

Nalawade

Oct 29

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

**MISC. APPLICATION NO. 585 OF 2023 (Prod. Of Docs.)**

**IN**

**APPEAL NO. AT006000000053309**

**M/s. Vihang Infrastructure Pvt. Ltd.**

12<sup>th</sup> Floor, Dev Corpora, Opp. Cadbury Junction  
Eastern express Highway,  
Khopat, Thane – 400 601.

... *Appellant*

***versus***

**Mrs. Rupali Kartik Giri**

D-903, Everest Garden, Pant Nagar,  
Ghatkopar (East), Mumbai – 400 075.  
Email: [girikartik@yahoo.com](mailto:girikartik@yahoo.com)

... *Respondent*

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*Mr. Harshad Bhadbhade a/w. Mr. Anwar Landge, Advocate for Appellant.  
Mrs. Rupali Giri, Respondent-in-person.*

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

**& DR. K. SHIVAJI, MEMBER (A)**

**DATE : 30<sup>th</sup> OCTOBER 2023**

(THROUGH VIDEO CONFERENCE)

**JUDGEMENT**

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

Captioned appeal has been preferred under The Maharashtra Real Estate (Regulation and Development) Act, 2016 (in short "The Act") by challenging the order dated 15<sup>th</sup> April 2021 passed by learned Member, Maharashtra Real Estate Regulatory Authority, (MahaRERA), wherein Appellant promoter has been directed *inter alia*

to handover possession of subject flats to Respondent by obtaining Occupancy Certificate and to pay interest to Respondent for the delayed possession from 01<sup>st</sup> January 2018 for every month till the actual date of possession on the actual amount paid by Respondent at prescribed rate in complaint No. CC 0060000000 195709.

2. Appellant is real estate developer, who is constructing a duly registered real estate project namely "Vihang Valley Phase – 3" residential complex, located at Ovale, Ghodbunder Road, Thane (west), (in short said project). Respondent is purchaser of two flats in Appellant's said project and is complainant before MahaRERA. For convenience, appellant and respondent will be addressed hereinafter as promoter and complainant respectively in their original status before MahaRERA.

**3. Factual matrix:**

- a. Complainant booked two adjoining flats nos. 1101 and 1102 on 31<sup>st</sup> December 2011 in promoter's said project for total consideration of ₹ 38, 96,500 for each flat excluding other charges and registered Agreements for Sale (AFS) were also signed on 31<sup>st</sup> December 2014 (registered on 7<sup>th</sup> February 2015). According to clause no. 14 of the agreement for sale, appellant promoter has agreed to handover possession of the subject flats by 31<sup>st</sup> December 2017 subject to certain reasonable extension and provided promoter has received full purchase price as per the payment schedule as set-out in the agreements. Respondent has cumulatively paid, ₹ 75,88,140/- excluding taxes, stamp duty and registration fees against both the flats after taking loan for which, respondent complainant has been paying EMI to Bank.
- b. On account of alleged delay in delivery of possession within the agreed timeline, captioned complaint came to be filed seeking



various reliefs *inter alia* possession of the flats besides compensation for delay in terms of appropriate interest on the total paid amounts from December 2017 till the date of actual possession of the flat.

- c. Despite service of notice, respondents failed to appear in complaint proceeding before MahaRERA and did not file reply therein. Accordingly, impugned order dated 15<sup>th</sup> April 2021 came to be passed by learned Member, MahaRERA, wherein appellant promoter was directed to handover possession of the said subject flats together with interest at prescribed rate as delineated herein above.
  - d. Aggrieved by this order, appellant promoter preferred the instant appeal seeking various reliefs *inter alia* to quash and set aside the impugned order dated 15<sup>th</sup> April 2021 and to modify the impugned order about the direction to promoter to pay interest at prescribed rate from 01<sup>st</sup> May 2020 till the actual date of possession instead of the existing order for the interest for delayed possession from 01<sup>st</sup> January 2018 till actual date of possession.
4. Heard Mr. Harshad Bhadbhade a/w. Mr. Anwar Landge, learned counsel for promoter and Mrs. Rupali K. Giri, respondent complainant-in-person *in extenso*.
5. Learned counsel for promoter sought to allow the present appeal by submitting that; -
- a. Phase -3 of the said project, where the subject flats are located, has received commencement certificate on 31<sup>st</sup> October 2013, wherein the condition no.14 of the commencement certificate stipulates that non-agricultural (N.A) order is mandatory before issuance of the plinth certificate. Therefore, plinth certificate will not be issued without non-agricultural order. Accordingly, promoter applied for the N.A order on 21<sup>st</sup> November 2013 before Collector, Thane. As a part



