

May 07

**BEFORE MAHARASHTRA REAL ESTATE APPELLATE TRIBUNAL
MUMBAI**

**MISC. APPLICATION NO. 397 OF 2023 (Delay)
WITH
MISC. APPLICATION NO. 396 OF 2023 (STAY)
IN
APPEAL NO. AT0060000000 154535 OF 2023**

Neelkamal Realtors Suburban Pvt. Ltd.

Resham Bhavvan, 7th Floor,
Veer Nariman Road, Churchgate,
Mumbai – 400 020.

... *Applicant*

versus

- 1. Mr. Swapnil Shiwalay**
- 2. Mrs. Sarita Shiwalay**

106, 4B, Versova Skylark,
New MHADA, Andheri (West),
Mumbai – 400 053.

... *Non-Applicants*

*Mr. Sushant Chavan, Advocate for Applicant a/w. Mr. Swapnil Shiwalay,
Applicant No.1 in-person.*

Ms. Divya Gupta, Advocate for Non-applicants.

CORAM : SHRI SHRIRAM R. JAGTAP, MEMBER (J)

& DR. K. SHIVAJI, MEMBER (A)

DATE : 07th MAY 2024

(THROUGH VIDEO CONFERENCE)

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

Heard learned counsel for parties *in extenso*.

2. By this application, delay of 385 days is being sought to be condoned in filing of the captioned appeal on 20th June 2023 under Section 44 of The Real Estate

(Regulation and Development) Act of 2016 (hereinafter referred to as, "the Act"), wherein, it has been prayed *inter alia* to set aside the impugned order dated 28th March 2022, passed by learned Member, Maharashtra Real Estate Regulatory Authority (MahaRERA) in Complaint No. CC006000000 194156, whereby, has applicant has been directed *inter alia* to pay interest for the delay in delivery of possession from 01st May 2017 till the date of delivery of possession on the paid amounts at prescribed rate.

3. For the purpose of disposal of present application, it is not necessary to narrate facts of the case in detail. Suffice it to say that Applicant is Promoter, who is developing duly registered project namely Building No.8 "DB Ozone" located at Mira Bhayander (M. Corp.) Thane (in short "said project"). Non-applicants are flat purchasers of the flat No.802 in the said project of the promoter, who have filed the captioned complaint before MahaRERA seeking various reliefs including for direction to applicant promoter for immediate delivery of possession of the subject flat as well as for payment of interest for delay in delivery of possession of subject flat from January 2016 till the actual date of possession at prescribed rate. For convenience, Applicant and Non-applicants will be addressed hereinafter as Promoter and Complainants respectively in their original status before MahaRERA.
4. Captioned appeal has been filed beyond the statutory permissible period of 60 days. Thereby, Applicant is seeking condonation of the said delay on various grounds as set out in the above application and learned counsel for Applicant made manifold submissions in support of the condonation of delay on the grounds of (a) alleged missing and non-availability of relevant records as well as difficulties in induction of the new internal legal team due to twice shifting of the office of the applicant company from Goregaon East to Jakob Circle, Mahalakshmi on 01st August 2020 and again from Mahalakshmi to Churchgate on 01st March 2023, (b) on account of difficulties faced owing to then



prevailing Covid-19 pandemic including due to its associated constraints and (c) due to lack of knowledge/ missing of the impugned order dated 28th March 2022. Learned counsel for the applicant promoter further submits that the said delay in filing of the captioned appeal is neither deliberate nor intentional and no harm nor prejudice will be caused to the non-applicants if the appeal is decided on merits by condoning the delay. He further submits that it will cause grave loss, harm and injury if the said delay is not condoned by rejecting the captioned application.

5. Per contra, non-applicants have vehemently opposed the captioned miscellaneous application by filing written reply and submitting that there is not even a single ground constituted after passing of the impugned order up to 60 days of time period i.e, up to 27th May 2022. Moreover, the applicant has not demonstrated sufficient cause required for the condonation of huge delay. The applicant has shown only vague excuses of shifting its registered office, which falls after the expiry of the limitation period i.e. 27th May 2022. Therefore, the said failures on the part of applicant are smacks of deceitful conduct and demonstrate malafide intentions of the applicant promoter. Moreover, these do not constitute sufficient cause and the applicant promoter had not acted diligently as required, rather has slept over its rights. The applicant has failed to disclose any convincing cause or any due diligence exercise/s to avoid such avoidable delays on its part. Therefore, sought to reject the condonation of the said delay by referring and citing following compilation of judgments; (i) In the case of Basawaraj & Anr. Vs. Special Land Acquisition Officer, (ii) Esha Bhattacharjee Vs. Managing Committee of Raghunathpur Nafar Academy & Ors. [Civil Appeal Nos. 8183-8184 of 2013], (iii) In the case of Sahyog Homes Limited Vs. Sulabha Shridhar Prabhudesai in appeal no. AT006000000053224 dated 07/03/2022 passed by this tribunal, (iv) Kailash Patil Vs. Ashish Gurav in appeal no. AT006000000010807 dated

