

**BEFORE THE HIMACHAL PRADESH REAL ESTATE
APPELLATE TRIBUNAL**

Date of Decision: July 19, 2024

(1) Appeal No. 11-HP/2024

Sumit Khanna (proprietor Unimex Builders), resident of B-
6/4, 3rd Floor, Safdarjung Enclave, New Delhi-110029

...Appellant

Versus

1. Sh. Sanjay K Dhingra, son of Shri Kishen Dhingra R/o B-204, Kashitij towers, G.E. Links CHS, Ram Mandir Road, Goregon West, Mumbai-400104.
2. Smt. Chetna Dhingra, wife Sh. Sanjay K Dhingra R/o B-204, Kashitij towers, G.E. Links CHS, Ram Mandir Road, Goregon West, Mumbai-400104.
3. Sh. Vikas Madan, (Partner M/s Pacific Construction and Management) D-64, First Floor, Vikas Marg, Shankarpur, Delhi-110092.
4. Sh. Pankaj Madan, (Partner M/s Pacific Construction and Management) D-64, First Floor, Vikas Marg, Shankarpur, Delhi-110092.
5. M/s Ansal Buildwell Ltd. through its MD, 118, Upper First Floor, Prakash Deep Building, Tolestoy Marg, New Delhi-110001.
6. M/s Kuldevi Pacific Infrastructure through its Managing Director, Sh. Bharat Vvaidya, 1, Pacific Upper Second Floor, Regal Building, Parliament Street, New Delhi-110001.

...Respondents

(2) Appeal No. 12-HP/2024

Sumit Khanna (proprietor Unimex Builders), resident of B-
6/4, 3rd Floor, Safdarjung Enclave, New Delhi-110029

...Appellant

Versus

- 1 Sh. Sanjay K Dhingra, son of Shri Kishen Dhingra R/o B-204, Kashitij towers, G.E. Links CHS, Ram Mandir Road, Goregon West, Mumbai-400104.

- 2 Sh. Pankaj Madan, (Partner M/s Pacific Construction and Management) D-64, First Floor, Vikas Marg, Shankarpur, Delhi-110092.
- 3 Sh. Vikas Madan, (Partner M/s Pacific Construction and Management) D-64, First Floor, Vikas Marg, Shankarpur, Delhi-110092.
- 4 M/s Ansal Buildwell Ltd. through its MD, 118, Upper First Floor, Prakash Deep Building, Tolestoy Marg, New Delhi-110001.
- 5 M/s Kuldevi Pacific Infrastructure through its Managing Director, Sh. Bharat Vvaidya, 1, Pacific Upper Second Floor, Regal Building, Parliament Street, New Delhi-110001.

...Respondents

CORAM:

Justice Rajan Gupta

Chairman

Present: Mr. Arpan Singh, Advocate for the appellant.

Ms. Manju Goyal, Advocate for M/s Kuldevi Pacific Infrastructure

O R D E R:

Rajan Gupta, Chairman (Oral):

1. This order shall dispose of Appeal Nos. 11-HP/2024 and 12-HP/2024, as common questions of law and facts are involved. However, the facts are being extracted from Appeal No. 11-HP/2024. The matter is being taken up on urgent basis on the plea of counsel for the appellant that the appellant-JD being in detention on the basis of an order which is against law, apart from other provisions, Article 21 of the Constitution is also violated.

2. The order dated 25.06.2024, passed by the Authority¹ is under challenge, whereby it has been directed that JD-appellant² be committed to civil prison for a period of ninety

¹ Real Estate Regulatory Authority, Himachal Pradesh

² Judgment Debtor

days on payment of subsistence allowance. The operative part of the order reads as under:

“22. In our view after looking the conduct of the JD-1, the present is an imminently fit case to direct the warrant of committal to jail of Sh. Sumit Khanna as he deserves no leniency and is required to dealt with strictly.

