BEFORE THE MAHARASHTRA REAL ESTATE APPELLATE TRIBUNAL, MUMBAI

Appeal No. AT006000000134173 of 2022
In
Complaint No. CC006000000196042

Mr. Sanjiv Kochhar
Address :
Shivam Logistics Eastern Court,
202, A-Wing, Tejpal Road,
Vile Parle (East),
Mumbai - 400 057. ... Appellant

Versus

Sai Siddhant Developers
Having its address at 1 Ramkrupa,
Devji Bhimji Lane, Mathuradas Road,
Kandivali (West),
Mumbai - 400 067. ... Respondent

CORAM : SHRIRAM R. JAGTAP, MEMBER (J) &
DR. K. SHIVAJI, MEMBER (A)
DATE : 6th October, 2023

CORRIGENDUM

It has been brought to our notice that the typographical mistake occurred in the name of the Advocate of the Appellant in the Judgment dated 12th September, 2023 in the captioned Appeal, which needs to be corrected as under :-

Sjagtap

The name of the advocate of the Appellant in the Judgement is to be read as Mr. Karan Aiya instead of Mr. Karan Iyer.

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

BEFORE THE MAHARASHTRA REAL ESTATE APPELLATE TRIBUNAL MUMBAI

APPEAL NO. AT006000000134173 OF 2022
IN
COMPLAINT NO.CC006000000196042

Mr. Sanjiv Kochhar]
Shivom Logistics Eastern Court,]
202, A-Wing, Tejpal Road,]
Vile Parle (East), Mumbai-400 057.] **...Appellant**

-vs-

Sai Siddhant Developers]
Having its address at 1 Ramkrupa,]
Devji Bhimji Lane, Mathuradas Road,]
Kandivali (West),]
Mumbai-400 067.] **...Respondent**

Adv. Mr. Karan Iyer for Appellant.
Adv. Mr. Shrey Shah for Respondent.

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

DATE : 12th September, 2023.

(THROUGH VIDEO CONFERENCING)

JUDGMENT

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

Being dissatisfied with order dated 9th November 2022 passed by the learned Chairperson, MahaRERA (for short "the Authority) in Complaint No.CC006000000196042, the complainant, who is an allottee in complaint, preferred instant appeal to raise

grievance that the impugned order has not granted reliefs sought in his complaint.

2] Appellant and respondent will hereinafter be referred to as "allottee" and "developer' for the sake of convenience.

3] The brief facts culled out from the pleadings of the parties reveal that the developer has launched a residential housing project namely "**D.N. Nagar Krishna CHS Ltd**." at Building No.3, D.N. Nagar, Ganesh Chowk, Andheri (West), Mumbai. On 2nd May 2012 the allottee had booked a Flat bearing No.1203 in the said project for a consideration of Rs.74,90,000/- and out of which the allottee has paid Rs.52,39,550/- to the developer from time to time. Despite having received amount more than 20% of total consideration, the developer had neither issued allotment letter to the allottee nor executed agreement for sale. Despite incessant follow-ups the developer did not execute agreement for sale. Being dissatisfied with the conduct of the developer the allottee had filed a complaint bearing No.CC006000000078442 of 2019 against the developer for seeking registration of the agreement for sale in respect of subject apartment and for compensation due to delay in possession, which was disposed of vide order dated 10.6.2019 passed by the then Chairperson, MahaRERA, as the complaint was withdrawn because parties had amicably resolved and settled the issue. The then Chairperson,

MahaRERA had also accorded liberty to the allottee to approach MahaRERA again if any of the terms of the settlement is violated by the developer in future. Pursuant to the said order, the allottee had approached the developer to adhere to the terms of the settlement. Besides, vide legal notice dated 31.1.2020 the allottee had called upon the developer to execute and register agreement for sale, but the developer miserably failed to reply the same. Therefore, the allottee was left with no other alternative but to file complaint and sought reliefs. Accordingly, the allottee had filed complaint seeking reliefs viz. (1) refund of entire amount with interest aggregating to amount of Rs.89,78,365, (2) a compensation to the extent of Rs.5.00 lakhs for mental agony and harassment and (3) costs of litigation of Rs.75,000/-.

