

Oct 13, 1800

BEFORE MAHARASHTRA REAL ESTATE APPELLATE TRIBUNAL, MUMBAI

APPEAL NO. AT006000000053319 OF 2021
IN
Complaint No. CC006000000192515 OF 2020

1. Ravindra Laxman Vengurlekar

2. Rupali Ravindra Vengurlekar

Flat no. 13/B-105, Shree Ram Darshan
CHS Ltd. Mhada Colony, Near
Sakinaka Police Station, Chandivali,
Mumbai- 400072.

... Appellants

~ *versus* ~

ITMC Developers Pvt. Ltd.

Registered address at - 1, Ram Krupa, Devji Bhimji Lane,
Mathuradas Road, Kandivali (west),
Mumbai- 400067.

... Respondent

Adv. Chaitra Rao, for Appellants.
None for Respondent.

**CORAM : SHRI. SHREERAM R. JAGTAAP, MEMBER (J)
& DR. K. SHIVAJI, MEMBER (A)**

DATE : 18th OCTOBER 2024

(*THROUGH VIDEO CONFERENCE*)

JUDGEMENT

[PER: DR. K. SHIVAJI, MEMBER (A)]

Captioned appeal has been preferred under The Maharashtra Real Estate (Regulation and Development) Act, 2016 (in short, "the Act") against the order dated 16th June 2021 in Complaint no. CC006 000000 192515 and against the order dated 7th March 2022 in Compliant cum review application no. CC006 000000 197677,

passed by learned Member, Maharashtra Real Estate Regulatory Authority, ("MahaRERA"), wherein respondent promoter has been directed *inter alia* to pay interest to appellants from 1st August 2018 till the actual date of possession on the actual amounts paid at prescribed interest rate under Section 18 of the Act and promoter is entitled to claim benefit of moratorium period as per the notifications no. 13 and 14 dated 2nd April 2020 and 18th May 2020 issued by MahaRERA.

2. Respondent is the real estate developer and is constructing duly registered real estate project namely "**SAPPHIRE 1**", located at Vikhroli (East), Mumbai- 400071. Appellants are flat purchasers in Respondent's said project and Complainants before MahaRERA. For convenience, Appellants and Respondent will be addressed as Complainants and Promoter respectively in their original status before MahaRERA.

3. Background giving rise to filing of the current appeal:

a. Complainants case : Complainants purchased flat no. 1004 in the said project of promoter for total consideration of ₹ 1,50,80,000/- by executing and registering an Agreement for Sale dated 27th July 2015, wherein clause 10 of the agreement stipulates *inter alia* that Respondent promoter will handover possession of the subject flat to complainants on or before December 2016 and subject to further reasonable extension of time on account of certain constraints as set out in the agreement.

b. On account of failure on the part of Promoter to deliver possession before the agreed timeline, captioned complaint came to be filed by Appellant before MahaRERA on 7th December 2020, seeking various

reliefs and for direction to Promoter *inter alia* to handover possession of the subject flat together with interest on the paid amounts for the delay in delivery of possession from 1st January 2017 till the date of the actual possession at prescribed interest rate and also for adjustment of this delayed interest payable to the complainants against the future demands of promoter.

- c.** Respondent promoter appeared before MahaRERA and denied the contentions raised by the complainants by submitting that the contents of the complaint are false and without any documentary evidence. The delay in project completion is due to reasons beyond the control of the promoter including due to the difficulties of then prevailing Covid –19 pandemics, for which, promoter is otherwise entitled for the moratorium period as notified by MahaRERA. Moreover, the building is complete up to 19th floor. In addition, the due date for handing over the possession of the subject flat has been extended by consents of the allottees including by the complainants. As such, complainants have made payments even after the expiry of the agreed possession date stipulated in the agreement for sale, which shows that complainants have already accepted the newly extended date of possession.
- d.** Upon hearing the parties, impugned orders came to be passed by MahaRERA with directions to Promoter as enunciated herein supra.
- e.** After the receipt of the said order dated 16th June 2021 passed by MahaRERA, promoter filed the complaint cum review application no. CC006 000000 197677 seeking review/ rectification of this order dated 16th June 2021 under Rule 36 of the Maharashtra Real Estate Regulatory Authority (General Regulations), 2017, by submitting that the said order dated 16th June 2021 does not account for the benefit

of moratorium period, which has already been granted by MahaRERA itself to all the promoters due to then prevailing Covid -19 pandemic by way of various circulars and prayed for the benefit of the moratorium periods under the said circulars.

