BEFORE THE MAHARASHTRA REAL ESTATE APPELLATE TRIBUNAL, MUMBAI

Appeal No. AT006000000052550 of 2020

In

Complaint No. CC006000000100389

Mr. Ramjee Prasad Sharma
Mrs. ILA Ramjee Sharma
Address :
Flat No. 402, E2, Rutu Enclave,
Patlipada,
Thane (West) - 400 607. ... Appellants

Versus

Macrotech Developers Ltd.
of Lodha Group
CIN U45200MH1995PLC093041
Residing at:
412, 17 G, Vardhaman Chambers,
Cawasji Patil Road, Horniman Circle,
Fort, Mumbai - 400 001.
For Its Project
Lodha Supremus-Thane, Kolshet ... Respondent

Adv. Mr. Arjun Amanchi for Appellants
Adv. Ms. Bhavi Vora for Respondent

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

DATE : 17th October, 2023

(THROUGH VIDEO CONFERENCING)

Jagtap

JUDGEMENT

[PER : SHRIRAM R. JAGTAP (J)]

This Appeal emerges from Order dated 6th March, 2020 passed by Member I, MahaRERA (for short the Authority) in Complaint No. CC006000000100389 filed by Appellants.

2] Appellants are "Allottees" and Respondent is a "Promoter". Both the parties will hereinafter be referred to as Allottees and Promoter respectively.

3] Facts gathered from record broadly reveal that Promoter launched a Project known as "**Lodha Supremus**" at Kolshet, Thane. In the month of November, 2018, Allottees booked a commercial unit bearing no. 502, on 5th floor in the subject Project for a consideration of Rs.1,23,16,074/- and submitted the booking application form dated 02.11.2018 to Promoter. The Allottees have paid an amount of Rs.13,79,407/- including GST amount of Rs. 1,47,800/- in two installments to Promoter. Since the Promoter has started harassing the Allottees for payment of amount even when the date of payment had not lapsed, the Allottees therefore requested the Promoter for cancellation of the booking and refund of the booking amount paid to the Promoter. By e-mail dated 18.12.2018 Allottees cancelled the booking for the subject unit and requested Promoter to refund the entire amount paid by them to

Sjagtap

Promoter against the subject unit. By e-mail dated 20.12.2018 Promoter acknowledged the e-mail of Allottees but did not consider the grievance of Allottees. However, in the month of March, 2019 Promoter apprised the Allottees that Allottees will have to sign voluntary cancellation letter and then refund will be initiated. In the month of June, 2019 Allottees were called upon by Promoter to collect the cheque. The Promoter has paid only Rs.6,52,759/- and has forfeited the remaining amount. However, at the time of cancellation of the booking the Promoter had promised to the Allottees that whole amount would be refunded after signing of the cancellation form. Being aggrieved by this conduct of the Promoter the Allottees have filed the Complaint seeking directions from the MahaRERA to the Promoter to refund booking amount paid by them to the Promoter alongwith compensation under Section 18 of RERA Act, 2016

4] Promoter appeared in the Complaint and resisted the Complaint contending that the Complaint does not disclose cause of action for filing the Complaint against the Promoter. The Allottees have booked the subject unit after understanding the terms and conditions enumerated in the booking application form and has paid booking amount to Promoter, which the Promoter

demanded as per the schedule of completion of milestones in the subject Project which the Allottees were reminded by the Promoter through demand letters, etc.

5] According to Promoter the Allottees have cancelled the booking of the subject unit for their personal reasons by e-mail dated 18.12.2018. The Promoter apprised the Allottees about the forfeiture Clause 3.5 of the application form filled in by Allottees at the time of booking of the subject unit which prescribes that whole amount will be forfeited. However, in March, 2019 Allottees wrote to Promoter to consider the circumstance and reduce the deduction towards liquidated damages upto maximum of 50% of the amount specified in the application form. The Promoter therefore paid 50% of the booking amount to the Allottees. With these contentions the Promoter has prayed for dismissal of the Complaint.

