Before Amol Rattan Singh & Lalit Batra, JJ.

M/S INTERNATIONAL LAND DEVELOPERS PRIVATE LIMITED—*Petitioner*

versus

ADITI CHAUHAN AND OTHERS—*Respondents*

CWP No. 7738 of 2022 (O&M)

August 17, 2022

Constitution of India, 1950— Art. 226—Haryana Real Estate Act, 2016, Section 40, 43, Land Revenue Act, Section 67—Maintainability of the petition—Held—Writ petition under Article 226 of the Constitution of India cannot be entertained against the order passed by RERA as the act itself provides an inbuilt mechanism where any order passed by the authority/adjudicating officer is appealable before the tribunal and further an appeal to the high court also lies under Sec. 58 of the act. Further financial inability of the promoter to deposit the amount under Sec. 43(5) of the RERA cannot be considered a genuine hardship for exercising discretion under Art. 226—The scheme of the act is to regulate the real estate sector and to safeguard the home buyers of plots/flats/units built and developed by large companies.

Held, that it is to be noticed that though learned senior counsel for the petitioner argued that the office order dated 16.03.2022 passed by the Authority, thereby delegating its powers upon the Adjudicating Officer to hear an execution application filed by respondent no.3 herein (complainant), is beyond the jurisdiction of the Authority and consequently the order passed by the AO in such execution proceedings on 30.03.2022 is also without jurisdiction; yet, we agree with learned counsel for the respondent Authority that with Section 81 of the Act empowering the Authority to delegate any of its powers and functions, other than the power to frame regulations under Section 85, to any member or officer of the Authority (or any other person), subject to any condition specified in the order, such delegation vide the said order dated 16.03.2022 (Annexure P-26) cannot be held to be beyond such power conferred upon the Authority

(Para 99)

Further held, that the Authority vide its order dated 10.07.2018 (Annexure P-8) having held that upon failure of possession of the

flat/unit being handed over before 19.12.2018, the respondents would be liable to pay the amount received by them in respect of such apartment alongwith interest at the prescribed rate; and if the apartment was handed over by the due date, then they would pay interest for every month of the delay (again at the prescribed rate till possession is actually handed over), we would not find any arbitrariness in that order so as to waive payment of the pre-deposit in terms of the proviso to Section 43(5) of the Act; but of course the petitioner would be free to raise its plea in that regard also before the Tribunal, if any such appeal is filed by it upon making the pre-deposit required. Yet, it is made clear that no arbitrariness in the amount to be paid is found by us at this stage, so as to exercise jurisdiction under Article 226 to direct a waiver of such pre-deposit.

(Para 102)

Chetan Mittal, Senior Advocate with Akshat Mittal, Advocate, Sandeep Sharma, Advocate and Mayank Aggarwal, Advocate, *for the petitioner* (CWP Nos. 7738 and 7750 of 2022).

Aashish Chopra, Senior Advocate, with Sugandha Kundu, Advocate, *for the petitioner* (in CWP No. 9942 of 2022).

Neeraj Gupta, Advocate, for respondent No.1 (in CWP no.7738 of 2022) and for respondents No.1 and 2 (in CWP no.7750 of 2022).

Ankur Mittal, Advocate with Kushaldeep Kaur, Advocate, Vasundhra Asija, Advocate and Anmol Dutt Sharma, Advocate, for the respondent RERA.

AMOL RATTAN SINGH, J.

(1) Vide this judgment, we are disposing of three writ petitions, i.e. CWP nos.7738, 7750 and 9942 of 2022.

The first two petitions are wholly on the same issue and in fact challenging the same order, with the petitioner also being the same in both, the only reason for filing two separate petitions being that the impugned order disposes of complaints filed by different persons against the same petitioner (company) and consequently the said company in its wisdom chose to file two petitions qua the different complainants, even though the impugned order is common.

The 3rd petition, i.e. CWP no.9942 of 2022, in one of its aspects, i.e. waiver of the pre-deposit to be made in terms of Section 43

(5) of the Haryana Real Estate (Regulation and Development) Act, 2016, is the same as the first two petitions and as a matter of fact as would be seen from this judgment, eventually the merits of the cases of any of the petitioners are not being touched upon by this court in exercise of jurisdiction under Article226 of the Constitution of India, there being an effective alternate remedy under the provisions of the aforesaid Act by way of appeals before the learned appellate tribunal constituted under Section 43 of the Act.

In view of the fact that one of the key issues raised in the 3rd petition is with regard to the manner of execution of the orders impugned in that petition, with reference to Section 40 of the aforesaid Act, they are both being dealt with separately, in Parts I and II of this judgment respectively.

Part I

CWP No. 7738 and 7750 of 2022

(2) Vide these petitions, the same petitioner (company) has challenged the common order passed by the learned Adjudicating Officer, Haryana Real Estate Regulatory Authority, dated 31.03.2021, by which, essentially, the petitioner has been directed to refund a sum of Rs.48,49,864/- to respondent no.1 in CWP no. 7738 of 2022 and a sum of Rs.50,49,387/- to respondents no.1 and 2 in CWP no.7750 of 2022.

The aforesaid direction has been given while deciding separate complaints filed by the said respondents in each petition, before the Haryana Real Estate Regulatory Authority (hereinafter referred to as the Authority) with the said order also having disposed of a 3rd complaint filed by one Nitin Suri and Priyanka Suri, but with the petitioner company not having challenged the same order order as regards Nitin Suri and Priyanka Suri, (or at least no such challenge before this court having been brought to our notice).

(3) The facts, for convenience, are being taken from CWP no.7738 of 2022, with the prayer in each petition as also the legal issues in each, being the same.

(4) The admitted case even as per the petitioner in its petitions, is that it has been issued a licence by the respondent State of Haryana to develop a residential housing project in Sector-33, Sohna, Gurugram; and specifically that part of the project as affects the aforesaid respondents in these petitions, has been given the

nomenclature of Project ARETE. Respondent no.1 in CWP no.7738 of 2022 was allotted Flat no.C-2002, 19th Floor, in the said project, with the area of the flat measuring 118.45 sq. mtrs. and with the total sale consideration settled between the petitioner and the said respondents being Rs.71,16,975/-, out of which the said respondent has already paid Rs.48,19,864/-.

A 'Builder Buyer Agreement' dated 20.06.2015 was also executed between the parties and possession of the flat was to be deliveredto respondent no.1 by 20.12.2019.

(5) It has also been stated in the petition that the said project is duly registered with the Authority with such registration being valid till 02.07.2022.

However, with possession of the flat allotted to the said respondent not having been delivered within time, she registered Complaint no.1073/2020 on 26.02.2020 with the Adjudicating Officer (hereinafter referred to as the AO) of the Authority, at Gurugram.

As per the petitioner, in her complaint the said respondent sought that the petitioner herein be directed to cancel the allotment of the flat/unit in question and to refund Rs.48,19,864/- to her and that she further be paid a sum of Rs.74,00,000/- on account of the bank loan taken by her forthe said unit and that she also be paid Rs.2,00,000/- as compensation for causing mental harassment to her, other than litigation expenses

The petitioner company herein filed its reply before the AO, seeking rejection of the complaint but with the complaint allowed (alongwith two other complaints referred to hereinabove), with a direction issued to the petitioner company herein to pay Rs. 37,13,649/- , Rs. 48,49,864/- and Rs. 50,49,387/- respectively, to the complainant in each complaint, alongwith interest @ 9.3% per annum, running from the date of each payment received till the whole amount is paid, with Rs.10,000/- to be also paid by way of litigation expenses and with the said direction to be complied with within 90 days of the passing of the order (31.03.2021).

(6) It has further been contended in the petition that as per the scheme of the Real Estate (Regulation and Development) Act, 2016 (hereinafter to be referred to as the Act) jurisdiction as regards the power to grant such refund vests solely with the Authority and not with the AO of the Authority.

It has next been contended that the petitioner in fact offered the property of the project itself for the satisfaction of the decretal amount, which was not accepted by the AO; and even the post-dated cheques to satisfy the decree, as had been placed on record before the officer, were rejected.

It has been contended in support of the contention on lack of jurisdiction with the AO, that in fact the Supreme Court in ***M/s Newtech Promoters and Developers Pvt. Ltd.*** *versus* ***State of UP and others*** (Civil Appeal no(s).6745-6749 of 2021) has categorically held that jurisdiction pertaining to refund is solely with the Authority and not the AO, and consequently the impugned order is wholly without jurisdiction.

(7) Next, it is contended in the petition that though a recourse to an appeal before the Appellate Tribunal constituted under the Act is otherwise available to the petitioner, however, such appeal can only be filed upon making a pre-deposit of the total amount to be paid to an allottee, including interest and compensation, failing which the appeal would not be admitted for hearing, in terms of sub-section (5) of Section 43 of the Act.

(8) Thus, it is contended that, as the impugned order itself is without jurisdiction, this petition has been filed seeking the setting aside thereof and with a direction to be issued to the Appellate Tribunal to hear the appeal of the petitioner against the said order, without insisting upon the compensation awarded to be deposited as a pre-deposit, before such hearing of the appeal.

Learned counsel had submitted in fact that either the matter be remitted to the Authority for consideration after setting aside the impugned order, or the Appellate Tribunal be directed to hear the petitioners without insisting on the pre-deposit].

(9) The petitioner has also contended that it is not in a fit financial condition to make the pre-deposit and in fact the Delhi High Court vide its order dated 02.03.2022 passed in OMP no.47/2021 and 121/2020, has restrained the company from transferring, selling, alienating or in any manner encumbering its immovable assets, including in units that are constructed or are under construction, in any of its projects.

(10) It has next been contended by the petitioner that respondentno.1 filed an execution application before the AO in which notice was issued to the petitioner, despite (as contended) the said

officer knowing very well that his order dated 31.03.2021 was without jurisdiction; and that vide a subsequent order dated 29.03.2022, he directed (as the executing court), arrest warrants to be issued against the Managing Director of the petitioner company, with the Commissioner of Police, Gurugram, authorized to arrest him.

It is also contended in the petition that though the said order was not uploaded on the website of the Authority, however in the 'complaint listing details' available on the website, it has been duly displayed that a show cause notice was issued to the Managing Director as to why he be not sent to civil imprisonment.

In fact, a perusal of the said order (reproduced in the petition) shows that it has also been observed by the AO that the decree holder (respondent no.1 herein) had stated that she was not ready to accept post-dated cheques as the JD (petitioner herein) had no balance in its bank accounts and as such the cheques would not be honoured.

The AO/executing court has further observed that though in the judgment cited before him, it has been held that if the financial condition of the judgment debtor was very poor, resort to civil imprisonment should not be made, but however, nothing had been shown to him (AO) that such financial condition was so bad; and in fact it was contended before him that the company was still selling and developing many projects.

Hence, the arrest warrants were ordered to be issued.

(11) The petitioner has next contended in the petition that it was under a "bonafide impression" that such like matters were sub-judice before the Supreme Court with the question of law to be adjudicated upon, qua the jurisdiction of the AO and the Authority, including waiver of the condition of pre-deposit; and hence, "only after the appellant had sought legal opinion", that they were apprised of the fact that an appeal or a writ petition in any case would have to be preferred against the order.

(12) Next, the petitioner contends that the Act was enacted with the objective of strengthening consumer protection through standardization of business practices and transactions in the real estate sector, while balancing interests of consumers and promoters by imposing certain responsibilities on both.

It has then contended that though certain parts of the Act came into effect on 01.05.2016, however some other parts thereof came into

effect on 01.05.2017; and therefore after the amendment in the Act it got itself registered with the Authority, and with such registration valid till 02.07.2022, it could complete the project by that date.

Hence, it is contended that in fact the complaint filed by respondent no.1 was premature, despite which it was allowed by the AO.

(13) When the petition initially came up for hearing before this court on 18.04.2022, after noticing the contentions raised at that stage by learned counsel for the petitioner, essentially on the issue of lack of jurisdiction with the AO to pass an order of refund, notice of motion was issued at that stage only to respondents no.3 and 4 in the petition, i.e. the Authority and the Tribunal, with execution of the arrest warrant stayed at that stage (and with that interim order still continuing to operate).

It is to be specifically observed here that though the Authority as also the Appellate Tribunal are *quasi-judicial fora* and normally notice would not be issued qua an order passed by any such authority, however, the Authority is being regularly represented before this court through counsel in all such cases where it has been impleaded, (which is so in almost everysuch case).

It is also to be observed that notice was not issued to the complainant (respondent no.1) as this court was of the opinion at that stage that it would not be right to burden a complainant who is already allegedly suffering due to non-delivery of her residential unit after having paid asubstantial amount for the same.

Nevertheless, even with no notice issued to her, respondent no.1 was duly represented by counsel appearing for her, with effect from the next date of hearing itself, i.e. 28.04.2022, as was the respondent Authority.

Hence, issuance of formal notice to respondent no.1 obviously stood waived by presence of her counsel.

As regards the State of Haryana, admittedly it is only a proforma respondent because the only function qua the said respondent is the issuance of a licence for developing the project to the petitioner. It is not refuted even by counsel for the Authority that such licence was issued(which is why obviously the project could have been registered with the Authority).

