

**IN THE HIGH COURT OF MADHYA PRADESH
AT INDORE
BEFORE**

HON'BLE SHRI JUSTICE SUBODH ABHYANKAR

SECOND APPEAL No. 1053 of 2021

BETWEEN:-

1. M/S G.S. ENTERPRISES REPRESENTED BY PARTNERS MR. GOVIND CHAWALA S/O LATE JETHANANDJI CHAWAL PLOT NO. 25, SCHEME NO. 78, PART-2 A.B. ROAD INDORE (MADHYA PRADESH)
2. M/S G.S. ENTERPRISES REPRESENTED BY PARTNERS SMT. NIMMI CHAWLA W/O SHRI GOVIND CHALWAL PLOT NO. 25, SCHEME NO. 78 , PART 2 A.B. ROAD INDORE (MADHYA PRADESH)
3. M/S G.S. ENTERPRISES REPRESENTED BY PARTNERS SAGAR CHAWLA S/O SHRI GOVIND CHAWLA PLOT NO. 25, SCHEME NO. 78, PART-2 A.B. ROAD INDORE (MADHYA PRADESH)

.....APPELLANTS

(BY SHRI YOGESH MITTAL, ADVOCATE)

AND

**YOGESH AGRAWAL AGED ABOUT 37 YEARS,
OCCUPATION: CHARTERED ACCOUNTANT
311/E SILCE-4 SCHEME NO. 78 VIJAY NAGAR
(MADHYA PRADESH)**

.....RESPONDENTS

(BY SHRI VINAY SARAF, SENIOR ADVOCATE WITH SHRI RIZWAN KHAN, ADVOCATE)

.....
Reserved on : 23.06.2023

Pronounced on : 29.08.2023

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This appeal having been heard and reserved for judgement, coming on for pronouncement this day, the court passed the following:

J U D G E M E N T

- 1] Heard finally, with the consent of the parties.
- 2] This civil second appeal has been filed under Section 58 of the Real Estate (Regulation and Development) Act, 2016 (in short 'the Act of 2016') and under Section 100 of the Code of Civil Procedure, 1908 against the judgement dated 07.06.2021, passed by Member, Madhya Pradesh Real Estate Appellate Tribunal at Bhopal in Appeal No.A-135/2019, thereby reversing the order dated 10.06.2019, passed by the M.P. Real Estate Regulatory Authority (in short, RERA) in Case No.M-IND-17-0761 of 2017.
- 3] This appeal was admitted by this Court vide order dated 05.10.2021, on the following substantial question of law:-

“1) Whether the impugned judgment can be sustained in the eyes of law, as it has been passed by one Member (Judicial) of the Appellate Tribunal, despite the fact that, as per Section 45 of the M.P. Real Estate (Regulatory Authority) Act, 2016 the Appellate Tribunal shall consist of a Chairperson and not less than two whole time Members of which one shall be Judicial Member and the other shall be a Technical or Administrative Member.”

- 4] Counsel for the appellants has filed an application I. A. No. 3758 of 2023 under proviso to Section 100 (5) of C.P.C. Raising additional substantial questions of law, which read as under:-

“(2) Whether the chairman is empowered under Section 25 of the Real Estate (Regulation

and Development) Act, 2016 to interfere in the judicial process of a bench of Appellate Tribunal while having administrative authority?

(3) Whether the impugned order passed by single member of the bench, be said to be an order passed by appellate tribunal under section 43(3) of the Real Estate (Regulation and Development) Act, 2016?"

5] The aforesaid application is allowed, and the aforesaid substantial questions of law are also here by framed. Since a copy this application was already served to the Sr. counsel for the respondent, who has also advanced his submissions on the said substantial questions of law as well.

6] In brief, the facts of the case are that the appellants are a registered partnership firm and are engaged in the business of construction and development of Real Estate Projects, whereas the respondent is the practicing Chartered Accountant in Indore, who had paid a sum of Rs.3,70,000/- on 16.04.2016, to the appellants as a part payment towards its booking for unit No.414 to the forthcoming project of the appellants, namely, "Sky Corporate Park" to be developed on plot No.25, Scheme No.78-II, A.B. road, Indore.

