

Nalawade

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

APPEAL NO. AT006000000031657

Pinaki Chatterjee }
A-1402, Mantri Serene, }
Off. Film City Road, Goregaon East, }
Mumbai – 400 065. } ... *Appellant*

versus

Nirmal Lifestyle Pvt. Ltd. }
3rd Floor, Multiplex Building, }
Nirmal Lifestyle, LBS Marg, }
Mulund West, Mumbai – 400 080. } ... *Respondent*

Mr. V. N Ajikumar, Advocate for Appellant.

Mr. Dharam Jumanji, a/w. Mr. Tushar Kadam, Advocate for Respondent.

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

DATE : 11th OCTOBER 2023

(THROUGH VIDEO CONFERENCE)

JUDGEMENT

[PER: HON'BLE DR. K. SHIVAJI, MEMBER (A)]

Present appeal has been filed seeking various reliefs *inter alia* to modify/ rectify the impugned order dated 11th July 2019 by directing respondent to handover possession of the purchased flat together with promised amenities and fixtures along with occupation certificate to appellant as well as to grant compensation by way of interest at prescribed rate from July 2013 till the actual handing over of possession of the said flat by challenging the order dated 11th July 2019 under Section

44 of The Maharashtra Real Estate (Regulation and Development) Act, 2016 (in short "the Act") passed by learned Member, Maharashtra Real Estate Regulatory Authority, (in short "MahaRERA") in Complaint No. CC 0060000000 55720.

2. Appellant is Complainant before MahaRERA and flat purchaser in a duly registered project named "ZIRCON PHASE - IV", at Nirmal lifestyle, LBS Marg, Mulund (West), Mumbai – 400 080, (in short "said project"), which is being developed/constructed by Respondent developer/ Promoter. For convenience, appellant and respondent will be addressed hereinafter as Complainant and Promoter respectively.

3. Brief backgrounds giving rise to the appeal: -

- a. **Complainant's case:** On 30th August 2009, Complainant booked flat no. 307 in Promoter's said project for total consideration of ₹60,08,256/- . Agreement for Sale was also executed and registered on 10th December 2009, wherein, clause 18 of the agreement stipulates for Promoter to deliver possession of the said flat on or before June 2013 and developer shall be entitled for grace period of six months for handing over of the possession, subject to further reasonable extension of time on account of certain force majeure events as set out in the agreement. Complainant has made cumulative payments of ₹58,28,015/- (besides payments for VAT, service tax, car parking), amounting to around 97 percent of the total consideration of the flat and remaining 3 percent is to be paid on the delivery of the possession.
- b. On account of failure on the part of Promoter to deliver possession of the flat within the agreed timeline, captioned complaint came to be filed by Appellant/ Allottee before MahaRERA on 13th August 2018, seeking direction to Promoter *inter alia* for possession of the said flat with occupation certificate including for payment of interest for delay in

delivery of the possession from the agreed timeline set out in the registered Agreement for Sale.

- c. Respondent/ Promoter appeared before MahaRERA and resisted complaint by submitting *inter alia* that project got delayed due to several factors beyond its control, which include the introduction of new policy of fungible FSI in 2012, resulting in the change in plan, but without change in the carpet area of the subject flat. Promoter further claimed to have the rights to make necessary changes in the plan in terms of the agreement for sale.
 - d. Upon hearing the parties, learned Member, MahaRERA, passed the impugned order dated 11th July 2019, *inter alia* directing Respondent/ Promoter to pay interest to Complainant on the money paid by him from 01st May 2017 till the date of possession as per MahaRERA's prescribed simple interest rate of Marginal Cost of Lending Rate (MCLR) of SBI plus 2 percent under the provisions of Section 18 of the Act and Rules made thereunder.
 - e. Aggrieved by the order, Complainant has preferred the present appeal seeking various reliefs including to modify/ rectify the impugned order dated 11th July 2019 with direction to respondent to handover possession of the said flat with promised amenities and fixtures with occupation certificate to appellant and also to grant compensation by way of interest at prescribed rate from July 2013 as elaborated herein.
4. Heard learned counsel for parties *in extenso*.
 5. Complainant sought aforesaid reliefs by submitting that,
 - a. Complainant has availed housing loan for purchase of the subject flat and has been staying on rent for the last 12 years in anticipation of getting possession of the residential flat by June 2013. Despite payment of 97 percent of the total consideration, Promoter is unable to complete

the project even after delay of more than 7 years owing to misconduct and gross negligence on the part of the promoter.

