



2024:KER:20821

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE A. BADHARUDEEN

MONDAY, THE 18TH DAY OF MARCH 2024 / 28TH PHALGUNA, 1945

MSA NO. 9 OF 2023

AGAINST THE ORDER DATED 11.11.2022 IN REFA NO.43 OF 2022 OF KERALA

REAL ESTATE APPELLATE TRIBUNAL, ERNAKULAM

ARISING FROM THE ORDER DATED 27.01.2022 IN SUO MOTU COMPLAINT

NO.3147/K-RERA/2021 OF KERALA REAL ESTATE REGULATORY AUTHORITY,

THIRUVANANTHAPURAM

APPELLANT/APPELLANT/RESPONDENT:

M/S. IFCI INFRASTRUCTURE DEVELOPMENT LIMITED
8TH FLOOR, IFCI TOWER,
61 NEHRU PLACE, NEW DELHI - 110019
(CIN: U45400DL2007GOI169232).

REPRESENTED BY MOHIT BHATNAGAR

AGED 38 YEARS

S/O LATE SRI NARENDER KUMAR BHATNAGAR,
WORKING AS SENIOR ASSOCIATE VICE PRESIDENT,
IFCI INFRASTRUCTURE DEVELOPMENT LTD.

BY ADVS.

VINOD MADHAVAN

M.V.BOSE

BIJU VARGHESE ERUMALA

SANIYA C.V.

RESPONDENTS/RESPONDENTS/COMPLAINANT:

- 1 KERALA REAL ESTATE REGULATORY AUTHORITY
REPRESENTED BY ITS SECRETARY,
TC NO. 25/1379, CRA D - 112,
NEAR PENTECOSTAL CHURCH, PLAMOODU,
CHARACHIRA ROAD, THIRUVANANTHAPURAM,
PIN - 695003

ADDL R2 SHERRY D' COUTO,
W/O MR. BAIDEN FRANCIS HARVEY D' COUTO,
FLAT NO.504, IIDL AERIE,
SHIHAB THANGAL ROAD,
PANAMPILLY NAGAR, KOCHI 682036.



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ADDL.R3 MIJI GEORGE,
W/O.GEORGE KUNNEL LEWIS,
FLAT NO.603, IIDL AERIE,
SHIHAB THANGAL ROAD, PANAMPILLY NAGAR,
KOCHI-682036.

ADDL.R4 SANJAY GANGADHARAN NAMBIAR,
FLAT NO.803, 8TH FLOOR, IIDL AERIE,
SHIHAB THANGAL ROAD, PANAMPILLY NAGAR,
KOCHI-682036.

ADDL.R5 DR.M.R.AMBIKALMAJAN PILLAI,
FLAT NO.8001, IIDL AERIE,
SHIHAB THANGAL ROAD,
PANAMPILLY NAGAR, KOCHI-682036.

(ADDITIONAL RESPONDENTS 2 TO 5 ARE IMPLEADED AS
PER ORDER DATED 19.02.2024 IN IA.NO.3/2023 IN
MSA.NO.9/2023) .

BY ADVS.
M.P.SHAMEEM AHAMED
AKHIL PHILIP MANITHOTTIYIL

THIS MISC. SECOND APPEAL HAVING BEEN FINALLY HEARD
ON 06.03.2024 AND THE COURT ON 18.03.2024 DELIVERED THE
FOLLOWING:



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CR**JUDGMENT**Dated this the 18th day of March, 2024

This miscellaneous second appeal is at the instance of M/s.IFCI Infrastructure Development Limited, who is the respondent in *Suo Motu* complaint No.3147/K-RERA/2021. The respondents herein are the Kerala Real Estate Regulatory Authority (hereinafter referred to as 'K-RERA' for short) and additional respondents 2 to 5 are the respective allottees (hereinafter referred to as 'allottees' for short).

2. Heard the learned counsel for the appellant/promoter, the learned counsel for the allottees and the learned Standing Counsel for the K-RERA.

3. I shall refer the parties in this miscellaneous second appeal as “promoter”, “allottees”, “K-RERA” and “Appellate Tribunal” for convenience.

4. At the time of admission, as per order dated



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02.03.2023, my learned predecessor raised the following substantial questions of law:

1. *Whether the direction for registration of the appellant's project by the K-RERA is legal and in consonance with the provisions of the Act?*
2. *Does the appellant retain any right over the project handed over to the association in terms of the law then in force so as to mulct with the responsibility of registration under the RERA Act?"*

5. The learned counsel for the promoter, Sri.Vinod Madhavan, submitted that in *Suo Motu* complaint No.3147/K-RERA/2021, K-RERA passed an order on 27.01.2022, directing the promoter to register the project 'IIDL Aerie' under Section 3 of the Kerala Real Estate (Regulation & Development) Act, 2016 (hereinafter referred to as K-RERA Act, 2016, for short).

