BEFORE THE MAHARASHTRA REAL ESTATE APPELLATE TRIBUNAL, MUMBAI

Appeal No. AT006000000052520/20
In
Complaint No. CC006000000079371

Ashok Sayaji Dhatrak
308/A Wing, Apli Ekta CHS.,
Navpada, Marol Naka,
Andheri (East),
Mumbai-400059 **... Appellant**

Versus

1. Rashmi Realty Builders Pvt. Ltd.
B-215, Shanti Shopping Centre,
1st Floor, Station Road,
Mira Raod (East), Opp. Railway Station,
Mira-Bhayandar Municipal Corp.
Thane-401 107

2. Mr. Yogesh Pranjivan Bosmiya
B-215, Shanti Shopping Centre,
1st Floor, Station Road,
Mira Raod (East), Opp. Railway Station,
Mira-Bhayandar Municipal Corp.
Thane-401 107

3. Mr. Ashok Pranjivan Bosmiya
B-215, Shanti Shopping Centre,
1st Floor, Station Road,
Mira Raod (East), Opp. Railway Station,
Mira-Bhayandar Municipal Corp.

Thane-401 107 **... Respondents**

Appeal No. AT006000000052526/20
In
Complaint No. CC006000000079355

Mr. Balu Sajaba Dhatrak
Executor of Late Bansi Sayaji Dhatrak
308/A Wing, Apli Ekta CHS.,
Navpada, Marol Naka,
Andheri (East),
Mumbai-400059 **... Appellant**

Versus

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B-215, Shanti Shopping Centre,

1st Floor, Station Road,
Mira Raod (East), Opp. Railway Station,
Mira-Bhayandar Municipal Corp.
Thane-401 107 **... Respondents**

Adv. Mr. Mukhtiyar Khan for Appellant
Adv. Mr. Ashokkumar Upadhyay for Respondents

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

DATE : 23rd September, 2024

(THROUGH VIDEO CONFERENCING)

JUDGEMENT

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

1] The captioned Appeals arise from common Order dated 30.01.2020 passed by learned Chairperson, MahaRERA (for short "the Authority") in Complaint Nos.CC006000000079355 and CC0060000000079371 whereby the Authority dismissed the said Complaints.

2] Respondent No.1 is a private limited Company incorporated with the Registrar of Companies, Mumbai under the provisions of Companies Act, 1956. Respondent Nos. 2 and 3 are directors of the said Company. Respondents are Promoters of the project named "**Rashmi's Star City-Phase IV**" township, Village Juchandra and Chandrapada, Taluka Vasai, District Thane.

3] For the sake of convenience, Appellants hereinafter will be referred to as "Complainants" and Respondent No. 1 to 3 will hereinafter be referred to as "Promoter". Since the captioned Appeals arise out of the same Order, have almost identical facts, grounds for appeals, and reliefs sought, these Appeals are disposed of by this common judgment.

4] The brief facts gathered from the pleadings, documents on record, and impugned Order are that the Complainants booked two apartments in the Promoter's said project "**Rashmi's Star City-Phase IV**" through separate Memorandums of Understanding dated 15.09.2011 for consideration of Rs.14,00,000/- and 13,40,000/- respectively. The terms and conditions of these Memorandums of Understanding are identical, they hereinafter will be collectively referred to as "**said MoU**". The date of possession as mentioned in the said MoU is 40 months of signing of the said MoU i.e. on or before 15.12.2015. The said MoU, however, did not identify any specific apartments, since as per Clause 13 of the MoU the allotment was to be decided through a lottery system at the plinth stage of the said project. The Complainants have paid Rs.10,18,540/- each for the subject flats. Despite payment of substantial amounts towards the consideration

of the said flats, the Promoter has neither allotted flats to them nor executed registered agreements for sale for the subject flats. The Complainants periodically followed up with the Promoter to know about the progress of the said project, but Promoter never responded to their requests. The Complainants also sent legal notice through their Advocate to the Promoter on 09.03.2019. The Complainants received reply to the said notice on 25.03.2019 assuring them possession of the subject flats within next 24 months. However, the Promoter failed to complete construction of the said project and hand over possession of the subject flats to the Complainants. Therefore, the Complainants filed the independent Complaints before the Authority with following prayers.