4] The developer had appeared in the complaint and remonstrated the claim of allottee. The defence of the developer which emerged from the impugned order and material on record is that the complaint is not maintainable as the allottee would only have remedy to proceed with the execution of order dated 10.6.2019 and would not have remedy to file fresh complaint. The reliefs sought by the allottee in the second complaint are contrary to the reliefs sought by the allottee in first complaint. In accordance with the consent terms executed between the allottee and the developer it is inter alia agreed and confirmed by the parties that the developer was in process of procuring

further commencement certificate from MHADA in order to proceed with the construction of the subject project beyond 9th floor and commencement certificate may be issued to the developer by end of September 2019 and only thereafter the developer would execute and register agreement for sale with respect to the subject flat within a period of 15 days subject to payments by the allottee towards statutory taxes including stamp duty, GST etc. The allottee was at liberty to approach MahaRERA in the event of non-compliance of the consent terms.

5] It is further case of the developer that neither of the parties could have set a fixed date for MHADA to issue commencement certificate on or before September 2019 and that this date was only indicative of possibility of MHADA issuing commencement certificate by post which, the proposed agreement for sale would be executed. However, till date the commencement certificate has not been issued by MHADA. Consequently, the registration and execution of agreement for sale has not been effected. There is no obligation on the part of the developer to execute agreement for sale on a particular date. Thus, alleged cause of action is misconceived by the allottee and therefore the complaint is not maintainable. Allotment letters dated 7.5.2012 and 2.11.2018 issued by the developer did not disclose the date of possession of the subject flat.

6] The developer has further contended that since no agreement for sale has been executed between the parties, therefore, allottee is not entitled to seek relief sought in complaint under Section 18 of RERA, 2016. Several meetings held between the parties wherein the allottee was apprised by the developer that the project is completed till 9th floor out of 16 floors and the possession for fit out has been given to existing members of the Society till 9th floor. The developer has also applied for part occupation certificate and is waiting for further commencement certificate beyond 9th floor. A supplementary development agreement came to be executed between the developer and the members of the Society wherein majority of the members of the society have given their free consent for completion of the re-development project by June 2023 which is also mentioned on the RERA website. The developer is ready and willing to execute and register agreement for sale.

7] The learned Authority heard parties to the complaint and dismissed the complaint by holding that the complaint is barred by principle of res-judicata.

8] We have heard learned Advocate Mr. Karan Iyer appearing for appellant/allottee and learned Advocate Mr. Shrey Shah appearing for respondent/developer.

9] The succinct of argument of learned Advocate Mr. Karan

Iyer appearing for the appellant is that on or about in the year 2012 the allottee had booked flat bearing No.1203 in the project of the respondent/developer for consideration of Rs.74,90,000/-. It is not in dispute that the allottee has paid Rs.52,39,550/- which is more than 20% of total consideration. As per provisions of MOFA the developer was supposed to execute agreement for sale before acceptance of amount more than 20% of total consideration from the appellant. However, till date the developer has not executed agreement for sale. This is clear violation of Section 4 of the MOFA.

10] The learned Advocate has further submitted that when the appellant had booked flat at that time commencement certificate was not issued by the concerned Authority. It means the developer did not have even permission to construct the building and despite this he had accepted booking amount from the appellant. This conduct of the developer shows that he had played a fraud on the appellant. In spite of incessant fallow ups by allottee, the developer did not execute agreement for sale which constrained the allottee to file complaint bearing No.CC006000000078442 of 2019. In the said complaint, the appellant had sought reliefs of execution and registration of agreement for sale and compensation due to delay in possession. The first complaint was disposed of on 10.6.2019. The allottee had filed application for withdrawal of the said complaint and at the same time

liberty was sought to file fresh complaint. While disposing of the said complaint, the then Chairperson, MahaRERA had accorded liberty to the appellant as sought by him. Thereafter by the notice dated 31.1.2020 the allottee had called upon the developer to execute agreement for sale, however, the developer did not have commencement certificate for the said project and therefore, he could not execute agreement for sale, as a result thereof this led to new cause of action to allottee to file complaint. However, the learned Authority declined to grant relief of refund of amount with interest holding that the complaint is barred by res judicata. The Hon'ble Apex Court in **"K. Sivaramaiah Vs. Rukmani Ammal"** has held that a judgment given in a suit which has been permitted to be withdrawn with the liberty of filing a fresh on the same cause of action cannot constitute res judicata in a subsequent suit filed pursuant to such permission of the Court. In the instant case, the relief sought in the second complaint is totally different than relief sought in first complaint. The second complaint is based on new cause of action. This fact is ignored by the learned Authority.

