

Nalawade

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

APPEAL NO. AT006000000052914

ALONG WITH

MISC. APPLICATION NO. 35 OF 2021 (Stay)

Sanjeevani Vyapaar LLP

Round & 3rd floor, Prius Infinity,
Subhash Road, Paranjape B-Scheme,
Vile Parle (East), Mumbai – 400 057.

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... Appellant

~ versus ~

Mrs. Snehalata Devram Deokar

2/D 1104, Dreams Complex
Behind Dreams Mall, LBS Road,
Bhandup (West), Mumbai – 400 018.

}
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}
}

... Respondent

Mr. Manish Gala, Advocate for Appellant.

Mr. Sameer Bhandari, Advocate for Respondent.

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

& DR. K. SHIVAJI, MEMBER (A)

DATE : 31st OCTOBER 2023

(THROUGH VIDEO CONFERENCE)

JUDGEMENT

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

Present appeal has been preferred under The Maharashtra Real Estate (Regulation and Development) Act, 2016 (in short "the Act") against the order dated 16th October 2020 passed by learned Member, Maharashtra Real Estate Regulatory Authority, (MahaRERA), directing



Appellant Promoter *inter alia* to refund the paid amounts to Respondent together with interest in Complaint No. CC 006 0000000 193735, wherein Complainant/ Respondent has sought various reliefs including for refund of the paid amounts together with interest thereon.

2. Appellant is developer/Promoter, who is developing a project known as "Avante" located at Kanjurmarg, Mumbai ('said project'). Respondent is flat purchaser and Complainant/ Allottee before MahaRERA. For convenience, Appellant and Respondent will be addressed hereinafter as Promoter and Complainant respectively in their original status before MahaRERA.
3. Brief background giving rise to the present appeal is as under; -
 - a. **Complainant's case:** Complainant booked flat no. 1201, C wing of promoter's said project on 23rd May 2015 by filing booking application form for total consideration of ₹ 1,53,41,500/- with alleged oral promise of the promoter to handover possession of subject flat by December 2019. Complainant has paid cumulative total amount of ₹ 47,46,785/-. On account of failure to construct the project in time and consequent delay in delivery of the possession of the subject flat within the agreed timeline, captioned complaint came to be filed by respondent/ allottee before MahaRERA seeking *inter alia* for refund of paid amounts together with interest by withdrawing from the project.
 - b. Appellant promoter resisted complaint after appearing before MahaRERA in the complaint proceeding by contending *inter alia* that date of completion declared before MahaRERA is 30th June 2022. Therefore, the complaint is not maintainable under Section 18 of the Act. Besides, agreement for sale has not been executed even after complainant was asked to come forward to get it executed. Delay in project completion is on account of factors and force majeure events



beyond the control of the promoter for example, delay in receipt of NOC from the Naval Authority, difficulties due to outbreak of Covid-19 pandemics and its associated lockdowns in the country.

- c. Upon hearing the parties, learned Member, MahaRERA, passed the impugned order dated 16th October 2020, directing Appellant / Promoter *inter alia* to refund the paid amounts to Respondent Allottee together with interest besides costs.
4. Aggrieved by this order of MahaRERA, Promoter has preferred the captioned appeal, seeking various reliefs including to quash and set aside the impugned order dated 16th October 2020 besides declaring that provisional letter of booking dated 20th July 2016 executed between the parties is valid, subsisting and binding.
5. Heard Learned counsel for parties *in extenso*.
6. Promoter submits that,
 - a. Respondent allottee has failed to make timely payment of the consideration amount and taxes to promoter even after communicating further demands as agreed upon in accordance with the payment schedules, promoter cancelled booking vide cancellation letter dated 07th May 2016. However, at the request of the complainant and upon making further payment, promoter did not cancel the booking of the said flat and instead issued provisional letter of booking dated 20th July 2016 and updated payment schedule was also finalized. Accordingly, allottee has made cumulative payment of ₹ 45,56,427/- to promoter towards the sale consideration plus ₹1,90, 358/- towards the service tax.
 - b. Promoter received an intimation of disapproval (IOD) on 15th February 2016 and commencement certificate on 28th April 2016. However, MCGM insisted for NOC of Indian Navy for granting further permissions

