

Aug 07,23

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

**APPEAL NO. AT006000000052888
ALONG WITH
MISC. APPLICATION NO. 35 OF 2022
(Withdrawal of amount)**

Sanjeevani Vyapaar LLP }
Sheth House, Gen. A.K. Vaidya Marg, }
Next to Dindoshi Fire Station, }
Malad (East), Mumbai – 400 097. } ... Appellant

versus

1. Mr. Mahesh Ramchandra Parulekar }
2. Mrs. Rupa Mahesh Parulekar }
5/601, Balaji Garden, New Ayre Road, }
Opp. Kopar Railway Station, }
Dombivali (East), Mumbai – 421 201. } ... Respondents

Mr. Manish Gala, Advocate for Appellant.

Mr. Bishwajit Mukherjee, Advocate for Respondents

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

DATE : 07th AUGUST 2023

(THROUGH VIDEO CONFERENCE)

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

Present appeal has been preferred under Maharashtra Real Estate (Regulation and Development) ACT, 2016 (in short "the Act") against the order dated 12th October 2020 passed by learned Member, Maharashtra Real Estate Regulatory Authority, (MahaRERA), directing

Appellant Promoter *inter alia* to refund the paid amounts to Respondents together with interest in Complaint No. CC 00 60000000 192530, wherein Complainants/ Respondents have sought various reliefs including for refund and interest thereon.

2. Appellant is the developer/Promoter, who is developing a project known as "Avante" located at Kanjurmarg, Mumbai ('said project'). Respondents are flat purchasers and Complainants/Allottees before MahaRERA. For convenience, Appellant and Respondents will be addressed hereinafter as Promoter and Complainants respectively in their original status before MahaRERA.
3. Brief background giving rise to the present appeal is as under; -
 - a. **Complainants case:** Complainants booked flat number 801, C wing of promoter's said project on 31st December 2017 by filing booking application form for total consideration of ₹ 1,58,13,559, paid initial amount of ₹ 2,50,000 and cumulatively paid total amount of ₹ 7,90,677. The booking was covered under the subvention scheme floated by the promoter wherein, applicants were liable to pay only 5% of the total consideration at the initial stage. Whereas remaining payments of 95% were to be paid to promoter by the agreed financier (India Bulls Housing Finance Limited, "in short financier") under this subvention scheme. It was also agreed between the parties that pre-EMI interest was to be paid by the promoter to the financier until the handing over of the possession of the flat to complainants. Complainants also procured a loan sanction letter dated 8th January 2018 from the financier.
 - b. Upon the receipt of loan sanction letter, financier asked for a copy of the approved floor plan of the said flat/ project along with copy of the commencement certificate and therefore, Complainants sought these from Promoter. Thereafter, for the first-time, promoter informed

complainants that project is stuck due to non-receipt of No Objection Certificate (NOC) from Naval Authority until then, the project is kept on hold vide its e-mail dated 20th March 2019.

- c. Thereafter, promoter did offer complainants to shift the booking of this flat to one of the other projects of promoter. However, complainants by their e-mail dated 21st December 2019 called upon promoter to provide for specific timeline for handing over possession of the said flat or to refund the paid amounts. But promoter informed that the cancellation charges will be of 5% of the total consideration and therefore, sought to forfeit the entire paid amounts, vide Promoter's email dated 27th December 2019. Aggrieved Complainants filed captioned complaint before MahaRERA on 31st August 2020 requesting to allow complainants to withdraw from the project and *inter alia* to direct promoter to refund the paid amounts together with interest.
- d. Promoter appeared before MahaRERA and opposed complaint by contending that the complaint filed is premature. Therefore, the complaint is not maintainable under Section 18 of the Act. Moreover, agreement for sale has not been executed despite complainants were asked vide letter dated 22nd January 2018. Due to arbitrary approach of MCGM and Naval authority, it was not possible for the promoter to commit the date as desired by the complainants for possession delivery date as of December 2021. As such, promoter further contended that promoter had already informed by its letter dated 27th December 2019 that promoter is ready to refund the paid amount. Therefore, urged to dismiss the complaint.
- e. Upon hearing the parties, learned Member, MahaRERA, passed the impugned order dated 12th October 2020, directing Appellant / Promoter



inter alia to refund the paid amounts to Respondents together with interest besides costs.

- f. Aggrieved by this order of MahaRERA, Promoter preferred the captioned appeal, seeking various reliefs including to set aside the impugned order dated 12th October 2020 besides costs.