6. According to the learned counsel for the promoter, the K-RERA passed the order negating the contention raised



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by the promoter to the effect that the Authority came into force only with effect from 17.04.2020 where an occupancy certificate/completion certificate in respect of the project was obtained by the promoter with effect from 29.02.2017. According to the learned counsel for the promoter, since the K-RERA Act, 2016 came into force practically with effect from 17.04.2020 (the date of establishment of K-RERA) the promoter is not bound to register the project in tune with Section 3 of the K-RERA Act, 2016. Therefore, the order of the K-RERA as confirmed by the appellate authority also would require interference.

7. The learned counsel submitted further that since K-RERA Rules framed with effect from 14.06.2018 and the Authority came into force with effect from 17.04.2020, the promoter, who completed the work and obtained occupancy/completion certificate with effect from 29.12.2017, is not bound to register and such a course of action is an absolute impossibility. It is also submitted that law does not



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permit an impossibility to be performed. The learned counsel relied on three legal maxims and three decisions of the Apex Court in this regard as under:

“LEGAL MAXIMS

'lex non cogit ad impossibilia'

law does not compel a man to do that which cannot possibly be performed

'impotentia excusat legem'

law will generally excuse a default if a party is unable to perform a duty created by law without any default in him and where he has no remedy

'impossibilium nulla obligatio est

The impossible is no legal obligation. A legal obligation that is impossible to perform must be excused.

CASE LAWS:

- 1. Re: Presidential Poll [AIR 1974 SC 1682; (1974) 2 SCC 33, [1975] 1 SCR 504]:**

The maxim of law impotentia excusal legem is intimately connected with another maxim of law lex non cogit ad impossibilia. Impotentia excusat legem is that when there is a necessary or invincible disability to perform the mandatory part of the law that impotentia excuses, the law does



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not compel one to do that which one cannot possibly perform. "Where the law creates a duty or charge, and the party is disabled to perform it, without any default in him, and has no remedy over it, there the law will in general excuse him." Therefore, when it appears that the performance of the formalities prescribed by a statute has been rendered impossible by circumstances over which the persons interested had no control, like the act of God, the circumstances will be taken as a valid excuse. Where the act of God prevents the compliance of the words of a statute, the statutory provision is not denuded of its mandatory character because of supervening impossibility caused by the act of God.

2. Cochin State Power and Light Corporation Ltd. V. State of Kerala., 1965 AIR 1688, 1965 SCR (3) 187, AIR 1965:

*The performance of this impossible duty must be excused in accordance with the maxim, *lex non cogitate ad impossible* (the law does not compel the doing of impossibilities), and sub-s(4) of s.6 must be construed as not being applicable to a case where compliance with it is impossible.*



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**3. State of M.P. v. Narmada Bachao Andolan
[(2011) 7 SCC 639]**

The court has to consider and understand the scope of application of the doctrines of lex non cogit ad impossibilia (the law does not compel a man to do what he cannot possibly perform); impossibilium nulla obligatio est (the law does not expect a party to do the impossible); and impotentia excusat legem in the qualified sense that there is a necessary or invincible disability to perform the mandatory part of the law or to forbear the prohibitory. These maxims are akin to the maxim of Roman law nemo tenetur ad impossibilia (no one is bound to do an impossibility) which is derived from common sense and natural equity and has been adopted and applied in law from time immemorial. Therefore, when it appears that the performance of the formalities prescribed by a statute has been rendered impossible by circumstances over which the persons interested had no control, like an act of God, the circumstances will be taken as a valid excuse.”



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8. It submitted further that as per Section 4 of the K-RERA Act, 2016, it is mandatory for all promoters to make an application before the Authority for registration of the real estate project in such form, manner, within such time and accompanied by such fee, as may be prescribed.

9. As per Section 3(2)(b) of the K-RERA Act, 2016, when the promoter receives completion certificate (occupancy certificate) in the State of Kerala for a real estate project prior to the commencement of this Act, such registration is not necessary. It is pointed out that as per Section 2(i) of the Act, 2016, “Authority” means the Real Estate Regulatory Authority established under sub-section (1) of Section 20 of the Act, 2016 and Section 20 deals with establishment and incorporation of Real Estate Regulatory Authority. According to the learned counsel for the promoter, since the K-RERA Rules necessary to establish the K-RERA came into force with effect from 14.06.2018 and practically, the K-RERA came into force with effect from 17.04.2020, the



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non-registration of the project by the promoter is an outright impossibility and therefore, the orders of the K-RERA and the Appellate Tribunal are illegal and the same would require interference.