on the pretext that the project site is in the vicinity of housing colony (Civilian) staff of Indian Navy. Promoter made an application to the Assistant Engineer for issuance of NOC. However, despite filing of formal application and even after continuous follow-ups, Naval Authority rejected it multiple times, causing delay in project construction, which were beyond the control of the promoter.

- c. Additionally, MCGM issued a stop work notice on 04th January 2019 under Section 534(A) of Municipal Corporation Act, 1888 and this stop work notice was not withdrawn despite further requests made by the promoter, vide letter dated 03rd February 2020.
- d. Naval authority once again refused to grant N.O.C vide their letter dated 24th May 2019 even after the grant of favorable order in Writ Petition No. 3013 of 2018 of the Hon'ble Bombay High Court in another society on the ground that favorable order was only for that specific property and the Hon'ble High has not accorded blanket sanction to approve projects in the vicinity of the Naval (civilian) Housing Colony. Promoter filed Writ Petition No. 1358 of 2019 before the Hon'ble Bombay High Court challenging the order of rejection of N.O.C and to issue *writ of mandamus* to direct MCGM. However, this is of no benefits.
- e. Pending reply from MCGM, Covid-19 global pandemic broke out, which has been causing innumerable difficulties including due to its associated lockdowns.
- f. MCGM issued another letter dated 03rd June 2020 stating that commencement certificate has been issued up to plinth level but due to the proximity of the housing colony, work be stopped for want of N.O.C from Naval Authority and refused to issue necessary travel passes required for undertaking pre-monsoon work on the said project.

Eventually, MCGM withdrew the stop work notice only on 13th August 2020.

- g. Accordingly, the delay in the project construction is entirely due to factors and force majeure events or circumstance beyond the control of promoter and it happened despite constant follow-ups. Allottee has been kept informed about these developments. Hence, there was no intentional delay, nor any default on the part of the promoter.
- h. The said project is registered with MahaRERA on 26th July 2017, wherein the project completion date is mentioned as 31st December 2021 and the same is reflected in registration certificate, which is also reflected on the RERA website. Therefore, promoter has not assured for the possession of the subject flat to be delivered by December 2019. Provisional allotment letter does not contain possession delivery date.
- i. MahaRERA has extended the registration of all the real estate projects by six months due to Covid-19 outbreak. Besides, the project registration has been extended till 30th June 2022, which has been further extended till 31st December 2024.
- j. It is pertinent to note that there is no possession date mentioned in the application form as well as in the provisional letter of booking because complainant was also fully aware of the fact that promoter will be developing this project in phased manner and project construction will take substantial amount of time.
- k. Due to defaulting allottee like complainant herein, the construction pace of the said project got seriously affected on account of less cash inflow.
- l. MahaRERA erred in granting refund together with interest without realizing that the same would severely jeopardize the project due to outflow of fund. Thus, it will affect other allottees, promoter and other stockholders of the project.



- m. MahaRERA further erred in granting refund of the service tax amount, which has already been paid to the government and therefore is not lying with the promoter.
- n. Learned counsel for promoter further submits that as per clause 9 of the booking application form duly agreed by the parties, does provides for forfeiture of 5% and 7% of the sale price if the allottee withdraw/cancel the booking.

.....Clause 9 "In the event if the Application if withdrawn / cancelled of the said apartment, the developer shall be entitled to retain cancellation charges, such amounts as stated below:

- i. A minimum amount of 5% of the sale price or all such losses and damages suffered in the sale of the said apartment to the new Applicant, whichever is higher.*
- ii. In case of any brokerage being paid with respect to the Application of the said apartment, a minimum of 7% of the sale price, or such losses and damages suffered in the sale of the said apartment to the new Applicant whichever is higher shall be retained by us.*

Accordingly, promoter is entitled for forfeiture of 12% of the total sale price in case of refund to be allowed to complainant.