6] After hearing the parties learned Authority dismissed the Complaint by holding that as there is no allotment letter or registered agreement for sale entered between the parties showing any agreed date of possession, the provision of Section 18(1) of RERA would not be applicable to grant refund to Allottees and action taken by Respondent for refund of the booking amount as

per Clause 3.5 of booking application form does not suffer from any lacuna.

7] We have heard learned Advocate Mr. Arjun Amanchi for Appellant and Advocate Ms. Bhavi Vora for Respondent.

8] An abridgment of argument of learned Advocate Mr. Arjun Amanchi for Appellant is that in the month of November, 2018 Allottees booked the commercial unit for a total consideration of Rs.1,23,16,074/- and submitted booking application form dated 02.11.2018 to Promoter. The Allottees have paid an amount of Rs.13,79,407/- including GST amount of Rs.1,47,800/- in two installments to Promoter. Since the Promoter was incessantly insisting the Allottees for payment of amount even when the date of payment had not lapsed, the Allottees decided to exit from the project. Accordingly, Allottees, by e-mail dated 18.12.2018 cancelled the booking for the subject unit and requested the Promoter to refund the entire amount. Learned Advocate has invited our attention to e-mail dated 20.12.2018 and sorely submitted that the Promoter has acknowledged the e-mail of Allottees but did not consider the grievances of Allottees. After incessant follow-up by Allottees, the Promoter agreed for cancellation of booking but at the same time asked the Allottees to

sign voluntary cancellation letter. Since Allottees have decided to exit from the project, the Allottees signed the voluntary cancellation letter as desired by Promoter.

9] It was further argued by learned Advocate that by e-mail dated 20.12.2018 Promoter agreed to refund the amount. However, the Promoter invoked Clause 3.5 of the booking application form and illegally forfeited 50% of the booking amount. Clause 3.5 of the booking application form does not empower the Promoter to forfeit 50% of the booking amount in the event of cancellation of booking by Allottees, infact Clause 3.5 speaks that if Promoter rejects the booking application form in that event only Promoter is entitled to forfeit 50% of the booking amount.

10] Learned Advocate has further submitted that the material on record clearly indicates that Promoter has paid 50% of the booking amount to Allottees in twelve installments during the year 2020-2021 and that too after 15 months of cancellation of the booking of subject unit. Learned Advocate has further submitted that recitals in the booking application form do not provide any Clause for forfeiture of 50% amount of the total consideration by Promoter on cancellation of booking by Allottees in the absence of allotment letter or agreement for sale. Accordingly, learned

Advocate argued that Respondent is now bound to refund the entire amount. Learned Advocate has placed reliance on the following Judgments of this Tribunal delivered in other Appeals:

1] **Mrs. Rekha Navani V/s. M/s. Omkar Ventures Pvt. Ltd. dated 29.06.2020 in Appeal No. AT006000000021466 of 2019**

2] **Mrs. Smita H. Deshpande & Ors. V/s. M/s. ERA Realtors Pvt. Ltd. dated 13.04.2022 in Appeal No. AT005000000052368**

3] **Mr. Dinesh R. Humane & Ors. V/s. M/s. Piramai Estate Pvt. Ltd. dated 17.03.2021 in Appeal No. AT006000000041967**

With these contentions Learned Advocate for Appellants has prayed for allowing the Appeal with costs.

11] Succinct of the argument of Advocate Ms. Bhavi Vora for Respondent is that Appellants in their original Complaint had raised several grounds and on the basis thereof claimed various reliefs under RERA, 2016. Original Complaint was filed for alleged harassment, breach of trust, cheating and fraudulent transaction. The Appellants have made bald allegations and falsely alleged that Respondent had acted in breach of contract. In fact, the Appellants

booked the subject unit at their free own will after going through the details of the project and understanding the same at the time of booking. Besides after having understood the terms and conditions of the application form, the Allottees agreed to book the unit in the subject project and subsequently paid the booking amounts -1 and 2.