(i) The Complainants be declared as allottees as per provision of Section 2(d) of the RERA Act, 2016.

(ii) Promoter be directed to allot the flats from the subject project to the Complainants by way of allotment letters.

(iii) Promoter be directed to forthwith, execute and register the agreements for sale for the subject flats.

(iv) Promoter be directed to pay interest on account of delay in handing over possession.

(v) Promoter be directed not to create a third-party interest in the allotted flats.

5] Promoter appeared in the Complaints and remonstrated the Complaints by filing affidavit in reply. The Promoter admitted the booking of the subject flats by Complainants for consideration of Rs.14,00,000/- and Rs. 13,14,000 respectively. Although, the Complainants claimed to have paid Rs. 10,00,000/- each towards consideration the subject flats apart from Rs. 18,540/- for registration charges, stamp duty, VAT and government taxes, the Promoter admitted to the payment of Rs. 7,50,000/- each towards the consideration of the said flats and denied having received cash payments of Rs. 2,50,000/- each for the subject flats as claimed by the Complainants. The Promoter contended that allotment of flats on random basis by lottery system could not be completed due to non-receipt of necessary development approvals from the authorities. Further, the project is delayed due to various factors such as lack of Environmental Clearance and lack of approvals from the competent planning authority. On 28.01.2020 Promoter submitted that he has now obtained the commencement certificate

for the said project, and he is willing to allot the flats, complete the project well within the time stipulated in the MahaRERA registration, and execute and register the agreements for sale. During the course of hearing the Complainants submitted that they would like to withdraw from the said project and sought relief of direction to Promoter to refund the amount paid in accordance with the provisions of said MoU. After hearing both the parties, the Authority observed that the said MoU can neither be treated as an allotment of apartments nor an agreement for sale in accordance with the provisions of RERA. Hence no direction can be issued regarding refund of the amount paid by the Complainants as per the said MoU since there is no violation of provisions of RERA. While disposing of the Complaints, the Authority observed that if the Complainants intend to terminate the MoU, then the said termination shall be guided by the terms and conditions of the said MoU or as agreed between the parties.

6] Aggrieved by the impugned Order dated 30.01.2020, the Complainants have filed the captioned Appeals on the following grounds.

(i) The learned Authority failed to consider all the facts and circumstances of the case while determining the

Complaints and the impugned order is arbitrary, perverse, and bad in law, not in conformity with the provisions of RERA.

(ii) The learned Authority failed to appreciate the provisions of MoU which stipulate that the allotment of flats shall be carried out and informed to the applicants at a function hosted by the Respondents at plinth stage of the project by a random flat allotment system. The learned Authority therefore erred in holding that allotment of the flats will be done after completion of the project.

(iii) The learned Authority failed to appreciate that Complainants are entitled to relief even on the basis of the MoU executed between the parties which disclose the essential ingredients of a contract. Further, the MoU is evidence to prove that the Complainants had booked the flats.

(iv) The learned Authority failed to appreciate that the agreement for sale means an agreement entered into and between Promoter and Allottees irrespective of its nomenclature, whether it is MoU or agreement for sale, or a sale agreement or any other nomenclature.

(v) The learned Authority failed to consider that the facts such as refusal of Environmental Clearance and stoppage of construction work were not disclosed by the Promoter at the time of registration of the project. Neither the Complainants nor any other flat buyers were informed about this at any point of time by the Promoter.

(vi) The learned Authority failed to appreciate that till date no statutory clearances have been granted by the planning and development authority and therefore their registration with MahaRERA is invalid in the light of the Provisions of Section 7 of RERA.

(vii) The learned Authority failed to appreciate that despite all demands of more than 75% of the consideration are met, even though the project has been at standstill for the past 10 years, the Complainants were not granted relief of refund either under Clause 14 of the said MoU or under Section 18 of RERA.

