

IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 02ND DAY OF JANUARY, 2023

BEFORE

THE HON'BLE MR. JUSTICE M. NAGAPPASANNA

WRIT PETITION No.18448 OF 2021 (GM - RES)

R

BETWEEN:

M/S. PROVIDENT HOUSING LIMITED
A COMPANY INCORPORATED UNDER
THE PROVISIONS OF THE COMPANIES ACT, 1956
HAVING ITS REGISTERED OFFICE
AT NO.8, ULSOOR ROAD,
YELLAPPA CHETTY LAYOUT
BENGALURU - 560 042
REPRESENTED BY ITS
AUTHORIZED SIGNATORY
MS. SONALI SYLVIA.

... PETITIONER

(BY SRI JOSEPH ANTHONY, ADVOCATE)

AND:

1. KARNATAKA REAL ESTATE REGULATORY AUTHORITY
2ND FLOOR, SILVER JUBILEE BLOCK
UNITY BUILDING, CSI COMPOUND,
BENGALURU - 560 027
REPRESENTED BY ITS SECRETARY.
2. MR. SHYAMA SHETTY
S/O LATE A.N.SHETTY
AGED ABOUT 62 YEARS,
PADMALEKHA KODI SASTAN ROAD,
GUDNMI VILLAGE, UDUPI TALUK
UDUPI - 576 226.

... RESPONDENTS

(BY SRI RAJASHEKHAR K., ADVOCATE FOR R1;
SRI HARISH KUMAR M.S., ADVOCATE FOR R2)

THIS WRIT PETITION IS FILED UNDER ARTICLES 226 AND 227 OF THE CONSTITUTION OF INDIA PRAYING TO QUASH THE IMPUGNED JUDGMENT AND ORDER ANNEXURE-A DATED SEPTEMBER 30, 2020 PASSED BY THE KARNATAKA REAL ESTATE REGULATORY AUTHORITY, BANGALORE IN CMP/UR/190214/0002137.

THIS WRIT PETITION HAVING BEEN HEARD AND RESERVED FOR ORDERS ON 07.11.2022, COMING ON FOR PRONOUNCEMENT THIS DAY, THE COURT MADE THE FOLLOWING:-

ORDER

The petitioner-M/s Provident Housing Limited is before this Court calling in question order dated 30-09-2020 passed by the 1st respondent/Karnataka Real Estate Regulatory Authority ('Authority' for short).

2. Brief facts that lead the petitioner to this Court in the subject petition, as borne out from the pleadings, are as follows:-

The petitioner is a Company incorporated under the Companies Act, 1956 and is engaged in the business of real estate development. The petitioner advertises a project i.e., apartment

complex in the name and style of "Provident Sunworth" in Sy.Nos.1 to 26 of Venkatapura Village, Kengeri Hobli, Bangalore. The 2nd respondent registers his interest by an application pursuant to the advertisement requesting the petitioner to allot an apartment in the project. On consideration of the application, the petitioner is allotted a flat bearing No.SUN-II-5G-506 on the fifth floor to the 2nd respondent by way of execution of an agreement to sell.

3. The 2nd respondent who is the applicant before the 1st respondent entered into a sale agreement with the petitioner for purchase of flat on 10-09-2014 and a construction agreement on the same day comes into effect. This was on the basis of a commencement certificate that was issued by the Bangalore Development Authority ('BDA' for short) in respect of the purchase in favour of the petitioner. It is averred that clause 1 of the construction agreement obliged the petitioner to hand over possession of the flat allotted to the 2nd respondent on or before 31-07-2016 with the extended period of 6 months from the date of commencement certificate which would be up to January 2017 subject to the condition that there was no delay or default in

payment of installments to the project by the 2nd respondent and in any event which would be force majeure.

4. The petitioner submits an application to the BDA on 21-10-2015 for grant of partial occupancy certificate in respect of the project which was scrutinized and the same was granted by the BDA on 18-11-2015. The petitioner later makes another application on 28-03-2017 to the BDA for a second partial occupancy certificate. It is the averment in the petition that when things stood thus, negotiations and discussions were held between the petitioner and the 2nd respondent and later the petitioner gave its willingness to execute the sale deed and hand over possession of flat No.506 pursuant to the said partial occupancy certificate. On 14-05-2017, it appears, the 2nd respondent seeks to cancel the agreement that was entered into between him and the petitioner, on the ground that there was information to him that the land had not been legally acquired by the petitioner for construction of the Apartment complex. It was alleged in the communication that the petitioner had not produced any letter from the competent authority with respect to acquisition of land and the petitioner had not replied to

all those queries which were intermittently raised by the 2nd respondent. The petitioner acceded to the request of the 2nd respondent and cancelled the agreement and the allotment made in favour of the 2nd respondent and also refunded a sum of Rs.17,85,212/- on 04-12-2017 after deduction of cancellation charges and applicable taxes.

