

**REAL ESTATE APPELLATE TRIBUNAL
JAIPUR, RAJASTHAN**

(Designated vide Government Notification No.F.10(132)/UDH/3/2009 dated 15.05.2017)

(1) APPEAL NO.RAJ-RERA-C-2018-2370

Jain Realtors (P) Ltd., New Delhi through Director Suresh Chand Jain. D-3, Himalaya Apartment, Plot No.10, Sector-22, Dwarka, Delhi-110077.

---APPELLANT

VERSUS

1. The Registrar of Real Estate Regulatory Authority, Jaipur, Rajasthan.
2. State of Rajasthan through Principal Secretary, Urban Development and Housing Department, Government of Rajasthan, Secretariat, Jaipur.
3. The Commissioner, Jaipur Development Authority.

---RESPONDENTS

(2) APPEAL NO.RAJ-RERA-C-2018-2462

Narain Builders and Developers, 102, First Floor, Corporate Park, Gopal Bari, Ajmer Road, Jaipur through its Authorized Signatory Shri Ashok Jain.

---APPELLANT

VERSUS

1. Real Estate Regulatory Authority, Rajasthan (RERA) through its Registrar, Nagar-Niyojan Bhawan, JLN Marg, Jaipur.
2. Nischal Jain S/o Shri Purshottam Lodha, R/o 4-GA-18, Jawahar Nagar, Jaipur-302004.

---RESPONDENTS

Present :-

Shri Tanveer Ahmed and Pancham Surana, Advocates on behalf of appellants.

Shri Shashwat Purohit, Advocate on behalf of JDA

Shri Prakul Khurana and Shri Kundan Singh Rathore, Advocates on behalf of intervener CREDAI.

None appeared on behalf of Respondent No.2 State of Rajasthan

Shri Pawan Gupta on behalf of respondent No.2 Nischal Jain.

ORDER

Date :-09.10.2018

Nub of the matter is that Jaipur Development Authority (hereinafter will be referred as "JDA") launched a scheme in the year 2006. Appellant firm purchased a piece of land in GH-2 Ratliya Scheme for development of Group Housing Scheme. It is stated that Rs.4,17,91,814/- Four Crore Seventeen Lakhs ninety one thousand eight hundred fourteen only) was deposited by the appellant to the JDA. However, the appellant could not get proper documents of transfer of piece of land in their favour by the JDA for the various reasons.

2. It is stated that the appellant/petitioner also preferred a writ petition before the Hon'ble Rajasthan High Court Bench at Jaipur i.e. SB Civil Writ Petition No.13781/2008 (appellant has submitted an undertaking to withdraw the same). Since there was no authority to regulate the real estate business, therefore, appellant was unable to resolve their differences with JDA before a proper forum.
3. However, after coming into force, the Real Estate Regulation and Development Act, 2016 (hereinafter will be referred as "Act of 2016"). Appellant preferred a complaint before the Rajasthan Real Estate Regulatory Authority, Jaipur (hereinafter will be referred as "RERA, Jaipur"). The same was dismissed on the ground that the matter is sub-judice before the Hon'ble Rajasthan High Court Bench at Jaipur. It was also conveyed to the appellant by the RAJ-RERA vide their letter dated 9.5.2018 that, if, petitioner is not satisfied with the order of the authority, petitioner may prefer an appeal before the Rajasthan Real Estate Appellate Tribunal.

Hence this Appeal is preferred.

4. Preliminary objection was raised by the respondent No.3 JDA, that, their project under scrutiny is not registered before the RAJ-RERA, therefore, this Appellate Tribunal have no jurisdiction to hear this appeal.
5. It was also stated that the project under scrutiny is not required to be registered as per explanation appended to rule 4 of the Rajasthan Real Estate Regulation and Development Rules, 2017 (hereinafter will be referred as "Rules of 2017").
6. It was stated by the appellant that the project is required to be registered before the RAJ-RERA. Rule 4 is contrary to the provisions of section 3 of the Act of 2016; Therefore, not applicable in this case. Provisions of section 3 of the Act of 2016 will prevail over Rules of 2017.
7. It was also stated tha, irrespective of the fact that a project is registered with RAJ-RERA or not; a complaint is maintainable under the Act of 2016 against the promoter.
8. Confederation of Real Estate Development Association (CREDAI) submitted an application to intervene in the matter, same was allowed on 01.08.2018.

9. In Appeal No. RAJ-RERA-C-2018-2370, similar point has been raised by the appellant. Therefore, on 14.8.2016 following points for determination were framed as preliminary objections:-
 - (1) Whether provisions of rule 4 of the Rules of 2017 are in conflict and divergent with the provisions of Section 3 of the Act of 2016?
 - (2) If yes, whether provisions of Rule 4 of the Rules of 2017 shall prevail over provisions of Section 3 of the Act of 2016.
 - (3) Whether Section 84 of the Act of 2016 empowers appropriate government to make such rules divergent to the provision (s) of the Act of 2016?
10. Notice of hearing issued to the respondent No.2 i.e., State of Rajasthan through Principal Secretary, Urban Development & Housing, Rajasthan, Jaipur. However, none appeared on behalf of State of Rajasthan, despite service of notice.
11. Arguments heard and also perused written submissions submitted by the parties.

