forum is not illusory nor can the condition of pre-deposit be termed as onerous”.

7. **Hon’ble Allahabad High Court** while examining the similar issue vide its judgment in *Misc. Bench No. 5867 of 2020 (M/S Ansal Prop. & Infrastructure Ltd. Thru. Auth. Signatory Vs. U.O.I. Thru. Secy. Ministry of Law & Justice New Delhi & Ors.)*, was pleased to observe that a condition of pre deposit imposed by legislature under their wisdom cannot be considered to be unconstitutional not being unreasonable or onerous. The relevant Para Nos. 4, 6, 24, 25, 26, 27, 28, 30 & 31 are reproduced herein:-

“4. The writ petition has been pressed mainly to challenge to Section 43(5) of the Act of 2016. The order of Real Estate Regulatory Authority has also been challenged, though for which an appeal is maintainable before the Real Estate Appellate Tribunal”.

“6. In the instant case also, Section 43 (5) of the Act of 2016 mandates deposition of at least 30% of the penalty or such higher percentage, as may be determined by the Tribunal or the total amount payable to the allottee including interests and compensation imposed on the promoter or both, before the appeal is heard. No discretion has been given to the appellate Tribunal to reduce the total amount payable to the allottee including interest and compensation. The discretion lies on the penalty, where also mandate is to deposit 30% amount.....”

*“24. In the case of **Seth Nand Lal and others Vs. State of Haryana and others 1980(Suppl) SCC 574**, the constitutional Bench elaborately discussed the issue regarding condition of pre deposit for maintaining an appeal or for its hearing. The condition of pre deposit for maintaining an appeal was held to be constitutionally valid. The argument regarding violation of Article 14 of the Constitution of India was not accepted. Para 21 and 22 of the judgment in the case (supra) are quoted herein for ready reference”.*

“21.....

*“22. It is well settled by several decisions of this Court that the right of appeal is creature of statute and there is no reason why the legislature while granting the right cannot impose conditions for the exercise of such right so long as the conditions are not so onerous as to amount to unreasonable restrictions rendering the right almost illusory (vide the latest decisions in **Anant Mills Ltd. Vs. State of Gujarat**). Counsel for the appellants, however urged that the conditions imposed should be regarded as unreasonable onerous especially when no discretion has been left with the appellate or revisional authority to relax or waive the condition or grant exemption in respect thereof in fit and proper cases, and therefore, the fetter imposed must be regarded as unconstitutional and struck down. It is not possible to accept this contention for more than one reason. In the first place, the object of imposing the condition is obviously to prevent frivolous appeal and revision that impede the implementation of the ceiling policy.....”*

*“25. In the case of **Gujarat Agro Industries Vs. Municipal Corporation by the City of Ahmedabad and others : 1999 (4) SCC 468**, the Apex Court held that the right of appeal, being statutory right and not inherent thus a condition for pre deposit can be imposed. It remains on the wisdom of the legislature. It can impose an appropriate condition of pre deposit for an appeal.....The Apex Court did not accept challenge to the condition of pre deposit. The issue was dealt with specifically in reference to Article 14 of the Constitution of India”.*

Paragraph 8 of the said judgment is quoted hereunder:-

“8.....This Court said that right of appeal is the creature of a statute and it is for the legislature to decide whether the right of appeal should be unconditionally given to an aggrieved party or it should be conditionally given. Right of appeal which is a statutory right can be conditional or qualified. It cannot be said that such a law would be violative of Article 14 of the Constitution. If the

statute does not create any right of appeal, no appeal can be filed. There is a clear distinction between a suit and an appeal. While every person has an inherent right to bring a suit of a civil nature unless the suit is barred by statute, however, in regard to an appeal, the position is quite opposite. The right to appeal inheres in no one and, therefore, for maintainability of an appeal there must be authority of law. When such a law authorises filing of appeal, it can impose conditions as well (see Ganga Bai v. Vijay Kumar)."

"26. In the light of the judgment referred to above, challenge to the constitutional validity of Section 43 (5) of the Act of 2016 cannot be accepted....."

