

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

**Appeal No. AT00600000010713 of 2019
In
Complaint No. CC006000000001235/18**

Mustafa Firoz Tinwala

Kedy Tower, Nagpada,
Mumbai 400 008

... Appellant

Versus

1. Amit. Malik

163 Udyog Nagar, P B Marg,
Near Nilam Centre,
Worli, Mumbai-400 025

2. Shankar Kamble

1/11, Pratibha Niwas,
Kajupada, Pipe line,
Kurla West, Mumbai-400 070

3. Nasir Musa Patel

101, Gulshan Complex,
Pipe road, Kurla west
Mumbai-400 070

4. Shakir Musa Patel

101, Gulshan Complex,
Pipe road, Kurla west
Mumbai-400 070

5. Jamiruddin Shaikh

204-D, Sky Park,
Near Oshiwara garden,
Ajit Glass road,
Goregaon-W, Mumbai

... Respondents

S. Jagtap

*Adv. Mr. Avinash Pawar for Promoter
None for Allottees*

**CORAM : SHRIRAM R. JAGTAP, MEMBER (J) &
DR. K. SHIVAJI, MEMBER (A)**

DATE : 30th January, 2024

(THROUGH VIDEO CONFERENCING)

JUDGEMENT

[PER : SHRIRAM R. JAGTAP, MEMBER (J)]

Being aggrieved by the Order dated 26.02.2018, passed by the learned Authority in the Complaint and Order dated 08.08.2018 passed by the learned Authority in the Application filed by Appellant Mr. Mustafa Firoz Tinwala in the above Complaint whereby the learned Authority ordered the Respondents to pay interest to Allottees on the paid amounts till the date of actual possession of the subject flats is delivered to the Complainants.

2] For the sake of convenience parties to the Appeals hereinafter will be referred to as "Promoters" and "Allottees".

3] Brief facts, which led to file instant Appeal are that the project **Ashrafi Towers** situated at Rafi Ahmad Kidwai Marg, Wadala (W), Mumbai is launched by Promoters. The Allottees have booked the flats in the subject project and the details of the same are as under.

S. Jagtap

Sr. No.	Name of Complainant	Flat No.	Date of possession
1	Amit Malik	604	May, 2013
2	Shankar Kerba Kamble	403	May, 2013
3	Nasir Musa Patel	703	September, 2014
4	Shakir Musa Patel	408	September, 2014
5	Jamiruddin Ibrahim Shaikh	406	April, 2014

4] Agreements for sale (AFS) came to be executed by and between the Allottees and Promoters. However, the Promoters have failed to offer the possession of the flats to Allottees on the agreed dates. The Allottees did not wish to withdraw from the project. Being dissatisfied with the conduct of the Promoters the Allottees have filed Complaint and sought relief of interest on the paid amounts for every month's delay till the possession of the flats is handed over. The Respondents did not file their reply to the Complaints and therefore failed to remonstrate the Complaints. After hearing the Complainants/ Allottees, the learned Authority was pleased to pass the Order dated 26.02.2018 and thereby directed the Respondents/ Promoters to pay interest on the paid amount to Allottees till the delivery of actual possession of the subject flats to Allottees.

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5] Being aggrieved by the said Order, Mr. Mustafa Firoz Tinwala, one of the Respondents has filed Application on 26.06.2018 in the said Complaints and sought to rectify the Order by deleting his name from the array of Respondents on the grounds enumerated in the said Application mainly on the grounds that the Complaints are misjoinder of parties, as he is not Promoter of the project. He was working with his father Mr. Firoz Tinwala, who is the Promoter of the project. He had no longer worked in the office of his father. He has been not associated with his father either personally, financially or professionally since four to five years. He was never a partner/ Promoter/ Director of the firm that undertook the subject project. He agitated further grounds such as (i) He has neither issued the allotment letters to Allottees nor executed the AFS in favour of Allottees. He has not retained any sale proceeds of the subject flats with him. (ii) His father Mr. Firoz Tinwala registered the subject project with MahaRERA in his personal name, the documents uploaded on the website of MahaRERA for registration do not disclose his name. With these contentions the Appellant Mr. Mustafa Tinwala prayed to rectify the impugned Order by deleting his name from the array of Respondents.