Relevant provisions of law scanned meticulously.
12. Shri Shashwat Purohit, learned Advocate for JDA would argue that on-going project have not been defined by the Act of 2016, therefore, it was necessary to define on-going project.
13. Appropriate Government in exercise of powers conferred under section 84 of the Act of 2016 made Rules of 2017.
14. Rule 4 of the Rules of 2017 defines the on-going project and also excludes certain projects from the ambit of on-going projects.
15. It was stated by the learned Counsel that the project under scrutiny is excluded in terms of explanation 6 of the rule 4 of Rules of 2017.
16. Promoter JDA submitted certain lease deed of plots as a proof thereof. Copy of the lease deed executed in favour of M/s Unique Developers Pvt. Ltd., for 2.2.2008 is also enclosed and marked as Annexure-1.
17. It was vehemently argued by the learned Counsel that, this project is not on-going project and not liable to be registration under section 3 of the Act of 2016.
18. It was further argued by the learned Counsel that the Hon'ble Bombay High Court has held in Case

No.2737/2017 that "**authority concerned would be dealing with the cases coming before it registered under RERA**". Therefore, the provisions of RERA are applicable only in cases, where projects are registered under the RERA.

19. Shri Shashwat Purohit, learned Counsel for JDA would further argue that this Tribunal do not have competence to examine the vires of the Rules of 2017.
20. It was further argued that there is no conflict in between section 3 of the Act of 2016 and rule 4 of the Rules of 2017.
21. Though, it was fairly admitted by the learned Counsel that in case of conflict between section 3 of the Act and rule 4 of the Rules of 2017 provisions of section 3 of the Act of 2016 will prevail. But there is no conflict between the provisions of section 3 of the Act of 2016 and Rules of 2017 in the opinion of the learned Counsel.
22. No challenge can be made on the ground of Constitutional validity of the legislation before this Tribunal. Rules of 2017 are enacted to supplement the provisions of the Act of 2016, hence will be presumed to be intra vires unless the competent Court declares the provisions of this subordinate legislation ultra vires.
23. Shri Shashwat Purohit, the learned counsel for JDA would further argue that Section 84 of the Act of 2016 conferred power to make rules on the appropriate Government. Clause-A to ZE of sub-section 2 of section 84 provides specific subject matters for which the appropriate Government is supposed to make rules.
24. Shri Prakul Khurana and Shri Kundan Singh Rathore, learned counsels for CREDAI adopted submissions made by Shri Sharashwat Purohit, learned counsel for JDA.
25. However, it was reiterated that this Tribunal have no jurisdiction to decide the legality of subordinate legislation.
26. The learned counsels further argued that the statement of object and reasons of the Act of 2016 clearly states that, it attempts to balance the interest of both consumer and the promoter by imposing certain responsibility on both.

27. Keeping in view the intention and object of the Act of 2016 provisions under section 3 of the Act of 2016 should be interpreted.
28. *The learned counsel would argue that by placing the word "and" between on-going and completion certificate has not been issued clarifies the intention of the legislation; that, it should fulfil both the condition to bring the project within the purview of registration.*
29. It was vehemently argued that, if project is complete in all respect and completion certificate is not obtained or issued for any reason, then also the project is not required to be registered and such project can be deemed to be completed as clarified by the rules of 2017.
30. If, promoter has not obtained completion certificate, then concerned Department have liberty to proceed against such promoter, but it cannot be said that the project is on-going project.
31. It was stated by learned counsel that, Act of 2016 cannot be used to ensure compliance of other Acts eg. Municipal Act.
32. The learned counsel for the appellant in Appeal No.2462-2018 also adopted submissions made on behalf of JDA and CREDAI.
33. Whereas, Shri Tanveer Ahmad, learned Counsel for appellant in Appeal No.2370-2018 would submit that provisions of rule 4 of the Rules of 2017 are in conflict with provisions of section 3 of the Act of 2016. Since, the Rules of 2017 are framed in exercise of power conferred by section 84 of the Act of 2016, therefore, appropriate government do not have competence to make such rule(s) which are contrary to the provisions of the principal Act.
34. It was further submitted by the learned counsel that without ignoring and disobeying the provisions of section 3 of the Act of 2016 the provisions of Rule 4 of the Rules of 2017 cannot be made effective.
35. As per the learned counsel, this Tribunal in its appellate jurisdiction can examine the validity of the subordinate legislation. If not, then also doctrine of repugnancy shall apply in this case and the provisions of Section 3 of the Act of 2016 shall prevail over the provisions of Rule 4 of the Rules of 2017.
36. It was submitted by the learned counsel that Section 3 of the Act of 2016 only speaks of projects which

are required to be registered. But, to say that only registered projects under the Act of 2016 are amenable to the jurisdiction of RERA is not legally correct.