4. Heard Learned counsel for parties *in extenso*.

5. Promoter submits that arbitrary and unfair decision in the impugned order has resulted in miscarriage of justice and sought to set aside the impugned order on following grounds; -

- a. The impugned order is vitiated by errors apparent on the face of the record, because impugned order is based on erroneous assumptions of facts and law, is contrary to the law and devoid of any valid justification. MahaRERA has failed to appreciate that the said project was registered in July 2017 before the booking of this said flat on 31st December 2017 and at the time of registration of the project all the prerequisite documents were uploaded on the website of MahaRERA. MahaRERA has wrongly concluded that said project did not have necessary commencement certificate and the said project was launched without securing requisite commencement certificate from the MCGM.
- b. Promoter submits that the basis of impugned order passed under Section 18 (1) (b) of the Act, is untenable in facts and law. It is because, bare perusal of the language of Section 18 of the Act would show that Section 18 is triggered only when, promoter fails to complete and hand over possession of the booked flat in accordance with the agreement for sale. It may be due to discontinuation of the promoter's business or due to any other reasons. Complainants had booked the flat on 31st December 2017 and the **booking form does not provide any date of project**

completion nor handing over of the possession of the said flat. Therefore, possession date as disclosed on the website of MahaRERA should be taken as the reference point for possession.

- c. Captioned complaint is premature because, date of possession of the subject flat as on the MahaRERA's website was apparently 31st December 2021, which got extended to 30th June 2022 and the complaint has been filed on 31st August 2020 itself. Captioned complaint was filed even before the expiry of the possession date mentioned on the MahaRERA website and therefore, the complaint is premature.
- d. Promoter is entitled to get forfeit of the paid amount in view of the settled law laid down by **The Hon'ble Supreme Court in the case of *Satish Batra versus Sudhir Rawal [(2013) 1 SCC 345]***.
- e. Promoter had informed complainant that it has applied for all necessary approvals / sanctions/ permissions for the development of the said project. However, on the ground of refusal and non-receipt of NOC from the Naval Authority, Commencement Certificate ("in short CC") got delayed. As such, The Hon'ble Bombay High Court in Writ petition no. 3013 of 2018 in *Tirandaz Subha Niketan Co-operative Housing Society Ltd. Vs. Union of India*, in its judgment dated 27th February 2019, has *inter alia* quashed and set aside the stop work notices issued by Naval establishment for construction near the said Naval housing colony to Tirandaz Subha Niketan Co-operative Housing Society Ltd. Even thereafter, Naval authority did not issue NOC by stating that the judgment in the Tirandaz matter was only for a specific property and The Hon'ble High Court has not accorded blanket sanction to approve all projects in the vicinity of the Naval Civilian Housing Colony. Being aggrieved by the said judgement, SLP no. 36126 of 2019 was also filed

in the Hon'ble Supreme Court challenging the said judgement. However, this was dismissed on the ground of delay.

- f. Works on the said project came to complete stand still due to COVID-19 pandemic and consequent lockdowns imposed by the Government.
- g. Learned counsel submits that Promoter has registered the said project with MahaRERA on 26th July 2017. The registration certificate placed on record is dated 18th May 2020 and proposed date for completion of the project mentioned in the registration certificate is 30th June 2022. However, according to complainants, promoter was to complete the same project by 31st December 2021. Even this date is yet to expire. The completion date was extended on account of the factors beyond the control of the promoter including due to then prevailing pandemic and non-grant of NOC from Naval authority. Promoter applied for further approvals to MCGM on 26th August 2020 along with architect letter dated 26th August 2020. Accordingly, promoter received further CC on 6th November 2020 for the extension of the validity of the CC for the period from 6th November 2020 to 5th November 2021.
- h. MahaRERA failed to appreciate that the said project "Avante" was registered with MahaRERA in July 2017 before the booking of the flat by complainants on 31st December 2017 and all the requisite documents were uploaded on MahaRERA website at the time of registration of the project,
- i. Promoter has kept informing complainant about the project status and related developments of the construction progress.
- j. Promoter informed complainant about the amount pertaining to a stamp duty and registration fee on 22nd January 2018. But complainant has avoided executing agreement for sale on one pretext or other.



