

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

APPEAL NO. AT006000000053623

ALONG WITH

MISC. APPLICATION NO. 292 OF 2022 (Stay)

Neelkamal Realtors Suburban Pvt. Ltd.]

DB Central, Maulana Azad Road,
Rangwala Compound, Jacob Circle,
Mumbai – 400 011.

... *Appellant*

versus

Mr. G. Satish

C/21, Highway Milton Chs,
Bansi Nagar, Kulupwadi,
Borivali East, Mumbai – 400 066.

... *Respondent*

Mr. Sushant Chavan, Advocate for Appellant.

Mr. Prashant Chavan, Advocate for Respondent.

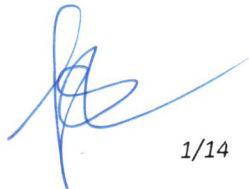
**CORAM : SHRI S. S. SHINDE J, CHAIRPERSON &
DR. K. SHIVAJI, MEMBER (A)**

DATE : 31st AUGUST 2023

(THROUGH VIDEO CONFERENCE)

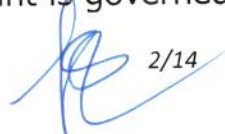
JUDGEMENT [PER : DR. K. SHIVAJI, MEMBER (A)]

Present appeal has been preferred under Section 44 of Maharashtra Real Estate (Regulation and Development) Act, 2016 (in short "the Act") against the order dated January 18, 2021 passed by learned Member, Maharashtra Real Estate Regulatory Authority, (MahaRERA) in Complaint No. CC 006 000000 193220, wherein, MahaRERA directed Appellant *inter alia* to pay interest at prescribed rate



to Respondent from 01st May 2017 till the actual date of handing over of the possession of the booked flat to Respondent.

2. Appellant is the developer, who is constructing a residential project known as "**DB OZONE**" located at Mira Road, Thane District (in short "the said project"). Respondent is the flat purchaser and complainant before MahaRERA. Respondent is the flat purchaser and complainant before MahaRERA. For convenience, appellant and respondent will be addressed hereinafter as promoter and complainant respectively in their original status before MahaRERA.
3. Brief background giving rise to the present appeal is as under; -
 - a. **Complaint's case:** In 2010, complainant booked flat No. 1507 in Building No. 10 of the promoter's said project for total consideration of Rs. 24,28,020/- and has paid Rs. 23,06,622/-. Agreement for sale was also executed and registered between the parties on 02nd March 2010, wherein Clause 29 of the said registered agreement for sale, stipulates that appellant promoter shall be liable to handover possession of the said flat on or before December 2014 with further extension of grace period of 12 months after 31st December 2014 and promoter shall be further entitled for reasonable extension for completion of the said project under certain conditions as mentioned in the agreement. On account of delay in delivery of the subject flat within the timelines as agreed in the agreement, captioned Complaint came to be filed by respondent before MahaRERA, seeking various reliefs as mentioned in the complaint *inter alia* for direction to appellant promoter to pay interest for delay in delivery of possession under Section 18 of the Act of 2016.
 - b. Promoter resisted complaint by filing reply before MahaRERA and raised *inter alia*, issue of maintainability of complaint by submitting that agreement has been registered under the provisions of the MOFA Act. Therefore, the complaint is governed by the provisions of the MOFA and



not under the provisions of RERA Act of 2016 and also contended that under the said clause 29 of the agreement for sale, project completion date can be extended due to factors beyond the control of the promoter, more particularly due to non-availability of steel/ construction material, war, Act of God and due to other economic factors including on account of economic downturn as well as due to delay in getting the regulatory approvals from the Competent Authorities.

- c. Upon hearing the parties, learned Member, MahaRERA passed the impugned order dated 18th January 2021 directing appellant promoter to pay interest at prescribed rate for the delay in delivery of possession as enunciated above.
- d. Aggrieved by this order of MahaRERA, promoter has preferred the captioned appeal, seeking various reliefs including to quash and set aside the impugned order dated 18th January 2021 and to declare that the delay in completion of the said project is due to factors beyond the control of appellant promoter and therefore, the due date for possession as specified in clause 29 for the agreement for sale stands extended for a period of 12 months on account of such factors beyond the control of the promoter.