of the process, public notice was published in local newspapers by Collector, Thane. There were certain court litigations pending in respect of some of the lands on which the said project is being constructed. Some of these litigants raised objections before the Collector, Thane. Pending application for N. A., certain amendments came into force in the Maharashtra Land Revenue Code, wherein Planning Authority was authorized to ascertain from concerned Revenue Authority for the class of land, its occupancy, and encumbrances, if any, before granting a development permission. However, after commencement of the above-mentioned amendment dated 22<sup>nd</sup> August 2014, Collector again started fresh enquiries for all pending applications, causing wastage of earlier process time. In addition, there was certain initial confusion in the implementation of these amendments as well. The said delay is due to above situations, which were beyond the control of the appellant promoter.

- b. In view of the said amendment, and at the instance of the Collector, Thane, an application was submitted by the Town Planning department on 15<sup>th</sup> June 2015 to Collector, Thane. The Collector again called a detailed report from Tahsildar. Tahsildar sent a report on 17<sup>th</sup> July 2015 to Collector on the basis of which, Collector Thane issued an order dated 9<sup>th</sup> November 2015 about classification of the project land. In the process, it took six months from the letter dated 15<sup>th</sup> June 2015 of the Town Planning department up to the Collector order of the classification of land dated 9<sup>th</sup> November 2015. Besides this, the earlier period of 18 months has been completely wasted in the entire process due to lack of understanding of the new process by the staff of Collector, Thane. Above said situations were beyond the control of appellant promoter and promoter is not at fault for the said delay, because promoter has applied for N.A order within a





- month immediately on 21<sup>st</sup> November 2013 itself after obtaining the commencement certificate on 30<sup>th</sup> October 2013. The entire process was beyond the control of the promoter because of *inter alia* lack of awareness among the staff of Collector, about the new procedure.
- c. Promoter has also issued letter dated 03<sup>rd</sup> October 2015 to all flat purchasers explaining the new process of the Government of Maharashtra.
- d. Based on the classification of land vide letter dated 9<sup>th</sup> November 2015 of the Collector, Thane, Town Planning department issued plinth certificate on 29<sup>th</sup> March 2016. Thereafter, certain amendments came into force again on 05<sup>th</sup> January 2017 by the State Government in Section 42 (A) and (B) of The Maharashtra Land Revenue Code, 1966.
- e. Further delay in construction has happened due to demonetization declared by Government i.e., imposition of "*Note Bandi*" by Government in 2016, Covid-19 and its associated lockdowns causing labour and material shortage.
- f. Promoter could not file reply before MahaRERA in March 2021 because, the concerned staff as well as advocate suffered from Covid-19 infection, which led to complete rest and isolation. Even the office of the promoter was closed during the crucial time. In view of these difficulties, promoter could not appear for the Webex meeting before MahaRERA. The Hon'ble Supreme Court has extended the limitation period in such cases to overcome the difficulties on account of Covid-19 pandemic.
- g. 28 months of delay have been wasted in the internal departmental procedure, amendment in Section 42(A) of MLRC code, 1966, which were beyond the control of promoter. In view of above, the period of 28 months of delay was in obtaining the N.A order/ order of



classification of land, from the application dated 21<sup>st</sup> November 2013 till the plinth certificate received on 29<sup>th</sup> April 2016, which were beyond the control of promoter. Only after the receipt of the plinth certificate, promoter started construction of the said building without interruption and completed the entire project up to 11<sup>th</sup> February 2022 and obtained occupancy certificate. As such, promoter has not raised further demand from flat purchasers in respect of payment till 29<sup>th</sup> March 2016. After receiving the plinth certificate, promoter quickly finished building of four towers.

