

**MAHARASHTRA REAL ESTATE APPELLATE TRIBUNAL
APPEAL NO.AT005000000010609**

Mr. Kavin P. Tulsiani
4B, Dev Ashish, Peddar Road,
Mumbai 400 026. ... Appellant

Versus

- 1) Marvel Omega Builders Pvt.Ltd.,
301-302, Jewel Tower, Lane No.5,
Koregaon Park,
Pune-411 001

- 2) Marvel Realtors & Developers Ltd.,
301-302, Jewel Tower, Survey No.25/H,
Lane No.5, Koregaon Park,
Pune-411 001 ... Respondents

APPEAL NO.AT005000000010654

W/S
Magnum Silk Mills Pvt.Ltd.
2A, Nariman Estate Centre,
1st Floor, Near HDFC Bank,
Chandivali Farm Road,
Mumbai 400 072. ... Appellant

Versus

- 1) Marvel Omega Builders Pvt.Ltd.,

301-302, Jewel Tower, Lane No.5,
Koregaon Park,
Pune-411 001

2) Marvel Realtors & Developers Ltd.,
301-302, Jewel Tower, Survey No.25/H,
Lane No.5, Koregaon Park,
Pune-411 001 ... Respondents

Advocate Pravin Nadkarni, for Appellant
Advocate Amit Patil, for Respondents.

CORAM : SUMANT M. KOLHE, Member(J)

DATE : MARCH 29th 2019

COMMON ORDER BELOW APPEAL NO.10654 AND APPEAL NO.10609

1 Both these appeals are separately filed challenging the orders passed in Complainant No.CC005000000010498 and C005000000010441 against the Promoters. As the pleadings, documents and other evidence pertaining to both Complaints are identical and similar, I decide both these Appeals by passing this common order.

2 The Complaint Nos. CC005000000010498 and C005000000010441 were filed by Allottees against Promoters for

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recovery of interest amount on account of delay in handing over possession of flats to them. Both the Complaints were filed under sec.18 of the RER Act 2016.

3 Learned Adjudicating Officer passed similar and identical order in both Complaints after hearing both sides and after perusing respective pleadings and documents of both sides. As per final order dated 14th August, 2018 passed by learned Adjudicating Officer, Promoter was directed to pay interest on the amount paid by Allottees at the rate prescribed under rule 18 of Maharashtra Regulatory Authority(Rate of Interest)Rules, 2017 along with costs within 30 days from the date of said order.

4 In the impugned order, it is also mentioned that amount which is refundable from the date of payment till possession of flats is delivered, subject to Complainants make stagewise payment.

The impugned order is conditional and it was subject to Complainants making stagewise payment. Unless the conclusion is arrived about the compliance made by Complainants of making stagewise payment of price and the rest of the impugned order relating to payment

of interest till Allottees get the possession cannot be executed in its present form.

Both these appeals are filed by Allottees even though the impugned order was passed in their favour. Admittedly, Promoter has not challenged the impugned order by filing the separate appeals.

5 Heard learned advocate for Allottees and learned advocate for Promoter. Read the impugned order as well as its operative part. Perused the registered agreements for sale executed between the parties.

6 Following points arise for my determination:

POINTS

1. Whether the impugned orders are sustainable in law ?
2. What order ?

My findings thereon for the reasons stated below are as under.

FINDINGS

1. No
2. As per final order.

REASONS

7 At the outset, I would like to point out that both Complaints were filed by Allottees against Promoter for recovery of interest on account of delay in handing over possession of flats as per agreed terms of agreement for sale between both the parties. So, Allottees had sought the reliefs under sec. 18 of the RER Act 2016. The impugned order passed by Adjudicating Officer in both Complaints is an identical and similar except the figures of amount and date regarding the transaction of sale and purchase for a consideration executed between the parties. For sake of convenience, I note down the impugned order which is passed in Complaint No.10498. It is as under:-

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" 1. The Respondent shall pay interest on Rs.66,75,365/-(minus)- Government expenditure to complainant @ the State Bank of India highest Marginal Cost of Lending Rate plus two percent per annum prevailing as on date, which is refundable from the date of payment till possession is delivered subject to complainant making stagewise payments.

