

Sarnobat

MAHARASHTRA REAL ESTATE APPELLATE TRIBUNAL

APPEAL NO.00600000010841

1. **Mrs. Jyoti K. Narang,**
2. **Mr. Kishore L. Narang,**
Residing at 301, Coste Belle,
687, Perry X road, Bandra West,
Mumbai 400 050. ... Appellants/Allottees.

Vs.

CCI Projects Pvt. Ltd.,
Rivali Park, CCI Compound,
Express Highway, Borivali East,
Mumbai 400 066. ... Respondent/Promoter.

Advocate Dr. Sanjay Chaturvedi, for the Appellant/s.

Advocate Mr. Abir Patel, for the Respondent/s.

CORAM : SUMANT M. KOLHE,(Member J.)

DATE : MARCH 20, 2019.

ORAL JUDGMENT :

Challenge to impugned order

Being dis-satisfied with the impugned order dated 17.09.2018 passed by Ld. Chairman MahaRERA in Complaint No. 55491, this Appeal has been filed.

Facts not in dispute

2. Appellants are the Allottees. Respondent is the promoter. Project namely Winter Green of Rivali Park situated at CCI Compound, Western Express Highway, Borivali (East), Mumbai is launched by the promoter. Allottees have booked flat No. 34-B in Wing 'A' in building "Winter Green" of "Rivali Park" Project. Flat admeasures approximately 1298 sq. ft. Promoter issued allotment letter on 19.11.2012 in favour of Allottees. Agreed price

of flat is Rs.1,48,73,782/- . Promoter agreed to hand over the possession of the flat within 56 months from the date of commencement of construction work i.e. from 30.06.2011. Possession was to be handed over on or before February, 2016 as per clause mentioned in allotment letter. Allottees have paid Rs.1,16,31,498/- (One Crore Sixteen Lakhs Thirty one Thousand Four hundred ninety eight) from time to time as per schedule of the payment agreed between the parties. Almost 78% amount of the price of the flat is paid by the Allottees. Project was delayed. In the month of June 2017 promoter revised the possession date up to March, 2018. Thereafter, in the month of August, 2017 again the promoter further extended the date of possession up to December, 2018. While making the registration of this incomplete project with MahaRERA Authority on the application of RER Act on 01.05.2017, promoter had shown the date of delivery of possession as 31.12.2019. Project is delayed for almost three years ten months. Promote has failed to deliver the possession and failed to complete the project as per agreed terms. Promoter has also failed to comply with the commitment regarding facilities and amenities as mentioned in the allotment letter. Promoter committed breach of Section 12 of RER Act 2016. As per clause 19 of allotment letter, Allottees asked for the refund along with interest from the promoter by filing the complaint No.55491 before MahaRERA Authority.

Defence of Promoter

3. It was a defence of the promoter that there were some reasons beyond his control due to which delay was resulted in completion of project. It is also the defence of promoter that he informed Allottees to execute agreement for sale from time to time

but the Allottees failed to do so.

Decision of Complaint by MahaRERA Authority

4. After hearing both the sides and after considering the documents on record, the Ld. Chairman of MahaRERA Authority passed impugned order dated 17.09.2018. As para 3 of the said impugned order the Ld. Chairman of MahaRERA Authority directed that if the Allottees wish to withdraw from the project, the Respondent shall refund the amount as per terms and conditions of the booking letter. In para 4 of the impugned order the Ld. Chairmain of MahaRERA Authority alternatively directed that if Allottees intend to continue in the said project the parties were directed to execute the registered agreement for sale as per Section 13 of RERA Act 2016 and the Rules and Regulations made there under within 30 days from the date of this order and thereafter, promoter was directed to hand over the possession of the flat along with occupation certificate to the Allottees before 31st December, 2019.

W/S

Determination of Points

5. Feeling aggrieved by the said order this Appeal has been filed by the Allottees. Heard Ld. Advocate for the Allottees. Read the notes of written argument filed by Allottees. Heard Ld. advocate for the promoter. Read the notes of argument filed by promote.

