

May 09

BEFORE MAHARASHTRA REAL ESTATE APPELLATE TRIBUNAL, MUMBAI

MISC. APPLICATION NO. 807 OF 2021
(Possession & Recovery of outstanding dues)

IN

APPEAL NO. AT006000000053027 OF 2021

IN

Complaint no. CC006 000000 182099

Adv. Mr. Prashant M. Sane]
Plot No. 116/701, Orchid Court,]
Sindhi Society, Chembur, Mumbai – 400 071 .] ... Appellant

~ versus ~

1. M/s. Vital Developers Private Ltd.,]
2. Mr. Jayesh C. Mehta – Director,]
M/s. Vital Developers Private Ltd.,]
402-407, 4th Floor, Traffic Lite building,]
Next to Bank of Baroda, M. G. Road,]
Ghatkopar (W), Mumbai – 400 086.] Respondents

Adv. Mr. Prashant M. Sane, Appellant-in-person.

Mr. Makarand Raut, Advocate for Respondent.

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

DATE : 09th MAY 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 21st December 2020 in Complaint no. CC006 000000 182099, passed by learned Member,

Maharashtra Real Estate Regulatory Authority, (MahaRERA), wherein respondents promoters have been directed *inter alia* to pay interest to appellant from 1st January 2020 for every month till the date of part occupation certificate is obtained for the project on the paid amount at prescribed rate under the provisions of Section 18 of the Act and this amount to be paid after setting off against the outstanding dues, if any, is payable by the appellant as well as upon payment of outstanding dues if any, possession of the subject flat be handed over.

2. Respondents are real estate developers and are constructing duly registered real estate project namely "Odina", located at Chembur, Mumbai- 400071. Appellant is flat purchaser in Respondent's said project and Complainant before MahaRERA. For convenience, Appellant and Respondents will be addressed as Complainant and Promoters respectively in their original status before MahaRERA.

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

a. Complainant's case : Complainant purchased flat no. 1504 on 15th floor in the said project of promoters for total consideration of ₹1,06,00,000/- by executing and registering an Agreement for Sale dated 15th November 2017, wherein clause 9 of the agreement stipulates *inter alia* that respondents promoters will handover possession of the subject flat to complainant on or before 31st March 2019 from the date hereof excluding a grace period of 9 months or such further period **as may be agreed between the parties** and subject to further reasonable extension of time on account of certain constraints as set out in clause 9 of the agreement.

b. However, 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 11th March 2021, seeking various reliefs/ direction to Promoter *inter alia* to handover possession

of the subject flat together with interest on the paid amount for the delay in delivery of possession from 1st April 2019 till the date of the actual possession at prescribed rate besides compensations for the damages of defective works and refund for the carpet area deficit of the subject flat.

- c.** Respondents promoters appeared before MahaRERA and refuted the claims of the complainant by submitting that the project has already got part occupation certificate of the subject building up to 15 floors from the Competent Authority (SRA) on 12th June 2020 itself, which covers the subject flat and was ready for occupation from July 2020. However, even after the passage of long time, complainant has failed to comply with his obligations of making timely payments of the outstanding dues for taking possession of the said flat.
 - d.** Upon hearing the parties, impugned order dated 21st December 2020 came to be passed by MahaRERA with direction to Promoter as enunciated herein supra.
 - e.** Aggrieved by this order, Complainant has preferred the instant appeal seeking various reliefs *inter alia* (a) to set aside impugned order dated 21st December 2020, (b) direction to promoters to handover possession and (c) to pay interest at prescribed rate on the paid amounts from 1st April 2019 till the date of the actual possession.
- 4.** Heard learned counsel for parties *in extenso*. Perused record.
 - 5.** At the time of oral argument, Advocate Mr. Prashant Sane submits that out of several reliefs sought in the appeal, complainant is now pressing for direction to promoters only to pay interest for delay in delivery of possession of the subject flat at prescribed rate and is not pressing for other reliefs prayed for in the appeal memo.
 - 6.** Accordingly, Complainant prayed for the said relief by submitting that MahaRERA has not followed the proper procedure in compliance to the



principles of natural justice and the impugned order is arbitrary without any reason, no rationale as well as no logic and has failed to consider the evidence on record in judicious manner. Even the vital facts raised by the complainant has not been considered and has relied on the false submissions made by promoters. Therefore, it has resulted in miscarriage of justice.