- b. Despite specific claim made in the complaint and even after making specific submissions as well as arguments to handover possession of the flat on or before June 2013 with occupation certificate as stipulated in the agreement for sale, MahaRERA has completely erred by not deciding this in the instant complaint. The impugned order dated 11th July 2019 is completely silent about the handing over of the possession of the subject flat with no observation nor any finding therein.
- c. MahaRERA has erred in granting compensation by way of interest on the amount paid by complainant to promoter by erroneously mentioning in the impugned order that agreement for sale has been executed on 10th December 2013. Whereas the agreement was actually executed on 10th December 2009.
- d. As per the agreement for sale, agreed date for delivery of possession was on or before June 2013. Therefore, the compensation by way interest at prescribed rate ought to be provided to complainant from 01st July 2013 till the handing over of the possession of the subject flat with occupation certificate. Therefore, MahaRERA has grossly erred in observing that complainant is entitled to get compensation at prescribed rate from 01st May 2017 till possession of the subject flat and impugned order does not describe any justification nor any reason/basis in this regard. This is erroneous, particularly in view of the fact that agreement stipulates for delivery of possession by June 2013.
- e. While passing the impugned order, MahaRERA has not considered its own order passed earlier dated 28th February 2018 in Compliant CC 006 0000000000646, CC 006 0000000000865 and CC 006 0000000000868, wherein interest for the delay for possession were awarded as per the agreement till the handing over of the possession with occupation certificate.



- f. MahaRERA did not appreciate the facts that complainant is paying EMI as well as rent for many years and the delay is causing mental agony and stress due to gross negligence and deficiency in service on the part of the promoter.
- g. MahaRERA has failed to appreciate the arguments advanced by complainant that promoter should provide quality products and fixtures used in the subject flat. Besides these, promoter has unilaterally increased the height of the building from 30 floors to 39 floors and thereby, has changed the plan without obtaining the mandatory consents of the flat purchasers.
- h. Contentions raised by promoter regarding the payment of interest due to delay from 01st May 2017 on the ground that the Act of 2016 came into force on this date, does not have any legal basis.
- i. Despite various letters and emails, there is no response from promoter regarding the possession of the flat. Whereas the latest position of the said project reveals that promoter has virtually abandoned it, as there is no construction work over the project for the last many years causing an inordinate delay in delivery of possession.
- j. In support of the above contention, learned counsel for appellant referred and relied upon following judgments/ orders; -
 - a. Order dated 20/12/2018 passed in Group Appeal No.10407 [Prasannaraj Prakash Bhatawdekar & Anr. Vs. Sheth Infraworld Pvt. Ltd] passed by the Appellate Authority.
 - b. Order dated 01/11/2018 passed in Group Appeal No.10474 [Bharat Raichand Shah Vs. Runwal Constructions, Runwal Group].
 - c. Order dated 01/12/2019 passed by MahaRERA in the case of Sunil J. Gautam Vs. M/s Nirmal Lifestyle Ltd. in the same project of ZIRCON.
 - d. Order dated 17/12/2020 passed by MahaRERA in the case of Vivek V. Shinde Vs. Nirmal Lifestyle Ltd.