(14) Even so, no written statement was filed by either of the

respondents, with learned counsel for the Authority having submitted that the issue was wholly a legal one, as regards the jurisdiction of the AO to pass the impugned order, as also on the question of waiver of pre-deposit of the compensation amount with the Appellate Tribunal. Hence, counsel for the respondents all addressed arguments, with written arguments also eventually submitted to this court.

(15) Coming then to the arguments raised by all counsel.

Mr. Chetan Mittal, learned senior counsel appearing for the petitioner, essentially of course reiterated in his arguments what has already been noticed above from the pleadings in the petition.

In support of such arguments, he first submitted that even as per the judgment in M/s Newtech (*supra*), it has been specifically held by the Supreme Court in paragraph 86 (Law Finder Edition), that the power toorder a refund of the payment made by a home/unit buyer is only with the Regulatory Authority and not with the Adjudicating Officer (AO) and hence, with the impugned order itself being wholly without jurisdiction, passed by the AO, this court would not hesitate in setting it aside and remitting the matter to the Authority, to be heard on its own merits, or in the alternative, to allow waiver of the condition of a pre-deposit of the amount directed to be paid, for the Appellate Tribunal to hear the appeal of the petitioner on questions of law and on the factual merits thereof.

(16) He next submitted that the petitioner having specifically pleaded its financial inability to make the pre-deposit in paragraph 12 of the petition, and with this court also having called for the bank accounts of the petitioner and financial statements, it would exercise jurisdiction under Article 226 of the Constitution of India to grant liberty to file an appeal before the Tribunal without making the pre-deposit of the amount awardedto the complainant by the AO.

In that context, he relied upon the following three judgments:-

a. ***Technimont Pvt. Ltd*** *versus* ***State of Punjab and others***[1];

b. ***Har Devi Asnani*** *versus* ***State of Rajasthan and others***[2] and

[1] (2019)SCC Online SC 1228

[2] (2011)14 SCC 160

c. ***Experion Developers Pvt. Ltd. and others*** *versus* ***State of Haryana and others***[3].

(17) Learned senior counsel for the petitioner next submitted that the petitioner has also placed on record, as Annexure P-2, the order of the Delhi High Court, dated 02.03.2022, whereby the petitioner has been restrained from transferring/selling/encumbering any of its immovable assets in any of its project.

He submitted that therefore, in the light of the petitioners' financial inability to make the deposit of the decretal amount, it is a case where such waiver is called for, with this court exercising jurisdiction under Article 226.

(18) In sum and substance the aforesaid were the arguments raised on behalf of the petitioner, including of course what has been reproduced from the petition hereinabove (and is not being repeated here as arguments also raised by learned senior counsel).

(19) In his arguments, Mr. Neeraj Gupta, learned counsel for the first respondent herein (also appearing for respondents no.1 and 2 in CWP no.7750 of 2022), submitted that in fact the petitioner herein had also filed CWP no.10063 of 2020 before this court, seeking the relief of waiver of statutory fee as required under Section 43(5) of the Act, and the said petition was taken up alongwith a large number of other petitions which were all disposed of vide a judgment of a co-ordinate Bench, dated 16.10.2020, the lead case therein being *Experion Developers Pvt. Ltd.* (supra).

Learned counsel for the respondent-complainant next submitted that this court vide the said judgment, rejected the challenge to the constitutional validity of Section 43(5) of the Act and directed that all petitioners in those petitions would make the pre-deposit as required withthe Tribunal, but were granted one months' time from the date of the judgment, as a last opportunity to do so.

Hence, he contended that a second writ petition seeking the same relief is not maintainable and is in fact an abuse of the process of law, with the petitioner having also concealed the fact of the earlier petition having been filed on the same issue.

He next submitted that SLP(C) no.4488-90 of 2021 as had been filed against the aforesaid judgment of this court were heard by the

[3] (2021)1 RCR (C) 1

Supreme Court alongwith SLP(C) no.13005 of 2020 (Sana Realtors' case) and vide its judgment dated 12.05.2022 the Apex Court while accepting the statement of counsel appearing in those petitions, that all the cases were covered by the judgment in *Newtech* (supra), had not granted any relief even to the petitioner herein, with paragraph III of that order dated 12.05.2022 having duly referred to the case of the petitioner.

(20) Learned counsel for the respondent-complainant next contended that this court also, in CWP no.3670 of 2022 (Supertech Private Limited vs. Union of India and others), specifically dealt with the issue of a challenge to the order of the AO as also orders passed by that Authority in execution proceedings, and held that in view of the right of statutory appeal provided under the Act, this court would not examine the validity and legality of the order under challenge, on the merits thereof.

He further submitted that similar relief was also declined by this court while deciding CWP no.3179 of 2021 and CWP no.13455 of 2021 with, in the latter petition, the issue of hardship in depositing the 'statutory fee' also having been duly dealt with, holding that no waiver can be granted except in the case of exceptional hardship/circumstances.

Mr. Neeraj Gupta next contended that a similar view was taken by this court in CWP no.2055 of 2022 (Magic Eye Developers Pvt. Ltd. v. Adjudicating Officer, Real Estate Regulatory Authority and others) and with the SLP filed against that order of this court dated 29.03.2022, also having been dismissed by the Supreme Court vide its order dated 06.05.2022 [SLP (C) No. 8241 of 2022].

(21) Learned counsel for the said respondent further submitted that the petitioner had not even placed on record a copy of the 'Builder Buyer Agreement', the complaint filed before the AO and any of the documents submitted to that forum.

He next submitted that though delivery of the flat was promised by 2017 to the allottees, even five years thereafter even 30% of the work is not complete at the site; and therefore what the Supreme Court has held in ***Newtech*** *(supra)* (reference paragraph 78 of that judgment), that the right ofa home buyer to a refund is an unqualified right, would hold the field, and consequently the present petition deserves to be dismissed.

(22) Last, Mr. Gupta submitted that the provisions of the Act

provide that 70% of the amount collected by a developer from an allottee are to be deposited in a separate account and used for development purpose and thus, with the petitioner having misutlized the funds of the allottees by not even constructing upto 30% of the project (flats) with such funds, it cannot now take a plea of non-availability of funds as a ground to not deposit the required fee in terms of Section 43(5) of the Act and to not in fact refund the amount already taken by it from the allottee.

(23) Mr. Ankur Mittal, learned counsel for the respondent-Authority, first submitted that in fact there are really two issues to be gone into in these petitions by this court:-

> A. Whether "financial inability" of a promoter to deposit the amount under proviso to section 43(5) of Real Estate Regulation Authority Act 2016 can be considered as a case of "genuine hardship" for exercising discretion under Article 226 for waiving the mandatory statutory requirement, or not?
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> B. Whether a petition under Article 226 of the Constitution of India can be entertained against the order passed by the Real Estate Regulatory Authority, even when the Act itself provides an in-built mechanism, as any order passed by the Authority/ Adjudicating Officer is appealable before the tribunal; and further, an appeal to the High Court also lies thereafter under Section 58 of Act?

(24) Learned counsel next submitted that the object and intent of the Act is as a beneficial legislation to provide a speedy and foolproof mechanism for redressing the grievances of those persons who have purchased plots/flats/units developed by a builder/project developer; and that the preamble of the Act itself very clearly enunciates the objects thereof.

(25) He specifically pointed to the preamble which reads as follows:-

> "An Act to establish the Real Estate Regulatory Authority for regulation and promotion ofthe real estate sector and to ensure sale of plot, apartment or building, as the case may be, or sale of real estate project, in an efficient and transparent manner and to protect the interest of 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."

Learned counsel for the respondent-Authority next submitted that the Act came to be enacted at a time when plot/flat purchasers from such builders were not being given delivery of their units and money collected from them was being diverted towards other projects/other things by developers, who were therefore actually reneging on their promises.

In that context he also referred to the objects and reasons of the Act which read as follows:-

"STATEMENT OF OBJECTS AND REASONS

The real estate sector plays a catalytic role in fulfilling the need and demand for housing and infrastructure in the country. While this sector has grown significantly in recent years, it has been largely unregulated, with absence of professionalism and standardization and lack of adequate consumer protection. Though the Consumer Protection Act, 1986 is available as a forum to the buyers in the real estate market, the recourse is only curative and is not adequate to address all the concerns of buyers and promoters in that sector. **The lack of standardization has been a constraint to the healthy and orderly growth of industry. Therefore, the need for regulating the sector has been emphasized in various forums**

2. In view of the above, it becomes necessary to have a Central legislation, namely the Real Estate (Regulation and Development) Bill, 2013 in the interests of effective consumer protection, uniformity and standardization of business practices and transactions in the real estate sector. **The proposed Bill provides for the establishment of the Real Estate Regulatory Authority (the Authority) for regulation and promotion of real estate sector and to ensure sale of plot, apartment or building, as the case may be, in an efficient and transparent manner and to protect the interest of consumers in real estate sector and establish the Real Estate Appellate Tribunal to hear appeals from the decisions, directions or orders of the**

Authority.

3. The proposed Bill will ensure greater accountability towards consumers and significantly reduce frauds and delays as also the current high transactions costs. It attempts to balance the interests of consumers and promoters by imposing certain responsibilities on both. It seeks to establish symmetry of information between the promoter and purchaser, transparency of contractual conditions set minimum standards of accountability and a fast-track dispute resolution mechanism. The proposed Bill will induct professionalism and standardization in the sector, thus paving the way for accelerated growth and investments in the long run."

[What learned counsel specifically stressed upon from the above has been therefore referred to in bold letters.]

(26) Mr. Ankur Mittal therefore submitted that the objectives thatwere intended to be achieved by the legislature, are:-

(i) Symmetry of information between promoters and purchasers;

(ii) Transparency and standardization of contractual conditions;

(iii) Fast Track system of resolution by establishing Authority, Tribunal and appeal to High Court; and

(iv) Reducing the possibility of frauds and setting minimumstandards of accountability.

(27) On the issue of whether a petition under Article 226 of the Constitution can be entertained against an order passed by the Authority, learned counsel first submitted that when the Act itself provides an inbuilt mechanism to redress the grievance of any person in respect of an order passed by the Authority/AO, this court would not exercise such jurisdiction without that remedy having been exhausted; and especially when a second appeal against an order passed by the Tribunal lies to this court under the provisions of Section 58 of the Act.

He therefore submitted that even if an order passed by the Authority/AO is "wrong" or against the principles of natural justice, or even without jurisdiction, the appropriate forum to appeal to against

such order, isthe Appellate Tribunal and not the writ court.

(28) In that context, he relied upon the following paragraphs of the judgment in Newtech (*supra*) (RCR citation):-

> "119. That scheme of the Act, 2016 provides an in-built mechanism and any order passed on a complaint by the authority under Section 31 is appealable before the tribunal under Section 43(5) and further in appeal to the High Court under Section 58 of the Act on one or more ground specified under section 100 of the Code of Civil Procedure, 1908, if any manifest error is left by the authority either in computation or in the amount refundable to the allottee/home buyer, is open to be considered at the appellate stage on the complaint made by the person aggrieved."

He submitted that therefore these petitions do not deserve to be entertained by this court on that short ground alone, and should consequently be dismissed.

(29) On the aspect of whether the financial inability of a promoter to deposit the amount required to be deposited with the Tribunal in terms of Section 43 (5) of the Act, can be considered to be a case of genuine hardship for this court to exercise discretion under Article 226 to waive that mandatory statutory requirement, learned counsel for the respondentAuthority also submitted that this court in the case of *Experion Developers (supra)* has already rejected the challenge of the petitioner itself, alongwith many such petitions filed, as regards the Constitutional validity of the said provision; and further, with the Supreme Court also having upheld the Constitutional validity thereof, both by dismissal of the challenge to the aforesaid judgment, as also by upholding the vires thereof in M/s Newtech, the prayer of the petitioner for waiver of the pre-deposit is wholly unsustainable.

Learned counsel in fact specifically referred to paragraphs 124 to 126 in M/s Newtech (RCR citation), with the arguments raised on behalf of the developer/builder having been noticed therein as follows:-

> "124. Learned counsel further submits that if the entire sum as has been computed either by the Authority or adjudicating officer, is to be deposited including 30 per cent of the penalty in the first place, **the remedy of appeal provided by one hand is being taken away by the other since the promoter is financially under distress and**

incapable to deposit the full computed amount by the authority/adjudicating officer. The right of appreciation of his defence at appellate stage which is made available to him under the statute became nugatory because of the onerous mandatory requirement of pre-deposit in entertainingthe appeal only on the promoter who intends to prefer under Section 43(5) of the Act which according to him is in the given facts and circumstances of this case is unconstitutional and violative of Article 14 of the Constitution of India."

(Emphasis applied here only)

Thereafter, while rejecting the aforesaid arguments, it was held by the Supreme Court as follows:-

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

126. Therefore, the question of discrimination in the first place does not arise which has been alleged as they fall under distinct and different categories/classes.