4. Heard parties in *extenso*.

5. Promoter has sought the above reliefs by filing the captioned appeal citing *inter alia* following grounds.

- a. construction of the said project got slowed down due to scarcity of sand, restrictions imposed on stone crushers and due to new conditions imposed for stone mining activities by the Maharashtra Pollution Control Board. The said project also suffered owing to slow down in the economy more particularly in the real estate sector leading to financial difficulties and also due to interim stay by the Hon'ble State Commission in a

consumer complaint etc. The said project was registered under Section 4 of the Act of 2016, after it came into force on 01st May 2017. Considering all the mitigating circumstances, the project completion date was revised to be completed by 31st December 2019. The said project consists of 25 buildings and 8 rehab building to be completed and to be handed over under rental housing scheme of MMRDA. However, the captioned complaint came to be filed even-though, promoter had offered to refund the paid amounts together with interest @ 9 percent per annum in accordance with provisions of Section 8 of the MOFA Act and as per the provisions of the agreement.

- b. MahaRERA has further extended the project registration and project completion date to 30th December 2020, which has been further extended to 30th June 2021 on account of factors including due to then prevailing Covid-19 pandemic and consequent difficulties faced in the availability of the construction workers.
- c. Agreement, which is valid, binding and subsisting was executed in 2010 during the MOFA regime and accordingly the provision of the Act of 2016 are not applicable to the transactions executed between the parties.
- d. In view of the judgment of the Hon'ble High Court, in reference to the revised proposed completion date, the revised project completion date, stands extended to 30th December 2021 and MahaRERA has failed to appreciate the realistic project completion date declared by appellant promoter.
- e. MahaRERA has wrongly concluded and misrepresented in point no. 7 of the impugned order, which reads as *"..... Respondent/promoter is liable to pay interest for the period of delay in accordance with the terms and conditions of the agreement and has failed to take note of the provisions mentioned in clause 29 of the agreement, which provides for the*



promoter to refund the paid amount to complaint with simple interest @ 9 percent per annum from the date of receipt."

- f. Section 8 of the MOFA also provides for *inter alia* the refund of the paid amount with interest for failure to give possession within the specified time.
 - g. The Bombay High Court in its judgement in W.P No. 2737 of 2017 in para 256, provides *inter alia* that Section 4(2)(1)(c) enables promoter to revise the date of completion of project and handover possession.
 - h. MahaRERA ought to have taken into consideration the fact that project has suffered financial constraints due to economic slowdown between 2012 and 2017 as well as again in 2020 and 2021. Therefore, possession date as mentioned in agreement stood extended by 60 months and promoter is entitled for reasonable extension under Clause 29 of the agreement.
 - i. MahaRERA has failed to appreciate that out of 3281 flats, 2170 flat purchasers have already taken fit out possession/ handover and most of the infrastructure services in 25 buildings are already functional including lifts, electricity, water supply etc.,
 - j. Considering *inter alia* above, appellant promoter sought *inter alia* to quash as well as to set aside the impugned order and appeal be allowed for the reliefs sought therein.
- 6.** Per Contra, complainant submits that; -
- a. As per the agreement for sale, promoter is required to handover possession on or before December 2015. Whereas, till July 2022, even after the lapse of more than 7 years of the promised date of possession, promoter appellant has failed to handover the possession of the subject flat even after admitted paid amounts of almost 95 percent of total consideration by February 2018. This has been subjecting to immense harassment because that complainant has been spending money on rent

