IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MRS. JUSTICE M.R.ANITHA

THURSDAY, THE 14TH DAY OF JULY 2022 / 23RD ASHADHA, 1944

MSA NO. 4 OF 2021

(FROM THE ORDER DATED 12/08/2021 IN REFA NO.21/2021 OF THE KERALA REAL ESTATE APPELLATE TRIBUNAL)

(FROM THE ORDER DATED 16/10/2020 IN COMPLAINT NO.185/2020 OF KERALA REAL ESTATE REGULATORY AUTHORITY)

APPELLANT/COMPLAINANT:

UNNIKRISHNAN CHANDRAN PILLAI,
10D, OLIVE WOOD STOCK, STADIUM LINK ROAD,
KALOOR, KOCHI, 682 017.

BY ADVS.
JOHNSON GOMEZ
S.BIJU (KIZHAKKANELA)
SANJAY JOHNSON
JOHN GOMEZ
SREEDEVI S.
ENLIN MARY RODRIGUS
MOHAMED SHEHARAN
DINOOP P.D.
SANJITH JOHNSON

RESPONDENTS 1 AND 2:

1 TATA REALITY INFRASTRUCTURE LTD.,
E BLOCK, VOLTAS COMPOUND, TB KADAM MARG,
CHINCHPOKIL, MUMBAI 400 033 REPRESENTED BY ITS CHAIRMAN

2 RELATIONSHIP MANAGER,
TATA REALITY AND INFRASTRUCTURE LTD. ,
TRITVAM, GOSHREE PACHALAM LINK RD, KOCHI 682 018.

BY ADVS.
ISAAC THOMAS
V.ABRAHAM MARKOS
ABRAHAM JOSEPH MARKOS
P.G.CHANDAPILLAI ABRAHAM
ALEXANDER JOSEPH MARKOS
SHARAD JOSEPH KODANTHARA

THIS MISC. SECOND APPEAL HAVING COME UP FOR HEARING ON 22.06.2022, ALONG WITH MSA.5/2021, THE COURT ON 14.07.2022 DELIVERED THE FOLLOWING:

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MRS. JUSTICE M.R.ANITHA

THURSDAY, THE 14TH DAY OF JULY 2022 / 23RD ASHADHA, 1944

MSA NO. 5 OF 2021

(FROM THE ORDER DATED 12/08/2021 IN REFA NO.27/2021 OF THE KERALA REAL ESTATE APPELLATE TRIBUNAL)

(FROM THE ORDER DATED 23/04/2021 IN CCP NO.110/2020 OF THE ADJUDICATING AUTHORITY)

APPELLANT/COMPLAINANT:

UNNIKRISHNAN CHANDRAN PILLAI
AGED 55 YEARS
10D, OLIVE WOOD STOCK, STADIUM LINK ROAD,
KALOOR, KOCHI-682017.

BY ADVS.
JOHNSON GOMEZ
SANJAY JOHNSON
JOHN GOMEZ
SREEDEVI S.
MOHAMED SHEHARAN
DINOOP P.D.

RESPONDENTS 1 AND 2:

1 TATA REALITY INFRASTRUCTURE LIMITED
E BLOCK, VOLTAS COMPOUND, TB KADAM MARG,
CHINCHPOKLI, MUMBAI-400033.

2 RELATIONSHIP MANAGER,
TATA REALITY AND INFRASTRUCTURE LTD., TRITVAM,
GOSHREE PACHALAM LINK RD., KOCHI-682018.

BY ADVS.
V.ABRAHAM MARKOS
ABRAHAM JOSEPH MARKOS
ISAAC THOMAS
P.G.CHANDAPILLAI ABRAHAM
ALEXANDER JOSEPH MARKOS
SHARAD JOSEPH KODANTHARA

THIS MISC. SECOND APPEAL HAVING COME UP FOR HEARING ON 22.06.2022, ALONG WITH MSA.4/2021, THE COURT ON 14.07.2022 DELIVERED THE FOLLOWING:

M.R.ANITHA, J

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M.S.A.Nos.04 of 2021

&

05 of 2021

Dated this the 14th day of July, 2022

JUDGMENT

These appeals have been filed under Section 58 of the Real Estate (Regulation and Development) Act, 2016, against the common order dated 12.08.2021 in REFA Nos.21 & 27 of 2021 on the files of the Kerala Real Estate Appellate Tribunal, Ernakulam.

2. M.S.A.No.4/2021 has been directed against the order in REFA No.21/2021 which was preferred against the order passed by the Kerala Real Estate Regulatory Authority (for short, K-RERA), Thiruvananthapuram on 16.10.2020 in Complaint No.185/2020 and M.S.A.No.5/2021 has been directed against the order in REFA No.27/2021 which was filed against the order of the learned Adjudicating Officer (A.O.) attached to K-RERA dated

23.04.2021 in CCP No.110/2020.