37. Learned counsel would, therefore, argue that, even after completion of the project and after obtaining the certificate of completion of project; complaint can be made against the promoter before the RERA for compliance of contractual obligations as envisaged in Section 11 of the Act of 2016.

38. **Points for determination:**

- (1) Whether provisions of rule 4 of the Rules of 2017 are in conflict and divergent with the provisions of Section 3 of the Act of 2016?
- (2) If yes, whether provisions of Rule 4 of the Rules of 2017 shall prevail over provisions of Section 3 of the Act of 2016.
- (3) Whether Section 84 of the Act of 2016 empowers appropriate government to make such rules divergent to the provision (s) of the Act of 2016?

39. **Decision:**

- (1) Provisions of Rule 4 of the Rules of 2017 are in conflict with the provisions of section 3 of the Act of 2016.
- (2) Provisions of section 3 of the Act of 2016 will prevail over the provisions of rule 4 of the Rules of 2017
- (3) Appropriate Government do not have competence under section 84 of the Act of 2016 to make such rules which are in conflict (divergent) to the provisions of the Act of 2016.

Reasons for decision:

40. It is necessary to understand the scheme of the Act of 2016. Statement of objects and reasons of the Act of 2016 are as under:-

- (1) The real estate sector plays a catalytic role in fulfilling the need and demand for housing and infrastructure in the country. While this sector has grown significantly in recent years, it has been largely unregulated, with absence of professionalism and standardisation and lack of adequate consumer protection. Though the Consumer Protection Act, 1986 is available as a forum to the buyers in the real estate market, the recourse is only curative and is not adequate to address all the concerns of buyers and promoters in that sector. The lack of standardisation has been a constraint to the healthy and orderly growth of industry. Therefore, the need for regulating the sector has been emphasised in various forums.

- (2) In view of the above, it becomes necessary to have a Central legislation, namely, the Real Estate (Regulation and Development) Bill, 2013 in the interest of effective consumer protection, uniformity and standardisation of business practices and transitions in the real estate sector. The proposed Bill provides for the establishment of the Real Estate Regulatory Authority (the Authority) for regulation and promotion of real estate sector and to ensure sale of plot, apartment or building, as the case may be, in an efficient and transparent manner and to protect the interest of consumers in real estate sector and establish the Real Estate Appellate Tribunal to hear appeals from the decisions, directions or orders of the Authority.
- (3) The proposed Bill will ensure greater accountability towards consumers, and significantly reduce frauds and delays as also the current high transaction costs. It attempts to balance the interest of consumers and promoters by imposing certain responsibilities on both. 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 mechanism. The proposed Bill will induct professionalism and standardisation in the sector, thus paving the way for accelerated growth and investment in the long run.
- (4) The Real Estate (Regulation and Development) Bill, 2013, inter alia, provides for the following, namely:-
- (a) *to impose an obligation upon the promoter not to book, sell or offer for sale, or invite persons to purchase any plot, apartment or building, as the case may be, in any real estate project without registering the real estate project with the Authority;*
 - (b) *to make the registration of real estate project compulsory in case where the area of land proposed to be developed exceed one thousand square meters or number of apartments proposed to be developed exceed twelve;*
 - (c) *to impose an obligation upon the real estate agent not to facilitate sale or purchase of any plot, apartment or building, as the case may be, without registering himself with the Authority;*
 - (d) *to impose liability upon the promoter to pay such compensation to the allottees, in the manner as provided under the proposed legislation, in case if he fails to discharge any obligations imposed on him under the proposed legislation;*
 - (e) *to establish an Authority to be known as the Real Estate Regulatory Authority by the appropriate Government, to exercise the power conferred on it and to perform the functions assigned to it under the proposed legislation;*
 - (f) *the functions of the Authority shall, inter alia, include - (i) to render advice to the appropriate Government in matters relating to the development of real estate sector; (ii) to publish and maintain a website of records of all real estate projects for which registration has been*

- given, with such details as may be prescribed;
(iii) to ensure compliance of the obligations case upon the promoters, the allottees and the real estate agents under the proposed legislation;
- (g) to establish an Advisory Council by the Central Government to advice and recommended the Central Government on – (i) matters concerning the implementation of the proposed legislation; (ii) major questions of policy (iii) protection of consumer interest; (iv) growth and development of the real estate sector;
 - (h) to establish the Real Estate Appellate Tribunal by the appropriate Government to hear appeals from the direction, decision or order of the Authority or the adjudicating officer;
 - (i) to appoint an adjudicating officer by the Authority for adjudging compensation under section 13, 14 and 16 of the proposed legislation;
 - (j) to make provision for punishment and penalties for contravention of the provisions of the proposed legislation and for non-compliance of orders of Authority or Appellate Tribunal;
 - (k) to empower the appropriate Government to supersede the Authority on certain circumstances specified in the proposed legislation;
 - (l) to empower the appropriate Government to issue directions to the Authority and obtain reports and returns from it.

