# BEFORE THE MAHARASHTRA REAL ESTATE APPELLATE TRIBUNAL, MUMBAI

**Appeal No. AT00600000053625/2022**
**In**
**Complaint No. CC006000000196018**

**1. Bharat Narendra Mistry**
**2. Rakesh Shah**
502, Dejoss, Ice Factory Lane,
Off Hill Road, Bandra [West], Mumbai-50 **... Appellants**

**Versus**

**M/s. Realgem Buildtech**
**Pvt. Ltd. [DB Crown-Phase 2]**
Office at:
DB Central, Maulana Azad Road,
Rangwala Compound, Jacob Circle,
Mumbai-011 **... Respondent**

*Adv. Mr. Sumanth Anchan for Appellants*
*Adv. Mr. Abir Patel for Respondent*

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

**DATE : 15th February, 2024**

**(THROUGH VIDEO CONFERENCING)**

**JUDGEMENT**

**[PER : SHRIRAM R. JAGTAP, MEMBER (J)]**

Being aggrieved by the Order dated 29th December, 2021, passed by the learned Chairperson, MahaRERA (for short the Authority) in Complaint No.CC006000000196018, the



Jagtap

Complainants, who are Allottees, have preferred the instant Appeal to raise grievance that the impugned Order has not granted reliefs sought in the Complaint.

2] For the sake of convenience parties to the Appeal hereinafter will be referred to as "Allottees" and "Promoter".

3] Brief facts culled out from the proceedings of the parties reveal that in February, 2013, Allottees had approached the Promoter seeking to book an apartment in the Project known as **"DB Crown" (now the Project is renamed as "Rustomjee Crown")** being developed by the Promoter situated at Plot No.1043, TPS IV Mahim Division, Gokhale Road (South), Prabhadevi, Mumbai. After discussions and negotiations, Allottees agreed to book apartment no.1802, in Tower 'C', admeasuring 1423 sq. ft. for a total consideration of Rs.6,67,00,900/-. Accordingly, the Allottees were issued the allotment letter titled as 'Application form'. The terms of allotment of the subject flat are duly set out in the Allotment letter dated 22.02.2013. Allottees have made a payment of Rs.1,34,52,579/- with service tax amounting to Rs.4,86,462/- to Promoter. The Promoter had verbally assured the Allottees that physical possession of the subject flat would be given within a period of 3 to 4 years.

4] After a period of three years, Promoter by e-mail dated 03.10.2016 issued a demand letter to Allottees and sought for the payment in respect of the subject flat. The Allottees by their reply e-mail dated 04.10.2016 sought clarification from the Promoter with regard to the construction progress and failure to execute the agreement for sale. Since Promoter was not in a position to complete the project, the Allottees by their e-mail dated 20.06.2017 conveyed their intention to exit from the project and called upon Promoter to refund the amount paid alongwith interest. This request was further reiterated by Allottees in their e-mails dated 03.02.2017, 14.02.2017, 31.03.2017 and 21.04.2017. Allottees had also contended in their e-mails that they are in dire need of accommodation and asked the Promoter to refund amount with interest on account of inordinate delay in completion of the project. The Promoter by e-mail dated 05.05.2018 categorically admitted that there was complete inactivity at the project site Despite this, the Promoter did not refund the amount to Allottees.

5] Being dissatisfied with this conduct of the Promoter, the Allottees had filed Complaint No.CC006000000001816 under Section 18 of RERA Act, 2016. During the pendency of the Complaint, Allottees had preferred an Application to amend their

Complaint and to seek reliefs in terms of Sections 11, 12, and 13 of RERA. This Application for amendment was opposed by the Promoter on the ground that the proposed amendment is going to change the nature of the litigation as it introduces a totally new and inconsistent case. While dismissing the Complaint on 10.04.2018 the learned Authority had observed in Order that the conversion of the Complaint filed under Section 18 into Sections 11, 12 and 13 of RERA Act will amount to a change in nature of the proceedings, therefore, it is desirable to dismiss the Complaint and allow the Complainants to file another Complaint in an appropriate form. Accordingly, the learned Authority had accorded liberty to Allottees to file another Complaint in an appropriate form on the same cause of action.

6] Even after dismissal of the Complaint, the Allottees had categorically expressed their desire to exit from the project. However, the Promoter by its e-mails dated 15.05.2019, 29.05.2019, 05.06.2019, 14.06.2019, 23.09.2019 and 07.07.2020 insisted the Allottees to execute the agreement for sale. Besides, the Promoter had also offered/ proposed an alternative accommodation at a lower price range to Allottees. The proposal of the Promoter was not accepted by the Allottees and they stick

up with their stand to exit from the project for the reasons mentioned in their e-mails.

7] The Promoter has failed to complete the project even after eight years of issuance of allotment letter dated 22.02.2013. Therefore, Allottees by their e-mail dated 12.04.2019 expressed their desire to purchase alternative accommodation and asked the Promoter to refund the amount with interest. At the time of registration of the project, the Promoter had declared the date of completion of the project as 30.06.2020, which has been revised to 30.06.2023 which signifies that there is unreasonable and unjustifiable delay in completion of the project. Inordinate delay in completion of the project redounded the Allottees to file Complaint on 29.02.2021 whereby the Allottees sought relief *inter alia* refund of amount of Rs.1,39,39,041/- with interest till realisation of entire amount.

