

Nalawade

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

APPEAL NO. AT006000000052557

1. Jagdish Bhoja Shetty

2. Mrs. Dipti J. Shetty

603, A wing, Vastu Shubh CHS.

R. J. Road, Pump House,

Andheri (East), Mumbai – 400 093.

... *Appellants*

versus

Neelkamal Realtors Suburban Pvt. Ltd.

D B House, Gen. A. K. Vaidya Marg,

Goregaon East, Mumbai – 400 063.

Email: info@dbg.co.in

... *Respondent*

Ms. Shivani Shukla a/w. Mr. Anil D'zouza, Advocate for Appellants.

Mr. Sushant Chavan, Advocate for Respondent.

CORAM : SHRI SHRIRAM R. JAGTAP, MEMBER (J)

& DR. K. SHIVAJI, MEMBER (A)

DATE : 19th OCTOBER 2023

(THROUGH VIDEO CONFERENCE)

JUDGEMENT

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

Present appeal has been preferred under Section 44 of Maharashtra Real Estate (Regulation and Development) Act, 2016 (in short "the Act") for directions to Respondent Promoter *inter alia* to execute Agreement for Sale, for possession of the booked flat and interest for delay by challenging the order dated 22nd July 2019 passed by learned Member, Maharashtra Real Estate Regulatory Authority, (MahaRERA), in Complaint No. CC 0060000000 57117, wherein,



Appellants had sought various reliefs including to direct Respondent Promoter to execute registered agreement for sale in consonance with the allotment letter dated 24th January 2010, to handover possession of the booked flat to Appellants, pay the interest for the delay in delivery of possession from 24th January 2013 till the date of possession.

2. Appellants are complainants before MahaRERA and flat purchasers in a duly registered project known as "**ORCHID OZONE**" located at Mira Road (East), in District Thane (in short "the said project"), which is being developed and constructed by respondent Promoter. For convenience, appellants and respondent will be addressed hereinafter as complainants and promoter respectively in their original status before MahaRERA.
3. Brief background giving rise to the present appeal is as under; -
 - a. **Complainant's case:** Appellants complainants booked flat no. 1604 in duly registered said project of promoter on 24th January 2010, vide allotment letter dated 24th January 2010, issued by promoter for total consideration of ₹ 39,39,582/-. According to complainants, possession of the said flat was orally agreed to be delivered within three years from the date of allotment letter. On account of *inter alia* non-execution of the registered agreement for sale and due to the delay in delivery of possession of the subject flat, captioned complaint came to be filed by appellants before MahaRERA seeking various reliefs as delineated above.
 - b. Respondent promoter appeared before the MahaRERA and opposed complaint. Upon hearing the parties, learned Member, MahaRERA passed the impugned order dated 22nd July 2019, directing respondent promoter to execute agreement for sale within one month.



- c.** Aggrieved by this order of MahaRERA, Appellants have preferred the captioned appeal, seeking various reliefs including to set aside the impugned order dated 22nd July 2019 and allow reliefs sought in complaint by directing respondent promoter to handover possession of the flat, pay interest to appellants from 23rd January 2013 till the date of handing over the possession of the subject flat besides costs and compensations.

4. Heard parties *in extenso*.

- 5.** Appellants have sought the above reliefs by filing the captioned appeal by submitting *inter alia* followings; -

- a.** The impugned order is erroneous on the face of it, as it is contrary to the established principles of law and is causing miscarriage of justice. Because, MahaRERA has considered and granted only part of the reliefs sought in the captioned complaint and has completely ignored other prayers *inter alia* for handing over the possession of the flat, payment for the interest in delay in handing over the possession. Even though, learned Member, MahaRERA has the jurisdiction and authority to adjudicate/grant reliefs sought in the complaint for direction to promoter to execute registered agreement for sale and to award interest for delay in deliver of possession from 23rd January 2013 till the actual handing over of flat with occupancy certificate, impugned order is completely silent about these prayers. Therefore, the impugned order is illegal, bad in law and arbitrary, reflecting non application of mind. Therefore, it is liable to be quashed and set aside/ to be modified.