16/01/2023 passed by this Tribunal and (v) Mount Marry Bilders Vs. Mr. Tajbar Aslam Saudagar in appeal no. AT0060000000144364 dated 26/04/2023 passed by this Tribunal.

6. From the rival submissions and upon perusal of record including the pleadings made by parties, solitary point that arises for our determination is whether Applicant has explained sufficient cause for condonation of delay in filing instant appeal, to this our finding is in the negative for the reasons to follow:-

REASONS

7. Before we advert to the merits of the controversy let us consider the settled position of law on condonation of delay.
8. In the case of Collector, Land Acquisition, Anantnag & Anr. Vs. Ms. Katiji and Others [(1987) 2SCC 107]; The Hon'ble Supreme Court in paragraph 3 reiterated the principles as follows: -
- a) *"Ordinarily a litigant does not stand to benefit by lodging an appeal late.*
 - b) *Refusing to condone delay can result in a meritorious matter being thrown out at the very threshold and cause of justice being defeated. As against this when delay is condoned, then the highest that can happen is that a cause would be decided on merits after hearing the parties.*
 - c) *"Every day's delay must be explained", does not mean that a pedantic approach should be made. Why not every hour's delay, every second's delay? The doctrine must be applied in a rational common sense and pragmatic manner.*
 - d) *When substantial justice and technical considerations are pitted against each other, cause of substantial justice deserves to be preferred and other side cannot claim to have vested right in injustice being done because of a non-deliberate delay.*
 - e) *There is no presumption that delay is occasioned deliberately or on account of culpable negligence or on account of malafides. A litigant does not stand to benefit by resorting to delay. In fact, he runs a serious risk.*
 - f) *It must be grasped that the judiciary is respected not on account of its power to legalize injustice on technical grounds but because it is capable of removing injustice and is expected to do so. It is needless to state that there should be liberal, pragmatic,*



justice-oriented, non-pedantic approach while dealing with an application for condonation of delay, but at the same time 'sufficient cause' should be understood in proper spirit and be applied in proper perspective to the facts and situations of a particular case."

9. In this connection, principles culled down by the Hon'ble Supreme Court in Esha Bhattacharjee vs. Managing Committee of Raghunathpur Nafar Academy and Ors. [(2013) 12 SCC 649] are as hereunder; -

- A. *Lack of bona fide imputable to a party seeking condonation of delay is significant and relevant fact.*
- B. *The concept of liberal approach has to encapsulate the concept of reasonableness and totally unfettered free play is not allowed.*
- C. *The conduct, behavior and attitude of a party relating to its negligence. cannot be given a total go-bye in the name of liberal approach.*
- D. *If the explanation offered is concocted or the grounds urged in the applications are fanciful, the Courts should be vigilant not to expose the other side unnecessarily to face such litigation.*
- E. *It is to be borne in mind that no one gets away with fraud, misrepresentation or interpolation by taking recourse to the technicalities of the law of limitation.*
- F. *An application for condonation of delay should be drafted with careful concern and not in a haphazard manner harboring the notion that the Courts are required to condone the delay on the bedrock of the principle that adjudication of a lis on merits is seminal to justice dispensation system.*
- G. *The increasing tendency to perceive the delay as a non-serious matter and hence lackadaisical propensity can be exhibited in a nonchalant manner requires to be curbed, of course, within legal Parameters".*

10. In the above background, we have to examine whether grounds put forth by Applicant amount to sufficient cause within the provisions of Section 44 of the Act.