3. Appellant booked an apartment in July, 2019 in the multi-storied residential apartment project named 'Tritvam' at Marine Drive in Kochi launched by the first respondent. He paid total amount of Rs.16 lakhs towards advance amount. Advance payment was received by the first respondent before executing the agreement as provided under Section 13 of the Act. However, in October 2019, the promoter requested the appellant to make payment of the amount required for registration of the sale agreement. For that appellant requested by letter to cancel the booking of the apartment on the ground of inability to raise the money and also requested the promoter to return the advance amount of Rs.16 lakhs paid by him, to which, the promoter sent a reply letter intimating that out of Rs.16 lakhs received, an amount of Rs.15,16,667/- is liable to be forfeited in view of the default on the part of the appellant and expressed willingness to return Rs.83,333/-. Aggrieved by that reply, the appellant approached K-RERA with a complaint No.185/2020, claiming advance payment with interest along with Rs.5 lakhs towards

compensation. Further he made a request for imposing penalty for violation of Section 13.

4. The respondents contended that the complaint is not maintainable before K-RERA and contended that provisions of the Act would not apply. The claim is also contended to be not maintainable under Section 18 of the Act. K-RERA dismissed the complaint reserving the right of the appellant to approach the Adjudicating Officer in Form N under Section 71 of the Real Estate (Regulation & Development) Act, 2016 r/w. Rule 37 of the Kerala Real Estate (Regulation & Development) Rules, 2018. Against which, REFA No.21/2021 was filed.

5. Appellant also filed CCP No.110/2020 before the A.O. claiming the advance amount of Rs.16 lakhs with interest and also compensation of Rs.5 lakhs. The A.O. dismissed the complaint finding that the power to order return of amount with interest is upon the K-RERA. It is also found that claim under Section 18 of the Act is not maintainable since he has made a claim on the ground of his own default and not on account of any default on the part of the respondents. Aggrieved by that order

REFA No.27/2021 was filed before the Kerala Real Estate Appellate Tribunal (in short 'Tribunal') and by the impugned common order, Tribunal disposed the matters and the operative portion of the order reads as follows:

> 1. *In a case where compensation is claimed by an allottee addition to the advance amount and interest, the jurisdiction to decide the claim shall be with the Adjudicating Officer attached to the Real Estate Regulatory Authority.*
> 2. *When the claim of the allottee is only for advance amount with interest, the jurisdiction to decide the same shall be with the Real Estate Regulatory Authority, and the Adjudicating Officer shall be the exclusive authority when the claim is only for compensation under Section 12, 14, 18 and 19 of the Act.*
> 3. *When an issue regarding registration is raised before the Adjudicating Officer, as to whether a given project is liable to be registered under the Act, the Adjudicating Officer shall direct the party to approach the Real Estate Regulatory Authority for orders regarding registration within such time fixed the Adjudicating Officer failing which, the Adjudicating Officer himself shall address the Real Estate Regulatory Authority, and refer the matter of registration to be decided*

by the Real Estate Regulatory Authority. Till a decision on the issue of registration is taken, and orders are passed by the Real Estate Regulatory Authority, the Adjudicating Officer shall keep the matter pending, and shall proceed with the matter after a decision is taken by the Real Estate Regulatory Authority.

4. *Dismissal of the appellant's application in CCP No.110/2020 dated 23/4/2021 by the learned Adjudicating Officer is confirmed without prejudice to the right of the appellant to approach the appropriate forum for the reliefs.*

5. *The findings of the Real Estate Regulatory Authority in the appellant's Complaint No.185/2020 that the Real Estate Regulatory Authority has no jurisdiction to decide the claim for compensation clubbed with advance amount and interest is confirmed, but the complaint is remitted to Kerala Real Estate Regulatory Authority for the purpose of initiating appropriate proceedings and passing orders appropriately in the matter of registration of the given project, and also for initiating necessary action for imposition of penalty and otherwise, for the alleged violation of Section 13 of the Act, if such violation is proved."*

6. When the matter came up for hearing, the learned

counsel for the appellant would submit that he is challenging paragraph Nos.4 and 5 of the above order alone in this proceedings.