- f.** No one appeared on behalf of the Appellants before MahaRERA in the said review proceeding. Therefore, after hearing the learned counsel for the promoter, MahaRERA modified its earlier order dated 16th June 2021 by adding para no. 12(a) therein and granted the benefits of moratorium periods notified under circular nos. 13 and 14 issued by MahaRERA for extensions of project completion period.
- 4.** Aggrieved by these orders, Complainants flat buyers have preferred the instant appeal seeking various reliefs *inter alia* to set aside impugned orders dated 16th June 2021 read with 7th March 2022 to the extent the same do not award interest for the delayed possession of the subject flat and car parking for the period 1st January 2017 till handing over the possession of the subject flat.
- 5.** Learned counsel for the parties appeared in the captioned appeal proceeding and completed their pleadings. Learned counsel for the promoter filed/circulated replies including written submissions, but he did not appear and made oral submissions even after providing sufficient opportunities. Therefore, we heard oral submissions of Adv. Chaitra Rao Sheth, learned counsel for the appellant. Perused record.
- 6.** At the time of oral submissions, Advocate Ms. Chaitra Rao prayed for the said reliefs by submitting the followings; -
- a.** Promoter has failed to hand over the subject flat on or before this agreed timeline despite contractual commitments in the agreement



for sale for delivery of the possession of subject flat on or before December 2016 and even after following ups.

- b.** Contentions of the promoter and the observations of MahaRERA in para 8, 9 and 11 of impugned order dated 16th June 2021 that agreement for sale was executed under the MOFA regime and if the alleged delay was not acceptable to appellants, then they ought to have claimed refund of their paid amounts along with interest as per the provisions of MIOA and not under the Act are erroneous. This is prima facie incorrectly recorded because MahaRERA itself has observed in para 9 of the impugned order that these reasons/grounds cited by the promoter for the delay are not covered under the force majeure clause.
- c.** Contentions of the promoter and the observations made by MahaRERA in the impugned order dated 16th June 2021 that complainants have also agreed and accepted the revised project completion date till July 2018, are also erroneous, because complainants have not even attended the said meetings called by the promoter on 11th July 2015, 17th September 2016 and 23rd April 2017 to explain the reasons for delay in project completion. Moreover, appellants have never accepted the alleged extension of project completion date. Accordingly, MahaRERA has incorrectly recorded that "*since the project was getting delayed, it has conducted several meetings between the Appellants of the Project between the year 2015-2017, wherein Complainants were also the attendees and have accepted the revised completion date till July 2018*".
- d.** Whereas, Hon'ble Bombay High Court in its judgement dated 2nd May 2022 in the case of *Jayesh Tanna, Director of ITMC Developer Pvt.*

Ltd. Vs. Radha Arakkal and Ors has specifically held *inter alia* that “the document, which is reduced into writing can only be altered, varied, added, subtracted, rescinded by executing a subsequent document in the like manner.” As such, the said judgement has attained finality because SLP filed against it before The Hon’ble Supreme Court dismissed it.