8] The Promoter appeared in the Complaint and remonstrated the Complaint by filing reply contending therein that the Complaint contains two composite reliefs under Sections 12 and 18 of RERA and therefore Complaint is not maintainable. The Allottees had filed Complaint No.CC006000000001816 under Section 18 of the RERA Act, 2016 seeking refund with interest on

similar grounds. The Allottees had filed Application dated 06.03.2018 seeking reliefs under Sections 11, 12 and 13 of RERA. Allottees cannot ask inconsistent reliefs as Section 13 of RERA deals with execution of an agreement for sale. Allottees on the one hand seek to execute the agreement for sale and on the other hand want to exit from the project. This clear shifting stance by the Allottees during the pendency of the first Complaint to give up their claim and shift their entire case, now bars the Allottees from taking a 180 degree turn and once again seek refund with interest in the Complaint which is impermissible. The Allottees have already abandoned their claim for refund with interest. The claim of Allottees for refund with interest is barred as the said claim has already been adjudicated by the learned Authority vide Order dated 10.04.2018 whereby the first Complaint was dismissed. The first Complaint was filed under Section 18 of RERA. By Order dated 10.04.2018, the learned Authority had not just rejected the application for amendment but the main Complaint seeking refund under Section 18 was also dismissed. The Allottees have not challenged the Order dated 10.04.2018. Therefore, the findings of rejection of the claim of Allottees in the first Complaint under Section 18 of the RERA binds the Allottees, as a consequence the

present Complaint is barred by the principle of *res judicata* and therefore cannot be entertained.

9] The Allottees have not produced a single document to demonstrate that there is an agreed date of possession between the parties that was breached by the Promoter thereby giving Allottees a cause of action to seek the refund. In the absence of documentary proof, the provisions of Section 12 of RERA do not attract, since Section 12 deals with false and misleading information having been made by means of advertisement, brochure, prospectus or notice. The Allottees claim to have been represented the possession date 'verbally' which by no means accept proof to any representation of possession date. Barring delay in possession, no other case has been made out for seeking refund with interest in the captioned Complaint. Since the requirement of Section 31 of RERA is not met, the Complaint is not maintainable.

10] It is further contention of Promoter that Allottees have been called on multiple occasions to execute the agreement for sale, but they failed to do so for the reasons best known to them. The Allottees have been avoiding to execute the agreement for sale, thus they are in continuous breach and violation of Section

13 of RERA. Since the Allottees intended to exit from the project unilaterally and for no fault of the Promoter, any exit and consequent refund will be subject to forfeiture as stated in Clause 8.1 of the application form dated 22.02.2013, which is the only document of title under which the Allottees are claiming rights in the subject project. The Promoter has borne and paid the administrative charges, brokerage and marketing expenses at the time of sale of the subject flat and for the purpose of reselling the flat, these charges will have to be re-incurred. The amount spent towards administration charges, marketing and brokerage expenses, they are on the bonafide belief that the Allottees would take possession but would now entail the loss to the Promoter which ought to be offset by means of forfeiture in the said form.

11] The Promoter has further contended that the Allottees were apprised by the Promoter that the project was at a nascent stage and timeline would only be stated in the agreement for sale. The Allottees had not qualms about the possession date as they always intended it to be a long term investment which they never intended to realize immediately.

12] The Promoter has further contended that the Application form does not mention the date of possession, since it was the

understanding between the parties that the possession date was to be stated in the agreement for sale. Clause 5.4 of the booking application form stipulates that Allottees would execute the registered agreement for sale when called upon. Clause 8.5 clarifies that the consequence of any premature termination by the Allottees would entail forfeiture in the amount refundable. The transaction had taken place in the regime of MOFA. As per terms of the payments schedule enumerated in the application form, the Allottees are liable to pay a sum of Rs.1,65,64,297/- due towards sale consideration and Rs.16,86,379/- due towards tax as on 13.07.2021 based on the milestones stated therein which have been completed at site together with an amount of Rs.30,98,034/- payable as interest alongwith further interest until payment of realisation.

13] It is further contention of the Promoter that the Allottees have only paid 19.90% of the consideration. The Allottees have been called upon by the representative of Promoter while numerous requests and reminders vide e-mails dated 15.05.2019, 29.05.2019, 05.06.2019, 14.06.2019, 07.07.2019 and 08.09.2020 to execute the agreement for sale, but Allottees have failed to do

so till date, and thereby the Allottees have violated the provisions of Section 4 of the MOFA and Section 13 of the RERA Act.

14] Promoter has further contended that **'Kingmaker Developers Pvt. Ltd. (KDPL)'** has been appointed as the development manager for the subject project by the Promoter to oversee the construction of the project and marketing thereof for a fixed fee to compensate for its services. The Respondent is the Promoter of the subject project and KDPL is only acting as an agent on its behalf. The Allottees are in arrears of Rs.1,65,64,297/- payable towards the said consideration which they have been avoided to pay with the intention to dodge execution of agreement for sale together with the amount of Rs.47,84,413/- payable as interest on account of delay in making payments due and agreed under the Application form. The Allottees cannot approbate or reprobate to suit their convenience by changing their stand. With these contentions the Promoter sought to dismiss the Complaint.