7] With above mentioned grounds, the Complainants have sought following relief in the Appeals.

(i) The Complainants be declared as Allottees in the said project as per Section 2(d) of RERA by virtue of having entered into the said MoU.

(ii) The Promoter be directed to issue allotment letters to the Complainants stating clearly the particulars such as the building no, flat no. allotted to them.

(iii) The Promoter be directed to forthwith register agreements for sale for the flats allotted to the Complainants.

(iv) The Promoter be directed to pay Complainants interest for delay in handing over possession of the subject flats under provisions of Section 18 of RERA.

(v) The Promoter be directed to handover possession of the said flats to the Complainants with reasonable timelines.

(vi) The Promoter be directed not to create any third-party interest on the flats allotted to the Complainants.

8] We have heard learned Advocate Mr. Mukhtiyar Khan for Complainants and Advocate Mr. Ashok Kumar Upadhyay for Promoter.

9] The submissions advanced by learned Advocates for respective parties are nothing but reiteration of the contents of appeal memo, affidavits in reply and written arguments.

10] Learned Advocate for Complainants, in addition, has submitted that the view taken by the Authority that MoU can neither be treated as an allotment/ booking of an apartment, nor an agreement for sale is misplaced and is against the provisions of RERA, Act, 2016 and various judgments of Hon'ble High Court and Hon'ble Supreme Court wherein it has been held that under the provisions of Section 18 of RERA even memorandum of understanding, allotment letter, booking form or any other document disclosing a contract is as good as an agreement for sale and the same are covered under Section 18 of RERA. The said MoU discloses all ingredients of an agreement for sale and therefore the same is enforceable. Learned Advocate further submitted that despite having received substantial amount towards consideration of the subject flats, the Promoter has violated the provisions of Section 4 of MOFA. It was obligatory for the Promoter to get the said MoU duly registered or execute and register agreements for sale in terms of said MoU. Further, since the subject project is registered under RERA, the Promoter has also violated the

provisions of Section 13 of RERA by not executing and registering agreements for sale despite having received more than 10 percent of the consideration. Learned Advocate further submitted that admittedly there is a delay in handing over the possession of the subject flats in terms of the said MoU, Complainants are entitled to relief under Section 18 of RERA.

11] Learned Advocate for Complainants have placed reliance on the following citations:

(i) **Suresh Shankar Rokade & Ors. Vs. Municipal Corporation of Greater Mumbai,** Bombay High Court [Civil Application (St) No.358 of 2018 in Appeal from Order (St.) No.276 of 2018

(ii) **Arif Sheikh Vs. Rashmi Realty Builders Pvt. Ltd.** [MahaRERA Complaint No.CC006000000012092]

(iii) **Rajeev Kumar Vs. Rashmi Realty Builders Pvt. Ltd.** [MahaRERA Complaint No.CC006/5737]

(iv) **Krishna Kishore Agrawal & Anr. Vs. Sahyog Homes Ltd.** [MahaRERA Complaint No.CC006/56265]

(v) **Manjit Singh Dhaliwal Vs. JVPD Properties Pvt. Ltd.** [MahaREAT Appeal no.AT006/17

(vi) **M/s. Fortune Infrastructure (Now known as M/s. Hicon Infrastructure and Anr. Vs. Trevor D'lima & Ors.)** [SC Judgment Dt.12.03.2018 Civil Appeal No(s). 3533-3534 of 2017

12] Learned Advocate for Promoter submitted that in the light of observations made by the Authority that MoU can neither be treated as an allotment/ booking of apartment, the Appeals are not maintainable and liable to be dismissed with costs. Learned Advocate further submitted that the project has been delayed due to several reasons which included delays in getting Environmental Clearance, delays in getting approval for the plans from the competent authority for want of clearance from Environment Ministry. The Order of Hon'ble High Court in Writ Petition (PIL) bearing no.87 of 2013 restrained the concerned authorities from sanctioning, approving, revision of plans for the building projects. Learned Advocate submitted that on account of aforesaid reasons which are beyond the control of the Promoter, the construction work has been delayed. Learned Advocate further submitted that the possession date has been extended to 31.12,2025 as mentioned in RERA registration.

