

Nalawade

**BEFORE MAHARASHTRA REAL ESTATE APPELLATE TRIBUNAL  
MUMBAI**

**MISC. APPLICATION NO. 682 OF 2023 (Delay)  
ALONG WITH  
MISC. APPLICATION NO. 683 OF 2023 (Stay)  
IN  
APPEAL NO. AT006000000174763 OF 2023**

**Moongipa Realty Pvt. Ltd.**

Raigad Darshan, J. P. Road,  
Andheri (West), D. N. Nagar Metro Station,  
Mumbai Suburban – 400 053.

... Applicant

~ VERSUS ~

**MSS Securities Private Limited**

1017-A-1020, 10<sup>th</sup> Floor,  
Jeejebhoi Tower, Dalal Street,  
Fort, Mumbai – 400 001.

... Non-applicant

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*Mr. Minil Shah, Advocate for Applicant.*  
*Mr. Wadhwani, Advocate for Non-applicant.*

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**CORAM : SHRI S. S. SHINDE J., CHAIRPERSON &  
DR. K. SHIVAJI, MEMBER (A)**

**DATE : 22<sup>nd</sup> JANUARY 2024**

**(THROUGH VIDEO CONFERENCE)**

**ORAL ORDER**

Learned counsel for parties joined the conference.

2. The applicant herein is the Promoter/developer, and the non-applicant is Allottee.
3. Heard learned counsel for the parties.



**4.** Mr. Minil Shah, Advocate appearing for the Appellant made following submissions:

- (i) Advocate Mr. Minil Shah appearing for Applicant submits that the present Appeal has been filed praying therein to quash and set aside the recovery warrant impugned dated 13<sup>th</sup> July 2023 in this appeal issued by Maharashtra Real Estate Regulatory Authority (in short "MahaRERA") under The Maharashtra Real Estate (Regulation and Development) Act, 2016 (in short, the Act).
- (ii) Advocate Mr. Minil Shah appearing for the applicant further submits that non-applicant had agreed to purchase real estate units on 04<sup>th</sup> May 2010 in the Applicant's project for total consideration of ₹ 73,89,200/- and had made cumulative payment of ₹ 66,50,280.
- (iii) Non-applicant filed a complaint before MahaRERA on 05<sup>th</sup> May 2018 seeking possession of the booked real estate units. However, the disputes were amicably settled by the Deed of Settlements dated 08<sup>th</sup> September 2018. Accordingly, MahaRERA disposed of the complaint filed by non-applicant allottee, vide its order dated 12<sup>th</sup> September 2018 with liberty to parties to approach again in case of the noncompliance of settlement terms.
- (iv) In view of the non-compliance of the settlement terms, non-applicant again approached MahaRERA for direction to Applicant promoter for execution/ compliance of settlement terms in a time bound manner.
- (v) Applicant promoter submitted before MahaRERA that Applicant is not in a position to make the balance payment as the project is held up. However, the applicant still intends to make the balance payment to non-applicant in installments and prayed for further reasonable time for making the balance payment, so as to not to hamper the progress of the project. Accordingly, MahaRERA vide its order dated 07<sup>th</sup> April 2021 disposed of non-compliance application filed by non-applicant allottee by directing applicant promoter to



adhere to the settlement terms executed between the parties at the earliest.

(vi) Applicant, thereafter, filed an Appeal No. i.e AT006000000053226 before this Tribunal challenging order dated 07<sup>th</sup> April 2021 passed by MahaRERA, which was dismissed by this Tribunal on 04<sup>th</sup> February 2022 for want of non-compliance by applicant promoter itself of the mandatory and statutory requirements to fulfill the Proviso to Section 43(5) of The Maharashtra Real Estate (Regulation and Development) Act, 2016 (in short, the Act). Applicant promoter had failed to deposit the requisite amount towards the compliance of the proviso as per impugned order passed by MahaRERA despite providing several opportunities to Applicant.

(vii) Advocate Mr. Minil Shah further submits that non-execution application was again listed on 30<sup>th</sup> March 2022 before learned Chairperson, MahaRERA. Thereafter, learned Chairperson, MahaRERA disposed of the non-execution application on 27<sup>th</sup> April 2022 by directing the Applicant promoter again to adhere to MahaRERA's order dated 07<sup>th</sup> April 2021 and to comply it *in toto* within 30 days from the date of hearing, which took place on 30.03.2022. It is pertinent to note that the order dated 7<sup>th</sup> April 2021 was based on the non-compliance application filed by non-applicant allottee and was disposed of by directing Applicant promoter again to adhere to the settlement terms executed between the parties at the earliest. However, in view of continued non-compliance of these orders by applicant promoter, MahaRERA has issued recovery warrant dated 13<sup>th</sup> July 2023.