- k. Promoter readily and willingly offered all interested flat purchasers of the subject project including the complainants and for shifting of their flat booking with suitable price adjustments to another project of the promoter for which the occupancy certificate had already been received on 9th August 2019 and in fact, complainants had given post-dated cheques dated 2nd September 2019 amounting to ₹7,00,000 for another project.
- l. In view of the arbitrary and lacklustre approach of MCGM and of Naval authority in providing necessary approvals, promoter had informed complainants that promoter is ready to refund the amount if any subject to the terms of the expression of interest.
- m. Complainant has not come with clean hands and had suppressed various material facts. Therefore, complainants are not entitled for any refund and/ or compensation, since there was no violation / breach of Section 12 / 18 of the Act.
- n. MahaRERA failed to observe that refund under Section 18 (1) (b) of the Act is not applicable in the present case as the promoter has neither discontinued the business nor its project registration has been suspended or revoked under the Act or for any other reason.
- o. MahaRERA has erred in its finding that promoter has defaulted in obtaining CC and the money deposited by complainants cannot be treated as earnest money liable for forfeiture and MahaRERA has further grossly erred in its finding that the judgement of the Hon'ble Supreme Court in the case of Satish Batra versus Sudhir Rawal is not applicable in the present case.
- p. Project construction was affected due to the circumference beyond the control of the promoter and since complainants have exited from the said project Suo Moto, complainants have no right to seek any compensation



and/ or interest under Section 18 of the Act. It is because this provision of the Act will not be applicable here, in the absence of the agreement for sale, more particularly because the complainants have already exited even before the expiry of the project completion date.

- q. MahaRERA has failed to observe that due to arbitrary approach of the MCGM and Naval authority, it was not possible for promoter to commit project completion date as desired by the complainants.
 - r. Considering the above, impugned order is not sustainable and liable to be quashed and set aside.
- 6.** Per Contra, learned counsel for Complainants pleads to dismiss the present appeal with costs by denying all averments of promoter as follows; -
- a. At the time of booking, promoter confirmed that all requisite approvals for the construction of the project have been received and there are no impediments, which will adversely affect the project construction in timely manner and further stated that the project is covered under the subvention scheme facilitated by India Bulls Housing Finance Limited (financier), wherein complainants were to make only the initial 5% of the payments and the balance amount was to be facilitated by the financier besides the promoter was to bear the pre-EMI interest on the amount disbursed by the financier till the handing over possession of the said flat to complainants. Based on these confirmations of promoter, complainant booked the subject flat with the assurance that possession of the flat will be handed over by 31st December 2021. Accordingly, Complainants procured a loan sanction letter dated 8th January 2018 from the financier and had also made the payment of ₹2,50,000 towards the cost of the said flat on 10th January 2018, which has been acknowledged by



promoter, vide receipt dated 16th January 2018 and also by issuing a welcome letter dated 20th January 2018 in favour of complainants.

- b. Despite several follow ups and requests to promoter, agreement for sale for the said flat was not executed and promoter had issued a revised stamp duty letter dated 22nd January 2018 to complainants, intimating for the execution of the agreement for sale. Moreover, promoter had started raising demands for making payments even before execution of agreement for sale by their email dated 29th January 2018. Against which, complainants had made a further payment of ₹5,59,557 and ₹68,095 towards the cost of the flat and further payments of ₹7907 towards TDS.
- c. Based on the demand of the financier to submit copies of the floor plan of 8th floor along with the commencement certificate, Complainants kept requesting for these documents from promoter, who eventually, after several follow ups, informed by its email dated 20th March 2019 that now the project has been delayed on account of the non-receipt of the NOC from Naval authority and till then, the said project is kept on hold. Shocked by this revelation, questioned the promoter about the reason for not disclosing the aforesaid litigations at the time of booking of the said flat vide emails exchanged from 20th March 2019 till 3rd May 2019.
- d. Thereafter, promoter offered to shift this allocation of flat to one of its another project and even after exchange of a series of emails, difficulties to shift booking to other project were not resolved. Therefore, complainants called upon promoter to refund their paid amount including amounts paid for taxes together with interest by their emails exchanged from 21st December 2019 till 26th December 2019. In response, promoter by its email dated 27th December 2019 informed complainants regarding the cancellation charges to the tune of 5% of the agreement



value and forfeited the entire paid amounts. It is against this background that, complainants were forced to exit from the project solely on account of defaults/ deficiencies on the part of the promoter and this was conveyed clearly by email dated 28th December 2019.