5. Long after receipt of the said amount, the 2nd respondent knocks at the doors of the 1st respondent/Authority by registering a complaint seeking refund of an amount of Rs.6,84,494/- along with interest. On receipt of the notice, the petitioner appears to have filed its objections with regard to maintainability of the complaint before the 1st respondent and its entertainment by the Authority. Notwithstanding the objections with regard to maintainability, the Authority passes the impugned order, on the complaint so made by the 2nd respondent, on 30-09-2020 directing refund of Rs.6,84,494/- to the 2nd respondent within 60 days from 30-09-2020, failing which, it would carry interest at 2% per month. It is this order that drives the petitioner to this Court in the subject petition.

6. Heard Sri Joseph Anthony, learned counsel appearing for the petitioner, Sri K. Rajashekhar, learned counsel appearing for respondent No.1 and Sri M.S. Harish Kumar, learned counsel appearing for respondent No.2.

7. The learned counsel appearing for the petitioner would submit that the project had commenced and partial occupancy certificate was issued in favour of the petitioner on 18-11-2015 and on 27-04-2017. The Real Estate (Regulation and Development Act, 2016 ('the Act' for short) comes into force on 01-05-2016 and the Rules thereunder were notified on 10-07-2017. The submission is that by the time the Act came into force, the project of the petitioner had lost its stage of being an ongoing project. It is his submission that the Act mandates that the project should be an ongoing one, for any aggrieved person to knock at the doors of the Authority. Since the Act itself was not in existence at the time when the occupancy certificate was issued and agreements were drawn with the 2nd respondent, the complaint was not even maintainable. In a complaint that was not even maintainable, the Authority could not have passed the order directing refund of certain amount.

8. On the other hand, the learned counsel for the 2nd respondent/complainant would contend that the project was still an ongoing project as complete occupancy certificate was not issued in favour of the petitioner and, therefore, it is not open to the petitioner to contend that the complaint was not maintainable. The petitioner has admittedly not refunded the entire amount. If the complaint was maintainable before the Authority, the writ petition is not maintainable, as the petitioner has to prefer an appeal before the Appellate Tribunal constituted under the Act and not knock at the doors of this Court, in this petition under Article 226 of the Constitution of India. He would further contend that for a large builder like the petitioner, the amount that is directed to be refunded is so paltry and the petition should, on that ground at least, be dismissed.

9. In reply, the learned counsel for the petitioner would contend that it is not the quantum of amount that is what is necessary to be noticed, but it is the very registration of the complaint before the Authority. If it was an act without jurisdiction, the relief that is granted becomes immaterial, as the complaint

itself would not become maintainable. He would reiterate his submission that if the complaint was not maintainable under the Act, any order that is passed is without jurisdiction and if it is without jurisdiction, it would be maintainable as a writ petition before this Court.

10. I have given my anxious consideration to the submissions made by the respective learned counsel and have perused the material on record. In furtherance whereof, the issues that fall for my consideration are:

"(i) Whether the complaint of the 2nd respondent before the Authority was maintainable?

(ii) Whether the order passed by the Authority is tenable in law?"

Issue No.1:

(i) Whether the complaint of the 2nd respondent before the Authority was maintainable?

11. The Real Estate (Regulation and Development) Act, 2016 (Act 16 of 2016) came into effect from 01-05-2016 vide Notification dated 26-04-2016 published in the official gazette. The Act was to establish a Real Estate Regulatory Authority for regulation and promotion of the real estate sector and to ensure sale of plot, apartment or building, as the case may be, in an efficient and transparent manner and for establishment of adjudicating mechanism for speedy dispute redressal and also to establish a Tribunal to hear appeals from the decisions of the Authority and for other matters incidental and connected thereto. Certain sections of the Act which are germane are 2(g), 2(q), 2(zn), 2(zk), 3, 18, 31, 43 and 84 and they read as follows:

"2(g) "appropriate Government" means in respect of matters relating to,—

(i) the Union Territory without Legislature, the Central Government;

(ii) the Union Territory of Puducherry, the Union Territory Government;

(iii) the Union Territory of Delhi, the Central Ministry of Urban Development;

(iv) the State, the State Government;

2(q) "completion certificate" means the completion certificate, or such other certificate, by whatever name called, issued by the competent authority certifying that the real estate project has been developed according to the sanctioned plan, layout plan and specifications, as approved by the competent authority under the local laws;

