

**BEFORE THE UTTARAKHAND REAL ESTATE APPELLATE TRIBUNAL
AT DEHRADUN**

Present: Hon'ble Mr. Justice U.C.Dhyani

----- Chairperson

Hon'ble Mr. Rajeev Gupta

-----Member

MISC. REVIEW APPLICATION NO. 18 OF 2021
(Arising out of the order dated 23.04.20219,
passed in Appeal No. 05/2019)

Rajeev Bhatnagar, Chartered Accountant (C.A.)

.....Review Applicant

vs.

M/s Assotech Supertech & another

.....Respondents

Present: Sri Rajeev Bhatnagar, C.A. Review Applicant.

Sri Nikhilesh Nabiyal, Sri Manish Kumar Singh & Sri Manoj Bisht, Advocates
for Respondent no. 1 [M/s Assotech Supertech (JV)].

Sri Ajar Rab, Advocate, for Respondent no. 2 [MRWA].

JUDGMENT

DATED: OCTOBER 21, 2021

Justice U.C.Dhyani (Oral)

The Appellate Tribunal's order dated 23.04.2019 is under challenge in this review petition.

2. When appeal, being appeal No.05/2019 was filed by the appellant-promoter being aggrieved against the order dated 21.01.2019 passed by the Real Estate Regulatory Authority (for short 'RERA') against Metropolis Resident Welfare Association (MRWA), then, on the very first date, learned Counsel for the parties stated that the parties have settled their dispute amicably. Going by the usual practice of asking the promoter about the necessary deposit before entertaining the appeal, learned Counsel for the appellant, on 23.04.2019 informed the Bench that Section 43(5) of the Real Estate (Regulation and Development) Act, 2016 (for short 'the Act') shall not be applicable on the appellant.

3. Relying upon the statements of learned Counsel for the parties, especially upon the statement of learned Counsel for the appellant and in an endeavor for “speedy dispute redressal” [words borrowed from Preamble of the Act], the Tribunal passed the following order:

**BEFORE THE UTTARAKHAND REAL ESTATE APPELLATE TRIBUNAL
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resent: Hon’ble Mr. Justice U.C.Dhyani
----- Chairperson
Hon’ble Mr. A.S.Nayal
-----Member

APPEAL NO. 05 OF 2019

M/S Assotech Supertech(JV). (Appellant)

vs.

Metropolis Resident Welfare Association(MRWA)
.....(Respondent)(s)

Present: Sri Shivam Nagaliya, Advocate, for the appellant.
Sri Devendra Shahi, President of Respondents’ Association(MRWA)
Sri Shashi Kumar, Advocate, for the Respondent.
Sri S.K.Saxena, Vice President, M/S. Assotech Supertech

JUDGMENT

Dated: APRIL 23, 2019

Justice U.C.Dhyani (Oral)

In response to a query, Ld. Counsel for the appellant apprised the Court that since no penalty has been imposed upon the appellant, therefore, proviso to sub-section (5) of Section 43 of Real Estate (Regulation and Development) Act, 2016, shall not be applicable on the appellant.

2. Present appeal has been filed under Section 44 of the Real Estate (Regulation and Development) Act, 2016, (for short, Act No. 16/2016) against the order dated 21.01.2019, passed by Real Estate Regulatory Authority (RERA).

3. Heard Ld. Counsel for the parties.

4. Admit.

5. After arguing the appeal at some length, Ld. Counsel for the parties agreed to settle the dispute amicably. Thereafter, Sri Shivam Nagaliya, Advocate, for the appellant, Sri Devendra Shahi, President of Respondents’ Association(MRWA), Sri Shashi Kumar, Advocate, for the Respondent and Sri S.K.Saxena, Vice President, M/S. Assotech Supertech sat together and settled the terms of compromise, which are as under:

1. That the impugned order dated 21.01.2019 passed by the Ld. RERA, Dehradun is challenged before this Hon’ble Tribunal.
2. That, the basic issue in the impugned order which is under challenge is pertaining to the common area maintenance of the project.
3. That, both the appellant and the respondent association have reached a compromise with respect to the common area maintenance as under.
4. That, the appellant shall hand over the maintenance of the entire project to the respondent association.
5. That, with respect to the books of accounts regarding maintenance, it is agreed that the accounts need to be reconciled. For this purpose, a Chartered Accountant (CA) will be appointed by the appellant and a CA will be appointed by the respondent association. That, both the C.As. shall audit and reconcile the accounts pertaining to maintenance and if there is

any dispute between the two C.As., then a 3rd C.A. shall be appointed by the earlier 2 C.As. and the decision of the 3rd C.A. shall be final and binding upon the parties.

6. That all the assets pertaining to the maintenance of the premises are to be handed over to the respondent association.

7. That, Mr. S.K. Saxena, authorized representative of the appellant has read the terms and conditions and has agreed to the same.

8. That, Mr. Devendra Shahi, authorized representative of the respondent has read the terms and conditions and has agreed to the same.

9. The compromise terms to be complied within 2 months.

6. The appeal is, accordingly, decided in terms of compromise, which shall form part of this order.

7. Let a copy of this order be sent to RERA for information and necessary action, in terms of *Sub Section (4) of Section 44 of Act, 2016, (No. 16/2016)*.

(A.S.NAYAL)
MEMBER

(JUSTICE U.C.DHYANI)
CHAIRPERSON
(Emphasis supplied)

4. The above noted order has been assailed by the review applicant in the present review petition.

5. Hon'ble Mr. Rajeev Gupta (Member) has replaced Hon'ble Mr. A.S.Nayal (Member) (since retired).

6. The order was passed on 23.04.2019 and review petition has been filed on 06.07.2021 by Sri Rajeev Bhatnagar, who is a Chartered Accountant by profession and who is resident of Metropolis City, but was not a party to the Appeal No. 05/2019. In this way, the review petition has been filed by a third party after a lapse of more than two years.