127. It may further be noticed that under the present real estate sector which is now being regulated under the provisions of the Act 2016, the complaint for refund of the amount of payment which the allottee/consumer has

> deposited with the promoter and at a later stage, when the promoter is unable to hand over possession in breach of the conditions of the agreement between the parties, are being instituted at the instance of the consumer/allotee demanding for refund of the amount deposited by them and after the scrutiny of facts being made based on the contemporaneous documentary evidence on record made available by the respectiveparties, the legislature in its wisdom has intended to ensure that the money which has been computed by the authority at least must be safeguarded if the promoter intends to prefer an appeal before the tribunal and in case, the appeal fails at a later stage, it becomes difficult for the consumer/allottee to get the amount recovered which has been determined by the authority and to avoid the consumer/allottee to go from pillar to post for recovery of the amount that has been determined by the authority in fact, belongs to the allottee at a later stage could be saved from all themiseries which come forward against him.
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> 128. At the same time, it will avoid unscrupulous and uncalled for litigation at the appellate stage and restrict the promoter if feels that there is some manifest material irregularity being committed or his defence has not been properly appreciated at the first stage, would prefer an appeal for reappraisal of the evidence on record provided substantive compliance of the condition of predeposit is made over, the rights of the parties inter se could easily be saved for adjudication at the appellate stage."

(30) Learned counsel for the respondent Authority next referred, as regards the basic principle on non-waiver of a statutory requirement for a pre-deposit prior to hearing of an appeal of an appellant, to paragraph 136 of the said judgment to submit that it was held by the Supreme Court asfollows, even after considering the judgment in the case of ***Technimont Pvt. Ltd*** (*supra*) (as also other judgments on the subject):-

> "136. It is indeed the right of appeal which is a creature of the statute, without a statutory provision, creating such a right the person aggrieved is not entitled to file the appeal. It is neither an absolute right nor an ingredient of natural justice, the principles of which must be followed in all

> judicial and quasi- judicial litigations and it is always be circumscribed with the conditions of grant. At the given time, it is open for the legislature in its wisdom to enact a law that no appeal shall lie or it may lie on fulfilment of pre-condition, if any, against the order passed by the Authority in question.
>
> 137. In our considered view, the obligation cast uponthe promoter of pre-deposit 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 pre-deposit 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 theConstitution of India."

(31) Learned counsel submitted that even Technimonts' case does not define "onerous" or "genuine hardship" to mean financial distress, and rather, onerous has been interpreted in that judgment to mean that it would only be onerous where determination of the amount of compensation awarded is wholly arbitrary or is based on extraneous consideration.

He submitted that while holding so even in Technimonts' case, reference was made to the case of ***Government of A.P.*** *versus* ***P. Laxmi Devi***[4], with it held as follows (in Technimont):-

> "….While dealing with the submission that in terms of said proviso, no relief could be granted even in cases where the requirement of pre-deposit may result in great prejudice, this Court went on to observe:-
>
> "28. We may, however, consider a hypothetical case. Supposing the correct value of a property is 10 lakhsand that is the value stated in the sale deed, but the registering officer erroneously determines it to be, say,2 crores. In that case while making a reference to the Collector under Section 47A, the registering officer will demand duty on

[4] (2008) 4 SCC 720

> 50% of 2 crores i.e. duty on 1 crore instead of demanding duty on 10 lakhs. A party may not be able to pay this exorbitant duty demanded under the proviso to Section 47A by the registering officer in such a case. What can be done in this situation?
>
> 29. In our opinion in this situation it is always open to a party to file a writ petition challenging the exorbitant demand made by the registering officer under the proviso to Section 47A alleging that **the determination made is arbitrary and/or based on extraneous considerations, and in that case it is always open to the High Court, if it is satisfied that the allegation is correct, to set aside such exorbitant demand under the proviso to Section 47A of the Stamp Act by declaring the demand arbitrary.** It is well settled that arbitrariness violates Article 14 of the Constitution vide Maneka Gandhi v. Union of India (1978) 1 SCC 248 = AIR 1978 SC 597. Hence, the party is not remediless in this situation."

(32) Hence, Mr. Ankur Mittal submitted that financial distress or financial hardship has not been considered to be a valid ground for waiver of a condition of pre-deposit, and in any case it was necessary for the petitioner to demonstrate that the amount awarded by the AO is arbitrary, exorbitant or based on some extraneous consideration, which it has not even vaguely attempted to do, because obviously the amount awarded is not in any manner arbitrary or exorbitant etc.

He submitted that thus even the incapability of a developer to make the payment as awarded/directed by the AO/Authority is not a ground to waive the condition of pre-deposit and consequently, that specific prayer of the petitioner deserves to be dismissed and if therefore the petitioner is aggrieved of the order of the AO in any manner, it is obviously within its right to file an appeal before the Appellate Tribunal after duly making the statutory pre-deposit required to be made in terms of Section 43 (5) of the Act and a waiver, if granted, would actually negate the statute in its entirety.

(33) In that every context, he next submitted that simply submitting bank account details (upon directions of this court), would not imply that the promoter is actually unable to pay the amount required to be paid, because it cannot be forgotten that it has received hardened money from home- buyers/allottees solely for the purpose of development of the project in question; and if such money has been

diverted for other uses, then even any financial inability due to such diversion of funds etc. cannot be used as an excuse to seek a waiver of the payment of pre-deposit, such pre-deposit being for the welfare of the home-buyer/unit buyer, which needs to be fully secured in terms of the compensation awarded, unless this court itself is of the opinion that the compensation/refund directed to be paid is wholly arbitrary, which in the present cases it obviously is not.

(34) As regards the right of a person to claim a refund in such circumstances, learned counsel for the respondent Authority relied upon a judgment in ***Imperia Structures Ltd.*** *versus* ***Anil Patni***[5], which judgment was also affirmed in M/s Newtech case (*supra*) (reference paragraph 78 of Newtech, RCR citation).

(35) Next, Mr. Ankur Mittal submitted that even this court (this very Bench), in the case of ***Magic Eye Developers Pvt. Ltd.*** *versus* ***Adjudicating Officer, Real Estate Regulatory Authority and others*** (CWP No. 2055 of 2022, decided on 29.03.2022), has held that the requirement of a deposit as a pre-condition to hearing of an appeal cannot be waived even if the order passed for directing payment of a refund is by an Authority that has no jurisdiction; and in fact that judgment of this court already stands affirmed by the Supreme Court in SLP (C) No. 8241 of 2022.

He submitted that even in the case of ***Experion Developers Pvt. Ltd*** (*supra*), this court had held to the same effect.

He thus submitted that even on that ground the petitions deserve to be dismissed.

(36) Mr. Ankur Mittal also referred to the judgment/order of this court in ***Sana Realtors Private Limited*** *versus* ***Real Estate Regulatory Authority and others*** (CWP No. 17657 of 2020, decided on 25.05.2022), to submit that this Bench itself has also held in that judgment that even on the grounds of violation of the principles of natural justice, the court would not entertain a writ petition under Article 226, and that ground would need to be considered by the Appellate Tribunal upon an appeal being filed subject to the condition of a pre-deposit.

(37) Last on that issue, learned counsel for the respondent-Authority submitted that though there can be no fetters on the power under Article 226 of the Constitution, yet, in the face of a statutory

[5] 2020 (10) SCC 783

provision [Section 43 (5) of the Act], such power would not be exercised to negate the Act itself, even on the ground of financial inability.

In that context, he referred to another judgment of the Supreme Court, in ***Kotak Mahindra Bank Pvt. Ltd.*** *versus* ***Ambuj a. Kasliwal***[6], wherein it was held as follows:-

> "14. Therefore, in the facts andcircumstances arising herein, when further amount is due and payable in discharge of the decree/recovery certificate issued by the DRT in favour of the appellant/Bank, **the High Court does not have the power to waive the pre-deposit in its entirety, nor can it exercise discretion which is against the mandatory requirement of the statutory provision as contained in Section 21, which is extracted above.** In all cases fifty per cent of the decretal amount i.e. the debt due is to be deposited before the DRAT as a mandatory requirement, but in appropriate cases for reasons to be recorded the deposit of at least twenty-five per cent of the debt due would be permissible, but not entire waiver. Therefore, any waiver of pre-deposit to the entire extent would be against the statutory provisions and, therefore, not sustainable in law. The order of the High Court is, therefore, liable to be set aside."
>
> (Emphasis applied by learned counsel before this court).

(38) In rebuttal to the arguments of both counsel for the respondents, Mr. Chetan Mittal, learned senior counsel appearing for the petitioner, submitted that as regards the contention of Mr. Neeraj Gupta, counsel for the respondent-complainants in these petitions, that the petitioner having earlier filed CWP No. 10063 of 2020 and with that petition having been dismissed and the SLP filed against that also having been withdrawn, in fact that would not bar the present petition because, firstly, that was a petition filed challenging a specific order in the case of another complainant and consequently, simply because the issue of the condition of a pre-deposit was raised in that petition, that would not bar the petitioner either Order 2 Rule 2 of the CPC or otherwise, from filing the present petition, which specifically impugns a completely different order in the context of a complaint filed by two completely different complainants, though they too were

[6] 2021 (2) Scale 593

allottees/buyers of flats in the same project as the complainant in CWP No. 10063 of 2020.

He further submitted that though the validity of Section 43 (5) of the Act had been challenged in that petition, however, there was no prayermade for waiver of the pre-deposit and in any case therefore, the contention of learned counsel for the respondent-complainants in these petitions to that effect is wholly without any basis.

(39) Having heard learned counsel for the parties, before examining the matter on merits, the contention raised by learned counsel for the respondent-complainant as regards the non-maintainability of these petitions on the ground that earlier the petitioner had filed CWP no. 10063 of 2020, needs to be examined.

Having called for the case file of that petition, it is seen that the said petition was filed by the petitioner (actually by the Chairman-cum-Managing Director of the petitioner company though in his capacity as such), impleading therein the Union of India, the State of Haryana, the Real Estate Regulatory Authority, Gurugram, Mr. Vibhor Goyal and Mr. Surender Kumar Goyal, as parties.

The petitioner had sought quashing of an order dated09.01.2019 passed by two members of the Authority (and not by AO), on a complaint filed by the aforesaid two persons, i.e. Vibhor Goyal and Surender Kumar Goyal, against the present petitioner (again through its CMD).

In that case, the petitioner had also challenged the *vires* of the notification issued by the Government of Haryana, on 12.09.2019, notifying the Haryana Real Estate (Regulation and Development) Amendment Rules, 2019, with a further prayer also made for quashing of an Execution Application pending before the Authority for execution of the order passed in favour of the complainant in that case, i.e. Vibhor Goyal and Surender Kumar Goyal.

(40) Thus, though the petitioner had challenged the *vires* of the notification amending certain parts of the aforesaid rules, learned senior counsel appearing for the petitioner in the present case is correct in his contention that at least as per the prayer in that petition, there was no prayer made for a waiver of the condition of pre-deposit before an appeal could be heard by the Appellate Tribunal.

In any case, the petitioner essentially challenged the order passed in the case of two other complainants who were aggrieved of

non- delivery of possession of the flat that they had purchased from the petitioner, in the same project as is in question in the present petition.

Hence, as regards that contention of learned counsel for the respondent complainants, we find no substance in it.

(41) Coming then to the prayers made in these petitions themselves. We would agree with learned counsel for the respondent Authority that as regards entertaining this petition under Article 226 of the Constitution, when there is an equally efficacious remedy of appeal before the Appellate Tribunal in terms of Section 43(5) of the Act, and with there being a provision for a further appeal to the High Court against any decision or order of the Appellate Tribunal, in terms of Section 58 of the Act, this court would not entertain a petition under Article 226 directly challenging the order of the AO as has been impugned in the present petition.

However, obviously the contention of learned senior counselfor the petitioner is that the said order is void *ab initio*, it being without jurisdiction in as much as it has been held by the Supreme Court in M/s Newtech (*supra*) that the AO would not have the power to direct a refund and which jurisdiction would only lie with the Authority, yet, even that ground obviously can be raised by the petitioner before the Appellate Tribunal in any appeal that it choses to file, against the impugned order ofthe A.O.

(42) Though, of course, if this court sees a complete failure of justice in any matter, naturally it would exercise jurisdiction under Article 226 to remedy such failure of justice at the earliest instance.

However, we would find no ground to do that in the present case because though the order of refund may have been passed by the AO beyond his jurisdiction in terms of the ratio of the judgment in M/s Newtech (*supra*), yet, it is not at all denied that the respondents-complainants herein have made large payments to the petitioner for allotment and purchase of flats in Project ARETE that was to be developed by the petitioner, but forthe reasons best known to it, has not been developed (despite it obviously having taken very large sums of money from each buyer).

Hence, the argument of Mr. Ankur Mittal, learned counsel for the respondent Authority, that the object of the Act is to ensure proper regulation of the real estate sector specifically with regard to

safeguarding the interest of the average citizen when pitted against a huge company, we would find that the remedy under Article 226 is not the remedy for the petitioner at the first instance and it should have availed of its remedy of appeal in terms of Section 43(5) of the Act, before the Appellate Tribunal, after making the requisite (statutory) pre-deposit.