(viii) Advocate Mr. Minil Shah further contends that the present Appeal has been filed, challenging this recovery warrant dated 13<sup>th</sup> July 2023 issued by MahaRERA on the grounds that the warrant has been issued in complete contraventions to the deed of settlement, without giving an opportunity to Applicant and without issuing the Order under Section 40(1) of the Act of 2016. Applicant also pressed for urgency to stay the effect and operation of





the recovery warrant dated 13<sup>th</sup> July 2023.

(ix) Learned counsel for Applicant promoter poignantly pressed for the urgent hearing and for issuance of interim relief to stay the effect and operation of recovery warrant dated 13<sup>th</sup> July 2023. It is further noted that the applicant has also filed Misc. Application No. 682/2023 for condonation of delay and the present appeal, which has come up today for the first time. Wherein, Advocate Mr. Wadhwani appearing for the non-applicant had specifically prayed for an opportunity to file reply to the delay condonation application. However, based on the urgency for hearing pressed for by Advocate Mr. Minil Shah, both sides argued the matter.

5. Mr. Wadhwani appearing for non-applicant made following submissions:
- i. Per Contra, Advocate Mr. Wadhwani appearing for non-applicant vehemently opposed by submitting that copy of Misc. Application for condonation of delay has not been received and sought time to file reply.
  - ii. He further submits that there is no specific format for issuance of warrant under Section 40(1) of the Act.

### **Discussion and our reasoning**

6. Perusal of record makes it abundantly clear that MahaRERA has passed the recovery warrant based on the order of MahaRERA dated 12<sup>th</sup> September 2018 for compliance of the amicable settlement already executed between the parties, which was not complied with by applicant promoter itself despite follow-ups and even after the subsequent repeated directions/ orders of MahaRERA vide *inter alia* its non-execution order dated 7<sup>th</sup> April 2021 issued based on the non-compliance application filed by non-applicant.
7. Despite disposal of the original complaint with direction to comply with the amicable settlement terms as directed in the consent order dated 12<sup>th</sup> September 2018, non-applicant/ allottee had to approach MahaRERA again



and again on account of repeated non-compliance by applicant promoter of the settlement terms even after passage of considerable time period from the date of first consent order dated 12<sup>th</sup> September 2018. These orders of MahaRERA including the order dated 07<sup>th</sup> April 2021 was also issued, wherein both the parties have participated and MahaRERA had again directed Applicant promoter to adhere to the consent terms already executed between the parties at the earliest.

8. Even after the order dated 07<sup>th</sup> April 2021, reiterating compliance of settlement terms and similar order passed by MahaRERA more than two (2) years back on 12<sup>th</sup> September 2018 for compliance of the amicable settlement terms by Applicant promoter and despite follow-ups by the Non-applicant, Applicant promoter did not comply with the settlement terms duly executed and settled by applicant itself. As such, the non-compliance of consent order by applicant promoter continues even after the dismissal of appeal filed by Applicant/promoter in this Tribunal, on 09<sup>th</sup> March 2022 due to default of applicant promoter despite providing several opportunities to applicant promoter for compliance of the statutory requirements of pre-deposit of the requisite amount as per the Proviso to Section 43(5) of the Act. It is pertinent to note that Advocate Ms. Mamta Harwani had also participated on behalf of Applicant promoter in the appeal proceeding.
9. Even after the dismissal of appeal filed by Applicant promoter, Non-applicant had to again file a non-execution application before MahaRERA for execution of the original consent order dated 12<sup>th</sup> September 2018, which was disposed of on 27.04.2022, again with a direction to Applicant promoter to comply with the order dated 07.04.2021 of MahaRERA *in toto* within a 90 days from the date of hearing (i.e. 30.03.2022), wherein MahaRERA had to again direct the Applicant promoter to adhere to the consent terms executed between the parties.