- b.** In view of the judgment of the Hon'ble Supreme Court, in para 14 and 17 in the case of Malluru Mallappa (D) Thr. Lrs. Vs. Kuruvathappa & Ors., wherein, it has been held that appeal is continuation of the



proceedings of the original court and the Appellate Court/ this Tribunal has ample power to adjudicate all the reliefs sought in the complaint.

c. Appellants are allottees under the provisions of the Act and Complainants have been diligently making payments towards the consideration of the subject flat in timely manner based on demands raised by respondent promoter leading to cumulative payments of around 90 percent of the total agreed consideration of the flat.

d. Despite respondent promoter having orally agreed to deliver the possession of the subject flat within three years from the date of allotment letter dated 24th January 2010 and even after follow-ups, possession of the flat has not been handed over yet.

e. The Hon'ble Supreme Court of India in the case of Fortune Infrastructure and Ors. Vs. Trevor D'Lima & Ors. has held that three years is reasonable time period to complete the construction of real estate project and to deliver the possession of the booked flats. However, even after delay of more than 10 years from the date of booking, promoter has failed to complete the project construction.

f. Even though promoter has agreed to handover possession of the subject flat within 3 years from the date of the allotment letter, the project is still incomplete and has not received occupancy certificate till date even after more than 13 years of the date of booking of the flat. The delay in completion of project is not attributable to allottees/ complainants.

g. Complainants were shocked to know that promoter has revised the project completion date to 31st December 2019, then revised to 2021 and now it has again been further revised to 31st December 2022 on MahaRERA website. These revisions are unilateral, arbitrary and demonstrate the failure of the promised obligations on the part of the

respondent promoter. However, in view of the judgment of the Hon'ble Bombay High Court in para 256, in the case of **Neelkamal Realtors Suburban Pvt. Ltd. & Anr. Vs. Union of India & Ors. [(2017) SCC Online Bom 93021]**, promoter cannot unilaterally revise the agreed possession delivery date by extending the project registration validity date.

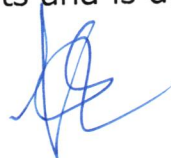
- h. Under section 13 of the Act, promoter cannot raise demands and accept payments more than 10% of total consideration without having first executed and registered agreement for sale. The corresponding maximum limit prescribed under MOFA (Maharashtra Ownership of Flats Act) is 20%. Appellants have always been willing and ready to execute agreement for sale. Even then, Promoter kept raising demands and has accepted cumulative payments of ₹ 33, 89,240/- amounting to 90 percent of the total consideration and Complainants have even paid for the stamp duty. Even then, promoter has failed to sign and execute registered agreement for sale. Thereby, promoter has violated the provisions of Section 13 of the Act.
- i. In view of above, complainants have issued legal notice to promoter on 09th July 2018 *inter alia* to execute agreement for sale for the said flat.
- j. In support of the above contentions, appellants have referred and relied upon judgments of this Tribunal in the case of Jyoti K. Narang & Anr. Vs. CCI Project Pvt. Ltd. in Appeal No. AT006000000010841 and the judgement of Hon'ble Supreme Court in the case of M/s. **Newtech Promoters and Developers Pvt. Ltd. Vs. State of U.P & Ors.**



k. Considering *inter alia* above, appellants urged to grant reliefs sought in the complaint by setting aside / modifying the impugned order and appeal be allowed for the reliefs sought therein.