The following points arise for my determination;

POINTS

1. Whether the impugned order is just, proper and legal?
2. What order?

My findings on the above points for the reasons stated below are as under :-

1. Negative.
2. As per final order.

REASONS :

POINT NO. 1 AND 2 :

Nature of Impugned order

6. Allottees had filed complaint No. 55491 against the promoter for return of the amount of Rs.1,16,31,498/- along with interest at the rate of 18% per annum from the date of payment of the said amount till the date of refund as per Section 18(1) of RER Act, 2016. If we perused the impugned order, Ld. Chairman of MahaRERA Authority appears to have given liberty to both the parties to adopt one of the two options and accordingly to take further action after adopting such one of the options out of two options. The first option is given to Allottees that if they wish to withdraw from project they are entitled to get the refund of the amount as per terms and conditions of booking letter and as per second option if Allottees intend to continue with project parties were directed to execute registered agreement for sale within 30 days from the date of impugned order and thereafter, promoter was further directed to hand over the possession of the apartment along with occupation certificate before 31.12.2019. It is true that Allottees have not prayed for giving direction of execution of agreement for sale. The complaint filed by the Allottees itself is very clear on the point that Allottees wish to withdraw from the project and they have asked for refund for the amount along with interest from the promoter. I reiterate that Ld. Chairman of

MahaRERA Authority had given opportunity to both the sides to adopt the proper course of action which may help both the sides to settle the matter. At the same time, it is also equally true that neither the allottees can ask for execution of impugned order for refund along with interest nor promoter can ask for execution of agreement for sale as per agreed terms in view of non-executable nature of the impugned order.

Objections to Appeal raised by Respondent/Promoter

7. The Ld. advocate for the promoter raised some objections to grant the relief of refund of amount along with interest to the Allottees as prayed in this appeal. It is the first objection of the promoter that Section 18 of RER Act, 2016 is not attracted to the present matter as there is no agreement for sale between the parties. It is strongly submitted that unless there is an agreement for sale, question of completion of project and question of handing over the possession of the project as per the terms and conditions of an agreement and on or before due date does not arise and Section 18 of RER Act, 2016 will not attract to this case. Reliance is placed on case law reported in **2014(1) Supreme Court Cases (civil 734) Hansa Gandhi Vs. Deep Shankar** wherein the Hon'ble Apex Court has observed that the letter of intent executed between the parties is not an agreement for sale and no right of specific performance accrued on the basis of letter of intent.

Nature of transaction in Allotment Letter

8. I would like to refer the copy of allotment letter filed on record. If we carefully perused the copy of allotment letter it is quite evident that promoter agreed to sale and allottees agreed to purchase the flat in dispute for agreed price as mentioned in the

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said allotment letter. Allotment letter consists of 25 different clauses consisting of different terms and conditions along with annexure I showing the details of payment schedule of the said flat and also annexure II and III regarding map, amenities provided. Though, this letter is styled as allotment letter executed on 19.11.2012 it is as good as agreement between promoter and allottees to sale the flat in the project launched by promoter for the price mentioned in letter and in the terms and conditions which are mentioned in the different clauses in the allotment letter. After all intention of the parties is important to gather the nature of the transaction and not the nomenclature of the documents. It is pertinent to note that almost 78% amount of agreed price is paid by the Allottees and also received by the promoter in respect of the transaction which is evident from the allotment letter. The definition of an agreement as given under Section 2 (c) of RERA Act, 2016 is that, it is an agreement entered into between promoter and allottee. Considering the contents of allotment letter regarding details of sale and purchase of the flat between allottees and promoter along with condition of stipulated period of handing over possession and the manner of payment of price as per the schedule it can be easily said that promoter agreed to sale the said flat to the allottees and executed the transaction of sale which is evident from the contents of an allotment letter.