(43) Before going on to the question of the obvious reason why the petitioner has approached this court before going to the Tribunal (as it is seeking waiver of the amount ordered by the AO), a reference to the relevant part of Section 43(5) of the Act needs to be made and is reproduced hereinbelow:-

> "Section 43. Establishment of Real Estate Appellate Tribunal -(1). XXX XXX XXX XXX XXX
>
> (2). XXX XXX XXX XXX XXX (3). XXX XXX XXX XXX XXX(4). XXX XXX XXX XXX XXX
>
> (5). Any person aggrieved by any direction or decision or order made by the Authority or by an adjudicating officer under this Act may prefer an appeal before the Appellate Tribunal having jurisdiction over the matter:
>
> Provided that where a promoter files an appeal with the Appellate Tribunal, it shall not be entertained, without the promoter first having deposited with the Appellate Tribunal atleast thirty per cent. of the penalty, or such higher percentage as may be determined by the Appellate Tribunal, or the total amount to be paid to the allottee including interest and compensation imposed on him, 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."

Further, a reference also needs to be made to what has been held by the Supreme Court in the context of the power of the Authority and the AO, which is summed up in paragraph 86 of *Newtech.*

The said conclusion has been drawn by the Supreme court in reference to the Question No.2 framed by it. Paragraph 86 reads as follows:-

> "86. From the scheme of the Act of which a detailed reference has been made and taking note of power of adjudication delineated with the regulatory authority and adjudicating officer, what finally culls out is that although the Act indicates the distinct expressions like 'refund', 'interest', 'penalty' and 'compensation', a conjoint reading of Sections 18 and 19 clearly manifests that when it comes to refund of the amount, and interest on the refund amount, or directing payment of interest for delayed delivery of possession, or penalty and interest thereon, it is the regulatory authority which has the power to examine and determine the outcome of a complaint. At the same time, when it comes to a question of seeking the relief of adjudging compensation and interest thereon under Sections 12, 14, 18 and 19, the adjudicating officer exclusively has the power to determine, keeping in view the collective reading of Section 71 read with Section 72 of the Act. If the adjudication under Sections 12, 14, 18 and 19 other than compensation as envisaged, if extended to the adjudicating officer as prayed that, in our view, may intend to expand the ambit and scope of the powers and functions of the adjudicating officer under Section 71 and that would be against the mandate of the Act 2016."

To further appreciate the above, the relevant Sections, i.e. Sections 12, 14, 18, 19, 71 and 72 of the Act of 2016, as are referred to above by the Apex Court, also need to be reproduced herein below:-

> "**12. Obligations of promoter regarding veracity of the advertisement or prospectus**.—
>
> Where any person makes an advance or a deposit on the basis of the information contained in the notice, advertisement or prospectus, or on the basis of any model apartment, plot or building, as the case may be, and sustains any loss or damage by reason of any incorrect, false statement included therein, he shall be compensated by the promoter in the manner as provided under this Act:
>
> Provided that if the person affected by such incorrect, false statement contained in the notice, advertisement or prospectus, or the model apartment, plot or building as the case may be, intends to withdraw from the proposed project, he shall be returned his entire investment along with interest

at such rate as may be prescribed and the compensation in the manner provided under this Act.

14. Adherence to sanctioned plans and project specifications bythe promoter.—

(1) The proposed project shall be developed and completed by the promoter in accordance with the sanctioned plans, layout plans and specifications as approved by the competent authorities.

(2) Notwithstanding anything contained in any law,contract or agreement, after the sanctioned plans, layout plans and specifications and the nature of the fixtures, fittings, amenities and common areas, of the apartment, plot or building, as the case may be, as approved by the competent authority, are disclosed or furnished to the person who agree to take one or *more of the said apartment, plot or building, as the case may be, the promoter shall not make*—

(i) any additions and alterations in the sanctioned plans, layout plans and specifications and the nature of fixtures, fittings and amenities described therein in respect of the apartment, plot or building, as the case may be, which are agreed to be taken, without the previous consent of that person:

Provided that the promoter may make such minor additions or alterations as may be required by the allottee, or such minor changes or alterations as may be necessary due to architectural and structural reasons duly recommended and verified by an authorized Architect or Engineer after proper declaration and intimation to the allottee.

Explanation.—For the purpose of this clause, "minor additions or alterations" excludes structural change including an addition to the area or change in height, or the removal of part of a building, or any change to the structure,such as the construction or removal or cutting into of any wall ora part of a wall, partition, column, beam, joist, floor including a mezzanine floor or other support, or a change to or closing of any required means of access ingress or egress or a change to the fixtures or equipment, etc.

(ii) any other alterations or additions in the sanctioned plans, layout plans and specifications of the buildingsor the common areas within the project without the previous written consent of at least two-thirds of the allottees, other than the promoter, who have agreed to take apartments in such building.

Explanation.—For the purpose of this clause, the [allottee], irrespective of the number of apartments or plots, as the case may be, booked by him or booked in the name of his family, or in the case of other persons such as companies or firms or any association of individuals, etc., by whatever name called, booked in its name or booked in the name of its associated entities or related enterprises, shall be considered as one allottee only.

(3) In case any structural defect or any other defect in workmanship, quality or provision of services or any other obligations of the promoter as per the agreement for sale relating to such development is brought to the notice of the promoter within a period of five years by the allottee from the date of handing over possession, it shall be the duty of the promoter to rectify such defects without further charge, within thirty days, and in the event of promoter's failure to rectify such defects within such time, the aggrieved allottees shall be entitled to receive appropriate compensation in the manner as providedunder this Act.

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 forsale 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 asprovided 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 subsection 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.

19. Rights and duties of allottees.—

(1) The allottee shall be entitled to obtain the information relating to sanctioned plans, layout plans along with the specifications, approved by the competent authority and such other information as provided in this Act or the rules and regulations made thereunder or the agreement for sale signed with the promoter.

(2) The allottee shall be entitled to know stage-wise time schedule of completion of the project, including the provisions for water, sanitation, electricity and other amenities and services as agreed to between the promoter and the allottee in accordance withthe terms and conditions of the agreement for sale.

(3) The allottee shall be entitled to claim the possession of apartment, plot or building, as the case may be, and the association of allottees shall be entitled to claim the possession of the common areas, as per the declaration given by the promoter under sub- clause (C) of clause (l) of sub-section (2) of section 4.

(4) The allottee shall be entitled to claim the refund of amount paid along with interest at such rate as may be prescribed and compensation in the manner as provided under this Act, from the promoter, if the promoter fails to comply or is unable to give possession of the apartment, plot or building, as the case may be, inaccordance with the terms of agreement for sale or due to discontinuance of his business as a developer on account of suspension or revocation of his registration under the provisions ofthis Act or the rules or regulations made thereunder.

(5) The allottee shall be entitled to have the necessary documents and plans, including that of common areas, after handing over the physical possession of the apartment or plot or building as the case may be, by the promoter.

(6) Every allottee, who has entered into an agreement for sale to take an apartment, plot or building as the case may be, under section 13, shall be responsible to make necessary payments in the manner and within the time as specified in the said agreement for sale and shall pay at the proper time and place, the share of the registration charges, municipal taxes, water and electricity charges, maintenance charges, ground rent, and other charges, if any.

(7) The allottee shall be liable to pay interest, at such rate as may be prescribed, for any delay in payment towards any amountor charges to be paid under sub-section (6).

(8) The obligations of the allottee under sub-section (6) and the liability towards interest under sub-section (7) may be reduced when mutually agreed to between the promoter and such allottee.

(9) Every allottee of the apartment, plot or building as the case may be, shall participate towards the formation of an association or society or cooperative society of the allottees, or a federation of the same.

(10) Every allottee shall take physical possession of the apartment, plot or building as the case may be, within a period of two months of the occupancy certificate issued for the said apartment, plot or building, as the case may be.

(11) Every allottee shall participate towards registration of

the conveyance deed of the apartment, plot or building, as the case may be, as provided under sub-section (1) of section 17 of this Act.

71. **Power to adjudicate.**—(1) For the purpose of adjudging compensation under sections 12, 14, 18 and section 19, the Authority shall appoint, in consultation with the appropriate Government, one or more judicial officer as deemed necessary, who is or has been a District Judge to be an adjudicating officer for holding an inquiry in the prescribed manner, after giving any person concerned a reasonable opportunity of being heard:

Provided that any person whose complaint in respect of matters covered under sections 12, 14, 18 and section 19 is pending before the Consumer Disputes Redressal Forum or the Consumer Disputes Redressal Commission or the National Consumer Redressal Commission, established under section 9 of the Consumer Protection Act, 1986 (68 of 1986), on or before the commencement of this Act, he may, with the permission of such Forum or Commission, as the case may be, withdraw the complaint pending before it and file an application before the adjudicating officer under this Act.

(2) The application for adjudging compensation under sub-section (1), shall be dealt with by the adjudicating officer as expeditiously as possible and dispose of the same within a period of sixty days from the date of receipt of the application:

Provided that where any such application could not be disposed of within the said period of sixty days, the adjudicating officer shall record his reasons in writing for not disposing of the application within that period.

(3) While holding an inquiry the adjudicating officer shall have power to summon and enforce the attendance of any person acquainted with the facts and circumstances of the case to give evidence or to produce any document which in the opinion of the adjudicating officer, may be useful for or relevant to the subject matter of the inquiry and if, on such inquiry, he is satisfied that the person has failed to comply with the provisions of any of the sections specified in sub-

section (1), he may direct to pay such compensation or interest, as the case any be, as he thinks fit in accordance with the provisions of any of those sections.

72. **Factors to be taken into account by the adjudicating officer.—**While adjudging the quantum of compensation or interest, as the case may be, under section 71, the adjudicating officer shall have due regard to the following factors, namely:—

(a) the amount of disproportionate gain or unfair advantage, *wherever quantifiable, made as a result of the default;*

(b) the amount of loss caused as a result of the default;

(c) the repetitive nature of the default;

(d) such other factors which the adjudicating officer considersnecessary to the case in furtherance of justice."

(44) Thus, what has been held by their Lordships is that though the AO has the jurisdiction to adjudge compensation and interest thereupon tobe paid to a complainant in terms of Sections 71 and 72 of the Act, however, as regards granting of a refund of the amount paid by a complainant and the interest thereupon, or directing payment of interest for delayed delivery and penalty and interest thereupon, it is the Authority which has the power to examine and determine the same, as an outcome of the complaint.

It has been held to be so in the context of the scheme of the Act, with sub-section (3) of Section 71 postulating that the AO, while holding an inquiry, if he is satisfied that the provisions of sub section (1) of the said Section have not been complied with, may direct payment of compensation or interest as he deems fit in accordance with the said provisions.

(45) Hence, in the present case, whether the AO has exceeded his jurisdiction in terms of the aforesaid provisions, in terms of what has been held by the Supreme Court thereupon, would also be a question that can be determined by the Appellate Tribunal.

Therefore, we would find no reason whatsoever to entertainthese petitions under Article 226 of the Constitution without the petitioner having availed of its remedy before the Tribunal, of course after making a deposit of the amount it has been directed to pay the complainant by the AO.

(46) We then come to the real issue why the petitioner has filed these petitions instead of approaching the Tribunal by way of an appeal directly in terms of Section 43(5).

Obviously, the petitioner is trying to avoid making the payment to the complainants in terms of the order which was passed more than one year prior to the filing of these petitions (seen to be dated 07.04.2022),which came up for hearing for the first time on 18.04.2022 before this court, (with the impugned order having been passed on 31.03.2021).

(47) It needs to be emphasized by this court that the scheme of the Act is of course to regulate the entire real estate sector; but specifically to also safeguard the home buyers/buyers of plots/flats/units, being built/developed by large companies etc.

Hence, the bottomline is that the respondent complainants herein having admittedly entered into a builder-buyer agreement with the petitioner and having paid large sums of money (above Rs.45 lakhs in each case), and they not having been delivered possession of their residential flats by the petitioner, their interests need to be safeguarded in terms of the scheme of the Act and as per the judgment in M/s Newtech (*supra*).

(48) Further, to repeat, the petitioner only approached this court in the month of April, 2022, to challenge the order passed by the A.O. on March 31, 2021, and consequently, the obvious inference that would be taken by this court, would be that it was simply trying to delay payment and was not even willing to make the pre-deposit as required in terms of Section 43(5) of the Act, and therefore now, simply by approaching this court one year later under Article 226, it cannot take advantage of its own fault, firstly of not delivering possession within time; and further, in not even approaching the appropriate forum within the time stipulated in Section 44 (2) for doing so, (60 days), though with the Tribunal having jurisdiction to entertain an appeal even after that period, if it is satisfied that there was sufficient cause for the delay.

Hence, we would find absolutely no reason, to entertain these petitions under Article 226, even against an order which is alleged to have been passed without jurisdiction, with that issue to be gone into by the Appellate Tribunal, if the appeal of the petitioner is entertained by that forum at this stage.

(49) Coming then to the contentions of learned counsel for the

petitioner that the petitioner does not have the financial capacity to make the pre-deposit of approximately Rs.99 lakhs, i.e. the total amount as would be involved in both these petitions (Rs.48,49,864/- and Rs.50,49,387/- respectively).