15] After hearing the parties, the learned Authority disposed of the Complaint with direction to the parties to abide by the terms and conditions of allotment letter/ Application form dated 22.02.2013. All claims in regards refund/ interest, shall be governed by the said allotment letter/ Application form.

16] We have heard learned Advocate Mr. Sumantha Anchan for Appellants/ Allottees and learned Advocate Mr. Abir Patel for Respondent/ Promoter.

17] An abridgment of argument of Advocate Mr. Sumantha Anchan for Allottees is that on 22.02.2013 Allottees had approached the Promoter to book an apartment in the project. After discussions and negotiations, Allottees booked apartment no.1802, in Tower 'C', for a total consideration of Rs.6,67,00,900/- and paid Rs.1,34,52,579/- towards part consideration and Rs.4,86,462/- towards service tax. The Promoter issued allotment letter titled as 'Application form' to Allottees. The terms of allotment of the subject flat are duly set out in the allotment letter/ Application form. Admittedly, no date of possession has been mentioned in the allotment letter. However, the Promoter had verbally committed to handover the possession of the subject flat to Allottees within three to four years. The Promoter did not complete the project within the stipulated period and failed to handover the possession of the subject flat to Allottees. It has been held by the Hon'ble Apex Court in **Fortune Infrastructure & Anr. Vs. Trevor D'Lima & Ors.** [(2018) 5 SCC 442] that, though there was no completion period stipulated in the document, the

reasonable time has to be taken into consideration and the time period of three years would be reasonable for completion of the construction i.e. possession was required to be given within three years. Since the Promoter deliberately failed to handover the possession of the subject flat to Allottees within a reasonable period therefore, Allottees expressed their intention to exit from the project and by e-mail conveyed the same to the Promoter and asked the Promoter to refund amount paid alongwith interest.

18] Learned Advocate has further submitted that since the Promoter failed to refund the amount paid, Allottees had filed Complaint No.CC006000000001816 before the learned Authority and sought relief under Section 18 of RERA. During the pendency of the Complaint, the Allottees had felt that their claim under Section 18 of RERA in the absence of agreement for sale would not sustain. Therefore, they had preferred an application for amendment of the Complaint seeking to invoke the provisions of Sections 11, 12 and 13 of RERA. While disposing of the Complaint the learned Authority had observed that the conversion of the Complaint filed under Section 18 into Sections 11, 12 and 13 of RERA will amount to change in the nature of the proceedings and therefore by Order dated 10.04.2018 dismissed the Complaint with

a liberty to file another Complaint in proper form on the same cause of action. Former Complaint was not decided on merits moreover, the matter in issue was not heard and finally decided by the learned Authority. Apart from this, the learned Authority erred in holding that the proposed amendment will change the nature of the proceedings. Therefore, it cannot be said that subsequent Complaint filed under Section 18 of RERA is barred by principle of *res judicata*.

19] Learned Advocate has further submitted that inspite of the fact that Allottees have categorically expressed their desire to exit from the project, Promoter by numerous e-mails insisted Allottees to execute the agreement for sale. After discussions, the Promoter had offered same proposal to Allottees but it was not acceptable, as a result thereof, Allottees did not accept the same and stick up with their stand to exit from the project. Accordingly, on 19.02.2021, Allottees filed the captioned Complaint seeking refund of amount of Rs. 1,39,39,041/- with interest. It is a well settled position of law that for entitlement of claim under Section 18 of RERA, requirement of a written agreement for sale is not mandatory. Despite this the learned Authority erred in holding that

in the absence of agreement for sale or agreed date of possession, Allottees are not entitled to claim relief under Section 18 of RERA.

20] The learned Advocate has further sorely submitted that it is evident from the material placed on record by the parties and also it is not in dispute that the subject project on the date of commencement of the RERA Act, 2016 was an on-going project, as a result thereof, the Promoter registered the project with MahaRERA and declared the date of completion of project as 30.06.2020. However, the Promoter did not complete the project on the specified date and revised the proposed date of completion of project from time to time as 31.12.2022, 30.06.2023, 30.12.2023 and 29.12.2024. This signifies that the Promoter has miserably failed to handover the possession of the subject flat to Allottees within a reasonable period. Even though the allotment letter does not expressly set out the possession date, the period of 11 years can in no manner be deemed as 'reasonable' period. Learned Authority has grossly erred in coming to the conclusion that since the allotment letter does not specify any date of handing over the possession of the subject flat, the date mentioned on the RERA website ought to be considered as the possession date and

thereby denied the reliefs sought in the Complaint. Learned Advocate has placed reliance on the following citations;