23. Keeping in view the aforesaid this Authority hereby passed the following order/directions:

a. Warrant of committal of JD Sh. Sumit Khanna to Civil Jail at Kaithu Shimla is hereby order as per the procedure prescribed in the Himachal Real Estate Regulatory Authority, (Adjudication of Execution Petition) Regulations no. 3 of 2020 read with Section 51 CPC and Order 21 Rule 30 and Order 21 Rule 40 CPC for a period of ninety days. The office of this Authority is directed to prepare warrant of committal to jail as per appendix XIII of the Himachal Real Estate Regulatory Authority, (Adjudication of Execution Petition) Regulations no. 3 of 2020. It is further clarified that as and when Sh. Sumit Khanna judgment debtor makes payment of Rs 41,33,677/- (20% of the decretal amount) and this Authority is intimated forthwith as per Section 58 CPC Sh. Sumit Khanna will be ordered to be released. The aforesaid payment shall be made in the bank account of this Authority, operative in the name of "Himachal Pradesh Real Estate Regulatory Authority Fund" bearing account no. "39624498226", in State Bank of India, HP Secretariat Branch, Shimla, having IFSC Code SBIN0050204.

b. The office of this Authority is directed to deposit Rs. 9000/- as subsistence allowance with Superintendent of Jail/ Incharge of the Jail, Kaithu for 90 days immediately under receipt of the amount.

3. The brief facts of the case are that a complaint was filed by allottees-Sanjay Dhingra and Chetna Dhingra (hereinafter referred to as 'the DHs³') that they had booked a flat with Ansal Meadows, Bajaura, Kullu, Himachal Pradesh (hereinafter referred to as 'the promoter'), pursuant to which various payments were made to the promoter. The DHs thereafter requested the promoter for execution of sale deed and possession of the plot but no satisfactory reply was received. The DHs felt that conduct of the promoter was not above board and decided to opt out of the project. The DHs thereafter filed a complaint before the Authority on 21.01.2020 demanding refund of the amount paid by them along with interest @ 18% per annum w.e.f. 31.03.2014. The Authority, vide its order dated 17.10.2020, disposed of the complaint allowing the claim of the DHs along with penalty. Pursuant to the decree, execution petition was filed by the DHs. Vide order dated 03.11.2022, it was directed that JD Nos. 1,2 and 3, namely, Unimexx Builder and Developer Pvt. Ltd., Vikas Madan and Pankaj Madan would pay 60% of the decretal amount which would be apportioned amongst them to the extent of 20% each. On 06.12.2022, JD-Sumit Khanna appeared before the Authority through virtual mode and admitted that he would pay 20% of the decretal amount and prayed for one month's time for the said purpose. The Authority clarified that in case 20% of the decretal amount was not remitted on or before 06.01.2023, arrest warrants would be issued.

4. It appears that warrants of arrest were actually issued but remained unexecuted. On 04.03.2023, fresh

³ Decree Holders

warrants were issued against JD-Sumit Khanna. Repeated warrants were issued thereafter. An application was moved by him that procedural requirement of Order 21 Rule 39 CPC be complied with. Stand was taken by the counsel that no useful purpose would be served by sending the JD to the prison. However, the Authority came to the conclusion that homebuyers had been suffering for a long time and JD-Sumit Khanna was taking vague pleas before the Authority. It came to the conclusion that no leniency can be shown. It found that liability of JDs to the extent of 20% each including that of the appellant-Sumit Khanna was upheld by the Hon'ble High Court of Himachal Pradesh at Shimla in CWP No. 4336 of 2023 vide order dated 05.07.2023. Consequently, vide impugned order, the Authority directed committal of Sumit Khanna to civil prison for a period of ninety days on payment of subsistence allowance.

5. Learned counsel for the appellant has posed a challenge to the order passed by the Authority, *inter alia*, on the plea that detention has been ordered to meet the liability which was joint and several in nature. Only the DHs were competent to make such a prayer and not similarly placed JD. Certain precedent was relied upon to contend that before ordering detention, JD ought to be given an opportunity showing cause why he should not be committed to civil prison. If the Court, for the reasons to be recorded, is satisfied as to the conditions mentioned in the aforesaid provision, it may order committal to civil prison. Reliance was placed upon a judgment of Hon'ble

Punjab and Haryana High Court in **Didar Singh @ Dara Singh v. State Bank of India⁴**.

6. Learned counsel for the respondent vehemently opposed the plea and stated that the appellant had not paid a single penny till date despite the fact that he admitted his liability and agreed to pay 20% of the decretal amount as would be clear from perusal of the order dated 06.12.2022. He further contended that the amount, as envisaged by proviso to Section 43(5) of the Act⁵ had been deposited by other JDs and not by the appellant. He has filed an affidavit of Bharat Vaidya dated 16.07.2024 in this regard. Paragraphs 3 to 7 thereof read as under:

“3. That it remains an admitted fact that no amount, hitherto, has been deposited by the appellant in compliance of section 43(5) of the Act and/or paid/deposited by him in compliance of the decretal amount. It is submitted that towards statutory compliance and hearing of the present appeal, the appellant is merely relying upon the deposit made by the deponent, in his separate appeals. At this juncture it is pertinent to note that the appellants own appeal was dismissed by this Hon'ble Tribunal on 06.05.2022, for want of compliance u/s 43(5) of the Act.