12] Learned Advocate has further submitted that both the parties are bound by the terms and conditions of the application form dated 02.11.2018. Allottees were obligated to make payments as per schedule annexed to the booking application form. However, the Allottees were, time and again, reminded to make payments on time in accordance with the agreed payment schedule to avoid late payments and interest. Pursuant to discussion between the parties vide e-mail dated 17.12.2018, the Respondent informed Allottees about the execution of documents with respect to subject unit and apprised the Allottees about the stamp duty and registration charges. However, Allottees vide e-mail dated 18.12.2018 sought to cancel the booking for the subject unit and asked for refund of the entire amount. She pointed out that Promoter acknowledged the request of Allottees and apprised the Allottees about the application of Clause 3.5, terms and

conditions specified in application form filled in by Allottees which provided that in the event of rejection of the application form by Promoter on account of non-payment of booking amount or any part thereof or not abiding the terms and conditions contained in the application form by Allottees an amount paid towards booking amount I and II (or 10% of total consideration, whichever is higher), or part thereof shall be forfeited.

13] Learned Advocate has invited our attention to letter dated 18.03.2019 of Appellants and poignantly submitted that by this letter Allottees inter alia made a voluntary request for cancellation of the booking of the subject unit and further requested to consider the circumstance and reduce the deduction to a maximum of 50% of the amount specified in the application form and refund balance amount as per terms and conditions of the application form. Pursuant thereto the Promoter informed the Allottees that a refund cheque against the cancellation of the subject unit is ready and requested the Allottees to collect the cheque accordingly. Allottees have agreed to collect the amount by e-mail dated 19.06.2019. The Appellants have deposited the cheque for encashment with their banker and received the refund amount as above. The Promoter has acted as per the terms of the application form and

discharged his duty post cancellation of booking. Therefore, the Complaint as well as the instant Appeal are not maintainable.

14] While supporting the impugned Order to have been correctly passed the learned Advocate has further submitted that claim of Appellants for refund under Section 18 of RERA Act is only liable when there is failure on the part of Promoter to handover possession as per the terms of the AFS. In the instant case, there is no failure on the part of Promoter under Section 18 to entitle the Appellants refund of amount. The Appellants have not only failed to make out any case under Section 18 of RERA but also did not mention the provision of RERA which are alleged to be violated by the Promoter. The Promoter had raised demand letter calling up on the Appellants to make the payments as per the schedule but the Appellants did not make the payment and requested for cancellation of the subject unit on account of personal reasons, as a result thereof the Promoter was constrained to cancel the allotment of the commercial unit. Thus, the Promoter is entitled to forfeit amount equivalent to 10% of the total consideration of commercial unit. However, the Promoter has forfeited 5% of the total consideration of the subject unit. The correspondence between the parties clearly indicate that Appellants have waived

their right relating to the subject unit and they have categorically acknowledged that they have no right against the Promoter. Therefore, it can be said that Appellants are estopped from claiming any relief against the Promoter. With these contentions, the learned Advocate prayed for dismissing the Appeal with exemplary costs.

15] On considering the submissions advanced by learned counsel for respective parties and on perusal of the documents placed on record as well as the impugned Order, the only point that arise for our consideration is whether the Appellants are entitled for refund of the amount paid by them to the Promoter. Our answer to the point is in the affirmative for the reasons to follow:

REASONS

16] It is not in dispute that Allottees had booked a commercial unit bearing no. 502 in the subject project for a total consideration of Rs.1,23,16,074/- and submitted the booking application form dated 02.11.2018 to Promoter. The Allottees have paid an amount of Rs.13,79,407/- including GST amount of Rs. 1,47,800/- in two installments to Promoter. It is specific case of Allottees that since the Promoter had started to harass the Allottees for payment of

amounts even when the date of payments had not lapsed, the Allottees decided to exit from the project and requested the Promoter for cancellation of the booking and refund the booking amount by e-mail dated 18.12.2018. It is not in dispute that by e-mail dated 17.12.2018 a demand was raised by Promoter asking the Allottees to pay amount as per schedule. It is not in dispute that in response to e-mail dated 18.12.2018 of the Allottees, Promoter accepted the request of Allottees for cancellation of the booking and at the same time apprised the Allottees about the forfeiture of the booking amount.