13] Learned Advocate further submitted that Promoter is not denying and is ready to handover subject flats after completion of

the project and after obtaining all necessary permissions from the competent authorities. Learned Advocate also submitted that there is an express provision of arbitration in the said MoU and Complainants instead of invoking the said provision have approached MahaRERA by filing the Complaints. In view of the specific arbitration clause in the said MoU, the Appeals are not maintainable and liable to be dismissed. Learned Advocate submitted that agreements for sale have not been executed and registered between Complainants and the Promoter in respect of any apartment, therefore, the provisions of Section 18 of RERA do not apply in the present cases. With these submissions learned Advocate for Promoter prayed for dismissal of the Appeals.

14] After having considered the submissions of the respective parties, supported by various documents on record, the following points that arise for our consideration and findings thereon for the reasons to follow are as under:

Sr. No.	Points	Findings
1	Whether Complainants are entitled to relief under Section 18 of RERA?	In the affirmative

2	Whether impugned Order dated 30.01.2020 warrants interreference in these Appeals?	In the affirmative
3	What Order?	As per Order

Point No.1

15] On ensembling the facts as submitted above by the parties, it is not in dispute that the Complainants have booked two flats in the Promoter's said project through memorandums of understanding dated 15.09.2011 for consideration of Rs.14,00,000/- and 13,40,000/- respectively. The date of possession as mentioned in the said MoU is 40 months of signing of the said MoU i.e. on or before 15.12.2015. The said MoU however, did not identify any specific flats, since as per Clause 13 of the said MoU the allotment was to be decided through a lottery system at the plinth stage of the said project. However, the Promoter has not yet made any allotment of specific flats by lottery system as contemplated in the said MoU. Although Complainants have claimed payment of Rs.10,18,540/- each for the subject flats, which included Rs.18,540/- towards registration charges, stamp

fee, VAT, etc., the Respondents has admitted to have received Rs.7,50,000/- each for the subject flats towards consideration and denied of having received Rs.2,50,000/- claimed to have been paid in cash by the Complainants for each flat. However, despite payment of substantial amounts towards the consideration of the said flats, the Promoter has neither allotted their flats nor executed the registered agreements for sale for the subject flats. The project is still incomplete. Thus, the Promoter has failed to complete the construction of the said project and handover possession to the Complainants by the date specified in the said MoU, thus, attracting the provisions of Section 18 of RERA.

16] Section 4 of MOFA cast an obligation on the promoter that they shall not accept the sum of money as advance part consideration or deposit, which will be more than 20% of the sale price without entering into written agreement for sale and the agreement for sale shall be registered under the Registration Act, 1908. Section 13 of RERA also casts a similar obligation on the part of promoter that they 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. It is not in dispute that the Complainants have paid substantial amount

towards part consideration of the respective flats, which is more than 20% in case of Section 4 of MOFA and 10% in case of Section 13 of RERA without executing and registering the agreements for sale. Therefore, the Promoter has violated the provisions of Section 4 of MOFA and Section 13 of RERA. The Promoter has contended that agreements for sale have not been executed and registered between Complainants and the Promoter in respect of any apartment, therefore, the provisions of Section 18 of RERA do not apply in the present cases. This contention of the Promoters is not acceptable, because of the settled position of law that he, who prevents a thing from being done, shall not avail himself of the non-performance, he has occasioned. As has been clarified by the Hon'ble Supreme Court in the case of **Kusheshwar Prasad Singh Vs. State of Bihar and Ors. [Supreme Court] Civil Appeal No. 7351 of 2000** that *"It is sound principle of law that he, who prevents a thing being done shall not avail himself of the non-performance he has occasioned. To put it differently, "a wrongdoer ought not to be permitted to make a profit out of his own wrong".* Thus, the Promoter is obligated to execute and register the agreements for sale for the subject flats in terms of the said MoU.