7. When the matter came up for admission the following substantial question of law has been formulated:

> *"(i) Whether Clause 21 of Annexure A of Kerala Real Estate (Regulation and Development) Rules, 2018 forms part of the Rules since the same is included as part of the statutory form of the agreement for sale.*
>
> *(ii) Whether Clause 21 has to be treated as a mandatory Rule especially in view of the note attached to Annexure A Form.*
>
> *(iii) Whether the term "in accordance with the terms of agreement for sale" as used in several provisions of the Act refers to the terms and conditions contained in Annexure A to the Kerala Real Estate (Regulation and Development) Rules, 2018?"*

8. In addition, the following substantial question of law is also formulated:

> *(iv) Promotor on violating the express provisions under Section 13(1) of the Act whether can deny the benefit under the proviso to Section 11(5) of the Act to the allottee?*

9. Records were called for. Heard both sides.

10. A three Judges Bench of the Hon'ble Apex Court in **M/s. Newtech Promoters and Developers Pvt. Ltd v. State of U.P. & Ors. [MANU/SC/1056/2021]** have made a detailed probe to various provisions of the Real Estate (Regulation and Develoopment) Act, 2016 (in short 'the Act') and the Uttar Pradesh Real Estate (Regulation and Development) Rules, 2016 and considered the question whether the Act 2016 is retrospective or retroactive in its operation and what will be its legal consequence if tested on the anvil of the Constitution of India. Following questions were dealt with:

> *"1. Whether the Act 2016 is retrospective or retroactive in its operation and what will be its legal consequence if tested on the anvil of the Constitution of India?*
>
> *2. Whether the authority has jurisdiction to direct return/refund of the amount to the allottee under Sections 12, 14, 18 and 19 of the Act or the jurisdiction exclusively lies with the adjudicating officer under Section 71 of the Act?*
>
> *3. .....*
>
> *4. .....*

11. Chapter II of the Act, 2016, deals with registration of real estate projects and its mandatory nature. It has been discussed in paragraph No.33 of **M/s. Newtech Promoters** which reads thus:

> *"Under Chapter II of the Act 2016, registration of real estate projects became mandatory and to make the statute applicable and to take its place under sub-Section (1) of Section 3, it was made statutory that without registering the real estate project with a real estate regulatory authority established under the Act, no promoter shall advertise, market, book, sell or offer for sale, or invite persons to purchase in any manner a plot, apartment or building, as the case may be in any real estate project but with the aid of proviso to Section 3(1), it was mandated that such of the projects which are ongoing on the date of commencement of the Act and more specifically the projects to which the completion certificate has not been issued, such promoters shall be under obligation to make an application to the authority for registration of the said project within a period of three months from the date of commencement of the Act. With certain exemptions being granted to such of the projects covered by sub-section (2) of Section 3 of the Act, as a consequence, all such*

home buyers agreements which has been executed by the parties inter se has to abide the legislative mandate in completion of their ongoing running projects."

12. The term "on going project" has also been dealt with in paragraph No.34. Paragraph Nos.34, 37, 41 and 54 are relevant to be extracted, which read thus:

"34. The term "ongoing project" has not been so defined under the Act while the expression "real estate project" is defined under Section 2(zn) of the Act which reads as under:-

"2(zn) "real estate project" means the development of a building or a building consisting of apartments, or converting an existing building or a part thereof into apartments, or the development of land into plots or apartments, as the case may be, for the purpose of selling all or some of the said apartments or plots or building, as the case may be, and includes the common areas, the development works, all improvements and structures thereon, and all easement, rights and appurtenances belonging thereto;"

37. Looking to the scheme of Act 2016 and

Section 3 in particular of which a detailed discussion has been made, all "ongoing projects" that commence prior to the Act and in respect to which completion certificate has not been issued are covered under the Act. It manifests that the legislative intent is to make the Act applicable not only to the projects which were yet to commence after the Act became operational but also to bring under its fold the ongoing projects and to protect from its inception the inter se rights of the stake holders, including allottees/home buyers, promoters and real estate agents while imposing certain duties and responsibilities on each of them and to regulate, administer and supervise the unregulated real estate sector within the fold of the real estate authority.

41. The clear and unambiguous language of the statute is retroactive in operation and by applying purposive interpretation rule of statutory construction, only one result is possible, i.e., the legislature consciously enacted a retroactive statute to ensure sale of plot, apartment or building, real estate project is done in an efficient and transparent manner so that the interest of consumers in the real estate sector is protected by all means and Sections 13, 18(1) and 19(4) are all beneficial provisions for safeguarding the pecuniary interest of the consumers/allottees. In

the given circumstances, if the Act is held prospective then the adjudicatory mechanism under Section 31 would not be available to any of the allottee for an on-going project. Thus, it negates the contention of the promoters regarding the contractual terms having an overriding effect over the retrospective applicability of the Act, even on facts of this case.

54. From the scheme of the Act 2016, its application is retroactive in character and it can safely be observed that the projects already completed or to which the completion certificate has been granted are not under its fold and therefore, vested or accrued rights, if any, in no manner are affected. At the same time, it will apply after getting the on-going projects and future projects registered under Section 3 to prospectively follow the mandate of the Act 2016. ....."