4. That the contention of the appellant that the decree is fully satisfied as per Section 58 of the CPC, 1908, is completely misplaced and contrary to the facts. The appellant in order to secure an interim relief in his favour has been making false/wrong submissions. It is most respectfully submitted that the interim relief being sought is in the nature of final relief and thus deserves to be rejected.

5. That the arrest and detention of the appellant is legal and valid in law. In fact, the appellant had on an earlier occasion challenged the issuance of warrants before the

⁴ 2013(2) RCR (Civil) 588.

⁵ Real Estate (Development and Regulation) Act, 2016

Hon'ble High Court Himachal Pradesh by way of CWP4336/2023. However, the Hon'ble High Court vide order dated 05.07.2023 dismissed the said challenge and upheld the directions, which indubitably included issuance of warrants, payment of 20% of the decretal amount by JD no.1, 2 & 3 etc.

6. *That the Proviso to Section 58 CPC, provides , as under "Provided that he shall be released from such detention before the expiration of the said period of detention:-*

(i) On the amount of mentioned in the warrant for his detention being paid to the officer in charge of the civil prison, or

(ii) On the decree against him being otherwise fully satisfied, or

7. *That the interim relief can only be granted to the appellant if he makes the deposit of the amount as stated in the warrants (i.e., Rs. 41,33,677/-, 20% of the decretal amount) and/or the decree stands fully satisfied i.e., on making the payment of Rs. 23,50,000/- (the remaining penalty amount) in due compliance of section 58 CPC, as reproduced hereinabove."*

7. Having heard learned counsel for the parties and given careful thoughts to the facts of the case, it reveals that during the pendency of the proceedings, CWP No. 4336 of 2023 filed by the appellant was disposed of on 05.07.2023 by a Division Bench of High Court of Himachal Pradesh. The order is reproduced hereunder for ready reference:

"This writ petition has been preferred challenging order dt. 04.03.2023, passed by the Himachal Pradesh Real Estate Regulatory Authority, Annexe Building, Majitha House, Shimla, (for short, 'the H.P. RERA') granting reliefs to respondent no. 3 and others and the consequential order passed on 29.05.2023 directing

initiation of all coercive measures against the petitioner and others, including the rest therein.

2. The petitioner had previously approached this Court challenging the primary order, passed by the H.P. RERA on 17.10.2020, but this Court declined to entertain the writ petition granting liberty to the petitioner to avail the remedy available under Section 43(5) of the Real Estate (Regulation & Development) Act, 2016.

3. Though, the petitioner preferred an appeal, but he did not comply with the directions contained in the statute of predeposit. Consequently, on 06.05.2022, the Haryana Real Estate Appellate Tribunal, Chandigarh, declined to entertain the appeal and dismissed the same.

4. In view of the said dismissal, consequential orders were passed by the H.P. RERA on 04.03.2023 and 29.05.2023 on account of non-satisfaction by the petitioner of the directions given in the primary order passed on 17.10.2020 by the HP RERA.

5. Learned Counsel for the petitioner sought to contend that it would cause great hardship to the petitioner if he is compelled to comply with the said order. But having regard to the fact that the appeal preferred against the primary order by the petitioner stood dismissed on 06.05.2022 itself, it is not permissible to the petitioner to canvass contentions on merits in this writ petition.

6. We are also of the opinion that the directions contained in the order dt. 29.05.2023, passed by the H.P. RERA permitting the petitioner and other JDs to

make payment of only 20% of the decretal amount on or before 10.06.2023, is extremely generous and the petitioner ought to have availed it.

7. We are, therefore, not inclined to entertain this writ petition and the same is accordingly dismissed. Pending application(s), if any, also stands disposed of.”