11. It is not in dispute that the order dated 20th March 2022 passed by learned Member, MahaRERA in the captioned complaint is the order under challenge

in the captioned appeal by filing it under Section 44 (1) of the Act on 20th June 2023, beyond the statutorily permissible period of 60 days under the Act. Accordingly, Applicant has sought for condonation of 385 days of delay in filing the captioned appeal on several grounds as set out in the captioned miscellaneous application as follows: -

- A. Ground I: Learned counsel for the Applicant submits that filing of the appeal got delayed due to change in the office address on two occasions. Pursuant there to, voluminous records of the company had to be shifted from Goregaon to Mahalakshmi on 01st August 2020 and again from Mahalakshmi to Churchgate on 01st March 2023. As a result of the said twice shifting of the office, routine processes/activities were also disrupted and many of the records went missing. Therefore, non-availability of the records combined with induction of new internal legal team created enormous difficulties in coordination and to keep track of all the matters with the concerned Advocates-On-Record and with the new internal legal team of the company. Consequently, applicant appears to have lost track of the passing of the said impugned order dated 20th March 2022. In the process, learned counsel further submits that applicant to its best of the knowledge has not received the said impugned order or the impugned order may have gone missing and/or email not monitored due to shifting of the office. Hence, applicant company was not aware of/ did not have knowledge/ lost track of the passing of the said impugned order. Applicant became aware of it only on 24th May 2023, when the applicant's advocate Mr. Pradip Tiwari received email of the non-compliance matter in email of another non-compliance matter in Complaint No. CC -57903. Applicant immediately checked on the website and came to know the listing of the present non-compliance matter. Therefore, the present appeal has been filed within the limitation period



from the date of the knowledge of 24th May 2023, because the application for the certified copy of the impugned order was filed on 02nd June 2023, and the certified copy is received on 13th June 2023. Hence, the delay is of 385 days if, it is reckoned from the date of the impugned order of 20th March 2022. However, these grounds raised by applicant are not cogent and not convincing on account of the followings: -

- a. Bare perusal of the impugned order clearly demonstrates that the applicant promoter was represented by advocate Mr. Sumit Singh in the complaint proceeding and is not an *exparte* order. Therefore, the applicant was fully aware of the passing of the impugned order.
- b. Applicant being promoter has added responsibility under the Act of 2016 to maintain and continuously updates/monitors its website and keep track of the development/s of the said project by frequently visiting on the MahaRERA website or otherwise in relation to the said project.
- c. Perusal of the stamp put by the MahaRERA office as on page 46 of record reveals that the application was presented by applicant for the certified copy before MahaRERA on 13th June 2023. Moreover, the certified copy is seen prepared and received on the very same day i.e. on 13th June 2023. Therefore, the contention of the applicant that the application was filed on 2nd June 2023 is *prima facie* incorrect.
- d. It is pertinent to note that, all the proceedings before this Tribunal and MahaRERA have been taking place in virtual mode/ online during Covid pandemic onwards and therefore, majority of the records are stored/ warehoused by promoters/ litigants in digital form and in emails etc., Therefore, the contentions that the relevant records were missing or dislocated due to twice shifting of the office are *prima facie* not convincing.



- e. Additionally, it is pertinent to note that Applicant is a promoter of a duly registered project, wherein promoter is duty bound to maintain website, containing all the project details and track these on the website of MahaRERA. Moreover, The Hon'ble Bombay High Court, in the case of *Neelkamal Realtors Suburban Pvt. Ltd. & Anr. Vs. Union of India & Ors.* (supra) 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....*".
- f. Accordingly, it is evident that Promoter is inherently better equipped about the market information and is structurally at advantageous position in as much as about such information are concerned. Careful perusal of the contentions of learned counsel for applicant further demonstrates that applicant promoter was neither vigilant nor diligent in keeping track of such developments about the said project more particularly about the passing of the impugned order despite being a promoter. As such, applicant remained sleeping over its rights and was not vigilant in filing appeal in time.
- g. Whereas in para 19 of the judgement of the Hon'ble Supreme Court in the case of "Sagufa Ahmed and Others vs. Upper Assam Plywood Products (P) Ltd [(2021) 2 SCC 317]", it has been laid down that, "*It is needless to point out that the law of limitation finds its root in two Latin maxims, one of which is Vigilantibus Non Dormientibus Jura Subveniunt, which means that the law will assist only those who are vigilant about their rights and not those who sleep over them.*"
- h. Even though the above Judgment/observations of The Hon'ble Supreme Court are in the context of availing benefits for extension of limitation period in filing of appeal, the core decision made therein in the above



order passed by The Hon'ble Supreme Court shows that it is intended to benefit only the vigilant litigants and only those, who are vigilant about their rights and only those will be eligible to avail such benefits and not to those, who sleep over their rights.

B. Ground II: The second ground contended by applicant for the said delay is on account of the difficulties faced by them in Covid-19 pandemic. This ground is also not legally tenable because the impugned order is passed on 20th March 2022 and by this date, Covid-19 pandemic was already over. Therefore, the question of delay on this count is *prima facie* an afterthought, frivolous, vague and not tenable. As such, this denotes that the applicant was negligent, and the said delay is *prima facie* on account of casual and non-seriousness of the applicant, despite being promoter.