**(i) Amrita Kaur Vs. M/s. East & West Builders** [AT006000000001977 of 2019]

**(ii) Bombay Dyeing Vs. Ashok Narang** [2021 SCC Online Bom 12330]

**(iii) Jyoti Narang Vs. CCI Projects Pvt. Ltd.** [AT006000000010841]

**(iv) Kolkata West Vs. Devasis Rudra** [(2020) 18 Supreme Court Cases 613]

**(v) Pioneer Urban Land and Infrastructure Ltd. Vs. Govindan Raghavan** [(2019) 5 Supreme Court Cases 725]

**(vi) K. Sivaramaih Vs. Rukami Ammal** [(20040 1 SCC 471]

**(vii) Daryao & Ors. Vs. State of U.P. & Ors. reported AIR 1961 SC 1457** [AIR 1961 SC 1457]

**(viii) Fortune Infrastructure & Anr. Vs. Trevor D'Lima & Ors.** [(2018) 5 SCC 442]

**(ix) Central Bank of India & Ors. Vs. Dragendra Singh Jadon** [(2022) 8 SCC 378]

21] Learned Advocate has further submitted that it is a well settled position of law that the provision of RERA however do not

rewrite the clause of completion or handover possession in agreement for sale. Section 4(2)(1)(c) of RERA enables the Promoter to fresh timeline independent of the time period stipulated in the agreement for sale entered into between him and the Allottees so that he is not vitiated with penal consequence laid down under RERA but he is not absolved from liability under the agreement for sale. The learned Authority failed to consider the fact that having paid substantial amount to Promoter, Promoter failed to execute the agreement for sale in favour of Allottees and failed to handover the possession of the subject flat within a reasonable period. Therefore, the Allottees are entitled to relief under Section 18 of RERA. With these contentions, learned Advocate has prayed to allow the Appeal with exemplary costs.

22] Succinct of arguments of Advocate Mr. Abir Patel for Respondent/ Promoter is that it is not in dispute that the Appellants have submitted a joint booking form dated 22.02.2013 which itself is sufficient to show that the buyers are mere investors and they are not allottees within the meaning of definition of Section 2(d) of the RERA Act, 2016. The allotment letter does not specify any date of handing over the possession of the subject flat. The transaction took place in the MOFA regime, under the

circumstance, the Appellants were supposed to pay 20% amount of the total consideration but they have paid 19.90% amount to the Promoter and thereby contravened the provisions of MOFA. The material on record clearly indicate that the Promoter had issued numerous e-mails to Appellants requesting the Appellants to pay balance amount for execution of agreement for sale. However, being investors, they do not want to remain in the project and decided to exit from the project, and therefore asked the Promoter to refund with interest.

23] The learned Advocate Mr. Abir Patel has further submitted that Appellants had filed Complaint bearing No.CC006000000001816 under Section 18 of the RERA Act, 2016 seeking refund with interest. Subsequently, the Appellants in complete contradiction to the reliefs claimed under Section 18 of RERA had filed the application for amendment seeking reliefs under Sections 11, 12 and 13 of RERA. This conduct of the Appellants clearly indicates that the Appellants were not sure of the reliefs they are asking and therefore they kept changing their stand. The first Complaint was dismissed by the learned Authority vide Order dated 10.04.2018 thereby rejecting the amendment application of Appellants and also their claim under Section 18 of

the RERA Act. Having consciously abandoned their claim under Section 18 of RERA, the Appellants are barred from re-agitating the same when the same was already rejected by the learned Authority. A perusal of Order dated 10.04.2018 reveals that the Appellants were only granted liberty to agitate the alleged grievance under Sections 11, 12 and 13 while entirely rejecting their case under Section 18 of RERA. Therefore, the subsequent Complaint filed by Appellants is barred by principle of *res judicata.*

24] Learned Advocate has further submitted that the claim of Appellants of alleged delay in possession is not backed by a single documentary proof. The Appellants have not produced cogent material on record to show that there is an agreed date of possession between the parties and the Promoter has breached any such date. On the contrary, the Promoter has called upon the Appellants on several occasions by e-mails to execute the agreement for sale wherein the date of possession is to be specified but the Appellants have intentionally not come forward for the reasons best known to them. Barring bald allegations, the Appellants have no case whatsoever to support their allegation of delay in possession by the Promoter.

25] The learned Advocate has sorely submitted that the Allottees did not adhere to the payment schedule specified in the application form dated 22.02.2013. The Appellants are liable to pay Rs.1,98,09,832/- towards sale consideration alongwith interest of Rs.40,81,485/-, but by deliberately not signing the agreement have prevented the Promoter from demanding further installments even though work was in progress. The Appellants have not just in violation of Section 13 of RERA, but also Section 19(6) of RERA, therefore, they are liable for interest for deliberately withholding the payments. The Appellants are parties in breach and thus they are not entitled to any reliefs.

26] Learned Advocate Mr. Abir Patel has further submitted that since the exit sought by the Appellants is wholly premature and unilateral the same shall be subject to forfeiture in terms of Clause 8.1 of the application form which binds the contract between the parties. In case of unilateral exit, the monies spent by Promoter for sale of the subject flat to the Appellants will have to be deducted from any refundable amount. The Promoter cannot be made to bear the loss for no fault of its own nor for a cancellation not attributable to it.

27] Learned Advocate has further submitted that it is not in dispute that first Complaint was filed under Section 18 of RERA seeking relief of refund of amount with interest however, the Appellants had filed application for amendment seeking reliefs under Sections 11, 12 and 13 of RERA. Section 13 of RERA is for execution of agreement for sale. It is well settled position of law that a party cannot be permitted to "blow hot-blow cold" where one knowingly accepts the benefits of a contract, or conveyance or of an order, he is estopped from denying the validity of or the binding effect of such contract, or conveyance or order upon himself. The party cannot claim anything more than what is covered by the terms of contract for the reasons that the contract is a transaction between two parties and has been entered into with open eyes and understanding the nature of the contract. Therefore, Appellants are now estopped from claiming reliefs under Section 18 of RERA. The Appellants have to elect either to claim relief under Section 18 or to claim relief under Section 13 of RERA. Appellants cannot be permitted to approbate or reprobate.

