

**AFR****Court No. - 7****Case :-** SECOND APPEAL No. - 367 of 2018**Appellant :-** Radicon Infrastructure And Housing Private Limited**Respondent :-** Dhaneshwari Devi Dhyani**Counsel for Appellant :-** Prashant Kumar, Siddharth Nandwani**Counsel for Respondent :-** Dr. Azhar Ikram**Hon'ble Rajan Roy, J.**

This second appeal under Section 58 of the Real Estate (Regulation and Development) Act, 2016 (hereinafter referred to as 'the Act, 2016') was admitted by this Court vide order dated 06.02.2019 on the following substantial questions of law:-

“(1) Whether in the light of Section 43(1) read with proviso to said Section, the Designated Appellate Tribunal can continue to function even after the period of one year from the date of coming into force the Real Estate (Regulation and Development) Act, 2016 ?

(2) Whether the appointment of the Chairperson and three whole time members of the Appellate Tribunal under Section 45 of the Real Estate (Regulation and Development) Act 2016 have the effect of establishment of an Appellate Tribunal under Section 43(1) of the Real Estate (Regulation and Development) Act, 2016 ?

(3) Whether order passed by the Designated Appellate Tribunal as provided under proviso to Section 43(5) of the Real Estate (Regulation and Development) Act, 2016 could have been passed even after it became coram non judis ?

By the same order the designated Appellate Tribunal was restrained from proceeding with the appeal in question.

A similar connected second appeal bearing No. 364 of 2018; Radicon Infrastructure and Housing Private Limited Vs. Kara Dhyani has been decided today by a separate judgment.

Heard Shri Siddharth Nandwani, learned counsel for the appellant and Dr. Azhar Ikram, learned counsel for the respondent no. 1.

The facts of the case in brief are that the respondent no. 1-Karan Dhyani had booked a flat with the appellant- promoter/ builder way back on 31.03.2013 and was allotted a flat bearing No. 1706 in Tower- A in the project, namely, 'Vedanta' located at Plot No. 1B, Sector- 16C, Greater Noida, U.P. On account of a dispute having arisen in this regard a complaint was preferred by the respondent no. 1 before the U.P. Real Estate Regulatory Authority, inter alia, praying for waiver of inappropriate late payment, interest penalty, possession charge and flat transfer charge levied by the Builder and delay possession penalty @ 24% per annum. The Regulatory Authority decided the matter on 25.06.2018 and ordered the appellant to deliver possession of the apartment and to pay 24% interest from 27.04.2015 till the date of possession on the deposited amount. As regard compensation the complainant was given liberty to initiate proceedings under Section 71 of the Act, 2016. It was also provided that if the amount as aforesaid is not deposited it would be a punishable offence under Section 63 of the Act, 2016 and that the due amount would be liable to be recovered under Section 40(1). Being aggrieved the appellant herein preferred a First Appeal before the Appellate Tribunal. Now, in this context it is relevant to mention that under the Act, 2016 the Real Estate Appellate Tribunal is to be constituted under Section 43(1) of the Act, 2016. Section 44(1) contains a provision for preferring an appeal to the Appellate Tribunal against an order or decision of the Authority or Adjudicating Officer under the Act, which would include the Regulatory Authority, within a period of 60 days from the date on which a copy of such order or decision is received, although, such appeal can also be entertained after 60 days if the Appellate Tribunal

is satisfied that there was sufficient cause for not filing it within that period.

In this case a Notification was issued on 22.09.2018 appointing the Chairman and three Members of the Appellate Tribunal purportedly under Section 46 of the Act, 2016, although, by then no notification had been issued for establishment of the Appellate Tribunal known as the 'Real Estate Appellate Tribunal' under Section 43(1), therefore, the Chairman and Members did not function as such. Prior to it, that is, on 24.01.2018, the appropriate Government issued a Notification under the proviso to Section 43(4) designating 'Uttar Pradesh Estate Transport Appellate Tribunal' to hear the appeals under the Act, 2016 until the establishment of the U.P. Real Estate Appellate Tribunal. The Tribunal itself was established subsequently by a Notification published in the Gazette on 27.02.2019, a copy of which has been placed before the Court and has been kept on record, meaning thereby, the Chairman and Members were appointed earlier but the Tribunal itself was established subsequently. Be that as it may, on 30.03.2019 another Notification was issued by the appropriate Government to the effect that the three persons who were appointed earlier as Members of Real Estate Appellate Tribunal would be authorized to hear the appeals with immediate effect. Needless to say that in the interregnum the designated Appellate Tribunal i.e. U.P. Estate Transport Appellate Tribunal continued to hear the appeals. It is in these circumstances that the impugned order dated 22.11.2018 was passed by the designated Appellate Tribunal.