"27. Contrary to the above, Section 43 of the Act of 2016 provides remedy of appeal after adjudication of the dispute by the Real Estate Regulatory Authority after providing opportunity of hearing to the parties. Thus, appeal thereupon is after adjudication of the complaint and not against a unilateral act of any party."

"28. If compliance of the order of the Real Estate Authority is not made, powers exist for imposition of penalty. Thus, in such circumstances, if a condition of pre deposit has been imposed by the legislature under their wisdom, it cannot be considered to be unconstitutional not being unreasonable or onerous."

"30. In those circumstances, if petitioner is directed to comply the direction of Section 43(5), it cannot be said to be unreasonable or onerous on the petitioner for maintaining the appeal."

"31. The object of the Act of 2016 is quite clear and Section 43 (5) is for the purpose sought to be achieved. It is to secure the complainant after adjudication of the matter by Real Estate Regulatory Authority. Thus, even on the facts of this case and in reference to the provisions of the Act of 2016, we find condition of pre deposit for hearing of the appeal to be neither unreasonable nor onerous so as to treat remedy to be illusory. The challenge to the provision cannot sustain rather for it, the writ petition is liable to be dismissed."

8. In a similar matter in **Second Appeal defective No. 237 of 2019 (Air Force Naval Housing Board Vs. Mohit Anand)**, the Hon'ble Allahabad High Court while dismissing the Second Appeal, was pleased to observe that:-

"17. Thus, from reading of sub-section (5) of Section 43 of the Act, 2016, it is evident that the condition for entertaining the appeal by the Appellate tribunal is prescribed under Section 43(5) of the Act, whereas the manner in which the appeal has to be dealt with, has been

provided in Section 44 of the Act, 2016. Thus, an appeal under Section 44 of the Act, 2016 can be entertained only if the condition precedent as prescribed under Section 43(5) of the Act, 2016 has been complied with and not otherwise.”

9. Similarly, **Hon’ble High Court of Punjab and Haryana** in **CWP No. 15205 of 2020 (O&M) in M/s Lotus Realtech Pvt. Ltd. Vs. State of Haryana and Others**, examined the provisions of Section 43(5) of the Act and upheld the constitutional validity of the provisions of Section 43(5) of the Act. The relevant Para Nos. 11, 14, 16, 17, 18 & 19 of the judgment are reproduced as follows:-

*“11. At the very outset, it is pertinent to note that the decision of this Court rendered in the case of **Punjab State Power Corporation Ltd. v. State of Punjab and Others** (supra) relying upon the Full Bench decision of this Court rendered in the case of **Ranjit Singh v. State of Haryana and others 2012(2) RCR (C) 353**, to the extent that it was held therein that the Appellate Authority had the inherent powers to waive the condition of pre-deposit even if no such power was specifically conferred upon the Appellate Authority under the statutory provision, has been over ruled by the Supreme Court on this point in the case of **M/s Technimont Pvt. Ltd. (formerly known as Technimont ICB Private Ltd.) v. State of Punjab and others 2019 AIR SC 4489**.”*

“14. The law laid down by the Supreme Court in the aforesaid decisions is that the right of 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. It has further been held that 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 or meaningless. The Supreme Court has also held that in genuine cases of hardship, an aggrieved person can take recourse to the remedy of filing a writ petition under Article 226 of the Constitution of India. However, even in such genuine cases of hardship, no relief of waiver of pre-deposit can be granted by the Appellate Authority. The challenge to the impugned provision of Section 43(5) proviso of the

Act of 2016 on this ground, being meritless, is therefore, rejected.”

“16. The object and purpose, for which the Act of 2016 has been enacted, as stated in its long title, is “to protect the interest of the consumers in the real estate sector and to establish an adjudicating mechanism for speedy dispute redressal and also to establish the Appellate Tribunal to hear appeals from the decisions, directions or orders of the Real Estate Regulatory Authority and the adjudicating officer and for matters connected therewith or incidental thereto”.