- e. The Hon'ble Supreme Court reported in 2020 DGLS (SC) 600 in the case of Imperia Structures Vs. Anil Patni & Anr. decided on 02/11/2020 "In para 33; *has held that, " the purpose of section 18 of RERA Act has to be reckoned in terms of Agreement and not the registration. Thus, it is the settled position of law, the compensation on delayed possession shall be counted from the date of possession as mentioned in the agreement and not from the date of registration of the project under the Real Estate Regulation and Development Act."*
- f. The Hon'ble Bombay High Court in the case of Westin Developers Pvt. Ltd. Vs. Raymond Alexis Nunes, held on 04/12/2020, *in para 3 that "The Appellate Tribunal held that there was no warrant for any such extension under the agreement between the parties and accordingly, ordered the interest with effect from the date of delivery of possession stipulated in the agreement. It is important to note that neither the Appellate Tribunal nor the Adjudicating Authority found in favour of the Appellant/Promoter in so far as its case for justification of the delay is concerned. **In the premises, the grace period of six months considered by the adjudicating authority was nothing but an ad-hoc measure and was rightly not accepted by the Appellate Tribunal.** Accordingly, no substantial question of law arises in connection with the impugned order of the Appellate Tribunal."*
6. Per Contra Promoter refuted the contentions of the complainant by submitting as under; -
- a. In view of the contentions raised by the appellant that the impugned order is unreasoned, is not supported by any finding and the impugned order is stated to be purportedly silent on several reliefs sought by Appellant/complainant and because, MahaRERA has not considered



several of its stated prayers in the complaint, then the impugned order ought to be set aside and the matter be remanded to MahaRERA for considering the matter afresh.

- b. The Act of 2016 came into force from 01st May 2017 and MahaRERA cannot be faulted for granting interest for delayed possession from that date onwards.
- c. Awarding interest for the delayed possession under Section 18 can be considered depending upon the relevant clauses in the agreement for sale. Whereas clause 18 of the agreement specifically provides grace period of six months besides extension of time for the reasons as set out therein. In the instant case, delay of 4 years and 3 months amounting to 1593 days has admittedly happened on account of reasons beyond the control of the promoter *inter alia* due to delay in granting various certificates and permissions from MCGM as well as from other government/ statutory authorities. Therefore, promoter is entitled to a corresponding extension of time for possession delivery and no compensation need to be awarded to complainant in view of the specific clause 18 of the agreement particularly because the delay is not attributable to promoter for securing necessary permissions/ approvals.
- d. Complainant has admittedly made substantial payment posts July 2013 until November 2016. Therefore, complainant would actually be unjustly enriched in as much as he would receive interest from 2013 despite his substantial payments made after 2013. Such unjust enrichments from July 2013 onwards for delay interest is impermissible in law and appellant is not entitled for this.
- e. Further assuming that there was delay on the part of the promoter, complainant has waived and acquiesced any such delay by making and continuing to make payment up to November 2016 without raising any claim or disputes for the delayed possession and has not made any protest, while making the payments.

- f. It is well settled that if a person is aggrieved by any incorrect recording or omission of any submissions then, the person is required to seek correction/modification/ speaking to minutes. Appellant has not even pressed for compensation or sought transfer of the matter for adjudging the compensation to the Adjudicating Officer. If that is the case, complainant ought to have first sought correction/ modification/ review/ speaking to minutes of the impugned order to MahaRERA before filing the present appeal. Admittedly, complainant has not done so till date and therefore, appellant is precluded from arguing these contentions in view of the judgment of the Hon'ble Supreme Court in the case of **Daman Singh Vs. State of Punjab reported in [(1985) 2 SCC 670]**.
- g. The claim/ prayer for certain quality of product or fixtures of complainant is not only premature and cannot be agitated at this stage because there is no provision under the Act for issuance of any direction at pre-possession stage. Besides there is no provision either for direction to provide work plan and hand over possession within definite time period.
- h. Without prejudice to the above, learned counsel for promoter submits that construction of the building in question is complete, four lifts are working and functional. As such 40-50 allottees have been permitted to start fitting works / furniture in their flats and promoter has applied for occupation certificate to municipal authority way back in 2019. However, Municipal Authority had asked to make certain compliances and clear certain deficiencies. Promoter was in the process of complying with the same and was hopeful for getting the occupation certificate by March 2020. However, it got delayed due to Covid-19 pandemic. Balance compliance process went into a complete limbo due to Covid pandemic and its associated lockdowns. Promoter is taking all possible steps now to complete balance compliance process expeditiously and is hopeful that occupation certificate will be obtained shortly and will commence



offering possession to allottees immediately thereafter. In view thereof, complainant has thus not made out a case for direction to provide work plan and/ or allocation of funds in the escrow account. Therefore, appellant is not entitled for any relief and the instant appeal is liable to be dismissed with costs.

