

Feb 02

BEFORE MAHARASHTRA REAL ESTATE APPELLATE TRIBUNAL, MUMBAI

**MISC. APPLICATION NO. 384 OF 2023 (Delay)
ALONG WITH
REVIEW NO. 11 OF 2023
IN
APPEAL NO. AT006000000053263**

Nahar Homes LLP

B-1, Mahalaxmi Chambers,
22, Bhulabhai Desai Road, Mumbai - 400 026.

... Applicant

Versus

1. Sarang Joshi

2. Naresh Joshi

1008, Frangipani, Nahar Amrit Shakti,
Chandiwali, Andheri (East), Mumbai – 400 072.

... Non-applicants

ALONG WITH

**MISC. APPLICATION NO. 388 OF 2023 (Delay)
ALONG WITH
REVIEW NO. 12 OF 2023
IN
APPEAL NO. AT006000000053262**

Nahar Homes LLP

B - 1, Mahalaxmi Chambers,
22, Bhulabhai Desai Road,
Mumbai - 400 026.

... Applicant

Versus

1. Naresh Joshi

2. Sarang Joshi

1008, Frangipani, Nahar Amrit Shakti,
Chandiwali, Andheri (East),
Mumbai – 400 072.

... Non-applicants

Mr. Harshad Bhadbhade, Advocate for Applicant.

Mr. Aman Shukla i/b. Adv. Anil D'souza, Advocate for Respondent.



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

DATE : 02nd FEBRUARY 2024

(THROUGH VIDEO CONFERENCE)

ORDER

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

By these two captioned Misc. Application Nos. 11 of 2023 and 12 of 2023, Applicant Promoter is seeking to correct/ review/recall of the common order dated 16th December 2022 passed by this Tribunal disposing of two separate appeals filed by non-applicants namely, APPEAL Nos. AT006000000053263 (in COMPLAINT NO. CC005000000022221) and AT006000000053262 (in COMPLAINT NO. CC005000000022204) under Section 53(4) (e) of The Maharashtra Real Estate (Regulation and Development) Act, 2016 (in short, 'the Act').

3. Applicant Promoter has also filed two separate miscellaneous application nos. MA 384 of 2023 and MA 388 of 2023 seeking the condonation of delay in filing of the captioned two review applications of 100 & 111 days respectively beyond the prescribed permissible time limit of 30 days on the grounds mentioned in these two respective misc. applications.
4. Applicant is Promoter. Non-applicants are allottees, home buyers and complainants before Maharashtra Real Estate Regulatory Authority (MahaRERA).
5. Non-applicants allottees had filed the captioned two separate complaints before MahaRERA, which were disposed of in May 2021 by MahaRERA and directed applicant Promoter to handover possessions of the apartments and in the event non-applicants allottees intend to withdraw from the said

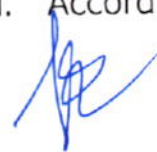


projects then, such withdrawals shall be guided by the terms and conditions of the agreements executed among these parties.

6. Non-applicants allottees had challenged the legality, propriety and correctness of this order dated May 2021 passed by MahaRERA, by preferring captioned two appeals, which were disposed of by this Tribunal, vide the said common order dated 16th December 2022, allowing these two Appeals partly and directed Promoter applicant *inter alia* to refund the paid amounts together with interest at prescribed rate under the Act.
7. Heard learned Counsel of the parties in extenso.
8. Perused record.
9. Applicant has preferred the captioned miscellaneous applications seeking to correct/ review/recall of this common order dated 16th December 2022 passed by this Tribunal on following grounds; -
 - a) Non-applicants had booked flats in a project being developed by applicant Promoter under subvention scheme of 10:80:10 after executing tripartite agreements between the parties and with the financier, namely India Bulls Housing Finance Limited (IHFL). Non-applicants allottees have availed loan from IHFL for making payment to applicant promoter. However, due to alleged delay in delivery of possession, Non-applicants allottees eventually filed captioned complaints before MahaRERA seeking refund of their paid amounts.
 - b) Learned counsel appearing for the Applicant Promoter further submits that even though, non-applicants allottees had filed securitization applications before DRT, Pune and were principal borrowers of the loan from IHFL, even then, non-applicants have suppressed these and have not disclosed these vital facts before the Tribunal in the appeal proceedings.