6. Per Contra, promoter submits that; -

- a.** There is not even a whisper of mention about the delay in delivery of possession of the subject flat in the impugned order and is also not seen mentioned even in the legal notice, which was sent by complainants to promoter before filing of the captioned complaint. This shows that appellants had not made any submission/ argument before MahaRERA claiming for payment of interest for delay in delivery of the possession of the flat. This is also evident from the legal notice, which does not contain any details regarding the claim for interest for delay in handing over of the possession of the flat. Hence, this cannot be raised in the appeal.
- b.** Moreover, in view of the alleged non-consideration/ non-adjudication of some of the claims made by appellants in the impugned order, proper recourse available to complainants was to file application for review of the impugned order before MahaRERA. But complainants have not opted for review. Therefore, the captioned appeal is not sustainable. In view of this, captioned appeal needs to be remanded to MahaRERA for its fresh consideration.
- c.** Complainants have been making payments up to 90% of consideration without making any protest nor raising any claim for delay interest and execution of agreement for sale. This shows that complainants are not genuine allottees, rather they are speculative investors.
- d.** The delay in execution of agreement for sale is because of the deficiencies on the part of complainants and is due to their failure to



come forward for executing agreement for sale. This is evident from the exchange of several emails between the parties and as such, draft consent terms for amicable settlement were shared by promoter to complainants as well as to their advocate twice on 11th May 2021 and 19th July 2021. Accordingly, complainants have deliberately chosen not to enter into registered agreement on one pretext or other and allotment letter is without any possession date. Therefore, complainants have no locus to file the present appeal claiming for compensation/delay interest in the absence of registered agreement.

- e.** The allotment letter issued by promoter does not contain any date of delivery of possession. As such, promoter has never agreed orally or otherwise, to handover possession of the flat within three years from the date of the allotment letter.
- f.** The delay in the construction of the project is due to factors beyond the control of promoter. This delay has happened due to scarcity of sand and on account of various restrictions imposed by the authorities on stone crushers during the year 2013-14. Besides these, the project has also suffered owing to slow down in the economy, more particularly in the real estate sector, slowdown got further aggravated by the policy of demonetization, announced by the Government etc.,. Despite the aforesaid mitigating circumstances and factors beyond the control of promoter, promoter has completed RCC and civil works for all the 25 buildings. However, the progress of the project construction got delayed due to unforeseen and force majeure events like Covid-19 pandemic as well as due to lockdowns associated to it.
- g.** In view of the above, respondent Promoter sought to dismiss the appeal with costs.



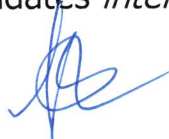
7. From the rival pleadings, submissions and documents relied upon by the parties, following points arise for our determination in this appeal and we have recorded our findings against each of them for the reasons to follow: -

	POINTS	FINDINGS
1.	Whether Promoter has violated Section 11(3) and 19(2) of the Act?	In the affirmative.
2.	Whether Promoter has violated Section 13 of the Act as claimed by complainant?	In the affirmative.
3.	Whether Appellants are entitled for the reliefs sought in the above complaint <i>inter alia</i> for execution of agreement, possession of the flat and for the interest for delay in delivery of possession from 24 th January 2013 till the date of handing over of possession?	As per the order.
4.	Whether impugned order calls for interference in this appeal?	As per the order.

R E A S O N S

Point. 1: Section 11 and 19(2).

8. There is no dispute that Complainants have booked the subject flat and promoter has issued allotment letter dated 24th January 2010. Accordingly, it is admitted position that Complainants are Allottees, and respondent is promoter under the provisions of the Act. The project under reference is duly registered under the Act of 2016. Learned counsel for Promoter himself further argued that allotment letter issued by the promoter itself, does not contain any date of delivery of possession. The allotment letter has been drafted and issued by promoter itself.
9. Whereas, Section 11 of the Act, while specifying functions and duties of the Promoter, its sub-Section (3) mandates *inter alia* 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: —*