13. As per Section 3(1), the respondent's project will come under the "on going project" since the project is not over and completion certificate is not issued and it is obligatory for the respondent to make an application to the Authority for registration of the project. So directions in that regard in the

impugned order passed by the Tribunal has already been answered by the dictum laid down in **Newtech Promoters and Developers Pvt. Ltd**., referred above. So, the respondent is bound to register the project under the Act.

14. Next is with regard to the claim of the appellant for return of advance amount. The dismissal of the appellant's application in CCP No.110/2020 by the Adjudicating Officer was confirmed by the Appellate Tribunal by which the Adjudicating Officer has found that the jurisdiction of the Adjudicating Officer does not extend to all individual disputes other than the adjudgment of compensation as specifically indicated in sub-section 1 of Section 71 of the Act and the jurisdiction of authority extend to every aspect under the Act except the sole jurisdiction of adjudgment of compensation vested with the Adjudicating Officer.

15. In **M/s.Newtech Promoters** the Apex Court while answering point No.2 as to whether Authority has jurisdiction to return/refund of the amount to the allottee under Sections 12, 14, 18 and 19 of the Act or the jurisdiction exclusively lies with

the adjudicating officer under Section 71 of the Act has been discussed in paragraph Nos.83, 84, 85, 86, which read thus:

> *83. So far as the single complaint is filed seeking a combination of reliefs, it is suffice to say, that after the rules have been framed, the aggrieved person has to file complaint in a separate format. If there is a violation of the provisions of Sections 12, 14, 18 and 19, the person aggrieved has to file a complaint as per form (M) or for compensation under form (N) as referred to under Rules 33(1) and 34(1) of the Rules. The procedure for inquiry is different in both the set of adjudication and as observed, there is no room for any inconsistency and the power of adjudication being delineated, still if composite application is filed, can be segregated at the appropriate stage.*
>
> *84. So far as submission in respect of the expeditious disposal of the application before the adjudicating officer, as referred to under sub-section (2) of Section 71 is concerned, it pre-supposes that the adjudicatory mechanism provided under Section 71(3) of the Act has to be disposed of within 60 days. It is expected by the regulatory authority to dispose of the application expeditiously and not to restrain the mandate of*

60 days as referred to under Section 71(3) of the Act.

85. The provisions of which a detailed reference has been made, if we go with the literal rule of interpretation that when the words of the statute are clear, plain and unambiguous, the Courts are bound to give effect to that meaning regardless of its consequence. It leaves no manner of doubt and it is always advisable to interpret the legislative wisdom in the literary sense as being intended by the legislature and the Courts are not supposed to embark upon an inquiry and find out a solution in substituting the legislative wisdom which is always to be avoided.

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 Section 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.*

16. So from the above without any further discussion it can be concluded that even if a single application seeking combination of reliefs like return of money and interest as well as compensation have been claimed the aggrieved person has to file in different format i.e. if there is violation of provisions under Section 12, 14, 18 and 19 a complaint as per Form (M) has to be filed before the K-RERA under Rules 36(1) of Kerala Real Estate (Regulation and Development) Rules, 2018 and for compensation

in Form N under Rule 37(1) of the Rules and that segregation can be made at appropriate stage. So when the appellant herein filed a composite petition claiming combination of reliefs like return of advance amount, interest as well as compensation, the compensation part of it has to be separated and given to the A.O and the other complaint has to be decided by the K-RERA since the scheme of the Act provide the power of adjudication with the A.O and the refund, interest, penalty it is the K-RERA which has power to examine and determine the outcome of the compliant. Whereas when a question seeking the relief of adjudging compensation and interest thereon under Sections, 12, 14, 18 and 19 came up the A.O exclusively has power to determine in view of Section 71 r/w Section 72 of the Act. It is also made clear that the adjudication under Sections 12, 14, 18 and 19 other than compensation if extended to the A.O it may intend to expand the ambit and scope of the power and functions of the A.O under Section 71 and that would be against the mandate of the Act, 2016.

17. Now the main question for consideration before this

Court is whether the advance amount of Rs.16 lakhs claimed by the appellant is entertainable by the K-RERA. The A.O has found that the claim for return of amount with interest solely based on the fact that the appellant was constrained to cancel the booking of apartment due to his inability to raise the necessary funds for paying the total amount of apartment will not come within the purview of sub-section (1) of Section 18 or sub-section (4) of Section 19 to claim return of amount with interest and to seek compensation. The Tribunal also confirmed that finding of the A.O without prejudice to the right of the appellant to approach the appropriate forum for the reliefs.

