

**The High Court of Madhya Pradesh
SA 1567 of 2019**

**Gwalior Development Authority vs. Nagrik Sahakari Bank Maryadit, Gwalior
Gwalior, dtd. 18/09/2019**

Shri Raghvendra Dixit, Counsel for the appellant/ GDA.

Shri Praveen Niwaskar, Counsel for the respondent.

Heard on the question of admission.

This Second Appeal under Section 58 of Real Estate (Regulation and Development) Act, 2016 [in short " the Act, 2016"] has been filed against the order dated 16-4-2019 passed by M.P. Real Estate Appellate Tribunal, Bhopal in Appeal No.32/2019 by which the application filed by the appellant from exemption from deposit of 30% of the amount as required under Section 43(5) of the Act, 2016 has been rejected.

The necessary facts for the disposal of the present appeal in short is that the respondent had filed a complaint before the M.P. Real Estate Regulatory Authority [in short " the RER Authority"] under Section 31 of the Act, 2016 read with Rule 25 and 26 of Real Estate (Regulation and Development) Rules, 2017 [in short "the Rules, 2017"] on the ground that in response to an advertisement, the respondent Bank had submitted its tender for showroom/shop ad-measuring 128.27 Sq. Mtr. situated at first floor of **Madhav Plaza Shopping Complex**. The tender submitted by the respondent/Bank was accepted and accordingly, prescribed amount was deposited, but in spite of the fact that entire amount has been deposited, the appellant has failed to deliver the possession of the property nor the registration of shop No.FS-5 has been made in favour of the

respondent/Bank.

The RER Authority allowed the complaint and by order dated 26-7-2018 directed the appellant to refund the entire amount deposited by the respondent/Bank along with interest and further forwarded the matter to the adjudicating authority to determine the value of interest on entire amount as ordered to be refunded.

Being aggrieved by the order of the RER Authority, the appellant has filed an appeal under Section 44 of the Act, 2016.

The appellant also filed an application under Section 43(5) of the Act, 2016 seeking exemption from depositing 30% of the mandatory amount as required under Section 43(5) of the Act, 2016.

The Tribunal has rejected the application by the impugned order dated 16-4-2019.

Challenging the order of the Tribunal, the present Second Appeal has been filed.

Before hearing on the question of admission, the Counsel for the appellant was directed to argue on the question of maintainability of this appeal.

It is submitted by the Counsel for the appellant, that even against an interlocutory order, Second Appeal would lie before the High Court under Section 58 of the Act, 2016.

Per contra, it is submitted by the Counsel for the respondent, that the Second Appeal against the interlocutory order is not maintainable. To

buttress his contentions, the Counsel for the respondent has relied upon the order passed by Bombay High Court in the case of **Nirman Realtors & Developers Ltd. Vs. Danish Ansari** passed on **4-9-2018** in **Second Appeal (ST) No.25167 of 2018**.

Heard the learned Counsel for the parties.

Section 58 of the Act, 2016 reads as under :

"58. Appeal to High Court.— (1) Any person aggrieved by any decision or order of the Appellate Tribunal, may, file an appeal to the High Court, within a period of sixty days from the date of communication of the decision or order of the Appellate Tribunal, to him, on any one or more of the grounds specified in Section 100 of the Code of Civil Procedure, 1908 (5 of 1908):

Provided that the High Court may entertain the appeal after the expiry of the said period of sixty days, if it is satisfied that the appellants were prevented by sufficient cause from preferring the appeal in time.

Explanation.—The expression “High Court” means the High Court of a State or Union Territory where the real estate project is situated.

(2) No appeal shall lie against any decision or order made by the Appellate Tribunal with the consent of the parties."

Now the centripetal question for determination is that whether the word “order” mentioned in Section 58 of the Act, 2016 would include interlocutory order(s) or not?

Although the “Word” has not been defined in the Act, 2016 but Section 57 of the Act, 2016 would throw sufficient light to interpret the word “Word”.

Section 57 of the Act, 2016 reads as under :-

"57.Orders passed by Appellate Tribunal to be executable as a decree.— (1) Every order made by

the Appellate Tribunal under this Act shall 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 subsection (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."

From the plain reading of Section 57 of the Act, 2016, it is clear that only those orders are included in Section 58 of the Act, 2016, which are executable as a decree of Civil Court, and not all orders including interlocutory order(s).

In the present case, the Tribunal has rejected the application filed by the appellant under Section 43(5) of the Act, 2016 which reads as under :-

- "43. Establishment of Real Estate Appellate Tribunal** (1) The appropriate Government shall, within a period of one year from the date of coming into force of this Act, by notification, establish an Appellate Tribunal to be known as the (name of the State/Union Territory) Real Estate Appellate Tribunal.
- (2) The appropriate Government may, if it deems necessary, establish one or more benches of the Appellate Tribunal, for various jurisdictions, in the State or Union Territory, as the case may be.
- (3) Every Bench of the Appellate Tribunal shall consist of at least one Judicial Member and one Administrative to (*sic* or) Technical Member.
- (4) The appropriate Government of two or more States or Union Territories may, if it deems fit, establish one single Appellate Tribunal:

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

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

(5) Any person aggrieved by any direction or decision or order made by the Authority or by an adjudicating officer under this Act may prefer an appeal before the Appellate Tribunal having jurisdiction over the matter:

Provided that where a promoter files an appeal with the Appellate Tribunal, it shall not be entertained, without the promoter first having deposited with the Appellate Tribunal at least thirty per cent of the penalty, or such higher percentage as may be determined by the Appellate Tribunal, or the total amount to be paid to the allottee including interest and compensation imposed on him, if any, or with both, as the case may be, before the said appeal is heard.

Explanation.—For the purpose of this sub-section “person” shall include the association of allottees or any voluntary consumer association registered under any law for the time being in force."

Thus, in view of proviso to Section 43(5) of the Act, 2016, the promoter has to first deposit atleast thirty percent of the penalty or such higher percentage as may be determined by the Appellate Tribunal, however, there is no provision, giving any discretion to the Appellate Authority to waive the mandatory deposit of thirty percent of the penalty.

The order rejecting the application under Section 43(5) of the Act, 2016 seeking exemption from compulsory deposit of thirty percent is not an order executable as a decree of Civil Court. Thus, it is merely an interlocutory order and no Second Appeal would lie against the said order.

Furthermore, the Supreme Court in the case of **M/s Technimont**

Pvt. Limited Vs. State of Punjab and others decided on in **C.A. No.**

7358 of 2019 has held as under :

"24. If the inherent power the existence of which is specifically acknowledged by provisions such as Section 151 of the CPC and Section 482 of the Cr.P.C. is to be read with the limitation that exercise of such power cannot be undertaken for doing that which is specifically prohibited, same limitation must be read into the scope and width of implied power of an appellate authority under a statute. In any case the principle laid down in *Matajog Dobby* states with clarity that so long as there is no express inhibition, the implied power can extend to doing all such acts or employing such means as are reasonably necessary for such execution. The reliance on the principle laid down in *Kunhi* cannot go to the extent, as concluded by the High Court, of enabling the Appellate Authority to override the limitation prescribed by the statute and go against the requirement of pre-deposit. The High Court was clearly in error in answering question (c)."

Thus, this Court is of the considered opinion, that the Second Appeal filed by the appellant against the interlocutory order dated 16-4-2019 is not maintainable.

Accordingly, this Second Appeal fails and is **hereby dismissed as not maintainable.**

The Record of the Tribunal be sent back immediately.

(G. S. Ahluwalia)
Judge