41. **Preamble of the Act of 2016 reads, as under:-**
An Act to establish the Real Estate Regulatory Authority 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 and 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

42. **Definitions relevant for decisions are as under:-**

Section 2 (q): "Completion certificate" means the completion certificate, or such other certificate, by whatever name called, issued by the competent authority certifying that the real estate project has been developed according to the sanctioned plan, layout plan and specifications, as approved by the competent authority under the local laws.

(zj) "project" means the real estate project as defined in clause (zn);

(zn) "real estate project" means the development of a building or a building consisting or 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;

(zr) words and expressions used herein but not defined in this Act and defined in any law for the time being in force or in the municipal laws or such other relevant laws of the

appropriate Government shall have the same meaning respectively assigned to them in those laws.

Section-11: Functions and duties of promoter-

(1)

(2)

(3)

(4) The promoter shall-

(a) *Be responsible for all obligations, responsibilities and functions under the provisions of this Act or the rules and regulations made thereunder of allottees as per the agreement for sale, or to the association of allottees, as the case may be, till the conveyance of all the apartments, plots or buildings, as the case may be, to the allottees or the common areas to the association of allottees or the competent authority, as the case may be:*

Provided that the responsibility of the promoters, with respect to the structural defect or any other defect for such period as is referred to in sub-section (3) of section 14, shall continue even after the conveyance deed of all the apartments, plots or buildings, as the case may be, to the allottees are executed.

(b) *be responsible to obtain the completion certificate or the occupancy certificate, or both, as applicable, from the relevant competent authority as per local laws or other laws for the time being in force and to make it available to the allottees individually or to the association of allottees, as the case may be;*

Section 20. Establishment and incorporation of Real Estate Regulatory Authority-

(1) *The appropriate Government shall, within a period of one year from the date of coming into force of this Act, by notification, establish an Authority to be known as the Real Estate Regulatory Authority to exercise the powers conferred on it and to perform the functions assigned to it under this Act.*

(.....) "

Section-31. Filing of complaints with the Authority or the adjudicating officer-

(1) *Any aggrieved person may file a complaint with the Authority or the adjudicating officer, as the case may be, for any violation or contravention of the provisions of this Act or the rules and regulations made thereunder against any promoter allottee or real estate agent, as the case may be. (.....)"*

Section-34. Functions of Authority-

The functions of the Authority shall include.

(a) *To register and regulate real estate projects and real estate agents registered under this Act;*

(b) *To publish and maintain a website records, for public viewing, of all real estate projects for which registration has been given, with such detail as may be prescribed, including information provided in the application for which registration has been granted.*

(c) *To maintain a database, on its website, for public viewing, and enter the names and photographs of promoters as defaulters including the project details, registration for which has been revoked or have been penalised under this Act, with reasons therefor, for access to the general public;'*

(d) *To maintain a database, on its website, for public viewing, and enter the names and photographs of real estate agents who have applied and registered under this Act, with such details as may be prescribed, including those whose registration has been rejected or revoked.*

- (e) To fix through regulations for each areas under its jurisdiction the standard fees to be levied on the allottees or the promoters or the real estate agent, as the case may be;
- (f) To ensure compliance of the obligations cast upon the promoters, the allottees and the real estate agents under this Act and the rules and regulations made thereunder;
- (g) To ensure compliance of its regulations or orders or directions made in exercise of its powers under this Act;
- (h) To perform such other functions as may be entrusted to the Authority by the appropriate Government as may be necessary to carry out the provisions of this Act.

Section-37: Powers of Authority to issue directions-

The Authority shall have powers to impose penalty or interest, in regard to any contravention of obligations cast upon the promoters, the allottees and the real estate agents, under this Act or the rules and regulations made thereunder.

Section-44: Application for settlement of disputes and appeals to Appellate Tribunal-

- (1)
- (2)
- (3)
- (4)
- (5)
- (6) The Appellate Tribunal may for the legality or propriety or correctness of any order or decision of the Authority or the adjudicating officer, on its own motion or otherwise, call for the records relevant to deposing of such appeal and make such orders as it thinks fit.

Section 84 Power of appropriate Government to make rules. - (1) The appropriate Government shall, within a period of six months of the commencement of this Act, by notification, make rules for carrying out the provisions of this Act.

(2) In particular, and without prejudice to the generality of the foregoing power, such rules may provide for all or any of the following matters, namely -

- (a)..... to .. (ze)
- (zf) any other matter which is to be, or may be, prescribed, or in respect of which provision is to be made, by rules.

43. It is appropriate here to compare the provisions of the Section 3 of the Act of 2016 and provisions of the Rule 4 of the Rules of 2017.

