

**BEFORE THE MAHARASHTRA REAL ESTATE
APPELLATE TRIBUNAL, MUMBAI
Appeal No. AT006000000010888**

1. Mrs. Rujuta Mandar Thatte
2. Mr. Mandar Narayan Thatte
Flat No. B-402, Charmee Enclave
CHSL, Service Road,
Vile Parle (East), Mumbai-400 057 ... Appellants

Versus

M/s Forefront Property Developers
Pvt. Ltd.,
Office No.60-1, 6th Floor,
Hub Town Viva, Western Express
Highway, Jogeshwari (East),
Mumbai 400 060. .. Respondent

*(Advocate Mr. P. B. Gujar for Appellants
Advocate Mr. Rubin Vakil for Respondent)*

**CORAM : SUMANT KOLHE, MEMBER (J)
S. S. SANDHU, MEMBER (A)
DATE : 31ST DECEMBER, 2019**

The Appellants have filed this appeal to assail the order dated 16.08.2018 passed by Learned Chairperson, MahaRERA (for short, "The Authority") in Complaint No. CC006000000023293 whereby the Authority has declined to grant interest/compensation under Section 18 of the Maharashtra Real Estate (Regulation & Development) Act 2016(for short, "the Act") to Appellants on account of delay in possession by the Respondent developer.



2. The facts of the case indicate that Respondent undertook construction of a redevelopment project of 12 floors known as "Forefront Primeria", situated at Vile Parle (East), Mumbai in accordance with development agreement with Prakash Ichhapurti Co-Operative Housing Society Ltd. (the Society hereinafter). Vide registered agreement for sale executed on 9.09.2015, Appellants purchased flat No.401 admeasuring 1159 sq. ft. in 'A' Wing of the project for a consideration of Rs.4,40,42,000/-. The agreed date of possession as per clause 12.1 of the agreement was 30.06.2017 subject to further extension on account of grace period of 6 months and certain other factors as mentioned therein. As per clause 4 of the agreement, Appellants opted for subvention scheme whereby they will pay 25% of the amount of total consideration and balance 75% will be paid from loan by HDFC Ltd. As also agreed in clause 4.1.3 Respondent was to pay Pre-EMIs for HDFC loan for a period of 22 months i.e. up to June 2017. Accordingly, a tripartite agreement was executed on 01.10.2015 between the Appellants, Respondent and the HDFC.

As Respondent failed to deliver possession in stipulated time and also stopped paying Pre-EMIs for HDFC loan beyond June,2017, Appellants contacted Respondent in June, 2017 and sought possession of the flat. It is alleged by Appellants that Respondent having agreed to pay Pre-EMIs till the possession is handed over and to adjust GST credit failed to execute the agreement to that effect. As the demand for further payment was made by Respondent on initiation of 8th floor slab, the



Appellants issued notice on 17.11.2017 raising the aforesaid issues relating to delay, failure to pay EMIs etc. Respondent in its reply dated 22.12.2017 denied non-compliance and did not comply with the demands of the Appellants. Appellants then filed the complaint with the Authority on 16.02.2018 to seek compensation for delayed possession.

3. The Authority took note of the reasons submitted by Respondent for delay in possession. The Authority in para 4 of the impugned order also recorded the concessions made by Appellant No. 1 by stating that being interested in completion of the project, she will not insist for payment of interest for delayed possession for the time being. The Authority further recorded her saying that she should be at liberty to demand interest under Section 18 of the Act in case she finds Respondent failing in making efforts to complete the project in time. The Authority also observed that award of interest to Appellants by drawing the amount from separate account meant for carrying out the construction of the project at that stage may jeopardise the project. After taking into account the aforesaid concessions by Appellants and considering that the date for completion of the project declared by Respondent as December 2020 on MahaRERA Portal was unreasonable, the Authority passed the impugned order directing thereby the Respondent to handover possession of the flat by 31.03.2019. The Authority also granted liberty to Appellants to demand interest at an appropriate stage under Section 18 of the Act.