2. The respondents shall pay Rs.25,000/- as costs to the complainant.

3. The respondent shall pay above amount within 30 days from the date of issue of this order".

8 While considering the submissions made by Advocates of both sides, it is revealed that Allottees as well as Promoter are making a

grievance against the impugned order though it appears to be passed only against Promoter. In para-5.2 of the appeal memo, Allottees have contended that Complainants had sought the relief under sec. 18 of the RER Act, 2016 in terms of delivery of possession and compensatory interest for delay of delivery. It is also contended that the final order is unclear and verbose because it states to refund the principal amount with interest until possession is delivered. It is further contended that Allottees seek the correction in the impugned order and the same should be done for giving direction to deliver possession and for granting interest for delay in delivering the possession. I find substance in this ground of appeal. The impugned order is totally silent about the reliefs claimed by Allottees for giving direction to Promoter to hand over possession of the flats. Similarly, the impugned order is not clear and specific to ascertain the period of delay in handing over possession of the flats for which Allottees are entitled to claim interest. The main sentence relating to the relief in the impugned order is that "it is refundable from the date of payment till possession is delivered". It is very difficult to ascertain the exact meaning of this sentence and so, both the parties are having confusion over the exact meaning of the sentence which is the main part of the impugned order. It is true that under sec. 39 of the RER Act, 2016, the parties can approach to MahaRERA for rectification of order if any mistake apparent from the record of the matter is committed. However proviso of sec. 39

further says that once the appeal is filed, sec. 39 of the RER Act, 2019 for rectification of order cannot be availed. Moreover, proviso further says that such rectification cannot be asked for any substantial changes in the form of reliefs granted or not granted in the final order as sought by the parties.

At this stage, I would like to point out that under sec. 18 of the RER Act, 2016, if Promoter is unable to give possession of flat or fails to complete the project as per terms and conditions of agreement for sale or on or before the due date of handing over possession, Allottees are having two options. As per first option, Allottees may withdraw from the project and may claim the refund of entire amount with interest including compensation from Promoter. As per second option, Allottees may continue with the project, but may ask for recovery of interest on the period for which delay is caused in handing over possession of flat. In ordinary course of nature, in second option, Allottees are entitled to claim only interest which is normally for delay in handing over possession and such delay can be calculated on the basis of agreed date for handing over possession till the date on which possession is actually given. So, the wordings in operative part of the impugned order are that the amount which is refundable from the date of payment appears to be connected with the first option of withdrawing from the project and getting the refund of entire amount along with interest by Promoter. The present

case falls under second option where interest is required to be awarded for the period of delayed possession only. In the present matter, learned Adjudicating Officer has failed to consider the important and vital aspects of the dispute while passing the order.

9 Apart from this, Allottees are claiming interest at the rate of 18% per annum on the basis of clause regarding interest as mentioned in agreement for sale between the parties. It is true that Allottees are under obligation to pay the price of flat as per the schedule mentioned in agreement for sale. In an agreement there is specific clause that if Allottees commit a default in adhering to payment of price of flat as per the schedule mentioned in the agreement, Promoter shall entitle to recover interest at the rate of 18% per annum from Allottees. Similarly, as per clause in an agreement if Allottees want to withdraw from the project, they will be getting the entire amount along with interest at the rate of 9% per annum only. It is a grievance of advocate for Allottees that the rate of interest as defined under sec. 2(z) of the RER Act, 2016 clearly shows that the rate of interest which Promoter is entitled to recover from Allottees, will be the same which Allottees will be entitled to recover from Promoter. So, on this count, learned advocate for Allottees argued that as per clause of interest contained in the agreement for sale between the parties, if Promoter is entitled to recover interest at the rate of 18% per annum from

Allottees on account of default committed in making the payment of flat as per the schedule. Allottees are also entitled to recover the interest at the rate of 18% per annum on the period of delayed possession from Promoter.