Section-3 of the Act of 2016 and rule 4 of the Rules of 2017 can be compared as under:-

Section-3 of the Act of 2016	Rule 4 of the Rules of 2017
<p>Prior registration of real estate project with Real Estate Regulatory Authority. - (1) No promoter shall advertise, market, book, sell or offer for sale, or invite persons to purchase in any manner any plot, apartment or building, as the case may be, in any real estate project or part of it, in any planning area, without registering the real estate project with the Real Estate Regulatory Authority established under this Act:</p>	<p>Disclosure by promoters of ongoing projects - (1) Upon the commencement of sub-clause (1) of section 3, promoters of all ongoing projects which have not received completion certificate as required under local law shall within the time specified in the said sub-section make an application to the Authority in rule 3. (2) The promoter shall disclose all project details as required under the Act, rules and regulations</p>

Provided that projects that are ongoing on the date of commencement of this Act and for which the completion certificate has not been issued, the promoter shall make an application to the Authority for registration of the said project within a period of three months from the date of commencement of this Act.

Provided further that if the Authority thinks necessary, in the interest of allottees, for projects which are developed beyond the planning area but with the requisite permission of the local authority, it may, by order, direct the promoter of such project to register with the Authority, and the provisions of this Act or the rules and regulations made thereunder, shall apply to such projects from that stage of registration.

(2) Notwithstanding anything contained in sub-section (1), no registration of the real estate project shall be required -

(a) where the area of land proposed to be developed does not exceed five hundred square meters or the number of apartments proposed to be developed does not exceed eight inclusive of all phases; Provided that, if the appropriate Government considers it necessary, it may, reduce the threshold below five hundred square meters or eight apartments, as the case may be, inclusive of all phases, for exemption from registration under this Act;

(b) where the promoter has received completion certificate for a real estate project prior to commencement of this Act;

(c) for the purpose of renovation or repair or re-development which does not involve marketing, advertising selling or new allotment of any apartment, plot or building, as the case may be, under the real estate project.

Explanation -

For the purpose of this section, where the real estate project is to be developed in phases, every such phase shall be considered a standalone real estate project, and the promoter shall obtain registration under this Act for each phase separately.

made thereunder including the status of the project and the extent of completion.

(3) The promoter shall disclose the size of the apartment based on carpet area even if earlier sold on any other basis such as super area, super built up area, built up area etc., which shall not affect the validity of the agreement entered into between the promoter and the allottee to that extent.

(4) In case of plotted development the promoter shall disclose the area of the plot being sold to the allottees.

(5) Where the project is to be developed as separate buildings in phase, every such building or group of buildings as decided or declared by the promoter at the time of registration shall be considered as a phase and the promoter shall obtain registration under the Act for each phase separately.

Explanation:-

For the purpose of this rule "on-going project" means a project where development is going on and for which completion certificate has not been issued but excludes such projects which fulfil any of the following criteria on the date of commencement of relevant provisions of the Act:-

(i) Where common areas and facilities have been handed over to the association of allottees or the competent authority, as the case may be, for maintenance;

(ii) Where sale/lease deeds or possession letter of minimum sixty per cent of the apartments/houses/plots in the phase/project have been executed;

(iii) Where all development works have been completed and completion certificate has been obtained from chartered engineer in practice as per prevalent Township Policy;

(iv) Where completion certificate has been obtained from the competent authority or where all development works have been completed and application has been filed with the competent authority;

(v) Where development is done in phases then each phase shall be considered as a separate project and the

	<p><i>phases which fulfil any of the above conditions shall be excluded;</i></p> <p><i>(vi) Where competent authorities/local bodies have started issuing lease deeds for plots by organising camps or otherwise in township schemes; or</i></p> <p><i>Where services have been handed over to the local authority for maintenance or more than fifty per cent of the development charges for the same have been deposited to the local authority.</i></p>
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44. Explanation appended to rule 4 of the Rules of 2017 defines on-going project; though there was no need to define it because word "on-going" is self-explanatory.
45. From the comparison of provisions of Section 3 of the Act of 2016 and Rule 4 of the Rules of 2017, it is crystal clear that so far as the word on-going project is concerned there is no difference in the proviso of Section 3 of the Act of 2016 and some part of the explanation appended to rule 4 of the Rules of 2017.
46. Explanation appended to Rule 4 of the Rules of 2017 not only define on-going project but also define what is not on-going project.
47. From the bare reading of explanation 1 to 7 it is crystal clear that almost every project which was on-going on the date of promulgation of the Act of 2016 has been excluded from the purview of Section 3 of the Act of 2016.
48. It is pertinent to mention here that as per Section 84 of the Act of 2016 power to make rules were conferred upon the appropriate Government for the purpose of carrying out the provisions of the Act; if explanation appended to Rule 4 of the Rules of 2017 including explanation 1 to 7 are removed from the rule book, then also provisions of the Act of 2016 can be carried out efficiently and smoothly.
49. It cannot be said that bereft of these explanations provisions of the Act of 2016 cannot be carried out. On the contrary, these explanations smother the very spirit of the Act of 2016.
50. One of the primary object of the Act of 2016 was to protect the interest of Consumers in the real estate

sector, but these explanation appended to Rule 4 of the Rules of 2017 completely ignores this object.

51. From the statement of objects and reasons of the Act of 2016, it is crystal clear that the consumer in the real estate sector was helpless regarding their grievances against promoters and now by the explanations of Rule 4 of the Rules of 2017, they have been made hapless. In substance explanation appended to Rule 4 of the Rules of 2017 replaces/substitutes provisions of Section 3 of the Act of 2016.

