

vks

**BEFORE MAHARASHTRA REAL ESTATE APPELLATE TRIBUNAL
MUMBAI**

**REFERENCE
IN
MISC. APPLICATION NO.14 OF 2021 (Review)
IN
APPEAL NO. AT00600000052700**

1] Paresh Kanti Parihar]
]]
2] Mrs. Vandana Paresh Parihar] Applicants.
]]
Both residing at : C-103, Uranus,]
Vasant Galaxy, Bangur Nagar,]
Mumbai 400 104]

-vs-

Kiyana Ventures LLP]
101, Kalpataru Synergy] Non-applicant.
Opposite Grand Hyatt,]
Santa Cruz (E) 400 055]

Mr. Mayur Khandeparkar a/w Mr. Abir Patel, Advocates i/by Wadia Ghandy & Co., for applicants.

Mr. Vipul J. Shah, Advocate for non-applicant.

**CORAM : INDIRA JAIN J., CHAIRPERSON
S. R. JAGTAP, MEMBER (J) &
S.S. SANDHU, MEMBER (A)**

DATE : 15th JULY 2022



(THROUGH VIDEO CONFERENCE)**ORDER [PER : INDIRA JAIN, J.]**

This Larger Bench is constituted pursuant to the reference made by Two Member Bench of this Tribunal [Indira Jain (J), Chairperson and S.S. Sandhu, Member (A)], by order dated 13th October 2021 passed in Misc. Application No.14 of 2021 (Review) in Appeal No.AT006000000052700 Kiyana Ventures LLP vs. Mr. Paresh Parihar & Anr..

FACTUAL MATRIX:

2] Applicants are allottees whereas non-applicant is a developer and appellant in above said appeal.

3] By Misc. Application No.14 of 2021, allottees sought review of the order dated 12th February 2021 passed by Two Member Bench on the ground that order is not in line with the Proviso to Section 43(5) of The Real Estate (Regulation and Development) Act 2016 (for short "the Act") as the intention of Legislature is clear from the Proviso that non applicant being promoter is required to deposit 100% interest and compensation for entertaining appeal and Tribunal has no power either to reduce amount

or waive the same. It was contended that directing the promoter to deposit 50% amount cannot be termed as legal, proper and correct and the same needs to be modified to bring in conformity with the settled position of law.

4] Review Application was heard by Two Member Bench and vide order dated 13th October 2021 Bench made the reference in view of order dated 22nd February 2021 passed by co-ordinate Bench in Parinee Realty Pvt. Ltd vs. Mr. Rajiv Govind Dharwadkar & Anr. thereby reviewing it's own order and directing promoter to deposit 40% amount towards pre-deposit and the order dated 12th February 2021 passed by Reference Bench directing the promoter to deposit 50% amount as per impugned order.

5] Before proceeding further it would be apposite to refer para 8 of the order dated 13th October 2021 passed by Two Member Bench in Review Application which runs as follows :-

"8] It is significant to note that at the time of passing order dated 22nd February 2021 by the Co-ordinate Bench in Parinee Realty Pvt. Ltd and 12th February 2021 by this bench points regarding principles of stare decisis and doctrine of prospective overruling were not raised and the same have been raised for the first time in present appeal. In this

situation it would be appropriate to refer the issue to a Larger bench so as to resolve the controversy involving broad ramification”.

6] Addressing the issue regarding scope of reference, learned counsel for non-applicant submitted that Larger Bench has to restrict itself to answer only issue referred to it and nothing more. In support thereof, learned counsel relied upon judgment of the Hon’ble Supreme Court in **T.A. Hameed vs. M. Viswanathan [(2008) 3 SCC 243]** in which it has been held that when reference is made on a specific issue to a Larger Bench, the Larger Bench cannot adjudicate upon the issue which is not the question referred to it. Their Lordships while setting aside the order passed by Full Bench dismissing Revision Petition held that Full Bench should have answered the question referred to it and remitted the matter to Division Bench for deciding Revision Petition on merits.

7] In the case on hand pursuant to the reference made, solitary issue that has to be answered by Larger Bench is regarding availability of principle of stare decisis and doctrine of prospective overruling to the Tribunal for exercise of its powers in the given facts and circumstances of the case as contended by non-applicant.

8] Heard the learned counsel for parties at length.

9] Before proceeding to answer the aforesaid question, it would be necessary to note principles of law enunciated by the Hon'ble Supreme Court in respect of doctrine of prospective overruling and stare decisis. The doctrine of prospective overruling was first accepted by the Hon'ble Supreme Court in **C. Golak Nath vs. State of Punjab [AIR 1967 SC 1643]**

10] In paragraphs 49, 52 and 117, the Hon'ble Supreme Court observed thus :-

"49. It is a modern doctrine suitable for a fast moving society. It does not do away with the doctrine of stare decisis, but confines it to past transactions. It is true that in one sense the court only declares the law, either customary or statutory or personal law. While in strict theory it may be said that the doctrine involves making of law, what the Court really does is to declare the law but refuses to give retroactivity to it. It is really a pragmatic solution reconciling the two conflicting doctrines, namely, that a court finds law and that it does make law. It finds law but restricts its operation to the future. It enables the court to bring about a smooth transition by correcting its errors without disturbing the impact of those errors on the past transactions. It is left to the discretion of the court to

prescribe the limits of the retroactivity and thereby it enables it to mould the relief to meet the ends of justice.