18. According to the learned counsel for the appellant, the total cost of the project is Rs.1,51,66,674/-. But, as advance, an amount of Rs.16 lakhs has been received from him. He would contend that Section 13(1) specifically prohibits acceptance of a sum more than ten per cent of the cost of the apartment, plot, or building as advance payment or an application fee, from a person without first entering into a written agreement for sale with such person. He would also contend that as per Rule 10 of

the Rules the agreement for sale shall be in the form in Annexure A and sub-rule (2) of Rule 10 provides that any application letter, allotment letter, agreement or any other document signed by the allottee in respect of the apartment, plot or building prior to the execution and registration of the agreement for sale for such apartment, plot or building shall not be construed to limit the rights and interests of the allottee under the agreement for sale or under the Act or the Rules or the Regulations made thereunder. He would also relies upon term 21 attached to Annexure A agreement for sale which reads thus:

> *BINDING EFFECT: Forwarding this Agreement to the Allottee by the Promoter does not create a binding obligation on the part of the Promoter or the Allottee until, firstly, the Allottee signs and delivers this Agreement with all the schedules along with the payments due as stipulated in the Payment Plan within 30 (thirty) days from the date of receipt by the Allottee and secondly, appears for registration of the same before the concerned Sub-Registrar as and when intimated by the Promoter. If the Allottee(s) fails to execute and deliver to the Promoter this Agreement within 30 (thirty) days from the date of its receipt by the Allottee and/or*

> *appear before the Sub-Registrar for its registration as and when intimated by the Promoter, then the Promoter shall serve a notice to the Allottee for rectifying the default, which if not rectified within 30 (thirty) days from the date of its receipt by the Allottee, application of the Allottee shall be treated as cancelled and all sums deposited by the Allottee in connection therewith including the booking amount shall be returned to the Allottee without any interest or compensation whatsoever.*

So, according to him, as per term 21 attached to Annexure A even if the promoter cancel the application of the allottee he is bound to return all sums deposited by the allottee in connection therewith including the booking amount.

19. The learned counsel would also relies on Section 18 of the Act and gave emphasis on sub-section (3) of Section 18 which provides that 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. He would further relies on Section 11(5) of the

Act which empowers the promoter to cancel the allotment but only in terms of the agreement for sale. Proviso to sub-section 5 of Section 11 further provides that the allottee may approach the Authority for the relief, if he is aggrieved by such cancellation and such cancellation is not in accordance with the terms of the agreement for sale, unilateral and without any sufficient cause.

20. Learned counsel for the respondents on the other hand would contend that either Section 11(5), 18(3) or 18(5) will not come to the rescue of the appellant to claim return of advance amount since all those Sections applies in different context.

21. Section 11 comes under Chapter III under the caption "Functions and Duties of Promoter" with regard to creating of web page on the website of the K-RERA and enter all the details of the proposed project as provided under sub-section (2) of Section 4, in all the fields provided, for public viewing, the advertisement of different future developments. He is also bound to provide the information to the allottee regarding the sanctioned plans, layout plans along with the specifications approved by the competent authority and is also responsible to

obtain completion certificate or occupancy certificate etc.

22. Section 18 of the Act deals with return of amount and compensation which is relevant in this context to be extracted, which reads thus:

> *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 for sale 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 as provided 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.*

23. Section 18 provides that if the promoter fails to complete or is unable to give possession of the apartment, plot or building in accordance with the terms of agreement for sale or duly completed by the date specified therein or due to discontinuance of his business as a developer on account of suspension or revocation of the registration under the Act or by

any other reason he is liable on demand of the allottee 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. Sub-section (3) provides that if the promoter failed to discharge any other obligations imposed on him under this Act or the rules or regulations or in accordance with the terms and conditions of agreement for sale, he shall be liable to pay compensation to the allottees. It is true that sub-section (3) of Section 18 only speaks about the compensation to be payable on failure of the promoter to discharge any obligation imposed on him under the Act, rules or regulations. One thing to be noted while analysing Section 18 is that the liability casts upon the promoter to return the amount received on satisfaction of the conditions like failure on his part to complete or unable to give possession in accordance with the terms of agreement or due to discontinuance of his business as the developer on account of suspension or revocation of registration under the Act etc.

24. Section 16 of the Act deals with the obligations of the

promoter. Section 19 of the Act deals with the rights and duties of the allottees. Sub-section 4 of Section 19 provides that the allottees is entitled to claim the refund of the amount paid along with interest as well as compensation as provided under the 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, in accordance 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 etc. So none of the provisions under the Act expressly enables the allottee to claim the return of advance on his unilateral cancellation of the booking of the apartment, prior to the execution of agreement for sale.