28] Learned Advocate has further submitted that the first Complaint was dismissed on 10.04.2019. Admittedly, second Complaint was filed in 2021. The Appellants did not exercise their

right for a long time. Even there is no limitation period prescribed by any statute relating to concerned proceedings, in such case, it is guided that Courts have coined the doctrine of latches and delays as well as doctrine of acquiescence and non-suited the litigants who approached the court belatedly without any justifiable explanation for bringing the action after unreasonable delay. In such case, this Tribunal can refuse to accord relief to Appellants/ Allottees.

29] It is not in dispute that there is forfeiture clause in the allotment letter. Since the Appellants have without any justifiable reasons decided to exit from the project, under this circumstance, the Promoter is entitled to forfeit the amount as per the terms of Clause 8.1 of the application form which binds the contract between the parties. The Appellants have miserably failed to establish their case. The Appeal is devoid of merits and therefore it is liable to be dismissed with costs. Learned Advocate has placed reliance on the following citations.

**(i) Prabhakar Vs. Joint Director Sericulture Department and Ors.** [AIR2016 SC2984]

**(ii) Mathura Prasad Bajoo Jaiswal and Ors. Vs. Dossibai N. B. Jeejeebhoy** [1970 (1) SCC 613]

**(iii) Rajasthan State Industrial Development and Investment Corporation and Anr. Vs. Diamond & Gem Development Corporation Ltd. & Anr.** [(2013) 5 Supreme Court Cases 470]

**(iv) Ashok Kapil Vs. Sana Ullah and Ors.** [(1966) 6 SCC 342]

**(v) Shree Hanuman Cotton Mills and Ors. Vs. Tata AirCraft Limited** [1969 (3) SCC 522]

**(vi) Saroj Anand and Ors. Vs. Prahlad Rai Anand and Ors.** [Civil Appeal No. 1185 of 2009 (Arising out of SLP (C) No. 23262 of 2008]

30] On consideration of the submissions advanced by the learned counsel appearing for the respective parties, pleadings of the parties, material placed on record and the impugned Order following points arise for our determination and we have recorded our findings thereupon for the reasons to follow.

| Sr. No. | Points | Findings |
|---|---|---|
| 1. | Whether Allottees/ Appellants are entitled to refund of amount paid with interest under Section 18 of RERA? | In the affirmative |

| | | |
|---|---|---|
| 2. | Whether the second Complaint is barred by the principle of *res judicata?* | In the negative |
| 3. | Whether impugned Order calls for interference in this Appeal? | In the affirmative |
| 4. | What Order? | As per final Order |

## REASONS

31] On scanning the pleadings of the parties reveal that it is not in dispute that in February, 2013, Allottees booked subject apartment in the project known as **"DB Crown"** being developed by the Promoter for a total consideration of Rs. Rs.6,67,00,900/-. The Allottees were issued the Allotment letter titled as 'Application Form'. The terms of allotment of the subject flat are duly enumerated in the Allotment letter dated 22.02.2013. Allottees have made an initial payment of Rs.1,34,52,579/- and service tax amounting to Rs.4,86,462/- to Promoter. Admittedly parties have not executed agreement for sale. According to Appellants the Promoter had verbally assured the Allottees that physical possession of the subject flat would be given within a period of 3 to 4 years. Despite this, the Promoter failed to discharge his

obligation. Therefore, Allottees by their e-mail dated 20.06.2017 conveyed their intention to exit from the project and called upon the Promoter to refund the entire amount with interest. The Promoter did not refund the amount to Allottees. Being dissatisfied with the conduct of the Promoter, Allottees had filed Complaint No.CC006000000001816 under Section 18 of Act, 2016 and sought relief of refund of amount with interest.

32] The Promoter has denied the allegations contending that the Allottees have not produced cogent material on record to show that there is an agreed date of possession between the parties. Therefore, the question of violation of Section 18 of RERA does not arise.

33] In the absence of formal agreement executed by the parties, the date of possession can be deciphered from any other document such as Allotment letter, brochure, e-mail communication, etc. A perusal of Allotment letter (Application form) reveals that there is no mention of date of possession. Except Allotment letter dated 22.02.2013 there is no document to show agreed date of possession. It is not in dispute that transaction between the parties took place in MOFA regime. At the time of booking of the subject flat, Allottees were issued Application form

dated 22.02.2013. Section 3(2)(f) of MOFA casts an obligation on Promoter to specify in writing the date by which possession of the flat is to be handed over and he shall handover such possession accordingly. The opening words of Sub-Section 2 of Section 3 of MOFA clearly indicate that the Promoter, who constructs or intends to construct such block or building or flats, shall specify in writing the date by which possession of flat would be handed over. It means it was obligatory on the part of the Promoter to mention the date of possession in the Application form at the time of booking of the flat or while issuing Allotment letter or Application form, as the case may be. Admittedly no date of possession has been mentioned in the Application form. It means the Promoter has violated the provisions of Section 3(2)(f) of MOFA. Promoter having himself, failed to comply with the obligation, cannot take advantage of his own wrong to deny that there is no agreed date of possession.

