

Nalawade

Feb 23

**BEFORE MAHARASHTRA REAL ESTATE APPELLATE TRIBUNAL
MUMBAI**

MISC. APPLICATION NO. 374 OF 2023 (Interim Relief)
IN
APPEAL NO. AT006000000154490 OF 2023
(In Complaint No. CC 006000000 282148)

Mr. Shreegopal Barasia

151-C, Grand Parady Apartments,
August Kranti Marg,
Kemps Corner, Mumbai – 400036.

... Applicant

~ *versus* ~

M/s. Honest Shelters Pvt. Ltd.

Office No. A & B, Dealings Chambers,
2nd Floor, J. M. Road, Deccan,
Pune – 411005.

... Non-applicant

Mr. Harshad Bhadbhade, Advocate for Applicant.

Mr. Mayur Khandeparkar, Advocate for Non-applicant.

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

DATE : 23rd FEBRUARY 2024

(THROUGH VIDEO CONFERENCE)

ORDER

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

By this application, Applicant allottee is seeking interim relief by way of injunction from creating any further third party rights over the booked subject flat in the Appeal filed by Applicant under Section 44 of The Maharashtra Real Estate (Regulation and Development) Act, 2016 (in short,

the Act), by challenging the order dated 20th March 2023 passed by learned Chairperson, MahaRERA in Complaint No. CC 006000000 282148 lodged before Maharashtra Real Estate Regulatory Authority (in short, MahaRERA).

2. Brief facts leading to filing of the captioned application/appeal and Complainant's Case:-

Applicant/applicant herein is an Allottee as per Section 2(d) of the Act, who has purchased a flat bearing no. 40NW in a project namely "PALAIS ROYALE"(in short "said project"), located at Ward-G South, Mumbai City, for a total consideration of ₹ 25 Crores by executing and registering an Agreement for Sale dated 01st June 2013 and also after executing a supplementary agreement dated 03rd June 2013 with M/s. Shree Ram Urban Infrastructure Limited (erstwhile Developer/promoter), who had been developing this real estate project. Applicant is stated to have paid cumulative amount of ₹ 12,61,61,616/- excluding taxes and registration charges. Non-applicant/respondent is the present Promoter, who has taken over the said project from the erstwhile promoter, after being successful bidder in e-auction conducted under the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (in short SARFAESI) on account of certain defaults in repayment obligations by erstwhile promoter to India Bulls Housing Finance limited (in short "IHFL").

- 3.** The project has been duly registered with MahaRERA. As per clause 20 of the said agreement for sale, it was agreed that possession of the booked subject flat shall be handed over to Applicant on or before 31st December 2014. When non-applicant has failed to honour its obligations as stipulated in the agreement for sale despite several requests then, applicant sent legal notice dated 13th June 2022 calling upon non-applicant to handover possession of the flat together with interest for delayed period as well as compensation and to comply with legal/statutory/contractual obligations. In

the wake of continued non-compliance, captioned complaint came to be filed on 29th July 2022 before MahaRERA seeking various reliefs *inter alia* for possession along with interest and compensation.

4. Non-applicant appeared before MahaRERA and refuted the contents of the complaint by filing reply *inter alia* that operation of the Act is not retrospective but retroactive, liability of the non-applicant promoter under Section 18 for possession and interest on the delayed possession will arise only upon the expiry of the project completion date as mentioned on the RERA portal. Whereas the project completion date as per MahaRERA has not yet expired and therefore, the said complaint is pre-matured. Moreover, complainant himself has claimed that project completion date was 31st December 2014. Therefore, the said complaint has been filed after passage of long time of 7 years from date of the cause of action arising on i.e. 01st January 2015.
5. Upon hearing the parties, captioned complaint came to be dismissed by MahaRERA by holding that the complaint is not maintainable vide impugned order dated 29th March 2023.
6. Heard learned counsel for parties *in extenso*.
7. Being aggrieved by the said order, applicant has filed the captioned appeal under Section 44 of the Act, wherein the captioned Misc. Application has been filed seeking interim relief *inter alia* to prohibit non-applicant by way of an injunction from creating any further third party rights over the said booked flat during the pendency of the captioned appeal by pleading various grounds as mentioned in the captioned application and made multifarious submissions as follows:-
 - a. Non-applicant after taking over the said project from the erstwhile promoter has stepped into the shoes of the erstwhile developer/promoter under the Act. Therefore, non-applicant is responsible for all the acts,



duties and liabilities of the erstwhile promoter and is also liable for all the obligations towards the applicant. Accordingly, applicant is entitled to claim his rights from the non-applicant promoter.