2(zk) "promoter" means,—

- (i) a person who constructs or causes to be constructed an independent building or a building consisting of apartments, or converts an existing building or a part thereof into apartments, for the purpose of selling all or some of the apartments to other persons and includes his assignees; or
- (ii) a person who develops land into a project, whether or not the person also constructs structures on any of the plots, for the purpose of selling to other persons all or some of the plots in the said project, whether with or without structures thereon; or
- (iii) any development authority or any other public body in respect of allottees of—
 - (a) buildings or apartments, as the case may be, constructed by such authority or body on lands owned by them or placed at their disposal by the Government; or
 - (b) plots owned by such authority or body or placed at their disposal by the Government,
for the purpose of selling all or some of the apartments or plots; or
- (iv) an apex State level co-operative housing finance society and a primary co-operative housing society which constructs apartments or buildings for its Members or in respect of the allottees of such apartments or buildings; or
- (v) any other person who acts himself as a builder, coloniser, contractor, developer, estate developer or by any other name or claims to be acting as the holder of a power of attorney from the owner of the land on which the building or apartment is constructed or plot is developed for sale; or
- (vi) such other person who constructs any building or apartment for sale to the general public.

Explanation.—For the purposes of this clause, where the person who constructs or converts a building into apartments or develops a plot for sale and the person who sells apartments or plots are different persons, both of them shall be deemed to be the promoters and shall be jointly liable as such for the functions and responsibilities specified, under this Act or the rules and regulations made thereunder;

2(zn) "real estate project" means the development of a building or a building consisting of apartments, or converting an existing building or a part thereof into apartments, or the development of land into plots or apartments, as the case may be, for the purpose of selling all or some of the said apartments or plots or buildings, as the case may be, and includes the common areas, the development works, all improvements and structures thereon, and all easement, rights and appurtenances belonging thereto;

3. Prior registration of real estate project with Real Estate Regulatory Authority.—*(1) No promoter shall advertise, market, book, sell or offer for sale, or invite persons to purchase in any manner any plot, apartment or building, as the case may be, in any real estate project or part of it, in any planning area, without registering the real estate project with the Real Estate Regulatory Authority established under this Act:*

Provided that projects that are ongoing on the date of commencement of this Act and for which the completion certificate has not been issued, the promoter shall make an application to the Authority for registration of the said project within a period of three months from the date of commencement of this Act:

Provided further that if the Authority thinks necessary, in the interest of allottees, for projects which are developed beyond the planning area but with the requisite permission of the local authority, it may, by order, direct the promoter of such project to register with the Authority, and the provisions of this Act or the rules and regulations made thereunder, shall apply to such projects from that stage of registration.

(2) Notwithstanding anything contained in sub-section (1), no registration of the real estate project shall be required—

- (a) *where the area of land proposed to be developed does not exceed five hundred square meters or the number of apartments proposed to be developed does not exceed eight inclusive of all phases:*

Provided that, if the appropriate Government considers it necessary, it may, reduce the threshold below five hundred square meters or eight apartments, as the case may be, inclusive of all phases, for exemption from registration under this Act;

- (b) *where the promoter has received completion certificate for a real estate project prior to commencement of this Act;*
- (c) *for the purpose of renovation or repair or re-development which does not involve marketing, advertising selling or new allotment of any apartment, plot or building, as the case may be, under the real estate project.*

Explanation.—For the purpose of this section, where the real estate project is to be developed in phases, every such phase shall be considered a stand alone real estate project, and the promoter shall obtain registration under this Act for each phase separately.

18. Return of amount and compensation.—(1) If the promoter fails to complete or is unable to give possession of an apartment, plot or building,—

- (a) ***in accordance with the terms of the agreement for sale or, as the case may be, duly completed by the date specified therein; or***
- (b) ***due to discontinuance of his business as a developer on account of suspension or revocation of the registration under this Act or for any other reason,***

he shall be liable on demand to the allottees, in case the allottee wishes to withdraw from the project, without prejudice to any other remedy available, to return the amount received by him in respect of that apartment, plot, building, as the case may be, with interest at such rate as may be prescribed in this behalf including compensation in the manner as provided under this Act:

Provided that where an allottee does not intend to withdraw from the project, he shall be paid, by the

promoter, interest for every month of delay, till the handing over of the possession, at such rate as may be prescribed.

(2) The promoter shall compensate the allottees in case of any loss caused to him due to defective title of the land, on which the project is being developed or has been developed, in the manner as provided under this Act, and the claim for compensation under this sub-section shall not be barred by limitation provided under any law for the time being in force.