17] Closer examination of the said MoU reveals the details of the project, property, total consideration of the subject flats, the payment schedule and handover of possession within 40 months along with other terms and conditions. The said MoU has been signed by the Complainants as well as the Promoter. The said MoU shows that there was an offer to purchase the flats by the Complainants and its acceptance by the Promoter by way of accepting the part payments from the Appellants. It is significant to note that the Promoter has not specifically denied the factum of payments made by the Complainants to the Promoter, execution of the unregistered MoU, and an issuance of receipts of the payment by the Promoters.

18] Clause (a) of Section 2 of Contract Act, 1872 talks about the proposal and Clause (b) of Section 2 of Contract Act, 1872 speaks about the promise. Clause (a) of Section 2 lays down that when one person signifies to another his willingness to do or to abstain from doing anything, with a view to obtaining the assent of that other to such act or abstinence, he is said to make a proposal. Clause (b) of Section 2 of the Contract Act stipulates that when the person to whom the proposal is made signifies his assent thereto, the proposal is set to be accepted. A proposal, when

accepted, becomes a promise. Careful examination of the aforesaid MoU reveals that it depicts the clear picture of fulfillment of Clause (a) and Clause (b) of Section 2 of the Contract Act, 1872.

19] By signing the MoU, it shows that there was an offer to purchase flats by the Complainants. The offer was accepted by the Promoter by an act of accepting payments towards part consideration of the subject flats. A contract is completed when an offer made is accepted. It is an acceptance that gives the right to the cause of action and not merely the making of the offer. The acceptance of the proposal of the Complainants by accepting amount from the Complainants towards part consideration signifies the intention of the Promoter to sale the subject flats to the Complainants. This depicts a clear picture of fulfillment of requirement of law. The Promoter has acted in furtherance of the said MoU by accepting the part payment towards consideration. Therefore, we are of the view that essential ingredients of a concluded contract are very much present there. Although the said MoU is not registered, the same discloses all the essential ingredients of a concluded contract, which is binding on both the parties.

20] Although the contract as per the said MoU was entered into during MOFA regime, the same is enforceable under the provisions of RERA, since the said project is registered with MahaRERA. In the complaint proceedings as well as in appeals, the Promoter has submitted that they are willing to allot the flats and execute and register the agreements for sale for the subject flats in favour of the Complainants. Further, the Promoter has also admitted to having received the payments towards part consideration of the subject flats in furtherance of the said MoU. Therefore, it is clear that both the parties to the said MoU have acted in furtherance of the terms and conditions mentioned in the said MoU. Therefore, the submission of Promoter that the said MoU can neither be treated as allotment/ booking of allotment and therefore Appeals are not maintainable, is not tenable and therefore rejected.

21] It is worthy to note that it is not in dispute that the Promoter has failed to handover possession of the subject flats to the Complainants by the date specified in the said MoU. The Promoter has attributed the delay in completion of the project to several factors which included delays in getting Environmental Clearance, delays in getting approval to the plans by the competent authority for want of clearance from Environment Ministry. Further,

the Order of Hon'ble Bombay High Court in Writ Petition (PIL) bearing no.87 of 2013 restrained the concerned authorities from sanctioning, approving, revising any plans for building projects. The Promoter submitted that on account of the aforesaid reasons, which were beyond the control of the Promoter, the construction work has been delayed.

22] 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 are of the considered view that delays in the granting of permissions/ sanctions from various competent authorities, litigations in the court, etc. cannot be construed as *force majeure*.

23] 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 Complainants have made a substantial payment out of total consideration to the Promoters. 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. Complainants are not responsible for the reasons for the 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.

24] 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 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)."

25] 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 Complainants nor is the case of the Promoter that the Complainants in any way has caused delay in completion of the Project. 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.

26] It is therefore clear that there are no shackles or limitations on exercise of right by the Complainants to seek interest once there is delay in possession. The date of possession as per the said MoU is on or before 15.12.2015. The fact that the project is still incomplete signifies that the Promoter has failed to adhere to its obligation to handover possession of the subject flats to the Complainants by the specified date in the said MoU.