- e. Even after the booking of the said flat on 31st December 2017, promoter, has neither executed agreement for sale nor delivered the possession of the said flat and only after the intimation regarding the forfeiture of the entire paid amount, the captioned complaint came to be filed in the year 2020 before MahaRERA.
- f. Promoter being a real estate developer having business of real estate construction, he is expected to know these problems, which may exist or arise in future, affecting the construction pace and completion of the project. As such, promoter was aware of the issues plaguing the said project but the same was never informed to complainants including even at the time of booking of the said flat.
- g. Moreover, Promoter had agreed and has also written in the booking application form that in the event of loan if, not get sanctioned for the said flat then, booking amount will be refunded. This is clearly written in the booking application form itself. Therefore, promoter is making false statements on oath, which is contrary to the documents on record. In fact, the promoter did not had permission to proceed with the construction of the said flat and was non-committal to handover the possession of the said flat by December 2021.
- h. It is also more than clear from the commencement certificate issued by MCGM, which clearly shows that the said project did not have valid commencement certificate / approvals between 27th April 2017 and up to 6th November 2020, which has been revalidated only after the issuance of the impugned order dated 12th October 2020. Therefore, *inter alia* on



account of the aforesaid deficiencies solely on the part of the promoter, complainants were well within their rights and compelled to withdraw from the said project and are demanding refund of *inter alia* the paid amounts.

- i. Under Section 19 of the Act, complainants have right to be informed about the status of the project and to act accordingly. But promoter had not been informing all such developments including at the time of the booking of the flat about the project approvals.
- j. Payment of ₹7,00,000 by cheque dated 2nd September 2019 was given subject to the discussions and accordingly, promoter was clearly requested not to proceed with the encashment of the aforesaid cheque.
- k. The delay in completion of the project on account of purported non-receipt of NOC from the Naval authority and consequent non-issuance of the commencement certificate by MCGM, project completion was clouded and fraught with uncertainties squarely on account of deficiencies on the part of the promoter. As such, these factors causing delay are not covered under the force majeure clause and reflect inability and deficiencies on the part of the promoter.
- l. Therefore, complainants are entitled to withdraw from the project and seek *inter alia* refund solely on account of the failure of on the part of the promoter for non-completion of the project in time.
- m. The direction given in the judgment in the matter of Satish Batra vs Sudhir Rawal (*supra*) is not applicable to this case for seeking right to forfeit the paid amounts because promoter cannot have it both ways. Therefore, present appeal is merely an afterthought, baseless, flagrant abuse of the process of law and is liable to be dismissed with costs.

7. From the rival pleadings, submissions and documents relied upon by the parties, following points arise for our determination in this appeal and we

have recorded our findings against each of them for the reasons to follow: -

	POINTS	FINDINGS
1.	Whether Promoter has complied with the provisions of Sections 11(3) and 19 (2) of the Act?	In the negative.
2.	Whether Promoter has complied with the provisions of Sections 4 (2) (C) of the Act?	In the negative.
3.	Whether the right of Allottees under Section 18 is absolute and unconditional on account of delay in possession?	In the affirmative.
4.	Whether the captioned complaint is premature?	In the negative.
5.	Whether Promoter is liable to refund the paid amounts to Allottees under the provisions of the Act?	In the affirmative.
6.	Whether impugned order is sustainable in law?	In the affirmative.
7.	Whether impugned order calls for interference in this appeal?	In the negative

REASONS

Point. 1, Status of compliance of Section 11(3) and 19 (2):

8. It is not in dispute that Complainants have booked the flat in the promoter's said project on 31st December 2017 by filing a booking application form and paid ₹ 2,50,000/-. The booking of the flat and initial payment have been duly acknowledged by the Promoter. According to complainants, possession of the flat was promised to be delivered before December 2021. However, learned counsel for Promoter submits that Complainants have booked the said flat on 31st December 2017 and the **booking form does not provide any date of project completion** nor handing over of the possession of the said flat and hence, possession date as disclosed on the website of MahaRERA should be taken as the reference point.



9. Whereas Section 11 (3) states that "(3) *The promoter, at the time of the booking and issue of allotment letter, shall be responsible to make available to the allottee, the following information, namely: —*
- (a) *sanctioned plans, layout plans, along with specifications, approved by the competent authority, by display at the site or such other place as may be specified by the regulations made by the Authority;*
- (b) *the stage wise time **schedule of completion of the project**, including the provisions for civic infrastructure like water, sanitation and electricity."*
10. There are similar provisions casting general liabilities on Promoter even in the erstwhile MOFA Act of 1963 in its Section 3(2) (f).
11. Additionally, The Hon'ble Bombay High Court, in the case of *Neelkamal Realtors Suburban Pvt. Ltd. & Anr. Vs. Union of India & Ors.* 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....***".
12. Accordingly, it is evident that Promoter is inherently better equipped about the market information and is structurally at advantageous position in as much as that of the information about the said project updates are concerned. Therefore, in consonance with the provisions 11 (3) of the Act, Promoter is expected to provide unambiguous information about project completion date/ possession delivery date at the time of booking.
13. Above provisions under the Act prescribe that information about possession delivery date including stage wise time schedule of completion of the project are essential prerequisites to be incorporated in all relevant communications including in the application form and in the allotment letter/booking form at the time of booking. Despite such statutory