- 7.** From the rival pleadings, submissions and upon perusal of 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 possession of flat was delivered on or before the agreed timeline in terms of the Agreement for Sale?	In the negative.
2.	Whether rights of Allottee under Section 18 of the Act are unconditional and absolute, regardless of unforeseen events and factors beyond control of Promoter?	In the affirmative.
3.	Whether appellant is entitled to get possession of subject flat in time bound manner as per the Agreement for Sale?	In the affirmative
4.	Whether Promoter is entitled to get grace period as per the Agreement for Sale?	In the negative.
5.	Whether Complainant is entitled for interests on account of delay in delivery of possession from July 2013 till possession with OC?	As per the Order.
6.	Whether impugned order is sustainable in law?	As per the Order.
7.	Whether impugned order calls for interference in this appeal?	As per the Order.

REASONS

Point 1: Possession delivery status:

- 8.** It is not in dispute that Complainant has booked the subject flat in the Promoter's said project on 30th August 2009 and Agreement for Sale was



also executed on 10th December 2009. Wherein, clause 18 of the agreement stipulates for delivery of possession of the subject flat on or before June 2013 with grace period of 6 months and further reasonable extension on account of certain force majeure events.

9. Whereas Promoter itself in its reply, submits that delay of 4 years and 3 months running into 1593 days has admittedly happened on account of the reasons beyond the control of the promoter *inter alia* due to delay in getting various certificates/ permissions from MCGM and other government/ statutory authorities. Therefore, according to promoter, it is entitled for corresponding extension of time for delivery of possession. Learned counsel for the promoter further submits that promoter has applied for occupancy certificate to municipal authority way back in 2019 and was hopeful of getting the occupancy certificate by March 2020. However, on account of various factors including due to the COVID-19 pandemic, promoter has not got occupation certificate as yet. Accordingly, it is not in dispute that project has still not been completed and has not got occupation certificate. Thus, it is clear that possession of the subject flat has not yet been handed over to complainant despite having clear stipulations for delivery of possession as in the agreement for sale. Hence, Section 18 of the Act is attracted and point 1 is answered in the negative accordingly.

Point 2: Rights under Section 18 are absolute.

10. Learned counsel for Promoter submits that delay in delivery of possession has happened on account of the several factors beyond the control of the promoter more particularly because of non-receipts of permissions and sanctions/ approvals from MCGM and other authorities and thus, the delay is on account of factors beyond the control of promoter, besides these are not attributable to promoter. Thus, according to promoter, it is entitled for extension of this time period of delay and in view of the specific clause 18



of the agreement for sale, no compensation could be awarded to complainant on these counts.

11. However, Section 18 of the Act specifically delineates the importance of the Agreement for Sale for the purpose of assessing the delay in handing over possession, which may be due to discontinuation of business as developer or for any other reasons. On perusal of Section 18, it is seen from the Proviso to its Sub Section (1) that if, Promoter fails to complete the project or is unable to deliver possession of apartment, plot or building within the agreed time and if an allottee does not intend to withdraw from the project then, he shall be paid, by promoter, interest for every month of delay, till the handing over of the possession, at such rate as may be prescribed.
12. Additionally, 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, [2021 SCC Online 1044]** has clarified that *"if the 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 beyond the control of promoter 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 to 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 this judgement further held as under; -

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 Allottees 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."