- c) Learned counsel for the Applicant further submits that the said flats were auctioned and sold, vide sale certificate dated 31st March 2023. Whereas Applicant got to know about this only when, IHFL intimated the sale of these flats.
- d) The said flats were sold before the passing of the said common order by this Tribunal. It signifies that Non-applicants /Appellants allottees, who had filed the appeals, were not the owners of the said flats on the date of passing of the common order and therefore, cannot seek prayer to withdraw from the subject project.
- e) Suppression of these vital facts of not disclosing the details of DRT proceedings/ auction and sale of the subject flats have material bearings in the outcomes of these two appeals and thus, these themselves are the sufficient grounds for review of the said common order passed by the Tribunal.
- f) Additionally, the common impugned order also contains several inadvertent mistakes apparent from the face of the record and therefore, corrections of these mistakes are necessary.
- g) In view of the above, captioned two review applications Nos. 11 and 12 of 2023 have been filed.
- h) Grave harm and prejudice will be caused to applicant if, the present review applications are not allowed, and no prejudice will be caused to the Non-applicants, as the removal of errors shall serve to place the correct facts and provisions of Law on record. Accordingly, Applicant Promoter prays that: -



- i. The order dated 16.12.2022 passed by the Hon'ble Tribunal be stayed pending hearing and final disposal of this Review Application.
 - ii. The errors apparent from record as appearing in the impugned order be corrected and for that purpose the said order dated 16.12.2022 be recalled.
 - iii. Ad-interim reliefs in terms of prayer clause (i) above.
 - iv. For such further and other reliefs, as this Hon'ble Tribunal deems fit.
10. In addition to the captioned two Review Application nos. 11 and 12 of 2023 seeking review of common order dated 16th December 2022 of this Tribunal, Applicant Promoter has also filed two separate application nos. M.A. 384 of 2023 and M.A. 388 of 2023 seeking condonation of delay of 100 & 111 days in filing of the captioned review applications beyond the prescribed permissible time limit of 30 days by submitting as follows: -
- a. Non-applicants allottees were principal borrowers, had filed the case before DRT, Pune and had obtained Ad-interim order, which was vacated later on. Therefore, they were fully aware of the auction cum sale proceedings initiated by financier/DRT. Even then, they have suppressed these vital material facts.
 - b. Learned counsel appearing for the Applicant further submits that the applicant was not aware of the said DRT proceeding and the sale conducted by DRT, Pune, who has sold the subject flats vide sale certificates dated 31st March 2023. The aforesaid flats were sold before the order of this Tribunal was passed.
 - c. Applicant got to know about the same only when, the Bank intimated in respect of the sale of the subject flats. As soon as the applicant promoter came to know about these, got the entire documents and approached

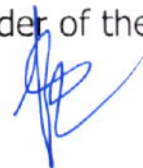


the Advocate for filing of the present two review applications. Therefore, the said delay has occurred in filing of these review applications. The delay in filing of the review applications is not intentional and has happened on account of suppression of vital facts by non-applicants allottees. Therefore, urged to condone the said delay of 100 & 111 days being neither intentional nor deliberate.

11. Per contra learned counsel appearing for the non-applicants vehemently opposed review applications and miscellaneous applications for condonation of delay in filing of review applications by submitting as follows: -

a) Applicant was aggrieved by the common order of the Tribunal dated 16th December 2022 and has filed the captioned two review applications with delay of more than 100 & 111 days beyond the permissible delay of 30 days by deliberately concealing the facts that applicant has slept over its rights for filing appeal etc., The said delay in filing of review applications are quite inordinate and there is absolutely no explanation or justification provided by the applicant for condonation of delay. The applicant claims to be unaware of the proceedings in DRT. But these claims are incorrect, vague and not backed by any material or particular evidence, which never constitute sufficient reasons for condoning the unnecessary delay. Therefore, the review applications are barred by limitation and deserve to be dismissed with costs.

b) Learned counsel for the non-applicants further submits that review applications were served upon non-applicants only on 21st August 2023 i.e. after 248 days from the date of the said order of the Tribunal dated 16th December 2022.