mandatory requirements, this essential information is missing from the application form in the present case. It is despite the fact that Promoter is the repository of information, is expected to be fully conversant with such information about the project undertaken for development but has failed to mention despite its bounded duty to do so under the Act. This has led to asymmetry of information, potentially making booking form as one sided and imbalanced leading to giving rise of such disputes. Consequently, it has adversely affected the transparency of the transactions, which is contrary to the fundamental and basic legislative intents, aims, purpose and objectives of the Act.

14. It is also important to note that the project has been registered under the Real Estate (Regulation & Development) AC Act, 2016, which provides several welfare provisions including for greater accountability towards consumers by injecting greater efficiency, transparency and accountability to protect consumers as contemplated in the statement of objects and reasons of the Act. Section 19 (1) and also 19 (2) of the Act further entitle Complainants Allottees to know stage wise time schedules of completion of project, including the provisions for water, sanitation electricity, other amenities including for services.
15. By not providing these vital information relating to possession delivery cum project completion date. in the booking form including its stage-wise time schedule of completion of the project etc. demonstrate *ex facie* abject failure on the part of Promoter to comply with the statutory mandatory obligations under the provisions of Sections 11 (3) and 19 (2) of the Act and we answer point 1 in the negative accordingly.

Point. 2, Status of compliance of Section 4 (2) (C):

16. Learned counsel for complainants submits that the said project didn't have valid commencement certificate from 28th April 2017 till 5th November

2020. Whereas, according to learned counsel for the promoter, complainants were informed that it has applied for all necessary approvals / sanctions/ permissions for the development of the said project and CC got delayed due to non-receipt of NOC from Naval Authority. However, perusal of record reveals following discrepancies; -

- a. The appeal memo reveals as "*authority failed to appreciate that the said project was registered with MahaRERA in July 2017 before booking of the said flat by complainants on 31st December 2017.*" But the project registration certificate placed on record is dated 18th May 2020 and proposed date for completion of the project mentioned in the registration certificate is 30th June 2022.
- b. Project registration certificate dated 18th May 2020, further shows that the certificate is granted **subject to the conditions** *inter alia* that promoter shall enter into an agreement for sale with allottees and shall comply with the provisions of Act and Rules and regulation made there under. However, the agreement for sale has not been executed and promoter has violated also the provisions of Section 11 as determined herein above.
- c. Application submitted on behalf of promoter by its Architect and Consultant to the Sub Engineer for revalidation of the CC up to 28th April 2018 is dated 4th May 2017, which also shows that date of CC as 28th April 2016 and it contains remarks as "**no work on this site.**" On the face of it, these documents clearly reveal that there was "**no work on site**" as at least up to date of that application i.e., 4th May 2017.
- d. Perusal of Commencement certificate issued by MCGM reflects that this was issued with reference to the application dated 18th December 2017 and the validity of the CC upto plinth level was only up to 27th April 2017, which has been revalidated only on 6th November 2020 for the period up to 5th November 2021 only. It implies that project did not have valid CC

between the period from 28th April 2017 till 5th November 2020. Admittedly booking date is 31st December 2017 and impugned order is dated 12th October 2020. Whereas the last email sent by complainants to promoter, seeking *inter alia* refund of the entire paid amounts along with interest is dated 21st December 2019. Chronology of dates of these events clearly demonstrate that the project did not have valid commencement certificate as on the dates of these crucial events, namely on the date of booking, date of impugned order and also on the date on which the complainants sought to cancel the booking for refund. These are again contrary to the law. Moreover, it is also clear that these **facts were not disclosed** to the Complainants at the time of the booking. This is not in accordance with the provisions of the Act.