25. Section 13 of the Act prohibits the promotor to accept the sum more than 10% of the cost of the apartment or building as advance payment or an application fee from person without first entering into a written agreement for sale with such person and register the said agreement for sale. The appellant has got a specific contention that the sale consideration of the apartment unit booked is Rs.1,51,66,674/- whereas, according to the

respondent, total consideration of the unit is Rs.1,68,48,685/-. But, on perusing the records it would go to show that the sale consideration of the unit booked as per the application submitted by the appellant with respect to the Unit 6A is Rs.1,51,66,674/- as borne out from the records and Annexure-R3 in the records called for from K-RERA. If that be so, admittedly Rs.16,00,000/- received by the respondent from the appellant would be in excess of 10% as provided under Section 13. The A.O as well as the K-RERA found concurrently that if respondent received more than 10% of the cost of apartment in advance payment in violation of Section 13, according to the A.O whether the appellant is entitled for any relief based on it or on the basis of Section 13 of the Act read with Clause 21 prescribed under Annexure-A agreement for sale are matters to be considered by the Authority not the A.O. The Tribunal while disposing the matter remitted the complaint to the Authority for initiating appropriate proceedings and passing orders in the matter of registration of the given project and also for initiating necessary action for imposition of penalty and otherwise for the alleged violation of Section 13 of the Act, if

such violation is proved. Learned counsel for the respondent also would contend that the course open to the Authority is only to initiate proceedings for violation of Section 13 of the Act and there is no provision in the Act or Rules for return of advance amount since the appellant himself unilaterally withdrawn from the project.

26. How far that contention of the respondent can be sustained in law is the point for determination mainly in these appeals.

27. Section 12 of the Act provides that 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 the Act. Proviso to Section 12 further states that if the person affected by such incorrect, false statement contained in the notice, advertisement or prospectus, or the model apartment, plot or building, 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 the Act. So, what Section 12 indicates is about the return of the entire investment along with interest to the allottee if the advance was on an incorrect or false statement contained in the notice, advertisement, prospectus etc of the promoter. It is true that it does not provide for return of the advance with interest if the allottee himself withdraws from the project for his own reasons.

28. In paragraph No.80 of **New Tech Promotors**, there is a discussion with regard to refund claim of the allottee when he himself defaulted the terms of agreement and an argument was advanced that if the allottee himself defaulted the terms, it has to be determined by the A.O. But the Apex Court categorically found that if the allottee has made a default either in making instalments or made any breach of the agreement the promoter has a right to cancel the allotment in terms of Section 11(5) of the Act and proviso to Sub Section 5 of Section 11 enables

allottee to approach the Regulatory Authority to question the termination or cancellation of agreement by the promotors and thus the interest of the promotor is equally safeguarded. So, sub Section (5) of Section 11 enables the promotor to cancel the allotment in terms of the agreement for sale but proviso to sub Section 5 as held by the Apex Court enables the allottee to approach the K-RERA for relief if he is aggrieved by the cancellation and if the cancellation is not in agreement with the agreement for sale unilaterally and without saying any sufficient cause.

29. Rule 10 of the Rules provides that the agreement for sale for the purpose of Sub Section (2) of Section 13 shall be in the form in Annexure-A. Sub Rule (2) further provides that any application like allotment letter, agreement or any other document signed by the allottee in respect of the apartment called building prior to the registration of agreement of sale shall not be construed to limit the rights and interest of the allottee under the agreement for sale and under the Act or the Rules or the regulations made thereunder. I have also stated earlier that

the learned counsel for the appellant relies on condition No.21 attached to Annexure A agreement provided under Rule 10 of the Rules which expressly provides that if the allottee does not rectify the defect within thirty days of the notice issued by the promoter, the application of the allottee shall be treated as cancelled and all sums deposited by the allottee in connection therewith including the booking amount shall be returned to the allottee without any interest or compensation whatsoever. It is true that a condition stipulated in the agreement attached to the Rules cannot have any binding effect or has any enforceable effect as provisions under the Act. But it would make the intention of the Rule making authority explicit that even if the allottee failed to rectify the default, the option available to the promoter is to cancel the allotment and in such contingency, the promoter is liable to return the booking amount without any interest or compensation.

30. Section 13 expressly prohibits the promoter to accept any sum more than 10% without first entering into a written agreement for sale and register the agreement for sale with the allottee. If at all the promoter in the case on hand had complied

with the direction provided under Section 13, he could not have received Rs.16,00,000/-, which is more than 10% of the cost of unit booked without entering into an agreement for sale as contemplated under Section 13. If at all such an agreement had been executed in between the promoter and the appellant when there was default on the part of the allottee in paying the balance consideration the option available to the promoter is cancellation of allotment as contemplated under sub Section 5 of Section 11. Then, the appellant could have availed the benefit under the proviso to Section 11(5) of the Act by approaching the K-RERA for such cancellation. Here merely due to the lapses of the promoter in receiving Rs.16,00,000/- which is an amount in excess which he could have received as per Section 13 without entering into an agreement for sale as provided therein, the appellant cannot be left without any remedy provided under Section 11(5) of the Act. Allottee cannot be penalised for the lapses of the promotor in receiving excess amount without executing sale agreement as provided under Section 13(1) of the Act.