- b. MahaRERA has failed to consider its own circular No. 24/2019 dated 04th June 2019 (said Transfer Circular), whereby such transfers even by way of enforcing security are also considered as the transfer under Section 15 of the Act and in view of para 3 of the said circular read with Section 15 of the Act, new promoter is required to comply with all the liabilities of the erstwhile promoter by virtue of stepping into the shoes of erstwhile promoter.
- c. It is crystal clear from the MahaRERA circular no 24/2019 dated 04th June 2019 that even if the new promoter acquires and takes over the said project under SARFAESI Act, then also, onus and liabilities of the erstwhile promoter have to be fulfilled by non-applicant new promoter *inter alia* the contractual obligations as per the agreement for sale.
- d. MahaRERA has failed to explain the inapplicability of the Circular No. 24/2019 on the ground that the said transfer of the project has been taken over by the non-applicant under "*unique and special circumstances*", even though, non-applicant has never contested that the said transfer was unique. Therefore, MahaRERA has erred in granting reliefs that were not even prayed for by non-applicant.
- e. MahaRERA has erred by not considering the fact that as per clause 20 of the agreement for sale, possession of the booked flat has been stipulated to be handed over on or before 31st December 2014, which has not happened despite follow-ups.
- f. MahaRERA has erred by failing to take into considerations *inter alia* that, there is no provision under the Act to change the possession date mentioned in the duly registered agreement. Even the validity of the



project registration was 30th June 2022 and possession has not been delivered till then. Therefore, the contractual liabilities will continue to the new promoter *inter alia* to pay interest for the delay in delivery of the possession from the stipulated date in the agreement more particularly in view of the judgment of the Hon'ble Bombay High Court in the case of Neelkamal Realtors Suburban Pvt. Ltd. -vs- Union of India [(2017) SCC Online Bom 9302)] wherein, it has been held *inter alia* that RERA does not contemplate re-writing of the contracts. It is the non-applicant new promoter, who has subsequently extended the project registration to 30th December 2023 during the pendency of the complaint and as such, there is no provision under the Act to extend the duly contracted possession delivery date unilaterally by non-applicant promoter.

- g. The said project had been transferred under the provisions of the SARFAESI Act under the paradigm of "*as is where is basis*". Therefore, non-applicant has taken over the project together with all its liabilities and encumbrances as well. Furthermore, SARFAESI has not given an undue advantage of only taking over the assets of the project by the non-applicant. Non-applicant is not absolved of any liabilities attached to the project rather has been transferred rights as well as liabilities. Therefore, claims of the allottee applicant in the project cannot be wiped out by mere certification from IHFL that non-applicant new promoter be absolved of the liability and therefore, non applicant cannot shirk of its legal responsibility to abide by the provisions of the Act.
- h. The applicant has not defaulted in any of the payment schedule prescribed in the agreement. Applicant has already paid ₹ 11.5 Crores as required under clause 4 of the agreement and as per Clause 3 of the supplementary agreement. Balance amount of ₹ 13.5 Crores shall become due and payable only after the expiry of 30 days from the



issuance of the Occupancy Certificate. As such, ₹ 1 Crore was also paid to the sister concerned of the erstwhile promoter, but MahaRERA has failed to direct non-applicant in the impugned order to consider this.

- i. MahaRERA has provided undue liberty to non-applicant of cherry picking only the rights without the liabilities even in the absence of any such provisions under the Act. As such, non-applicant has to undertake and abide by the provisions of Section 18 of the Act. Thereby, non-applicant is liable *inter alia* to handover possession as well to pay interest for the delay period for possession delivery under the provisions of the Act.
- j. In view of the above, learned counsel appearing for applicant urged *inter alia* to allow the Misc. Application and grant injunction against the non-applicant from creating any third-party rights over the said booked flat. Applicant has referred and relied upon the following orders in support of his contentions.
 - i. *Order dated 16th November 2018 of MahaRERA in the case of Ms. Mala Sen Vs. Ahimsa Builder and Anr. bearing complaint no. CC00600000023643.*
 - ii. *Order dated 18th August 2021 of MahaRERA in the case of Saturn Advisory Services Pvt. Ltd. Vs. Parthesh Developers/Mr. Nirav P Shah bearing complainant no. CC006000000057853 AND*
 - iii. *Order dated 03rd December 2021 of the MahaRERA in the case of Ramasubramanian R. Nadar Vs. Siroya Yug Realtors & Vishwas Co-operative Housing Society & Mangal Buildhome Pvt. Ltd. Bearing complaint no. CC006000000057259.*
 - iv. *Para 43 of order of the Hon'ble Bombay High Court dated 17th September 2019 in the case of M/s. Samruddhi Developers Vs. Kiran Vasant Vereka [Second Appeal (S.T) No.27914 of 2018], wherein the new developer has been held to be liable to comply with all the pending obligations under the provisions of the Act.*