10. Whereas Adv.M.P.Shameem Ahamed, who appears for the allottees (party respondents), refuted this argument mainly relying on the decision of the Apex Court in **M/s.Newtech Promoters and Developers Pvt. Ltd. V. State of UP and Others [MANU/SC/1056/2021 : (2021) 9 SCR 909]**. Accordingly, it is pointed out by the learned counsel for the allottees that in **M/s.Newtech Promoters'** case (*supra*), the Apex Court considered the first question viz., 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 and finally held in paragraph Nos. 41 and 42 as under:

“41. The clear and unambiguous language of the statute is retroactive in operation and by applying



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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.

42. What the provision further emphasizes is that a promoter of a project which is not complete/sans completion certificate shall get the project registered under the Act but while getting the project registered, promoter is under an obligation to prescribe fresh timelines for getting the remaining development work completed and from



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the scheme of the Act, we do not find that the first proviso to Section 3(1) in any manner is either violative of Articles 14 and 19(4)(g) of the Constitution of India. The Parliament is always competent to enact any law affecting the antecedent events under its fold within the parameters of law.”

11. According to the learned counsel for the allottees, in view of the authoritative pronouncement of the Apex Court in **M/s. Newtech Promoters'** case (*supra*), the contention raised by the promoter could not be appreciated and thus the second appeal would necessarily fail.

12. The learned Standing Counsel, Sri.C.M.Nazar, appearing for K-RERA, submitted that the argument at the instance of the learned counsel for the promoter no longer subsists since prior to Central Act, the Kerala State Legislature enacted Kerala Real Estate (Regulation and Development) Act, 2015 on 04.05.2015 and accordingly, and Authority was constituted as per G.O.No.259/2015 of the



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Local Self Government Department dated 17.08.2015. He also submitted that later, certain provisions of the Central Act came into force with effect from 01.05.2016 and the remaining provisions came into force with effect from 01.05.2017 and in tune with the Central Act, the Government issued G.O.(MS) No.26/2018/LSGD dated 23.02.2018 appointing Dr.B.Ashok as the temporary Real Estate Regulatory Authority and as per G.O.(MS) No.87/2018/LSGD dated 28.06.2018 when Dr.B.Ashok left the LSG Department, Dr.Mithra T.,I.A.S. was appointed as temporary Real Estate Regulatory Authority. Therefore, the promoter should have applied for registration in terms of Section 3 of the K-RERA Act, 2016 before the temporary Authority and no element of impossibility to be adjudged in this matter.

13. In the matter of impossibility, the learned counsel for the party respondents submitted that since there is temporary Real Estate Regulatory Authority prior to formation of K-RERA and K-RERA Act as per the State Act, the



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impossibility principle, as argued by the learned counsel for the promoter, cannot be appreciated.

14. In the decision in **Graceland Foundation v. Kerala Real Estate Regulatory Authority**, reported in **2023 (7) KHC 551**, this Court considered certain matters in tune with the decision in **M/s. Newtech Promoters's** case (*supra*) and held as under:

"Thus it is clear that all projects that are on-going on the date of commencement of the Act, 2016, as on 01/05/2017 and for which the completion certificates have not been issued, the promoter shall make an application to the authority for registration of the said project within a period of three days from the date of commencement of this Act i.e. from 01/05/2017. So the cardinal aspect which would govern mandatory registration is whether the completion certificate has been issued on or before 01/05/2017 in relation to a project in dispute. It is not in dispute that S.2(q) of the Act, 2016 deals with completion certificate. "Completion certificate" means the completion certificate, or such other certificate, by



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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.”

15. Thus, the real question to be decided is, *since the Rules for the formation of the Real Estate Authority came into force with effect from 14.06.2018 and the K-RERA came into force with effect from 17.04.2020, whether the promoter herein is not bound to register the project in terms of Section 3 of the K-RERA Act, 2016* and the same is an outright impossibility.

16. As pointed out by the learned counsel for the promoter, allottees and the learned Standing Counsel for K-RERA, the Act, 2016 was published in the Gazette of India on three different dates. The first one, Ext. Part 2, S.1 was notified and published in the Gazette of India on 26/03/2016. S.2, S.20, S.21 to S.39, S.41, S.42 to S.58, S.71, S.72 to



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S.78, S.81, S.82 to S.92 (w.e.f. 01/05/2016) were notified and published in the Gazette of India as per S.O.1544(E), dt. 26/04/2016 and S.3, S.4 to S.19, S.40, S.59, S.60 to S.70, S.79, S.80 (w.e.f. 01/05/2017) were notified and published as per S.O. 1216(E), dt. 19/04/2017. Therefore, S.1 came into force with effect from 26/03/2016. S.2, S.20, S.21 to S.39, S.41, S.42 to S.58, S.71, S.72 to S.78, S.81. S.82 to S.92, came into force with effect from 01/05/2016 and S.3, S.4 to S.19, S.40, S.59, S.60 to S.70, S.79, S.80 came into force with effect from 01/05/2017.