27] The Promoter has also submitted that the possession date has been mentioned in RERA registration as 31.12.2025. The contention of the Promoter is that in view of the said completion date of the project in MahaRERA registration, there is no delay in handing over the possession. We are of the view that such an extended date of possession in the MahaRERA Certificate cannot be allowed to amend the agreed date of possession as per the terms in the said MoU as the same is without any consent from the Complainants. The agreed date of possession in the said MoU can be modified/ extended only by mutual consent of the parties to the

MoU. Therefore, we do not find any merits in the above submission of the Promoter.

28] The Promoter has also contended that there is a specific provision of arbitration in the said MoU and Complainants instead of invoking the said provision have approached MahaRERA by filing the Complaints. In view of the specific arbitration clause in the said MoU, the Appeals are not maintainable and liable to be dismissed. Clause 16 of the said MoU stipulates that *"in case of any dispute between the company and the applicant regarding interpretation of or exercise of any terms of these presents, the opinion of the company shall prevail. However, if the applicant is aggrieved by such a decision, the dispute may be referred to the Sole Arbitrator appointed by the company and such proceedings will be conducted in accordance with the provisions of Arbitration and Conciliation Act, 1996".* The plain reading of the said arbitration clause reveals that the arbitrator will be appointed solely by the Promoter, which will be binding on the Complainants. Therefore, it reveals that this Clause is not balanced and is one sided, unreasonable and unfair to the Complainants. The Hon'ble Supreme Court in case of **Pioneer Urban Land Infrastructure Ltd. Vs. Govindan Raghavan [(2019) 5 SCC 725]** has held that

"6.7 A term of a contract will not be final and binding if it is shown that the flat purchasers had no option but to sign on the dotted line, on a contract framed by the builder. The contractual terms of the Agreement dated 08.05.2012 are ex-facie one-sided, unfair, and unreasonable. The incorporation of such one-sided clauses in an agreement constitutes an unfair trade practice as per Section 2(r) of the Consumer Protection Act, 1986 since it adopts unfair methods or practices for the purpose of selling the flats by the Builder."

29] In view of the ratio laid down in above judgment of the Hon'ble Supreme Court, we are of the view that the said provision of the arbitration in the said MoU is unfair, unreasonable to the Complainants and therefore not binding.

30] The RERA Act, 2016 is a special Act with a focused scheme and objective to protect interest of allottees in the real estate sector. Section 88 of the Act provides that the provisions of the Act shall be in addition to, and not in derogation to, the provisions of any other law for the time being in force. Further, Section 89 of the Act provides that the provisions of this Act shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force. Thus, the provisions of this Act have overriding effects in the case of repugnancy with any other Act including the Arbitration and Conciliation Act, 1996.

31] The RERA Act, 2016 was enacted with the aim and objective of *inter alia* regulation and promotion of real estate sector in an efficient, fair and transparent manner, for protection of the interest of the real estate consumers. The adjudicating mechanism established under the Act is exclusively for disputes relating to the real estate sector whereas the Arbitration and Conciliation Act, 1996 is general in nature regarding any dispute between the parties in any sectoral area of a contract. The settled principle of law is that a special law will have an overriding effect over any general law.

32] Section 18(1) (b) of RERA states that:

> " ***18 – Return of amount and compensation-*** *(1) If the Promoter fails to complete or is unable to give possession.....he shall be liable on demand to the allottees, in case the allottee wishes to withdraw from the project,* ***without prejudice to any other remedy available****, to return the amount received by him in respect of that apartment, plot, building, as the case may be, with interest at such rate as may be prescribed in this behalf including compensation in the manner as provided under this Act:*
>
> *Provided that where an allottee does not intend to withdraw from the project, he shall be paid, by the promoter, interest for every month of delay, till the handing over of the possession, at such rate as may be prescribed".*

It is evident that the relief under Section 18 of the Act is without prejudice to any other remedy available to the Allottees. Such entitlement of relief under Section 18 of RERA is absolute and

indefeasible which cannot be frustrated by any means. In view of discussions above, the Complainants cannot be precluded from seeking relief under Section 18 of the Act notwithstanding any provision of arbitration in the MoU.