11] The learned Advocate has further submitted that the appellant is entitled to refund because of failure of developer to complete the project. No doubt the developer has failed to execute agreement for sale, but at the same time it cannot be ignored that the

developer is at fault by not executing agreement for sale though he received substantial amounts from the allottee. Under the circumstances, the appellant is entitled to reliefs as sought. It is specific contention of the respondent that the allotment letter does not mention any date of completion of the project or the date of possession and therefore, the claim of appellant does not fall under Section 18 of RERA. However,, the Hon'ble Apex Court in **"Fortune Infrastructure Vs. Trevor D'lima"** has held that a person cannot be made to wait indefinitely for the possession of the flat allotted to him and he is entitled to seek the refund of the amount paid by him along with compensation. A time period of 3 years would have been reasonable for completion of the contract. Whenever builder has refused to perform the contract without valid justification, the home buyer is entitled to for compensation as he has been deprived of price escalation of the flat.

12] Since the respondent/developer has committed violation of Section 13 of RERA and Section 4(1A) (ii) of MOFA by not executing agreement for sale even after legal notice dated 31.1.2020 and therefore the appellant is entitled to relief sought for in the complaint. Since there is no progress in completion of project, the appellant is entitled to withdraw from the project. Accordingly, appellant has exercised his right to withdraw from the project and claimed refund of

amount with interest. The claim of the appellant very well falls within the ambit of Section 18 of RERA Act, 2016. and therefore, the appeal is liable to be allowed with costs. The learned Advocate has placed his reliance on the following citations-

(1) **K. Sivaramaiah Vs. Rukmani Ammal**

(2) **Manjit Singh Dhaliwal & Ors. Vs. JVPD Properties Pvt. Ltd.**

(3) **Fortune Infrastructure Vs. Trevor D'lima** [(2018) 3 S.C.R. 273]

(4) **Mrs. Amrita Kaur and Anr. Vs. M/s East & West Builders and Ors.**

13] An abridgment of argument of learned Advocate Mr. Shrey Shah appearing for the respondent/developer is that it is not in dispute that the appellant had filed complaint bearing No.CC006000000078442 of 2019 inter alia seeking execution and registration of agreement for sale in respect of subject flat. The said complaint was disposed of by virtue of terms of settlement dated 10.6.2019 entered into between the appellant and respondent. The said consent terms contemplate that agreement for sale would be executed within a period of 15 days from the date on which the respondent procures further commencement certificate from MHADA so as to enable them to proceed with the construction of the said project beyond 9th floor subject to payment by

the appellant towards statutory taxes, stamp duty, GST etc. The second complaint was filed alleging failure of respondent to execute agreement for sale in spite of service of legal notice by the Advocate of allottee. However, under the consent terms both parties had understood and agreed that execution and registration of agreement for sale would be effected within a period of 15 days subject to payment by the allottee towards statutory taxes, stamp duty, GST etc. upon issuance of commencement certificate by MHADA and that procurement of commencement certificate would be endeavoured to be procured by the respondent by September 2019. It is to be noted that neither of the parties could have set a fixed date for MHADA to issue commencement certificate on or before September 2019. The appellant could have exercised his right to claim relief which he had claimed in the first complaint only after obtaining further commencement certificate.

14] The learned Advocate has sorely submitted that it is not in dispute that till date the commencement certificate has not been issued by MHADA and the respondent is pursuing the same. Therefore, the question of execution and registration of agreement for sale does not arise. Besides there is no obligation on the part of the respondent to register the agreement for sale on particular date. Therefore, alleged cause of action is misconceived by the appellant and therefore the

complaint was not maintainable.

15] The learned Advocate has further argued that the appellant had sought reliefs under Section 18 of RERA Act, 2016 which is inapplicable since the ingredients that trigger a relief of refund of money from the respondent/developer are non-existence. There is neither a registered agreement for sale nor agreed possession date mentioned in the allotment letters. The absence of registered agreement for sale ought to invalidate a plea for reliefs under Section 18 of RERA. In ***Mohit Melwani Vs. A A Estates***, this Tribunal has ruled that an allotment letter which did not have a specified date of possession could not have been said to have been a violation of Section 18. Therefore, the learned Authority has rightly held that the complaint is not maintainable and it is barred by principles of res judicata. The impugned order was reasonably passed and does not warrant interference. Since the first complaint had already been disposed of in accordance with the consent terms, the appellant is now estopped from reagitating the same issue for the same premises and seeking different reliefs with respect to the subject flat which was subject matter of the first complaint. The respondent has not violated any of the provisions of RERA Act, 2016. The current status of the project is that it is completed till 9th floor out of 16 floors and possession for fit out has been given to the respective members of the Society till 9th floor. The

respondent has also applied for a part occupation certificate and waiting for further commencement certificate beyond 9th floor.

With these contention learned Advocate has prayed to dismiss the appeal with exemplary costs.