4. Heard Learned Counsel for parties at length.
5. Learned Counsel for Appellants argued that
 - (i) The reasons adduced by Respondent for delay such as litigation by the society, interruption of work by local encroachers/goons, delay caused by the planning authority i.e. Municipal Corporation of Greater Mumbai (MCGM) in giving approvals etc. are baseless and false. In fact, delay is caused intentionally due to inaction on the part of Respondent in complying with the necessities for obtaining the requisite approvals from MCGM.
 - (ii) The fact of pending litigation for removal of encroachments was suppressed from Appellants while executing the agreement on 09.09.2015. This litigation was not disclosed on MahaRERA portal on 23.08.2017 at the time of registration, or in its reply of Respondent dated 22.12.2017 to Appellants while enumerating reasons for delay beyond the control of Respondent. Litigation was disclosed for the first time by Respondent in his reply filed during the Complaint proceedings before the Authority.
 - (iii) By submitting the documents relating to Writ Petition No. 3515 of 2018 filed by encroacher Yamuna Ghanekar against MCGM & 6 Others during the arguments in the earlier proceedings



before this Tribunal, it was argued by Respondent that in view of status quo granted therein by Hon'ble High Court on 10.8.2018, Respondent was unable to handover possession to Appellants on 31.03.2019 as directed by the Authority in the impugned order. However, this Writ Petition and any order therein is of no consequence or relevance as the said Petition is against the MCGM and its officers to prevent them from demolishing the structures occupied by the concerned petitioner. Moreover, the said status quo granted on 10.08.2018 till the next date ceased to exist on passing the subsequent order dated 21.08.2018 by the Hon'ble High Court as is evident from the copy of order submitted on record by Appellants.

- (iv) In clauses (m) and (n) of the agreement, Respondent has stated that all necessary statutory approvals have been obtained and MCGM has sanctioned the plans for construction of the building. Further, the facts on record also reveal that MCGM has granted commencement certificates (CCs) from time to time and the project was never stopped at any stage for any reasons. The aforestated litigation and any other factors/*force majeure* never posed any hinderance to completion of the project within stipulated period as alleged by Respondent.



However, the Authority has failed to consider these aspects while allowing further time for completion of the project up to 31.03.2019, which is also not adhered to by Respondent.

- (v) The Authority failed to consider that Respondent has defaulted in paying Pre-EMIs to HDFC as agreed at the time of executing the agreement and that since possession is not given up to 30.06.2017, Respondent was liable to pay Pre-EMIs till the possession of the flat.
- (vi) The Authority has wrongly recorded in para 4 of the impugned order that Appellant No.1 being interested in completion of the project does not insist for interest for delay in possession and will be at liberty to claim the same at an appropriate stage. The Authority failed to consider that the compensation to be awarded could be adjusted towards the balance sale consideration payable to Respondent before handing over possession of the flat and once Respondent recovered the entire sale consideration, it would not be possible for Appellants to lodge fresh claim for compensation and recover the same from Respondent.
- (vii) The Authority did not consider that due to delay in handing over possession, the Appellants are not only required to pay EMIs of the loan already disbursed but are also sustaining severe financial



loss on account of expenses being incurred for alternate accommodation.

- (viii) The Authority has wrongly observed that award of interest would take out the money from the account that is kept for completion of the project and will jeopardise the project by slowing down its progress. However, while observing so, the Authority failed to appreciate the loss and prejudice caused to Appellants on account of delay in handing over possession.

In view of the above submissions, Learned Counsel submitted that Appellants have already paid Rs.3.83 crores towards consideration of the flat and only Rs.57.25 lacs remained to be paid. The said amount can be adjusted from the amount of compensation payable to Appellants for delay in possession. He therefore vehemently argued that encroachment, the litigations and other difficulties as cited by Respondent for delay in handing over possession of the flat are nothing but an afterthought exercise to justify the delay after filing of the complaint proceedings by Appellants. It is their claim that since there are no reasons beyond the control of Respondent to justify the delay in possession, the Appellants are entitled for compensation on the amount already paid and yet to be paid till 31.01.2020 for delay in possession under Section 18 of the Act

6. In reply to the contentions as above by Learned Counsel for Appellants, Learned Counsel for Respondent tendered oral as well as written submissions in support of his contentions along with detailed 'list of dates' showing various events



chronologically. He contended and argued that on account of the reasons beyond the control of Respondent the delay has taken place in completion of the project. He elaborated that the project plot had encroachments on it. As per the scheme opted by Respondent, the MCGM and not the Respondent was obligated to rehabilitate the occupants of the encroaching structures as Project Affected Persons (PAPs). A Writ Petition No. 86 of 2015 was filed on 17.11.2014 before Hon'ble Bombay High Court by the Society for seeking directions to MCGM and others for demolition and removal of encroaching structures. Respondent also rigorously followed up removal of structures with MCGM. The aforesaid litigation was sub-judice for a long time before it was disposed of on 13.01.2017 by ordering demolition of the structures within 6 weeks.