- 13.** In view of above, it has been held that the rights of Allottees under Section 18 of the Act are unconditional and absolute, regardless of unforeseen events including *stay orders of the Court/Tribunal*, **any other reasons or even on account of factors beyond the control of the Promoter** and it is allottee, who has sole discretions to proceed either under Section 18 (1) or under the proviso to the Section 18 (1). Accordingly, the contentions of the promoter for extension in possession delivery due to said delay being on account of factors beyond the control of promoter, are not tenable and cannot be accepted.
- 14.** Promoter has further contended that complainant has given implicit consent and has waived /acquiesced the said delay by making and continuing to make payments up to November 2016 without raising any claim nor any dispute/ protest for the delayed possession. This contention also cannot be

accepted, because there is no document, placed on the record, which shows any expressed consent/s of the complainant in this regard. It is settled position of law that such implicit silence cannot be accepted in the absence of an expressed concurrence/consents between the parties. Moreover, there is expressed contractual commitments in writing by promoter in the form of a registered agreement for sale between the parties, which explicitly contains *inter alia* agreed timeline for delivery of possession. Therefore, contractual commitments in the form of registered agreement cannot be altered/modified /changed without another expressed consent to its contrary in the form of another registered agreement between the parties. Additionally, on account of delay in delivery of possession on the part of the promoter, certain statutory rights have already accrued to complainant under the provisions of the Section 18 of the Act of 2016. Therefore, these accrued rights cannot be changed/altered by the purported said implicit consent. In view of these, contentions of the promoter are legally not sustainable and are unacceptable. Accordingly, Complainant's rights accrued under section 18 of the Act is absolute, irrespective of the causes of delay on account of the factors beyond the control of the promoter and complainant is entitled for interest at prescribed rate for the delay in delivery of possession. Therefore, we answer point 2 in the affirmative.

Point 3; possession in time bound manner.

15. Learned counsel for the promoter further contended that prayer of the complainant to provide quality products for fixtures is premature and cannot be agitated at this stage because there is no provision under the Act for issuance of any direction at the current pre-possession stage. Besides this, there is no provision for direction to provide work plan and handover possession within definitive time period.
16. Whereas Section 11 (3) of Act provides that "(3) *The promoter, at the time of the booking and issue of allotment letter, shall be responsible to make available to the allottee, the following information, namely: —*

(a) sanctioned plans, layout plans, along with specifications, approved by the competent authority, by display at the site or such other place as may be specified by the regulations made by the Authority; -

b) the stage wise time **schedule of completion of the project**, including the provisions for civic infrastructure like water, sanitation and electricity."

17. There are similar provisions casting general liabilities on Promoter even in the erstwhile MOFA Act of 1963 in its Section 3(2) (f). Besides this, Sections 11 4(b), 19(2) and 19(3) of the Act also contain similar provisions.
18. Additionally, **The Hon'ble Bombay High Court, in the case of Neelkamal Realtors Suburban Pvt. Ltd. & Anr. Vs. Union of India & Ors. in para 119**, has held that "*While the proposal is submitted, the Promoter is supposed to be conscious of the consequences of getting the project registered under RERA. Having sufficient experience in the open market, the **Promoter is expected to have a fair assessment of the time required for completing the project....***".
19. Accordingly, it is evident that Promoter is inherently better equipped about the market information and is structurally at an advantageous position in as much as that of the information about the updates of said project are concerned. Above provisions under the Act prescribe that information about possession delivery date together with stage wise time schedule of completion of the project is essential prerequisites to be shared right at the time of booking itself and onwards. Promoter has the repository of information, is expected to be fully conversant with such information about the project undertaken for development and promoter has bounded duty to do so under the Act.
20. It is also important to note that the project has been registered under the Real Estate (Regulation & Development) AC Act, 2016, which provides several welfare provisions including for greater accountability towards consumers by injecting greater efficiency, transparency and accountability

to protect consumers as contemplated in the statement of objects and reasons of the Act. Section 19 (1) and also 19 (2) of the Act further entitle Complainant Allottee to know stage wise time schedules of completion of project, including the provisions for water, sanitation electricity, other amenities including for other basic services.