7] The dispute between the parties was that according to the respondent, the cost of the unit was Rs.37 lakhs, whereas according to the appellants, it was Rs.42, 65,000/-, and other charges. Thus, a complaint was filed by the respondent before the Madhya Pradesh Real Estate Regulatory Authority (hereinafter referred to as 'RERA') in which a reply was also filed by the appellants. The RERA has decided the complaint vide its order dated 16.04.2018, in favour of the respondent, and being aggrieved of the same, the Appeal

No.34/2018 was preferred by the appellants before the Madhya Pradesh Real Estate Appellate Tribunal at Bhopal (hereinafter referred to as 'Appellate Tribunal'), who vide its judgement dated 23.01.2019, remanded the matter back to RERA to decide afresh on merits of the case. After it was remanded back, the RERA has passed the order on 10.06.2019, now, in favour of the appellants. The aforesaid order was again challenged by the respondent in an appeal before the Appellate Tribunal, which has been allowed by the Tribunal vide its impugned order dated 07.06.2021, and being aggrieved of the same, the present appeal has been filed under Section 58 of the Act of 2016.

8] Counsel for the appellants has submitted that the impugned order suffers from the apparent errors which go to the root of the matter for the reason that the impugned order has been passed by only one member of the Appellate Tribunal, which runs contrary to Section 45 of the Act of 2016, which provides that the Tribunal shall consist of a Chairperson and not less than two whole time Members of which one shall be Judicial Member, and the other shall be a Technical or Administrative Member. It is submitted that a bare perusal of the impugned order reveals that it has been signed by only Judicial Member, whereas the other Member has signed jointly with the Judicial Member, the flag sheet only.

9] Counsel has also drawn the attention of this Court to the proceedings of the Appellate Tribunal wherein, after the matter was heard by a bench of Judicial Member and an administrative member of the Appellate Tribunal, the Chairman/President, vide its

order dated 21.01.2021, has assigned the matter only to the Judicial Member for preparation of the final order. Thus, it is submitted that the Chairman of Appellate Tribunal has exceeded its jurisdiction and ought not to have specifically directed that the matter to be decided by judicial member only, when the matter was heard by both the learned Members of the Tribunal. It is also submitted that the aforesaid direction by the Chairman was uncalled for and runs contrary to law.

10] Shri Vinay Saraf, learned senior counsel for the respondent, on the other hand, has opposed the prayer and it is submitted that no illegality has been committed by the Appellate Tribunal in passing the order as the original order may have been signed by the Judicial Member only, however, in the flag sheet, it has been signed by both the Members, which clearly reflects that the other member had also consented with the order passed by the Judicial Member.

11] So far as the impugned order having not passed by the quorum, Shri Saraf has also drawn the attention of this court to s.55 of the Act of 2016 which provides that vacancies etc. shall not invalidate the order. Thus, it is submitted that even accepting the fact that the Chairman of the Appellate Tribunal was not the member of the quorum, it is merely an irregularity in the proceedings and has no impact on the final outcome.

12] So far as the endorsement made by the Chairman of the Appellate Tribunal in the order dated 21.01.2021 is concerned, it is submitted that it is the discretion of the Chairman and this practice is followed in a routine manner for the proper functioning of the

Appellate Tribunal, and as such no illegality has been committed by the Chairman of the Appellate Tribunal. It is submitted that no substantial question of law arises for the consideration of this court, and the appeal is liable to be dismissed.

13] Heard counsel for the parties and perused the record.

14] On perusal of the documents filed on record as also the provisions of the Act of 2016, it is found that the substantial questions of law involved in this case relate to the regulation of power by the Real Estate Appellate Authority under the Act of 2016.