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

10. There are similar provisions casting general liabilities on Promoter in the erstwhile MOFA Act of 1963 in its Section 3(2) (f).
11. By not providing this vital information relating to possession delivery cum project completion date in the booking form/ allotment letter including its stage-wise time schedule of completion of the project etc. amounts to *ex facie* failure on the part of Promoter to fulfill the statutory mandatory obligations under the provisions of Section 11 of the Act.
12. The Hon'ble Bombay High Court, in the case of (Promoter company itself) **Neelkamal Realtors Suburban Pvt. Ltd. & Anr. Vs. Union of India & Ors. [(2017) SCC Online Bom 9302]** in para 119, further 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...*".
13. Accordingly, it is evident that Promoter is inherently better equipped about market related information and is structurally at advantageous position in as much as the information about the said project updates are concerned. Therefore, in consonance with the provisions 11 (3) of the Act, Promoter is liable to provide unambiguous and expressed information about project completion date / possession delivery date at the time of booking.
14. Above provisions under the Act stipulate that information about possession delivery date including stage wise time schedule of completion of the project are essential pre-requisites to be incorporated

in all relevant communications including in the application form/ in the allotment letter at the time of booking. Despite such statutory mandatory requirements, this essential information is missing in the allotment letter in the present case. It is despite the fact that Promoter is the repository of information, fully equipped with information on the project undertaken for development but has failed to mention despite its bounded duty to do so under the Act. This has led to asymmetry of information, potentially making sale transaction one sided and imbalanced. Consequently, it has adversely affected the transparency of the sale transaction, which is contrary to the fundamental and basic legislative intents, aims, purpose and objectives of the Act.

- 15.** It is also important to note that the project has been registered under the Real Estate (Regulation & Development) Act, 2016 ("the Act"), which provides several welfare provisions including for greater accountability towards consumers to inject greater efficiency, transparency, and accountability to protect consumers as contemplated in the statement of Objects and Reasons of the Act. Section 19 (2) of the Act also entitles Allottees to know stage wise times schedule of completion of project, including the provisions for water, sanitation, electricity, other amenities including for services as agreed between promoter and allottees.
- 16.** In view thereof, Promoter has violated the statutory provisions of Section 11 (3) and 19(2) of the Act, and we answer point 1 in the affirmative accordingly.

17. Points 2; - Section 13.

- 18.** It is admitted position of parties that agreement of sale has not been executed so far. Perusal of record further reveals that despite the promoter having onus to first execute agreement for sale under Section 13 of the Act, promoter has kept on raising demands and has accepted



payments up to 90% of consideration. Whereas the draft agreement has been shared by promoter to complainants only after 11 years of the issuance of the allotment letter, i.e., for the first time in 2021. Even this draft agreement has not been executed so far. Learned counsel for complainants further submits that every such payment has been made only after the receipt of the demands raised by promoter and because, complainants had no other option but to continue making payments to avoid being defaulter, which may lead to termination of allotment letter and it is the promoter, who kept on raising demands even beyond the maximum permissible ceiling of 20/ 10 percent prescribed under MOFA/ RERA Act. However, Section 13 of the Act specifically prohibits promoter from raising demands and accepting cumulative payments of not more than 10% before first execution of agreement for sale. Corresponding provision under MOFA is at Section 4 (1). All these facts expressly demonstrate that Complainants had not received even the draft of the agreement for sale before 11 years.

- 19.** Learned counsel for promoter further submits that promoter has always been willing to execute agreement for sale and this is reflected in several emails exchanged between the parties containing draft agreement. However, it is observed that the draft consent terms exchanged by emails are nothing but the reflection of the attempts by the parties to explore the possibility of amicable settlement without prejudice to the rights and contentions.
- 20.** These details clearly reveal that Promoter has raised a series of demands beyond prescribed statutory permissible limits even in the absence of the agreement of sale and Promoter, at that point of time was not entitled to raise any further demands beyond 10% without execution of the agreements for sale. Such demands raised by Promoter for further



payments beyond 10% has clearly breached, the upper ceiling prescribed under Section 13 of the Act and Section 4(1) of MOFA. Thereby, promoter has violated the statutory provisions of Section 13 of the Act. Accordingly, we answer points 2 in the affirmative as above.

Point. 3 and 4: Reliefs sought. These points are Interrelated so have been considered together.