- to stay elsewhere. Under the said circumstances, respondent complainant is entitled for compensation as the promoter cannot be allowed to use complainant's paid amount free of cost.
- b. Further Vehemently contended that even though the agreement has been executed in 2010 during the MOFA regime, still the provisions of the RERA Act of 2016 are squarely applicable for the said sale transactions under the agreement for sale because, the project has been duly registered by the promoter itself under the provisions of the said Act of 2016 as an ongoing project.
 - c. Moreover, the provisions of the said Act of 2016, more particularly Section 88 specifically provides *that "the provisions of this Act shall be in addition to, and not in derogation of the provisions of any other law for the time being in force"*.
 - d. Moreover, all the ongoing projects, which have not got completion certificates more particularly after its registration, are covered under the provisions of the said Act of 2016.
 - e. The project has been registered under the said Act of 2016 and the flat purchaser's complainant for the said project are entitled for benefits accrued due to delay in delivery of the possession under Section 18 of the Act. Besides, the provisions of said Act of 2016 are squarely applicable including the compensation from the promised date of possession as per the agreement.
 - f. Appellant promoter has already accepted more than 95 percent of the total consideration, admittedly till 2018, when the last payment was made, and appellant's hard-earned money has been blocked. Whereas the complainant respondent has to pay rent. The delay in delivery of possession is not attributable to complainant and the appellant promoter is squarely responsible for the project delay. The rights under Section 18 accrued to complainant allottee on account of delay in delivery of



possession is absolute and unconditional in terms of the judgment of The Hon'ble Supreme Court 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]***

g. Considering the above, respondent complainant sought to dismiss the appeal with costs.

7. From the rival pleadings, submissions and documents relied upon by parties, following points arise for our determination and we have recorded our findings against each of them for the reasons to follow: -

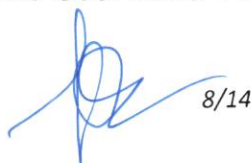
POINT(S)		FINDING(S)
1.	Whether the provisions of the Act of 2016 will be applicable in the instant case?	In the affirmative
2.	Whether Promoter establishes that possession of flat was delivered as per the agreed timeline in terms of the agreement for sale?	In the negative.
3.	Whether rights of allottees under Section 18 of the Act is unconditional & absolute, regardless of unforeseen events and factors beyond control of Promoter?	In the affirmative.
4.	Whether project completion date, while registering the project be taken as the agreed date for delivery of possession?	In the negative.
5.	Whether impugned order is sustainable in law?	In the affirmative.
6.	Whether impugned order calls for interference in this appeal?	In the negative



REASONS

Point 1:

8. It is not in dispute that complainant has booked the subject flat in the promoter's said project and promoter has accepted payment of almost 95 percent of total consideration. Parties have also executed a registered agreement for sale, wherein, clause 29 stipulates for delivery of possession of the subject flat before 31st December 2014 with grace period of 12 months and further reasonable extension under certain conditions as stipulated in the agreement. In view of the above, it is not in dispute that respondent complainant is an allottee and appellant is promoter under the provisions of the said Act of 2016. Promoter itself has further submitted that the said project has been duly registered as an ongoing project after the said Act came into force as on 01st May 2017. Whereas The Hon'ble Bombay High Court in para 86 of its judgement in the case of Neelkamal Realtors Suburban Pvt. Ltd. & Anr. Vs. Union of India & Ors. [(2017) SCC Online Bom 9302] *has held inter alia that ".....The RERA (the Act of 2016) will apply after getting the project registered. In that sense, the application of RERA is prospective in nature....."*.
9. Hon'ble Supreme Court In para 54 of its judgment dated November 11, 2021, in the case of ***M/s. Newtech Promoters and Developers Pvt. Ltd vs. State of UP & Ors. (supra)*** *has also held that " 54. From the scheme of the Act 2016, its application is retroactive in character, and it can safely be observed that the projects already completed or to which the completion certificate has been granted are not under its fold and therefore, vested or accrued rights, if any, in no manner are affected. At the same time, it will apply after getting the ongoing projects and future projects registered under Section 3 to prospectively follow the mandate of the Act 2016."*
10. Therefore, as per the settled positions of law including as per the decision of the Hon'ble Supreme Court and The Hon'ble Bombay High Court (supra),


8/14

various provisions of the Act will be applicable in the instant case. Consequently, the said transactions including the agreement for sale dated 02nd March 2010 in the instant case are also squarely covered within the purview of the Act of 2016. Moreover, in case of conflict/s, provisions of the said Act of 2016 will prevail. Thus, it is hard to agree with the contentions of Promoter stating that provisions of the said Act of 2016 will not be applicable merely because the agreement has been executed during the MOFA regime. Accordingly, we answer the point no.1 in the affirmative.