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6] Learned Authority heard the Appellant Mr. Mustafa Firoz Tinwala and by Order dated 08.08.2018 rejected the Application filed by Respondent No.2 Mr. Mustafa Firoz Tinwala. This rejection of Application of Respondent No.2 Mr. Mustafa Firoz Tinwala, rebound the Appellant to file instant Appeal.

7] The Respondents/ Allottees have filed reply. The gist of contentions of Respondents/ Allottees is that the Appellant was hand in glove with his father Mr. Firoz Usman Tinwala. Mr. Firoz Usman Tinwala had filed affidavit in the Application filed for Anticipatory Bail by Appellant contending therein that he and Appellant are partners of the firm, they and Allottees have arrived at compromise, and they executed the consent terms. The Appellant has signed the consent terms dated 05.03.2016 which *prima facie* shows that Appellant was and is partner of the firm. Allottees have made payments to Appellant and in turn Appellant issued receipts under his signatures to many of the Allottees. The Appellant has accepted the monies from Allottees by cheques and deposited the cheques in his account. With these contentions the Allottees have prayed for dismissal of Appeal with cost.

8] We have heard Advocate Mr. Avinash Pawar for Appellant. In spite of ample opportunities, Respondents/ Allottees failed to

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argue the matter. The submissions advanced by Advocate, Mr. Avinash Pawar for Appellant are nothing but reiteration of the contents of Appeal memo and Application filed for rectification of Order dated 26.02.2018. Having considered the submissions advanced by Advocate Mr. Avinash Pawar for Appellant, impugned Orders and material on record following points arise for our determination and we have recorded the findings thereon for the reasons to follow.

Sr. No.	Points	Findings
1	Whether impugned Orders dated 26.02.2018 and 08.08.2018 warrant interference in the instant Appeal?	In the negative
2	Whether Appeal is hit by non-joinder of necessary party?	In the affirmative
2	What order?	As per final order

REASONS

9] On ensembling the pleadings of the parties, material on record and impugned Orders reveal that it is not in dispute that M/s. Mayur Builders and Developers undertook the project **Ashrafi Towers**. The Allottees booked their respective flats in the subject

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project. The partners of M/s. Mayur Builders and Developers did not handover the possession of the subject flats to respective Allottees on the agreed dates. As a result thereof, the Allottees had filed Complaints and sought relief of interest on the paid amount for delayed possession. The Complaints were filed against Mr. Firoz Usman Tinwala and Mr. Mustafa Firoz Tinwala.

10] The core of contention of Appellant is that the Allottees have wrongly made him party to the Complaints. According to Appellant, he is not Promoter of the subject project. He was/ is never the partner or Director of M/s. Mayur Builders and Developers. He has been not associated with his father either personally, financially or professionally since four to five years. He has neither issued allotment letters to Allottees neither executed agreements for sale in favour of Allottees. He has not retained any sale proceeds of the subject flats with him. His father Mr. Firoz Tinwala registered the subject project with MahaRERA in his personal name and the webpage does not disclose his name.

11] Learned Advocate Mr. Avinash Pawar has invited our attention to the Deed of partnership and sorely submitted that the Deed of partnership does not disclose the name of Appellant as partner. Apart from this, the affidavit filed by father of Appellant in

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the year 2018 in the Anticipatory Bail Application discloses that the Appellant is not partner of the firm. Besides, the Allottees have not produced any material on record which will slightly indicate that the Appellant was/ is partner of M/s. Mayur Builders and Developers. Apart from this, the statement of account produced on record by Appellant clearly shows that monies which were received by him from Allottees have been credited to the account of the firm. It is well settled position of law that any statement made before the police is inadmissible is evidence and therefore by any stretch of imagination it cannot be said that the Appellant was/ is partner of partnership firm and therefore, he is not liable to pay interest to Allottees and the Complaints filed by Allottees are hit by misjoinder of party. We do not find substance in the submissions of learned Advocate Mr. Avinash Pawar.