21. Contention of promoter that recourse available to appellants

was review: Learned counsel for promoter further submits that there is no observation/ consideration with respect to the claims of the appellants for delay in delivery of possession of the subject flat in the impugned order, which shows that appellants had not made any submission and argument before MahaRERA for payment of interest for the delay in delivery of possession. This is also evident from the fact that legal notice sent by complainants is also silent in this regard. Therefore, proper recourse available to complainants was to file review of the impugned order before MahaRERA and this cannot be raised now in appeal and thus the instant appeal is not sustainable.

22. Perusal of impugned order demonstrates that even though these claims for delay interest and execution of the agreement are not mentioned in the impugned order, but the impugned order does not contain any negative findings as well against these claims of appellants. It is settled principle of law that if the claims made by appellants are not granted in the order, then, it is presumed to have been denied. Therefore, complainants, being aggrieved by the denial of these claims, appellants have filed the present appeal based on having statutory rights to prefer appeal for these under the provisions of Section 44 of the Act. Accordingly, contention of the promoter is legally not tenable.

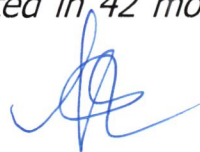


23. Contention of promoter to remand: Learned counsel for promoter further submits that having not opted for review, captioned appeal ought to be remanded to MahaRERA for consideration afresh. This contention of the promoter is also not sustainable in view of para 14 and 17 of the judgement of **The Hon'ble Supreme Court in the case of Malluru Mallappa (Dead) through Legal Representatives Vs. Kuruvathappa and Others [(2020) 4 SCC 313]**, wherein, it has been held that appeal is continuation of the proceedings of the original court and the Appellate Court/ this Tribunal has ample power to adjudicate all the reliefs sought in the complaint. Moreover, to avoid delay, and in the interest of justice, it is desirable to decide these grievances in appeal itself instead of relegating the parties to the original forum to the extent possible.

24. Contention of promoter to accept revised project registration validity date as possession delivery date: Learned counsel for promoter further contended that in the absence of expressed date for possession delivery in the allotment letter, revised extended validity of the project registration be taken as the possession delivery date. However, this cannot be accepted on account of the followings; -

- a. The Hon'ble Supreme Court in para 33 of its Judgement dated November 02, 2020, in the case of **M/s Imperia Structures Ltd. Vs. Anil Patni and Another [5 2020(10) SCC 783]**, has laid down as under; -

"33. We may now consider the effect of the registration of the Project under the RERA Act. In the present case the apartments were booked by the Complainants in 2011-2012 and the Builder Buyer Agreements were entered into in November 2013. As promised, the construction should have been completed in 42 months. The period



*had expired well before the Project was registered under the provisions of the RERA Act. Merely because the registration under the RERA Act is valid till 31.12.2020, does not mean that the entitlement of the concerned allottees to maintain an action stands deferred. It is relevant to note that even **for the purposes of Section 18, the period has to be reckoned in terms of the agreement and not the registration.** Condition no. (x) of the letter dated 17.11.2017 also entitles an Allottee in same fashion. **Therefore, the entitlement of the Complainants must be considered in the light of the terms of the Builder Buyer Agreements** and was rightly dealt with by the Commission."*

- b. It shows that delivery of possession of flat and project completion date are two different and distinct things. Delivery of possession of flat is particularly governed by the terms of the agreement for sale, which are sacrosanct for the purpose of the provisions of the Act and the terms of the agreement cannot be rewritten as held by the **Hon'ble Bombay High Court in its judgment in the case of Neelkamal Realtors (supra).**
- c. Whereas, project completion date is guided by the project registration validity date, which can get lapsed or be changed, extended, suspended, or revoked following the provisions of the Act. But Promoter's liabilities under the Act will not get absolved under the agreement for sale without appropriate and prior mutual consents of parties.
- d. Possession delivery date as agreed in the agreement for sale cannot be changed or modified without the consents of both the parties. Whereas in the instant case, it has been done unilaterally by the promoter, which is not sustainable.