21. In the light of above, it is an abject failure on the part of promoter, if promoter doesn't provide these information containing time bound possession delivery and project completion date including its stage-wise time schedule of completion of the project for not complying with the statutory mandatory obligations under the provisions of Sections 11 (3) and 19 (2) of the Act. Promoter is under statutory obligations, and it is contractual/ statutory rights of complainant to claim for the quality products/ the fixtures as per the agreement for sale even at pre- possession stage. Promoter is bound to provide realistic work plan and progress schedule for handing over of the possession of the subject flat to each of the allottees in definite time frame. Additionally, promoter is also bound to provide progress updates of the project from time-to-time as well as during even at pre-possession stage. Accordingly, contentions of the promoter for inability to provide work plan etc., are legally not sustainable and cannot be accepted and we answer point 3 in the affirmative.

Point 4; Whether promoter is entitled for 6 months of grace period.

22. Learned counsel for appellant further seeks to modify/ rectify the impugned order dated 11th July 2019 for grant of interest from 01st July 2013 till the handing over of the possession of the said flat with occupation certificate. Learned counsel further submits that as per the agreement for sale, agreed date for delivery of possession was on or before June 2013. Therefore, according to learned counsel for appellant, interest be provided to complainant from 01st July 2013 without any grace period. In this regard, Appellant further referred and relied upon judgments of the Hon'ble

Supreme Court reported in Imperia Structures Vs. Anil Patni & Anr. (supra), the judgment of the Hon'ble Bombay High Court in the case of Westin Developers Pvt. Ltd. Vs. Raymond Alexis Nunes (supra) dated 04th December 2020 and of MahaRERA itself in complaint no. CC 006 00000000646, 00000000865 and 868, wherein interest for delay in delivery of possession was awarded as per the agreement till the handing over of the possession. learned counsel for appellant further submits that promoter is not entitled for grace period.

23. Learned counsel for promoter vehemently objected the contentions of the appellant by submitting that clause 18 of the agreement specifically provides for grace period of six months besides extension of time for the reasons as set out in the agreement.

24. The Hon'ble Bombay High Court in the case of Westin Developer vs. Raymond A. Nunes (supra) has held that; -

*"3. Learned Counsel for the Appellant submits that the agreement contains a clause to the effect that the date of possession was subject to inter- alia to any cause beyond the control of the developer including any order of the Central Government, Local Authority or Body or due to delay in issuing completion certificate or occupation certificate by the Authorities. The clause referred to by learned Counsel is nothing but an ordinary force majeure clause, where the promoter cannot be faulted for delay in delivery of possession, if such delay is caused by any reason beyond his control. **This clause by itself does not provide for any grace period to the promoter.** The promoter has to make out a case that delay caused in handing over possession of the premises was due to any of the elements referred to in the majeure clause. It is apparent from the record that the adjudicating authority was not impressed by any of the reasons submitted by the Appellant herein towards justification for this delay. Yet, the order of the adjudicating authority proceeded on the basis that even if facts pointed out by the Promoter were to be taken into consideration as justification for*

*the delay, a six months' grace period could be granted for delivery of possession to the Promoter. The Appellate Tribunal held that there was no warrant for any such extension under the agreement between the parties and accordingly, ordered interest with effect from the date of delivery of possession stipulated in the agreement. It is important to note that neither the Appellate Tribunal nor the adjudicating authority found in favour of the Appellant/Promoter insofar as its case for justification of the delay is concerned. **In the premises, the grace period of six months considered by the adjudicating authority was nothing but an ad-hoc measure and was rightly not accepted by the Appellate Tribunal.** Accordingly, no substantial question of law arises in connection with the impugned order of the Appellate Tribunal."*