In the light of the substantial questions of law already framed by this Court the contention of Shri Siddharth Nandwani, learned counsel for the appellant is that the Chairman and Members of the Real Estate Appellate Tribunal having been appointed on 22.02.2019 the subsequent establishment of the Tribunal by Notification dated 27.02.2019 has to relate back to the appointment of the Chairman and Members, therefore, the 'Designated Appellate Tribunal' did not have jurisdiction to pass the

impugned order dated 22.11.2018 in view of the proviso to Section 43(4), as, the designation of the designated Tribunal is only until the establishment of an Appellate Tribunal under Section 43(1). Once the order dated 22.09.2018 had been issued, the delegated Appellate Tribunal ceased to have power to decide the appeals, as such, the impugned order dated 22.11.2018 is without jurisdiction. He also invited the attention of the Court to the second proviso to Section 43(4) by which once the Real Estate Appellate Tribunal has been established all matters pending before the designated Appellant Tribunal shall stand transferred to the former which shall be competent to hear the same, therefore, for this reason also the impugned order could not have been passed by the designated Appellate Tribunal.

He also submitted that in view of the use of the word 'shall' in Section 43(1) the Appellate Tribunal was mandatorily required to be established within one year and as Section 43 came into force w.e.f. 01.05.2016 in pursuance to a Notification issued in this regard on 26.04.2016 annexed as Annexure No. 11 and the Appellate Tribunal had not been established by 01.05.2017, therefore, it could not have been established and in any case in this scenario the designated Tribunal could not have functioned.

On the other hand Dr. Azhar Ikram, learned counsel for the respondent no. 1 contends that this issue has already been decided by a Division Bench of this Court vide judgment dated 17.09.2018 passed in Writ- C No. 31085 of 2018; M/s Gardenia Aims Developers Pvt. Ltd. Vs. State of U.P. and Ors., wherein it had been held that Section 43 of the Act prescribes a time of one year for establishment of the Tribunal but the proviso to the said Section says that till such time regular Tribunal is established the State Government will have power to designate any other existing Tribunal to hear the appeals. The Court held that in the said case the State Government by an order dated 24.01.2018 had designated the U.P. State Transport Appellate Tribunal as the Tribunal to hear the appeals

and the proviso does not prescribe any time limit for functioning of the designated Tribunal, which says that the said designated Tribunal will function till such time a regular Tribunal is established and as the regular Tribunal had not been established till 17.09.2018, the designated Tribunal had jurisdiction. Dr. Azhar Ikram, learned counsel for the respondent no. 1 submitted that merely because the word 'shall' had been used in Section 43(1) it would not mean that if the Appellate Tribunal is not established by the appropriate Government within one year then it would never be appointed and that this would frustrate the objects of the matter.

Having heard the learned counsel for the parties and perused the records, considering the substantial question of law at Serial No. 1 referred hereinabove this Court is of the opinion that the Act, 2016 was formulated for regulation and promotion of the real estate sector and to ensure sale of plot, apartment or building, as the case may be, or sale of real estate project, in an efficient and transparent manner and to protect the interest of consumers in the real estate sector and to establish an adjudicating mechanism for speedy dispute redressal and also to establish the Appellate Tribunal to hear appeals from the decisions, directions or orders of the Real Estate Regulatory Authority and the adjudicating officer and for matters connected therewith or incidental thereto, as, is evident from its long title, the Statement and Objects and Reasons of the Act, 2016 also are to the same effect.

Section 43 of the Act, 2016 reads as under:-

***“43. Establishment of Real Estate Appellate Tribunal. -
(1) The appropriate Government shall, within a period of one year from the date of coming into force of this Act, by notification, establish an Appellate Tribunal to be known as the - (name of the State/Union territory) Real Estate Appellate Tribunal.***

(2) The appropriate Government may, if it deems necessary, establish one or more benches of the Appellate

Tribunal, for various jurisdictions, in the State or Union territory, as the case may be.

(3) Every bench of the Appellate Tribunal shall consist of at least one Judicial Member and one Administrative or Technical Member.

(4) The appropriate Government of two or more States or Union territories may, if it deems fit, establish one single Appellate Tribunal:

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

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

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

Provided that where a promoter files an appeal with the Appellate Tribunal, it shall not be entertained, without the promoter first having deposited with the Appellate Tribunal at least thirty percent 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.”