“17. The statement of object and reasons of the Act of 2016 make it clear that the Act seeks to provide for, amongst other things, to “ensure greater accountability towards consumers and significantly reduce frauds and delays as also the current high transaction costs” and “to impose liability upon the promoter to pay such compensation to the allottees, in the manner as provided under the proposed legislation, in case if he fails to discharge any obligations imposed on him under the proposed legislation”.

“18. A perusal of the provisions of the Act make it clear that while limited and few rights and duties are prescribed for allottees under Section 19 of the Act of 2016, several onerous duties and obligations have been imposed on the promoters, namely, registration, duties of promoters, obligations of promoters adherence to the sanctioned plans, insurance of real estate, payment of penalty, interest and compensation etc., under Chapter III and VIII of the Act of 2016. This classification between consumers and promoters is based upon intelligible differentia between the rights, duties and obligations of the allottees/consumers and the promoters and is in furtherance of the very object and purpose of the Act to protect the interest of the consumers viz.-a-viz. promoters in the real estate sector. It is for this reason that the duties, liabilities, obligations and penalties imposed on the promoters are much more onerous as against those imposed upon the allottees. A perusal of the provisions of the Act of 2016 makes it apparent that promoters and the allottees form two distinctly identifiable separate class of persons and have also been differently and separately dealt with under the various provisions of the Act of 2016, therefore, the question of discrimination between the promoters and the allottees as alleged by the petitioner does not arise as they fall under two distinct and different categories/classes.”

“19. From the object and purpose of the Act of 2016, it is further evident that the Act seeks to reduce fraud and delays resorted to by the promoters. For this purpose, adjudication through an authority established under the

Act has been provided and thereafter with a view to deter promoters from protracting the dispute by involving the allottees/consumers in lengthy litigation and with a view to discourage them to file frivolous appeals only with an intention of delaying the delivery of possession to the allottees, the onerous condition of pre- deposit has been imposed upon the promoters in case they file appeals before the Appellate Tribunal against the orders passed by the authorities. Evidently, 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 and ensure prompt delivery of the real estate to the allottees within the time frame prescribed.”

10. **The Hon’ble High Court of Punjab and Haryana in CWP No. 38144 of 2018 (Experion Developers Pvt. Ltd. Vs. State of Haryana and others)** and 43 other connected writ petitions vide its judgment and order dated 16.10.2020, taking note of the judgment of its own Court in **CWP Nos. 14623 and 14689 of 2020 (M/s Landmark Apartments Pvt. Ltd. Vs. Union of India)** and **CWP No. 15205 of 2020 (O &M) (M/S Lotus Realtech Pvt. Ltd. Vs. State of Haryana and others)**, was pleased to observe that when it comes to an appeal filed by the promoter, the requirement under the proviso to Section 43(5) of the Act, will have to be mandatorily fulfilled, even for the purposes of the Appellate Tribunal having to pass orders in terms of Section 44 of the Act. The proviso to Section 43(5) of the Act clearly states that the pre-deposit is required to be made *“before the said appeal is heard.”* In other words, 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.
11. In the case of **Janta Land Promoters Pvt. Vs. Abhimanyu Singh Vinayak, 2020 (1) RCR (Civil) 160**, the **Hon’ble Punjab & Haryana High Court** was also pleased to hold that even in a case where *“the Appellate Authority proceeds to decide the appeal on the ground of maintainability of the proceedings before the RERA Authority, that will also amount to hearing and taking a decision in the appeal”* and that *“the promoter would be liable to deposit the pre-requisite amount as per proviso to the Section 43(5) of the Act”*.