15] So far as the first and third substantial questions of law are concerned, i.e., ***“1) Whether the impugned judgment can be sustained in the eyes of law, as it has been passed by one Member (Judicial) of the Appellate Tribunal, despite the fact that, as per Section 45 of the M.P. Real Estate (Regulatory Authority) Act, 2016 the Appellate Tribunal shall consist of a Chairperson and not less than two whole time Members of which one shall be Judicial Member and the other shall be a Technical or Administrative Member.”*** and ***“Whether the impugned order passed by single member of the bench, be said to be an order passed by appellate tribunal under section 43(3) of the Real Estate (Regulation and Development) Act, 2016?”*** are concerned, it is found that that although the impugned order has been signed by one Member-judicial only, but in the flag sheet, the Member-(Adm.) has also signed.

16] In the considered opinion of this court, when a matter is heard by a bench of two members, merely because the final order is

signed by one member only, and the accompanying flag sheet is signed by both the members, it would not be an illegality but merely an irregularity not affecting the merits of the case. **Thus, the third substantial question of law is answered against the appellant.** However, the larger question is whether in the first place, the matter could have been heard by a bench of two members only, or it was required to be heard and decided by the Appellate Tribunal consisted of Chairman and the two members.

17] To appreciate the controversy involved, it would be fruitful to refer to the relevant provisions of the Act of 2016 regarding the constitution of the Appellate Tribunal etc. which are s.43, 45, 52, 54 and 55 along with the other provisions, viz., ss.20, 21, 29 and 30 of the Act of 2016 which refer to Real Estate Regulatory Authority.

18] The aforesaid provisions (relevant excerpts only), in juxtaposition to each other read as under:-

Real Estate Regulatory Authority	Real Estate Appellate Tribunal
<p>20. Establishment and incorporation of Real Estate Regulatory Authority. - (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 Authority to be known as the Real Estate Regulatory Authority to exercise the powers conferred on it and to perform the functions assigned to it under this</p>	<p>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.</p>

<p>Act:</p> <p>Provided that the appropriate Government of two or more States or Union territories may, if it deems fit, establish one single Authority:</p> <p>Provided further that, the appropriate Government may, if it deems fit, establish more than one Authority in a State or Union territory, as the case may be:</p> <p>Provided xxxx</p> <p>Provided xxxx</p> <p>(2) xxxx</p> <p>21. Composition of Authority.—<u>The Authority shall consist of a Chairperson and not less than two whole time Members to be appointed by the appropriate Government.</u></p> <p>25. Administrative powers of Chairperson.—The Chairperson shall have powers of general</p>	<p>(2) <u>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.</u></p> <p>(3) <u>Every bench of the Appellate Tribunal shall consist of at least one Judicial Member and one Administrative or Technical Member.</u></p> <p>(4) xxxx</p> <p>(5) xxxx</p> <p>45. Composition of Appellate Tribunal.—<u>The Appellate Tribunal shall consist of a Chairperson and not less than two whole time Members of which one shall be a Judicial member and other shall be a Technical or Administrative Member, to be appointed by the appropriate Government.</u></p> <p>Explanation.—xxxx</p> <p>54. Administrative powers of Chairperson of Appellate Tribunal.—<u>The Chairperson shall</u></p>
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superintendence and directions in the conduct of the affairs of Authority and he shall, in addition to presiding over the meetings of the Authority, exercise and discharge such administrative powers and functions of the Authority as may be prescribed.

29. Meetings of Authority.—(1) The Authority shall meet at such places and times, and shall follow such rules of procedure in regard to the transaction of business at its meetings, (including quorum at such meetings), as may be specified by the regulations made by the Authority.

(2) If the Chairperson for any reason, is unable to attend a meeting of the Authority, any other Member chosen by the Members present amongst themselves at the meeting, shall preside at the meeting.