No doubt Section 43(1) provides that the appropriate Government shall, within a period of one year from the date of coming into force of the

Act, 2016 by notification, establish an Appellate Tribunal to be known as the - (name of the State/Union territory) Real Estate Appellate Tribunal but the question is, should the provision be read and understood to mean that in the event such Appellant Tribunal is not established within one year then because of use of the word 'shall' therein the appropriate Government can not appoint the Tribunal at all ?, would it be a correct and reasonable understanding of the provision keeping in mind the object of the Act, 2016 and its scheme ? Would it not frustrate the very object of the Act ? It is well settled that the meaning of a provision is not to be understood merely by the use of the word 'shall' or 'may'. It would have to be interpreted in the light of the settled principles, and while ensuring that intent of the Rule is not frustrated. It will always depend upon the facts of a given case, the conjunctive reading of the relevant provision along with other provisions of the Rules, the purpose sought to be achieved and the object behind implementation of such a provision. Reference may be made in this regard to the decision of the Supreme Court reported in **(2010) 11 SCC 500; Dinesh Chandra Pandey Vs. High Court of Madhya Pradesh and Anr.**

Reference may also be made in this regard to another decision of the Supreme Court rendered in the case of **Mohan Singh and Ors. Vs. International Airport Authority of India and Ors.** reported in **(1997) 9 SCC 132** wherein it was held in Paragraph 26 - "The word "shall" though prima facie gives impression of being mandatory character, it requires to be considered in the light of the intention of the legislature by carefully attending to the scope of the statute, its nature and design and the consequences that would flow from the construction thereof one way or the other. In that behalf, the Court is required to keep in view the impact on the profession, necessity of its compliance; whether the statute, if it is avoided, provides for any contingency for non-compliance; if the word "shall" is construed as having mandatory character, the mischief that would ensue by such construction; whether the public convenience would

be subserved or public inconvenience or the general inconvenience that may ensue if it is held mandatory and all other relevant circumstances are required to be taken into consideration in construing whether the provision would be mandatory or directory. If an object of the enactment is defeated by holding the same directory, it should be construed as mandatory whereas if by holding it mandatory serious general inconvenience will be created to innocent persons of general public without much furthering the object of enactment, the same should be construed as directory but all the same, it would not mean that the language used would be ignored altogether. Effect must be given to all the provisions harmoniously to suppress public mischief and to promote public justice.”

In the same case it was held that language is the medium of expressing the intention and the object that particular provision of the Act seeks to achieve. Therefore, it is necessary to ascertain the intention. The word ‘shall’ is not always decisive. Regard must be had to the context, subject matter and object of the statutory provision in question in determining whether the same is mandatory or directory.

The Court in *Mohan Singh’s case* (supra) referred to *Maxwell on the Interpretation of Statutes, 10th Edition in Para 318* wherein it has been opined that where the prescriptions of a statute relate to the performance of a public duty and where the invalidation of the acts done in neglect of them would work serious general inconvenience or injustice to persons who have no control over those entrusted with the duty without promoting the essential aims of the legislature, such prescriptions seem to be generally understood as mere instructions for the guidance and government of those on whom the duty is imposed, or, in other words, as directory only. The neglect of them may be penal, indeed, but it does not affect the validity of the act done in disregard of them.

In this regard reference may be made to the opinion of *de Smith* in his Book *Judicial Review* 6th Edition in this regard as referred in a Full

Bench decision of this Court in the case of *Vikas Trivedi Vs. State of U.P. and Ors.* reported in **(2013) 2 UPLBEC 1193**, wherein it has been observed that “a second reason for the tangle in this area is the use of the terms “mandatory” and “directory”; the latter term is especially misleading. All statutory requirements are prima facie mandatory. However, in some situations the violation of a provision will, in the context of the statute as a whole and the circumstances of the particular decision, not violate the objects and purpose of the statute. Condoning such a breach does not, however, render the statutory provision directory or discretionary. The breach of the particular provision is treated in the circumstances as not involving a breach of the statute taken as a whole. Furthermore, logically, a provision cannot be mandatory if a Court has discretion not to enforce it.”

Reference may also be made to the decision of the Supreme Court in the case of *Rani Drigraj Kuer Vs. Amar Krishan Narain Singh* reported in **AIR 1960 SC 444** wherein it was held that a provision giving a discretionary power leaves the donee of the power to use or not to use it at his discretion. A directory provision however gives no discretionary power free to do or not to do the thing directed. A directory provision is intended to be obeyed but a failure to obey it does not render a thing duly done in disobedience of it, a nullity.