31. Clause 21 attached to Annexure-A of Rule 20 of the Rules decipher the intention of the rule making authority to return the entire booking amount on cancellation of the agreement due to the default of allottee in rectifying the defect with respect to registration of agreement. As discussed earlier, only because of the fact that an agreement for sale as contemplated under Section 13 read with Rule 10 was not executed by the appellant before the advance of more than 10% of the total sale value of the unit, disabled him in taking the recourse to proviso to Section 11(5) of the Act. It is also found earlier that the act of the promoter in receiving advance exceeding 10% of the total sale value of the unit is in violation of Section 13(1) of the Act.

32. It is relevant in this context to quote the maxim "*nullus commodum capere potest de injuria sua propria* meaning no man can take advantage of his own wrong." **Union Of India & Ors vs Major General Madan Lal Yadav : 1996 (1) KLT Online 901 (SC)** was a case in which an action was taken against the respondent under Section 122 of the Army Act, 1950

on account of dereliction of duty and action. Relevant paragraph reads as follows:

> *"..... On consideration of the charge, the proceedings were adjourned from day to day till the respondent appeared on March 2, 1987. It is obvious that the respondent had avoided trial to see that the trial would not get commenced. Under the scheme of the Act and the Rules, presence of the accused is a pre-condition for commencement of trial. In his absence and until his presence was secured, it became difficult, may impossible, to proceed with the trial of the respondent- accused. In this behalf, the maxim nullus commodum capere potest de injuria sua propria- meaning no man can take advantage of his own wrong - squarely stands in the way of avoidance by the respondent and he is estopped to plead bar of limitation contained in Section 123. In Broom's Legal Maximum [10th Edn.] at page 191 it is stated "it is a maxim of law, recognized and established, that no man shall take advantage of his own wrong; and this maxim, which is based on elementary principles, is fully recognized in Courts of law and of equity, and, indeed, admits of illustration from every branch of legal procedure. The reasonableness of the rule being manifest, we proceed at once to show its application by reference to decided cases. It was noted therein that a man*

shall not take advantage of his own wrong to gain the favourable interpretation of the law. In support thereof, the author has placed reliance on another maxim frustra legis auxilium quoerit qui in legem committit. He relies on Perry v. Fitzhowe [8 Q.B. 757]. At page 192, it is stated that if a man be bound to appear on a certain day, and before that day the obligee put him in prison, the bond is void. At page 193, it is stated that "it is moreover a sound principle that he who prevents a thing from being done shall not avail himself of the non-performance he has occasioned". At page 195, it is further stated that "a wrong doer ought not to be permitted to make a profit out of his own wrong". At page 199 it is observed that "the rule applies to the extent of undoing the advantage gained where that can be done and not to the extent of taking away a right previously possessed".

33. In **Devendra Kumar vs State Of Uttaranchal & Ors** : 2013 (3) KLT (Suppl) 62 (SC) : (2013) 9 SCC 363 : AIR 2013 SC 3325 the applicability of the maxim has again come up. In paragraph 23 of the said judgment it has been held that a person having done wrong cannot take advantage of his own wrong and plead bar of any law to frustrate the lawful trial by a competent court. In such a case, the legal maxim 'Nullus Commodum

Capere Potest De Injuria Sua Propria' applies. The persons violating the law cannot be permitted to urge that their offence cannot be subjected to inquiry, trial or investigation. Paragraph 23 of the said judgment is relevant in this context which is extracted below:

> *" ..... A person having done wrong cannot take advantage of his own wrong and plead bar of any law to frustrate the lawful trial by a competent Court. In such a case the legal maxim Nullus Commodum Capere Potest De Injuria Sua Propria applies. The persons violating the law cannot be permitted to urge that their offence cannot be subjected to inquiry, trial or investigation. (Vide: Union of India v. Maj. Gen. Madan Lal Yadav, AIR 1996 SC 1340; and Lily Thomas v. Union of India & Ors., AIR 2000 SC 1650 nor can a person claim any right arising out of his own writing.*

34. In the present case, the promoter after having violated the law in receiving more than 10% of the sale value of the unit without executing a sale agreement as provided under Section 13(1) has contended that the appellant is not entitled for the benefit under Section 11(5) proviso. The appellant is forbidden from claiming the benefit solely for the reason that a written

agreement was not executed as provided under Section 13(1) when the law prohibits the promoter itself to receive in advance in excess of 10% of the total sale value and thereafter refuse to repay the amount contending that there is no agreement for sale or that the appellant himself withdrawn from the project etc. cannot be sustained in law. Proviso to Section 11(5) enables the appellant allottee to approach the K-RERA for redressal of grievances when the promoter cancels the agreement as per Section 11(5). So, the receipt of amount in excess prescribed limit as contemplated under Section 13(1) is itself a violation of the provisions of law by the promoter and thereafter the promoter cannot find fault with the appellant contending that he himself withdrawn from the project or that no agreement was executed so as to attract the proviso to Section 11(5) of the Act.