52. It was vehemently argued by the learned Counsel appearing on behalf of JDA and CREDAI that this Tribunal do not have competence to examine legality of the Rules. Reliance was place on (2010) 4 SCC 603. In Para 48, 93 and 94 of this case, the Hon'ble Supreme Court has laid down, as under:-

"48. In every case one needs to examine the statutory context to determine whether a court or a tribunal hearing a case has jurisdiction to rule on a defence based upon arguments of invalidity of subordinate legislation or administrative act under it. There are situations in which Parliament may legislate to preclude such challenges in the interest of promoting certainly about the legitimacy of administrative acts on which the public may have to rely.

93. For the aforesaid reasons, we answer the question raised in the reference as follows:

The Appellate Tribunal for Electricity has no jurisdiction to decide the validity of the Regulations framed by the Central Electricity Regulatory Commission under Section 178 of the Electricity Act, 2003. The validity of the Regulations may, however, be challenged by seeking judicial review under Article 226 of the Constitution of India.

94. Our summary of findings and answer to the reference are with reference to the provisions of the Electricity Act, 2003. They shall not be construed as a general principal of law to be applied to Appellate Tribunals vis-à-vis Regulatory Commissions under other enactments. In particular, we make it clear that the decision may not be taken as expression of any review in regard to the powers of the Securities Appellate Tribunal vis-à-vis Securities and Exchange Board of India under the Securities and exchange Board of India Act, 1992 or with reference to the Telecom Disputes Settlement and Appellate Tribunal vis-à-vis Telecom Regulatory Authority of India under the Telecom Regulatory Authority of India Act, 1997."

53. It is crystal clear that no such law of universal application has been laid down in this case by the Hon'ble Supreme Court of India. On the contrary, this authority is applicable only in case of Appellate Tribunals for Electricity cases.

54. This Tribunal was established in exercises of powers conferred under Section 43 of the Act of 2016 by the State of Rajasthan.
55. In sub-section 6 of Section 44 of the Act of 2016. It is provided, as under:-
"44. *Application for settlement of disputes and appeals to Appellate Tribunal-*
(6). *The Appellate Tribunal may, for the purpose of examining the legality or propriety or correctness of any order or decision of the Authority or the adjudicating officer, on its own motion or otherwise, call for the records relevant to deposing of such appeal and make such orders as it thinks fit.*
56. Powers of the Tribunal have been provided in Section 53 of the Act of 2016, as under:-
53. Powers of Tribunal- (1) *The Appellate Tribunal shall not be bound by the procedure laid down by the Code of Civil Procedure, 1908 (5 of 1908) but shall be guided by the principles of natural justice.*
(2) *Subject to the provisions of this Act, the Appellate Tribunal shall have power to regulate its own procedure.*
(3) *The Appellate Tribunal shall also not be bound by the rules of evidence contained in the Indian Evidence Act, 1872 (1 of 1872).*
(4) *The Appellate Tribunal shall have, for the purpose of discharging its functions under this Act, the same powers as are vested in a civil court under the Code of Civil Procedure, 1908 (5 of 1908) in respect of the following matters namely:-*
(a) *summoning and enforcing the attendance of any person and examining him on oath;*
(b) *requiring the discovery and production of documents;*
(c) *receiving evidence on affidavits;*
(d) *issuing commissions for the examinations of witnesses or documents;*
(e) *reviewing its decisions;*
(f) *dismissing an application for default or directing it ex-parte;*
and
(g) *any other matter which may be prescribed.*
(5) *All proceedings before the Appellate Tribunal shall be deemed to be judicial proceedings within the meaning of sections 193, 219 and 228 for the purposes of section 196 of the Indian Penal Code (45 of 1860), and the Appellate Tribunal shall be deemed to be civil court for the purposes of section 195 and Chapter XXVI of the Code of Criminal Procedure, 1973 (2 of 1974).*
57. From the bare reading of the above provisions, it is crystal clear that in appellate jurisdiction legality of Rule 4 of the Rules of 2017 cannot be examined by this Tribunal.
58. As discussed earlier, there is inconsistency between provisions of Section 3 of the Act of 2016 and Rule 4 of the Rules of 2017. In this situation as per Article 254 of Constitution of India, law made by the Parliament shall prevail.
59. Though, Article 254 is applicable in case of inconsistency between law made by the Parliament and law made by the State. Here also the Act of

2016 has been made by the Parliament and subordinate legislation has been made by the appropriate Government - State of Rajasthan. Though, it cannot be put at par with law made by the legislation of the State, but subordinate legislation is also a legislation of the State according to Section 84 of the Act of 2016. It cannot be said that provisions of Article 254 of the Constitution of India do not apply to subordinate legislation.