Further, the Full Bench in *Vikas Trivedi's case* (supra) considered the aforesaid dictum and held that all provisions of the statute are required to be complied but the Court has to look into as to whether there is substantial compliance of the provision, meaning thereby, if there was substantial compliance the omission in regard to a mandatory provision shall not vitiate the action. Thus, the test of substantial compliance was applied.

Thus, merely because the appropriate Government failed in the performance of its public duty under Section 43(1) to establish the Tribunal within one year it does not invalidate its subsequent

establishment, as, if it is held to be so, it would work serious general inconvenience and/or injustice to persons who had no control over those entrusted with the duty and would defeat the object of the Act which is inter alia to protect the interest of consumers in the Real Estate Sector.

Reference may also be made in this regard to the decision of the Supreme Court in the case of *Raza Buland Sugar Company Ltd. Vs. Municipal Board, Rampur* reported in *AIR 1965 SC 895* wherein it was held that that requirement of Section 131(3) of the Municipalities Act, 1960 regarding publication of resolution was mandatory, however, the manner of publication as prescribed in Section 94(3) was not mandatory and sufficient compliance of the said provision would suffice.

The Court may refer to another decision reported in *(1984) 2 SCC 486; Dalchand Vs. Municipal Corporation, Bhopal and Anr.*, wherein it has been held that the negligence of those to whom public duties are entrusted cannot by statutory interpretation be allowed to promote public mischief and cause public inconvenience and defeat the main object of the statute. It is as well to realise that every prescription of a period within which an act must be done, is not the prescription of a period of limitation with painful consequences if the act is not done within that period.

In view of the above discussion, though, Section 43(1) which contains a mandate to appoint a Real State Tribunal is mandatory as is evident from the use of the word “shall” therein, the period of one year prescribed therein for establishing the Tribunal has to be treated as directory which does not mean that the appropriate Government is not obliged to adhere to the said time limit but only that if in a given situation the Tribunal is appointed after the expiry of the period of one year mentioned therein this by itself would not render the establishment of the Tribunal void or liable to be struck down. Thus, the word ‘shall’ indicates the mandatory nature of the provision so far as the establishment of the Real State Appellate Tribunal is concerned but not with regard to the period mentioned therein which is to be treated as directory as aforesaid.

The period of one year prescribed in Section 43(1) is indicative of the urgency and importance attached by the legislature to establishment of the Tribunal at the earliest which does not mean that it can not be established after one year.

In the present case as already stated hereinabove, no doubt under Section 43(1) the appropriate Government is obliged to establish the Appellate Tribunal within one year from the date of commencing into force of the Act, 2016 and any observation made hereinabove or hereinafter does not in any manner takeaway the obligation of the appropriate Government to establish the Tribunal within the aforesaid period. All that is being said is that merely because it has not been so established within one year it would be highly unreasonable and against the grain of the Act, 2016 as also its object to say that now it can not be established. While the statutory obligation of the appropriate Government remains, the fact that the appropriate Government failed to appoint the Real Estate Tribunal within one year would not mean that any decision taken by such Tribunal or the designated Appellate Tribunal would have to be quashed, as, it would frustrate the very object of the Act and this is all the more for the reason, though, the word “shall” has been used in Section 43(1) of the Act, 2016 it does not mention any penal/fatal consequences for non observance of the provisions contained in Section 43(1).

Now, so far as the ‘Designated Appellate Tribunal’ is concerned, it is not in dispute that it was constituted on 24.01.2018 by Notification under the Act, 2016. Here also the same analogy would apply as has been applied in the case of establishment of ‘Real Estate Appellate Tribunal’, meaning thereby, in the normal course of things, the ‘Designated Appellate Tribunal’ should also have been appointed within one year of coming into force of the Act, 2016 and the statutory obligation of the appropriate Government in this regard is not diluted in any manner but

merely because this was not done, the acts and decisions of the 'Designated Appellant Tribunal' can not be invalidated.

As regards the entitlement of the 'Designated Appellate Tribunal' to continue to function even after the period of one year from the date of coming into force of the Act, 2016, from what has been stated hereinabove it follows as a logical legal corollary that it would certainly be entitled to continue even after the expiry of period of one year from the date of coming into force of the Act, 2016, as otherwise, there would be chaos and as already stated the very object and scheme of the Act, 2016 would be frustrated. Having said so the Court once again reiterates that in the normal course the establishment of the Tribunal should be made by the appropriate authority within one year as aforesaid and till then the designated Appellate Tribunal should function but in a given case as the present one, if this was not done, merely because of this, the orders passed by the 'Designated Appellate Tribunal' or the Appellate Tribunal can not be held to be vitiated. Question no. 1 is answered accordingly.