25. Perusal of the agreement for sale as well as upon consideration of the above judicial pronouncements more particularly that of **the Hon'ble Bombay High Court in the case of Westin Developers Pvt. Ltd. Vs. Raymond Nunes (supra)** and that of 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), it is evident that promoter is not entitled for the grace period of six months for extension of possession delivery.
26. It is also important to note that the RERA Act of 2016 is a Social Legislation with primary purpose and objective with legislative intent to safeguard the interest of the Allottees. Therefore, the rights of Allottee cannot be taken away for no faults on the part of the Allottees and without following the due process of law.
27. Additionally, it is pertinent to note that promoter has not invoked the stated clause for claim of the purported grace period by issuing notice to complainant together with specific grounds/ reasons based on which, promoter is seeking benefit of the grace period in terms of the agreement for sale. In the absence of the above, we are of the considered view that

contentions of promoter, seeking grace period of six months is legally not sustainable and we find that the agreed date for delivery of possession in terms of the agreement for sale is June 2013. Accordingly, we answer point 4 in the negative.

Point 5; Whether delay interest from July 2013

28. From the above, it is more than clear that promoter has not been able to deliver possession of the subject flat in terms of the agreed timeline as set out in the agreement. As a result, Complainant is entitled under section 18 of the Act to receive interest at prescribed rate for the delay in handing over of possession beyond the agreed timeline. Therefore, as determined herein above, appellant complainant is entitled for interest for delay in delivery in possession from 01st July 2023 till the delivery of possession. But, in the impugned order, MahaRERA has directed promoter to pay delay interest to complainant at prescribed rate from 1st May 2017 till the date of the actual possession. Reasons for awarding interest from 1st May 2017 are not seen set out in the impugned order. Therefore, the impugned order, *ex facie* suffers from infirmities to this extent. Accordingly, complainant is entitled for interest from July 2013 till the date of the possession of the subject flat along with occupation certificate.
29. However, learned counsel for the promoter further submits that substantial payment has been made by complainant to promoter after July 2013 until November 2016. Therefore, awarding interest on the total cumulative paid amount by the complainant from July 2013 itself would actually result in unjust enrichment of complainant in as much as he would receive interest on the whole amounts from 2013, despite his payments made after 2013. Such unjust enrichment to appellant from July 13 onward for the delay interest is impermissible in law and therefore, complainant is not entitled for. Perusal of record also reveals that certain payments have been made by complainant to promoter after July 2013.
30. In this context, following judgements are relevant; -

- a. The Hon'ble Supreme Court of India in its judgment in the case of **Experian Developers Pvt. Ltd. vs. Sushma Ashok Shirur, [(2022) SCC Online SC 416]**, has held that interest payable on amount deposited by the flat buyer is not only **restitutionary but also compensatory** and the interest has to be paid from the date of deposits and not from the estimated date of possession.
- b. The Hon'ble Supreme Court has further clarified in para 21 and 22 of its judgement in the case of Experian Developers Pvt. Ltd. Vs. Sushma Ashok Shirur (supra) as follows:

*"22.1. We are of the opinion that for the interest payable on the amount deposited to be restitutionary and also compensatory, **interest has to be paid from the date of the deposit of the amounts.** The Commission in the order impugned has granted interest from the date of last deposit. We find that this does not amount to restitution. Following the decision in DLF Homes Panchkula Pvt Ltd v. DS Dhanda and in modification of the direction issued by the Commission, we **direct that the interest** on the refund shall be payable **from the dates of deposits.** Therefore, the appeal filed by the purchaser deserves to be partly allowed. The interests shall be payable from the dates of such deposits."*
- c. Additionally, The Hon'ble Bombay High Court in para 258 of its judgment in case of Neelkamal Realtors Suburban Pvt. Ltd. & Anr. Vs. Union of India & Ors. (supra), has held inter alia that.

*".....**The object of Section 18 is to recompense an allottee for depriving him of the use of the funds paid by him. The Promoter who has received money from the allottee but has failed to adhere to his contractual or statutory obligations, cannot claim that he is entitled to utilize the monies without paying any interest with respect thereto to the allottee.**"*
- d. Besides above, Promoter has been earning interest on the amount received from Allottees and has been utilising such amounts received from Allottees for its own commercial gains right from the date on which, Promoter has received these payments. Thereby, Promoter has

been earning interests and other incomes out of such payments made by allottees right from the date of the receipts from Allottees.