In fact learned counsel for the respondents were absolutely correct in pointing out to this court that the petitioner, other than making a bare assertion in paragraph 12 of CWP no.7738 of 2022, that it is not in a financial condition to make the pre-deposit, did not even bother to even annex any document in support of that contention and consequently, as a matter of fact we (this court) had obviously erred in even calling for thebank account details and financial statements from the petitioner, in the absence of any firm proof provided in the petition.

In retrospect, we need to observe that in any case the petitioners' present financial condition would have no bearing whatsoever on its ability to make the pre-deposit in terms of the impugned order, within the statutory period of 60 days that it had to file the appeal before the Tribunal after 31.03.2021.

(50) The contention of learned senior counsel for the petitioner that the Delhi High Court vide its order dated 02.03.2022 (copy Annexure P-2 with the petition), had restrained the petitioner company and the entire group of companies from transferring /selling/encumbering/alienating any immovable estate, also has absolutely no bearing on the financial condition of the petitioner for making the requisite pre-deposit for an appeal against the impugned order dated 31.03.2021, because the order of the Delhi High Court has been passed 1 year thereafter, on 02.03.2022.

Thus, if the petitioner had clear intentions, it would have filed an appeal within the statutory period granted in the Act, and made the pre- deposit before the Tribunal in respect of any grievance it had against the impugned order.

(51) It is also necessary to state here that this court (this very bench), (as has also been argued by learned counsel for the respondents), had already dismissed a petition filed by another builder/developer, i.e. Magic Eye Developers (*supra*), wherein also the plea was that the order impugned therein was passed by the AO without jurisdiction.

That order passed by this court was challenged by way of SLP (C) No. 8241 of 2022, but without any success.

(52) As regards the contention of learned senior counsel for the petitioner that the Supreme Court, even in *Technimont* (supra) held, even while referring to two earlier judgments in *P. Laxmi Devi and Har Devi Asnani* (both supra), that in a genuine case of hardship a High Court would exercise jurisdiction under Article 226 to waive the condition of pre-deposit before an appeal can be filed, we do not find any substance in that argument either because firstly, the judgment of *Technimont* was duly considered by the Supreme Court in *Newtech,* after which it was held in paragraphs 136and 137 of *Newtech* that the obligation cast upon a promoter of making a pre-deposit under Section 43(5) of the Act, is 'a class in itself' and that a promoter in receipt of money being claimed by home buyers/allottees for a refund, must comply with the statutory provision.

Further, as pointed out by Mr. Ankur Mittal, learned counsel appearing for the Authority, even in *Technimont,* while referring to *P. Laxmi Devi,* the Apex Court had held that only where the amount awardedby the Authority concerned appears to be arbitrary to the High Court, it would exercise jurisdiction under Article 226 to waive the pre-depositrequired to be made.

In the present case, we do not see (for the purpose of these petitions), as to how the amounts ordered to be paid vide the impugned order are arbitrary in any manner, when admittedly the amount paid to the petitioner by the respondent-complainants in these petitions, is only marginally below what has been ordered to be given to the complainants, vide the impugned order.

(53) Further, it is also to be observed that whereas in *Technimont* case, the issue was with regard to a pre-deposit under the Punjab VAT Act, 2005; and in *Laxmi Devi* case the issue was with regard to payment in terms of Section 47-A of the Indian Stamp Act, 1899, which were amounts to be paid to the State by the assessees persons challenging such orders, here we are dealing with an Act that has been enacted to safeguard the interest of the common citizen against large companies/developers etc.

Consequently, we in any case would find no parity in the two situations.

As regards *Har Devi Asnani* case (supra) cited by learned counsel for the petitioner, that again was a matter involving the Stamp Act, with the Supreme Court having held that the High Court should have gone into the question of whether or not the amount ordered to be paid under

that Act was actually reasonable or exorbitant.

As already said, in the present case we do not find (for the purposes of these petitions) the amount to be exorbitant or arbitrary in any manner though of course that would be a plea that would also be considered by the Appellate Tribunal if the petitioner wishes to file such an appeal, and it is entertained by the Tribunal (after making the pre-deposit necessary).

(54) As regards the judgment of a co-ordinate bench of this court in ***Ramprastha Promoters and Developers Pvt. Ltd.***, CWP no.6688 of 2021, (which though not referred to earlier in this judgment, is seen to be provided by learned counsel for the petitioner in the compendium of judgments supplied to this court), that was a case dealing with the RERA Act itself wherein it was observed that in an appropriate case of hardship, this court would exercise jurisdiction under Article 226 to waive the pre-deposit required in terms of the judgment in *Technimont* and other such cases; but eventually even in *Ramprastha* itself, finding that it was not a case ofextreme hardship, the prayer of the petitioners therein was actually declined, though they were given additional time to make the requisite pre-deposits.

It needs to be observed here also, as we have already held hereinabove, that even as regards hardship, it was held in *Technimont* case itself that such hardship would only be with regard to an arbitrary sum awarded by the Authority concerned; and further, with the Supreme Court having held in the context of this very Act, in *Newtech*, that it is a mandatory pre-deposit that must be made to safeguard the interest of the home buyer/allottee, we find ourselves unable to accept the argument of learned senior counsel for the petitioner, and hold that if the petitioner is to file any appeal before the Appellate Tribunal, it must be on the condition ofa pre-deposit to be made in terms of the proviso to Section 43(5) of the Act, and thereafter of course, the learned Tribunal would see vide the discretion provided to it by the Act, as to whether that appeal should be entertained at all at this stage or not.

(55) Hence, to sum up, though we would not entirely disagree with learned senior counsel for the petitioner that in absolutely appropriate circumstances where this court finds a complete failure of justice, on account of any conduct of the buyer/allottee etc., it may entertain a petition under Article 226 of the Constitution to either hear the petitioner therein on the merits of the order impugned, or may direct a waiver of the pre-deposit ifthe amount to be paid is found to be

highly arbitrary or unjust, yet, in the present case we find no such circumstance as would justify entertainment of these petitions for the detailed reasons given hereinabove, summed up hereinbelow:-

i. Whether or not the impugned order is actually wholly without jurisdiction in terms of Sections 12, 14, 18, 19, 71 and 72 of the Act, and in terms of the ratio of the judgment of the Supreme Court in M/s Newtech (*supra),*is also an issue to be gone into by the Tribunal in terms of the statutory appeal provided for in the Act itself upon a pre-deposit being made for that purpose in terms of Section 43(5) thereof;

ii.that the petitioner obviously deliberately did not even avail of that remedy for a period of more than one year after the impugned order was passed and therefore, it cannot be said to have approached this court in a *bona fide* manner to claim that it was financially unable to make the pre-deposit, even in the context of the order of the Delhi High Court (P-2), which was passed more than one year after the impugned order;

iii. the amounts directed to be paid vide theimpugned order are not found by this court (for the purposes of these petitions), to be arbitrary in any manner, thoughwhether it was a completely correct calculation made or not by the AO, would be a question again to be determined by the Tribunal, if the appeal(s) of the petitioner is/are entertained by it after payment of the statutory deposit (s) required. Consequently, these petitions are dismissed.

Part II

CWP-9942 of 2022

(56) The petitioner herein seeks the quashment of three orders passed by the Haryana Real Estate Regulatory Authority, Gurugram, as also one of the Adjudicating Officer of that Authority, with an alternate prayer made, for a direction that the petitioner be allowed to appeal against the order dated 10.07.2018 passed by the Authority, before the Appellate Tribunal, without making the requisite pre-deposit in terms of Section 43(5) of the Haryana Real Estate (Regulation and Development) Act, 2016 (hereinafter to be referred to as the Act).

The following is a brief description of the impugned orders:-

i. Order dated 10.07.2018	Order passed by the Authority holding that if the promoters failed to hand over possession (of the flat in question) before 19.12.2018, they shall be liable to pay the amount received by them for the apartment (by respondent no.3 alongwith interest), at the prescribed rate, within 45 days thereafter; but in case the apartment was handed over by that date then they would pay interest for every month of delay, at the prescribed rate of 10.15% till the date of such possession being handed over.
ii. Order dated 09.02.2021 :	Order of the Authority, in execution (Annexure P-17)proceedings initiated by respondent no. herein (Plaza Fincap), essentially directing therein the attachment of the account of respondent no.4 herein, with a direction to the Bank Manager of the Union Bank of India to remit an amount of Rs.1,31,22,115/- in favour of the decree holder (respondent no.3) within 15 days, and upon failure of deposit of the amount, directing that the particulars of the assets of the judgment debtor be provided; and further, that if the said order is disobeyed, the person so disobeying it may be detained by civil imprisonment.
iii. Order dated 03.02.2022	Order passed by the Authority holding (Annexure P-24)that since both the petitioner herein and respondent no.4 being the licensee and developer, and therefore both being promoters of the project, it was the joint liability of both

	to satisfy the decree, with the first JD (respondent no.4 herein) having developed the project solely on behalf of the 2nd JD (the petitioner herein). It was also noticed that Rs.43,30,000/- had already been paid and that a list of two properties of respondent no.4 herein had been provided, thoughthe affidavit submitted on its behalf was not in compliance of the earlier orders as the list of assets had not been given and with even the list of bank accounts not submitted.
iv. Order dated 30.03.2022	Order passed by the Adjudicating (Annexure P-25) Officer, noticing the prayer of the decree holder (respondent no.3 herein) for execution of the decree *qua* the petitioner herein also (JD no.2) and directing issuance of a show cause notice to the Directors of the petitioner company as to why they should not be committed to civil imprisonment for not complying with the order of the Authority.

(57) The facts are that the petitioner company in this case is stated to be the owner of land measuring 80 Kanals situated in Sector-79, village Naurangpur, Tehsil and District Gurugram, and was granted a license bearing no.37 of 2011 by the respondent State, for development and construction of a group housing project, on 26.04.2011.

Thereafter, on 25.02.2012 the petitioner entered into an understanding with respondent no.4 herein (M/s Supertech Ltd.), in respectof which a Memorandum of Understanding was entered into on that date. A collaboration agreement was also executed between the petitioner and respondent no.4 on 27.03.2012, vide which the said respondent undertook to develop the land at its own costs and expenses and agreed that the petitioner would not be liable for development and

construction of the project (as contended before this court), with the copy of the agreement having been annexed as Annexure P-2 with the petition.

It is stated that it was agreed between the petitioner and respondent no.4 that of the 'collections' received from buyers/lessees of any built or unbuilt area or space of the said complex/project, on sale or transfer of flats/apartments/units/space, all interests and late payment charges on instalment towards the sale price would be shared in the ratio of 35% and 65% between the petitioner and respondent no.4, in lieu of their contribution of land and other rights (by the petitioner), and expenses incurred by respondent no.4 for approvals and sanctions of the project and for the development and construction on the land.

(58) The said respondent is also stated to have commenced construction and started developing a project known as 'Araville'.

As per the petitioner, in July 2014 respondent no.4 approached the petitioner company seeking additional funds for the project and requested that the petitioner assist the said respondent company to raise Rs.100 crores from M/s ITZA Holdings Pvt. Ltd.; but in February 2016 respondent no.4 informed the petitioner that the loan facility from ITZA "had become unsustainable" and that another loan would be secured.

In February 2016 itself fresh loan agreements are stated to have been executed between respondent no.4 and M/s Indiabulls Housing Finance Ltd., with a loan of Rs.79 crores having been settled and of which Rs.74.92 crores had been received by the said respondent (as per the petitioner).

An agreement is also stated to have been reached between the petitioner and respondent no.4 to the effect that out of the petitioners' 35% share in the project, only 33.5% of the loan amount would be credited to the project escrow account, with an Escrow Agreement also executed between the petitioner, respondent no.4, Axis Bank and Indiabulls, with 30% of the project profits to be received by Indiabulls, 33.5% by the petitioner and the remaining 66.5% by respondent no.4.

However, as per the petitioner, it has not received any share in the total revenue of the project.

(59) On 28.04.2018 a letter is stated to have been received by the petitioner from respondent no.3, i.e. M/s Plaza Fincap Pvt. Ltd., informing that the said company had filed a complaint before the

Haryana Real Estate Regulatory Authority at Gurugram (hereinafter referred to as the Authority), further asking the petitioner to take necessary action as per the directions of the Authority.

[In fact it was also stated by learned senior counsel appearing for the petitioner before this court that vide the said complaint dated 05.12.2017 (bearing no.65/2018), respondent no.3 herein had sought for withdrawal from the project and had sought payment of Rs. 85,81,953/- alongwith interest @ 24% per annum.]

It is contended by the petitioner that in the reply filed by respondent no.4 before the Authority, it had taken upon itself the onus and obligation to deliver possession of the flat to respondent no.3 and to also compensate for the delay in such delivery.

The petitioner also filed a short reply to the complaint, stating therein that it was not a necessary party and should therefore be deleted as such, as there was no privity of contract between the complainant and the petitioner herein.