- o. In support of the above contentions, learned counsel for promoter referred and relied upon the judgment of the Hon'ble Bombay High Court in the case of **Neelkamal Realtors Suburban Pvt. Ltd. Vs. Union of India & Ors. [(2017) SCC Online Bom 9302]** and urged that the impugned order dated 16th October 2020 be quashed and set aside.
- 7.** Per Contra, learned counsel for Complainant pleads to dismiss the present appeal with costs by denying averments of promoter as follows; -
- a. Complainant has till date paid cumulative amount of ₹ 47,46,785 in the year 2015-16 as demanded by promoter. After this, no further demand was raised and communicated by promoter.

- b. Promoter has revised the possession date of the subject flat to year 2021 without intimating the complainant. This date has been further revised to December 2022 and has further been revised to December 2024.
- c. According to the promoter, the major cause for the delay in project construction was due to the stop work notice issued by MCGM, because the Naval Authority refused to grant N.O.C and promoter was not aware that NOC of Naval Authority was required. Project completion was clouded and fraught with uncertainties squarely on account of deficiencies on the part of the promoter. As such, these factors causing delay are not covered under the force majeure clause and reflect inability and deficiencies on the part of the promoter.
- d. However, the perusal of the condition no. 33 of the undertaking dated 18th June 2015, given by promoter to MCGM clearly shows that "NOC from Naval Authority will be required. Mr. Chintan A. Sheth, partner of appellant himself has given an undertaking in this regard. Moreover, promoter was not only aware of this undertaking, but also, Promoter is expected to know all such factors.
- e. Promoter being a real estate developer having business of real estate construction, he is expected to know these problems, which may exist or arise in future, affecting the construction pace and completion of the project. As such, promoter was aware of the issues plaguing the said project but the same was never informed to complainant including even at the time of booking of the said flat, as per the order of the Hon'ble High Court in the case of M/s. Neelkamal Realtors Suburban Pvt. Ltd. (supra).
- f. Learned counsel for complainant further submits that promoter is not entitled for any forfeiture because complainant has not withdrawn *Suo*



moto rather she has been forced to withdraw due to failure on the part of the promoter in fulfilling its commitments and allottee has statutory right to withdraw and seek refund with interest under Section 18 of the Act of 2016.

- g. Flat was booked on 23rd May 2015, while the commencement certificate was received only on 28th April 2016. This shows that promoter has started booking without having mandatory approvals of commencement certificates and other mandatory NOC and permissions from the concerned authorities. This is a violation of Section 4(2) (c) of the Act of 2016.
- h. Promoter had promised the complainant at the time of booking to hand over the possession of subject flat in December 2019. This is also being corroborated by the fact that the initial project registration date mentioned on RERA website was December 2019. Possession date promised was December 2019, which was in fact prior to the Covid-19 pandemic outbreak.
- i. Perusal of the RERA website demonstrates that the project could not be completed even by December 2022. MahaRERA website shows that the project is complete only up to podium level even after waiting for 9 years and is demonstrating zero percent construction progress.
- j. At the time of booking, promoter confirmed that all requisite approvals for the construction of the project have been received and there are no impediments, which will adversely affect the project construction in timely manner.
- k. Complainant is now aged 57 years, cannot wait further for the project to be completed, which has already been unduly delayed. Therefore, complainant is entitled to withdraw from the project and seek *inter alia*



refund solely on account of the failure on the part of the promoter for non-completion of the project in time.