(3) All questions which come up before any meeting of the Authority shall be decided by a majority of votes by the Members present and voting, and in the event of an equality of votes, the Chairperson or in his

have powers of general superintendence and direction in the conduct of the affairs of Appellate Tribunal and he shall, in addition to presiding over the meetings of the Appellate Tribunal, exercise and discharge such administrative powers and functions of the Appellate Tribunal as may be prescribed.

52. Vacancies. - If, for reason other than temporary absence, any vacancy occurs in the office of the Chairperson or a Member of the Appellate Tribunal, the appropriate Government shall appoint another person in accordance with the provisions of this Act to fill the vacancy and the proceedings may be continued before the Appellate Tribunal from the stage at which the vacancy is filled.

<p>absence, the person presiding shall have a second or casting vote.</p> <p>(4) xxxxx</p> <p>30. Vacancies, etc., not to invalidate proceeding of Authority.—No act or proceeding of the Authority shall be invalid merely by reason of— (a) any vacancy in, or any defect in the constitution of, the Authority; or (b) any defect in the appointment of a person acting as a Member of the Authority; or (c) any irregularity in the procedure of the Authority not affecting the merits of the case.</p>	<p>55. Vacancies, etc., not to invalidate proceeding of Appellate Tribunal.—<u>No act or proceeding of the Appellate Tribunal shall be invalid merely by reason of— (a) any vacancy in, or any defect in the constitution of, the Appellate Tribunal; or (b) any defect in the appointment of a person acting as a Member of the Appellate Tribunal; or (c) any irregularity in the procedure of the Appellate Tribunal not affecting the merits of the case.</u></p>
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(emphasis supplied)

19] A perusal of Section 43 of the Act of 2016 clearly reveals that Sub-section (1) of Section 43 provides for the establishment of Appellate Tribunal in the State or the Union Territory to be known as Real Estate Appellate Tribunal, Sub-section (2) provides for one or more benches of the Appellate Tribunal for various jurisdiction in the State or Union Territory as the case may be, and *Sub-section (3) which is important*, provides that every Bench of the Appellate Tribunal shall consist of at least one Judicial Member and one Administrative or Technical Member, meaning thereby that whenever a Bench of the Appellate Tribunal is constituted apart

from the Appellate Tribunal, it should have at least one Judicial Member in addition to one Administrative or Technical Member.

20] From the aforesaid provisions of Real Estate Regulatory Authority, namely, Section 21 it is found that it provides for composition of Real Estate Regulatory Authority, and Section 29 provides for meeting of the Authority, it is apparent that while Section 29(2) clearly provides that if the Chairperson, for any reason is unable to attend the meeting of the Authority, any other Member chosen by the Members present amongst themselves at the meeting shall preside at the meeting. **On the contrary, s.52** which provides for the Vacancies of appellate tribunal, makes it clear that even when a vacancy occurs in the office of the Chairperson or a Member of the Appellate Tribunal, the appropriate Government shall appoint another person in accordance with the provision of this Act to fill the vacancy and the proceedings may be continued before the Appellate Tribunal from the stage at which the vacancy is filled. Thus, an Appellate Tribunal cannot continue to operate in case of a vacancy which has to be filled before proceeding any further in any particular case, and they cannot act on their own by way of implication only.

21] This court is also of the considered opinion that Section 30 which provides that any vacancy or defect in the constitution of the Authority not to invalidate proceedings of the Authority is in line with the provisions of s.29(2).

22] Thus, it can be safely concluded that when it comes to composition of Appellate Tribunal, the presence of the Chairperson

is necessary along with the two members as provided under Section 45 of the Act of 2016. In such circumstances, Section 55 which provides that vacancies or defect in the constitution of the Tribunal etc. not to invalidate the proceedings of the Appellate Tribunal, if read in isolation would frustrate the very purpose of Section 45 of the Act, which provides for composition of Appellate Tribunal with a Chairman and two members, and thus, it has to be held that the Appellate Tribunal must consist of one Chairman and two members, which is *sine qua non* for its constitution.