Ratio of Case Law not attracted to this Case

9. So, the ratio of above mentioned case law is not attracted to the present matter since, the ratio arises out of different facts and circumstances. Suit for specific performance was filed on the basis of letter of intent. The Hon'be Apex Court observed that right of

specific performance cannot be accrued on the basis of letter of intent in absence of agreement for sale. It cannot be ignored that the Hon'ble Apex Court has also laid down in the said case law that the purchaser is entitled to get back the amount paid towards advance of the price along with interest thereon from the owner of the property. So, even under letter of intent the transaction executed by the parties was accepted by Hon'ble Apex Court at least to return the amount along with interest to the purchaser as right of specific performance cannot be granted to the purchaser in absence of agreement for sale in the above mentioned case law. So, in view of clause 18 and 19 of allotment letter, I am of the opinion that the allotment letter is binding on promoter and allottees and the transaction which is revealed from the allotment letter is of sale of flat by promoter to the allottees as per the terms and conditions mentioned in the said allotment letter. So, the submission made by the Ld. advocate of the Respondent that Section 18 of RER Act, 2016 is not attracted to the present matter cannot be accepted.

10. The Ld. advocate for the Respondent raised second objection and argued that Allottees cannot raise the point in Appeal which was not argued before MahaRERA Authority. He relied on case law reported in "**(1985)2 Supreme Court Cases 670 Darmansingh Vs. State of Punjab**" wherein the Hon'ble Apex Court observed that pleadings and grounds taken in Petitions and Memo of Appeal but not argued before the Court are not open. In fact if we peruse the impugned order passed by Ld. Chairman of MahaRERA Authority, it cannot be said that parties were not given

opportunity of making their submissions before MahaRERA Authority at the time of hearing of the complaint. The Ld. Chairman of MahaRERA Authority might not have referred all the points raised by both the sides in his impugned order. However, that does not mean that the principle of natural justice was not followed by Ld. Chairman of MahaRERA Authority in disposing the said complaint. So, the objection raised by Ld. advocate for the Respondent is not sound enough to say that allottees are demanding interest along with amount for the first time in the Appeal. It is true that in para 3 of the impugned order which speaks about return of amount as per agreed terms of Allotment letter. There is a reference of agreed terms and conditions between the parties as per allotment letter and the word amount is not accompanied by the word interest. However, clause 19 of allotment letter is very clear on this point. There is specific mention of rate of 9% interest to be paid by the promoter to the Allottees on the payment received from the allottees in case of demand of refund of money by the allottees on failure of the promoter to deliver the possession as per the extended time limit. So, the impugned order is passed on the refund of amount as per agreed terms and conditions of allotment letter and clause 19 of the said letter is very clear on the point of refund of amount to the Allottees along with interest on failure on part of promoter to hand over the possession as per agreed time limit. So, above mentioned case law referred by Ld. advocate for the Respondent is also not attracted to the present matter.

Rectification of Impugned order U/S 39 of RER Act

11. The Ld. advocate for the Respondent also raised third

objection and argued that if the impugned order is not clear and neither party can get benefit of the said order by asking its execution, it was the duty of Allottees to approach to the MahaRERA Authority for rectification of the said order under Section 39 of the RER Act, 2016. This submission is also not forceful in this particular case. Section 39 reads as under :

Section 39 : Rectification of orders.

The Authority may, at any time within a period of two years from the date of the orders made under this Act, with a view to rectifying any mistake apparent from the record, amend any order passed by it, and shall make such amendment, if the mistake is brought to its notice by the parties;

Provided that no such amendment shall be made in respect of any order against which an appeal has been preferred under this Act;

Provided further that the Authority shall not, while rectifying any mistake apparent from record, amend substantive part of its order passed under the provisions of this Act.

12. As per first proviso of the above Section 39, if an Appeal has been preferred, no such amendment can be made in respect of the impugned order under the said provision. Moreover, as per second proviso of Section 39 Authority is not empowered to rectify and amend substantive part of its order and only mistake apparent from the record can be rectified.

13. I would like to point out that Allottees have already preferred the present Appeal. So, Section 39 of RERA Act, 2016 is not attracted and there is no question of asking to go for rectification of the impugned order before MahaRERA Authority. Similarly, the alleged rectification is not in respect of any technical error or mistake arising out of slip of hand or of such minor nature. To seek substantive relief regarding recovery of amount along with interest or giving direction to parties to execute an agreement by asking for rectification is not a mistake apparent on the face of record but it is relief granted by the Authority by finally disposing of the complaint before it on merit. So, Section 39 is not attracted to the present matter. In fact Section 39 is all most at par with Section 152 of Civil Procedure Code under which the party can rectify any minor mistake in the order which arises out of technical error or typing mistake or mistake arising out of slip of hand and not the mistake regarding grant of substantive relief asked by the party.

