

**BEFORE THE MAHARASHTRA REAL ESTATE
APPELLATE TRIBUNAL, MUMBAI**

M. A. No.720/22 (Stay)

In

Appeal No. AT00600000093934/22

In

Complaint No. CC006000000196667

1. Shri. Mahesh Kumar Lohia

2. Smt. Madhuri Lohia

Sita Sadan, C-41,

New Sai Baba Nagar,

Kandivali (W), Mumbai 400067

... Appellants

Versus

ITMC Developers Pvt. Ltd.

Formerly known as

M/s. International Trading and Manufacturing Company

Ram Krupa Devji Bhimji Lane,

Mathurdas Road,

Kandivali (W),

Mumbai 400067

... Respondent

Adv. Mr. Mithil Sampat for Appellants

None for Respondent

**CORAM : SHRIRAM R. JAGTAP, MEMBER (J) &
SHRIKANT M. DESHPANDE, MEMBER (A)**

DATE : 11 October, 2024

(THROUGH VIDEO CONFERENCING)

JUDGEMENT

[PER : SHRIKANT M. DESHPANDE, MEMBER (A)]

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1. The captioned Appeal arises from Order dated 08.04.2022 passed by learned Member I, MahaRERA (for short "the Authority") in Complaint No.CC006000000196667 whereby the Authority directed the Promoter to pay interest on delayed possession on the amounts paid by the Appellants/ Complainants towards consideration of the subject flat from the date of possession as mentioned in the agreement for sale with grace period of 6 months. The Authority further directed that in view of the mitigating circumstances and to ensure that the said project is not jeopardized due to outflow of finances, the amount payable may be paid after obtaining Occupation Certificate for the project or before 30.06.2023 whichever is earlier. The Authority also directed that the Promoter is entitled to claim the benefit of 'moratorium period' as mentioned in the notifications/orders No.13 and 14 dated 02.04.2020 and 18.05.2020 issued by the MahaRERA and the notifications/orders which may be issued in this regard from time to time.
2. For the sake of convenience, the parties to the Appeal hereinafter will be referred to as "Appellants/ Complainants" and "Respondent/ Promoter" respectively.

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3. The brief facts gathered from the pleadings, documents on record, and impugned Order are that the Appellants booked a flat bearing no.1704 in the Respondent's project named "**Sapphire-I**" vide allotment letter dated 02.09.2014. Booking of the flat no.1704 was subsequently changed to 1904 (for short the "said flat"). At the time of booking, possession was promised on or before 31.12.2016. Failure of commitment on the part of Promoter to handover the said flat by the promised date, the Appellants filed the Complaint No.CC00600000001678 before the Authority in or around November, 2017. After hearing the parties, the learned Authority passed Order dated 06.12.2017 whereby the parties were directed to execute and register agreement for sale as per the provisions of RERA before 31.12.2017. After some follow up by the Appellants, agreement for sale dated 28.02.2018 came to be executed and registered between the Appellants and Promoter for a total consideration of Rs.1,55,52,500/-. The possession date as per the said agreement for sale is 31.03.2019. The Appellants have paid Rs.1,09,58,110/- out of which Rs.94,17,465/- were towards part consideration of the said flat and rest towards stamp duty, registration charges, service tax, VAT, GST, etc.

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4. However, the Promoter failed to handover possession of the said flat as per the stipulated date in the said agreement for sale dated 28.02.2018. Aggrieved by the failure of the Promoter to handover possession of the said flat on the specified date in the said agreement for sale, the Appellants filed the captioned Complaint before the Authority in or around March, 2021 and sought the relief of compensation for delay in handing over possession of the said flat and also that the amount paid to the Promoter be returned at the compound rate of interest, which the Promoter had suggested in the demand letters.
5. The Promoter appeared in the Complaint and remonstrated the Complaint by filing affidavit in reply and written submissions. The Promoter contended that possession of the said flat was to be handed over by the date stipulated in the said agreement for sale, however the same was subject to obtaining Occupation Certificate. The project being SRA project, various challenges are being faced by the Promoter in completing balance construction work resulting in delay. Further, the project got delayed due to Covid-19 pandemic. The Promoter further submitted that when the Complainants were informed about the delays, they did not object to the same. The Promoter submitted