- h. Possession delivery date as per the agreement is December 2017. However, considering the factual position, causing delay of 2 years and 4 months (28 months) for which, appellant is not responsible. Therefore, it is necessary to adjust and compensate for these 28 months by adding and extending the period from date of possession from 31<sup>st</sup> December 2017 to 30<sup>th</sup> April 2020. Accordingly, the impugned order dated 15<sup>th</sup> April 2021 passed by MahaRERA for awarding interest payment be modified for payment of interest from 1<sup>st</sup> May 2020 till the actual date of possession.

**6. Per Contra complainant submits that -**

- a. Promoter itself has submitted that commencement certificate was received on 31<sup>st</sup> October 2013 and there was court litigation pending with respect to project land. However, promoter opened the booking in 2011 itself without having the valid commencement certificate that too on disputed land.
- b. Complainant did not receive any communication conveying project updates by promoter for the said project after booking in 2011 despite several attempts to reach out promoter on the given phone numbers or even after personal visits given to their offices until



December 2014, when the complainant received communication for payment for stamp duty and registration fees for execution of registered agreement for sale. Agreement for sale was registered on 07<sup>th</sup> February 2015 (signed on 31<sup>st</sup> December 2014).

- c. The complainant was helpless and had no option but to sign the agreement for sale after a delay of 5 years from the date of booking of flats. Promoter was obligated to deliver possession by December 2017. Therefore, promoter is seeking advantage of its own wrong despite its own failure to deliver possession as per the agreement.
- d. The communication regarding construction delay was received from promoter on 05<sup>th</sup> July 2015, wherein, it was mentioned that "project is approved, and plinth work is completed. N.O.C will be received in two to three months, rest assured that project will be completed at the earliest."
- e. Project was not complete until the time respondent allottee filed the complaint with MahaRERA in January 2021, even though the agreed possession date was December 2017. Even today, amenities mentioned in the agreement are not constructed.
- f. Promoter is taking advantage of its own wrong by criticizing the order of MahaRERA.
- g. Complainant was offered possession by communication dated 28<sup>th</sup> July 2022. However, on inspection, the conditions of flats are not good even after waiting for more than 5 years. The club house is in disastrous condition and amenities were not in existence.
- h. Promoter was very much aware of all disputes relating to the project land even then, promised for possession date as of December 2017. Whereas promoter has utterly failed to deliver possession within the agreed time.





- i. Respondent has faced lot of mental stress and financial losses on account of the delay, has been paid pre-EMI of ₹ 24 lakhs, home insurance of ₹ 3 lakhs and has been currently staying in rented premises and paying extravagant EMI's because of the failure on the part of the promoter to deliver possession in agreed timeline.
- j. Complainant has referred the judgment of The Hon'ble Supreme Court in the case of *Kolkata West International City Vs. Devasis Rudra IN civil appeal no. 3182/19 on 25-03-2019* and para 259 of the judgment of The Hon'ble Bombay High Court in the case of *Neelkamal Realtors Suburban Pvt. Ltd and Ors.* and urged that promoter is not entitled for any relief in the present appeal. Hence, the appeal deserves to be dismissed with heavy compensatory 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 is entitled for adjustment of 28 months of its delay interest payment liability by limiting its interest payment for the delay in delivery of possession to complainant from 01 <sup>st</sup> May 2020 till the actual delivery of possession by modifying the impugned order as prayed for by promoter in the appeal?	In the negative.
2.	Whether impugned order calls for interference in this appeal?	In the negative.

## REASONS

**Point. 1 and 2: Reliefs sought.** These points are interrelated, hence have been considered together as under.

8. It is not in dispute that complainant has booked two flats in the respondent's said project on 31<sup>st</sup> December 2011 and agreement for sales have also been executed and registered. The project under reference is duly registered before MahaRERA under the Act of 2016. According to the agreements for sale, promoter has agreed to deliver possession of the subject flats on or before 31<sup>st</sup> December 2017. Therefore, under the provisions of the Act 2016, appellant and respondent are promoter and allottee respectively.
9. **Reliefs status under Section 18:** Admittedly, promoter has agreed to deliver possession of the subject flats by 31<sup>st</sup> December 2017. But promoter has failed to deliver the possession within the agreed timeline. In view of the delay in delivery of the possession of the subject flats, Section 18 of the Act will be attracted.
10. 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, complainant 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.
11. Accordingly, MahaRERA has directed the Appellant promoter in the impugned order, *inter alia* to handover possession of flat to Respondent by obtaining Occupancy Certificate and to pay interest to Respondent for

the delayed possession from 01<sup>st</sup> January 2018 for every month till the actual date of possession on the amounts paid by Respondent at prescribed rate.