60. In the present case, there is a direct conflict between provisions of section 3 of the Act of 2016 and explanation appended to rule 4 of the Rules of 2017. There is clear and direct inconsistency between the provisions of section 3 of the Act of 2016 i.e., the Central Act and rule 4 of the Rules of 2017 i.e., delegated legislation made by the appropriate Government of State of Rajasthan; and this inconsistency is absolutely irreconcilable, it is of such nature that it brings into direct collision with each other.
61. There is a situation, where it is impossible to obey the one without disobeying the other.
62. From the aforesaid discussions, it is clear that appropriate Government have competence to frame Rules in terms of powers conferred under section 84 of the Act. Provisions of explanation of rule 4 of the Rules of 2017 are in direct conflict between the provisions of the Act of 2016, therefore, the provisions of the Act of 2016 shall prevail over the explanation appended to rule 4 of the Rules of 2017.
63. There is no force in the argument that such power is conferred vide sub-section 2 (zf) of section 84 of the Act. This sub-section provides for the matters which are incidental or ancillary to the provisions of section 2 (a) to (ze).
64. All other arguments regarding applicability of Section 3, consequences of applicability of Section 3 have been examined by the Hon'ble High Court of Bombay in the case of *Neelkamal Realtors Suburban Pvt. Ltd. & Anr. V/s Union of India and Ors.* and other similar matters reported in *2017 SCC online Bom 9302*.

In para 87 to 94 of the judgment, the Hon'ble High Court of Bombay held as under:-

"87. RERA relates to the development of buildings/projects and sale of flats therein. The statute does not interfere with any ownership rights of the owner of developer of the property. RERA regulates the development of real estate project in respect of constructions which are not complete wherein occupation

certificate had not been obtained on the date of commencement of provisions of RERA.

ANALYSIS OF CHALLENGE TO VALIDITY OF CERTAIN PROVISIONS: SECTION 3:

88. Section 3 of RERA prevents the promoter to advertise, market, book, sell or offer for sale, or invite persons to purchase unit in the real estate project without getting registration under RERA. First proviso to Section 3 (1) mandates that ongoing project on the date of commencement of RERA, of which completion certificate had not been issued, are covered under the provisions of RERA and such promoter shall make an application to the authority for registration of the project.

89. On behalf of the petitioners it was submitted that registration of ongoing project under RERA would be contrary to the contractual rights established between the promoter and allottee under the agreement for sale executed prior to registration under RERA. In that sense, the provisions have retrospective or retroactive application. After assessing, we find that the projects already completed are not in any way affected and, therefore, no vested or accrued rights are getting affected by RERA. The RERA will apply after getting the project registered. In that sense, the application of RERA is prospective in nature. What the provisions envisage is that a promoter of a project which is not complete/sans completion certificate shall get the project registered under RERA, but, while getting project registered, promoter is entitled to prescribe a fresh time limit for getting the remaining development work completed. From the scheme of RERA and the subject case laws cited above, we do not find that first proviso to Section 3 (1) is violative of Article 14 or Article 19 (1) (g) of the Constitution of India. The Parliament is competent to to enact a law affecting the antecedent events. In the case of State of Bombay V. Vishnu Ramchandra (Supra), the Apex Court observed that the fact that part of the requisites for operation of the statute were drawn from a time antecedent to its passing did not make the statute retrospective so long as the action was taken after the Act came into force. The consequences for breach of such obligations under RERA are prospective in operation. In case ongoing projects, of which completion certificates were not obtained, were not to be covered under RERA, then there was likelihood of classifications in respect of undeveloped ongoing project and the new project to be commenced. In view of the material collected by the Standing Committee and the Select Committee and as discussed on the floor of the Parliament, it was thought fit that ongoing project shall also be made to be registered under RERA. The Parliament felt the need because it get possession for years together. Huge sums of money of the allottees is locked in. Sizable section of allottees had invested their hard earned money, life savings, borrowed money, money obtained through loan from various financial institutions with a hope that sooner or later they would get possession of their apartment/flat/unit. There was no law regulating the real estate sector, development work/obligations of promoter and the allottee. Therefore, the Parliament considered it to pass a central law on the subject....”.

90. *The important provisions like Sections 3 to 19, 40, 59 to 70 and 79 to 80 were notified for operation from 1/5/2017. RERA law was enacted in the year 2016. The Central Government did not make any haste to implement these provisions at one and the same time, but the provisions were made applicable thoughtfully and phase-wise. Considering the scheme of RERA, object and purpose for which it is enacted in the larger public interest, we do not find that challenge on the ground that it violates rights of the petitioners under Articles 14 and 19 (1) (g) stand to reason. Merely because sale and purchase agreement was entered into by the promoter prior to coming into force of RERA does not make the application of enactment retrospective in nature. The RERA was passed because it was felt that several promoters had defaulted and such defaults had taken place prior to coming into force of RERA. In the affidavit-in-reply, the UOI had stated that in the State of Maharashtra 12608 ongoing projects have been registered, while 806 new projects have been registered. This figure itself would justify the registration of ongoing projects for regulating the development work of such project.*