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that it had obtained funds from ECL Finance Limited for completion of the construction work, however, due to ILFS crises in 2017/18, further disbursement by NBFC was put on hold which hampered the progress of the project. The Promoter further submitted that the possession date mentioned on the website of MahaRERA is now June, 2023 and contended that the Promoter will complete construction and handover possession of the subject flat to Appellants before the said date. The Promoter also submitted that he had to first complete rehab component of the project, which was affected by refusal of slum dwellers to vacate the project land and shift to the transit camp. The Promoter submitted that the project got delayed for reasons mentioned above which were beyond the control of the Promoter. If all the allottees of the project start demanding compensation, grave prejudice would be caused to the development of the project and since the Promoter is willing to handover possession on or before the timeline mentioned on the MahaRERA website i.e. 30.06.2023, the Promoter prayed that the Complaint be dismissed.

6. After hearing both the parties, the Authority passed the impugned Order dated 08.04.2022. Aggrieved by this Order of

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the Authority, Appellants have preferred this Appeal on the grounds set out in the memorandum of Appeal and sought the following reliefs:

- i. The impugned Order of the Authority dated 08.04.2022 be quashed and set aside.
 - ii. The Promoter be directed to handover possession with Occupation Certificate.
 - iii. The Promoter be directed to pay interest on the amount paid to the Promoter from the date of respective payments till realization of the amount to the Appellants.
 - iv. The Promoter be directed to give compensation, return of advance fees, penalty under Section 61 and 63 of RERA for violation of the provisions of RERA.
7. We have heard learned Advocate Mr. Mithil Sampat for Appellants. The submissions made by the Appellants are nothing but reiteration of the contents of the Appeal memo and written submissions.
8. Record reveals that since long the Promoter has been failing to appear before the Tribunal. Despite service of notice to the Promoter, the Promoter remained absent for hearing. The record also reveals that both the parties have filed written

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submissions. In order to give fair and reasonable opportunity, the Promoter was directed to argue the matter on 03.10.2024 failing which the matter would be reserved for judgment without arguments of the Promoter. The Promoter again failed to appear for hearing on 3.10.2024. Since we have already heard the Appellants and the Promoter failed to appear, the matter was reserved for judgment.

9. Learned Advocate for Appellants has relied on the following citations.

- i. **Madan Singh Shekhawat vs. Union of India & Ors.**
[Judgment dated 17/08/1999 of the Hon'ble Supreme Court of India in Civil Appeal No 1926 of 1999].
- ii. **State of Uttar Pradesh vs. K.K. Modi & Anr.** [The Hon'ble Allahabad High Court in Judgment dated 09/05/1996 in AIR 1968 All 197].
- iii. **Secretary, H.S.E.B vs. Suresh & Others** [Judgment dated 30.03.1999 of the Hon'ble Supreme Court of India in Civil Appeals Nos. 11335-11395 of 1995 with Nos. 10863,10541 of 1996].
- iv. **National Consumer Disputes Redressal Commission in Revision Petition No. 2721 of 2007**

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[Judgement dated 13.12.2007 in Consumer Education & Research Society & Another vs. New India Assurance Co. Ltd. & Others].

v. **Union of India & Another vs. Harendra Gawaria**

[Judgment dated 04/02/2022 of the hon'ble High Court of Rajasthan in D. B. Civil Writ Petition No. 1587 of 2022].

10. Having considered submissions of the respective parties supported by various documents and material on record, the points that arise for our consideration and finding thereon for the reasons to follow are as under:

Sr. No.	Points	Finding
1.	Whether the Appellants are entitled to relief of interest under Section 18 of RERA?	In the affirmative
2.	Whether the impugned Order dated 08.04.2022 warrants interference in this Appeal?	In the affirmative
3.	What Order?	As per final Order

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REASONS

Point No. 1

11. On ensembling the facts as submitted above by the parties, it is not in dispute that the Appellants have booked a flat bearing number 1704 with a car parking in the Respondent's project vide allotment letter dated 02.09.2014 with purchase price of Rs.1,55,52,500. The booking of the flat number 1704 was subsequently changed to 1904. At the time of booking, possession was promised on or before 31.12.2016. Prior to the said allotment letter, the Appellants have paid Rs.75,00,000/- towards part consideration of the said flat. Although the amount paid by the Appellants for the subject flat was more than 20% of consideration of the said flat, the Promoter failed to execute agreement for sale. Therefore, the Appellants filed Complaint No.CC006000000001678 before the Authority in or around November, 2017. After hearing the parties, the learned Authority passed Order dated 06.12.2017 whereby the parties were directed to execute and register agreement for sale as per the provisions of RERA. Thereafter, agreement for sale dated 28.02.2018 came to be executed and registered between the Appellants and Promoter for a total consideration of

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Rs.1,55,52,500/-. The possession date as per Clause 16 of the said agreement for sale is 31.03.2019. The Appellants have paid Rs.1,09,58,110/- out of which Rs.94,17,465/- are towards part consideration of the said flat and the rest towards stamp duty, registration charges, service tax, VAT, GST, etc.