8. Per Contra, learned counsel for non-applicant vehemently opposed the application and sought to reject his prayers by submitting as hereunder; -
- a. Applicant has miserably failed to show any perversity/ infirmities in the impugned order passed by MahaRERA, wherein non-applicant has been directed to complete construction and handover possession of the subject flat to applicant as per the date of completion of the said project on the MahaRERA portal.
 - b. Applicant has also not paid ₹ 1 Crore towards the consideration of the subject flat and as such, this was also disputed even during the complaint proceeding. Thereafter, as per para 19 of impugned order, applicant was directed to pay all the balance amounts due and payable to non-applicant. This has been accepted by the applicant and has paid to non-applicant after the passing of the impugned order. Therefore, the impugned order is unconditionally and unequivocally accepted by the applicant. Thus, applicant is disentitled to challenge the impugned order before this Tribunal in this appeal and applicant cannot be allowed to approbate and reprobate. Thereby, applicant is attempting to mislead by suppressing the material facts. On this ground alone, the captioned application and appeal are liable to be dismissed at the threshold with compensatory costs.
 - c. Captioned application is duplication of appeal and even the reliefs sought herein are in the nature of final reliefs, which are impermissible in law.
 - d. Impugned order is based on the provisions of the Act and other statutes. As such, applicant has not made out any *prima facie* case for interference therein, more particularly in view of Section 88 of the Act, wherein the provisions of the Act are in addition to and not in derogation to the provisions of the other laws.



- e. Admittedly, the project is transferred by way of involuntarily transfer under The SARFAESI Act, with the approval of the order of the Hon'ble Bombay High Court and therefore, the said transfer shall be without any encumbrances and liabilities. This has been crystal clear as per the sale certificate, which is in compliance with the Security Interest (Enforcement Rules, 2002). Therefore, non-applicant promoter is not bound to satisfy any liabilities of the erstwhile promoter, arising prior to the date of its taking over of the said project. The only obligation, which has been rightly held in the impugned order, is to complete the said project and handover the possession against the outstanding amount as receivable. Any claims, of the past dues/liabilities would lie against the erstwhile promoter non-applicant and therefore, applicant can pursue remedies as available under the law.
- f. It is a matter of record that applicant has filed the captioned complaint belatedly in the year 2022 after huge delay of more than five years after the RERA coming into force despite the cause of action for the captioned complaint had arisen way back in the year 2014, when the erstwhile promoter had promised for the said possession by December 2014 itself. Applicant has chosen to institute the present proceedings only after the non-applicant has purchased and taken over the said project. Whereas erstwhile promoter had violated its obligations to handover possession of the subject flat way back in 2014 itself.
- g. On account of the stated default by the erstwhile promoter on its repayment obligations under the loan facilities despite giving notice and ample opportunities, IHFL has exercised its statutory rights under SARFAESI Act. Thereby, official liquidator took possession of the mortgaged assets of erstwhile promoter on 17th April 2018 pursuant to the order of the Hon'ble Bombay High Court, official liquidator handed



over the possession of the said project properties on 07th May 2019 to IHFL and the erstwhile promoter's said project was auctioned on certain conditions as published in the e-auction notice *inter alia* containing all the plants and machinery attached to the project including all receivable/cashflow arising from the sales of the aforesaid project, the developed project area as well as the pre-sold except *inter alia* (i) 142 flats in the said project, (ii) 4210 sq. mtrs. of the proposed car parking building area and (iii) area required to provide common access as mentioned in the sales certificate.