34] In the case of **Fortune Infrastructure** (supra) now known as **M/s Hicon Infrastructure and Anr. Vs Trevor D'Lima & Ors.** [reported (2018) 5 SCC 442], the Hon'ble Apex Court has held that when no date of possession is mentioned in the agreement, Promoter is expected to handover the possession

within a reasonable time and the period of 3 years is held to be reasonable. In the instant case the Allottees booked a flat in February, 2013. The Promoter issued Allotment letter (Application form) to Allottees confirming the carpet area of the flat alongwith payment schedule, other details and other terms and conditions except date of possession. Therefore, in view of ratio and dictum laid down by the Hon'ble Apex Court (supra) Promoter was supposed to handover the possession of the flat to Allottees by January, 2016.

35] It is specific contention of Promoter that execution of agreement for sale is necessary for specifying the date of possession without which no delay can be made out to attract the provisions of Section 18 of RERA for considering relief of refund of amount with interest. Despite several communications, the Allottees neither responded nor executed agreement for sale forwarded to them. The absence of registered agreement for sale and agreed date of possession ought to invalidate a plea for relief under Section 18 of RERA and therefore, the Appellants are not entitled to relief of refund of amount with interest. We should not be oblivious of the fact that RERA Act, 2016 as a welfare legislation, has been enacted mainly to safeguard the interest of the Allottees.

Mere non-mentioning of the date of possession or non-execution of agreement for sale cannot be allowed to operate in favour of the Developer who, like respondent, is not responsive to the cause of the allottees. Section 8 of MOFA and Section 18 of RERA for their applicability do not contemplate execution of written and registered agreement for sale contrary to what is envisaged under Section 4 of MOFA and under Section 13 of RERA. It has been held by the Hon'ble Bombay High Court in the case of **G. Swaminathan Vs. Shivram Co-Operative Housing Society and Others** [1983 (2) Bom CR 548] that -

> *".....Not all sections of the Maharashtra Ownership Flats Act, however talk about the execution of such agreements... There is no reference to an agreement executed under Section 4 in Section 8 of the said Act. Section 8 is meant to give protection to persons who have parted with monies for the purchase of flats in the event of the Promoter not giving them flats as promised... There is nothing in the provisions of Section 8 which would indicate that this statutory charge is conditional upon the agreement being registered under Section 4... Moreover, there is no provision under the said Act to the effect that an agreement for sale which is not registered under Section 4 is void for all purposes."*

36] Therefore, we are of the view that mere non-execution of agreement for sale Allottees are not precluded from invoking Section 18 of RERA. The provisions of Section 18 of RERA can equally be invoked in terms of oral or formal agreement executed

by the promoter/ developer such as booking letter/ confirmation letter/ LOA/ correspondence etc. capable of being construed as an agreement. In the instant case as indicated above Promoter issued Allotment letter (Application form) to Allottees confirming carpet area of the flat alongwith payment schedule, other details and other terms and conditions except the date of possession which is capable of being construed as an agreement. Under the circumstance, we do not find substance in the contention of Promoter/ Respondent that sans execution of the agreement for sale and without specifying the date of possession without which no delay can be made out to attract the provisions of Section 18 of RERA for considering relief of refund of amount.

37] It is not in dispute that on the date of commencement of the RERA Act, 2016 the project was an on-going project, as a result thereof, the Promoter registered the project with MahaRERA and declared the date of completion of project as 30.06.2020. It is significant to note that the Promoter did not complete the project on the specified date and revised the proposed date of completion of the project from time to time as 30.12.2020, 30.06.2023, 30.12.2023 and 29.12.2024. This signifies that the Promoter has miserably failed to adhere to his commitment and was/ is unable

to complete the project even on the revised dates of completion of the project. The conduct of the Promoter which signifies that the Promoter has miserably failed to give possession of the subject flat to the Allottees within a reasonable period even though the Allotment letter (Application form) does not expressly state out the possession date, the period of 11 years can in no manner be deemed as a reasonable period.

38] Section 18 of RERA spells out the consequences, if promoter fails to complete or is unable to give possession of the apartment, plot or building, either in terms of agreement for sale or to complete the project by the date specified therein, on account of discontinuation of business as a developer either on account of suspension or revocation of registration under the Act or for any other reasons, the allottee/ homebuyer holds an unqualified right to seek refund of the amount with interest at such rate as may be prescribed in this behalf. As indicated above the Promoter has miserably failed to handover the possession of the subject flat to Allottees within a reasonable period more so on the revised dates, therefore, Appellants are entitled to refund of amount with interest under Section 18 of RERA. The ratio laid down by the Hon'ble

Supreme Court in **M/s. Imperia Structures Ltd. Vs. Anil Patni & Ors.** [in Civil Appeal No.3581-3590 of 2020] is that-

> *"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 upto the allottee to proceed either under Section 18(1) or under proviso to Section 18(1). "*

It is not in dispute that the Promoter by e-mail dated 05.05.2018 categorically admitted that there was complete inactivity at the project site. It means the delay is not attributable to the Allottees nor is the case of Promoter that the Allottees in any way caused delay in possession.

