



**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

**SECOND APPEAL (St.) NO.92158 OF 2020
ALONG WITH
INTERIM APPLICATION NO.92694 OF 2020
AND
SECOND APPEAL (St.) NO.92186 OF 2020
ALONG WITH
INTERIM APPLICATION NO.92187 OF 2020**

Nagpur Integrated Township Pvt. Ltd. ... Appellant
Versus
Maharashtra Real Estate Regulatory
Authority, Mumbai
And Others ... Respondents

**SECOND APPEAL (St.) NO.92146 OF 2020
ALONG WITH
INTERIM APPLICATION NO.92153 OF 2020**

Chourangi Builders & Developers
Pvt. Ltd. ... Appellant
Versus
Hansa Kishore Shah
And Others ... Respondents

.....

Mr. Nirman Sharma i/b Sonu Tandon, for the Appellant in SAST/92158/2020 and SAST/92186/2020 and for Respondent No.3 in SAST/92146 of 2020.

Mr. Mayur Khandeparkar a/w Mr. Ranjeev Carvalho, Mr. Vikramjit Garewal, Ms. Sabeena Mahadik, Mr. Pankaj Uttaradhi and Mr. Aayush Kothari for Respondent No.3 in SAST/92158 and SAST/92186/2020 and for the Appellant in SAST/92146/2020.

Mr. Ramesh Tripathi, for Respondent Nos. 1 and 2 in SAST/92146/2020 and for Respondent No.2 in SAST/92186/2020.

.....

CORAM : S.C. GUPTE

DATE : 11 SEPTEMBER 2020

(JUDGMENT)

. These Second Appeals, which are connected, are heard together. Mr. Sharma, learned Counsel appearing for the Appellant in Second Appeal (St.) No.92158 of 2020, seeks leave to withdraw the appeal. The second appeal is dismissed as withdrawn with no order as to costs. In view of the disposal of the second appeal, the Interim Application made therein does not survive and is also disposed of.

2 The two remaining second appeals, i.e. Second Appeal (St.) No.92186 of 2020 and Second Appeal (St.) No.92146 of 2020, raise significant points of law arising under the proviso to sub-section (5) of Section 43 of Real Estate (Regulation and Development) Act, 2016 (“Act”), concerning, particularly, pre-deposit to be ordered, when a promoter files an appeal with the Appellate Tribunal under sub-section (5) of Section 43 of the Act. The Appellants in both these appeals are claiming that they do not come under the expression “promoter” used in the proviso and hence, are not liable to make any pre-deposit.

4 The Appellant in Second Appeal (St.) No.92146 of 2020, i.e.

Chourangi Builders & Developers Pvt Ltd (“Chourangi”), was the original developer, who had issued allotment letters to the allottee flat purchasers contesting these appeals and who had entered into agreements for lease, covered by the Act, with them. The development rights, in pursuance of which these documents were executed, were originally conferred on Chourangi by Maharashtra Airport Development Company Limited (“MADC”), a Special Planning Authority under the Maharashtra Regional and Town Planning Act, 1966 for colonizing areas around Nagpur Airport. It appears that MADDC subsequently terminated the development agreement in favour of Chourangi and appointed Nagpur Integrated Township Pvt. Ltd (“NIT”) - companion appellant in Second Appeal (St.) No.92186 of 2020 - as a developer for the project. A *tripartite* agreement was thereupon entered into between MADDC, Chourangi and NIT for taking over of the project by the latter. In pursuance of this *tripartite* agreement, Chourangi claims to have given an option to all its allottees including the Respondents herein to opt either for return of their monies paid for their allotments or substitute their agreements by agreements with NIT for the allotted premises; in either case, it was NIT, who was to be responsible for dealing with the allottees. There are disputes between the parties on various issues arising out of this arrangement, such as, whether, under the *tripartite* agreement, NIT could be said to be liable to the allottees for any lapse on the part of Chourangi prior to the execution of the *tripartite* agreement, or whether the allottees in the present case had opted for any

