

THE U.P. REAL ESTATE APPELLATE TRIBUNAL
AT
LUCKNOW

Appeal No. (D) 335/2023

M/s Capital Infratechomes Pvt. Ltd.

Vs.

Deepali Dixit

(Complaint No. NCR144/11/84688/2021)

Hon'ble Mr. Justice (Dr.) D.K. Arora, Chairman.

Hon'ble Mr. Kamal Kant Jain, Technical Member.

1. This defective appeal was filed on 18.09.2022 by M/s Capital Infratechomes Pvt. Ltd. (hereinafter “the applicant/promoter”) challenging the order dated 04.08.2022, passed by U.P. Real Estate Regulatory Authority (hereinafter “the Regulatory Authority”) under Section 44 of the Real Estate (Regulation and Development) Act 2016 (hereinafter “the Act”).
2. The issue is with respect to compliance of the provisions of Section 43(5) of the Act, while filing an appeal by a promoter against the order of the Regulatory Authority is involved.
 - 2.1 Shri Rishindra Vikram Singh, learned counsel for the applicant is present, but the compliance of the provisions of Section 43(5) of the Act has not been made and the matter cannot be heard.
3. We are required to examine the mandate of compliance of the provisions of Section 43(5) of the Act while filing an appeal by the promoter.
4. The vires of various provisions of the Real Estate (Regulation and Development) Act, 2016 and the U.P. Real Estate (Regulation and Development) Rules, 2016 were challenged before the Hon'ble Supreme Court in **Civil Appeal No.(s). 6745-6749 of 2021 (M/s Newtech Promoters & Developers Pvt. Ltd. Vs. State of U.P. & others)**, decided on **11.11.2021**, where five issues were framed and vide issue no. (4)

Hon'ble Supreme Court considered the issue with respect to pre-deposit under Section 43(5) of the Act by a promoter. The question no. (4) reads as under:-

“Whether the condition of predeposit under proviso to Section 43(5) of the Act for entertaining substantive right of appeal is sustainable in law?”

After examining the provisions of Section 43(5) of the Act, the Hon'ble Supreme Court vide para no. 122 and 137, was pleased to observe as under:-

“122. It may straightaway be noticed that Section 43(5) of the Act envisages the filing of an appeal before the appellate tribunal against the order of an authority or the adjudicating officer by any person aggrieved and where the promoter intends to appeal against an order of authority or adjudicating officer against imposition of penalty, the promoter has to deposit at least 30 per cent of the penalty amount or such higher amount as may be directed by the appellate tribunal. Where the appeal is against any other order which involves the return of the amount to the allottee, the promoter is under obligation to deposit with the appellate tribunal the total amount to be paid to the allottee which includes interest and compensation imposed on him, if any, or with both, as the case may be, before the appeal is to be instituted.”

“137. In our considered view, the obligation cast upon the promoter of predeposit under Section 43(5) of the Act, being a class in itself, and the promoters who are in receipt of money which is being claimed by the home buyers/allottees for refund and determined in the first place by the competent authority, if legislature in its wisdom intended to ensure that money once determined by the authority be saved if appeal is to be preferred at the instance of the promoter after due compliance of predeposit as envisaged under Section 43(5) of the Act, in no circumstance can be said to be onerous as prayed for or in violation of Articles 14 or 19(1)(g) of the Constitution of India.”

5. 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 appeals 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 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 (M/s Capital Infratechomes Pvt. Ltd.) is a promoter and therefore the applicant/appellant must first deposit the full amount and interest thereon, in pursuance to the directions contained in the impugned order of the Regulatory Authority, before the appeal is entertained or heard, as provided in Section 43(5) of the Act of 2016.

6. 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.
7. 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 a part of it is provided in the provisions of the Act. Therefore, as per literal rule of interpretation also, the Tribunal is needed to go by the wording of provisions mandating complete pre-deposit by the promoter if the Appeal is to be entertained.
8. Section 44(5) of the Act, 2016 mandates that appeal shall be dealt with as expeditiously as possible and endeavour shall be made by the Tribunal to dispose off the appeal within a period 60 days from the receipt of the appeal and in case an appeal cannot be disposed off 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. The instant defective appeal was filed on 18.09.2022 without making any compliance of the provisions of Section 43(5) of the Act of 2016. More than 9 months have already elapsed since filing of this defective appeal, and despite giving several opportunities; no compliance of the provisions of Section 43(5) of the Act has been made by the applicant (Promoter). The Tribunal cannot be made to wait indefinitely by the applicant/Promoter for making statutory compliance of the provisions of Section 43(5) of the Act.

9. In view of the fact that no compliance of the provisions of Section 43(5) of the Act has been made in last 9 months despite several opportunities having been given to the applicant (Promoter). Hence, we are left with no option but to dismiss this case. Accordingly, **Appeal No. (D) 335/2023 (M/s Capital Infratechomes Pvt. Ltd. Vs. Deepali Dixit) is dismissed for non-compliance of the provisions of Section 43(5) of the Act.**

Dated: 04.07.2023

GauravSri/-

(K.K. Jain)

(D. K. Arora)