39] While explaining the scope of Section 18 of RERA, the Hon'ble Supreme Court in **M/s Newtech Promoter and Developers Pvt. Ltd. V/s. State of Uttar Pradesh** [2021 SCC Online 10441 dated 11 November, 2021 held that;

*"Para 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."*

It is therefore clear that there are no shackles or limitation on exercise of their rights by Allottees to seek refund of amount paid with interest once there is delay in possession. The indefeasible right of Allottees to claim interest cannot be defeated by any reason.

40] The aims and objectives of RERA admittedly are heavily titled in favour of Allottees. However, contrary to the said objectives, the impugned Order is seen to be titled only in favour of the Promoter. It may be noted that despite having all the relevant and sufficient facts placed before it, the Authority, instead

of taking the adjudication of the Complaint to its logical end by determining there and then the entitlement of Allottees *inter alia* to refund with interest under Section 18 of RERA, in case of delay of possession, has unnecessarily and unjustifiably directed the parties to abide by the terms and conditions of the Allotment letter/ Application form dated 22.02.2013. This approach of Authority is contrary to the effective grievance redressal mechanism as envisaged under the RERA Act, 2016. Such an approach defeats the very purpose of RERA Act, 2016 and hence cannot be accepted.

**RES JUDICATA**

41] The next contention of the Promoter is that the first Complaint was dismissed by the learned Authority vide Order dated 10.04.2018 thereby rejecting the amendment application of Appellants and also their claim under Section 18 of RERA, Act, 2016. The Order dated 10.04.2018 reveals that the Appellants were only granted liberty to agitate the alleged grievance under Sections 11, 12 and 13 while entirely rejecting their case under Section 18 of RERA. Appellants have not challenged this Order. Therefore, this Order has attained finality. Therefore, the subsequent/ second Complaint filed by Appellants seeking same reliefs under Section

18 of RERA Act, 2016 is barred by *res judicata*. We do not find substance in the said submissions.

42] It is significant to note that while dismissing the former Complaint the learned Authority had observed in the impugned Order that conversion of Complaint filed under Section 18 into Sections 11, 12 and 13 of RERA Act, will amount to change in nature of the proceedings therefore, it is desirable to dismiss the Complaint and allow the Complainants to file another Complaint in a proper form. This signifies that the former Complaint was not decided on merits. The former Complaint was filed initially under Section 18 of RERA for refund of amount with interest. The learned Authority had dismissed the Complaint only on technical grounds and matter in issue in the former Complaint was not heard and decided on merits by the then Authority. The Order dated 10.04.2018 is silent on the point of entitlement or disentitlement of Allottees to claim relief under Section 18 of RERA. This itself is sufficient to show that the matter in issue in the former Complaint was not heard and decided on merits by the then Authority.

43] There is one more reason as to why we have arrived at a unhesitating conclusion that subsequent i.e. the present Complaint is not barred by the principle of *res judicata.* The e-mail

communications produced on record by Promoter reveal that the Promoter was insisting Allottees to execute the agreement for sale. One of the e-mails of the Promoter discloses that there was discussion between the parties on this issue. Besides, the Promoter had also offered/ proposed alternative accommodation at a lower price range to Allottees. The Promoter had given an opportunity to Allottees to accept its offer. Under the circumstance, the Allottees had two options either to exit from the project and seek refund of amount or to opt to accept the offer. The e-mail communications clearly indicate that after negotiations, no fruitful solution had been worked out. The offer of the Promoter was not accepted by the Allottees and they stick up to their stand to exit from the project. These eventualities created or gave rise to new cause of action to Allottees to file a fresh Complaint.

44] It is worthy to note that by the Order dated 10.04.2018, the Allottees were given liberty to file a fresh Complaint by the then Authority. Under the circumstance, we are of the view that the present Complaint/ second Complaint is not barred by the principle of *res judicata.*

45] We are of the view that if the Promoter fails to complete the project or unable to give possession as per specified date

mentioned in the agreement for sale or in accordance with the terms and condition of the agreement for sale, the Allottees have unqualified right to seek relief under Section 18 of RERA. However, if Promoter revised the date of possession and again assured the Allottees to handover the possession of flat on the revised date then the Allottees have two options, Allottees can give an opportunity to the Promoter to complete the project on the revised date or to seek reliefs as contemplated under Section 18 of RERA Act, 2016. If Allottees exercise first option and give opportunity to Promoter to complete the project on the revised date and on failure of Promoter to handover the possession on the revised date, then Allottees will have recurring cause of action to file Complaint and seek relief under Section 18 of RERA.

46] We would like to reiterate that it is not in dispute that on the date of commencement of RERA Act, 2016 the subject project was an on-going project, therefore Promoter registered the project with MahaRERA and declared the date of completion of project as 30.06.2020. However, the Promoter had failed to complete the project on the said date and again revised the dates for completion of the project from time to time as 31.12.2022, 30.06.2023, 30.12.2023 and 29.12.2024. Therefore, it can be said that the

second Complaint is based on new cause of action/ recurring cause of action. Therefore, by any stretch of imagination it cannot be said that the second Complaint i.e. present Complaint is barred by the principle of *res judicata.*

**APPROBATE AND REPROBATE**

47] It is specific contention of Promoter that the first Complaint was filed under Section 18 of RERA seeking relief of refund of amount with interest. During the pendency of the first Complaint, the Allottees had filed application for amendment seeking reliefs under Sections 11, 12 and 13 of RERA. Section 13 of RERA is for execution of agreement for sale, therefore, the party cannot be permitted to "blow hot-blow cold" where one knowingly accepts the benefits of a contract, or conveyance or of an order, he is estopped from denying the validity of or the binding effect of such contract, or conveyance or order upon himself. Allottees on one hand seek to execute the agreement for sale and on the other hand wants to exit from the project. This clear shifting stance by the Allottees during the pendency of the first Complaint, shows that the Allottees have abandoned their claim for refund with interest. The Appellants have to elect either to claim relief under Section 18 or to claim relief under Section 13 of RERA. Appellants cannot be

permitted to approbate or reprobate. We do not find substance in the said contention of the Promoter.