- e. Project registration certificate dated 18th May 2020 and that project did not have valid CC between the period from 28th April 2017 till 5th November 2020. These also demonstrate that the **application for registration** of the project was submitted before MahaRERA on a date, **when the project was not having a valid commencement certificate**, which is one of the statutory and mandatory requirements for filing of the application for project registration under Section 4 (2) (C) of the Act and these provisions of the Act have been violated by promoter. Impugned order dated 12th October 2020 in Para 4 has also correctly observed about this as "*without commencement certificate*", respondent should not have launched the project and accepted booking. Unfortunately, in this case respondent launched the project without obtaining/ having valid commencement certificate. Accordingly, we answer point 2 in the negative above.



Point. 3; Rights under Section 18 are absolute:

17. Learned counsel for Promoter submits that the basis of the impugned order being Section 18 (1) (b) of the Act, is untenable in facts and law by submitting that the project has been delayed on account of factors beyond the control of promoter more particularly in view of the arbitrary and lacklustre approach of MCGM and Naval authority in providing necessary approvals. Hence, the project got delayed due to non-approval of the commencement certificate and project works came to a complete stand still due to COVID-19 pandemics and consequent lockdowns imposed by the government.
18. Section 18 of the Act specifically delineates the importance of agreement for sale for the purpose of assessing delay in handing over possession, which may be due to discontinuation of business as developer or **for any other reasons**. On perusal of Section 18, it can be seen from the Proviso to its Sub Section (1) that if, Promoter fails to complete the project or is unable to deliver possession of apartment, plot or building by agreed time and allottees intend to withdraw from the project then, Promoter shall refund the paid amounts together with interest to Allottee at such rate as may be prescribed.
19. The Hon'ble Supreme Court in para nos. 25 and 78 of its judgment dated November 11, 2021, in the case of M/s Newtech Promoters and Developers Pvt. Ltd vs. State of Uttar Pradesh & Ors. [2021 SCC Online 1044] has 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. Relevant abstract is being reproduced below for ready reference.

"25. The unqualified right of the Allottee to seek refund referred under Section 18(1)(a) and Section 19(4) of the ACT is not dependent on any contingencies or stipulations thereof. It appears that the legislature has consciously provided this right of refund on demand as an unconditional absolute right to the Allottee, if the Promoter fails to give possession of the apartment, plot or building within the time stipulated under the terms of the agreement **regardless of unforeseen events or stay orders of the Court/Tribunal**, which is in either way not attributable to the Allottee/home buyer, the Promoter is under an obligation to refund the amount on demand with interest at the rate prescribed by the State Government including compensation in the manner provided under the ACT with the proviso that if the Allottee does not wish to withdraw from the project, he shall be entitled for interest for the period of delay till handing over possession at the rate prescribed."

20. In view of above, it has been held that the rights of Allottees under Section 18 of the Act are unconditional and absolute, regardless of unforeseen events including the factors propounded by the learned counsel for Promoter herein that the project got delayed due to factors beyond their control such as non-receipt of NOC from Naval authority and consequent denial of sanctions by MCGM etc. Accordingly, Complainants, continue to be entitled for their rights under Section 18 of the Act, accrued due to delay in project completion beyond agreed timelines irrespective of such factors beyond the control a promoter including due to non-receipt of the NOC from Naval authority and consequent denial of extension/revalidation of the commencement certificate by MCGM. Moreover, the delay is not attributable to allottees complainants. Accordingly, we answer point 3 in the affirmative.

Point. 4, whether the captioned complaint is premature:

21. Before we consider the contention of promoter that complainants have withdrawn from the project prematurely, it is important to examine the

background circumstances under which, complainants have withdrawn from the project.

22. Learned counsel for promoter contended that Complainants have withdrawn from the project *Suo Moto* on their own. However, perusal of record reveals that booking application form contains a condition as **"subject to sanction with the loan, else the booking amount is fully refunded"**. Based on the request received from the financier, complainant called for the approved sanction plan and the copy of the commencement certificates from promoter. However, on account of non-availability of these two valid documents from Promoter, complainants could not avail benefits of finance from the financier, and availability of finance for payments are crucial for allottees. In the instant case, it is the promoter, who has floated the subvention scheme as an integral part of the booking of the said flat in the project. Accordingly, this condition was specifically stipulated in the booking form that in case of non-availability of the sanction of loan, promoter will refund the paid amounts. Therefore, the contentions of the promoter that the withdrawal by complainants from the project was *Suo Moto* on their own, cannot be accepted on account of followings; -

- a. It is the promoter, who is responsible to provide sanctioned and valid floor plan and commencement certificate to complainants to make these documents available to financier. However, promoter has failed to make available these two valid documents to Complainants.
- b. Promoter himself submitted that project got delayed due to non-receipt of NOC from Naval authority leading to non-extension of the commencement certificate. This is not on account of the complainants.