12. It is pertinent to note that the Appellants have paid substantial amount of Rs.75,00,000/- in the year 2014. However, the agreement for sale came to be executed between the Appellants and Promoter only on 28.02.2018. Section 4 of MOFA casts an obligation on the part of Promoter that he shall not accept sum of money as advance part consideration or deposit, which would be more than 20% of the sale price without entering into written agreement for sale and agreement for sale shall be registered under the Registration Act, 1908. Section 13 of RERA also casts a similar obligation on the part of the Promoter that he shall not accept sum more than 10% of the purchase price from allottee without first entering into written agreement for sale and register the said agreement for sale. It is not in dispute that out of total consideration the Appellants have paid substantial amount towards part consideration of the said flat. The Promoter has received more than 20% in case of Section 4 of

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MOFA and 10% in case of Section 13 of RERA without executing and registering the agreement for sale. Therefore, the Promoter has violated the provisions of Section 4 of MOFA and Section 13 of RERA. Only after the order of the Authority dated 06.12.2017, the Promoter executed and registered the agreement for sale on 28.02.2018.

13. As per Clause 16 of the agreement for sale, the date of possession has been specified as on or before 31.03.2019 with Occupation Certificate. However, the Promoter failed to handover possession of the said flat to the Appellants as per the specified date in the said agreement for sale dated 28.02.2018. Thus, the delay is established in handing over possession of the subject flat to the Appellants in terms of the agreement for sale and therefore the Appellants are entitled to relief of interest under Section 18 of RERA.
14. It is specific contention of the Promoter that as per the terms of the said agreement, the Promoter was to handover possession of the said flat by the date stipulated in the said agreement for sale, however, the same was subject to obtaining Occupation Certificate. The project being Slum Rehabilitation Authority (SRA) project, various challenges are being faced by Promoter

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in completing balance construction work that has resulted in delay. The Promoter has contended that the project got delayed due to Covid-19 pandemic. Promoter has submitted that when the Appellants were informed about the delays, they did not object to the same. Promoter contended that financial difficulties being faced by him also delayed the project and submitted that he had obtained funds from ECL Funds Limited for completion of the construction work, however, due to ILFS crises in 2017/18, further disbursement by NBFC was put on hold which hampered the progress of the project. The Promoter further submitted that the possession date mentioned on the website of MahaRERA is now 30 June 2023 and contended that the Promoter will complete construction of the project and handover possession of the subject flat to Appellants before the said date. The Promoter has also submitted that being SRA project he had to first complete rehab component, which was affected by refusal of slum dwellers to vacate the project land and shift to the transit camp. The Promoter has submitted that the project got delayed for reasons mentioned above which were beyond the control of the Promoter.

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15. Clause 16 of the agreement for sale stipulates that the purchaser hereby agrees to the eventuality if the possession is delayed due to various factors as outlined in the said Clause such as reasons beyond the control of the developer; non-availability of steel and/or cement or any such building material; war, civil commotion or any act of god; any prohibitory Order of any Court against development of property; any notice, order, rules, notification of government or public or competent authority; changes in any rules, regulation, by laws of various statutory bodies and authorities affecting the development of the project; etc. The contention of the Promoter is that on account of various factors mentioned above as well as the factors outlined in Clause 16 of the said agreement, the project has been delayed.

16. As an experienced Promoter in the market, it is the Promoter who is well aware of the factors that may endanger the prospects of timely completion of the project. So being domain experts and considering likely time to be consumed by various activities and approvals, Promoter is the best judge to establish the likely timeline for completion of the project. On the contrary, the purchasers have no domain knowledge, neither aware nor

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expected to be aware of the nature of mitigating factors which may delay the project. The purchaser executes the agreement for sale based on the commitment given by the Promoter to handover the possession by certain date.

17. Careful examination of Clause 16 of the said agreement reveals that certain eventualities that might cause delays are routinely provided in the agreement and thus cannot be considered relating specifically to this project. It further cannot be construed that by signing the agreement for sale, the Allottees are considered to await infinitely for completion and possession concerning all these factors that would delay completion of the said project.