7. Per Contra learned counsel for Promoters vehemently opposed the contentions raised by complainant and submits that complainant has time and again been called-upon to take possession of the subject flat after setting off the balance considerations amount including after clearing the outstanding dues by complainant even after the issuance of the impugned order. But complainant has been reluctant. Complainant has made false and misleading statements, has suppressed vital and relevant facts as such, has approached the tribunal with unclean hands. Therefore, complainant is not entitled to claim equitable relief.
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 Appellant complainant is 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 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 Complainant has booked flat no. 1504 on 15th floor in duly registered said project of Promoter under the Act. Therefore, Complainant is Allottee as per Section 2 (d) of the Act and the provisions of this Act are applicable. Complainant has opted not to withdraw from the said project, has taken possession of the subject flat on 3rd August 2022 and has prayed for interest for delay in delivery of possession under the provisions of the Act as elaborated above.
11. It is also not in dispute that the agreed timeline for delivery of possession as per clause 9 of the duly executed and registered agreement for sale between the parties, stipulates that promoters will handover possession of the subject flat to complainant on or before 31st March 2019 from the date hereof excluding grace period of 9 months or such further period **as may be agreed between the parties** and subject to further reasonable extension of time on account of certain constraints as set out in clause 9 of the agreement.
12. Perusal of record and upon consideration of the rival submissions of the parties, it is more than clear that promoters **have not sent notice to complainant and has not invoked clause 9** for the entitlement for extension of the nine months of grace period as per the agreement for sale. Moreover, clause 9 for the grace period as stipulated in the agreement is "excluding grace period of 9 months or for such further period **as may be agreed between the parties**". Evidently, parties have not agreed in this regard. Moreover, the said grace period is not permissible in view of the judgment of the Hon'ble Bombay High Court **dated 4th December 2020 in the case of Westin Developers (P)**



Ltd. v. Raymond Alexis Nunes, [2020 SCC OnLine Bom 3912],”

Relevant abstract of the judgement is being reproduced here with.

*“ The clause referred to by learned Counsel is nothing but an ordinary force majeure clause, where the promoter cannot be faulted for delay in delivery of possession, if such delay is caused by any reason beyond his control. This clause by itself does not provide for any grace period to the promoter. The promoter has to make out a case that delay caused in handing over possession of the premises was due to any of the elements referred to in the majeure clause. It is apparent from the record that the adjudicating authority was not impressed by any of the reasons submitted by the Appellant herein towards justification for this delay. **Yet, the order of the adjudicating authority proceeded on the basis that even if facts pointed out by the Promoter were to be taken into consideration as justification for the delay, a six months' grace period could be granted for delivery of possession to the Promoter. The Appellate Tribunal held that there was no warrant for any such extension under the agreement between the parties and accordingly, ordered interest with effect from the date of delivery of possession stipulated in the agreement. It is important to note that neither the Appellate Tribunal nor the adjudicating authority found in favour of the Appellant/Promoter in so far as its case for justification of the delay is concerned. In the premises, the grace period of six months considered by the adjudicating authority was nothing but an ad-hoc measure and was rightly not accepted by the Appellate Tribunal. Accordingly, no substantial question of law arises in connection with the impugned order of the Appellate Tribunal.**”*

- 13.** In view of the above, it is more than clear that promoters are also not entitled for extension of possession on account of the grace period of nine months beyond 31st March 2019.

- 14.** Learned counsel for promoter further contended that promoters are entitled for extension of possession delivery timeline because the delay in delivery of the possession has taken place is due to the factors beyond the control of the promoter more particularly because of the delay in issuance of the required approvals from the concerned competent authorities and also due to injunction order passed in P.I.L No. 86 of 2014, whereby, the Hon'ble Bombay High Court had restrained the Airport Authority of India from granting any further NOC, pending disposal of P.I.L.. Consequent thereof, Airport Authority of India issued final NOC only on 27th July 2018. Moreover, even after the receipt of the part-occupancy certificate covering the subject flat, complainant refused to take possession of the subject flat and filed complaint before MahaRERA, who has passed the impugned order dated 21st December 2020 awarding *inter alia* interest for delay from 01st January 2020 till the date of the part-occupancy certificate i.e., 12th June 2020. Pursuant thereto, after adjustment to the amounts payable by the complainant, subject flat was handed over on 03rd August 2022 and complainant was called upon to collect the demand draft for the balance net payable amount of ₹ 2,08,712/-. Accordingly, complainant has taken over the possession of the subject flat after adjustment of the net payable amounts between the parties. Therefore, the appeal has become infructuous. Details of the calculation of the payables by respective parties is shown on page 542 (Annexure - A).
- 15.** But, the contentions of the learned counsel for promoters that delay in delivery of possession on account of the factors beyond the control of promoters as enumerated above (P.I.L, delay in issuance of the requisite approvals from the authorities, etc.), are legally not sustainable in view of the settled position of law and under the provisions of Section 18 of the Act including on account of the followings:-



- a. In view of para nos. 25 and 78 of the judgement in the case of **M/s. Newtech Promoters and Developers Pvt. Ltd vs. State of Uttar Pradesh & Ors. [2021 SCC Online 1044]** dated 11th November 2021, wherein, it has been clarified that *if the Promoter fails to give possession of the apartment, plot or building within the time stipulated under the terms of the agreement, then, Allottee's right under the Act to seek refund/ claim interest for delay is unconditional & absolute, regardless of unforeseen events or stay orders of the Court/Tribunal.* Accordingly, it has been held that the rights of Allottee under Section 18 of the Act are unconditional and absolute, **regardless of unforeseen events including due to any other reasons even factors beyond control of the Promoter** and "*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 allottee and not to the promoter to seek refund or otherwise.
- 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 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. 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.