16] After considering the submissions of the parties, documents on record and the impugned order, the following points are arise for our determination and we answer the points for the reasons to follow-

	POINTS	**ANSWER**
(1)	Whether the appellant is entitled for refund of amount paid with interest on account of delay in possession?	In the affirmative
(2)	Whether impugned order calls for interference in this appeal?	In the affirmative
(3)	What order?	As per final order

REASONS

17] It is not in dispute that on 2.5.2012 the allottee had booked a flat bearing No.1203 in the subject project for consideration of Rs.74,90,000/- and out of which the allottee has paid Rs.52,39,550/- to the developer from to time. It is further not in dispute that no agreement for sale has been executed even though the allottee has

paid more than 20% of total consideration amount in the course of time. Despite incessant follow ups by the allottee, the developer did not execute agreement for sale. Being aggrieved by the conduct of the developer the allottee had filed complaint bearing no. No.CC006000000078442 of 2019 inter alia seeking execution and registration of agreement for sale in respect of subject flat and also for compensation due to delay in possession, which was disposed of vide order dated 10.6.2019. The material produced on record by the appellant would show that the allottee had filed application (page-103) in the former complaint proceedings for withdrawal of the complaint with a liberty to approach the Authority again if any of the terms of settlement is violated by respondent. The then Chairperson, MahaRERA had disposed of the complaint and at the same time granted liberty to allottee to approach MahaRERA again if any of the terms of settlement is violated by the respondent.

18] It is significant to note that by legal notice dated 31.1.2020 the allottee had called upon the developer to execute and register an agreement for sale in his favour. It is not in dispute that the developer has neither replied the said notice nor executed and registered the agreement for sale. It is worthy to note that both Sections 4 of MOFA and 13 of RERA, 2016 cast obligations on the promoter to execute agreement for sale before receiving 20% and 10% amount respectively

of the total consideration. Nothing is placed on record to show that the developer had forwarded draft agreement with terms and conditions stipulated therein prior to legal notice dated 31.1.2020 issued by the allottee. The developer having himself failed to comply with the obligation cannot take advantage of his own wrong to deny the benefit under Section 18 of RERA. Section 4(1A)(ii) of MOFA casts obligation on the promoter that before accepting advance payment or deposit more than 20% of sale price, the promoter is liable to enter into written agreement for sale and mention in it the date by which the possession is to be handed over to the allottee. Section 13(2) of RERA also casts similar liability on the developer. Therefore, we are of the view that the developer cannot take advantage of his wrong and in fact the developer has contravened or violated the provisions of Section 4 of MOFA and Section 13 of RERA.

19] In the absence of formal agreement for sale executed by the parties, the date of possession can be deciphered from any documents such as allotment letter, broacher, pamphlet, email communications etc. A perusal of material on record would show that there is no mention of date of possession in any of the documents or communications. In a case of **"M/s Fortune Infrastructure (now known as M/s Hicon Infrastructure) & Anr. Vs. Trevor D'Lima & Ors.** [(2018) 3 S.C.R. 273], the Hon'ble Apex Court has held that

when the date of possession is not mentioned in the agreement, the promoter is expected to handover possession of the unit within a reasonable time and a period of three years held to be reasonable time. In the instant case the allottee had booked flat in the year 2012 and deposited substantial amount to the developer from time to time. Pursuant thereto the developer had issued receipts to allottee. However, there is no mention of date of possession in the payment receipts. Therefore, in view of the ratio and dictum laid down by the Hon'ble Apex Court the developer was supposed to handover possession of the subject flat to allottee by 1st May 2015. However, it is not in dispute that till date the developer has not executed and registered the agreement for sale nor handed over possession of the subject flat to allottee.

20] It is thus clear from the above that the developer has committed violation of the provisions of MOFA and RERA Acts by not executing requisite agreement for sale. We also note that while examining the claim of the allottee, the learned Authority did not consider several documents submitted on record by the allottee, which showed that the developer is not only irresponsive in his conduct, but also has least regard for his legal obligation towards flat purchasers. The payment receipts produced on record by the appellant/allottee show that though the developer has received huge amounts from the

allottee since more than nine years, he has not executed agreement for sale. Such indifferent attitude of the developer who has gone into inaction by not declaring the date of possession in any of the documents nor executed an agreement for sale calls for serious cognizance of the Authority. However, the learned Authority has declined to grant relief to allottee only on the ground that the complaint is hit by principles of res judicata.