- h. In these circumstances, erstwhile promoter had mortgaged to IHFL the said project assets of the erstwhile promoter and due to stated defaults by erstwhile promoter, this was sold/auctioned under the provisions of the SARFAESI Act. Accordingly, non-applicant being the successful bidder, sales certificate dated 26th June 2019 was issued to it for the said project as a whole including the receivables *inter alia* from the sale of 142 flats and 2 flats out of 144. Accordingly, non-applicant has taken over the entire project as promoter with obligation to complete the project. Liabilities attached to the pre-transacted 144 flats under the provisions of MOFA or RERA are not taken over by non-applicant. Moreover, SARFAESI Act does not contemplate such of the liabilities non-applicant.
- i. Perusal of mortgaged deed and other documents pertaining to the loan facilities, it is clear that only the mortgaged property and receivables arising therefrom had been secured in favour of the IHFL, which has been sold. Accordingly, non-applicant has taken over the obligations in respect of the said project to define the project completion date under Section 4(2)(I)(c) of RERA and to execute agreement for sale with allottees, with whom the erstwhile promoter has not been executed till date as well as

to complete construction and handover possession under Section 19 of the Act. Non-applicant is also entitled to receive balance consideration/s as receivables from the allottees as per the sale certificate dated 26th June 2019, which specifically excluded 142 pre-transacted units as the third-party rights were already created by erstwhile promoter even before the non-applicant has taken over the project under RERA.

- j. The only date relevant for adjudication of any default on the part of non-applicant is the project completion date as on website of MahaRERA, which is 30th December 2023. Thus, non-applicant is not in default of any obligations including under Section 18 of the Act.
- k. Learned counsel further submits that Complaint arising from and on account of any such breach or non-compliance of its contractual or statutory obligations qua any liability would be maintainable only against the erstwhile promoter. If non-applicant is held liable towards such claims, then the project completion date would be jeopardized and would once again become unviable, adversely affecting rights of other allottees.
- l. Non-applicant's liability is limited to the extent of completing the construction of the said booked flat by applicant as prescribed by MahaRERA i.e. 30th December 2023 and to handover the possession of the flat before December 2023. Moreover, non-applicant having purchased the said project under the SARFAESI Act, is free from all encumbrances.
- m. Thus, levy of interest by applicant under Section 18 of the Act does not arise against non-applicant at all as the revised date of project completion is yet to arrive and MahaRERA has rightly dismissed the complaint denying interest under Section 18 of RERA and urged to reject the captioned miscellaneous application.



9. From the rival submissions and upon perusal of pleadings, short point that arises for our determination is whether, applicant has made out a case to prohibit non-applicant by way of an injunction from creating any further 3rd party rights and to maintain status quo over the said booked flat and to this, our finding is in the affirmative for the reasons to follow; -

REASONS

10. It is not in dispute that applicant has booked a flat in the said project, which was being initially developed by erstwhile promoter, namely M/s. Shree Ram Urban Infrastructure Limited, by executing and registering agreement for sale dated 1st June 2013 and also a supplementary agreement dated 3rd June 2013 for total consideration of ₹25,00,00,000. Applicant has also paid certain amounts towards the consideration of the booked flat in the said project, which is duly registered with MahaRERA. It is also not in dispute that erstwhile promoter was developing the project after availing loan from IHFL. On account of default in repayment obligations to IHFL by erstwhile promoter, the said project was auctioned and sold/ transferred under SARFAESI Act, 2002 to present non-applicant and sale certificate was also issued on 26th June 2019 in favour of the non-applicant, who was successful bidder. The said project is duly registered with MahaRERA. Accordingly, it is crystal clear that applicant is an allottee and non-applicant is promoter under the provisions of the Act.
11. Learned counsel for the applicant further submits that Hon'ble Supreme Court, in its order dated 6th December 2023 in civil appeal no. 8093/ 2023 arising out of the SLP (Civil) no. 8674/ 2023 in the case of Pankaj Majithia vs. non applicant "Honest Shelters private limited and Ors." has held inter alia as follows; -

"Leave granted....

.....



*We may note that a relevant aspect is that on 26th June 2019, sale certificate was issued under the Securitisation and Reconstruction of Financial Assets and Enforcement of security interest Act, 2002 (SARFAESI Act) in terms whereof while giving the description of the immovable property as collectively forming part of the plots no. 5B and 6, 142 apartments in the Sky and Manor situated in Worli estate, have been specifically excluded. Reasons for this is that qua these flats, the work is assigned to (respondent no. 1) non-applicant herein and there are flat buyers, who made payments in respect thereof. The orders of the Real Estate Regulatory Authority (RERA) dated 20th March 2023 and 19th July 2023 required to complete the project and handover possession of the flat owners. **The obligations of the flat buyers would be governed by their agreements. It is perceived that the impugned order would amount to revisiting this issue by the NCLT.***