10 After carefully perusing the impugned order, it is revealed that there is no issue framed for determining the rate of interest while deciding the complaints. Consequently, there is no discussion about the rate of interest which is applicable to the present dispute. So, there is no finding on the part of Adjudicating Officer while deciding the complaints as to whether the clause about the rate of interest will prevail over the provision made under the RER Act, 2016 or vice-versa. The impugned order is conditional in the sense that Allottees are entitled to claim interest subject to Allottees making stagewise payments of price to Promoter. Whether Allottees had completed their obligation of making stagewise payment as per the schedule of price of flats mentioned in the agreement till the date of passing of impugned order is not decided by Adjudicating Officer while passing the final orders in the complaints. However, those issue remained unanswered. Thus, in absence of finding as to whether Allottees had made payment of price as per schedule till date of passing impugned order or not made, it may not possible to execute the order in its correct sense.

11 In view of above discussions, I am of the opinion that there are some legal and factual issues which are required to be framed and answered with the reasoning after giving an opportunity to both the parties to put up their respective cases along with evidence on those issues before learned Adjudicating Officer.

12 The Appellate Tribunal is empowered to reassess the evidence. This is first Appellate Tribunal and it is fact finding forum. However, to find out the facts and to analyse the same on the basis of documents on record, there should have an opportunity to the parties to know before starting of inquiry as to what are the points of dispute arising out of pleadings of the parties and what documents and evidence is to be adduced and ultimately what are the provisions under which reliefs are claimed. In absence of these things, this Appellate Tribunal is left with no option but to remand both the matters to learned Adjudicating Officer for deciding afresh the dispute between the parties after framing necessary points for determination including the point of determination of rate of interest, the exact option adopted by Allottees under sec. 18 of RER Act, 2016 and determination of the period of delayed possession on the basis of evidence and then to award the interest on such period of delayed possession and also to find out on the basis documents as to whether the

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schedule of payment of price of flat as mentioned in the agreement is duly complied by Allottees or not till the date of passing of impugned order. So, the impugned order is not just, proper and legal, it is necessary to set aside it and to remand the matters back to learned Adjudicating Officer for fresh hearing. So, I answer point Nos.1 and 2 accordingly.

In the result, I pass the following order.

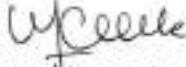
: ORDER :

1. Appeal Nos. AT005000000010609 and AT005000000010654 are allowed.
2. The impugned order dated 14th August, 2018 passed by Adjudicating Officer in Complaint No. CC005000000010498 and CC005000000010441 is set aside.
3. Both the complaints are remanded back to learned Adjudicating Officer for fresh decision after giving opportunity to both the parties to submit their additional pleadings, evidence and submissions on record.
4. The learned Adjudicating Officer shall take into consideration at least three points of dispute which are discussed in body of this judgment, mainly the dispute about the determination of rate of interest, determination of period of delayed possession, for

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awarding the interest and decision on the point as to whether the Allottees have made payment of price as per the schedule mentioned in the agreement to Promoters or not and effect thereof for granting or not granting the reliefs as sought by Allottees.

5. Both the parties shall appear before learned Adjudicating Officer on 29th April, 2019.
6. Fresh notices to the parties be dispensed with.
7. Learned Adjudicating Officer shall decide Complaint No. CC005000000010498 and CC005000000010441 as early as possible.
8. The original common order is kept in Appeal No.10654 and copy is maintained in Appeal No.10609.
9. The copy of the order be sent to learned Adjudicating Officer for information and necessary action.

 29-03-19.
[SUMANT M. KOLHE,]
JUDICIAL MEMBER,
Maharashtra Real Estate Appellate
Tribunal, (MahaRERA) Mumbai.

29.03.2019.

dr