8. It is clear that Complaint No. RERAHPKUCTA09210046 was preferred by Mrs. Kamal Arjan with similar grounds. That complaint was allowed vide order date 08.07.2022 by the Authority at Shimla. The appellant also posed a challenge to the said decree/order dated 08.07.2022 in Appeal No. 01 of 2020. However, the appellant was not serious in pursuing the appeal as he failed to remove the objections raised by the Registry. The appeal was, thus, dismissed vide order dated 04.10.2023. The same is reproduced hereunder for ready reference:

“It appears that incomplete paper book has been received in the Registry vide Dairy No. 02 dated 05.01.2023. There are number of objections have been raised by the Registry. Thereafter, four reminders were sent by the Registry to the appellant i.e. on 13.01.2023, 03.02.2023, 23.02.2023 and 16.03.2023 but to no response.

2. In view of the above facts that incomplete paper book has filed in the Registry and no number has been assigned to the appeal. Same cannot be entertained.

3. Dismissed as such.”

9. Thereafter, challenge was also posed to order dated 25.11.2023 whereby the Authority directed that the JD would

deposit the decretal amount alongwith interest or file a list of assets in order to enable the Authority to execute the order. Against the said order, the appellant filed Appeal No. 3/HP/2023 without making pre-deposit as required by proviso to Section 43(5) of the Act. The said appeal was dismissed vide order dated 09.05.2024. The operative part thereof reads as under:

“8. It is, thus, evident that the present appeal cannot be entertained in view of non-compliance of condition of pre-deposit in terms of the proviso to Section 43(5) of the Act. The ratio of the judgment in M/s Newtech Promoters and Developers Pvt. Ltd. v. State of UP and others etc. 2022 (1) RCR (Civil) 357 would be attracted in the instant case.

9. Appeal, thus, cannot be entertained and same is hereby dismissed.”

10. Considering the conduct of the appellant, this Bench finds no ground to interfere in the order passed by the Authority. It is evident that at no stage, the appellant made any pre-deposit in terms of requirement of Section 43(5) of the Act. During the course of arguments, learned counsel for the appellant submitted that entire decretal amount had been deposited, thus there was no question of committal of the appellant to civil prison. This contention was rebutted by Ms. Manju Goyal, counsel for M/s Kuldevi Pacific Infrastructure.

11. In my considered view, the appellant/JD cannot rely upon the deposit made by other JD(s) to contend that he had satisfied the decree. The contention that all the JDs are jointly and severally responsible and decretal amount having been deposited, the Authority could not have taken any coercive measure, does not

carry any weight. The fact that JDs are liable jointly and severally would necessarily imply that the appellant-JD is equally liable. However, he has consistently defaulted in making any payment whatsoever. He has been filing appeals/petitions before this Tribunal without even complying with the condition of pre-deposit.

12. As regards the reliance on **Didar Singh's case (supra)**, a perusal of the record shows that the Authority recorded its satisfaction in terms of the relevant provisions of CPC. Besides, the Act is a special enactment which provides for pre-deposit to protect the interest of the allottees. The provision was subject-matter of consideration in **M/s Newtech Promoters and Developers Pvt. Ltd. v. State of UP and others etc.**⁶, wherein the Hon'ble Supreme Court held as under:-

“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 is based 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-viz., 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.

⁶ 2022(1) RCR (Civil) 357

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/allottee 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 respective parties, 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 the miseries which come forward against him.

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 re- appraisal of the evidence on record provided substantive compliance of the condition of pre-deposit is made over, the rights of the parties inter se could easily be saved for adjudication at the appellate stage.”

13. In view of the law laid down in **M/s Newtech Promoters and Developers Pvt. Ltd.'s case (supra)**, it is evident that pre-deposit is *sine qua non* in entertaining an appeal before the Tribunal. However, admittedly, at no stage, the appellant deposited any amount either in lieu of the decretal amount or penalty. The principle of joint and several liability is sought to be invoked by a person, who has consistently defaulted. As per observations of the Authority, on 06.12.2022, Sumit Khanna appeared before the Authority through virtual mode and admitted his liability to the extent of 20% of the decretal amount, for payment of which he prayed for one month's time. However, he failed to adhere to this undertaking. It is inexplicable as to how the plea of joint and several liability is being raised by the appellant despite the fact that he did not deposit any amount in spite of the undertaking given before the Authority on 06.12.2022 and the decretal amount was deposited by another JD.

14. The appeals have, thus, no merit. The same are hereby dismissed.

Justice Rajan Gupta
Chairman

Himachal Pradesh Real Estate Appellate Tribunal

July 19, 2024

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