18. The *force majeure* factors as demonstrated by the Promoter do not fall within the ambit of explanation to Section 6 of RERA which clearly clarifies that "*force majeure*" shall mean case of war, food drought, fire, cyclone, earthquake or any other calamities caused by nature affecting the regular development of real estate project. None of the grounds as demonstrated by the Promoter falls within the scope of explanation to Section 6 of the Act, which could have justified the delay. Therefore, we

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are of the considered view that reasons of delays as submitted by the Promoter cannot be construed as *force majeure*.

19. Considering the liability of Promoter to assess the likely date of completion of project, the Allottees have very limited liability of discharging their own obligations as per the terms of the agreement for sale *inter alia* relating to primarily to make payments from time to time so that the project is not starved of funds to cause delay in completion. It is not in dispute that the Allottees have made a substantial payment out of total consideration to the Promoter. Allottees can be held responsible only if failure to discharge their obligations as per the agreement for sale has caused a delay in completion of the project. Allottees are not responsible for the reasons for delay, they are entitled to relief under Section 18 of the Act and cannot be saddled with the consequences for delay in completing the project.
20. The language employed in Section 18(1)(a) makes it clear that the Promoter is obligated to handover the possession of flat as per the agreement for sale by date specified therein. The ratio laid down by the Hon'ble Supreme Court in **M/s. Imperia**

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Structures Ltd. Vs. Anil Patni & Ors. [in Civil Appeal No.3581-3590 of 2020] is that-

"In terms of Section 18 of the RERA Act, if a promoter fails to complete or is unable to give possession of an apartment duly completed by the date specified in the agreement, the Promoter would be liable, on demand, to return the amount received by him in respect of that apartment if the allottee wishes to withdraw from the Project. Such right of an allottee is specifically made "without prejudice to any other remedy available to him". The right so given to the allottee is unqualified and if availed, the money deposited by the allottee has to be refunded with interest at such rate as may be prescribed. The proviso to Section 18(1) contemplates a situation where the allottee does not intend to withdraw from the Project. In that case he is entitled to and must be paid interest for every month of delay till the handing over of the possession. It is upto the allottee to proceed either under Section 18(1) or under proviso to Section 18(1)."

21. Even if, *force majeure* factors as demonstrated by the Promoter are given some consideration, we are of the view that the Promoter is not entitled to get benefit of the same for the reasons that the same are not attributable to the Allottees nor is the case of the Promoter that the Allottees in any way has caused delay in completion of the Project. Therefore, the submission of the Promoter that he is entitled to extension on account of delays due to factors beyond his control as per the clause 16 of the agreement for sale is not tenable. While

explaining the scope of Section 18 of RERA, the Hon'ble Supreme Court in **M/s. Newtech Promoter and Developers Pvt. Ltd. V/s. State of Uttar Pradesh** [2021 SCC Online 1044] dated 11 November, 2021 held that;

"Para 25. The unqualified right of the allottee to seek refund referred under Section 18(1)(a) and Section 19(4) of the Act is not dependent on any contingencies or stipulations thereof. It appears that the legislature has consciously provided this right of refund on demand as an unconditional absolute right to the allottee, if the promoter fails to give possession of the apartment, plot or building within the time stipulated under the terms of the agreement regardless of unforeseen events or stay orders of the Court/Tribunal, which is in either way not attributable to the allottee/home buyer, the promoter is under an obligation to refund the amount on demand with interest at the rate prescribed by the State Government including compensation in the manner provided under the Act with the proviso that if the allottee does not wish to withdraw from the project, he shall be entitled for interest for the period of delay till handing over possession at the rate prescribed.

22. It is therefore clear that there are no shackles or limitations on exercise of right by the Appellants to seek interest once there is delay in possession. Further as per the agreement for sale the Promoter has committed possession on or before 31.03.2019 and still the project is incomplete. This signifies that the Promoter has miserably failed to adhere to his obligation to

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handover possession of the said flat to Appellants by the date specified in the said agreement for sale.

23. The Promoter has also submitted that as per Registration Certificate with MahaRERA, the time period of possession is now extended to 30.06.2023. The contention of the Promoter is that in view of the said extension granted by the Authority, the Promoter will complete the construction and handover the subject flat to Appellants by the said date. We are of the view that the subject date of possession in MahaRERA Certificate cannot be allowed to amend the agreed date of possession as per the agreement for sale as the same is without any consent from the Appellants. The agreed date of possession in the said agreement can be modified/ extended only by mutual consent of the parties to the agreement for sale. Therefore, we do not find any merit in the above submissions of the Promoter.