particular option, and if so, which, or whether, so far as the allottees in the two second appeals herein are concerned, which of the two, i.e. Chourangi and NIT, could be said to be a promoter ? A *prima facie* appreciation of these issues was necessary to decide the question of application of the proviso to sub-section (5) of Section 43 of the Act. Only after such appreciation could the Appellate Tribunal have passed a pre-deposit order either against Chourangi or against NIT or against both. Far from satisfying this mandate, what appears from the orders impugned herein by both Chourangi and NIT is that the Tribunal has passed orders of pre-deposit under the proviso against both without any discussion as to their respective status as promoter/s for the purposes of these appeals. An important question of law, besides the question on merit briefly indicated above, which immediately arises, as a result, is whether the Appellate Tribunal, whilst acting under sub-section (5) of Section 43 of the Act, could make an order of pre-deposit against any appellant before it without considering whether he is a “promoter” within the meaning of the proviso to that sub-section. The second appeals are, accordingly, admitted on this question of law and are taken up for hearing forthwith by consent of parties.

5 It is obvious that sub-section (5) of Section 43 of the Act entitles “any person aggrieved by any direction or decision or order made by the authority or by an adjudicating officer” under the Act to file an appeal. It is only when such appeal is filed by a promoter that the

proviso to sub-section (5) is attracted. When a promoter files an appeal with the Appellate Tribunal, such appeal cannot be entertained, by virtue of the proviso, unless the promoter first deposits with the Appellate Tribunal at least 30 per cent of the penalty or such higher percentage as may be determined by the Tribunal or of the total amount to be paid to the allottees including interest and compensation imposed on him, if any, or both, as the case may be. It may well be that a pre-deposit order is made by the authority or by the adjudicating officer under the Act against a party, without such party being in the position of a promoter within the applicable meaning of that expression. If such party were then to approach the Appellate Authority, there is no way the Appellate Authority could order pre-deposit against it under the proviso to sub-section (5) of Section 43. In other words, for the purpose of acting under the proviso to Section 43(5) of the Act, whether or not the Appellant is a promoter within the meaning of that expression used in the proviso, is a jurisdictional question to be decided by the Appellate Tribunal before any order of pre-deposit could be passed. This is not to say that the controversy, namely, whether the particular appellant before the Tribunal is such a promoter is to be finally decided by the Appellate Tribunal when it makes an order of pre-deposit. What is imperative is that whenever such question is legitimately raised and falls for consideration of the Tribunal, it must take at least a *prima facie* view of the matter and only thereupon pass an order of pre-deposit.

6 The Appellate Tribunal, in the present case, appears to have been completely oblivious of the controversy raised by both appellants in these appeals; it does not even refer to the question as to whether Chourangi or NIT or both could be termed as 'promoters' within the meaning of that expression under the proviso to sub-section (5) of Section 43. This obviously cannot be countenanced. For the reasons, more particularly indicated above, it was imperative for the Tribunal to at least take a *prima facie* view on this issue and only then proceed to order pre-deposit against either Chourangi or NIT or both. The impugned order, thus, deserves to be quashed and set aside.

7 Both second appeals, i.e. Second Appeal (St.) No.92186 of 2020 and Second Appeal (St.) No.92146 of 2020, are, accordingly, allowed, by quashing and setting aside the impugned common order dated 18 August 2020, and remitting the appeals to the Appellate Tribunal for making a fresh order under the proviso to sub-section (5) of Section 43 in the light of the observations made hereinabove.

8 It is made clear that whilst passing this order, this court has not applied its mind to the merits of the controversy, particularly, whether either of the Appellants before this court or both could be termed as promoters within the meaning of that expression under the proviso of sub-section (5) to Section 43 of the Act, and also whether, if both are to be considered as promoters, the whole of permissible pre-deposit could have been ordered against both. These questions are

to be considered by the Tribunal at the remand hearing. All rights and contentions of the parties in that behalf are kept open.

9 Both second appeals are disposed of accordingly. Considering the fact that this is an old matter which deserves to be disposed of early, the Appellate Tribunal is requested to consider the matter as expeditiously as possible and preferably within two months from today.

10 In view of the disposal of the second appeals, the Interim Applications, namely, Interim Application No.92187 of 2020 and Interim Application No.92153 of 2020, respectively, made therein do not survive and are also disposed of.

11 This order will be digitally signed by the Personal Assistant of this Court. All concerned will act on production by fax or email of a digitally signed copy of this order.

(S.C. GUPTE, J.)