Point 2: Whether Possession was delivered as per agreed timelines:

- 11.** It is not in dispute that Complainant has booked the said flat and agreement for sale has also been executed on 02nd March 2010. Clause 29 of the agreement stipulates that possession of the flat will be handed over before 31st December 2014 with a grace period of 12 months and further reasonable extension is subject to certain restrictions regarding force majeure events. This implies that even after adding grace period, possession of the said flat was agreed to be delivered by 31st December 2015.
- 12.** However, learned counsel for the Promoter himself submits that project was not completed due to financial constraints and on account of several factors beyond the control of the promoter including due to certain economic factors including owing to slow down in the economy, shortage of sands, stones, labours and workforce as well as due to difficulties faced by promoter due to then prevailing Covid-19 pandemic. But these factors causing delay, are not attributable to complainant and appellant promoter is a squarely responsible for these as per the contractual commitments given by Promoter as provided under the agreement.
- 13.** It is also not in dispute that the booking of flat was done during 2010. Accordingly, delivery of legal possessions of flats are not seen delivered by



promoter even after adding 3 years of reasonable time as laid down by The Hon'ble Supreme Court in para 15 of its judgment in the case of ***FORTUNE INFRASTRUCTURE & ANR VERSUS TREVOR D'LIMA & ORS (2018) 5 SCC 442.***

- 14.** Learned counsel for appellant promoter during the argument, himself submits that the subject flat is located in building no. 10 and the promoter has not received the occupancy certificate of this building as yet. As such, the promoter has not been able to even apply for the occupancy certificate for this building due to factors beyond the control of the promoter.
- 15.** In view of above, it is more than clear that delivery of legal possession of the said flat with required occupancy certificate has not been handed over before the agreed timeline, despite having specific stipulations for this in the agreement. Therefore, promoter has failed to deliver possession of flat neither within the agreed timelines nor within reasonable permissible period and we answer **point 2** in the negative, accordingly.

Point No.3: Whether rights accrued under Section 18 is absolute.

- 16.** It is apposite to reproduce Section 18 of the Act as under: -

*"18. Return of amount and compensation. — (1) If the Promoter fails to complete or is unable to give possession of an apartment, plot or building, —
(a) in accordance with the terms of the agreement for sale or, as the case may be, duly completed by the date specified therein; or*

*(b) due to discontinuance of his business as a developer on account of suspension or revocation of the registration under this Act **or for any other reason**, he shall be liable on demand to the allottees, in case the Allottee wishes to withdraw from the project, without prejudice to any other remedy available, to return the amount received by him in respect of that apartment, plot, building, as the case may be, with interest at such rate as may be prescribed in this behalf including compensation in the manner as provided under this Act:*

(2) ..

(3) If the Promoter fails to discharge any other obligations imposed on him under this Act or the rules or regulations made thereunder or in accordance with the terms and conditions of the agreement for sale, he shall be liable to pay such compensation to the allottees, in the manner as provided under this Act."



17. 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. (supra)** dated **11th November 2021** has clarified that *if 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."*

And para 78 of the judgement is as under; [OB]

78. This Court while interpreting Section 18 of the Act, in Imperia Structures Ltd. Vs. Anil Patni and Another [5 2020(10) SCC 783], has held that Section 18 confers an unqualified right upon an Allottee to get refund of the amount deposited with the Promoter and interest at the prescribed rate, if the Promoter fails to complete or is unable to give possession of an apartment as per the date specified in the home buyer's agreement, then in para 23/25, it was held as under:

"23/25. In terms of Section 18 of the RERA Act, if a Promoter fails to complete or is unable to give possession of an apartment duly completed by the date specified in the agreement, the Promoter would be liable, on demand, to return the amount received by him in respect of that apartment if the Allottee wishes to withdraw from

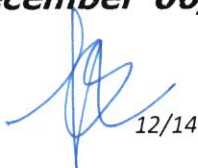
the Project. Such right of an Allottee is specifically made "without prejudice to any other remedy available to him". The right so given to the Allottee is unqualified and if availed, the money deposited by the Allottee has to be refunded with interest at such rate as may be prescribed.