(60) A local commissioner is stated to have been appointed by the Authority to verify the construction of two towers in the project, with the local commissioner having submitted her/his report on 14.06.2018, stating that the project in that regard was 70% was complete (as per the petitioners' contentions before us).

Upon that, an order dated 19.06.2018 was passed by the Authority, recording that respondent no.4 had stated that the unit would be handed over to the complainant (respondent no.3 herein) within 6 months, with it also held thereafter vide two orders dated 10.07.2018 (Annexure P-8), that in case such possession was not handed over, the respondents before the Authority (including the petitioner) would be liable to pay the entire amount received by them from the complainant (respondent no.3), within 45 days of the expiry of the promised date for possession.

Though the complainant-respondent no.3 also filed an appeal against that order, it was withdrawn three months later.

(61) It is next contended by the petitioner that a registration certificate was also issued by the Authority on 13.10.2018, *qua* Project Araville, valid till 31.12.2019.

It is to be noticed here that in the said licence, Annexure P-10, it has been shown that the promoters of the project are the petitioner and respondent no.4, with the petitioner being the licencee and the said

respondent being the developer.

(62) On 24.01.2019 respondent no.3 addressed a letter to the petitioner and respondent no.4 that since possession had not been handed over, respondent no.3 would be entitled to a complete refund along with interest thereupon.

In response to that letter, the petitioner addressed a letter to respondent no.4 stating that as the onus to complete construction was on the said respondent as per the terms and conditions of the collaboration agreement, therefore respondent no.4 should comply with the order dated 10.07.2018 and immediately complete the project (as it was actually to be completed by 19.12.2018 in terms of the said order).

(63) On 08.04.2019 Execution Petition No.E/4/65/2018 of 2019 was filed by respondent no.3, for execution of the order dated 10.07.2018, seeking a refund of Rs.85,81,953/- along with interest upto the date of actual payment, with such interest amounting to Rs.45,40,162/- (as sought).

The petitioner submitted its reply to the execution petition on 22.08.2019.

On 20.02.2020, a direction was issued by this court in a different proceeding (not specified in the petition), the proceedings in the execution petition were adjourned by the Authority; but thereafter on 09.02.2021, the Authority directed attachment of the moveable property/vehicle of the "Judgment-Debtor", in terms of Order 21 Rule 43 of the Code of Civil Procedure, other than putting the JD (shown in that order to be respondent no.4 herein), to notice, that in case the earlier order passed by the Authority directing payment of refund etc. was not complied with, the person disobeying the order may be detained in civil imprisonment for three months.

However, in view of an order stated to have been passed by the Supreme Court in SLP no.1904 of 2021, the attachment order was recalled on 09.03.2021 till further orders.

(64) On 27.06.2019, in the meanwhile, the petitioner herein also filed a complaint before the Authority, stating therein that respondent no.4 had played a fraud on the petitioner as also on the Authority.

On 15.09.2021 the Authority passed an order (Annexure P-19), wherein it is recorded that the Union Bank of India was directed to attach the bank account "of the JD" to the extent of Rs.1,31,22,115/-,

out of which Rs.43,30,000/- had been received by the Authority on 10.03.2021.

(65) On 02.11.2021 the Managing Director of the petitioner company received a notice under Order 21 Rule 42 of the Code of Civil Procedure, directing him to appear before the Authority and to deposit the remaining decretal amount of Rs.1,09,76,515/-.

The petitioner filed objections to that notice, with the Authority, vide its order dated 01.02.2022, having ordered that the list oftwo properties provided by respondent no.4 be attached and put to auction for recovery of the remaining decretal amount (other than that which stood deposited), while taking notice of the contention of the petitioner (shown to be JD no.2 in that order), to the effect that an application for exemption of payment was sought on the ground that the petitioner herein was the land owner, with there being no privity of contract between it and the decree holder/complainant.

(66) Thereafter, on 03.02.2022 the authority vide its order Annexure P-24, held that other than the 1st JD (respondent no.4 herein) even "**the liability of JD no.2 can also not be denied as the license for developing the said project and the occupation certificate have been received from** the competent authority in the name of JD no.2 only. Moreover, all the development as done by the JD no.1 is done solely on behalf of JD no.2. Therefore, M/s Tirupati Buildplaza Private Limited cannot repudiate from its legal obligation as mentioned in license and occupation certificate since there is no document on record with regard to changeof developer." (Bold part so shown in the said order itself).

(67) Thereafter the execution application before the Authority was transferred vide an administrative order to its Adjudicating Officer on 16.03.2022, and on 30.03.2022 it was pointed out to the AO by the counsel for respondent no.4 herein that the said respondent had been declared to be insolvent and an Interim Resolution Professional (IRP) had been appointed.

Consequently, the Adjudicating Officer issued notice to the Directors of the petitioner company to show cause as to why they should not be committed to civil imprisonment, for not complying with the order of the Authority.

Thus, it is actually the orders dated 03.02.2022 and 30.02.2022 that are 'hurting' the petitioner, due to which this petition has been filed, though of course other orders passed by the Authority and by the AO

have also been challenged, as noticed in the initial part of this order hereinabove.

(68) It needs mention in the context of this petition also, that though no notice was issued, it was because of the fact that learned counsel for the respondent authority, obviously on an advance copy of the petition received by him, had appeared on the first day of hearing itself, i.e. 11.05.2022, and thereafter arguments had been raised on both sides with in fact no notice at all issued to respondents no.3 and 4, i.e. the complainant in whose favour the impugned orders have been passed, and respondent no.4 which, alongwith the petitioner company, has been shown to be the promoter of the project as per the registration certificate issued by the respondent Authority on 13.10.2018 (Annexure P-10).

However, the issues raised being entirely legal, with this court not having been inclined to agree with learned counsel for the petitioner, as would be seen at the end of this judgment, issuance of notice to the said respondents would have been superfluous, in the light of the view taken by us.

(69) Mr. Aashish Chopra, learned senior counsel appearing for the petitioner, began by addressing arguments first on the issue of the petitioner company not being liable in any manner to make any payment to respondent no.3, i.e. the buyer/allottee of a flat measuring 1530 sq. feet in the project in question, with the total sale consideration having been settled at Rs.89,18,500/- between respondent no.3 and respondent no.4, and with the petitioner not being a party to the 'flat buyers agreement' executed between those two parties.

He submitted that thus, even the execution petition filed by respondent no.3 is not maintainable against the petitioner at all, further in view of the fact that the petitioner cannot be said to be covered by the definition of a 'promoter' as given in the Act of 2016.

Further in that context, Mr. Chopra submitted that the petitioner in fact neither had any sway or control in the construction of the project by respondent no.4, with the entire management of the project also being in the hands of the said respondent, who was solely responsible to complete it and deliver the units purchased to the allottees on time, in terms of the agreement reached with each allottee thereof.

He submitted that the only agreement between the petitioner and respondent no.4 being the collaboration agreement and a Memorandum of Understanding between them, no third party had any

right to initiate proceedings even under the Act against the petitioner.

(70) Next on that issue, learned senior counsel for the petitioner submitted that burdening the petitioner with the obligations of respondent no.4 would be in fact against the very foundation of the Indian Contract Act, 1872 (specifically Sections 40 and 43 thereof), and consequently the impugned orders passed by the respondent Authority and its Adjudicating Officer, cannot be enforced against the petitioner.

(71) Mr. Chopras' next argument on that issue was that simply because respondent no.4 has now been declared to be insolvent, with an IRP appointed under Section 14 of the Insolvency and Bankruptcy Code, 2016, that cannot be made a ground to fasten the petitioner with the burden of making the refund to respondent no.3 along with interest thereupon in terms of the impugned order.

The other aspect of that argument raised by learned senior counsel, was that once respondent no.3 is already seeking its remedy before the IRP, it should be barred from seeking any parallel remedy under any other provision such as the Act of 2016.

(72) Next, Mr. Chopra submitted, orally as also by way of his written submissions, that the respondent Authority and the AO have sought to exercise the powers of the civil court in execution proceedings when the Act does not bestow any such jurisdiction or power upon them.

He submitted that the recourse adopted by the Authority in seeking to enforce its order dated 10.07.2018 as a decree and that too by exercising the power of a civil court, is wholly without jurisdiction, illegal and even perverse.

Learned senior counsel submitted that the legislative intent in not providing such a recourse is obvious from a perusal of Section 57 of the Act, wherein it is stipulated that the order passed by the Appellate Tribunal constituted under Section 43 thereof, alone can be made executable as a decree, with the Tribunal therefore vested with the powers of the civil court vide that provision (Section 57).

He contended that as the respondent Authority is a creature of the statute it therefore obviously derives its powers from the Act and with the Act not vesting it with any power of a civil court, the impugned ordersare wholly without jurisdiction.

(73) Next, on that issue, Mr. Chopra submitted that though

Rule 27 of the Haryana Real Estate (Regulation and Development) Rules 2017 (hereinafter referred to be as the Rules) provides that every order passed by the AO or the Authority or the Tribunal shall be enforced as it were a decree or an order made by a civil court "in a suit pending therein", with the AO/ Authority/Appellate Tribunal also within its jurisdiction to forward the case to the civil court for such execution (if the AO/ Authority/Appellate Tribunal was unable to execute it itself), however, the rule itself goes beyond the provisions of the Act and specifically sub-section (1) of Section 40 thereof.

Learned senior counsel further submitted that when the Authority itself could not exercise such a power, it could not have, vide an administrative order, directed transfer of the execution application to the AO for enforcement of the orders passed by it (Authority) against the petitioner and respondent no.4 and in favour of the complainant-respondent no.3.

(74) Mr. Chopra next submitted that sub-section (1) of Section 40 of the Act provides for recovery of interest of penalty or compensation imposed by the AO or the Authority, in such manner as may be prescribed, as an arrear of land revenue.

He submitted that the Supreme Court in ***Newtech Promoters and Developers Pvt. Ltd.*** *versus* ***State of U.P. and others***[7] has held that the scope of the said provision is to the effect thatthe amount as has been determined to be refundable to the allottees/ home buyers, by either the Authority or the AO in terms of their orders, is recoverable under that provision itself, i.e. Section 40(1).

He next submitted that in fact sub-section (2) of Section 40 of the Act provides for enforcement of any order by either forum in such manner as may be prescribed; but Rule 27 of the Rules, wholly illegally and erroneously, provides for enforcement of every order, whether under sub- section (1) or sub-section (2) of Section 40 of the Act, in the same manneras if it was a decree made by a civil court.

He submitted that the said rule itself is thus wholly 'erroneous', and in fact illegal in the face of Section 40 of the Act because further, theAct gives power to the AO or the Authority only to get the recovery made asan arrear of land revenue.

(75) Last, Mr. Chopra submitted that as an alternative to this court examining the legality of the impugned orders, if it is inclined to

[7] 2021 SCC Online SCC 1044

leave the petitioner to its remedy of filing an appeal under Section 43 of the Act before the Tribunal, then in view of what has been submitted on the meritsof both, the illegality of the orders in terms of Section 40, as also on the ground that the liability qua respondent no.3 is not that of the petitioner butof respondent no.4, pre-deposit of the amount ordered to be paid vide the impugned order, may be waived, and the Appellate Tribunal may be directed to hear the appeal and decided it on merits without insisting on such pre- deposit in terms of the proviso to Section 43(5) of the Act.

With that, learned senior counsel for the petitioner closed his arguments.

(76) *Per contra*, Mr. Ankur Mittal, learned counsel appearing for the respondent Authority, first again reiterated the objects and intent of the Act, as also the 'statement of objects and reasons' thereof, as have been already referred to in Part-I of this judgment hereinabove.

Thereafter he submitted that the two essential questions that arise in this petition are as follows:-

> "A. What is the extent and scope of Section 40 of RERa Act 2016 and whether the Authority/Adjudicating Officer can exercise power under Rule 27 of Haryana Rules, 2017 for execution of order as a civil court decree or not?
>
> B. Whether the power to execute the order can be delegated by the Authority to the Adjudicating Officer under Section 81 of RERA Act 2016 or not?"

(77) As regards the first question hereinabove, learned counsel for the respondent Authority submitted that the contention on behalf of the petitioner that an order of refund, return, penalty or compensation can only be enforced in the manner provided under section 40(1) of the Act of 2016, and other orders can only be enforced in terms of Section 40(2) of the Act, is a wholly misconceived contention because every statute has to be interpreted in a textual as also contextual perspective and therefore, though a particular statute on its plain reading may be interpreted in two ways, in terms of its text, however the scheme of the Act has to be kept foremost in mind and therefore a contextual interpretation would need to be given, looking at the intent in enacting the statute, which would be an actual harmonious construction thereof.

He submitted that in that background if Section 40 is read, sub-

sections (1) and (2) are both mutually inclusive and do not operate by way of exclusion of one against the other as is sought to be interpreted by the petitioner.