10. The present appeal has arisen primarily on account of non-compliance of the amicable settlement terms by the Appellant already executed between the parties way back in 2018. It is pertinent to note that the consent order was also passed by MahaRERA on 12<sup>th</sup> September 2018 itself. This was reiterated by MahaRERA by its another order dated 07<sup>th</sup> April 2021 in view of the non-compliance of the consent order by applicant promoter. Thereafter, the appeal filed against this order had already been dismissed by the Tribunal on 09<sup>th</sup> March 2022 for default of the Applicant promoter itself. Even then, the present appeal has been filed challenging the recovery warrant dated 13<sup>th</sup> July 2023, which has been issued by MahaRERA pursuant to the non-compliance of multiple orders e.g. dated 12<sup>th</sup> September 2018, 07<sup>th</sup> April 2021 and 30<sup>th</sup> March 2022 by applicant promoter itself. Recovery warrant is seen issued after repeated noncompliance by applicant promoter of the very same settlement terms duly executed between the parties way back in 2018.
11. Despite several orders issued by MahaRERA, it is the Applicant promoter, who has not complied with, even the amicable consent terms, where the Applicant itself has been the signatory and even after participating in all the proceedings of MahaRERA including in its earlier appeal filed in this Tribunal.
12. In view of the undue delay in implementation of its own amicable consent terms, prayer for urgency by applicant promoter can't be accepted, because the delay in compliance of settlement terms is due to applicant himself. Therefore, it himself cannot take undue advantage of its own deficiencies/non-performance and despite being party in breach. It is 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***". Where in, it has been held that - "*It is settled principle of law that a man cannot be permitted to take undue and unfair advantage of his own wrong to gain favourable interpretation of*



*law. It is sound principle that he, who prevents a thing from 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."*


- 13.** Another ground on which the appeal has been filed is purportedly non-issuance of the notice under Section 40(1) of the Act. Perusals of record reveals that present impugned recovery warrant has been issued in pursuance of several underlying previous orders of MahaRERA, repeatedly directing applicant promoter to comply with settlement terms, more particularly in orders dated 12.09.2018, 07.04.2021 and 27.04.2022.
- 14.** It is also important to note that in all the previous proceedings before MahaRERA and even before the appeal proceeding in this Tribunal, Applicant promoter has duly participated. Therefore, the grounds that Applicant promoter was not given an opportunity before issuance of recovery warrant is *ex facie* legally not tenable and thus, cannot be accepted.
- 15.** In view of the dismissal of appeal filed by applicant promoter by this Tribunal's order dated 09<sup>th</sup> March 2022, consent order passed by MahaRERA based on the amicable settlement terms between the parties stands in the field and it holds the ground. As per the settled position of law, when the appeal filed in this Tribunal is dismissed, then MahaRERA is the Executing Authority for execution and implementation of its underlying order passed by MahaRERA, which stands in the field. Accordingly, it is for the applicant promoter to approach MahaRERA in case such remedy is available to him for redressal of its grievances if any, relating to execution of the consent order passed by MahaRERA.
- 16.** Despite repeated queries, learned counsel for applicant Mr. Minil Shah is unable to present any document placed on record raising its instant grievance/s before MahaRERA and direction if any, of MahaRERA thereon.





- 17.** Perusal of record further reveals that MahaRERA is the competent Executing Authority for implementation of its own directions/order, which holds the field. The applicant promoter has not placed any document on record after the issuance of recovery warrant dated 13<sup>th</sup> July 2023 passed by MahaRERA, which amply signifies that applicant promoter has not raised its present grievance before MahaRERA. Applicant promoter is also seen participating in all the previous orders passed by MahaRERA.
- 18.** In view of the fact that MahaRERA is the Executing Authority and the order passed by MahaRERA is under execution by issuance of the captioned impugned recovery warrant and in view of the appeal filed before this Tribunal has already been dismissed for the default of the applicant promoter itself and cause of action remain the same as the non-compliance of settlement terms held way back in 2018, we are of the considered view that captioned appeal filed by applicant promoter is not maintainable and hence, stands dismissed.
- 19.** Considering the peculiar facts and circumstances of the case, it may be open for Applicant promoter to approach MahaRERA for redressal of its grievances in case such remedy is available to him under relevant provisions.
- 20.** Accordingly, captioned appeal stands disposed of on above terms.
- 21.** In view of dismissal of appeal, pending Misc. Applications will not survive and hence, stands disposed of.
- 22.** No order as to costs.
- 23.** 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)

  
(S. S. SHINDE, J.)