23] In the considered opinion of this court, the controversy involved in the present case has already been answered by the four judges bench of the Supreme Court in the case of ***Ram Bharosey Agarwal v. Har Swarup Maheshwari, (1976) 3 SCC 435*** where a similar controversy arose before the Supreme Court in the case of **wherein the similar provisions under s.9 and s.13 of the Advocates Act, 1961** were pressed into service and s.13 is in *pari materia* with s.55 of the Act of 2016, and while holding in favour of the appellant who had challenged the constitution of the Disciplinary Committee of the Bar Council, comprising of two members only instead of three members, it was held as under:-

“9. Thirdly, it has been argued by Mr Sen that although Section 9 of the Advocates Act provided that the Bar Council shall constitute one or more Disciplinary Committees, each of which “shall consist of three persons”, only two persons were present on July 21, 1974 when the appellant's defence was closed and arguments were heard in the case. Mr Sharma appearing on behalf of the respondent has not been able to deny that this was so. He has argued that, by virtue of Section 13 of the Act, no act done by the Bar Council or its committee could be called in question on the ground merely of the existence of any

vacancy in, or any defect in the constitution of the Council or committees, as the case may be. We have gone through Section 13, but it is inapplicable to the present controversy as it cannot be said that there was any “vacancy” in the Disciplinary Committee. It is nobody's case that any of the three members of the committee ceased to be a member thereof at any time during the course of the proceedings before the committee. It is also nobody's case that there was any defect in the constitution of the committee or that it was permissible to function with two members only. There is therefore justification for the third argument of Mr Sen also.

10. In these circumstances, we are constrained to allow the appeal and to set aside the appellate order dated December 10, 1974. In the circumstances of the case, we would direct that the parties shall pay and bear their own costs.”

(emphasis supplied)

24] In view of the aforesaid dictum of the Supreme Court, it leaves no room for any further interpretation of s.45 and 55 of the Act of 2016. And thus, it is held that a Real Estate Appellate Tribunal shall consist of Chairman and two members as aforesaid, and any defect in the constitution would not mean that it is permissible to function with two members only. In the case at hand, as there was neither any vacancy in the Appellate Tribunal nor any defect in its constitution, thus, only two members could not have passed the final order. In such circumstances, **the first substantial question of law is answered in favour of the appellant and the impugned order is hereby set aside.**

25] At this juncture, it would also be necessary to point out that the constitution of a Bench, and constitution of the Appellate Tribunal, is two different concepts used in the Act of 2016. While the constitution of Bench is provided u/s.43 which is under the

domain of the State Government, whereas, the constitution of Real Estate Appellate Tribunal is provided under s.45. There can be one or more benches of the Appellate Tribunal, which shall consist of two members as provided u/s.43, whereas, the Appellate Tribunal shall consist of a Chairperson and not less than two whole time Members of which one shall be a Judicial member and other shall be a Technical or Administrative Member, to be appointed by the appropriate Government. Thus, there appears to be some anomaly between these two sections, viz., s.43 and 45, because on one hand s.45 provides for constitution of appellate tribunal with three persons, whereas the benches can consist of two members only, which needs urgent attention of the Legislature.

26] So far as the second substantial question of law **i.e., *whether the chairman is empowered under Section 25 of the Real Estate (Regulation and Development) Act, 2016 to interfere in the judicial process of a bench of Appellate Tribunal while having administrative authority?*** is concerned, on perusal of the proceedings of the Appellate Tribunal, it is found that the matter was finally heard by only two members, namely, Shri A. M. Saxena Member Judicial, and Shri J. S. Mathur, Member Administrative on 23.02.2021, and the matter was reserved for orders. However, just below the proceedings, a hand written endorsement has been made by the Chairman. Order dated 23.02.2021 reads as under:-

“(Hearing Through Video Conferencing)
Shri Vishnu Agrawal, CA, connected for the Appellant.
Shri Animesh Agrawal, CA connected for the Respondent.