(3) If the promoter fails to discharge any other obligations imposed on him under this Act or the rules or regulations made thereunder or in accordance with the terms and conditions of the agreement for sale, he shall be liable to pay such compensation to the allottees, in the manner as provided under this Act.

31. Filing of complaints with the Authority or the adjudicating officer.—(1) Any aggrieved person may file a complaint with the Authority or the adjudicating officer, as the case may be, for any violation or contravention of the provisions of this Act or the rules and regulations made thereunder against any promoter allottee or real estate agent, as the case may be.

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.

(2) The form, manner and fees for filing complaint under sub-section (1) shall be such as may be ⁶[prescribed].

43. Establishment of Real Estate Appellate Tribunal.— (1) The appropriate Government shall, within a period of one year from the date of coming into force of this Act, by notification, establish an Appellate Tribunal to be known as the (name of the State/Union Territory) Real Estate Appellate Tribunal.

(2) The appropriate Government may, if it deems necessary, establish one or more benches of the Appellate Tribunal, for various jurisdictions, in the State or Union Territory, as the case may be.

(3) Every Bench of the Appellate Tribunal shall consist of at least one Judicial Member and one Administrative or Technical Member.

(4) *The appropriate Government of two or more States or Union Territories may, if it deems fit, establish one single Appellate Tribunal:*

Provided that, until the establishment of an Appellate Tribunal under this section, the appropriate Government shall designate, by order, any Appellate Tribunal functioning under any law for the time being in force, to be the Appellate Tribunal to hear appeals under the Act:

Provided further that after the Appellate Tribunal under this section is established, all matters pending with the Appellate Tribunal designated to hear appeals, shall stand transferred to the Appellate Tribunal so established and shall be heard from the stage such appeal is transferred.

(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 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.

84. Power of appropriate Government to make rules.—
(1) The appropriate Government shall, within a period of six months of the commencement of this Act, by notification, make rules for carrying out the provisions of this Act.

(2) In particular, and without prejudice to the generality of the foregoing power, such rules may provide for all or any of the following matters, namely—

- (a) the form, time and manner of making application and fees payable therewith under sub-section (1) of Section 4;**
- (ab) information and documents for application to the Authority for registration under clause (m) of sub-section (2) of Section 4;**
- (ac) the form of application and the fees for extension of registration under Section 6;]**
- (b) the form and manner of making application and fee and documents to be accompanied with such application as under sub-section (2) of Section 9;**
- (c) the period, manner and conditions under which the registration is to be granted under sub-section (3) of Section 9;**
- (d) the validity of the period of registration and the manner and fee for renewal under sub-section (6) of Section 9;**
- (e) the maintenance and preservation of books of account, records and documents under clause (b) of Section 10;**
- (f) the discharge of other functions by the real estate agent under clause (e) of Section 10;*
- (g) the rate of interest payable under Section 12;*
- (h) the form and particulars of agreement for sale under sub-section (2) of Section 13;*
- (i) the rate of interest payable under clause (b) of sub-section (1) of Section 18;*
- (j) the rate of interest payable under sub-section (4) of Section 19;*
- (k) the rate of interest payable under sub-section (7) of Section 19;*
- (l) the manner of selection of Chairperson and Members of Authority under Section 22;*
- (m) the salaries and allowances payable to, and the other terms and conditions of service of, the Chairperson and other Members of the Authority under sub-section (1) of Section 24;*

- (n) *the administrative powers of the Chairpersons under Section 25;*
- (o) *the salaries and allowances payable to, and the other terms and conditions of service of, the officers and other employees of the Authority under sub-section (2) of Section 28;*
- (oa) *the form, manner and fees for filing of a complaint under sub-section (2) of Section 31;]*
- (p) *the details to be published on the website as under clause (b) and under clause (d) of Section 34;*
- (q) *the additional functions which may be performed by the Authority under clause (iv) of sub-section (2) of Section 35;*
- (r) *the manner of recovery of interest, penalty and compensation under sub-section (1) of Section 40;*
- (s) *the manner of implementation of the order, direction or decisions of the adjudicating officer, the Authority or the Appellate Tribunal under sub-section (2) of Section 40;*
- (t) *recommendations received from the Central Advisory Council under sub-section (2) of Section 42;*
- (u) *the form and manner and fee for filing of appeal under sub-section (2) of Section 44;*
- (v) *the manner of selection of Members of the Tribunal under sub-section (3) of Section 46;*
- (w) *the salaries and allowances payable to, and the other terms and conditions of service of, the Chairperson and other Members of the Appellate Tribunal under sub-section (1) of Section 48;*
- (x) *the procedure for inquiry of the charges against the Chairperson or Judicial Member of the Tribunal under sub-section (4) of Section 49;*
- (y) *the salaries and allowances payable to, and the other terms and conditions of service of, the officers and employees of the Appellate Tribunal under sub-section (3) of Section 51;*
- (z) *any other powers of the Tribunal under clause (g) of sub-section (4) of Section 53;*
- (za) *the powers of the Chairperson of the Appellate Tribunal under Section 54;*