12] It is not in dispute that since the Promoters did not handover the possession of the subject flats to Allottees on the agreed dates, the Allottees lodged the complaint to R.A.K. Marg Police Station, Mumbai. It is further transpired that the Police Inspector of the said police station recorded the statement of Appellant on 02.12.2016. On scanning the said statement reveals that Appellant has categorically stated in his statement that he



became the partner of M/s. Mayur Builders and Developers Partnership Firm somewhere in the year 2010-2011. There is no material on record to show that he has retracted the said statement. It is not in dispute that Appellant has filed Anticipatory Bail Application No.1757 of 2015 before the Hon'ble Bombay High Court. A perusal of Order dated 08.08.2018 would show that the learned Authority, in para 5 of the impugned Order dated 08.08.2018, has observed that

"Complainants have placed before me the copy of Affidavit of Mr. Firoz Tinwala filed in Anticipatory Bail Application No.1757 of 2015 before the Bombay High Court to contend that Mr. Mustafa Tinwala is the partner of M/s. Mayur Builders and Developers. Similar are the contents of application. Not only that, Mr. Mustafa Tinwala has also given statement before the Police on 02.12.2016 that he and his father were the partners to the said firm. The learned advocate of Mr. Mustafa does not deny the contents and genuineness of these documents".

13] It is significant to note that Appellant has not produced on record the copy of Anticipatory Bail Application No.1757 of 2015 filed by him. The sum and substance of the above observations of learned Authority is that the Appellant in Anticipatory Bail Application No.1757 of 2015 has averred that he and his father were partners of M/s. Mayur Builders and Developers. In order to dislodge or refute this observation of learned Authority it was expected of Appellant to produce copy of Anticipatory Bail Application No.1757 of 2015, however, the Appellant has not

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produced the copy of Anticipatory Bail Application. Therefore, adverse interference can be drawn against the Appellant that there were such contentions in the said Bail Application filed by Appellant.

14] Learned Advocate Mr. Avinash Pawar for Appellant has poignantly submitted that any statement made before the Police Authority is inadmissible and therefore the same cannot be taken into consideration. No doubt, the statement made before Police is inadmissible in evidence but the fact remains that Appellant has categorically stated in the Bail Application that he and his father became partners of partnership firm. He had made such statement before the Police Inspector that he became partner of the firm somewhere in the year 2010-2011.

15] It is significant to note that it is not in dispute that Appellant was accepting the monies from the Allottees by cheques. The Appellant used to deposit the cheques received from Allottees in his account. The Appellant also used to issue receipts to the Allottees and that too in the name of the firm. The material produced on record clearly indicates that Appellant used to sign the receipts on behalf of the firm. The Appellant has not offered a plausible explanation as to in what capacity he used to accept

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monies from Allottees and used to issue receipts to Allottees signed by him.

16] It is worthy to note that the Appellant tried to depict the picture that he is not partner of M/s. Mayur Builders and Developers, the partnership firm, by placing Deed of partnership firm on record. A perusal of copy of Deed of partnership would show that this Deed of partnership was executed on 30.10.2010. We would like to reiterate that the statement made by the Appellant before Police reveals that he became partner of the said firm somewhere in the year 2010-2011. Under the circumstance, it was expected of Appellant to produce copy of Deed of partnership of the relevant period. Therefore, we do not find substance in the contention of Appellant that he was never a partner of the partnership firm.

17] There is one more reason as to why we are not inclined to place implicit faith on the contention of Appellant that he is not partner of the partnership firm. Perusal of copy of affidavit of Mr. Firoz Usman Tinwala filed by him in Anticipatory Bail Application No.1757 of 2015 reveals that he has categorically stated in his affidavit that he and Mr. Mustafa Firoz Tinwala are partners of M/s. Mayur Builders and Developers. He has further categorically stated

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that they have executed the consent terms with the interveners (i.e. the Allottees). The copy of consent terms filed in criminal application no.76/2010 in Anticipatory Bail Application No.1757 of 2015 is placed on record by Appellant. On going through the said copy reveals that the said consent terms are signed by Allottees, Appellant and his father. Paragraph Nos.2 and 3 clearly indicate that Appellant is one of the partners of M/s. Mayur Builders and Developers, the partnership firm. It is worthy to note that the Appellant has not denied the contents of consent terms. Moreover, the Appellant has also not denied the fact that his signature is appearing on the said consent terms. Therefore, we are of the view that the Appellant is now estopped from denying the fact that he is partner of M/s. Mayur Builders and Developers. Therefore, the material produced on record by Appellant is sufficient to hold that the Appellant was one of the partners of M/s. Mayur Builders and Developers at the relevant time. The conduct of the Appellant shows that at the relevant time he was acting as a partner of the firm.