- e. The Act of 2017 is welfare legislation, which has been enacted to protect the interests of the real estate consumers and the appellants herein are allottees and real estate consumers as well.
 - f. The contentions of the promoter that the delay in the project completion is due to factors beyond the control of the promoter and these factors are not force majeure events. Therefore, these are not sustainable in law and have resulted in miscarriage of justice.
7. Per Contra Promoter vehemently opposed the contentions raised by complainants by filing and circulating replies/written arguments, wherein, it submits the followings; -
- a. Complainants have also challenged the order dated 7th March 2022, on the ground that this order has been passed by MahaRERA behind their backs and no opportunity was given to appellants to be heard. This is despite the fact that complaints were very well aware of the review application, which was filed to modify the original impugned order dated 16th June 2021.
 - b. The said delay in the project completion is due to the factors beyond the control of the promoter on the accounts of the difficulties faced by the then prevailing covid-19 pandemics and are also due to delay on part of the Slum Rehabilitation Authorities (SRA). It is because the subject project is under Slum Rehabilitation Scheme.

- c. Promoter, by calling several meetings of allottees/flat purchasers, wherein the complainants also attended, has informed to all the flat purchasers including the complainants that there was delay in completing the said building due to reasons beyond the control of promoter and flat purchasers including the complainants were kept apprised of such developments.
- d. Thus, Complainants were fully aware of the said meetings, wherein, the possession delivery date was extended and renewed the possession date to March 2020, finally to May 2020 and was further revised to June 2023 by consents of all the allottees including the said appellants. Complainants did not take any objection even though, the project extension certificate of registration containing these extensions were always available in the public domain.
- e. When the parties to the contract decide to substitute it with a new contract or alter it or rescind the same then, it is the settled proposition of law that it can be done after an agreement of all the parties to a new contract. In that event, the old obligations will stand extinguished and the validity of new ones will kick in. Accordingly, the obligations under the old contract will stand cancelled.
- f. Moreover, Section 18 of the Act of 2016 and Section 8 of MOFA cannot be invoked in view of the agreed contractual positions between the parties, more particularly in terms of clause 10 of the agreement for sale, wherein, time period of the possessions delivery of the subject flat will automatically stand extended in case of the said delay in the instant case on account of the reasons beyond the control of the promoter. This has been specifically stipulated in the agreement itself. Therefore, the captioned appeal is liable to be dismissed with costs.



8. From the rival pleadings, submissions and upon perusal of record, following points arise for our determination in the appeal and we have recorded our findings against each of them for the reasons to follow:-

	POINTS	FINDINGS
1.	Whether Appellants complainants are entitled for possession and interest for the alleged delay in delivery of possession of the subject flat as prayed for in the appeal?	As per the order.
2.	Whether impugned order is sustainable in law?	In the negative.
3.	Whether impugned order calls for interference in this appeal?	In the affirmative.
4.	If yes, then, what Order?	As per the Order.

REASONS

Point nos. 1, 2, 3 and 4 : Interest for the delay in delivery of possession:

9. These points are interlinked, so have been considered together.
10. It is not in dispute that Complainants have booked flat no. 1004 in the duly registered said project of Promoter under the Act. Therefore, Complainants are Allottees as per Section 2 (d) of the Act and the provisions of this Act are squarely applicable. Complainants have opted not to withdraw from the said project and have prayed for interest for the delay in delivery of possession under the provisions of the Act as elaborated above.



11. It is also not in dispute that the clause 10 of the duly executed and registered agreement for sale between the parties, stipulates for the promoter to handover possession of the subject flat to complainants on or before December 2016. However admittedly, project has not been completed and the occupation certificate of the building has not been received so far. Therefore, Section 18 of the Act is attracted.
12. However, Promoter has pleaded that the delay in project completion has happened on account of factors beyond the control of promoter. These include the delay in getting approvals and clarifications from SRA and also on account of difficulties faced by the then, prevailing Covid-19 pandemic. As such MahaRERA itself has also granted extensions in the project completion timelines by issuing moratorium notifications.
13. But these contentions of the learned counsel for promoter are legally not sustainable in view of the settled position of law on account of the followings: -
 - a. In view of para nos. 25 and 78 of the judgement of Hon'ble Supreme Court in the case of **M/s. Newtech Promoter and Developers Pvt. Ltd vs. State of Uttar Pradesh & Ors. [2021 SCC Online 1044] dated 11th November 2021**, it has been clarified that *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*

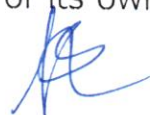
is under an obligation to refund the amount on demand with interest at the rate prescribed by the State Government including compensation in the manner provided under the Act with the proviso that if the allottee does not wish to withdraw from the project, he shall be entitled for interest for the period of delay till handing over possession at the rate prescribed.