- (zb) *the terms and conditions and the payment of such sum for compounding of the offences under Section 70;*
- (zc) *the manner of inquiry under sub-section (1) of Section 71;*
- (zd) *the form to be specified in which the Authority shall prepare a budget, maintain proper accounts and other relevant records and prepare an annual statement of accounts under sub-section (1) of Section 77;*
- (ze) *the form in which and time at which the Authority shall prepare an annual report under sub-section (1) of Section 78;*
- (zf) *any other matter which is to be, or may be, prescribed, or in respect of which provision is to be made, by rules."*

(Emphasis supplied)

Section 2(q) defines what is completion certificate; Section 2(zk) defines who is a promoter; Section 2(zn) defines what is real estate project. Section 3 makes prior registration of a real estate project with the Real Estate Regulatory Authority and mandates several obligations while making such registration under sub-section (1) and (2) of Section 3. Section 18 deals with return of amount and compensation. It would spring into action, if the promoter fails to complete or unable to give possession of an apartment, floor or building in accordance with the terms of the agreement for sale; due discontinuance of business as a developer or several other circumstances projected in Section 18. Section 31 empowers aggrieved person to file a complaint before the Authority

or the Adjudicating Officer for any violation or contravention of the provisions of the Act or the Rules and Regulations made there under against any promoter. The powers of the Authority are defined under Section 38. Section 43 deals with constitution of Real Estate Appellate Tribunal. Any order passed by the Authority in terms of the Act and the Rules is appealable under sub-section (5) of Section 43. Section 84 empowers appropriate Government to make Rules. The appropriate Government is also defined to be respective State Government.

12. In exercise of its powers under Section 84, the Government of Karnataka notifies the Rules. Rules 3 and 4 of the Rules read as follows:

"3. Information and documents to be furnished by the promoter for registration of project.— (1) *The promoter shall furnish the following additional information and documents, along with those specified in sub-section (2) of Section 4 of the Act for registration of the real estate project with the regulatory authority namely:—*

- (a) *self attested copy of the PAN card of the promoter;*
- (b) *annual report including audited profit and loss account, balance sheet, cash flow statement, directors report and the auditors report of the promoter for the immediately preceding three financial years; and where annual report is not available, the audited profit and loss account, balance sheet, cash flow statement and the auditor report of the*

promoter for the immediately preceding three financial years;

- (c) the number of parking slots available in the said real estate project;*
- (d) authenticated copy of the legal title deed reflecting the title of the promoter to the land on which development of project is proposed along with legally valid documents for chain of the title;*
- (e) the details of encumbrances on the land for which permission given under Section 109 of the Karnataka Land Reforms Act, 1961 if applicable, the Certified copy of the conversion order under Section 95 of the Karnataka Land Revenue Act, 1964 and permission of change in land use granted under Section 14 of the Karnataka Town and Country Planning Act, 1961, if applicable on which development is proposed including any rights, title, interest or name of any party in or over such land along with details;*
- (f) where the promoter is not the owner of the land on which development is proposed details of the consent of the owner of the land along with self attested the collaboration agreement, development agreement, joint development agreement or any other agreement, as the case may be, entered into between the promoter and such owner and copies of title and other documents reflecting the title of such owner on the land proposed to be developed; and*
- (g) name, photograph, contact details and address of the promoter if it is an individual and the name, photograph, contact details and address of the chairman, partners, directors, as the case may be, and the authorised person in case of other entities.*

(2) An application to the Authority for registration of the real estate project shall be made in writing in Form 'A', in triplicate, until the procedure is made web based for filing of such application.

(3) The promoter shall pay a registration fee at the time of application for registration by way of a demand draft or a bankers cheque drawn on any scheduled bank or a Co-operative Bank or

through online payment mode, as the case may be, for a sum calculated at the rate of,—

- (a) in case of group housing project,-five rupees per square meter for projects where the area of land proposed to be developed does not exceed one thousand square meters; or rupees ten per square meter for projects where the area of land proposed to be developed exceeds one thousand square meters, but shall not be more than five lakhs rupees;
- (b) in case of mixed development (residential and commercial) project,-ten rupees per square meter for projects where the area of land proposed to be developed does not exceed one thousand square meters; or fifteen rupees per square meter for projects where the area of land proposed to be developed exceeds one thousand square meters, but shall not be more than seven lakhs rupees;
- (c) in case of commercial projects,-twenty rupees per square meter for projects where the area of land proposed to be developed does not exceed one thousand square meters; or twenty five rupees per square meter for projects where the area of land proposed to be developed exceeds one thousand square meters, but shall not be more than ten lakhs rupees; and
- (d) in case of plotted development projects,-five rupees per square meter, but shall not be more than two lakhs rupees.