7. In view of the encroachments and the ongoing litigation, the MCGM insisted on granting phase-wise commencement certificates (CCs) and did not permit completion of construction of the entire building (by utilising FSI potential to the extent of the said encroachment). As a consequence, Respondent had to make frequent presentations followed by scrutiny at multiple levels before the MCGM granted CCs every time only for limited construction activities. Due to this process, CC for plinth level was granted on 16.01.2015, 2nd floor on 26.08.2015 and 3rd floor on 13.10.2015. Further CCs till 6th and 8th floors were granted on 09.06.2016 and 17th May, 2017 respectively. This process of granting phase-wise CCs due to encroachment and litigation is



responsible for causing delay in completion of the building and it was beyond the control of Respondent.

8. Learned Counsel for Respondent further submitted that following disposal of the aforesaid Writ Petition on 13.01.2017 by Hon'ble High Court, the structures were demolished on 27.01.2017. In the period subsequent to demolition, the occupants of illegal structures supported by goons entered the project premises and assaulted workers of the Respondent and thereafter re-erected the structures again leading to complete stoppage of construction activities. Respondent again had to initiate the entire process of removal thereof by filing complaints with the MCGM and the police authorities in or around August, 2017. Finally, as is evident from the extract of notings dated 20.11.2017 from the record of MCGM submitted by Respondent on page 275 in the proceedings, the MCGM passed order granting alternative PAP accommodation to the encroachers. However, the said structures were demolished in July/August 2018. Again, as a second round of litigation, Writ Petition No.3515 of 2018 filed securing status-quo order from Hon'ble Bombay High Court on 10.08.2018.

9. It was also argued by learned Counsel for Respondent that in the meantime new Development Control and Promotion Regulations 2034 (DCRs 2034) came into effect in or around 13.11.2018 following which the Respondent applied for revised concessions on 18.02.2019. Approval to the same was granted by MCGM on 7.03.2019 only. He submitted that at present the



work is complete upto 11th floor and only two floors are yet to be constructed. Currently the Respondent is in the process of applying for CC for the 12th floor.

10. To support and justify the contention that Respondent is entitled to extension in period of possession as agreed between the parties it is argued that as per clause 12.1 of the agreement for sale, Respondent is entitled for a grace period of six months over and above the prescribed date of possession as 30.06.2017. In addition, the Respondent is eligible for further reasonable extension of time for giving possession if the completion of building is delayed inter alia on account of delay in issuance of permissions/approvals for construction and other reasonable cause beyond the control of Respondent as provided at Sr. Nos. 4 and 8 respectively of clause 12.1 of the agreement. Respondent submitted that pending the litigation on account of encroachments despite best efforts by Respondent MCGM did not issue the requisite permissions to carry out further construction which are sine qua non for real estate projects. The circumstances responsible for delay mentioned hereinbefore viz. encroachments on plot of the project, litigations, phase-wise approvals by MCGM etc. are not in the hands of Respondent and the same could not have been foreseen by Respondent in spite of all due diligence. Delay in completion is not deliberate or intentional but due to force *majeure* i.e. non-issuance of construction permissions on time by MCGM. The concerned factors being beyond the control of Respondent squarely qualify for necessary protection under clause 12.1 of the agreement and



therefore the Respondent is entitled for extension in period for possession. Conversely, it is argued that the Appellants cannot be held entitled for compensatory reliefs as prayed for as the alleged delay in possession is justifiable as per terms of the agreement. Respondent tried also to suggest that as mention was made of the encroachments in clause (b) of the agreement signed by Appellants, they were aware of the likely delay in possession for this reason.

11. In so far as the contention relating to payment of EMIs as per subvention scheme adopted by Appellants is concerned, it is argued that Respondent has discharged his liability diligently by paying Pre-EMIs to HDFC for a period of 22 months i.e. up to 30.06.2017 as per agreement. After the said period the Respondent has no obligation on this count and it is for the Appellants to pay for the balance EMIs to HDFC at their own cost.