7. Let us see what is the law on the point?

8. The appellate Tribunal has, for the purpose of discharging its functions under the Act, the powers of Civil Court under CPC in respect of reviewing its decisions [Sec. 53(4)]. Time period for filing a review application, normally, is 30 days.

9. Hence, there is delay of approx 750 days in filing the review application. The reasons for filing review late is attributed to the fact that residents of Metropolis City were not aware of the proceedings before the Tribunal and, therefore, the delay in filing the review application is *bonafide* and is liable to be condoned.

10. It may be noted here that Metropolis Resident Welfare Association (MRWA) was a party to the appeal and the same was duly represented by its President, Sri Devendra Shahi. Therefore, separate notices to all the residents of Metropolis were not necessary. The delay in filing the review, in such circumstances, cannot be condoned. Secondly, scope of review is very limited to the extent of (i) clerical or arithmetical mistakes (ii) error apparent on the face of record and (iii) for any other 'sufficient reason'.

11. The review applicant was not a party to the proceedings which culminated in the order, which is sought to be reviewed.

12. The Appellate Tribunal, however, for the purpose of discharging its functions under the Act has the same powers as are vested in the Civil Court under the Code of Civil Procedure 1908, in respect of the following matters, namely-

- (a)
- (b)
- (c)
- (d)
- (e) reviewing its decisions;
- (f)
- (g)

This has been provided in Section 53(4) of the Act. Section 39 of the Act is, probably, akin to Section 53(4) of the Act. Section 39 of the Act provides for rectification of any mistake apparent from the record by RERA, provided that no appeal has been preferred against such order. The Tribunal has been informed that its order dated 23.04.2019 has not been assailed before any superior forum. The words 'sufficient reason' occurring in order XLVII rule (1) CPC is wide enough to include a misconception of fact or law by a Court or even an Advocate. Review may be necessitated by way of invoking the doctrine '*actus curiae neminem gravabit*' [BCCI v. Netaji Cricket Club, AIR 2005 SC 592]. The Tribunal can therefore, review its decision on its own (*suo motu*).

13. To proceed further, sub section (5) of Section 43 of the Act provides as under:

“43(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.”

[Emphasis supplied]

The *proviso* to sub section (5) of Section 43 of the Act is unequivocal when it says that the appeal by promoter shall not be entertained without the promoter first having deposited the Appellate Tribunal atleast 30% of the penalty or such higher percentage as may be determined by the Appellate Tribunal. The sentence does not stop here. It continues to say that “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.” Thus the provision gives vast scope for the appellate Tribunal to direct the promoter to deposit with it (i) at least 30% of the penalty or (ii) such higher percentage as may be determined or (iii) the total amount to be paid to the allottee including interest... In the order dated 21.01.2019, which was passed by the RERA, a direction was given to Assotech Supertech (Joint Venture) on complaint of Metropolis Resident Welfare Association (MRWA) to return maintenance charges which were enhanced after 01.09.2017 or adjust the same in the maintenance charges being taken from them. Other directions were also given but they are not required to be mentioned for the sake of deciding present controversy.

State Industrial Development Corporation of Uttarakhand Ltd. (SIDCUL) was also a party before RERA.

14. Order dated 21.01.2019 of the RERA could be interpreted either way for the purposes of interpretation of *proviso* of sub section (5) of Section 43 of the Act. Two options were available before the Tribunal (i) whether to direct the appellant-promoter to deposit “maintenance charges which were enhanced after 01.09.2017” in the Appellate Tribunal as a condition precedent for entertaining the appeal OR (ii) not to direct the appellant-promoter to deposit such amount, as the maintenance charges were adjustable in future.

15. The Tribunal had, therefore, the option to direct the appellant-promoter to first comply with the 3rd part of the *proviso* to sub section (5) of Section 43 of the Act and only then the appeal ought to have been entertained. Since learned Counsel for the parties submitted that the parties have settled their dispute amicably and on a specific query of the Court, learned Counsel for the appellant stated that the *proviso* to sub section (5) of Section 43 of the Act shall not be applicable to the appellant, therefore, the Tribunal did not consider this point in its order dated 23.04.2019. Now realizing that the same was collusive act of the parties, that SIDCUL was unrepresented and the Tribunal placed excessive reliance on the statement of the learned Counsel for the appellant, to which learned Counsel for the respondent MRWA did not object, we feel that we should rectify our mistake by recalling our order dated 23.04.2019 in the interest of justice. We accordingly, rectify our mistake of not considering the mandatory requirement of law before entertaining the appeal.

16. Chief Justice Edward Coke of England observed about more than three Centuries ago that “fraud avoids all judicial acts, ecclesiastical or temporal.” It is settled proposition of law that a judgment or decree obtained by playing fraud on the Court is a nullity and *non-est* in the eyes of law. Such a judgment/decree has to be treated as nullity by every Court, whether superior or inferior. While passing the order dated 23.04.2019, although

fraud was not practiced upon the Tribunal, but certainly it was a case of concealment and misrepresentation, based on collusion. One odd incident should not be permitted to become a bad law. We accordingly, recall our order dated 23.04.2019 purely in the interest of justice. Let Misc. Application of the promoter [no. 05/20019] be restored to its original number.

17. Review application thus stands disposed of.

18. Let a copy of this order be sent to RERA under sub section (4) of Section 44 of the Act no. 16/16.

(RAJEEV GUPTA)
MEMBER

(JUSTICE U.C.DHYANI)
CHAIRPERSON

DATED: OCTOBER 21, 2021
DEHRADUN
KNP