**12.** However, learned counsel for promoter further contended that delay of 28 months in project completion was due to delay in obtaining various permissions for the project, namely permissions for the non-agricultural land permission of the project land, on account of unexpected amendment in the Maharashtra land Revenue Code and consequent change in the procedure for granting required permissions from the town planning department for plinth certificate, including due to certain litigations involved in the project land etc... According to promoter, these factors are beyond the control of the promoter, not attributable to promoter. Therefore, promoter cannot be held liable for this delay of 28 months. Thus, promoter is seeking various reliefs *inter alia* to quash and set aside the impugned order dated 15<sup>th</sup> April 2021 and to modify the impugned order to pay interest at prescribed rate from 01<sup>st</sup> May 2020 till the actual date of possession instead of the existing order for payment of interest interest for delayed possession from 01<sup>st</sup> January 2018 till actual date of possession.

**13.** However, these contentions of the promoter are legally not tenable on account of the followings; -

- a. The Hon'ble Supreme Court in para nos. 25 and 78 of its judgment in the case of **M/s. Newtech Promoters and Developers Pvt. Ltd vs. State of Uttar Pradesh & Ors. [2021 SCC Online 1044] dated 11<sup>th</sup> 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.

- b. "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."*

*In para 78 of this Judgment- ".....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...."*

- c. 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.
- d. These delay in project completion and consequent delay in delivery of possession of the subject flats are not attributable to allottee. Delivery of timely possession is the contractual commitments given by promoter

under the agreements for sale. Therefore, promoter continues to be legally liable to pay interest at prescribed rate for the period of delay in delivery of the procession.

- e. 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....*".
- f. 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) and 19(2) of the Act, Promoter is liable to provide unambiguous and expressed/ definite information about project completion date / possession delivery date at the time of booking.
- g. 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 protect consumers as contemplated in the statement of Objects and Reasons of the Act. Whereas it is distressing to note that, there is undue and inordinate delay in delivery of the possession of the subject flats despite payment of substantial amounts by the complainant after taking loan, for which complainant has stated that she has continued to pay pre-EMI. As a result of this, complainant continues to be deprived of it's a legitimate entitlement of getting the possession of the flats in time.





**h. Party in breach, cannot take advantage of its own wrong:**

However, it is pertinent to note that it is the promoter, who is responsible for timely delivery of possession of the booked flat, but has failed by not delivering possession of the subject flats within the agreed timelines as per the agreements. Therefore, promoter has violated the statutory provisions under Sections 18 of the Act on this count.

- i. The said delay, being attributable to Promoter itself, 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 delay, especially because the rights so accrued to allottees under Section 18 are unconditional, unqualified and absolute. Promoter is seeking adjustment/ extension/ compensation of this very 28 months of delay on account of its own deficiencies/ non-performance and despite being party in breach. This is legally not permissible because, he himself cannot take advantage of its own wrong 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.*

- j. 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.*

- k. 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 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.

- 14.** In view of the foregoing and upon considerations of findings herein above and after considering overall facts, circumstances and context of the case, diligent analysis of the material on record and more particularly in view of deficiencies as well as the non-compliances on the part of promoter

including the contractual and statutory breaches on the part of the promoter under Section 18 of the Act, impugned order dated 15<sup>th</sup> April 2021 passed by MahaRERA does not call for interference in this appeal as determined herein above. In this premises, complainant continues to be entitled for interest at prescribed rate for the complete delay in delivery of the possession of the subject flat from 1<sup>st</sup> January 2018 without any adjustment as prayed for by promoter. Therefore, the contentions of the promoter to adjust and extend the date by 28 months for payment of interest for delay to complainant at prescribed rate for the payment of this interest from 1<sup>st</sup> May 2020 instead of from 1<sup>st</sup> January 2018 onward is legally not admissible. Thus, captioned appeal is devoid of merits, lack substance and the impugned order passed by MahaRERA does not call for interference in this appeal. Accordingly, we answer points 1 & 2 as above and proceed to pass order as follows; -

### **ORDER**

- a.** The captioned Appeal No. AT0060000000 53309 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. 585 of 2023 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)

  
(S. R. JAGTAP, J.)