18] Ordinarily a person becomes liable for the debts and obligation of a firm because he is a partner in that firm. But a person who is not in fact a partner may also become liable to



another whom he has led to believe that he is a partner and to act on that behalf. In such a case, though not in point of fact a partner, he is rendered liable for the obligations of the firm to that person because he held himself out as a partner. **Section 28 of Partnership Act** deals with the doctrine of 'holding out' which in fact is a branch of law of estoppel. Where a man holds himself out as a partner or allows others to do it, he is then properly estopped from denying the character he has assumed and upon the faith of which creditors may be presumed to have acted. A man so acting may be rightly held liable as a partner by estoppel. This is the rule of liability commonly called "holding out".

19] As indicated above, the material on record clearly indicate that Appellant had represented himself or permitted himself to be represented as a partner. The principle of 'holding out' under the Indian Partnership Act as mentioned in Section 28 of Indian Partnership Act, is squarely applicable to the present case. As per Section 28 of the Indian Partnership Act, any person who by words spoken or written or by conduct represents himself, or knowingly permits himself to be represented, to be a partner in a firm, is liable as partner in that firm to anyone who



has on the faith of any such representation given credit to the firm, whether the person representing himself or represented to be a partner does or does not know that the representation has reached the person so giving credit.

20] We would like to reiterate that there are observations of learned Authority in para 5 of the impugned order that the contents of anticipatory bail application are similar to the contents of affidavit of Mr. Firoz Tinwala filed in anticipatory bail application 1757 of 2005 viz., Appellant is a partner of M/s. Mayur Builder and Developers. Paragraph Nos. 2 and 3 of consent terms signed by Appellant clearly indicate that Appellant is one of the partners of M/s. Mayur Builder and Developers. The statement of Appellant recorded by Police Inspector of R.A.K. Marg Police Station, Mumbai, shows that Appellant became partner of the said partnership firm somewhere in 2010-2011. Allottees used to make payments to Appellant by cheques, Appellant used to accept the same and used to deposit cheques in his account for encashment. The Appellant used to issue receipts under his signature to Allottees in the name of partnership firm.



21] All the above circumstances, entail us to arrive an unhesitating conclusion that Appellant by his conduct represented himself or knowingly permitted himself to be represented, to be a partner in that firm. Allottees, who have on the faith of such representation, made payments to the firms. Therefore, Appellant in any event under Section 28 of Indian Partnership Act can be construed as 'holding out' as a partner and the two essential elements emphasised under Section 28 of Partnership Act, viz. (i) that there must be representation and (ii) credit must be given to the firm on the faith of such representation, have been made out. Therefore, by virtue of Section 28 of Indian Partnership Act, Appellant is held liable as a partner of M/s. Mayur Builder and Developers, the partnership firm. Thus, we have come to the conclusion that there is no infirmity in the impugned order passed by learned Authority.

22] It is not in dispute that Allottees have filed Complaints against Appellant and his father Mr. Firoz Usman Tinwala. The documents placed on record by the Appellant reveals that Mr. Firoz Usman Tinwala had taken consistent stand in the proceedings filed against him and his son that he and his son i.e. Mr. Mustafa Firoz


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Tinwala were partners of M/s. Mayur Builders and Developers at

the relevant time. A perusal of Appeal memo would show that the Appellant has not made his father Mr. Firoz Usman Tinwala party to the Appeal. Mr. Firoz Usman Tinwala is a necessary party to the Appeal. Therefore, we are of the view that Appeal is hit by non-joinder of necessary party. On this score also Appeal is liable to be dismissed with cost. We therefore answer the points accordingly. Consequently, we proceed to pass the following Order.

ORDER

1. Appeal AT006000000010713/2019 is dismissed.
2. The Appellant shall pay cost of Rs.10,000/- to each of the Respondents.
3. Copy of this Order be communicated to the Authority and the respective parties as per Section 44(4) of RERA, 2016.


(DR. K SHIVAJI)


(SHRIRAM R. JAGTAP)

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