12. In the case of **Shri Mohan Singh Vs. Haryana Real Estate Regulatory Authority, Gurugram (RERA Appeal No. 6 of 2020 decided on 06.03.2020)**, the **Hon'ble High Court of Punjab and Haryana** while examining the issue of dispensation with the condition of pre-deposit under the Act of 2016 was pleased to observe that due to lack of jurisdiction, the Real Estate Appellate Tribunal has no powers to waive off the pre-deposit condition while considering an appeal filed by a promoter. The relevant paraNos. 1 and 16 are reproduced herein :-

"1. By this appeal, the appellant challenges the order passed by the Haryana Real Estate Appellate Tribunal, Chandigarh (in short "the Tribunal"), dated 03.01.2020, also seeking that this court may pass any other order that it may deem fit, necessary and just.

The aforesaid order of the learned Tribunal, dated 03.01.2020, had been passed on an application filed by the appellant, seeking "dispensation with the condition of pre- deposit of the penalty imposed by the Haryana Real Estate Regulatory Authority", (in short "the Authority"), vide its order dated 19.06.2019, that order having been challenged before the learned Tribunal by the present appellant.

16. It needs however to be noticed that as regards the ratio of the judgment of the Supreme Court in Tecnimonts' case, sub- section (3) of Section 63 of the Punjab Value Added Tax Act, 2005, reads as follows:-

"(3). The Tribunal may, on an application made by the appellant, order the stay of the recovery of the amount involved, subject to the payment of minimum twenty five percent of the amount and fulfillment of such other conditions, as it may deem necessary."

Hence, very obviously the Tribunal under that Act specifically has been debarred from ordering any stay of the minimum pre-deposit required to be made prior to hearing of an appeal.

Under the Act of 2016, in the present case, no doubt learned counsel is correct that no similar bar is contained in sub- section (3) of Section 44 of the Act, yet, the Tribunal as also this court, having prima facie at least found that the petitioners' contention as regards the merits of the case cannot be determined without actually hearing the appeal itself in detail, the question of a waiver a 'pre-deposit' would not arise, as already held hereinabove.

To repeat, this court would also hold that subject to an order being shown to be void ab initio due to lack of jurisdiction with the Authority, waiver of a pre-deposit could not be considered by the Tribunal in appeal (as has been held by it), as that would defeat the statutory provision of a pre deposit itself”

13. Further, on examining the various judgments, we are of the opinion that words used in the provisions of Section 43(5) of the Act namely “*it shall not be entertained*” prevents examination of the present defective appeal and the clause “*before the said appeal is heard*” without the “*Promoter first having deposited with the Appellate Tribunal, atleast 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 interest and compensation imposed on him, if any, or with both, as the case may be.*” mandates the Appellate Tribunal to exercise its jurisdiction only after the compliance of the provisions of Section 43(5) of the Act has been made and the conjoint reading of these clauses clearly shuts out even the presentation or physical filing of appeal before the Appellate Tribunal. The Appellate Tribunal has no jurisdiction or discretion to waive off or reduce the amount of pre-deposit, and the compliance of the provisions of Section 43(5) of the Act is mandatory for a promoter, who chooses to challenge the order of Regulatory Authority. There is no doubt or dispute to the fact that the applicant/appellant is a promoter and therefore the applicant/ appellant must first deposit with the Tribunal, the total amount and interest payable to the complainants/respondents as directed by the Regulatory Authority in its relevant orders, before the appeal is entertained or heard, as provided in Section 43(5) of the Act of 2016.