52. As this Court for the first time has been called upon to apply the doctrine evolved in a different country under different circumstances, we would like to move warily in the beginning. We would lay down the following propositions : (1) The doctrine of prospective overruling can be invoked only in matters arising under our Constitution; (2) it can be applied only by the highest Court of the country i.e. the Supreme Court as it has the constitutional jurisdiction to declare law binding on all the courts in India; (3) the scope of retroactive operation of the law declared by the Supreme Court superseding its earlier decisions is left to its discretion to be moulded in accordance with the justice of the cause or matter before it.

117. But it is urged that instead of following the principles of stare decisis which would make the decision in Sankari Prasad case good for all times, we should follow the doctrine of prospective overruling, which has been evolved by some Unites States courts so that everything that has been done upto now, including the Seventeenth Amendment would be held good but in future it would not be open to Parliament to amend part III by taking away or

abridging any of the rights conferred thereby and, if the argument as to implied limitations on the power to amend is accepted, further limit the power of Parliament to amend what may be called basic features of the Constitution. We must say that we are not prepared to accept the doctrine of prospective overruling. We do not know whether this doctrine which it is urged should be applied to constitutional amendment would also be applied to amendments of ordinary laws. We find it difficult to visualise what would be the effect of this doctrine if it is applied to amendment of ordinary laws. We have so far been following in this country the well known doctrine that courts declare law and that declaration made by a court is the law of the land and takes effect from the date the law came into force. We would on principle be loath to change that well known doctrine and supersede it by the doctrine of prospective overruling. Further, it seems to us that in view of the provisions of Article 13(2) it would be impossible to apply the doctrine of prospective overruling in our country, particularly where a law infringes fundamental rights. Article 13(2) lays down that all laws taking away or abridging fundamental rights would be void to the extent of contravention. It has been held by this Court in *Deep Chand v. State of Uttar Pradesh* that a law made after the Constitution came into force which infringes fundamental rights is a still-born law and that the

prohibition contained in Article 13(2) went to the root of the State power of legislation and any law made in contravention of that provision was void ab initio. This case has been followed in Mahendra Lal Jaini v. State of Uttar Pradesh. In the face of these decisions it is impossible to apply the principle of prospective overruling in this country so far as ordinary laws are concerned. Further, if the word "law" in Article 13 (2) includes an amendment of the Constitution, the same principle will apply, for that amendment would be still-born if it infringes any fundamental rights contained in part III. In these circumstances, it would be impossible to apply the principle of prospective overruling to constitutional amendments also. On the other hand, if the word "law" in Article 13(2) does not include an amendment of the Constitution then there is no necessity of applying the principle of prospective overruling, for in that case unless some limitations on the power of amendment of the Constitution are implied the amendment under Article 368 would not be liable to be tested under Article 13(2). We are therefore unable to apply the doctrine of prospective overruling in the circumstances. Further as we are of opinion that this is the fittest possible case in which the principle of stare decisis applies, we must Sankari Prasad case for this reason also".

11] This view was adopted in **Ashok Kumar Gupta & Anr vs. State of U.P.& Ors [1997 5 SCC 201]**. In para 61 of the judgment it is held as follows :-

"61. Admittedly, the Constitution has entrusted this statutory duty to this court with power to remove injustice or to do complete justice in any cause or matter before this court. The Rangachari ratio was in operation for well over three decades under which reservation in promotions were given to several persons in several services, grades or cadres of the Union of India or the respective State Governments. This Court, with a view to see that there would not be any hiatus in the operation of that law, as held earlier, to bring about smooth transition of the operation of law of reservation in promotions by a judicial creativity extended the principle of prospective overruling applied in Golak Nath case in the case of statutory law and of the judicial precedents in Karunakar case and further elongated the principle postponing the operation of the judgment in Mandal case for five years from the date of the judgment. This judicial creativity is not anathema to constitutional principle but an accepted doctrine as an extended facet of stare decisis. It would not be labeled as Proviso to Article 16(4) as contended for."

12] It is now settled law that doctrine of prospective overruling is a device innovated to avoid reopening of settled issues, to prevent multiplicity of proceeding and to avoid uncertainty and avoidable litigation. In other words actions taken contrary to the law declared prior to the date of declaration are validated and applies to futures cases. The Hon'ble Supreme Court in catena of judgments has held that it is for the highest Court to indicate as to whether the decision in question will operate prospectively. It means there shall be no prospective overruling unless it is so indicated in a particular decision. To simplify it can be stated that prospective overruling is the law declared by the Hon'ble Supreme Court which applies to future cases.