17] It is significant to note that parties are governed by the terms and conditions set out in the application form. According to Promoter, since the Allottees suo moto cancelled the booking, the Promoter invoked Clause 3.5 of booking application form which entitles the Promoter to forfeit 50% of the booking amount. Accordingly, the Promoter has forfeited 50% of the booking amount and refunded (Rs.6,52,759/-) 50% of the booking amount to Allottees.

18] A careful examination of booking application form dated 02.11.2018 would reveal that it is silent on the point that in the event of cancellation of booking by Allottees, the Promoter is

entitled to forfeit entire amount or part thereof paid by Allottees. There is no express condition in the booking application form that if Allottees suo moto cancel the booking Promoter is empowered to forfeit the entire amount or part thereof paid by Allottees.

19] On scanning Clause 3 of the booking application form, which talks about acceptance/ rejection of application, reveals that first part of said Clause provides in the event Promoter rejects the application form for any reason other than non-receipt of the booking amount/ or installment as per schedule of payments and / or for any other reasons not directly attributable to the applicant Promoter shall inform the Allottees of the same in writing within the period of 30 days and shall refund the entire amount to the Allottees without any interest within the period of 30 days. It is worthy to note that Clause 3.5 of booking application form stipulates a situation that in the event, the Company/ (Promoter) rejects the application on account of non-receipt of booking amounts or any part thereof or the applicant is not abiding by the terms and conditions contained in the application form, than this application form shall, without any further Notice, be liable to be rejected and an amount paid towards booking amount I and II (or 10% of total consideration, whichever is higher), or part thereof

shall stand forfeited. It is specific case of Promoter that Promoter has invoked this Clause and forfeited 50% of booking amount and paid the balance amount to Allottees. It is pertinent to note that it is not the case of Promoter that Promoter has rejected the application for the reasons mentioned in Clause 3.5 of booking application form, as a result thereof, he is entitled to forfeit the booking amount as per Clause 3.5 of application form.

20] It is further contention of the Promoter that the Allottees by letter dated 18.03.2019 requested Promoter to take a considerate view of the circumstances of Allottees and reduce the deduction towards liquidated damages to maximum of 50% of the amount specified in the application form and refund the balance amount to Promoter as per the provisions contained in the application form. Pursuant to this letter the Promoter has deducted 50% of booking amount and refunded the balance amount to Allottees. After receipt of communication of Allottees about cancellation of booking the Promoter by e-mail dated 20.03.2019 (Page 48), asked the Allottees to sign cancellation form which was already sent to Allottees by Promoter. It means the Promoter was aware that Clause 3.5 of application form will not help in forfeiting the booking amount because the Promoter has not rejected the

application form, on the contrary the Allottees have suo moto cancelled the booking. Therefore, the promoter very conveniently apprised the Allottees to sign the cancellation form by e-mail and after signing the same the Promoter can initiate cancellation of booking and refund process. In response to the said e-mail, the Allottees have signed the request letter dated 18.03.2019. By the said letter the Allottees have requested for deduction towards liquidated damages. Accordingly, Promoter deducted the amount as per the said letter which speaks about deduction towards liquidated damages. On consideration of terms of application form and request letter dated 18.03.2019, we find that prior to letter dated 18.03.2019 quantum of 50% of the deduction was never predetermined and/ or agreed between the parties towards liquidated damages. Therefore, there is no question of deduction of the said amount.