- c. As determined here in above, promoter has not given any reasonable and definite date for delivery of possession of the booked flat particularly in the absence of the valid commencement certificate.
- d. Moreover, Promoter cannot deny the accrued rights to seek refund to Allottees on the very same ground for which, Promoter himself is responsible for especially because the rights so accrued to allottees under Section 18 are unconditional, unqualified and absolute. Promoter himself cannot take advantage of its own deficiencies/ non-performance and despite being party in breach, 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."*
- e. Therefore, the withdrawal from the project was not Suo Moto by complainants on their own. Rather, it was on account of the deficiencies and non-performance on the part of the promoter, which has compelled complainants to opt for withdrawal and seek *inter alia* refund.
- 23.** Learned Counsel for the promoter further argued that complaint is premature. However, according to learned counsel for complainants, request for refund has been filed only after several deficiencies/non-performances and on violations on the part of the promoter as well as after promoter failed to provide definite date for completion of the project



and delivery of possession of the subject flat owing to severe uncertainties, which the project had been facing due to non-receipt of NOC from Naval authority. The project completion was clouded and fraught with uncertainties squarely on account of purported non-receipt of NOC from the Naval authority and consequent non-issuance of the commencement certificate by MCGM and these are on account of deficiencies on the part of the promoter. In that background, complainants had no other option but to withdraw from the project and therefore, withdrawal from the project by complainants were not Suo Moto, as determined here in above. Moreover, prevailing situations/ circumstances reflect that inordinate delay in the project completion was inevitable, and evidently waiting to happen more particularly in the background, when promoter himself was unable to give any definite date for project completion and possession delivery of the flat. In that situation, no rational or prudent mind will ever wait for such inevitable delays to actually happens and then only, will Act upon. Accordingly, we are of the considered view that complaint has been filed after coming to know that there were huge uncertainties leading to undue delay in delivery of the possession is not less than reasonable period of 3 years as prescribed by The Hon'ble Supreme Court in the case of **FORTUNE INFRASTRUCTURE & ANR VERSUS TREVOR D'LIMA & ORS (2018) 5 SCC 442.**

- 24.** It is also not in dispute that booking has taken place on 31st December 2017 and the complaint has also been filed in the year 2020, which is approximately 3 years of reasonable time period from the date of the booking. In view of above, it is not necessary for the complainant to wait for undue delay to happen and then only, complaint need to be filed, which will amount to nothing but waiting for the time to pass despite

coming to know that delay is inevitable, especially after the non-receipt of the crucial information from the promoter himself. Therefore, it is not correct to say that complaint is premature, and we answer point 4 in the negative accordingly.

Point. 5,6 and 7: Whether Promoter is liable to refund.

25. These points are interlinked, hence, have been taken together. Learned counsel for Promoter argued that promoter is entitled to forfeit 5% of the total consideration of the flat by placing reliance on Para 15/17 of the judgement of the **Hon'ble Supreme Court in the case of Satish Batra versus Sudhir Rawal [(2013) 1 SCC 345]**. It is apposite to reproduce relevant abstract of the judgement as here under; -

*"15/17. Law is, therefore, clear that to justify the forfeiture of advance money being part of 'earnest money' the **terms of the contract should be clear and explicit.** Earnest money is paid or given at the time when the contract is entered into and, **as a pledge for its due performance by the depositor to be forfeited in case of non-performance,** by the depositor. There can be **converse situation also that if the seller fails to perform** the contract the purchaser **can also get the double the amount,** if it is so stipulated. It is also the law that part payment of purchase price **cannot be forfeited unless** it is a **guarantee for the due performance of the contract.** In other words, if the payment is made **only towards part payment of consideration and not intended as earnest money then the forfeiture clause will not apply.**"*

26. The moot question, thus, for our consideration is whether the promoter is entitled to forfeit 5% of the total consideration resulting in 100% of the forfeiture of the paid amounts made by the complainant.
27. Meticulous perusal of the aforesaid relevant abstract of the judgement clearly shows the pre-existence of clear and explicit agreed terms of contract with unequivocal pledge for the concerned parties for their due performance. Whereas, in the present case as we have seen above,

agreement for sale between the parties have not been executed. Moreover, learned counsel for promoter has claimed for the said forfeiture of the paid amounts based on the solitary sentence written in the booking application form stating that "holding charges / ~~[non-refundable]~~, earnest money (In short "EMD") to be paid on or before the construction linked schedule attached", against which, ₹2,50,000 have been paid as initial part payment. It is to note that the remaining amount has been paid subsequently, which are not the part of EMD as have been claimed by promoter for forfeiture in the name of EMD amount, citing the aforesaid judgement of the Hon'ble of the Supreme Court in the case of *Satish Batra vs. Sudhir Rawal [supra]*. From the record, it appears that the EMD amount is only ₹2.5 lakhs and not the total paid amounts. Moreover, promoter itself has informed complainants earlier that they are ready to refund the paid amounts.