He submitted that since sub-section (1) provides that interest, penalty or compensation shall be recovered as arrears of land revenue in the manner as may be prescribed, and thereafter sub-section (2) gives a 'wide sweep' to say that any order or direction passed, directing any person to do any act or refrain from so doing it, shall be enforced in the manner prescribed, therefore Rule 27 was notified in the rules promulgated by the State of Haryana under the provisions of Section 84 of the Act, with the said rule stipulating that every order passed by either the AO, Authority or the Appellate Tribunal, shall be enforced by either of these authorities in the same manner as it were a decree or an order made by a civil court in a suit pending before it; and it would also be lawful for the AO/Authority/Tribunal to get the order executed through the civil court if the AO/Authority/Tribunal is unable to execute the order itself.

(78) Mr. Ankur Mittal next submitted that in fact with both sub-section (1) and (2) of Section 40 using the word "shall", it is not as if thefirst sub-section would use the said word to be mandatory and the second sub-section as only directory, because if that were so, then sub-section (1) would be rendered otiose.

Similarly, Section 57 of the Act empowers the Appellate Tribunal to execute every order made by it as a decree of a civil court and therefore with even with the word "shall" also having been used in Section 57, as a mandatory word, it would be applicable in the case of Section 40 in its entirety, also as mandatory.

(79) Learned counsel for the respondent Authority then referred to a judgment of the Bombay High Court in ***Marvel Sigma Homes Pvt. Ltd.*** *versus* ***State of Maharashtra***[8], wherein it was held that a perusal of both sub-sections of Section 40 would make it clear that the intention of the legislature was to group all directions to pay monetary reliefs granted against the promoter in one category, i.e. Section 40(1) of the Act, and to treat them differently from all other orders, for the purpose of themeans of enforcement or recovery and there is no valid explanation orjustification for treating some forms of monetary reliefs granted to allottees differently from others.

[8] AIR 2022 (1) Bom.R 817

Thereafter, after referring to the preamble of the Act and its objective to provide a speedy and efficacious remedy to an allottee against any breach of contract made by promoters and developers, it was further held that the scope of Section 40(2) of the Act, on the other hand, pertains to orders or directions against any person to do an act or refrain from doing an act under the provisions of the RERA Act and therefore, when read in the light of Section 40(1) and the other provisions of the Act, it is apparent that Section 40(2) of the Act deals with orders or directions that are not in the nature of monetary reliefs or for recovery of amounts that are specifically provided for in Section 40(1) of the Act.

(80) Mr. Mittal submitted that even so, what is eventually of importance is that the provisions of both sub-sections has to be given meaning by enforcement of the orders passed under either of them, by an effective means, which has been provided for in Rule 27 of the Rules.

He therefore submitted that though thereafter in paragraph 14.4a distinction has been made by the Bombay High Court between sub-sections (1) and (2) when read with Section 57 of the Act, however he submitted that the interpretation was erroneous if the scheme of the Act and its purpose and objective is to be considered and given effect to.

(81) Mr. Mittal next referred to Section 84 of the Act which confers powers on the appropriate Government to make rules to give effect to various provisions of the Act, with the said provision reading as follows:-

> "84.Power of appropriate Government to make rules.-
>
> xxxxx xxxxx xxxxx
>
> (2) In particular, and without prejudice to the generality ofthe foregoing power, such rules may provide for all or any of the following matters, namely:-
>
> xxxxx xxxxx xxxxx
>
> (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 decision of the adjudicating officer, the Authority or the Appellate Tribunal under sub-section (2) of section 40;"

Learned counsel for the Authority therefore submitted that Rule

27 having been incorporated in the rules promulgated in terms of the aforesaid provision, it cannot be said that the rule is contrary to the provisions of the Act as has been contended by the learned senior counselfor the petitioner.

Further in that context, learned counsel submitted that as regards the provisions for execution of all orders passed by the Authorities under the Act including the AO, by way of a civil court decree, even that is within the four corners of law because all such proceedings are civil in nature, with the Code of Civil Procedure being the general Code dealingwith such proceedings and consequently, enforcement of an order passed under the Act as a decree of a civil court, is very much within the scheme of the Act.

(82) Next, learned counsel drew an analogy with regard to the mode of execution of an order as a decree, from what has been held by the Gujarat High Court in ***Heerabhai Nanubhai Desai*** *versus* ***State of Gujarat and others***[9], wherein while considering the challenge to a rule providing the mode of execution, that court held that Rule 233 of the Rules constituted under the Motor Vehicles Act, 1988, was very much intravires the Act and a Motor Vehicle Claims Tribunal actually being a Court for all intents and purposes, it had complete right to exercise powers under Section 47 of that Act read with Order 21 of the CPC.

(83) As regards the issue of the power to execute an order being delegated by the Authority to the Adjudicating Officer under the provisions of the Act, Mr. Ankur Mittal submitted that Section 81 provides that any power of the Authority can be delegated to one of its members or officers and consequently such delegation of power to execute an order, to the Adjudicating Officer, is very much legal and valid in terms of the aforesaid provision; and therefore the order dated 16.03.2022 issued by the Authority is within the four corners of the provisions of Section 81.

In that context, learned counsel relied upon paragraphs 112,114, 115 and 117 of the judgment in *Newtech* (supra) (RCR citation), which read as follows:-

> "112. Section 81 of the Act 2016 empowers the authority, by general or special order in writing, to delegate its powers to any member of the authority, subject to conditions as may

[9] AIR 1991 Gujarat 1

be specified in the order, such of the powers and functions under the Act. What has been excluded is the power to make regulations under Section 85, rest of the powers exercised by the authority can always be 72 delegated to any of its members obviously for expeditious disposal of the applications/complaints including complaint filed under Section 31 of the Act and exercise of such power by a general and special order to its member is always permissible under the provisions of the Act.

114. What is being urged by the learned counsel for the appellants in interpreting the scope of Section 29 of the Act is limited only to policy matters and cannot be read in derogation to Section 81 of the Act and the interpretation as argued by learned counsel for the promoters if to be accepted, the very mandate of Section 81 itself will become otiose and nugatory.

115. It is a well-established principle of interpretation of law that the court should read the section in literal sense and cannot rewrite it to suit its convenience; nor does any canon of construction permit the court to read the section in such a manner as to render it to some extent otiose. Section 81 of the Act positively empowers the authority to delegate such of its powers and functions to any member by a general or a special order with an exception to make regulations under Section 85 of the Act. As a consequence, except the power to make regulations under Section 85 of the Act, other powers and functions of the authority, by a general or special order, if delegated to a single member of the authority is indeed within the fold of Section 81 of the Act.

116. The further submission made by learned counsel for the promoters that Section 81 of the Act empowers even delegation to any officer of the authority or any other person, it is true that the authority, by general or special order, can delegate any of its powers and functions to be exercised by any member or officer of the authority or any other person but we are not examining the delegation of power to any third party. To be more specific, this Court is examining the limited question as to whether the power under Section 81 of the Act can be delegated by the authority to any of its member to decide the complaint under

> Section 31 of the Act. What has been urged by learned counsel for the promoters is hypothetical which does not arise in the facts of the case. If the delegation is madeat any point of time which is in contravention to the scheme of the Act or is not going to serve the purpose and object with which powerto delegate has been mandated under Section 81 of the Act, it is always open for judicial review."

(84) Learned counsel for the respondent Authority therefore submitted that the Supreme Court has effectively held that except for the power of framing regulations, Section 81 of the Act empowers the Authority to delegate any of its function including the power with respect to complaints filed under Section 31 of the Act, to any officer working for the Authority, which therefore includes the power to execute the orders issued by the Authority.

(85) As regards the alternative prayer of the petitioner on waiver of making a pre-deposit of the amount directed to be paid by the Authority to respondent no.3 herein (by the petitioner and respondent no.4), Mr. Mittal reiterated what he had already argued in the context of CWP no.7738 of 2022, as has been reproduced and considered in Part-I of this judgment.

(86) Having considered the arguments on both sides, first of all of course it is to be noticed that despite the arguments raised by learned senior counsel for the petitioner on Rule 27 of the Rules, there is actually no challenge made in the petition to the vires of the rule.

Nevertheless, since a legal issue as regards the rule being ultra vire the provisions of sub-section (1) of Section 40 of the Act has beenraised, we considered it appropriate to adjudicate upon that contention.

(87) Rule 27 of the Rules of 2017 and Section 40 of the Act of 2016 are reproduced hereinbelow as is Section 57 of the Act:-

> **27. Enforcement of order, direction or decision of adjudicating officer, Authority or Appellate Tribunal --**
>
> (1) Every order passed by the adjudicating officer or the Authority or the Appellate Tribunal, as the case may be, under the Act or rules and the [regulation] made thereunder, shall be enforced by an [adjudicating officer or] the Authority or Appellate Tribunal inthe same manner as if it were a decree or a order made by a civil court in a suit

pending therein; and it shall be lawful for the adjudicating officer or the Authority or the Appellate Tribunal, as thecase may be, in the event of its inability to execute the order, send such order to the civil court, to execute such order.

(2) The court may, for the purposes of compounding any offence punishable with imprisonment under the Act accept an amount as specified in the Table below:-

Offence	**Amount to be paid for compoundingthe offence**
Punishable with imprisonment under sub section (2) of section 59.	five to ten percent of the estimated costof the real estate project.
Punishable with imprisonment under section 64.	five to ten percent of the estimated costof the real estate project.
Punishable with imprisonment under section 66	five to ten percent of the estimated cost of the plot, apartment or building, as thecase may be, of the real estate project, for which the sale or purchase has been facilitated.
Punishable with imprisonment under section 68.	five to ten percent of the estimated cost of the plot, apartment or building, as thecase may be.

"40 **Recovery of interest or penalty or compensation and enforcement of order, etc.**

(1) If a promoter or an allottee or a real estate agent, as the case may be, fails to pay any interest or penalty or compensation imposed on him, by the adjudicating officer or the Regulatory Authority or the Appellate Authority, as the case may be, under this Act or the rules and regulations made thereunder, it shall be recoverable from such promoter or allottee or real estate agent, in such manner as may be prescribed as an arrears of land revenue.

(2) If any adjudicating officer or the Regulatory Authority or the Appellate Tribunal, as the case may be, issues any

> order or directs any person to do any act, or refrain from doing any act, which it is empowered to do under this Act or the rules or regulations made thereunder, then in case of failure by any person to comply with suchorder or direction, the same shall be enforced, in such manner as may be prescribed."

Obviously, the said provision is actually an execution/ enforcement provision as regards orders passed under the Act, with therealso being Section 57 as deals with orders specifically passed only by the Appellate Tribunal. The said provision reads as follows:-

> "57 **Orders passed by Appellate Tribunal to be executable as a decree.**
>
> (1) Every order made by the Appellate Tribunal under this Actshall be executable by the Appellate Tribunal as a decree of civil court, and for this purpose, the Appellate Tribunal shall have all the powers of a civil court.
>
> (2) Notwithstanding anything contained in sub-section (1), the Appellate Tribunal may transmit any order made by it to a civil court having local jurisdiction and such civil court shall execute the order as if it were a decree made by the court."

Thus, though Section 57 provides that any order passed by an Appellate Tribunal would be executable as a decree of civil court, yet, Section 40, in both of its sub-sections, also provides the method of enforcement of orders passed by the appellate Authority in addition to the Adjudicating Officer and the Authority itself.

In that context, it is to be noticed that "appellate Authority" is not specifically defined in Section 2 of the Act though Appellate Tribunalhas been defined in clause (s) thereof, to mean the Real Estate Appellate Tribunal established under Section 43.

Section 43 also does not use the phrase 'Appellate Authority' anywhere and only refers to the establishment of an Appellate Tribunal, withsub-section (5) thereof providing that any person aggrieved by any direction or decision or order made by the Authority or by an Adjudicating Officer, may prefer an appeal before the Appellate Tribunal concerned, (as has jurisdiction over the matter).

(88) Learned senior counsel appearing for the petitioner had argued that Sections 40 and 57 operate in different fields and of

course to thatextent he would be right as regards that basic contention, but this court is to obviously harmoniously construe the different provisions of the Act, where there may be some conflict, keeping in view the aims and objectives of the Act.

(89) Coming then to the provisions contained within Section 40;very obviously sub-section (1) thereof pertains only to enforcement of an order directing payment of any interest or penalty or compensation, whether such order is passed by the Adjudicating Officer, the Regulatory Authority or the Appellate Tribunal; whereas sub-section (2) is a provision for enforcement of any order or direction given by either the AO or the Authority or the Appellate Tribunal.

Therefore, any person as violates any direction or order issued even in respect of summoning such person etc., would be dealt with wholly under the provision of sub-section (2), with however the provision of sub- section (1) to apply to an order pertaining to payment of interest, penalty or compensation as ordered by the AO/Authority/Appellate Tribunal.

Again very obviously, sub-section (1) postulates that if anyperson fails to pay any interest or penalty or compensation imposed, it shall be recoverable from such person (whether a promoter, an allottee or a Real Estate agent) "in such manner as may be prescribed as an arrear of land revenue".

Thus, it would seem that any Rule prescribing the method of enforcement of such an order, must necessarily provide such method for recovery only as an arrear of land revenue *qua* any interest, penalty or compensation; and in fact Section 84 of the Act, which confers the power on the appropriate Government to make rules, postulates in Clause (r) of sub- section (2) thereof, that such rule may provide for the manner of recovery of interest, penalty and compensation under sub-section (1) of Section 40, with Clause(s) of sub-section (2) of Section 84 providing the manner of implementation of the order/direction or decision given by the AO/Authority/Appellate Tribunal under sub-section (2) of Section 40.