24. For the foregoing reasons we have come to the conclusion that the Appellants are not responsible for delay in completion of the project, on the contrary the Promoter has failed to discharge his obligation to handover possession of the said flat to the Appellants on the date specified in the agreement for sale and thereby violated the provisions of Section 18 of RERA.

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Therefore, the Appellants are entitled to relief of interest under Section 18 of RERA on account of the delay in handing over the possession of the said flat by the Promoter to Appellants. Accordingly, we answer point no.1 in the affirmative.

Point No. 2

25. While passing the impugned Order dated 08.04.2022, the Authority directed the Promoter to pay interest on account of delay in handing over possession on the amounts paid by the Appellants towards part consideration of the said flat from the date of possession as mentioned in the agreement for sale **with grace period of 6 months**. It is pertinent to note that Clause 16 of the said agreement for sale clearly stipulates that the Promoter shall give possession of the said flat on or before 31.03.2019 upon receipt of part Occupation Certificate/ Occupation Certificate; nowhere in the said clause or in the agreement there is mention of any grace period. Nor such grace period is pleaded in the Complaint proceedings. Therefore, granting a grace period of 6 months by the Authority has no basis or without any reasons. The Authority has further directed that in view of the mitigating circumstances and to ensure that the said project is not jeopardized due to outflow of finance, the

amount payable may be paid after obtaining the Occupation Certificate for the project or before 30.06.2023, the date of completion of the project as per MahaRERA website, whichever is earlier. As we have observed earlier that the right of an allottee to claim interest under Section 18 of RERA on account of delay in handing over possession of the flat is indefeasible and unqualified right which cannot be defeated by any reason. Therefore, such conditional payment of interest by the Promoter is contrary to the provisions of RERA as well as the ratio and the dictum laid down in the judgements by the Hon'ble Apex Court. The Authority also directed that the Promoter is entitled to claim the benefit of 'moratorium period' as mentioned in the Notifications/Orders No. 13 and 14 dated 02.04.2020 and 18.05.2020 issued by MahaRERA as well as Notifications/ Orders that will be issued in this regard from time to time. It is pertinent to note that the specified date of handing over of the possession as per Clause 16 of the agreement for sale is 31.03.2019, which is much prior to the Covid-19 pandemic. Therefore, we are of the view that the Promoter is not entitled to claim benefit of 'moratorium period' as mentioned above.



26. For the reasons mentioned above we are of the view that the said Order dated 08.04.2022 passed by the Authority is contrary to the provisions of RERA as well as ratio and dictum laid down by the Hon'ble Apex Court. Therefore, the said impugned Order warrants interference in this Appeal. Accordingly, we answer the point no.2 in the affirmative.
27. With discussions and observations recorded hereinabove, the Appellants are not found responsible for the delay in completion of the said project, the Appellants are entitled to interest for delay in possession under Section 18 of RERA. Consequently, we proceed to pass the following Order.

ORDER

- i. Appeal No.AT006000000093934/22 is allowed with following directions
- a. The impugned Order dated 08.04.2022 passed by the Authority is set aside.
 - b. The Promoter is directed to pay interest on the amount of Rs.94,17,465/- paid by the Appellants towards part consideration of the subject flat at the rate of 2% above the State Bank of India highest Marginal Cost Lending Rate from 01.04.2019 till the

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actual possession with Occupation Certificate is handed over by the Promoter to the Appellants.

- c. The amount of interest payable by the Promoter mentioned in (b) above shall be adjusted against outstanding balance payment, if any, to be made by the Appellants to the Promoter at the time of handing over the possession of the subject flat to the Appellants.
 - d. The Promoter shall not create any third-party rights in the said flat.
 - e. The Promoter is directed to hand over possession of the subject flat to the Appellants by completing the project and after obtaining Occupation Certificate.
- ii. Accordingly, Misc. Application, if any, also stands disposed of.
 - iii. Parties to bear their own costs.
 - iv. Copy of this Order be communicated to the Authority and the respective parties as per Section 44(4) of RERA Act, 2016.

(SHRIKANT M. DESHPANDE)

(SHRIRAM R. JAGTAP)

MBT/