- d. 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 Promoters and Promoters themselves 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. [Supreme Court] Civil Appeal No. 7351 of 2000*** (supra).
- e. In the Judgment of the Hon'ble Supreme Court of India in the case of *M/s. Newtech Promoters and Developers Pvt. Ltd. versus State of U.P & Ors (super)*., it has been observed with regard to some of the relevant statement of objects and reasons as mentioned in para 11 that "11. *Some of the relevant Statement of Objects and Reasons are extracted as under:* "
- 4...(f) the functions of the Authority shall, inter alia, include –*
(iii) to ensure compliance of the obligations cast upon the promoters, the allottees and the real estate agents under the proposed legislation.
- 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 Regulations shall be deemed to limit or otherwise affect the inherent power of the Tribunal to make such orders as may be necessary for meeting the ends of justice 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.

- 16.** In view of the above, the agreed timeline as per the agreement for possession is 31st March 2019 itself.
- 17.** Admittedly the project has got the part-occupancy certificate from the Competent Planning Authority (SRA) on 12th June 2020 for occupation of this part of the subject building up to 15 floors (which covers the subject flat located at 15th floor). However diligent perusal of the part occupation certificate reveals that occupation of this part of building is allowed subject to compliance of several conditions mentioned therein including its "*condition no.6 - That the certificate under section 270A of MMC, Act shall be obtained from A.E. (WW)-M/W- ward and a certified copy of the same shall be submitted to this office.*". This includes that the prior availability of basic amenities including for the water supply connection in the subject building is prerequisite before the occupation is permitted.
- 18.** Perusal of record further shows that the water supply connection, being one of the basic amenities required as per the BMC Act and also as stipulated in the part-occupancy certificate itself, was established by BMC only on 08th April 2021 vide page 556 of the record. Accordingly, the possession of the subject flat cannot be given before 08th April 2021.
- 19.** However, admittedly, the possession of the subject flat has been handed over and complainant has taken possession on 03rd August 2022 (vide page 534). Therefore, Promoter has failed to adhere to a timeline to deliver possession of the subject flat and thus, section 18 of the Act is attracted.
- 20.** Even though, complainant has taken possession of the subject flat on 03rd August 2022, but the subject flat was offered for possession by the promoters with occupation certificate (after its receipt on 12th June 2020)



and upon connection of the water supply on 08th April 2021. Hence, further delay in possession beyond 08th April 2021 was on account of allottee complainant himself and not because of promoters. Therefore, the delay in delivery of possession is from 01st April 2019 till 08th April 2021.

- 21.** Perusal of the provision of Section 18 specifically, shows that in the context of assessing delay in handing over possession that if the Promoter fails to complete or unable to deliver possession of apartment, plot or building, as per the agreed timelines, Allottee intend to not to withdraw from the project, Promoters 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. Accordingly, in view of the settled position of law, complainant is entitled for interest for delay in delivery of possession at prescribed rate from 01st April 2019 till 08th April 2021.
- 22.** At the time of the oral argument, learned counsel for the parties confirmed the computation of the payables between the parties (page 542) that there is no dispute with respect to item nos. tabulated therein at item "C" and item "K". Learned counsel for the promoters upon instructions did not press for the amounts mentioned in the calculations on page 542 in item nos. "F". "G" and "H". complainant appellant is directed to pay maintenance charges as in item "E" from the entitled date of possession of 8th April 2021. In addition, learned counsel for parties agreed for the payment for applicable taxes by the concerned parties upon their entitled amount under the provisions of the Act.
- 23.** Considering above, it is more than evident that there is delay in delivery of possession. Whereas 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. 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 follow:

ORDER

- a. Appeal is partly allowed.
- b. Para 13 of the impugned order dated 21st December 2020, passed in Complaint No. CC 0050000000 182099 stands modified to the extent as here under: -
"13. Promoters are directed to pay interest to complainant from 01st April 2019 for every month of delay till 08th April 2021 on the actual amount paid by complainant 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..... Complainant is directed to pay maintenance charges from the entitled date of possession of 8th April 2021."
- c. The rest of the order stands confirmed.
- d. Parties will pay the applicable taxes.
- e. In view of the disposal of captioned appeal, pending Misc. Application will not survive. Hence, stands disposed of.
- f. No order as to costs.
- g. 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.)