*We are of the view that since the process by the NCLT under the Insolvency and Bankruptcy Code 2016 commences on 6th November 2019 and the sale certificate was issued on 26th June 2019, **the rights of the non-applicant respondent no.1 (non-applicant) and flat buyers cannot be affected by this process. Thus, the NCLT is not to examine these aspects, which apparently troubles the parties.***

*In view of our order aforesaid, we believe that there is clarity on the aspect and no further directions are required in that behalf and **responded no.1, non applicant will proceed in pursuance to the RERA orders. The impugned orders stand modified/ clarify to that extent.***

- 12.** Learned counsel appearing for the non-applicant strongly opposed the contentions of the applicant by referring to the aforesaid judgment of the Hon'ble Supreme Court and by submitting that the subject flat has been sold by the erstwhile promoter and the non-applicant has taken over the project based on the sale certificate issued under SARFAESI Act, 2002,

MahaRERA has already rejected the claim of the Applicant and the Complaint has already been dismissed by MahaRERA. Learned counsel for the non-applicant further submits that the applicant has not paid the amount of Rs.1 crore in the designated account as per the agreement for sale executed between the erstwhile promoter and the applicant. Therefore, Rs. 1 Crore is still outstanding to be paid by the Applicant. He further opposed the contentions of the applicant that applicant is willing to pay Rs.1 crore under protest by submitting that as per the agreement for sale. As such, applicant is required to make unqualified payment without any condition of "under protest" and conditional payment is not permitted under the agreement. Learned counsel for the non-applicant further submits that the Order passed by MahaRERA has already been disposed of by the aforesaid order of the Hon'ble Supreme Court, because the SLP filed, was already admitted. Therefore, the captioned application and the appeal filed by the applicant are not maintainable.

- 13.** Whereas learned Counsel for the applicant in rejoinder further refuted the contentions of the non-applicant by submitting that the agreement for sale is still valid, binding and the applicant was not a party to the said SLP in the Hon'ble Supreme Court. Non-applicant has taken over the project from erstwhile promoter under the provision of the Act of 2016. Therefore, delivery of possession of the subject flat is to be handed over before 31st December 2014 and the delay is not attributable to applicant. Non-applicant by taking over the project under the provisions of the Act, is liable to comply with the all the terms and conditions of the agreement. Therefore, applicant is entitled for possession of this said flat subject to compliance of the terms and conditions of the agreement under the Act.
- 14.** Diligent perusal of the aforesaid judgment of the Hon'ble Supreme Court, it is more than evident that Hon'ble Supreme Court has specifically observed



inter alia that "**the obligations of the flat buyers would be governed by their agreements**". It is also crystal clear that the Hon'ble Supreme Court has further held in the aforesaid judgment *inter alia* "**we are of the view that, rights of the respondent no.1 non-applicant and flat buyers cannot be affected by this process. Thus, the NCLT is not to examine these aspects, which apparently trouble the parties**".


15. In view of above, admittedly applicant and non-applicant are allottee and promoter respectively under the provisions of the Act. Accordingly, we are of the considered view that the terms and conditions of the agreement for sale executed between the applicant and erstwhile promoter, continue to be valid, binding and the rights as well the contentions of the parties will be governed by the provisions of the agreement read with the provisions of the RERA Act, which will continue to be applicable in the instant case. Therefore, we are of the view that there is no impediment if, non-applicant is directed to maintain status quo with regard to the said booked subject flat in the said project and non-applicant is prohibited by way of injunction from creating any third party rights over the said booked subject flat during the pendency of the captioned appeal by keeping open all the rights and contentions of the parties with liberty to the parties to rebut the same on merits and will be heard and adjudicated at the time of final hearing. Accordingly, the solitary point is answered in the affirmative and we proceed to pass the following order: -


ORDER

- (a) Captioned Misc. Application No.374/23 is partly allowed.
- (b) Non-applicant is directed to maintain status quo with regard to the subject booked flat in the said project and non-applicant is further prohibited by way of injunction from creating any third party rights over the said booked one flat during the pendency of the captioned

appeal by keeping all the rights and contentions of the parties open with liberty to the parties to rebut the same on merits, to be heard and adjudicated at the time of final hearing

- (c) No order as to costs
- (d) In view of the provisions of Section 44(4) of the Act, a copy of the order be sent to the parties and MahaRERA.


(DR. K. SHIVAJI)


(SHRIRAM R. JAGTAP, J.)