35. At the same time, since the appellant himself withdrawn from the project, I do not think that he would be entitled to get any amount towards compensation. It has already been found that the issue regarding claim of refund of amount and interest is to be dealt with by the Regulatory Authority which

has the power to examine and determine the outcome of the complaint. Since the appellant himself withdrawn from the project there is no scope for adjudging the relief of compensation and interest as per Section 12, 14, 18 and 19 of the Act.

36. Section 31 of the Act enables any person aggrieved to file complaint to the K-RERA or the A.O for any violation or contravention of the provision of the Act or Rules and Regulations against any promotor, allottee or real estate agent as the case may be. Section 34 of the Act states about the functions of the authority and Section 34 clause (f) provides that the authority has to ensure compliance of obligations cast upon the promoters, the allottees and the real estate agents under the Act and the Rules and Regulations made thereunder.

37. Section 35 of the Act deals with the powers of K-RERA which is relevant to be extracted which reads thus:

> *Section 35: "Powers of Authority to call for information conduct investigations" - The Real Estate (Regulation and Development Act, 2016)*

(1) Where the Authority considers it expedient to do so, on a complaint or suo motu, relating to this Act or the rules of regulations made thereunder, it may, by order in writing and recording reasons therefor call upon any promoter or allottee or real estate agent, as the case may be, at any time to furnish in writing such information or explanation relating to its affairs as the Authority may require and appoint one or more persons to make an inquiry in relation to the affairs of any promoter or allottee or the real estate agent, as the case may be.

(2) Notwithstanding anything contained in any other law for the time being in force, while exercising the powers under sub-section (1), the Authority shall have the same powers as are vested in a civil court under the Code of Civil Procedure, 1908 while trying a suit, in respect of the following matters, namely:-

(i) the discovery and production of books of account and other documents, at such place and at such time as may be specified by the Authority;

(ii) summoning and enforcing the attendance of persons and examining them on oath;

(iii) issuing commissions for the examination of witnesses or documents;

(iv) any other matter which may be prescribed"

38. So, the above factors would reveal that the K-RERA have the same powers as are vested in a civil court under the Code of Civil Procedure, 1908 while trying a suit with respect to discovery and production of books of accounts and other documents at such place and at such time and summoning and enforcing the attendance of persons and examining witnesses etc.

39. Section 37 further provides that K-RERA for the purpose of discharging its functions under the provisions of Act or Rules or Regulations can issue directions from time to time to promoters allottees or real estate agents as the case may be and such direction shall be binding on all concerned. Section 38 further provides about the powers of K-RERA to impose penalty or interest in regard to any contravention of obligation cast upon the promoters, allottees and real estate agents under the Act or Rules and Regulations. So, the above provisions under the Act also would speak in volumes about the power and authority of the K-RERA to resolve the issue when a complaint is preferred or suo motu in relation to the Act and Rules. So, when it has come

out that there is express violation of the provisions of the Act from the part of the promoter in receiving more than 10% of the sale value as advance without executing agreement by the promoter the Authority is well within its powers to resolve the issue when a complaint is filed by an aggrieved allottee, to regulate and promote the real estate sector without again driving the allottee to civil court for redressal of the grievance to get the advance amount unauthorisedly received by the promoter. The statement of objects and reasons of the Act also points that the Act has been established for regulation and promotion of the real estate sector and to ensure sale of plot, apartment, building etc in an efficient and transparent manner and to protect the interest of the consumers in real estate sector. It is to ensure greater accountability towards the customers, consumers and to reduce frauds and delays, the Act has been promulgated. 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 machanism. Real Estate (Regulation and Development) Act, 2016

is a beneficial legislation intending to safeguard the interest of the consumers as well as promoters by imposing certain responsibilities on both. So, bearing in mind the great objectives with which the Act has been promulgated if at all it could not redress the grievance of consumers like the appellant the very purpose of the Act would become otiose.

40. In the result, order in M.S.A.No.04/2021 and M.S.A.No.05/2021 stands modified and Kerala Real Estate Regulatory Authority, Thiruvananthapuram is also directed to reconsider the complaint No.185/2020 filed by the appellant for return of advance amount with interest and pass fresh orders in accordance with law within two months from the date of receipt of certified copy of this judgment in the light of the principles of law discussed above. Parties shall bear their respective cost.

(sd/-) **M.R.ANITHA, JUDGE**

shg/jsr/13/07/2022

True Copy

P.S to Judge