Matter heard finally.
Case reserved for order

Sd/-
(A. M. Saxena)
Member (J)

Sd/-
(J. S. Mathur)
Member (A)

*Place the record of the preparation of the final Order
before learned Member (J).*

Sd/-
Chairman”

27] A perusal of the proceedings of the Tribunal, it is found that initially *it was listed before all the three Members of the Appellate Tribunal*, including the Chairman, but on 23.02.2021, it was heard by a bench of two members only viz., the Judicial and the Administrative. And in the order sheet dated 23.02.2021, an endorsement as aforesaid was made by the Chairman as a postscript that the record be placed before the learned Member, Judicial for final order. Thus, even assuming for the sake of arguments that two members could have passed the final order, the question is whether the Chairman could have directed one such member to pass the order?

28] From the aforesaid proceedings, two facts emerge, *firstly*, on 23.02.2021, the Chairman did not participate in the final hearing, and *secondly*, the Chairman, without even hearing the matter, and without being a part of the bench comprising of only two members, has directed that the record be placed before the learned Member, Judicial, for final order.

29] In the considered opinion of this Court such a direction on the

part of the Chairman of the Tribunal cannot be said to be an administrative function and defeats the very purpose for which the Tribunal is constituted. It is true that as per S.54 of the Act of 2016 provides that the Chairperson shall have powers of general superintendence and direction in the conduct of the affairs of Appellate Tribunal and he shall, in addition to presiding over the meetings of the Appellate Tribunal exercise and discharge such administrative powers and functions of the Appellate Tribunal as may be prescribed, but, in the considered opinion of this court, this provision does not empower the Chairman, who did not participate in the hearing of a case, to delegate powers to pass the final order, to one particular member only, out of the two members who heard the matter. This court is of the considered opinion that when a matter is placed before a two members of Appellate Tribunal, it is presumed that it is heard by both the members of the bench, and it is up to their discretion as to who would pass the orders, or at times, they may also pass two different orders separately, either disagreeing with each other or even agreeing with each other but for different reasons. Thus, it is intrinsic that both the members are entitled to form their opinion in the matter, and there can also be difference of opinion between them.

30] In such circumstances, the direction on the part of the Chairman to only one member of the bench of two members, to pass the final order, cannot be sustained in the eyes of law.

31] Counsel for the respondent has also placed on record the other similar orders passed by the Chairman in other cases in which

such directions have also been issued to one Member, only for passing the final order. These cases are, *Navin Kumar Gupta Vs. M.P. Housing & Infrastructure Development Board, Through Commissioner in Appeal No.08 of 2019; M.P. Housing & Infrastructure Development Board Through Commissioner Vs. Navin Kumar Gupta in Appeal No.A-166 of 2018 dated 14.06.2021; and Annapoorna Developers Partnership Firm, through its Partners Vs. Vijay Kumar Chourasiya in Appeal No.A-109/2019 dated 25.06.2021.* However, this court again reiterates that when the matter is heard by the Bench of two members, it should be left to the discretion of those members only as to who will pass the final order, after the matter is heard by them, in such circumstances, the earlier precedence would be of no help to the respondent. **Thus, the second substantial question of law i.e., whether the chairman is empowered under Section 25 of the Real Estate (Regulation and Development) Act, 2016 to interfere in the judicial process of a bench of Appellate Tribunal while having administrative authority? is also answered as aforesaid, in favour of the appellant.**

32] In view of the aforesaid discussion, the Second Appeal stands allowed and the impugned judgment/order dated 07.06.2021, passed by the Appellate Tribunal is hereby set aside and the matter is remanded back to the Appellate Tribunal for its reconsideration in accordance with law, in the light of the observations made as aforesaid in this order. It is made clear that this court has not reflected on the merits of the case.

33] Let the original record be sent back to the Real Estate Appellate Tribunal, Bhopal at the earliest. Parties are also directed to appear before the Appellate Tribunal on **25.09.2023**.

34] Appeal stands **allowed** and **disposed of**, accordingly.

(Subodh Abhyankar)
Judge

Pankaj