21] It is pertinent to note that the former complaint was withdrawn by the appellant. It means the former complaint was not decided on merits. Matter in issue in the former complaint was not heard and decided on merits by the then learned Chairperson, MahaRERA. It has been held by the Hon'ble Apex Court in **K. Sivaramaiah Vs. Rukmani Ammal** [(2003) SUPP. 6 S.C.R.] that-

> *"The short question which arises for decision in this appeal is whether the appellant's suit filed in the year 1994 can be said to be barred by res judicata. Having heard the learned counsel for the parties, we are satisfied that the High Court and the two Courts below have committed an error of law in holding the suit filed by the appellant to be barred by res judicata. In the present suit instituted in the year 1994, the appellant shall have to establish the acquisition of prescription right of easement under Section 15 of the Indian Easements Act, 1882 by reference to the date of the institution of the suit.* ***This issue did not and could not have arisen for decision either by way of ground of attack in the 1989 suit filed by the appellant or by way of defence in the 1976 suit filed by the respondent's mother.*** *Moreover, the 1976 suit filed by the respondent's mother was dismissed insofar as relief of*

injunction sought for by the respondent's mother against the appellant is concerned. It was an admitted case of the parties, as has been noted by the trial court also in its judgment dated 4th August, 1979, that the openings in the western wall of the appellant had existed and yet respondent's mother was held not entitled to the grant of compensation because in the opinion of the trial court the remedy of the respondent's mother was not to seek an injunction against the appellant but to raise a wall on her own property so as to block the openings in the wall of the appellant standing on his own property. ***By no stretch of imagination the judgment dated 4th August, 1979 can constitute res judicata for the purpose of the present situation.***

So far as the Original Suit No. 7359/1989 is concerned, ***the findings recorded in the judgment therein could have constituted res judicata but the fact remains that the Appellate Court permitted the withdrawal of the suit and once the suit has been permitted to be withdrawn all the proceedings taken therein including the judgment passed by the trial court have been wiped out. A judgment given in a suit which has been permitted to be withdrawn with the liberty of filing a fresh suit on the same cause of action cannot constitute res judicata in a subsequent suit filed pursuant to such permission of the Court.***"

22] It is not in dispute that after disposal of the former complaint, by legal notice dated 31.1.2020 the appellant had called upon developer to comply his obligation. However, the developer has neither replied nor complied with his obligation. This conduct of the developer led new cause of action for allottee to file fresh complaint. Section 18 of RERA gives an option to the allottee either to continue

with the project by claiming interest on delayed possession or to withdraw from the project and claim refund of entire amount with interest including compensation. The appellant has chosen next option. Therefore, we are of the view that the view taken by the learned Authority that complaint is barred by res judicata is contrary to the ratio and dictum led down by the Hon'ble Apex Court and also contrary to the Section 18 of RERA.

23] It is specific contention of the developer that the absence of registered agreement for sale ought to invalidate a plea for reliefs under Section 18 of RERA and therefore, the appellant is not entitled to relief of refund of amount with interest. We do not find substance in the said contention of the developer. We should not be oblivious of the fact that RERA Act as a welfare legislation, has been enacted mainly to safeguard the interest of the allottees. Mere non-mentioning of 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 allottee. While explaining the scope of Section 18 of RERA, the Hon'ble Apex Court in para-25 of of **M/s Newtech Promoter and Developers Pvt. Ltd V/s. State of Uttar Pradesh** [Civil Appeal Nos. 5745, 6749 and 6750 to 6757 of 2021] that-

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.*

24] Section 18 of RERA confers unqualified rights upon the allottee to get refund of amount with interest if developer fails to complete the project or is unable to give possession of the subject unit by agreed date. We would like to reiterate that in spite of notice dated 31.1.2020 the developer has failed to execute agreement for sale. The developer having himself failed to comply with the obligations cannot take advantage of his own wrong to deny the benefit under Section 18 of RERA.

25] For the foregoing reasons, it crystal clear that the respondent/developer has not only failed to execute and register the agreement for sale but also failed to handover possession of the subject

flat to allottee within reasonable period. It is not the case of the developer that the allottee has committed default in making payment. Therefore, we are of the view that the impugned order cannot be sustained and calls for interference in this appeal. We answer the points accordingly and consequently, proceed to pass the following order-

ORDER

1] Appeal No.AT006000000134173 of 2022 is partly allowed.

2] Impugned Order dated 9th November 2022 passed in Complaint No.CC060000000196042 is set aside.

3] The respondent/developer shall refund the amount paid by the appellant/allottee with interest at the rate 2% above as per State Bank of India's marginal cost of lending rate 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 above amount.

5] The developer is directed to pay costs of Rs.20,000/- to the appellant/allottee.

6] A copy of this judgment be communicated to the learned Authority and parties as per Section 44(4) of RERA, 2016.

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

Dond