Section 18 of RER Act is attracted

14. In view of above discussion, I am of the opinion that the promoter failed to complete the project and is unable to hand over the possession of flat to the allottees as per agreed terms. In fact there is a delay of more than three years though some period of delay may be justified for reasonable causes which are acceptable. However, the fact remains that inspite of booking of the flat in the year 2012 for getting possession on or before 2016, allottees have not received the possession till today inspite of making payment of 70% amount of price of the said flat to the promoter. Once the allottees have chosen to withdraw from the project and demanded the refund of money along with interest, it is obligation of promoter

to repay the amount along with interest to the allottees in view of Section 18 of RER Act, 2016. It cannot be ignored that there Lordships of Bombay High Court have laid down in Neekamal Realtor in case law that RER Act, 2016 is social and beneficial legislation and to safeguard the interest of allottee is one of the object of the said Act. So, there cannot be any different interpretation of Section 18 of RER Act, 2016 which will not helpful and beneficial to the allottees for getting back their amount along with interest from the promoter for which amount allottees were deprived of use for more than five years. There is no hardship to the promoter by paying the refund along with interest to the allottees on account of withdrawal of allottee from the said project because the allotment letter and booking of allottees shall stand cancelled and allottees will be entitled to get back their amount along with interest from the promoter and promoter will get the right to sale the said flat to any other prospective purchaser. So, promoter is not put to any loss as he gets back right to sale flat as per his choice and allottee also get the refund of the amount along with interest. As far as interest is concerned, Section 18 and Rule 18 of Maharashtra Rules and Regulations 2017 is attracted to the present matter and accordingly interest will have to be paid by the promoter to allottee. Thus, there will be cancellation of booking of the flat. Clause 9 of Allotment Letter gives right to promoter to deduct 10% and no benefit of interest to the allottee. However, this clause 9 is not attracted to the present matter but, clause 19 is attracted and cancellation is on account of delayed possession and hence, clause 9 of an agreement does not attract. So, I answer the points accordingly.

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Conclusion

15. Allottees are entitled to get refund of amount along with interest from date of payment till it's realization. Allotment letter in favour of Allottees in respect of flat stands cancelled. Clause 19 and not clause 9 of Allotment is attracted. Thus, Appeal stands partly allowed with partial modification of impugned order for refund with interest and cancellation of Allotment letter in respect of flat.

In the result I pass the following order;

ORDER

1. Appeal No. 006000000010841 is partly allowed.
2. Impugned order dated 17.09.2018 passed by Ld. Chairman MahaRERA in complaint No.CC0060000000055491 is partly modified as under:
 - a) Complaint No. CC0060000000055491 is partly allowed as under :
 - i) The Respondent shall refund an amount of Rs.1,16,21,439/- (Rs. One Crore Sixteen Lakhs Twenty one thousand four hundred and thirty nine) along with interest to the complainant from the date of payment of said amount till its realization.
 - ii) Allotment letter dated 19.11.2012 executed by Promoter in favour of Allottees stands cancelled.
 - iii) Rate of interest shall be the State Bank of India highest Marginal Cost of Lending Rate plus 2 % as per Rule 18 of the Maharashtra Real Estate (Regulation and Development)

W/S

Appeal No.10841

Registration of Real Estate Projects,
Registration of Real Estate Agents, Rates of
Interest and Disclosures on Website) Rules,
2017.

W/S

- iv) The Respondent shall also pay Rs.5,000/-
towards costs to the complainant.

Sumant M. Kolhe
20/03/19

[SUMANT M. KOLHE,]
JUDICIAL MEMBER,
Maharashtra Real Estate
Appellate Tribunal, (MahaRERA)
Mumbai.

20.03.2019.