- I. Learned counsel for complainant referred and relied upon the following judgments and orders in support of the above contentions: -

MahaRERA Complaint No. CC006000000079131 between Sanjay M. Chiplunkar vs. M/s. Sanjeevani Vyapar LLP dated 13-03-2020. Mrs. Jyoti K. Narang and Anr. Vs. CCI Projects Pvt. Ltd. decided by this Tribunal on 24-11-2020. Mantri Dwellings Pvt. Ltd. Vs. Rajesh Saxena and Anr. Along with Mantri Dwellings Pvt. Ltd. Vs. Ravendra Saxena and Anr. decided by this Tribunal on 11-07-2019. M/s. ITMC Developer Pvt. Ltd. Vs. Mrs. Radhika Arakkal and Anr. decided by this Tribunal on 04-11-2020.

8. 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 complied with the provisions of Sections 11(3) and 19 (2) of the Act?	In the negative
2.	Whether Promoter has violated Section 13 of the Act as claimed by complainant?	In the affirmative
3.	Whether Promoter is liable to refund the amounts paid to Allottee under the provisions of the Act?	In the affirmative
4.	Whether Promoter is entitled to forfeit 12% of the sale price as claimed under the provisions of the Act?	In the negative.
5.	Whether impugned order is sustainable in law?	As per order.
6.	What order?	As per order.



R E A S O N S

Point. 1, Status of compliance of Section 11(3) and 19 (2):

9. It is not in dispute that Complainant has booked the subject flat in the promoter's said project on 23rd May 2015 by filling a booking application form. According to complainant, possession of the flat was promised to be delivered before December 2019. However, learned counsel for Promoter submits that the **booking form does not provide any date of project completion** nor handing over of the possession of the said flat and hence, possession date as disclosed on the website of MahaRERA should be taken as the reference point.
10. Whereas Section 11 (3) states 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."*
11. There are similar provisions casting general liabilities on Promoter even in the erstwhile MOFA Act of 1963 in its Section 3(2) (f).
12. Additionally, The Hon'ble Bombay High Court, in the case of *Neelkamal Realtors Suburban Pvt. Ltd. & Anr. Vs. Union of India & Ors. (supra)* in para 119, 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 the market information and is structurally at advantageous position in as much as that of the information about the said project updates are concerned. Therefore, in consonance with the provisions 11 (3) of the Act, Promoter is expected to provide unambiguous information about project completion date/ possession delivery date at the time of booking.
- 14.** Above provisions under the Act prescribe that information about possession delivery date including stage wise time schedule of completion of the project are essential prerequisites to be incorporated in all relevant communications including in the application form and in the allotment letter/booking form at the time of booking. Despite such statutory mandatory requirements, this essential information is missing from the application form in the present case. It is despite the fact that Promoter is the repository of information, is expected to be fully conversant with such information about 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 booking form as one sided and imbalanced leading to giving rise of such disputes. Consequently, it has adversely affected the transparency of the transactions, 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, 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 services.

- 16.** By not providing this vital information relating to possession delivery cum project completion date in the booking form including its stage-wise time schedule of completion of the project etc. demonstrate *ex facie* abject failure on the part of Promoter to comply with the statutory and mandatory obligations under the provisions of Sections 11 (3) and 19 (2) of the Act and we answer point 1 in the negative accordingly.

Point. 2: alleged violation of Section 13:

- 17.** According to respondent/allottee, she has paid cumulative amounts of Rs.47,46,785/- towards part consideration. The cumulative payments are more than 20% of the total considerations of the subject flat.
- 18.** These cumulative payments are more than the thresholds of 10%, as stipulated in Section 13 of the Act and that of the corresponding provisions in MOFA of 20%. In terms of the Section 13 (abstract being reproduced below for ready reference), responsibility to execute agreement for sale lies on Promoters and to not to accept payment more than these prescribed thresholds without having first executed agreement for sale.
- 19.** "Section 13. *No deposit or advance to be taken by promoter without first entering into agreement for sale. — (1) A promoter shall not accept a sum more than ten per cent. of the cost of the apartment, plot, or building as the case may be, as an advance payment or an application fee, from a person without first entering into a written agreement for sale with such person and register the said agreement for sale, under any law for the time being in force.*"

20. Therefore, raising demands and acceptance of payments by promoter beyond these prescribed thresholds statutorily stipulated in Section 13 of the Act/ corresponding provision of MOFA, without first executing agreement is specifically prohibited under Section 13 of the Act/MOFA and is evidently a breach of the provisions of these provisions. Accordingly, we answer point 2 in the affirmative.