The proviso to Section 18(1) contemplates a situation where the Allottee does not intend to withdraw from the Project. In that case, he is entitled to and must be paid interest for every month of delay till the handing over of the possession. It is up to the Allottee to proceed either under Section 18(1) or under proviso to Section 18(1). The case of Himanshu Giri came under the latter category. The RERA Act thus definitely provides a remedy to an Allottee who wishes to withdraw from the Project or claim return on his investment."

- 18.** In view of above, it has been held by by the Hon'ble Apex Court that the rights of Allottees under Section 18 of the Act are unconditional and absolute, regardless of unforeseen events including due to any other reasons, even due to factors beyond control of the Promoter and it is the allottees, who have sole discretions to proceed either under Section 18 (1) or under the proviso to the Section 18 (1). Accordingly, respondent allottee has unconditional and absolute rights to claim interest at prescribed rate under Section 18 of the Act for delay in delivery of possession of the subject flat from the agreed date and we answer the point 3 in the affirmative.

Point 4: possession date on MahaRERA website:

- 19.** Clause 29 of the agreement for sale dated 02nd March 2010 stipulates for delivery of possession by December 2014 subject to grace period of 12 months and is eligible for further reasonable extension. It was alleged that promoter has unilaterally extended the date of possession without any information nor consent of complainant to December 2020, while registering the project with MahaRERA. But this is not tenable in the light of the paras 119 and 256 of **the Judgment of The Hon'ble Bombay High Court** in the case of **Neelkamal Realtors Suburban Pvt. Ltd vs. UOI & Ors dated December 06, 2017, in writ petition number**



2737 of 2017, which clarifies that "*The RERA **does not contemplate rewriting of contract** between the flat purchaser and the promoter.*" Para 256 of this Judgment further clarifies that "*by giving opportunity to the promoter to prescribe fresh timeline under Section 4(2)(I)(C), he is **not absolved of the liability** under the agreement for sale*".

- 20.** Moreover, delivery date mentioned on MahaRERA's website is revised unilaterally without consent of complainant. Therefore, it is not binding on complainant. Accordingly, project completion date mentioned on the website of MahaRERA cannot be accepted as agreed possession delivery date. In view of above, revised possession dates mentioned on the website, while registering the project are legally not permissible and we answer the point 4 in the negative accordingly.

Point 5 and 6:

- 21.** In view of the foregoing, it is crystal clear that the provisions of the Act of 2016 are squarely applicable in the instant case, promoter has failed to deliver the possession of the subject flat within the agreed timeline in terms of the agreement for sale and the rights so accrued to complainant respondent under Section 18 of the said Act is unconditional and absolute regardless of unforeseen events including due to factors beyond the control of the promoter. Therefore, the claim of the promoter for the extension of possession delivery date under the agreement for sale is legally not sustainable. Moreover, project completion date extended, while registering the project with MahaRERA, cannot be taken as an agreed date in terms of the agreement for sale for the purpose of the rights accrued under Section 18 of the Act of 2016 to allottee complainant, more specifically for claiming interest at prescribed rate for delay in delivery of the possession.
- 22.** Perusal of the impugned order dated 18th January 2021, clearly reveals that MahaRERA has rightly passed the said order by rejecting the claim of

the promoter on the grounds for delay in delivery of possession and has rightly awarded interest to complainant respondent delay in delivery of possession till the actual date of possession at prescribed rate. In view of above, we are of the considered view that there is no infirmity in the impugned order on the above and no interference is called for in this appeal. Therefore, the captioned appeal filed by promoter is devoid of merits and lacks substance and promoter appellant is not entitled for the reliefs sought in the appeal. Consequently, the appeal having no merit, deserves to be dismissed. Accordingly, we answer point 5 and 6 as above and proceed to pass the order as follows; -

ORDER

- (i) Captioned Appeal No. AT006000000053623 is dismissed.
- (ii) In view of the dismissal of appeal, pending miscellaneous application will not survive, hence stand disposed of.
- (iii) No order as to costs.
- (iv) In view of the provisions of Section 44(4) of the Act of 2016, a copy of the Judgment be sent to the parties and MahaRERA.


(DR. K. SHIVAJI)


(S. S. SHINDE, J.)