- e. Moreover, para 256 of the said judgement in the case of Neelkamal Realtors Suburban Pvt. Ltd. & Anr. Vs. Union of India & Ors. (supra) categorically held as under: *"Section 4 (2) (I) (C) enables the Promoter to revise the date of Completion of project and hand over possession. The provisions of RERA, however, do not rewrite the clause of completion or handing over possession in agreement for sale. Section 4 (2) (I) (C) enables the Promoter to give fresh timeline independent of the time period stipulated in the agreements for sale entered into between him and the Allottees so that he is not visited with penal consequences laid down under RERA. In other words, by **giving opportunity to the Promoter to prescribe fresh timeline under Section 4(2) (I) (C) he is not absolved of the liability under the agreement for sale.**"*
- f. **Party in breach, cannot take advantage of its own wrong:**
 Learned counsel for promoter contends that project registration validity date be taken as agreed possession delivery date in the absence of delivery date in the allotment letter. However, it is pertinent to note that it is the promoter, who is responsible to specify possession delivery date at the time of booking of the flat and the promoter has violated the statutory provisions under Sections 11, 18 and 19(2) of the Act on this count. Moreover, Promoter cannot deny the accrued rights under Section 18 of the Act to Allottees on the very same ground for which, Promoter himself is responsible for especially because the rights so accrued to allottees under Section 18 are unconditional, unqualified and absolute. Promoter himself cannot take advantage of its own deficiencies/ non-performance and despite being party in breach, in view of the judgement of The Hon'ble Supreme Court in the case of **Kusheshwar Prasad Singh Vs. State of Bihar**



and Ors. [Supreme Court] Civil Appeal No. 7351 of 2000".
Where in, it has been held that - "It is settled principle of law that a man cannot be permitted to take undue and unfair advantage of his own wrong to gain favourable interpretation of law. It is sound principle that he, who prevents a thing from being done shall not avail himself of the non-performance he has occasioned. To put it differently, "a wrongdoer ought not to be permitted to make a profit out of his own wrong."

- 25. Legal and reasonable possession delivery period:** Learned counsel for promoter further contended that in the absence of expressed date of delivery of possession in the allotment letter, it cannot be inferred that there is delay in delivery of possession. However, as rightly contended by complainants that this cannot be accepted in the light of the para 15 of the judgement of the Hon'ble **Apex Court in FORTUNE INFRASTRUCTURE & ANR VERSUS TREVOR D'LIMA & ORS [(2018) 5 SCC 442]**, which clarifies as "*Moreover, a person cannot be made to wait indefinitely for the possession of the flats allotted to them and they are entitled to seek the refund of the amount paid by them, along with compensation. Although we are aware of the fact that when there was no delivery period stipulated in the agreement, a **reasonable time has to be taken into consideration. In the facts and circumstances of this case, a time period of 3 years would have been reasonable** for completion of the contract*".
- 26.** Learned counsel for complainants further argued that promoter has orally agreed to deliver possession of the flat within 3 years from the date of allotment letter and this has not been denied by promoter in writing. Accordingly, we are of the view that 24th January 2013 is the date, which need to be taken as the legal delivery date of the possession of the flat.



- 27. Reliefs status under Section 18:** It is admitted position that the project is still incomplete and has not received occupation certificate. In view of the delay in delivery of the possession of the subject flat, section 18 of the Act will be attracted. Section 18 of the Act specifically delineates the importance of agreement for sale for the purpose of assessing delay in handing over possession, which may be due to discontinuation of business as developer or for any other reasons. Proviso to the Sub Section (1) of the Section 18 provides that, if, Promoter fails to complete the project or is unable to deliver possession of apartment, plot or building by agreed time and allottees do not intend to withdraw from the project then, complainants shall be paid by the promoter, interest for every month of the delay, till the handing over of the possession, at such rate as may be prescribed.
- 28.** However, learned counsel for the promoter further contended that delay in project completion and consequent delay in delivery of possession has happened on account of several factors beyond the control of promoter owing to scarcity of sand, other various restrictions imposed by the authorities on stone crushers and the project construction also suffered on account of the slowdown in the economy, demonetization including due to COVID-19 pandemics and lockdowns associated to it. Hence, according to promoter, these are not attributable, and promoter cannot be held liable for delay.
- 29.** However, these are legally not sustainable in view of the judgement 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. [2021 SCC Online 1044] dated 11th November**



2021 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 or stay orders of the Court/Tribunal.* Relevant abstract is being reproduced below for ready reference.