21. Points. 3: Whether Promoter is liable to refund.

It is not in dispute that the booking of the subject flat took place on 23rd May 2015 and even after the passage of more than 8 years, yet possession of the subject flat has not been delivered. Accordingly, Section 18 will be attracted, whereby, certain rights have accrued to complainant and complainant is entitled for refund of the paid amounts from promoter together with interest at prescribed rates. Accordingly, learned Member, MahaRERA has passed the impugned order dated 16th October 2020 directing promoter *inter alia* to refund the paid amount to complainant together with interest at prescribed rate.

22. However, the learned counsel for Promoter further submits that the basis of the impugned order being Section 18 (1) of the Act, is not tenable in facts and law. It is because the project has been delayed on account of factors beyond the control of promoter, more particularly because of MCGM and Naval authority in providing necessary approvals. Hence, the project got delayed due to non-approval of the commencement certificate and project works came to a complete stand still due to COVID-19 pandemics and consequent lockdowns imposed by the government.

23. According to learned counsel for complainant, request for refund has been filed only after several deficiencies/non-performances and upon violations on the part of the promoter as well as due to delay in



completion of the project. Delivery of possession of the subject flat has been facing severe uncertainties due to non-receipt of NOC from Naval authority. The project completion was also clouded and fraught with uncertainties squarely on account of non-receipt of NOC from the Naval Authority and consequent non-issuance of the commencement certificate by MCGM. All these are on account of deficiencies on the part of the promoter. In that background, complainant had no other option but to withdraw from the project and therefore, withdrawal from the project by complainant was not *Suo Moto*, as determined here in above. Accordingly, we are of the considered view that complaint has been filed after coming to know that there were huge uncertainties leading to undue delay in delivery of the possession, which is more than reasonable period of 3 years as prescribed by The Hon'ble Supreme Court in the case of **FORTUNE INFRASTRUCTURE & ANR VERSUS TREVOR D'LIMA & ORS (2018) 5 SCC 442**.

24. Moreover, 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**. On perusal of Section 18, it can be 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 by agreed time and allottees intend to withdraw from the project then, Promoter shall refund the paid amounts together with interest to Allottee at such rate as may be prescribed.
25. 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 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 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.*"

26. 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 despite the factors propounded by the learned counsel for Promoter herein that the project got delayed due to factors beyond their control such as non-receipt of NOC from Naval Authority and consequent denial of sanctions by MCGM etc. Accordingly, Complainant is entitled for her rights under Section 18 of the Act for complete refund of paid amounts, which has already accrued in her favour due to delay in project completion beyond agreed timelines irrespective of such factors beyond the control of promoter. Moreover, such delays are not attributable to allottee complainant. Accordingly, we answer point no. 3 in the affirmative.

27. Point. 4, 5 and 6: forfeiture.

28. These points are interlinked. Hence, have been taken together. Learned counsel for promoter contended that Complainant has withdrawn from the project Suo Moto on her own. However, these contentions of the promoter cannot be accepted on account of the followings; -

- a. Promoter himself submitted that project got delayed due to non-receipt of NOC from Naval Authority leading to issue of the commencement certificate. This is not on account of the complainant.
- b. Moreover, Promoter cannot deny the accrued statutory rights to seek complete refund to Allottee on the very same ground for which, Promoter himself is responsible for, more particularly because the rights so accrued to allottees under Section 18 are unconditional, unqualified and absolute.
- c. Additionally, 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."*

29. Therefore, the withdrawal from the project was not Suo Moto by complainant on her own. Rather, it was on account of the several deficiencies and non-performances on the part of the promoter, which

has compelled complainant to opt for withdrawal and seek *inter alia* refund.

