

## M/s Cordial Foundation Pvt. Ltd Vs Dr. Purushothama Bharathi

**Court:** High Court Of Kerala

**Date of Decision:** Feb. 13, 2025

**Acts Referred:** Real Estate Regulation and Development Act, 2016 &" Section 12, 14, 18, 43(5), 71

**Hon'ble Judges:** M.A.Abdul Hakhim, J

**Bench:** Single Bench

**Advocate:** R.Surendran, Laya Mary Joseph, C.M.Andrews, Harish Abraham, Ashwathi Shyam, Swathy Sudhir, Ram Mohan Shyam Padman

**Final Decision:** Dismissed

### Judgement

M.A.Abdul Hakhim, J

1. The appellants in this Miscellaneous Second Appeal (MSA) filed under Section 43(5) of the Real Estate Regulation and Development Act, 2016

(the Act) are the Promoters/respondents in Complaint - CCP No. 50/2022 filed by the Allottee before the Adjudicating Officer.

2. The complaint filed by the Allottee before the Adjudicating Officer was allowed, declaring that the Allottee is entitled to get compensation of

Rs.1,69,80,000/- with interest at the rate of 14.85% per annum from 08.02.2021 till realization from the Promoters and their assets along with a cost

of Rs.25,000/.

3. The Promoters filed the appeal as REFA No.94/2023 before the Appellate Tribunal challenging the Order of the adjudicating Officer. Promoters

filed I.A No. 2/2024 seeking exemption from statutory deposit under the Proviso to Section 43(5) of the Act. The Appellate Tribunal its Order dt

03.05.2024 dismissed I. A No. 2/2024 directing the Promoters to make deposit of the entire amount due under the impugned order by way of Fixed

Deposit with the Appellate Tribunal for a period of one year drawn on any Nationalised Bank functioning within the Ernakulam District and to make

such deposit within one month from the date of the said order. This MSA is filed by the Promoters challenging the said Order of the Appellate

Tribunal in I.A No. 2/2024 in REFA No. 94/2023.

4. This Court admitted the MSA on the Substantial Questions of Law formulated in the Memorandum of Appeal.

5. When this MSA came up for consideration today the learned Counsel for the respondent/Allottee Sri.Laya Mary Joseph pointed out that the issue

raised in this Appeal is covered against the appellant by the recent judgment of this Court Artech Realtors Private Limited (M/s.) v. Savithri K. [2025

KHC Online 88] in which it is held that Pre-Deposit in Proviso to Section 43(5) is mandatory which could not be evaded by the Promoter and that the

Appellate Tribunal has no discretion in reducing or exempting the Promoter from payment of Pre-Deposit contemplated under proviso to S.43(5) of

the Act.

6. The learned counsel for the appellant, Sri.R Surendran, tried to distinguish the said decision in Artech (supra) on the facts of the present case and

advanced arguments.

7. The learned Counsel for the appellant contended that in the impugned order passed by the Adjudicating Officer, the amount found to be entitled by

the Allottee is towards rent and not compensation. Proviso to Section 43(5) mandates pre-deposit of compensation alone and not rent. Learned

Counsel invited my attention to Section 71, which provides for the appointment of the Adjudicating Officer for the purpose of adjudging compensation

under S.12, 14, 18, and 19 of the Act. Sections 12, 14, 18, and 19 do not provide for rent, and hence the realization of rent is beyond the jurisdiction of

the Adjudicating Officer. When the Adjudicating Officer passes an order allowing the realisation of rent, it does not come within the scope of Proviso

to Section 43(5), and hence, the Appellate Tribunal cannot insist on pre-deposit of the rent ordered by the Adjudicating Officer.

8. On the other hand the learned Counsel for the respondent contended that it is clear from the impugned order passed by the Adjudicating Officer

itself that the amount ordered therein is compensation and hence Proviso to Section 43(5) is clearly applicable to the Promoters and they are bound to

deposit the entire compensation ordered by the adjudicating officer with the Appellate Tribunal for maintaining the Appeal.

9. The legality of the order passed by the Adjudicating Officer is a matter to be considered by the Appellate Tribunal in the appeal filed by the

appellant. Whether the compensation ordered is in the nature of rent or whether the Adjudicating officer has jurisdiction to adjudicate rent are matters

to be decided in the Appeal filed by the appellant before the Appellate Tribunal, if those grounds are taken. Going by the Order passed by the

Adjudicating Officer, the amount of Rs.1,69,80,000/- ordered therein is referred to as compensation. When the Adjudicating Officer has ordered

compensation, it is in the exercise of his jurisdiction under Section 71 of the Act. In view of the Proviso to Section 43(5) of the Act and the decision of

this Court in Artech (supra) explaining the said provision, the Promoter has to mandatorily deposit the entire amount payable under the Order of the

Adjudicating Officer with the Appellate Tribunal. Hence, the contention of the learned counsel for the appellant in this regard is unsustainable.