13] The decision in Golaknath (supra) was subsequently overruled in **Keshavanand Bharati –vs. State of Kerala AIR 1973 SC 1461** though not specifically on the point. Further in **M. A. Murthy vs. State of Karnataka [(2003) 7 SCC 517]**, it is held by the Hon'ble Supreme Court that principle of law enunciated is applicable to all cases irrespective of its stage of pendency because it is assumed that what is enunciated by the Supreme Court is in fact the law from inception. Moreover, the law declared by the Hon'ble Supreme Court is presumed to be law at all times.

14] As regards the arguments on principle of stare decisis, learned counsel for non applicant submitted that decision taken by coordinate Bench in Parinee's case on 22nd February 2021 is without considering the principles of stare decisis and prospective overruling which do not permit retrospective changing of orders and could not be done in exercising inherent powers. Such an action is contrary to settled principles of law and would lead to serious consequences including opening up flood gates for matters already decided and disposed of. Learned counsel submits that order dated 22nd February 2021 in Parinee's case cannot be a ground for review of the order of pre-deposit dated 12th February 2021 passed in the instant case and urged to answer the reference accordingly.

15] The Hon'ble Supreme Court in **State of Gujarat vs. Mirzapur, Moti Kureshi Kassab Jamat and others [(2005) 8 SCC 534]** held thus :-

"111. Stare decisis is a Latin phrase which means "stand by decided cases; to uphold precedents; to maintain former adjudication". This principle is expressed in the maxim "stare decisis et non quieta movere" which means to stand by decisions and not to disturb what is settled. This was aptly put by Lord Coke in his classic English version as "Those

things which have been so often adjudged ought to rest in peace". However, according to justice Frankfurter, the doctrine of stare decision is not "an imprisonment of reason" (Advanced Law Lexicon, P. Ramanatha Aiyer, 3rd Edn. 2005, Vol.4, P.4456). The underlying logic of the doctrine is to maintain consistency and avoid uncertainty. The guiding philosophy is that a view which has held the field for a long time should not be disturbed only because another view is possible.

118. The doctrine of stare decisis is generally to be adhered to, because well settled principles of law founded on a series of authoritative pronouncements ought to be followed. Yet the demands of the changed facts and circumstances, dictated by forceful factors supported by logic, amply justify the need for a fresh look."

16] It is well recognized that doctrine of stare decisis is premised on the maintenance of certainty, stability and consistency in the decision making process whereby the legal issues are resolved on the basis of precedents.

17] In deviation from the doctrine of stare decisis, the doctrine of prospective overruling, which is also accepted as an extended facet of stare decisis, dictates that a decision made in a particular case would have

operation in future (prospective) only and will not carry any retrospective effect on any past decisions.

18] In the recent decision **in M/s Newtech Promoters and Developers Pvt. Ltd. Vs. State of UP & Ors.** [Civil Appeal Nos.6745 of 2021 to 6749 of 2021) dated 11th November 2021, in para 127, the Hon'ble Supreme Court has made the following observations -

"127 It may further be noticed that under the present real estate sector which is now being regulated under the provisions of the Act 2016, the complaint for refund of the amount of payment which the allottee/consumer has deposited with the promoter and at a later stage, when the promoter is unable to hand over possession in breach of the conditions of the agreement between the parties, are being instituted at the instance of the consumer/allottee demanding for refund of the amount deposited by them and after the scrutiny of facts being made based on the contemporaneous documentary evidence on record made available by the respective parties, the legislature in its wisdom has intended to ensure that the money which has been computed by the authority at least must be safeguarded if the promoter intends to prefer an appeal before the tribunal and in case, the appeal fails at a later stage, it becomes difficult for the consumer/allottee to get the amount recovered 0which has been determined by the authority and to avoid the



consumer/allottee to go from pillar to post for recovery of the amount that has been determined by the authority in fact, belongs to the allottee at a later stage could be saved from all the miseries which come forward against him”.

19] Needless to state that under Article 141 of the Constitution of India, law declared by the Hon'ble Supreme Court is binding on all Courts including the Tribunals within the territory of India. It is clear by now that Proviso to Section 43(5) mandates pre-deposit without which appeal cannot be entertained. It is a long settled principle that when a statute requires anything to be done in a particular manner, it should be done in that manner only or not at all.

20. This being the position of law settled in respect of doctrine of prospective overruling and principle of stare decisis, the view that we have taken can be crystalized by concluding that doctrine of prospective overruling and principle of stare decisis are not available to the Tribunal for exercise of it's powers and answer the question in reference accordingly.

21] In view of the answer to reference pending Misc. Applications would not survive, hence disposed of.

22] By answering the reference as above, we direct the Registry



to place the matter before the Bench assigned to take Misc. Application No.14 of 2021 (Review) in Appeal No. AT006000000052700 Kiyana Ventures LLP vs. Paresh Parihar and Anr., so as to enable the Bench to dispose of the Misc. Application.


(S.S. SANDHU)


(S. R. JAGTAP)


(INDIRA JAIN, J.)