30. Learned counsel for Promoter argued that promoter is entitled to forfeit 5% of the total consideration of the flat by placing reliance on Para 15/17 of the judgement of The Hon'ble Supreme Court in the case of **Satish Batra versus Sudhir Rawal [(2013) 1 SCC 345]**. It is apposite to reproduce relevant abstract of the judgement as here under; -

"15/17. Law is, therefore, clear that to justify the forfeiture of advance money being part of 'earnest money' the **terms of the contract should be clear and explicit**. Earnest money is paid or given at the time when the contract is entered into and, **as a pledge for its due performance by the depositor to be forfeited in case of non-performance**, by the depositor. There can be **converse situation also** that **if the seller fails to perform** the contract the purchaser **can also get the double the amount**, if it is so stipulated. It is also the law that part payment of purchase price **cannot be forfeited unless** it is a **guarantee for the due performance of the contract**. In other words, if the payment is made **only towards part payment of consideration and not intended as earnest money then the forfeiture clause will not apply.**"

31. The moot question, thus, for our consideration is whether the promoter is entitled to forfeit $5 + 7 = 12$ % of the total consideration resulting in forfeiture of the paid amounts made by the complainant.
32. Meticulous perusal of the aforesaid relevant abstract of the judgement clearly shows the pre-existence of clear and explicit agreed terms of contract with unequivocal pledge for the concerned parties for their corresponding explicit performance is essential prerequisite. Whereas, in the present case, as we have seen above, agreement for sale between the parties has not been executed. Moreover, learned counsel for promoter has claimed for the said forfeiture of the paid amounts based

on the solitary clause 9 written in the booking application form stating as under; -

"Clause 9 *"In the event if the Application if withdrawn / cancelled of the said apartment, the developer shall be entitled to retain cancellation charges, such amounts as stated below:*

- i. *A minimum amount of 5% of the sale price or all such losses and damages suffered in the sale of the said apartment to the new Applicant whichever is higher.*
- ii. *In case of any brokerage being paid with respect to the Application of the said apartment, a minimum of 7% of the sale price, or such losses and damages suffered in the sale of the said apartment to the new Applicant whichever is higher shall be retained by us."*

Promoter has claimed forfeiture of 5% and 7% of the sales price for forfeiture, citing the aforesaid judgement of the Hon'ble of the Supreme Court in the case of *Satish Batra vs. Sudhir Rawal (supra)* without placing any details on record about the losses and damages actually suffered on this count in this sale and without any information with respect to the exact amount paid to broker along with specific details in terms of the date of payments etc., and by whom.

- 33.** Furthermore, the said judgement also reveals that the existence of explicit and clear agreed terms duly defining the purpose and performance by the respective parties are prerequisite and **only in case of their non-performance of their agreed pledges, forfeiture clause can be invoked.** Whereas in the instant case, the corresponding specific terms of performance are not mentioned in the booking form. The existence of such defined terms and conditions are prerequisite to make parties to understand their consequences well in advance failing which, claim of forfeiture will not arise. Hence, without any prior explicit



information/ knowledge/ agreed terms of both the parties in the booking form, such claims for forfeiture are legally not tenable.

- 34.** Details of the pledge as stipulated in the said judgment, are also missing in the instant case. Additionally, it appears that there is no non-performance and no deficiencies on the part of the complainant. Whereas as determined herein above, there are a series of non-compliances of statutory mandatory requirements on the part of the Promoter itself under the provisions of the Act. Therefore, a converse situation exists in the present case as laid down in this said judgment itself of the Hon'ble Supreme Court, which has also been laid down that "*There can be **converse situation also** that **if the seller fails to perform** the contract the purchaser **can also get the double the amount**, if it is so stipulated.*"

Accordingly, **a converse situation exists in the present case**, where the promoter itself has failed to perform its statutory and mandatory liabilities as determined here in above and not the complainant.