28. Furthermore, the said judgement also reveals that the existence of explicit and clear agreed terms duly defining the purpose and performance by the respective parties is prerequisite and **only in case of their non-performance of their agreed pledges, forfeiture clause can be invoked.** Whereas in the instant case, such prior existence of agreed terms of the said 5% of the total consideration for forfeiture does not exist in the booking form. The corresponding terms of performance are also not mentioned in the booking form. The existence of such defined terms and conditions are prerequisite to make parties to understand their consequences well in advance failing which, claim for forfeiture will not arise. Hence, without any prior explicit information/ knowledge/ agreed terms of both the parties in the booking form, such claims for forfeiture is legally not tenable.



29. Details of the pledge as stipulated in the said judgment, is also missing in the instant case. Additionally, it appears that there is no non-performance and no deficiencies on the part of the complainants. Whereas as determined herein above, there are a series of non-compliances of statutory mandatory requirements on the part of the Promoter itself under the provisions of the Act. Therefore, a converse situation exist in the present case as laid down in this said judgment itself of the Hon'ble Supreme Court, which has also been laid down that "*There can be **converse situation also** that **if the seller fails to perform** the contract the purchaser **can also get the double the amount**, if it is so stipulated.*"

Accordingly, **a converse situation exists in the present case**, where the promoter itself has failed to perform its statutory and mandatory liabilities as determined here in above and not the complainants.

30. In addition, it is also important to note that the booking has been done on 31st December 2017, when the welfare legislation of Real Estate (Regulation & Development) Act, 2016 has already come into force, which provides several welfare provisions including for greater accountability towards consumers to inject greater efficiency, transparency and accountability to protect consumers as contemplated in the statement of objects and reasons of the Act.

31. 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.*, it has been observed with regard to some of the relevant statement of objection regions as mentioned in para 11 as 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.


- 32.** However, there is no express provision in the Act, which shows that promoter is entitled to forfeit earnest amount or any other amount of certain quantum in the event of cancellation of booking on the part of either parties. Act is silent on the point of permissible quantum of forfeiture, if parties, suo-motu or otherwise, for whatsoever reason cancel booking.
- 33.** Promoter has not provided cogent rationale behind the forfeiture claims for 5% of the total consideration and in the absence of such rationale, the possibility of undue and unjust income to promoter cannot be ruled out. Moreover, it is also important to note that the Promoter continues to use the amount paid by complainants for its own commercial use and it continues to do so even now. Use of the amount paid by the promoter for its own commercial gains by using this fund during this period has led to potential interest losses to complainants on this amount, which cannot be ignored.
- 34.** After considering overall circumstances and context of the case, diligent analysis of the material on record and more particularly in view of several deficiencies and non-compliances on the part of promoter, we are of the considered view that the promoter is not entitled for any forfeiture of any amount at all and complainants are entitled to receive the entire paid amounts together with interest from the date of payments including amounts paid for the statutory duties and taxes from the promoter without any deductions whatsoever.
- 35.** Upon consideration of the above findings, we are of the view that appeal is devoid of merits, lacks substance, deserves to be dismissed and MahaRERA has correctly concluded in the impugned order dated 12th October 2020 and is sustainable in law. Therefore, no interference in the




impugned order is called for in this appeal. Accordingly, we answer point 5, 6, and 7 and proceed to pass the order as follows; -

O R D E R

- a. The Appeal No. AT0060000000 52888 is dismissed.
- b. The Appellant shall pay costs of Rs. 15,000/- to Complainants within 30 days from the date of this order and shall bear its own costs.
- c. In view of the disposal of the appeal as above, pending Misc. Application No. 35 of 2022 will not survive. Hence, stands disposed of.
- d. In view of the provisions of Section 44(4) of the Act of 2016, copy of the Judgment be sent to the parties and MahaRERA.


(DR. K. SHIVAJI)


(SHRIRAM R. JAGTAP, J.)