- c) Contentions of the applicant that applicant was not aware of the proceeding before the DRT, Pune, is false. In fact, Applicant was duly served with a copy of the said DRT papers and proceedings by non-applicants and a copy of the affidavit of service dated 30th September 2022 reflecting the service upon applicant is clearly marked in Exhibit - A therein, which shows that applicant was well aware of the DRT proceedings. Therefore, the applicant is clearly making false statement before this Tribunal with futile attempt to delay the execution proceeding.
- d) Furthermore, the Rozanama dated 22nd July, 2022 of this Tribunal also shows the presence of advocates of both the parties and categorically records that the said flats allotted to non-applicants, have been attached in the proceedings under SARFAESI Act. This shows beyond reasonable doubt that applicant was well aware of the said DRT proceedings. Apart from making false averments in the said application, the applicant has not even attempted to provide with any explanation or justification to show that they had any plausible and sufficient cause in not filing the review applications in time bound manner.
- e) Hence, it will be improper and unjustifiable to indulge in the said application and review application in condoning the immense delay particularly when no case for sufficient cause has been made out for condonation of delay.
- f) Moreover, the delay in filing of review applications is the result of Applicant's own negligence, lack of seriousness and care without any justifiable cause much less the sufficient explanation required to be demonstrated for condonation of delay. It is settled law that once time starts running, it does not stop with respect to limitation.

- g) In view of the above, review applications along with delay condonation applications ought to be dismissed forthwith with hefty cost.
12. After considering the aforesaid rival contentions of the parties, solitary points that arises for our determination is whether applicant has explained sufficient cause and established justifiable sufficient grounds for delay in filing of the review applications and whether the review applications are maintainable as per law, for which, our findings are in the negatives for the reasons as hereunder:
13. It is not in dispute that captioned Misc. Review applications have been filed with delay of more than 100 & 111 days beyond the permissible limitation period of 30 days primarily on the ground that applicant Promoter claims to have come to know about the DRT proceedings and auction cum sale of the subject flats only on 31st March 2023 based on the sale certificate of the subject flats. Learned counsel appearing the applicant promoter poignantly submits that due to default in repayment of the loan by the non-applicants principal borrowers, financier has auctioned and sold the flats under DRT proceedings. However, applicant promoter was not aware of DRT proceedings because, these vital facts were not disclosed by non-applicants before this Tribunal in the appeal proceedings before passing of the impugned common order of the Tribunal dated 16th December 2022. Therefore, delay in filing of the review applications is not intentional, nor deliberate and have happened because the applicant promoter was not aware of the DRT proceedings and came to know only on 31st March 2023 based on the sale certificate.
14. However, the contentions of the applicant promoter that applicant was not aware of the DRT proceedings are contrary to the facts on record and are legally not sustainable on account of the followings: -

- a) Perusal of the para 5 (k) of the impugned common order of this Tribunal dated 16th December 2022, which has been sought for review by the applicant, itself reveals that it contains all the relevant details of DRT proceedings as follows:

"Pursuant to non-payment of pre-EMI, secured creditor and financial institution maliciously and dishonestly initiated action under SARFAESI Act and took symbolic possession of the subject flats on 10th December 2019 despite pendency of the litigation before MahaRERA. Indiabulls Asset Reconstruction Company Limited assigned its financial assets along with underlying securities in favour of the Asset Care and Reconstruction Enterprise Limited and has taken steps for auction."

In view of these details, the common impugned order sought under review itself clearly reveals that the DRT proceedings related all the information were already disclosed in the appeal proceedings and applicant promoter was well aware of all these facts.

- b) Applicant Promoter itself is a party in the DRT proceedings and affidavit of service to applicant has also been filed before the DRT by Non-applicants, after actually serving the same to applicant promoter, which is seen received by applicant promoter on 27th September 2022, vide page 139 of the record. Applicant Promoter was also intimated about the date of hearing of 30th September 2022 before DRT Pune, by non-applicants vide Page 140 of the record. However, applicant chose to continue remaining absent in the DRT proceedings and therefore, its absence before the DRT proceedings is primarily on account of its own faults/lapse. It further signifies that applicant remained sleeping over its rights by not participating in the DRT proceeding despite having been



duly served, intimated and even after being party to the DRT proceedings.

- c) Therefore, the contention of the applicant promoter of being not aware of the DRT proceedings including the auction and sale of the subject flats have happened solely on account of its own faults/lapses. 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."*
- d) From the above, it is more than clear that Applicant promoter remained purportedly unaware of the DRT proceedings because of the faults/lapses of applicant promoter itself. All these clearly demonstrate that applicant promoter was not at all vigilant, was casual and remained sleeping over its rights.
- e) Moreover, it is pertinent to note that The Hon'ble Supreme Court in para 19 of its judgement in the case of "Sagufa Ahmed and Others vs. Upper Assam Plywood Products (P) Ltd [(2021) 2 SCC 317]", has laid down as follows;

19. 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."