17. Since it was so found by this Court in **Graceland's** case (*supra*), as extracted above, how far as the impossibility principle to be judged is the crucial question.

18. Going by the maxims highlighted by the learned counsel for the promoter and the ratio in **Re-Presidential's** case (*supra*), when it appears that the performance of the formalities prescribed by a Statute has been rendered impossible by circumstances over which the persons



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interested had no control, like the act of God, the circumstances will be taken as a valid excuse. Similarly, when the performance of an act because of impossibility must be exercised in accordance with the maxim *lex non cogit ad impossibilia* (the law does not compel the doing of impossibilities) and must be construed as not being applicable to a case where compliance with it is impossible. Similarly, when the performance of formalities prescribed by a Statute has been rendered by circumstances over which the the persons interested had no control, as already stated would be a valid excuse.

19. On perusal of G.O.(MS) No.26/2018/LSGD dated 23.02.2018, Dr.B.Ashok, the Secretary, Urban Affairs Department, was appointed as the temporary Real Estate Regulatory Authority till the establishment of the Kerala Real Estate Regulatory Authority in terms of Section 20(1) of the K-RERA Act. The said GO has been placed by the learned Standing Counsel for K-RERA. Thus, as on 23.02.2018



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onwards, a temporary Real Estate Regulatory Authority had been established and subsequently Real Estate Regulatory Authority also had been established in continuation of the same.

20. It is true that in this case, the promoter urges impossibility on raising contention that the promoter obtained completion certificate/occupancy certificate with effect from 29.02.2017. Therefore, before 29.02.2017 even temporary Real Estate Regulatory Authority also not established. In this context, it is relevant to note that as per Section 20(1) of the K-RERA Act, 2016, the appropriate Government shall, within a period of one year from the date of coming into force of the K-RERA Act, 2016, 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 the Act. In fact, temporary Real Estate Regulatory Authority had been established within one year from the date of coming into force of the Act.



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21. Now it has been brought to the notice of this Court that prior to 23.02.2018 either temporary or permanent Real Estate Regulatory Authority was not established. In this context, it is submitted by the learned counsel for the promoter that there is no scope for registering the project by the promoter since before introduction of the K-RERA Act, 2016 (Central Act), as per Section 3(c) of the K-RERA Act, 2015 (State Act), where the promoter has received all requisite approvals/permits for the development of the real estate project prior to commencement of the Act, registration was not mandatory. This submission is correct. The learned counsel pressed this point to assert the principle of impossibility, he already projected.

22. In fact, this Court already rendered judgment in **Graceland's** case (*supra*), after referring the decision in **M/s.Newtech Promoters'** case (*supra*), holding the view that the K-REARA Act, 2016, is retroactive in operation and it was further held that all projects that are on-going on the date of commencement of the Act, 2016, as on 01/05/2017 and for



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which the completion certificates have not been issued, the promoter shall make an application to the authority for registration of the said project within a period of three days from the date of commencement of this Act i.e. from 01/05/2017. So the cardinal aspect which would govern mandatory registration is whether the completion certificate/occupancy certificate has been issued on or before 01/05/2017 in relation to a project in dispute. It is not in dispute that S.2(q) of the Act, 2016 deals with completion certificate. "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. Since the law is laid down as above, merely because temporary Real Estate Regulatory Authority established with effect from 23.02.2018 and occupancy certificate/completion certificate



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obtained prior to 23.02.2018 would not exempt the promoter herein, who received occupancy certificate after 01.05.2017, from the purview of the K-RERA Act, 2016, and its mandatory registration as provided under Section 20(1) of the K-RERA, Act, 2016. It is also held that there is no outright impossibility in this matter, since the promoter, being law obeying body, should have to register this project, which was an ongoing project from 01.05.2017, either before the temporary K-RERA or before the K-RERA, and such a course of action is not at all an impossibility.

23. Therefore, the substantial questions of law answered, holding that the order passed by the K-RERA directing the promoter to register the project is legal and in consensus with the provisions of the K-RERA Act, 2016. It is also held that the appellant's status is that of a promoter as defined in the K-RERA Act, 2016, the appellant is bound by the K-RERA Act, 2016 and its compulsory registration.



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24. Accordingly, this miscellaneous second appeal is found to be meritless and is dismissed.

25. The appellant/promoter is directed to register the project within one week from today. On failure to do so, the K-RERA is directed to proceed under law without fail.

All interlocutory orders stand vacated and all interlocutory applications pending in this miscellaneous second appeal stand dismissed.

**Sd/-
A. BADHARUDEEN
JUDGE**

nkr