91. *On behalf of the petitioners it was submitted that Parliament lacks power to make retrospective laws. Series of judgments cited above would indicate a settled principle that a legislature could enact law having retrospective/retroactive operation. It cannot be countenance that merely because an enactment is made retrospective in its operation, it would be contrary to Article 14 and Article 19 (1) (g). We find substance in the submissions advanced by the learned counsel appearing for the respondents that Parliament not only has power to legislate retrospectively but even modify pre-existing contract between private parties in the larger public interest. No enactment can be struck down merely by saying that it is arbitrary and unreasonable unless constitutional infirmity has been established. It is settled position that with the development of law, it is desirable that Courts should apply the latest tools of interpretation to arrive at a more meaningful and definite conclusion. A balance has to be struck between the restrictions imposed and the social control envisaged by Article 19 (6). The application of the principles will vary from case to case as also with regard to changing conditions and the surrounding circumstances.*

92. *Legislative power to make law with retrospective effect is well recognised. In the facts, it would not be permissible for the petitioners to say that they have vested right in dealing with the completion of the project by leaving the proposed allottees in helpless and miserable condition. In a country like ours, when millions are in search of homes and had to put entire life earnings to purchase a residential house for them, it was compelling obligation on the Government to look into the issues in the larger public interest and if required, make stringent laws regulating such sectors. We cannot foresee a situation where helpless allottees had to approach various forums in search of some reliefs here and there and wait for the outcome of the same for indefinite period. The public interest at large is one of the relevant*

consideration in determining the constitutional validity of retrospective legislation.

93. The provisions of Section 3 (2) states that notwithstanding anything contained in sub-section (1), no registration of the real estate project shall be required in cases falling under Clauses (a), (b) and (c). The RERA takes care of exclusion of certain projects/constructions which will not be governed under RERA.

94. We, therefore, hold that challenge made to first proviso to Section 3 (1) as contrary to Articles 14 and 19 (1) (g), is merit-less and the contentions raised in that behalf are negative.

65. In written submission submitted by JDA, it is stated that the Hon'ble Bombay High Court in the above referred case has held that **"The Authority concerned would be dealing with the cases coming before it in respect of the projects registered under RERA."**
66. This line has been extracted from the judgment of the Bombay High Court without taking the context in which it was written. The Hon'ble Bombay High Court while appreciating the vires of the provisions of Chapter 8 of RERA observed in Para 169 as under:-
169.- On behalf of the petitioners, there is no specific challenge raised to legislative competence of Parliament to pass RERA. Therefore, we would not deal with the said issue. We had already discussed that the penalties to be imposed under Chapter VIII of RERA are not retrospective in its operation. Merely because it relates to on-going projects which get registered with the authority, the present statute cannot be said to be operating retrospective. Events taking place and instances occurring after registration of the project are taken note of under the penal provisions. The authority concerned would be dealing with cases coming before it in respect of project registered under RERA. Therefore, the Parliament was competent enough to enact provisions under Chapter VIII of RERA. The challenge raised by the petitioners to the penal provisions under Chapter VIII is merit-less.
67. As discussed earlier, it is incorrect to say that the provisions of RERA are applicable only in cases of the project registered under the Act of 2016. Registration of project is one of the functions of the RERA.
68. Section 11 of the Act of 2016 defines functions and duties of the promoter. It is nowhere provided that provisions are only applicable to promoters of a registered project. Expressions used everywhere in this section is the promoter.
69. Therefore, it cannot be said that duties cast upon promoter will be applicable only to the promoter of a registered project and not to the promoter of the unregistered project.
70. Object of registration of the project is only to monitor development and progress of the project.

71. It is a comprehensive Act. Though it leans in favour of the Consumer of the Real Estate Sector, but at the same time, it also protects rights of the promoter.

ORDER

72. (a) Provisions of Rule 4 of the Rules of 2017 are in conflict with the provisions of section 3 of the Act of 2016.
- (b) Provisions of section 3 of the Act of 2016 will prevail over the provisions of rule 4 of the Rules of 2017
- (c) Appropriate Government do not have competence under section 84 of the Act of 2016 to make such rules which are in conflict (divergent) to the provisions of the Act of 2016.
- (d) Complaint regarding any grievance covered by the provisions of the Act of 2016 is maintainable before the RERA.
- (e) The RERA has no power to decline any complaint or grievance on the basis that the project is not registered under the RERA.
- (f) Act of 2016 is applicable to all projects which are required to be registered in terms of provisions of Section 3 of the Act of 2016.
- (g) If any project which comes within the purview of section 3 of the Act of 2016 is not registered than it is incumbent upon the authority to take appropriate action against such promoter; but in the guise of non-registered project, a consumer of the real estate cannot be made remediless.
- (h) A remedy is always available to the consumer/promoter of the real estate sector irrespective of the fact that project is registered under the RERA or not.
- (i) Since project under scrutiny of the JDA is required to be registered before the RERA in terms of provisions of Section 3 of the Act of 2016, therefore, this appeal is maintainable. Preliminary objection of JDA is rejected.

Pronounced on 09.10.2018.

(Umesh Kumar Sharma)
Presiding Officer