

BEFORE MAHARASHTRA REAL ESTATE APPELLATE TRIBUNAL, MUMBAI

MISC. APPLICATION NO. 169 OF 2023 (Restoration)

IN

APPEAL NO. AT006000000133963

- 1. M/s. Falak Developers**
- 2. Aqeel Ahmed Khan**
- 3. Mr. Ajaz Ahmed Abdul Gani Belim**
1st floor, 15/21, 23/29-A, Barkat Ali Virani Marg,
(Huzaria Street), Opp. Mastan Talao,
Mumbai - 400 008.

... Applicants

versus

Mr. Abu Saud Niyaz Aahad Azmi

C-1, Augmmariee CHS Limited,
Bamanwada Sahar Road,
Chakala, near Cigarette Factory,
Andheri (East), Mumbai – 400 099.

... Non-applicant

Mr. Shariq Nachan, Advocate for Applicants.
Mr. Chetan Yadav, Advocate for Non-applicant.

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

DATE : 20th SEPTEMBER 2023

(THROUGH VIDEO CONFERENCE)

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

Captioned application has been filed for restoration of the Appeal No. AT006000000 133963, by setting aside the order of this Tribunal dated 6th February 2023, wherein captioned Appeal was dismissed for want of Non-compliance of the statutory and mandatory



requirements under the proviso to Section 43 (5) of the The Maharashtra Real Estate (Regulation and Development) Act, 2016 (in short 'the Act') by not depositing the requisite amount as per the order dated 16th January 2023, as well as on account of non-compliance of the order of condonation of delay in filing the captioned appeal dated 16th January 2023 by not paying the cost of ₹5000 to non-applicant.

2. Heard learned counsel for parties *in extenso*.
3. For the purpose of disposal of present application, it is not necessary to narrate facts of the case in detail. Suffice it to say that applicants are developers, who are developing a duly registered project namely "NEMAT -E- FAROOQUE HERITAGE", located at Huzaria Street, Mumbai - 400008. Whereas Non-applicant is flat purchaser and Complainant before Maharashtra Real Estate Regulatory Authority ("MahaRERA" in short).
4. It is not in dispute that condonation of delay of 30 days in filing of the captioned appeal was allowed vide order dated 16th January 2023 of this tribunal, subject to the cost of ₹5000/- to be paid to non-applicant and applicants being appellants, were also directed to comply with the statutory and mandatory requirements, vide order passed on the same day under the Proviso to Section 43 (5) of the Act by depositing the entire amount as per the impugned order dated 13th May 2022 passed by learned Chairperson, MahaRERA. Accordingly, the matter was listed for further hearing on 6th February 2023 for compliances. However, the captioned appeal came to be dismissed on 6th February 2023 due to non-compliance of the order dated 16th January 2023 with following observations.



"....

It is noted that the appellants have neither deposited costs nor complied with the above proviso as directed.

In view of non-payment of costs, as directed, the application for condonation of delay stands dismissed. Consequently, the appeal is also dismissed.

No costs."

5. Applicants are seeking restoration of captioned appeal on various grounds set out in the above application and learned counsel for Applicants further made multifarious submissions as follows:
- a. Erstwhile advocate for the applicants did not inform in time to applicants about the cost of Rs. 5000/- to be paid to non-applicant/respondent along with name and other details of the beneficiary for the payment of the cost and also the details of amount with name of beneficiary, required for preparing the demand draft towards compliance of the Proviso to Section 43(5) of the Act.
 - b. As such, the earlier advocate informed applicants only on 01st February 2023 that he needs to pay the cost of Rs. 5000/- to non-applicant towards the compliance of the condition for condonation of delay in filing the appeal and only after following it up, the earlier advocate sent the name of beneficiary on WhatsApp. Applicants have placed on record, the screenshot of the whatsapp, which has been attached at Annexure B of the above application.
 - c. After follow-up, earlier advocate informed the applicants only on 06th February 2023 that the amount of Rs. 09,70,550/- is required for preparing the Demand Draft towards the compliance of the proviso. Accordingly, applicants got the demand draft prepared immediately



on the same day and handed over it to earlier advocate on 06th February 2023 itself and has placed the copy of the demand draft on record as at Annexure C attached to the above application.