Now, coming to question no. 2 the appropriate Government proceeded to appoint the Chairman and Members of the Real Estate Appellate Tribunal without establishing the Tribunal in the first place. In normal course of things first of all the appropriate Government should have established the Appellant Tribunal under Section 43(1) and thereafter, the Members should have been appointed, however, the Court is unable to accept the argument of Shri Nandwani, learned counsel for the appellant that the subsequent Notification under Section 43(1) establishing the Tribunal on 27.02.2019 should be read and applied retrospectively w.e.f. 22.09.2018 when its Chairman and Members were appointed. In fact, it should be just the other way round, otherwise it would amount to putting the cart before the horse. The Tribunal having been constituted on 27.02.2019 the appointment of its Chairman and Members although on a preceding date i.e. on 22.09.2018 will have to be treated as valid and effective from 27.02.2019 or from 30.03.2019 when

another notification was issued by the appropriate Government authorizing them to function as Members of the said Tribunal, meaning thereby, the error committed by the appropriate Government was rectified subsequently on 30.03.2019 when the subsequent notification authorizing them to function as aforesaid was issued, a copy of which has been placed before the Court by the learned counsel for the appellant and is taken on record.

It is also worthwhile to mention that during the period 22.09.2018 to 27.02.2019/30.03.2019, the Chairman and Members of the Real Estate Appellate Tribunal did not function nor did they decide any matter obviously for the reason that the Tribunal itself had not been established. There is no dispute about this fact.

In view of the above discussion, it is held that the appointment of Chair Person and three whole time Members of the Real Estate Tribunal on 22.09.2018 does not have the effect of establishment of the Tribunal as this could only be by a notification under Section 43 and not under Section 46. The establishment of the Tribunal is only w.e.f. 27.02.2019 when a notification was issued under Section 43 and the effective appointment and functioning of the Chairman and Members, as the case may be, is to be treated only from 30.03.2019 and not prior to it, therefore, the functioning of the 'Designated Appellate Tribunal' is valid till 30.03.2019. The question no. 2 is answered accordingly.

In view of the answer given by the Court to question no.1 and 2, it cannot be said that in the facts and circumstances of the case, the designated appellate tribunal became coram-non-judice and could not have passed the impugned order dated 22.11.2018. It could have passed it. Question no.3 is answered accordingly.

At the time of hearing the learned counsel for the appellant, in addition to these three substantial questions of law framed by the Court earlier prayed that another substantial question of law be framed with

regard to the apparent non-application of mind by the designated appellate tribunal in ordering the appellant to deposit the entire amount deposited by the allottee with interest @ 25% per annum on the entire deposited amount with effect from 27.4.2015 when the judgment of the Regulatory Authority which is under challenge before the Appellate Tribunal did not so order and it only ordered to hand over the possession of the flat (which according to the appellant has been offered but is being denied by the learned counsel for the respondent no.1) and till such handing over of possession interest on the deposited amount with effect from 27.4.2015 till the date of possession was ordered, meaning thereby, the entire deposited amount was not required to be deposited under the order of the Regulatory authority, therefore, it could not have been directed to have been deposited under the proviso to Section 43 (5) .

On this issue, learned counsel for the respondent no.1 fairly conceded that to this limited extent the order of the appellate tribunal is bad. In view of this no substantial question of law arises on this aspect and the appellate tribunal should not insist on the deposit of the entire amount deposited by the allottee with the appellant- company against the allotted flat in question with interest @24% per annum on such amount with effect from 27.4.2015. The appellant shall, however, deposit the interest payable under the order of the Regulatory Authority before the Appellate Tribunal before the appeal is entertained. The impugned order is modified to this extent with the consent of the parties. The aforesaid interest shall be deposited with effect from 27.4.2015 till the date of passing of this order as the appellant has admittedly not deposited the said amount. In the context of the interest imposed by the Regulatory Authority the learned counsel for the respondent no.1 has relied upon Section 2-(Z) (A) to contend that the interest imposed was imposable as the appellant himself proposed to charge interest on the same rate as imposed by the Regulatory Authority, however, this is not an issue to be adjudicated by this Court but for the Appellate Court to consider.

For these reasons while the appeal fails on the substantial questions of law which have been answered hereinabove, in practical terms, the impugned order stands modified as aforesaid. Subject to the above, the second appeal is **dismissed**.

Interim order stands discharged.

Order Date :- 26.07.2019

R.K.P./mks

(Rajan Roy,J.)