48] A perusal of Application filed by Allottees in the former Complaint for amendment of Complaint reveals that no concession as alleged by Promoter was made by the Allottees. The Application nowhere discloses that the Allottees had abandoned their claim of refund of amount with interest as contemplated under Section 18 of RERA. It is seen from the Application for amendment that the Allottees were under bonafide impression that their claim would not be sustainable in the absence of agreement for sale under Section 18 of the Act, 2016 and on advice of Advocate, they had moved Application for amendment of Complaint. We are of the view that the party can seek two-fold reliefs in alternative form.

49] Learned Advocate Mr. Abir Patel for Promoter has poignantly submitted that e-mail communications between the parties indicate that Appellants were ready for execution of agreement for sale and at the same time they were claiming refund with interest. The Appellants have to elect either to get execution of agreement for sale or to claim relief under Section 18 of RERA. Therefore, Appellants cannot be permitted to approbate or reprobate. We do not find substance in the said contention of the

learned Counsel appearing for Promoter. The e-mail communications placed on record by the parties clearly indicate that since inception Appellants were asking Promoter for refund of amount with interest. As indicated above, Promoter had offered alternative accommodation at a lower price range to Allottees. It means, the Promoter had given an opportunity to Allottees to accept its offer however, it is evident that the Allottees did not accept this offer of the Promoter and they were insisting the Promoter to refund amount with interest. Apart from this, in the captioned Complaint, Allottees have not asked for two-fold reliefs, they have asked only relief of refund of amount with interest. Under the circumstances, we are of the view that there is no merit in the contention of the Promoter.

50] For the foregoing reasons, we have come to the conclusion that the Promoter has failed to adhere to his obligation in handing over the possession of the subject flat within the reasonable period. Therefore, the Allottees are entitled to refund of amount with interest under Section 18 of RERA. The transaction in the instant case is governed by the RERA Act, 2016. It cannot be ignored that the objective of RERA is to protect the interest of consumers. So, whatever amount is paid by homebuyers to the

Promoter should be refunded to the homebuyers on their withdrawal from the project. It is to be noted that Regulations are framed to carry out the purpose of the Act. Regulation 39 of Maharashtra Real Estate Regulatory Authority (General) Regulation, 2017 speaks about saving of inherent powers of the Authority. It reads as under;

> *"Nothing in the Regulations shall be deemed to limit or otherwise affect the inherent power of the Authority to make such orders as may be necessary for meeting the ends of justice or to prevent the abuse of the process of the Authority".*

Similarly, Regulation 25 of Maharashtra Real Estate Appellate Tribunal, 2019 speaks about saving of inherent powers of the Tribunal;

> *"25(1) Nothing in these Regulations shall be deemed to limit or otherwise affect the inherent power of the Tribunal to make such orders as may be necessary for meeting the ends of justice or to prevent the abuse of the process of the Tribunal."*

It means the Regulatory Authority as well as the Appellate Tribunal have inherent powers under the Regulations framed under RERA Act, 2016 to pass such Orders which are necessary to meet the ends of justice. In exercise of powers thereof and in the interest of justice it is desirable to direct the Promoter to refund the total amount paid by Allottees with interest accordingly.

51] There is no express provision in RERA Act, 2016 by which the Promoter is entitled to forfeit earnest amount or part thereof in the event of cancellation of booking by allottee. The Act is silent on the point of liquidate deduction, forfeiture of amount, etc. if allottee suo moto for whatsoever reason cancels the booking. In view of the above observations, we are of the view that it is improper on the part of Promoter to forfeit the amount paid by Allottees as per the terms of Application form. Allottees are entitled to refund of entire amount with interest. Therefore, the impugned Order is not sustainable in the eyes of law and deserves to be set aside. Consequently, we proceed to pass the following Order.

**ORDER**

1. Appeal AT006000000053625/2022 is partly allowed.
2. The impugned Order dated 29th December, 2021 passed in Complaint No.CC006000000196018 is set aside.
3. The Respondent/ Promoter is directed to refund an amount of Rs.1,39,39,041/- paid by the Allottees/ Appellants with interest at the rate 2% above as per the SBI's Marginal Cost Lending Rate (MCLR) from the dates of payment of the said amount till realization of the entire amount.

4. The charge of the amount shall remain on the respective flat till realization of the above amount.

5. The Respondent/ Promoter is directed to pay cost of Rs.20,000/- to the Appellants/ Allottees.

6. Copy of this Order be communicated to the Authority and the respective parties as per Section 44(4) of RERA, 2016.

**(DR. K SHIVAJI)** **(SHRIRAM R. JAGTAP)**

MBT/