(4) The declaration to be submitted under clause (1) of sub-section (2) of Section 4, shall be in Form-B, which shall include a declaration stating that the promoter shall not discriminate against any allottee at the time of allotment of any apartment, plot or a building, as the case may be.

(5) In case the promoter applies for withdrawal of application for registration of the project before the expiry of the period of thirty days specified under sub-section (1) of Section 5, registration fee to the extent of ten percent paid under sub-rule (3), or rupees fifty thousand whichever is more, shall be retained as processing fee by the regulatory authority and the remaining amount shall be refunded to the promoter within thirty days from the date of such withdrawal.

4. Additional disclosure by promoters of ongoing projects.— (1) Upon the notification for commencement of sub-section (1) of Section 3, promoters of all ongoing projects which have not received completion certificate shall, within the time specified in the said sub-section, make an application to the Regulatory Authority in the form and manner as specified in Rule 3.

Explanation: For the purpose of this rule "Ongoing project" means a project where development is going on and for which completion certificate has not been issued but excludes such projects which fulfill any of the following criteria on the date of notification of these rules, namely:—

- (i) in respect of layouts where the streets and civic amenities sites and other services have been handed over to the Local Authority and Planning Authority for maintenance;**
- (ii) in respect of apartments where common areas and facilities have been handed over to the registered Association consisting of majority of allottees;**
- (iii) where all development works have been completed as per the Act and certified by the competent agency and sale/lease deeds of sixty percent of the apartments/houses/plots have been registered and executed;**
- (iv) where all development works have been completed as per the Act and certified by the competent agency and application has been filed with the competent authority for issue of completion certificate/occupation certificate; and**
- (v) where Partial occupancy certificate is obtained to the extent of the portion for which the partial Occupancy Certificate is obtained.**

(2) The promoter shall in addition to disclosures provided in Rule 3 disclose the following information, namely:—

- (a) the original sanctioned plan, layout plan and specifications and the subsequent modifications carried out, if any, including the existing sanctioned plan, layout plan and specifications;**

Explanation:—For the purpose of clause (ii) of sub-section (2) of Section 14 of the Act, the Prior written consent of at least two third of the allottees would not be required if,—

- (i) implementation of the proposed plan has already been disclosed to the allottees under the agreement prior to registration, or**
- (ii) modification is required to be made in compliance of any order or direction issued by competent authority or statutory authority, under the agreement for sale, the promoter is not required to obtain the consent of allottee in case of any alteration or addition to the apartment required by Government authorities or due to change in any law.**
- (b) the total amount of money collected from the allottees and the total amount of money used for development of the project including the total amount of balance money lying with the promoter; and**
- (c) status of the project (extent of development carried out till date and the extent of development pending) including the original time period disclosed to the allottee for completion of the project at the time of sale including the delay and the time period within which he undertakes to complete the pending project, which shall be commensurate with the extent of development already completed, and this information shall be certified by an engineer, an architect and a chartered accountant in practice.**

(3) The promoter shall disclose the size of the apartment based on carpet area even if earlier sold on any other basis such as super area, super built up area, built up area etc. which shall not affect the validity of the agreement entered into between the promoter and the allottee to that extent.

(4) In case of plotted development, the promoter shall disclose the area of the plot being sold to the allottees as per the layout plan.

(5) For projects that are ongoing and have not received completion certificate on the date of commencement of the Act, the promoter shall, within a period of three months of the application for registration of the project with the Authority, deposit in the separate bank account, seventy per cent, of the amounts already realized from the allottees, which have not been utilized for construction of the project or the land cost for the project as required under sub-clause (D) of clause (I) of sub-section (2) of Section 4, which shall be used for the purposes specified therein:

Provided that if the receivable of the ongoing project is less than the estimated cost of balance construction, then the promoter shall deposit 100 per cent of the amounts to be realised in the separate account."