- d. Learned counsel for applicants further submit that applicants have forwarded the amount to earlier advocate for payment of cost to non-applicant in pursuance to the order dated 16th February 2023 and had also prepared the demand draft dated 06th February 2023 towards the compliance of the Proviso to the earlier advocate.
 - e. Learned counsel for applicants further submits that applicants were not able to comply with the order of the Tribunal dated 16th January 2023 because of negligence on the part of the earlier advocate of the applicants and not due to the fault of applicants.
 - f. Learned counsel for applicants upon instructions further undertake that applicants are ready and willing to pay the cost of Rs. 5000/- to non-applicant and is also ready to deposit the demand draft of requisite amount towards the compliance of the Proviso as directed in the order dated 16th January 2023 and urged that the captioned appeal be restored to the original file by recalling the order dated 06th February 2023 passed by the Tribunal and thereby condone the delay in the interest of justice for restoration of instant appeal.
- 6.** Per Contra, learned counsel for non-applicant vehemently opposed the contentions of the applicants by submitting that the applicants have failed to pay the cost in pursuance to the order dated 06th February 2023 passed by this Tribunal.
- 7.** Upon hearing the learned counsel for parties and perusal of record more particularly Annexure B, it is more than clear that applicants have received



whatsapp message from the earlier advocate about the details of the demand draft required to be deposited in the Tribunal towards the compliance of the proviso on 04th February 2023 and perusal of copy of the demand draft placed at Annexure-C also reveals that the applicants had already prepared demand draft for Rs. 09,70,550/- dated 06th February 2023. However, apparently on account of the stated deficiency on the part of the earlier advocate, compliances required as per the order dated 16th January 2023 of this Tribunal remained incomplete consequently led to dismissal of appeal on 06th February 2023. Accordingly, applicants have suffered due to dismissal of appeal on account of rejection of the condonation of delay in filing of the appeal.

8. However, **The Hon'ble Supreme Court in the case of RAFIQ & ANR. Vs. MUNSHILAL & ANR. [(1981) 2 SCC 788] on 16th April 1981,** has laid down as "*It is not proper that an innocent litigant, after doing everything in his power to effectively participate in his proceedings by entrusting his case to the Advocate, should be made to suffer for the inaction, deliberate omission or misdemeanour of his agent. For whatever reason the Advocate might have absented himself from the Court, the innocent litigant could not be allowed to suffer injustice for the fault of his Advocate.*" Accordingly, applicants should not suffer on account of the deficiency of service on the part of their erstwhile advocate.
9. Learned counsel for applicants further submits that applicants are ready and willing to pay the costs to non-applicant and undertakes to deposit the requisite amount in the Tribunal towards the compliance of the proviso.



- 10.** In view of above as well as in the interest of justice and to avoid denial of opportunity, we are of the view that there is no impediment to provide one more opportunity to applicants to comply with the order dated 16th January 2023 and we proceed to pass order as follows: -

ORDER

- (a) Misc. Application No. 169 of 2023 for restoration of Appeal No. AT006000000133963 by setting aside the order dated 06th February 2023 is allowed, subject to the compliance of the conditions mentioned in the order dated 16th January 2023 passed by this Tribunal for payment of Rs. 5000/- directly to non-applicant and also subject to the condition to deposit the entire amount as per order of the MahaRERA along with interest at prescribed rate till the date of the deposits to be made by the applicants towards the compliance of the Proviso to Section 43(5) of the Act within 15 days from the date of uploading of this order.
- (b) Payment of costs and compliance of the Proviso as above are conditions precedent for the condonation of delay and consequently also for the restoration of captioned appeal.
- (c) 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)


(SHRIRAM R. JAGTAPA, J.)