(90) **The question before this court therefore is as to whether the Government of the respondent State of Haryana has correctly or erroneously clubbed the mechanism for enforcement of any order passed by the AO/Authority/Appellate Authority/Tribunal, in respect of both, sub-sections (1) and (2) of Section 40.**

We were of the opinion that, as has been done by various States

including the State of Maharashtra [reference the judgment of the Bombay High Court in *Marvel Sigma Home* (supra)], the Government of Haryana should have provided for a separate mechanism qua enforcement of different kinds of orders as per the two provisions of Section 40, i.e. sub-sections (1) and (2); however, one aspect that needs to be considered by this court is that the Supreme Court in *Newtech* (supra) has held (reference para 86 RCR citation) that the Adjudicating Officer cannot order payment of refund and interest thereupon, though he has the power to direct payment ofcompensation and interest thereupon, as also a penalty.

Hence, with sub-section (1) only speaking of payment of interest, penalty or compensation, obviously it can be interpreted to mean that even an order of refund may not be covered by sub-section (1) and would in fact would come within the ambit of sub-section (2).

However, that may possibly stretch the interpretation of sub-section (2) too far, and in our opinion we need not dwell upon it more than necessary, in view of what has been provided in Section 84 (2)(r) as regards the manner of recovery of interest, penalty and compensation in terms of sub-section (1) of Section 40, with sub-section (2) of Section 40 dealt separately by Section 84(2)(s), as already seen.

(91) To repeat yet again, sub-section (1) of Section 40 stipulates that the manner of recovery of payment of interest, penalty and compensation, may be prescribed (by rules) for recovery <u>as an arrear of land revenue</u> and does not postulate any other method of such recovery; however sub-rule (1) of Rule 27 empowers the AO/Authority/Tribunal to enforce any order passed by it under Section 40 (without specifying any particular sub-section thereof), as if it were a decree or an order made by a civil court in a suit pending before it.

(92) Here we would like to observe that learned counsel for therespondent Authority had submitted that Rule 27 is an effective and quick mechanism for giving effect to the orders passed by the AO, the Authority and the Tribunal, in the interest of any person in whose favour that order was passed (whether a promoter or an allottee), whereas recovery as an arrear of land revenue would be a cumbersome method of making such recovery, thereby making it highly ineffective and in fact defeating the main objective of the Act, which is to safeguard the interest of the home buyer/allottee.

Though we agree with learned counsel for the respondent

Authority in that regard, however to hold that sub-sections (1) and (2) of Section 40 could have been clubbed together as regards the method of recovery/enforcement of orders passed under the provisions of the Act by various authorities including the Tribunal, would override the intent of the legislature which had kept in mind that recovery as an arrear of land revenue may be actually a very effective method of ensuring such recovery.

(93) In that context, Section 67 of the Punjab Land Revenue Act, 1887 (even as applicable to the State of Haryana), reads as follows:-

> "**67. Process for recovery of arrears.-** Subject to the other provisions of this Act, an arrears of land-revenue may be recovered by any one or more of the following processes, namely:-
>
> (a) by service of writ of demand on the defaulter;
>
> (b) by arrest and detention of his person;
>
> (c) by distress and sale of his movable property and uncut or ungathered crops;
>
> (d) by transfer of the holding in respect of which the arrears is due;
>
> (e) by attachment of the estate or holding in respect of which the arrears is due;
>
> (f) by annulment of the assessment of that estate or holding;
>
> (g) by sale of that estate or holding;
>
> (h) by proceedings against other immovable property of the defaulter."

(94) In our opinion, looking at the fact that even the enabling provision by which Government can frame rules (Section 84), deals with sub-sections (1) and (2) of Section 40 separately, therefore, so as to not render the provisions of sub-section (1) of Section 40 of the Act otiose, as regards the phrase "as an arrears of land revenue", we hold that Rule 27 of the Rules should actually have provided a mechanism separately for giving effect to the provisions of sub-sections (1) and (2) of Section 40, but we would not hold Rule 27 to be ultra vires the provisions of the Act, firstly because there is actually no challenge in the petition to the vires of the said rule; and second,

holding so would 'abrogate' the machinery provision for enforcement of the provisions of Section 40.

We would like to observe here that the rule could easily have stipulated that recovery to be made as arrears of land revenue in terms of Section 40(1), would be as per the provisions of Section 67 of the Land Revenue Act, and possibly with the Adjudicating Officer, Regulatory Authority/ Appellate Authority given the power of the revenue officers concerned for effecting such recovery; so as to ensure that a person who has been awarded compensation/interest in terms of Section 40(1) of the Act, does not have to run from pillar to post to actually get the order in her/his/its favour enforced.

(95) Consequently, in order to try and ensure that the execution proceedings do not get delayed in the present case, we direct the Authority/the Adjudicating Officer to immediately take appropriate measures to get the recovery effected in such proceedings as arrears of land revenue (subject of course to any interim order passed by the Tribunal in any appeal that the petitioner may file after making the pre deposit necessary).

Upon such proceedings being initiated by the AO/Authority, the revenue officers/any other officers/officials and specifically the Collector concerned, as would be responsible for taking such proceedings to their logical conclusion (for realisation of the sum due as per the execution proceedings as arrears of land revenue), would conclude such proceedings within a period of three months from the date that such proceedings are received by the Collector/other revenue officers/officials.

It is made absolutely clear that if the said proceedings are not completed by the Collector/revenue officers and other officers/officials as have jurisdiction to do so, respondent no.3 herein would be within its right to take recourse to its remedy for violation of this order.

(96) As regards a permanent solution to ensure compliance of what is stipulated in sub-section (1) of Section 40 of the Act, the respondent State Government of Haryana is directed to consider within a period of 4 months from today, an appropriate amendment in Rule 27 of the Rules, so as to ensure that any amount that is recoverable in terms of the said provision [Section 40(1)], is recovered within the shortest possible time; by way of either posting permanently a revenue official to each Regulatory Authority in Haryana as has been constituted under the provisions of the Act, empowered with the

jurisdiction as would be necessary to be conferred upon him/her for recovery as arrears of land revenue, so that upon any execution proceedings being filed for giving effect to any recovery in terms of Section 40(1), the matters need not be referred to regular revenue Authorities and can be effectively dealt with immediately by the officer posted in the Authority itself for that purpose, (as has been conferred with such jurisdiction to carry out the procedure of recovery by way of arrears of land revenue).

Alternatively, the Government could also consider conferring powers of recovery under the relevant provisions of the Land Revenue Act, upon any officer already posted in the Regulatory Authority.

Of course, that entire matter is for the Government to consider and act upon, within a period of four months from today, so as to try and ensure that all aims and objectives of the Act are given an effective meaning.

(97) It needs to be emphasized here that we are in complete agreement with learned counsel for the respondent Authority that referring recovery proceedings to the revenue authorities, i.e. the Collector/other revenue officers under the provisions of the Land Revenue Act, would indeed result in an extremely lengthy and almost never ending process of a recovery actually being effected, especially when the revenue authorities are already over burdened with enforcement of the provisions relating to recovery of various dues as arrears of land revenue, as have been provided in different statutes including of course the Land Revenue Act itself.

(98) Coming then to the merits of what is contained in the other orders impugned in this petition.

(99) Again it is to be noticed that though learned senior counsel for the petitioner argued that the office order dated 16.03.2022 passed by the Authority, thereby delegating its powers upon the Adjudicating Officer to hear an execution application filed by respondent no.3 herein (complainant), is beyond the jurisdiction of the Authority and consequently the order passed by the AO in such execution proceedings on 30.03.2022 is also without jurisdiction; yet, we agree with learned counsel for the respondent Authority that with Section 81 of the Act empowering the Authority to delegate any of its powers and functions, other than the power to frame regulations under Section 85, to any member or officer of the Authority (or any other person), subject to any condition specified in the order, such delegation vide the said

order dated 16.03.2022 (Annexure P-26) cannot be held to be beyond such power conferred upon the Authority.

It is to be observed that execution of orders is a function that can be effectively carried out by the Adjudicating Officer, especially with Section 71 of the Act stipulating that such officer would be a person who is or has been a District Judge. Thus, very obviously such Adjudicating Officerwould be completely familiar with the manner of execution of a decree issued or order passed in civil proceedings; and consequently would be the appropriate person to execute his own orders as also those of the Tribunal/Authority under the Act.

(100) Coming then to the contention of learned senior counsel for the petitioner that the petitioner is not an appropriate party impleaded by respondent no.3 herein in its complaint before the Authority.

We would, even while observing that it is for the purpose of only this petition, like to observe as already noticed in the earlier paragraphs of Part-II of this judgment, that the petitioner is the holder of a licence issued by the respondent State for the purpose of setting up a Group Housing Colony on the land in question, with the petitioner admitting that it is the owner of the said land measuring 10 acres.

Further, the registration certificate issued by the respondent Authority on 13.10.2018 (Annexure P-10), shows both, the petitioner and respondent no.4, to be 'promoters' of the land in question; and with a promoter defined in the Act as follows:-

> "2. **Definitions.**
>
> In this Act, unless the context otherwise requires,-
>
> xxxxx xxxxx xxxxx
>
> (zk) "promoter" means,-
>
> a. 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
>
> b. 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 withoutstructures

thereon; or

c. any development authority or any other public body in respect of allottees of-

i. 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

ii. 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

d. 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

e. 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 ofthe land on which the building or apartment isconstructed or plot is developed for sale; or

f. such other person who constructs any building or apartment for sale to the general public.

Explanation.-For the purposes of this clause, where the personwho constructs or converts a building into apartments or develops a plot for sale and the persons 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;"

Thus, sub-clause (i) of the aforesaid clause reads to state that a promoter would also include a person who "causes to be constructed", with sub-clause (ii) also further stating that such person may not be the person who actually constructs a structure on the plot.

Yet, we would not finally adjudicate upon that question in these proceedings and leave it to the Tribunal to consider that question, if it is raised before it in any appeal filed by the petitioner, after duly making the pre-deposit as is necessary for such appeal to be heard, in

terms of the proviso to sub-section (5) of Section 43 of the Act.

(101) Coming then to the argument of Mr. Chopra, learned senior counsel for the petitioner, for a waiver of the pre-deposit as stipulated by that provision.

For the same reasons as have already been given by us while rejecting a similar plea made by the petitioners in the other two petitions as have been decided vide Part-I of this judgment hereinabove, we do notaccept that contention, and for that purpose, the reasoning given in paragraphs 47 to 54 in Part I of this judgment is reiterated here also; and the prayer of the petitioner in this petition, for waiver of the pre-deposit amount, is rejected.

(102) Further, the Authority vide its order dated 10.07.2018 (Annexure P-8) having held that upon failure of possession of the flat/unit being handed over before 19.12.2018, the respondents would be liable to pay the amount received by them in respect of such apartment alongwith interest at the prescribed rate; and if the apartment was handed over by the due date, then they would pay interest for every month of the delay (again at the prescribed rate till possession is actually handed over), we would not find any arbitrariness in that order so as to waive payment of the pre-deposit in terms of the proviso to Section 43(5) of the Act; but of course thepetitioner would be free to raise its plea in that regard also before theTribunal, if any such appeal is filed by it upon making the pre-deposit required. Yet, it is made clear that no arbitrariness in the amount to be paid is found by us at this stage, so as to exercise jurisdiction under Article 226 to direct a waiver of such pre-deposit.

We may add here that in two petitions as were clubbed to be heard with the present one [titled as "***IREO Grace Realtech Pvt. Ltd. andand others*** *versus* ***Union of India"*** (CWP no.11836of 2022) and "IREO Grace Realtech Pvt. Ltd. and and others vs. Union of India" (CWP no.11943 of 2022)], we have issued notice of motion on that ground alone, as it was shown to us at that stage at least, by counsel for the petitioner therein, that there was no inordinate delay in completion of the project in question inthose cases; and in fact it was the allottees who were trying to back out from taking possession of the units allotted to them. Hence, even an interim order, till the next date of hearing in those petitions, has been passed by us.

However, obviously replies still to have filed by the allottees and others impleaded in those petitions; and thereafter the matters

would be considered by this court as to whether the pre-deposit can be waived inthose circumstances (if eventually found to be so), before an appeal can be heard by the Tribunal.

(103) In the present case, it is however, the admitted case of even the respondent Authority that Rs.43,30,000/- has already been paid by respondent no.4 to the decree holder; and therefore, presently for any appeal to be heard, filed before the learned Tribunal, it would be the difference between that amount and Rs.1,31,22,115/-, as would be required to be paid by way of a pre-deposit by the petitioner, in terms of Section 43(5).

(104) With thus only the aforesaid clarification made as regards the amount to be deposited by the petitioner, prior to any appeal that it may file before the Tribunal being heard, we find no reason to entertain this petition also, which is consequently dismissed.

A photocopy of this order be placed on the file of the other connected cases.

Dr. Payel Mehta