33] Thus, from the above discussion, provision of the said arbitration clause is one-sided, unreasonable and unfair to the Complainants. Further, in case of conflict with the provisions of the Act, the provisions of the Act will prevail and will have overriding effect. Besides, provisions under RERA are additional remedies available at the sole discretion of the allottees to seek suitable recourse appropriately. Therefore, we do not find merits in the contention of the Promoter that the Complainants are barred from taking recourse to Section 18 of RERA due to specific provision of arbitration clause in the said MoU.

34] From the discussions hereinabove, we are of the view that mere non-execution of the agreement for sale, Complainants are not precluded from invoking Section 18 of RERA. The provisions of Section 18 of RERA can equally be invoked in terms of oral or formal agreement executed by the Promoter/ developer such as booking application form/ formal letter/ allotment letter/ letter of intent/ memorandum of understanding, etc. capable of being

construed as an agreement. We have already observed that the said MoU has all the essential ingredients of an agreement capable of being construed as an agreement. Admittedly, the said project is ongoing project and as per the view taken by this Tribunal in catena of cases, provisions of RERA are applicable to this project. Accordingly, the MoU signed between the Promoter and Complainants prior to RERA are enforceable under Section 18 of RERA.

35] Section 18 of RERA Act spells out the consequences that, if Promoter fails to complete or unable to give possession of an apartment by the dates specified in the agreement for sale, the allottees hold an unquailed right to seek interest for every month of delay, till the handing over of the possession, at such rate as may be prescribed. We have already observed that the Promoter has violated the provisions of Section 4 of MOFA and Section 13 of RERA by not executing and registering the agreements for sale for the subject flats even after having received more than 20% of the said price. Therefore, we are of the view that Complainants are entitled to seek relief of interest on account of delay in handing over of possession under Section 18 of RERA. Therefore, we answer the Point No. 1 in the affirmative

36] During the course of proceeding, the Complainants have prayed, in the alternative, for withdrawal from the project seeking refund of paid amounts with interest. This prayer, however, cannot be granted in these Appeals as the same is not prayed in the original Complaints.

37] While passing the impugned Order, the Authority dismissed the Complaints by observing that the said MoU can neither be treated as an allotment of apartment nor an agreement for sale in accordance with the provisions of RERA thereby holding that there is no violation of provisions of RERA. For the reasons and observations hereinabove, the view taken by the Authority is contrary to the provisions of RERA and to the ratio laid down by Hon'ble Apex Court as mentioned above. Thus, the same is found unsustainable in the eyes of law and hence calls for interference in these Appeals. We therefore answer Point No.2 in the affirmative. Consequently, we proceed to pass the following Order:

ORDER

(i) Appeal Nos.AT006000000052520/20 and AT006000000052526/20 are allowed with following directions:

a. The impugned Order dated 30.01.2020 passed in Complaint Nos. CC006000000079731 and CC006000000079355 is set aside.

b. The Promoter is directed to execute and register agreements for sale in terms of the memorandum of understanding dated 15.09.2011 after allotment of flats as stipulated in Clause 13 of the said MoU within 30 days from the date of this Order.

c. The Promoter is directed to pay interest at the rate of SBI's highest Marginal Cost Lending Rate (MCLR) plus 2% on account of delay in handing over the possession of the said flats on the amounts paid by the Complainants towards consideration of the said flats from 16.12.2015 till handing over of the possession to the Complainants.

d. The Promoter is directed to adjust the amount of interest as mentioned above against any balance payment to be made by the Complainants at the time of handing over of the possession.

e. The Promoter is directed to handover possession of the flats to Complainants after completing the construction

of the project and obtaining Occupation Certificate from the competent authority.

f. The Promoter is directed not to create any third-party rights or interest in the flats allotted to the Complainants.

(ii) Parties shall bear their own costs.

(iii) 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/