21] It is worthy to note that Appellants booked the unit on 02.11.2018 and cancelled the booking vide e-mail dated 18.12.2018. Thus, in a period of less than two months, no significant variation/ diminution in sale price/ market price of the unit is brought to our knowledge by Respondent to show any liquidated damage alongwith any loss that may have occurred on

account of cancellation of unit to warrant forfeiture of the amount paid by Allottees.

22] Project involved in the matter is registered and governed by the RERA Act, 2016. Rights and liabilities of the parties are also governed by the provisions of the RERA. RERA Act, 2016 is a welfare legislation enacted primarily to safeguard the interest of the allottees. Therefore, we are of the view that the forfeiture of amount paid by Allottees is erroneous and against the objective and purpose of RERA Act, 2016 which is enacted as a beneficial legislation to abate hardships of gullible flat purchasers.

23] The learned Advocate Ms. Bhavi Vora for Respondent has poignantly submitted that claim of Appellants for refund under Section 18 of RERA is only liable when there is failure on the part of promoter to handover possession as per the terms of the agreement for sale. In the instant case there is no failure on the part of Promoter under Section 18 to entitle the Appellants refund of amount. We do not find substance in the said submission. The transaction in the instant case is governed by RERA Act, 2016. Though the claim of Appellants for refund of amount is not governed by any specific provision of RERA, but it cannot be ignored that 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 his 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 in the instant

case, it is in the interest of justice to direct the Promoter to refund the total amount paid by Allottees accordingly.

24] There is no express provision in RERA Act, 2016 by which the promoter is entitled to forfeit earnest amount 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. Undoubtedly, for projects promoter may have to incur certain expenses, it may need to deduct but such deduction should be reasonable, just, fair and commensurate to the underlying expenses to prevent forfeiture becoming a source of unjust income. The deduction must not be unfair, unreasonable and unjust. The Promoter has failed to enlighten us that he is entitled to deduct 50% of the booking amount on account of expenses incurred by him for the project.

25] It is not in dispute that Allottees had paid an amount of Rs.13,79,407/- including GST amount of Rs.1,47,800/- in two installments to Promoter in the month of November, 2018. It is specific contention of Allottees that Promoter has refunded Rs.6,52,759/- to them in 12 installments during the year 2020-2021 and that too after 15 months of cancellation of booking of the

said unit. The Promoter has not disputed this fact, it means the Promoter has utilised the said amount of Rs.6,52,759/- for developing the project i.e. for commercial purpose for a approximate period of 2.5 years and thereby deprived the Allottees to get the same for the said period for no reasons. We have already observed that Promoter has to refund the entire amount to Allottees. It means the Promoter, since the date of payment of amount as above by Allottees, has been utilising the balance amount of Rs.5,78,848/- till date for project. The Appellant is entitled to get GST amount of Rs.1,47,800/- from the government. The Promoter shall co-operate the Allottees in reimbursing the said amount from government. Therefore, considering the peculiar circumstance of the case we are of the view that Promoter is required to refund Rs.5,78,848/- to Allottees.

26] In view of the above observations, we are of the view that the forfeiture of amount paid by Allottees is improper. Allottees are entitled to refund of entire amount without interest. Therefore, the impugned Order declining refund of amount as sought by Allottees in their Complaint cannot be sustained and it deserves to be set aside. We therefore proceed to pass the following Order.

ORDER

1. Appeal No. AT006000000052550 of 2020 is partly allowed.
2. The impugned Order dated 06.03.2020 passed in Complaint No.CC006000000100389 is set aside.
3. Respondent Promoter is directed to refund an amount of Rs.5,78,848/- to Appellants on or before 30th November, 2023 failing which an interest @2% above the State Bank of India highest Marginal Cost Lending Rate shall be payable by Promoter to Allottees with effect from 1st December, 2023 till the realisation of the entire amount as above.
4. Parties to bear their own cost.
5. 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