(Emphasis supplied)

Rule 3 mandates information and documents to be furnished by the promoter for registration of a project under the Act. Rule 4 mandates additional disclosure by promoters of ongoing projects. The said Rule mandates that upon the notification for commencement under sub-section (1) of Section 3 of the Act, promoters of all ongoing projects which have not received completion certificate shall, within the time specified in the said

sub-section, make an application to the Regulatory Authority. The Rule places an explanation as to what is an '**ongoing project**'. An ongoing project would mean where a development of a project is going on, for which completion certificate has not been issued, but excludes those projects which fulfill the criteria enumerated therein which are layouts where the streets and civic amenities and other services have been handed over to the Local Authority. Among other things clause (v) of Rule 4 therein exempts rigour of the Act and the Rules where partial occupancy certificate is obtained to the extent of the portion for which occupancy certificate is issued. Therefore, the Rule itself recognizes the situation of issuance of partial occupancy certificate on the exemption with the applicability of the Act and the Rules or the conditions stipulated therein. It is in the aforesaid statutory frame work the issue in the *lis* is to be considered. A little walk in history is needed for the said purpose.

13. Certain events are a matter of record. On 10-09-2014 an agreement between the petitioner and the 2nd respondent which was an agreement of sale and construction agreement are signed. Prior to the said construction agreement, the BDA which was the

Competent Authority had issued a commencement certificate for commencement of the project. The project was completed to certain extent and a partial completion certificate was issued by the BDA on 18-11-2015 accepting the application of the petitioner dated 21-10-2015. The partial occupancy certificate is appended to the petition. Another partial occupancy certificate is issued on 27-04-2017. The 2nd respondent with whom agreement of sale was signed between the parties seeks to wriggle out of the project or the agreement, communicates to the petitioner that he is intending to cancel the agreement on some information that he received that the project is not on a legally acquired land.

14. The petitioner did not make a hue and cry over it; did refund an amount of Rs.17,85,212/- on 04-12-2017. This amount having been realized is also not in dispute. Therefore the contract between the parties had concluded on 04-12-2017 without the 2nd respondent making any grievance with regard to the refund. But on 14-02-2019, the 2nd respondent registers a complaint before the Authority, invoking Section 31 of the Act claiming that he is aggrieved that the entire refund is not received from the hands of

the petitioner and an amount of Rs.6,84,494/- was still due. The petitioner filed its detailed objections before the Authority contending that the complaint itself was not maintainable as the project was not an ongoing project. Declining to accept the same, the Authority passes the order dated 30-09-2020 directing refund of the amount claimed along with interest under Section 18 of the Act. The order reads as follows:

"I failed to understand the stand taken by the developer who has said nothing about the plea taken by the complainant. In the present case only the issue regarding non-repayment of part of the amount which was withheld by the developer stating that he has withheld the same towards cancellation charges. In this regard I would say that the developer has transacted with the complainant even after coming into force of this Act. It means the cause of action to file this complaint was alive even after the coming into force of this Act. Hence, the question of maintainability as contended by the developer has no basis. Further he said nothing so far as allegations are made towards deduction of amount. In what way he is deducted the part of the amount is not explained. In the absence of specific defense, the contention of the complainant has to be honoured. When he has cancelled the booking then the developer ought to have returned the amount in full or he ought to have given reasons for deduction. But the developer has denied the case of the complainant on the ground of receipt of OC. It is not correct on his part why he has withheld the amount when his project was not on the free litigated land. He has returned major portion of the amount but withheld some portion without any reason. He failed to give reasons for the same. In his absence now I have to go to the same. The developer has received the amount in the year 2014 and he has utilized the same for his project. After cancellation of booking he has returned the money without any interest. The present amount was withheld as cancellation charges and towards tax. In this regard I would say that the developer will again collect the amount towards the tax

from the new buyer. Hence, he has to return the same to the present complainant. The developer has already benefitted with the money and earned benefit out of the money when it was with him. The major portion of the money which has been returned to the complainant was without interest and hence the same is also to be returned. With this observation I allow this complaint in part.

13. Before passing the final order I would like to say that as per Section 71(2) of RERA the complaint shall be disposed off by the Authority within 60 days from the date of receipt of the complaint. This complaint was filed on 14.02.2019. Since this complaint was filed against the unregistered project, the file was with the Secretary who has taken necessary steps against the developer with regard to the registration of his project. Later the complaint has been transferred to this authority on 18.12.2019 for disposal in accordance with law. Afterwards this authority has issued notice to the parties. The developer has appeared and filed the objections. In the meanwhile on account of natural calamity COVID-19 the Government has declared lock down completely from 24.03.2020 till 17-05-2020 and as such this judgment could not be passed and as such it is with some delay. With this observation, I proceed to pass the following:

ORDER

- a. **The complaint filed by the complainant bearing No.CMP/UR/190214/0002137 is hereby allowed in part.**
- b. **The developer shall return Rs.6,84,494/- to the complainant within 60 days from to-day. If not, it will carry interest @ 2% above the MCLR of SBI commencing from 61st day till the realization.**
- c. **Intimate the parties regarding the order.”**
(Emphasis added)

As observed hereinabove, against the said order in the normal circumstance an appeal would be maintainable. The issue here is

whether the complaint before the Authority was itself maintainable or otherwise. If the complaint before the Authority was maintainable, the impugned order becomes appealable under subsection (5) of Section 43. If the Authority had no jurisdiction to pass the order, the writ petition in the form that is presented becomes maintainable. In view of the preceding analysis, more particularly, with regard to the explanation of 'ongoing project' under the Rules which exempts application of the Act and the Rules since the project had commenced and partial occupancy certificate was issued prior to coming into force of the Act, the complaint itself was not maintainable before the Authority. Notwithstanding such exemption, the Adjudicating Authority appears to have been swayed by the grievance vented out by the 2nd respondent in entertaining the complaint.

15. The issuance of occupancy certificate prior to the Act coming into force, *albeit* partially, is not in dispute. Therefore, the project loses its character, as an ongoing project in terms of Rule 4 of the Rules, as the explanation in the Rule exempts such an ongoing project. Therefore, the determination by the Authority was

without jurisdiction and if it is an act without jurisdiction, it is *non est* in the eye of law, and if it is *non est* in the eye of law, it is rendered unsustainable and requires to be obliterated. It is germane to notice at this juncture the judgment of the Apex Court in the case of **NEWTECH PROMOTERS AND DEVELOPERS PVT. LTD. v. STATE OF U.P.**¹ wherein the Apex Court considers the retroactivity and retrospectivity of the Act in the following paragraphs:

"40. Learned counsel further submits that the key word, i.e., "ongoing on the date of the commencement of this Act" by necessary implication, ex-facie and without any ambiguity, means and includes those projects which were ongoing and in cases where only issuance of completion certificate remained pending, legislature intended that even those projects have to be registered under the Act. Therefore, the ambit of Act is to bring all projects under its fold, provided that completion certificate has not been issued. The case of the appellant is based on "occupancy certificate" and not of "completion certificate". In this context, learned counsel submits that the said proviso ought to be read with Section 3(2)(b), which specifically excludes projects where completion certificate has been received prior to the commencement of the Act. Thus, those projects under Section 3(2) need not be registered under the Act and, therefore, the intent of the Act hinges on whether or not a project has received a completion certificate on the date of commencement of the Act.

... ..

51. Thus, it is clear that the statute is not retrospective merely because it affects existing rights or its retrospection because a part of the requisites for its action is drawn from a time antecedent to its passing, at the same time, retroactive statute

¹ **2021 SCC OnLine SC 1044**

means a statute which creates a new obligation on transactions or considerations already passed or destroys or impairs vested rights.

... ..

54. From the scheme of the Act 2016, its application is retroactive in character and it can safely be observed that the projects already completed or to which the completion certificate has been granted are not under its fold and therefore, vested or accrued rights, if any, in no manner are affected. At the same time, it will apply after getting the ongoing projects and future projects registered under Section 3 to prospectively follow the mandate of the Act 2016."

(Emphasis supplied)

The Apex Court at paragraph-40 considers what is an ongoing project and issuance of completion certificate interpreting the Act and the Rules made by the State of Uttar Pradesh. At paragraph-51 the Apex Court holds that the statute is not retrospective merely because it affects existing rights or its retrospection because of a part of the requisites for its action would destroy or impair the vested rights. At paragraph 54 the Apex Court holds that its action is retroactive in character and can safely be observed that the projects which are already completed or to which completion certificate has been granted are not under the fold of the Act and at the same time the Apex Court holds that it will apply after getting the ongoing projects and future projects registered under the Act.

In the case at hand, it is Rule 4 which exempts the projects like the petitioners.

16. In the light of the judgment of the Apex Court and undisputed facts as narrated hereinabove, the order passed by the Authority is without jurisdiction and a nullity in law. The first issue being held in favour of the petitioner with regard to maintainability of the complaint itself before the Authority, no other issue need be considered with regard to tenability of the order passed by the Authority.

17. For the aforesaid reasons, I pass the following:

ORDER

- (i) The Writ Petition is allowed.
- (ii) The judgment/order dated 30.09.2020 passed by the 1st respondent/Karnataka Real Estate Regulatory Authority, Bangalore in No.CMP/UR/190214/0002137 stands quashed.

- (iii) The amount in deposit before this Court shall be refunded to the petitioner forthwith.

Sd/-
JUDGE

bkp