14. The right to appeal is not an absolute right, but is only a statutory right, restricted by the statutory provisions. The condition of pre-deposit is neither onerous nor does it make the remedy of appeal as illusory. An appeal being a statutory right must fall within the conditions as laid down in the statute.
15. It is well recognized that the Act of 2016 is a special legislation enacted with a social objective of safeguarding primarily interests of allottees who have invested their lifetime savings in buying a home of their dreams. No exemption from complete pre-deposit or the discretion to waive off a part of it is provided in the provisions of the Act. Therefore, as per literal rule of interpretation also, the Tribunal needs to go by the wording of provisions of the Act 2016, mandating complete pre-deposit by the promoter if the Appeal is to be entertained.
16. From a perusal of the orders dated 15.04.2019, 19.09.2019 and 30.09.2019, passed by the Regulatory Authority, it is evident that no “penalty” has been imposed on the applicant/appellant in any of these cases and only interest at the rate of MCLR+ 1 percent or as provided under the respective agreements is to be paid by the appellant/promoter to the complainants/respondent in accordance with the concerned orders of the Regulatory Authority. In all these cases the clause of “depositing 30% of the penalty or such higher percentage as may be determined by the Appellate Tribunal” does not attract since in all these cases the Regulatory Authority has awarded only interest in the form of compensation and no “penalty” has been imposed in any of these cases.
17. Section 44(5) of the Act mandates that the appeal shall be dealt with as expeditiously as possible and an endeavour shall be made by the Tribunal to dispose off the appeal within a period of 60 days from the date of receipt of the appeal and in case an appeal cannot be disposed of within the said period of 60 days, the Appellate Tribunal has to record its reasons in writing for not disposing off the appeal within that period. These appeals have been filed between May 2019 and December 2019 and already more than 21 months have elapsed without the applicant/appellant making complete compliance of the provisions of Section 43(5) of the Act, 2016. Despite several opportunities being given, the Tribunal has been made to wait for a very long time for complete compliance of the provisions of

Section 43(5) of the Act in all the 4 appeals. The Tribunal cannot be made to wait indefinitely for compliance of the provisions of Section 43(5) of the Act in view of the provisions of Section 44(5) of the Act. The Tribunal has no powers to even entertain an appeal unless complete compliance of the provisions of Section 43(5) of the Act is made by the Promoter; and the amount to be deposited by the Promoter is “total amount to be paid to the allottee, including interest and compensation”. As mentioned earlier, in all these cases, the clause of “depositing 30% of the penalty or such higher percentage as may be determined by the Appellate Tribunal” does not attract as no “penalty” has been imposed in any of these cases.

18. Sufficient opportunities have been given to the appellant to comply with the provisions of Section 43(5) of the Act as mentioned in Para 2, and today (i.e. on 27.09.2021), the learned counsel for the appellant/promoter submitted that the appellant/promoter is not in a position to make complete compliance of the provisions of Section 43(5) of the Act in any of these four cases and prayed that the Tribunal may pass appropriate orders in all the four cases. We are, thus, left with no option but to dismiss all these appeals. Accordingly, Appeal No. 157/2019 (earlier Misc. Case No. 198/2019) (M/s S. V. P. Builders India Ltd. Vs. Neha Sharma), Appeal No. 350/2019 (M/s S. V. P. Builders India Ltd. Vs. Virendra Kumar Jain), Appeal No. 351/2019 (M/s S. V. P. Builders India Ltd. Vs. Neha Jain) and Appeal No. 353/2019 (M/s S. V. P. Builders India Ltd. Vs. Saurabh Suri) are **dismissed** for non compliance of the provisions of Section 43(5) of the Act.
19. Before we part, we would like to observe that some of the Builders/Promoters are filing defective appeals/cases before the Tribunal under Section 44 of the Act without complete compliance of Section 43(5) of the Act. This results in such defective appeals getting delayed unnecessarily and the Tribunal is unable to comply with the provisions of Section 44(5) the Act which mandates that the Tribunal shall make endeavour to dispose of the appeal within 60 days from its receipt. Such delay tactics adopted by some promoters, like the applicant/appellant in the present case, cause unnecessary harassment to the allottees/buyers as they are not getting relief of getting interest on their hard earned life time saving invested with the Builder/Promoter despite delay in handing over of possession. Such tactics cause undue financial loss, mental agony and

harassment to the allottees/home buyers. In order to protect the interest of home buyers (respondents) we deem it fit to direct the Registry immediately to transfer the amount deposited in each case by the applicant/appellant with the Tribunal in partial compliance of Section 43(5) of the Act, case wise, to the concerned account of the Uttar Pradesh Real Estate Regulatory Authority (UPRERA) who will dispose it of in accordance with law, after due diligence, during the execution proceedings.

Dated: 27.09.2021
Gaurav

(Rajiv Misra)

(D. K. Arora)