Accordingly, it has been held that the rights of Allottees under Section 18 of the Act are unconditional and absolute, regardless of unforeseen events including the factors propounded by the Promoter herein that the project got delayed due to factors beyond its control. Thus, Complainants, continue to be entitled for their rights under Section 18 of the Act, accrued due to delay in delivery of possession of subject flat beyond the agreed timelines irrespective of such factors beyond the control of the promoter.

- b.** The Hon'ble Bombay High Court, in the case of (Promoter company itself) **Neelkamal Realtors Suburban Pvt. Ltd. & Anr. Vs. Union of India & Ors. [(2017) SCC Online Bom 9302]** in **para 119**, further held that "*While the proposal is submitted, the Promoter is supposed to be conscious of the consequences of getting the project registered under RERA. Having sufficient experience in the open market, the **Promoter is expected to have a fair assessment of the time required for completing the project....***". Accordingly, it is evident that Promoter is inherently better equipped about market/project related information and is structurally at advantageous position in as far as the information about the said project completion are concerned. But promoter has failed to deliver possession in agreed timeline.



- c. **The Hon'ble Bombay High Court, in the case of *Neelkamal Realtors Suburban Pvt. Ltd. & Anr. Vs. Union of India & Ors.* in para 257 and 258, (supra)** has further held that
- "257. If the allottee does not intend to withdraw from the project, he shall be paid by the promoter interest for every month's delay till handing over of the possession. The requirement to pay interest is not a penalty as the payment of interest is compensatory in nature in the light of the delay suffered by the allottee who has paid for his apartment but has not received possession of it. The **obligation imposed on the promoter to pay interest till such time as the apartment is handed over to him is not unreasonable. The interest is merely compensation for use of money.**"*
- "258. The object of Section 18 is to **recompense an allottee for depriving him of the use of the funds paid by him.** The promoter, who has received money from the allottee but has failed to adhere to his contractual or statutory obligations, cannot claim that he is entitled to utilize the monies without paying any interest with respect thereto to the allottee."*
- d. Timely completion of the project and delivery of possession of the subject flat in time is contractual commitment of promoter as per the agreement of sale but has failed to fulfil it.
- e. **Party in breach, cannot take advantage of its own wrong:** It is pertinent to note that in the instant case promoter has violated the statutory provisions of Section 18 of the Act by not delivering possession of the subject flat within the agreed timelines as per the agreement. The said delay being attributable to Promoter and Promoter itself cannot take advantage of its own deficiencies/ non-



performances and despite being party in breach, more particularly in view of the judgement of The Hon'ble Supreme Court in the case of ***Kusheshwar Prasad Singh Vs. State of Bihar and Ors. Civil Appeal No. 7351 of 2000***”.

- f. It is also important to note that the project has been registered under the Real Estate (Regulation & Development) Act, 2016, which provides several welfare provisions to protect interests of consumers including for greater accountability towards consumers to inject greater efficiency, transparency and accountability as contemplated in the statement of Objects and Reasons of the Act. Regulation 25 of Maharashtra Real Estate Appellate Tribunal, 2019 speaks about saving of inherent powers of the Tribunal; -

"25(1) Nothing in these rules or to prevent the abuse of the process of the Tribunal."

It means the Appellate Tribunal has inherent powers under the Regulations framed under RERA Act, 2016 to pass appropriate Orders, which are necessary to meet the ends of justice.