- 35.** In the Judgment of the Hon'ble Supreme Court of India in the case of *M/s. Newtech Promoters and Developers Pvt. Ltd. versus State of U.P & Ors (super).*, it has been observed with regard to some of the relevant statement of objection regions as mentioned in para 11 as that "*11. Some of the relevant Statement of Objects and Reasons are extracted as under: "*

4...(f) the functions of the Authority shall, inter alia, include –

(iii) to ensure compliance of the obligations cast upon the promoters, the allottees and the real estate agents under the proposed legislation.

- 36.** It is also important to note that the project has been registered under the Real Estate (Regulation & Development) Act, 2016, which provides several welfare provisions to protect interests of consumers including for greater accountability towards consumers to inject greater efficiency, transparency and accountability as contemplated in the statement of Objects and Reasons of the Act. Regulation 39 of Maharashtra Real Estate

Regulatory Authority (General) Regulation, 2017 further stipulates about 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 appropriate Orders, which are necessary to meet the ends of justice.

- 37.** However, there is no express provision in the Act, which shows that promoter is entitled to forfeit earnest amount or any other amount of certain quantum in the event of cancellation of booking on the part of either party. The Act is silent on the point of permissible quantum of forfeiture, if parties, Suo-motu or otherwise, for whatsoever reason to cancel booking.
- 38.** In view of the above, Promoter has not provided cogent rationale behind the forfeiture claims for $5 + 7 = 12\%$ of the total consideration and in the absence of such rationale, the possibility of undue and unjust income to promoter cannot be ruled out. Moreover, it is also important to note that Promoter continues to use this amount paid by complainant for its own commercial use even now. Use of the amount paid by the promoter for

its own commercial gains by using this fund during this period has led to potential interest losses to complainant on this amount, which cannot be ignored.

39. It is distressing to note that the booking has been done by the complainant on 23rd May 2015 and even after the lapse of around 8 years, promoter has failed to deliver possession of the subject flat. Moreover, it is the developer promoter, who has committed a series of non-compliances and violations of the provisions of the Act of 2016.

- a. Moreover, the reliefs sought by complainant herein are nothing but refund of her own paid amounts together with interest at prescribed rate due to the fault and deficiency in service on the part of the promoter as determined herein above *inter alia* delay in delivery of possession. Delay is squarely on account of the promoter, and he is not at all attributable to complainant allottee.
- b. promoter itself being the party in breach cannot seek advantage of its own faults and claim for forfeiture out of the amount duly paid to promoter by allottee.
- c. Interest on the paid amount claimed by complainant is not a penalty to promoter in view of the judgement of the Hon'ble Bombay High Court in the case of Neelkamal Realtors Suburban Pvt. Ltd. (supra).

40. After considering overall circumstances and context of the case, diligent analysis of the material on record and more particularly in view of several deficiencies and non-compliances on the part of promoter, we are of the considered view that the promoter is not entitled for any forfeiture of any amount at all and complainant is entitled to receive the entire paid amounts together with interest from the date of payments including the amounts paid for the statutory duties and taxes from the promoter without any deductions whatsoever.



41. Upon consideration of the above findings, we are of the view that appeal is devoid of merits, lacks substance, deserves to be dismissed and MahaRERA has correctly concluded in the impugned order dated 16th October 2020 and this is sustainable in law. Therefore, no interference in the impugned order is called for in this appeal. We answer point 4, 5, and 6 accordingly and proceed to pass the order as follows; -

O R D E R

- a. The Appeal No. AT0060000000 52914 is dismissed.
- b. The Appellant shall pay costs of Rs. 25,000/- to Complainant within 30 days from the date of uploading of this order and shall bear its own costs.
- c. In view of the disposal of the appeal as above, pending Misc. Application No. 35 of 2022 will not survive. Hence, stands disposed of.
- d. 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)


(SHRIRAM R. JAGTAP, J.)