- 31.** Moreover, the explanation (ii) of Section 2(z) of the Act (being reproduced below for ready reference) has expressly clarified the period for which the interest needs to be paid by Promoter to Allottees by clearly specifying as hereunder.

"2. (z) "interest" means the rates of interest payable by the Promoter or the allottee, as the case may be.

*Explanation. —For the purpose of this clause—
(ii) the interest payable by the Promoter to the allottee shall be from the date the Promoter received the amount or any part thereof till the date the amount or part thereof and interest thereon is refunded, and the interest payable by the allottee to the Promoter shall be from the date the allottee defaults in payment to the Promoter till the date it is paid;"*

- 32.** Considering above, more particularly in the light of the statutory provisions mentioned in Explanation (ii) of Section 2(z) and based on above discussions including in view of the aforesaid judicial pronouncements, we are of the view that payment of interest for the delay is compensatory in nature. Hence, contentions raised by promoter regarding the payment of interest due to delay from 01st May 2017 on the ground that the Act of 2016 came into force on this date does not have any legal basis more particularly because complainant is paying EMI as well as rent for many years of default on the part of promoter. Therefore, impugned order suffers from infirmity to this extent.

- 33.** In view of forgoing, it will be just, fair and equitable that promoter be directed to pay interest to complainant at prescribed rate from 01st July 2013 till the date of possession on the amount cumulatively paid to promoter until 30th June 2013 and thereafter, promoter to pay further the interest at prescribed rate from the date of payments received from allottee after 1st July 2013 by promoter till the date of delivery of possession at

prescribed rate. Accordingly, the impugned order needs to be corrected/modified to these extents and we answer point 5 accordingly.

Point 6, and 7; -

- 34.** These points are interconnected and interrelated, hence, have been taken up together for discussion.
- 35.** In view of the foregoing and considering our findings herein above, it is more than evident that possession has not been delivered within the agreed timeline in terms of the Agreement for Sale. Therefore, Section 18 of the Act provides certain unconditional and unqualified rights to Complainant and Promoter is under statutory obligations *inter alia* to pay interest at prescribed rate for the delay in delivery of the possession from the agreed timeline. Thus, MahaRERA is not justified in denying the valuable rights accrued to Complainant under Section 18 of the Act to claim interest at prescribed rate for the period of default/ delay delivery of possession in terms of the agreement for sale. Therefore, it is evident that impugned order suffers from infirmities, warrants interference in this appeal and, impugned order needs to be modified and corrected to these extents. Accordingly, we answer the points 6, along with 7 as above and proceed to pass order as follow:

O R D E R

- a)** Appeal is partly allowed.
- b)** Impugned order dated 11th July 2019 passed in Complaint No. CC 0060000000 55720 is modified as hereunder: -
- i. Respondent promoter is directed to handover possession of the subject flat after receipt of the occupation certificate as soon as possible by providing a time bound realistic work plan for delivery of possession in terms of the agreement for sale.
 - ii. Respondent Promoter is further directed to pay interest to appellant allottee at the rate of highest marginal cost of lending

rate of State Bank of India plus 2% on the amount cumulatively paid to promoter till 30th June 2013 from 1st July 2013 till the date of delivery of possession of the subject flat.

- iii. Respondent Promoter is further directed to pay interest to appellant allottee at the rate of highest marginal cost of lending rate of State Bank of India plus 2% on the amount paid to promoter after 30th June 2013 from the date of these payments received by promoter till the date of actual delivery of possession.
- c) No order as to costs.
- d) In view of the provisions of Section 44(4) of the Act of 2016, a copy of this order shall be sent to the parties and to MahaRERA.


(Dr. K. SHIVAJI)


(SHRIRAM R. JAGTAP, J.)