- 14.** In view of the above, the agreed timeline as per the agreement for possession is December 2016 itself and admittedly the project has not been completed so far.
- 15.** Contentions of the Respondent that the agreement for sale was executed during the MOFA regime and if the alleged delay was not acceptable to appellants, then they ought to have claimed refund for their paid amounts under the provisions of MOFA and not under the Act of 2016. However, this contention of Respondent promoter is legally not sustainable on account of the followings; -



- a. It is not in dispute that the said Act came into force on 01st May 2017 and the subject project has been duly registered by the promoter under the Act of 2016 as an ongoing project. Whereas **The Hon'ble Bombay High Court in para 86 of its judgement in the case of Neelkamal Realtors Suburban Pvt. Ltd. & Anr. Vs. Union of India & Ors. (supra)** has held *inter alia* that ".....The RERA (the Act of 2016) **will apply after getting the project registered**. In that sense, the application of RERA is prospective in nature.....". Accordingly, the said sale transaction falls within the purview of the Act of 2016.
- b. Moreover, the Hon'ble Supreme Court in para 54 of its judgment dated November 11, 2021, in the case of **M/s. Newtech Promoters and Developers Pvt. Ltd vs. State of UP & Ors. (supra)** has also held that " 54. From the scheme of the Act 2016, its application is retroactive in character, and it can safely be observed that the projects already completed or to which the completion certificate has been granted are not under its fold and therefore, vested or accrued rights, if any, in no manner are affected. At the same time, **it will apply after getting the ongoing projects and future projects registered under Section 3 to prospectively follow the mandate of the Act 2016.**" Accordingly, all the provision of the Act of 2016 are retroactively squarely applicable after the registration as an ongoing project.
- c. Moreover, in case of conflict/s, provisions of the said Act of 2016 will prevail as per Section 88 of the Act.



- 16.** Therefore, in view of the settled positions of law, even though, the Agreement for sale has been executed during MOFA regime, all the provisions of the Act Act of 2016 are squarely applicable for the captioned sales transactions.
- 17.** In that view of the matter, the contentions of the promoter that complainants should have opted for refund of the paid amount under the provisions of MOFA are legally not sustainable and as per the settled positions of law that the provisions of the Act of 2016 are squarely applicable in the instant case. Consequently, the sale transaction under question is entirely covered and are within the purview of the Act of 2016, even though the agreement for sale was executed during the MOFA regime.
- 18.** In addition, The Hon'ble Supreme Court while interpreting Section 18 of the Act, in para 78 of its judgment in the case of ***Imperia Structures Ltd. Vs. Anil Patni and Anr.*** [5 2020(10) SCC 783] has further held *inter alia* that
- “..... *It is up to the Allottee to proceed either under Section 18(1) or under proviso to Section 18(1).*” Hence, it is the complete discretion of the allottees to seek refund or otherwise to continue in the project and seek possession of the subject flat together with the interest for the delay in delivery of the possession and this discretion is not of the promoter.
- 19.** The contention of the Promoter that all the flat purchasers including the complainants have been kept informed about the said delay in completion of project, which has happened due to the reasons beyond the control. It was further contended that complainants/ flat purchasers were fully apprised of such developments by calling



meetings during 2015 -2017, wherein complainants also attended the meetings, and they have agreed for the extensions in the possession delivery dates. However, learned counsel for complainants submits that complainants were not even present in those meetings, which is evident from the perusal of the copy of those minutes itself and has placed a copy of the minutes of the concerned meetings on record. Accordingly, learned counsel for complainants vehemently controverted the contentions of the respondent promoter that they have agreed for the said extension to any delivery date of possession of the subject flat.