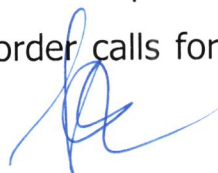
- 30.** "25. *The unqualified right of the Allottee to seek refund referred under Section 18(1)(a) and Section 19(4) of the Act is not dependent on any contingencies or stipulations thereof. It appears that the legislature has consciously provided this right of refund on demand as an unconditional absolute 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.*"

The proviso to Section 18(1) contemplates a situation where the Allottee does not intend to withdraw from the Project. In that case, he is entitled to and must be paid interest for every month of delay till the handing over of the possession. It is up to the Allottee to proceed either under Section 18(1) or under proviso to Section 18(1). The case of Himanshu Giri came under the latter category. The RERA Act thus definitely provides a remedy to an Allottee who wishes to withdraw from the Project or claim return on his investment."

- 31.** 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 any other reasons even factors beyond control of the Promoter and it is allottees, who have sole discretions to proceed under Section 18.

- 32.** Perusal of captioned complaint further reveals that appellants have sought several reliefs including for execution of the agreement for sale, possession of subject flat as well as to award interest at prescribed rate for the delay in delivery of the possession besides compensations and costs. However, it is not in dispute that the impugned order dated 22nd July 2019 passed by learned Member MahaRERA is silent and does not contain adjudication of all the prayers made by appellants in the captioned complaint and has considered only the prayer for execution of agreement. This is despite the fact that these reliefs sought in the instant complaint are well within the jurisdiction and the purview of the Member, MahaRERA, more particularly in view of the judgement of the Hon'ble Supreme Court in the case of **M/s Newtech Promoters and Developers Pvt. Ltd vs. State of Uttar Pradesh & Ors. (supra)**.
- 33.** In view of the foregoing and upon considerations of findings herein above, more particularly about the breaches on the part of the promoter under sections 11(3), 13, 18 and 19(2) of the Act, impugned order dated 22nd July 2019 passed by MahaRERA suffers from infirmities to the extent as determined herein above. Therefore, complainants are entitled for interest at prescribed rate for the delay in delivery of the possession of the subject flat from 24th January 2013 till the actual date of handing over the possession of the subject flat and promoter is further directed to execute and register agreement for sale in terms of the instant allotment letter besides promoter to handover the possession of the flat at an early date. Accordingly, impugned order calls for interference in



this appeal and we answer points 3 & 4 as above and proceed to pass order as follows; -

O R D E R

- (i) The captioned Appeal No. AT0060000000 52557 is partly allowed.
- (ii) Impugned order dated 22nd July 2019 passed in complaint no. CC. 006 0000000 57117 stands modified as follows: -
 - a. Promoter is directed to handover the possession of the subject flat at an early date upon receipt of Occupancy Certificate.
 - b. Promoter is further directed to execute agreement for sale in consonance with the allotment ~~of~~ letter dated 24th January 2010 within 30 days from the date of uploading of this order.
 - c. Promoter is further directed to pay interest at the rate of highest MCLR (Marginal Cost of Lending Rate) of SBI plus 2% from 24th January 2013 till the actual delivery of the possession of the subject flat to appellants on the amounts paid by allottees.
- (iii) No order as to costs.
- (iv) In view of the provisions of Section 44(4) of the Act of 2016, a copy of the Judgment be sent to the parties and MahaRERA.


(Dr. K. SHIVAJI)


(S. R. JAGTAP J.)