12. Careful perusal of the record further reveals that the permissible limitation period of 60 days for filing of the captioned appeal was over by 27th May 2022. However, applicant has not taken any timely action for filing of the appeal within this period and has merely taken vague excuses of difficulties of locating the records and disruptions due to the shifting of the offices within the limitation period.
13. But the same team of advocates were appearing in MahaRERA and also in this tribunal. Hence, there was continuity of advocates team for applicant. All the contentions of applicant have been successfully controverted by the learned counsel for non-applicants in her submissions by asserting that the said delay is reflection of the failure of the applicant in not filing the appeal in time and these reflect smack of malafide intentions/ conduct. As such applicant has awoken for filing of this appeal only after the non-execution proceeding has started and not taken any concrete step for timely filing of appeal. Learned



counsel for Applicant has not placed any documentary evidence to controvert any of the arguments advanced by non-Applicant.

- 14.** Therefore, Applicant has failed to produce even a single concrete step nor any tangible supporting evidence on record demonstrating filing the appeal within time after passing of the order. All these, indicate that Applicant has *prima facie* not taken any visible, tangible, and demonstrable action. Hence, Applicant was not vigilant enough about its rights and law will not benefit such non-vigilant litigants for delay.
- 15.** It is true that length of delay is not important, but acceptability of explanation is important criteria as primary function of Tribunal is to adjudicate dispute between the parties and to advance substantial justice. The Hon'ble Supreme Court summarized the law on this issue in Basawaraj and Anr vs. Special Land Acquisition Officer [(2013) 14 SSC 81] and in para 15, the Hon'ble Supreme Court has held that -

"15. The law on the issue can be summarized to the effect that where a case has been presented in the court beyond limitation, the Applicant has to explain the court as to what was the "sufficient cause" which means an adequate and enough reason which prevented him to approach the court within limitation. In case a party is found to be negligent, or for want of bona fide on his part in the facts and circumstances of the case or found to have not acted diligently or remained inactive, there cannot be a justified ground to condone the delay. No court could be justified in condoning such an inordinate delay by imposing any condition whatsoever. The application is to be decided only within the parameters laid down by this Court in regard to the condonation of delay. In case there was no sufficient cause to prevent a litigant to approach the court on time condoning the delay without any justification, putting any condition whatsoever, amounts to passing an order in violation of the statutory provisions and it tantamount to showing utter disregard to the legislature".

- 16.** In the instant case, Applicant has made only vague and unsubstantiated submissions. Whereas non-applicants have effectively controverted all the

contentions raised by Applicant. Despite providing enough opportunities, Applicant has failed even remotely to demonstrate any meaningful and cogent reason in support of the condonation of delay, leave aside the much-needed sufficient cause, which is required for condonation of delay.


- 17.** Further, it is also significant to note that Applicant is not a person of ordinary prudence. It is a company managed by educated functionaries, who know its business activities very well in the real estate market. The applicant did not bother for its own interests and for its rights. Applicant slept over for a long time without any cogent and convincing justification. Keeping in view of the proposition of law laid down by the Hon'ble Supreme Court and the Hon'ble High Court relating to condonation of delay and having regard to the totality of facts and circumstances of this case as discussed above and also in view of the citations/judgments/ orders of this tribunal referred by learned counsel for the parties in their respective submissions, Applicant is found to be casual, non-serious and not vigilant in preferring the appeal against the impugned order in time. Therefore, in the absence of cogent reasons to condone enormous delay of 385 days in filing appeal and in order to avoid injustice to non-Applicant, we are of considered view that the application for condonation of delay for 385 days is devoid of merits and does not deserve to be allowed. Accordingly, solitary point for determination is answered in the negative and we proceed to pass the following order: -

: O R D E R:

- a. Captioned Misc. Application No. 397 of 2023 with prayer for condonation of delay stands dismissed.
- b. In view of dismissal of Misc. Application for condonation of delay, pending captioned Appeal No. AT- 154535 would not survive, consequently stands disposed of.



- c. In view of disposal of appeal no. 154535 as above, other pending Misc. Application will not survive. Hence, stands disposed of.
- d. No order to costs.
- e. In view of the provisions of Section 44(4) of the Act of 2016, copies of the order shall be sent to the parties and to MahaRERA.


(DR. K. SHIVAJI)


(SHRIRAM R. JAGTAP, J.)