- 20.** In addition, complainants further submit that promoter has contractually committed for delivery of possession by December 2016 itself. Therefore, any extension of the possession date can be possible only with the prior and expressed consents in writing by both the parties. But in the instant case, promoter has not furnished any such written documents in support of the said contentions of the alleged extensions of the possession date. In support of this contention, learned counsel for complainants have placed reliance on the judgment of the Hon'ble Bombay High Court in the case of Jayesh Tanna, Director of ITMC Developers Pvt. Ltd. Versus Radha Arakkal & Ors in Second Appeal No.113 of 2022 dated 02nd May 2022 wherein, the Hon'ble High Court had formulated *inter alia* the substantial question of law and held thereon as follows; -

"2. Whether the Appellate Tribunal was correct to hold in the Impugned Order-2 that the mere presence of Allottees will not amount to consent for extension of date of possession despite of the fact that the Respondent nos.1 and 2 themselves in their original complaint before the RERA authority relied



upon and did not dispute the concerned Minutes of the meetings and correspondence evidencing extension of the date of possession?"

21. The Hon'ble Bombay High Court has held the following against the above substantive questions of law in para 17 of its judgment; -

*"17. Upon arriving at the conclusion, that the agreement entered into between the parties, which has been **reduced into writing cannot be substituted or stand novated by a subsequent oral understanding, the substantial questions of law formulated above, are answered in the negative.** By upholding the impugned orders passed by MahaRERA and the Appellate Authority, the appeal is dismissed."*

22. It is to note that in the above matter before The Hon'ble Bombay High Court is relating to the same project and the same promoter. Whereas allottees in that case were even present in the said meetings of the same promoter unlike in the present case, where the complainants were not even present in said meetings.

23. Even then, The Hon'ble Bombay High Court has held that in the absence of the duly executed amendment of the agreement for sale expressly extending the possession date, possession date cannot be changed even if the allottees were present in the said meetings. Whereas, in the instant case, complainants were not even present in the meeting. Therefore, the contention of the promoter that the complainants have agreed for extension of the possession date merely on the ground that complainants had purportedly attended the meeting called by the promoter is legally not sustainable. Likewise, it is also not legally correct to say that complainants have accorded implied consents for the extension of the possession delivery date by making payments

to the promoter even after the expiry of the agreed possession date. Therefore, the contention of promoter is legal unsustainable and cannot be accepted.

- 24.** In view of the above, the agreed timeline as per the agreement for possession is December 2016 itself and admittedly the project has not been completed, occupation certificate has not been received so far and therefore, the possession of the subject has not been handed over till now.
- 25.** Whereas perusal of the provision of Section 18 specifically, shows that in the context of assessing delay in handing over possession and if Promoter fails to complete or unable to deliver possession of apartment, as per the agreed timelines and if Allottees intend to not to withdraw from the project, then, Promoter shall pay interest at prescribed rate on the total paid amounts for the period of delay at such rates as may be prescribed in this behalf as provided under Section 18 of the Act.
- 26.** Considering above, it is more than evident that there is delay in delivery of possession and Section 18 of the Act provides unconditional and unqualified right to Complainants for payment of interest for delay in delivery of possession on the total paid amounts. In view of the settled position of law, complainants are entitled for interest at prescribed rate from 1st January 2017 till the actual date of the delivery of possession of the subject flat with occupation certificate. Therefore, impugned order suffers from infirmities, it warrants interference in this appeal, and it needs to be modified to the extent as determined here in above. Accordingly, we answer the points 1, 2, 3 along with 4 as above and proceed to pass order as follows:



ORDER

- a.** Appeal is partly allowed.
- b.** Promoter is directed to pay interest to complainants from 01st January 2017 for every month of delay till the delivery of the possession of the subject flat with occupation certificate on the amounts paid by appellants at the rate of Marginal Cost of Lending Rate (MCLR) of SBI plus 2 % as prescribed under the provision of Section 18 of The Maharashtra Real Estate (Regulation and Development) Act, 2016 and the Rules made thereunder.
- c.** No order as to costs.
- d.** In view of the provisions of Section 44(4) of the Act of 2016, a copy of this order shall be sent to the parties and to MahaRERA.


(Dr. K. SHIVAJI)


(SHREERAM R. JAGTAP J.)