- f) Even though the above Judgment of The Hon'ble Supreme Court is in the context of the availing benefits for extension of limitation period in filing of appeal, the core decision made therein in the above judgment passed by The Hon'ble Supreme Court shows that such benefits can be extended only to vigilant litigants and only those, who are vigilant about their rights and not to those, who sleep over their rights.
- g) However, in the present case, the impugned order is dated 16th December 2022, applicants have failed to produce even a single concrete evidence on record demonstrating tangible action undertaken by applicant for filing of the said review applications. Not even a single step is seen taken by them at all for filing the captioned review application in time within the limitation period. All these conclusively demonstrate that *prima facie*, applicant has not taken any visible, tangible and demonstrable action. Applicant was not vigilant about their rights and law will not benefit such non-vigilant litigants. Accordingly, it is more than evident that applicant being not vigilant, cannot now take shelter under the grounds mentioned in their applications and seek benefits of condonation of delay on these counts.
- h) Non-applicants have taken loan from IHFL after availing the facility of subvention scheme of 10:80:10 floated by none other than the applicant promoter itself for the home buyers of the said project being developed by applicant promoter itself.
- i) It is pertinent to note that auction proceedings by DRT are generally undertaken after giving wide publicity and normally by public auction.



- j) In view of these, the said contentions of the applicant that they were not aware of the DRT proceedings are not convincing and so cannot be accepted.
15. In view of the above peculiar facts and circumstances of the case, it is more than evident that the solitary reasons put forth by applicant promoter for condonation of delay that applicant was not aware of the DRT proceedings till 31st March 2023, is *ex facie* contrary to the facts on the record and legally not tenable. Furthermore, it is settled law that delay in filing of the review applications can be condoned only after explaining each day of delay with sufficient cause. In the instant case, not even a single coherent, cogent and convincing reason has been submitted nor been pleaded by applicant promoter for condonation of delay of more than 100 & 111 days, much less the sufficient cause required as per the settled position of law.
16. It is pertinent to observe here that applicant is a Promoter, who is managed by educated functionaries in the Promoter company and is not a person of ordinary prudence. Even then, applicant promoter company has not produced even a single convincing reason for the said delay.
17. 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 disputes between the parties and to advance substantial justice. The Hon'ble Supreme Court summarized the law on the issue in *Basawaraj and Anr vs. Special Land Acquisition Officer* [(2013) 14 SSC 81]. In para 15 the Hon'ble Supreme Court held thus –

"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”.

18. In the instant case, applicant has made only vague and unsubstantiated submissions, despite being a promoter company, which have been conclusively controverted by non-applicants on affidavit. Applicant, despite providing enough opportunities, failed even remotely to show sufficient cause and demonstrate any meaningful, convincing and cogent reason in support of the condonation of delay, much less the sufficient cause, which is required for condonation of delay.
19. 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 relating to condonation of delay and having regard to the totality of facts and circumstances of these cases as discussed above, in our considered view, applicant is found to be casual, non-serious and not vigilant in preferring the review against the impugned common order in time. Therefore, in the absence of cogent reasons to condone inordinate delay of more than 100 days in filing of review applications and in order to avoid injustice to non-applicant, the captioned applications for condonation of said delays are devoid of merits and lack substance.



Therefore, the solitary point for determination is answered in the negative and we proceed to pass the following order: -

ORDER

- a. Misc. Application Nos. 384 of 2023 and 388 of 2023 for condonation of delay stand rejected.
- b. In view of dismissal of Misc. Applications for condonation of delays, pending captioned Review Applications Nos. 11 of 2023 and 12 of 2023 will not survive, consequently stand disposed of.
- c. Applicant Promoter to pay the costs of Rs.25,000/- for each review application directly to the account of Non-applicants besides bearing its own costs.
- d. 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)


(S. S. SHINDE, J.)

At this stage, Adv. Padma Chinta, learned counsel appearing for Applicant seeks time to pay the said costs within four weeks from the date of uploading of the order directly to the account of Non-applicants.


(DR. K. SHIVAJI)


(S. S. SHINDE, J.)