10. The learned Counsel for the appellant further contended that the object of the pre-deposit under the Proviso to Section 43(5) of the Act is to

secure payment to the Allottee in case of dismissal of Appeal filed by the Promoter. The Promoters, like the appellant, will not be in a position to raise

such a huge amount for the purpose of depositing the same with the Appellate Tribunal for securing payment to the Allottee. No bank or financial

institution will extend financial assistance to the Promoters for depositing the amount to maintain the appeal. The purpose would sufficiently be served

if the appellant is permitted to furnish a Bank Guarantee for the amount ordered by the Adjudicating Officer in the impugned order. The Promoters

will be able to obtain a Bank Guarantee from the Banks on furnishing their properties as security to the Banks. There is no prohibition in the Proviso to

Section 43(5) to accept any other mode of security to the satisfaction of the Appellate Tribunal to secure payment to the Allottee.

11. The Appeal to the Appellate Tribunal against the Order of the Regulatory Authority or Adjudicating Officer is a creature of Statute. It is a

statutory right available to the aggrieved person under Section 43(5) of the Act. Such right of appeal under Section 43(5) of the Act is to be exercised

strictly in accordance with the provisions of the Statute. Deposit is mandated under Section 43(5) of the Act. Deposit mandated under Section 43(5) of

the Act could not be substituted with security. Bank Guarantee is only a security for the amount ordered by the Adjudicating Officer. Furnishing

security for the amount will not be equivalent to deposit of the amount. When the statutory provision is clear and specific, the Court cannot dilute the

same by prescribing another mode. Hence, it is mandatory for the Promoter to deposit the amount ordered in the impugned order under Proviso to

Section 43(5) of the Act.

12. As rightly contended by the learned counsel for the respondent, the scheme of the Act does not permit security in substitution of deposit in view of

Paragraphs Nos.124 & 125 the decision of the Hon'ble Supreme Court in Newtech Promoters and Developers Pvt. Ltd. v. State of U. P. and

Others 2021 (13) SCALE 466. While considering the scope of Section 43(5) of the Act, it is held that the scheme of the Act makes it clear that limited

rights and duties are provided on the shoulders of the allottees under S.19 of the Act and several onerous duties and obligations have been imposed on

the Promoters under Chapter III and VIII of the Act. When onerous duties and obligations are imposed on the Promoters considering the object and

purpose of the enactment, it is not permissible to make the duties and obligations lighter. Hence, the appellant could not be allowed to maintain Appeal

Section 43(5) of the Act before the Appellate Tribunal by furnishing Bank Guarantee for the amount ordered under the impugned order.

13. The learned counsel for the appellant further contended that the Appellate Tribunal has no power to direct the appellant to make a fixed deposit

with the Appellate Tribunal for a specified period and to make the fixed deposit in a nationalized Bank. Those procedures are not there in the Proviso

to Section 43(5) of the Act. When such procedures which are absent in the provision are adopted, it is well within the power of the Tribunal to permit

Bank Guarantee in substitution of the deposit provided in the Proviso. It is true that the Proviso provides only for deposit of the amount with the

Appellate Tribunal. It does not provide for a fixed deposit or deposit of the amount in a nationalized bank. Those procedures are adopted for the best

interest of the promoter as a matter of convenience and benefit. It would be beneficial to the interest of the Promoter and detrimental to the interest of

the Promoter. Of course, it is open to the Promoter to make necessary Application to the Appellate Tribunal specifying the mode of deposit of the

amount. The provision mandates only deposit of the amount with the Appellate Tribunal and the Appellant Tribunal needs only to ensure deposit of the

amount.

14. In view of the aforesaid decision of this Court in Artech (supra), the substantial questions of law formulated in the above Appeal filed against the

order refusing to exempt pre- deposit, do not arise for consideration.

15. The time period for making the pre-deposit has already expired. The amount ordered is Rs.1,69,80,000/-"with 14.85% interest. It is in the interest

of justice to grant the appellant two months time to make the deposit.

16. The Miscellaneous Second Appeal is dismissed but granting two months time to the appellant to make the pre-deposit before the Appellate

Tribunal in REFA No.94/2023.