12. Learned Counsel for Respondent further argued that as held by Hon'ble High Court in para 137 of the judgment in the case of **Neelkamal Realtors Suburban Pvt. Ltd. v. Union of India, 2017 SCC Online Bom 9302: (2018) 1 AIR Bom R 558 : AIR 2018 (NOC 398)136** (hereinafter referred as Neelkamal judgment) that in case in spite of making genuine efforts, the promoter fails to complete the project, the concerned Authorities would certainly look into genuine cases and mould their reliefs accordingly, the Authority has allowed the reasonable extension of time upto 31.03.2019 considering

the delay caused by the aforementioned circumstances beyond the control of Respondent. The date prescribed by the Authority for possession in para 8 of the impugned order is not challenged by Appellants in their submissions. Also, the same had not yet lapsed at the time of passing the impugned order. Therefore, the Appellants cannot demand interest/compensation up to 31.03.2019 as there is no delay and in view thereof the claim of the Appellants is premature.

13. The concessions not to claim interest till 31.03.2019 once made by Appellant No.1 as recorded in para 4 of the impugned order cannot be disputed or withdrawn later. If these were wrongly recorded, Appellants could have sought review thereof under Section 39 of the Act. Appellants have not taken any steps in this regard and therefore no interest is payable up to 31.03.2019.

14. Learned Counsel for Respondent also submitted that if the compensation is to be granted, the matter needs to be referred for consideration of and adjudication by the Adjudicating Officer as per provisions of Section 71(3) and Section 72 of the Act as held by Hon'ble High Court in para 133, 134 and 136 of the Neelkamal judgment. If the said issue is decided by the Tribunal, Respondent will be denied opportunity of the First Appeal and the natural justice.

15. After considering the detailed submissions made by respective parties and the documents on record, following points arise for our consideration and decision.



POINTS

FINDINGS

- | | |
|--|---------------------|
| 1. Whether the Respondent is entitled for extension in date of possession? | Partly affirmative |
| 2. Whether the Appellants are entitled for the reliefs as prayed for? | Partly affirmative |
| 3. Whether impugned order needs interference in this appeal? | Affirmative. |
| 4. What order? | As per final order. |

The reasons for our findings shown against the aforementioned points are as follows:

POINT NOS. 1 TO 3

16. It is undisputedly clear from the facts hereinabove that the possession has not been handed over as yet as was the case when the impugned order was passed and till today there is an apparent delay of around 30 months from the committed date of possession. At the outset, we observe that parties have executed a registered agreement for sale on 09.09.2015 to govern their rights and liabilities in respect of the flat purchased by the Appellants. As per clause 12.1 of the agreement, Respondent is liable to deliver possession by 30.06.2017 subject to further extensions on account of certain factors mentioned in para 9 hereinabove by Respondent in addition to six months' grace period. Appellants have not disputed the extension of 6 months' grace period and in fact have conveniently ignored the



mention thereof while seeking compensation w.e.f. from 01.07.2017. Considering the terms of agreement related to grace period and the facts and circumstances of the case, we feel that Respondent is entitled for six months' extension in the date of possession as agreed between the parties. Consequently, with these six months, the date of possession would extend up to 31.12.2017. In result, no liability of compensatory interest would arise for Respondent till 31.12.2017.

17. With regards to the remaining period of delay of almost 2 years by this date, on examination of the submissions of the parties we find that even though the reasons and grounds advanced by the Respondent in support of the overall delay in delivering the possession appear to some extent be beyond the control of Respondent, those cannot be considered as unforeseeable or unpredictable as claimed by Respondent. On perusal of the list of dates of different events submitted by Respondent, we do not see any *force majeure* responsible for the delay caused in possession. The list of dates reveals that application for grant of CC was made after execution of tripartite agreement between Hubtown, Respondent and the Society on 30.06.2014. Subsequently an application for revised IOD was made on 01.10.2014 for 'A' Wing up to 4th floor. The Society filed Writ Petition No. 86 of 2015 on 17.11.2014 for removal of encroachments. CC was granted up to plinth on 16.01.2015. So, these factors viz. encroachments, pending litigation and phase wise approval process by MCGM put forth as reasons for delay

were already known and visible to Respondent prior to execution of allotment letter and the agreement between the parties on 24.06.2015 and 09.09.2015 respectively.

As observed by Hon'ble High Court in Para 119 of the Neelkamal judgment that having sufficient experience in open market, the promoter is expected to have a fair assessment of the time required for completing the project. Being experienced and aware that the existing factors and circumstances are beyond its control and may cause delay in completing the project/delivering possession, Respondent should have exercised due diligence while planning schedule for completion of the project and accordingly indicated the realistic /reasonable date of possession to Appellants in the agreement. In such circumstances, having failed to foresee and assess the delay likely to be caused by the aforesaid factors, Respondent is not entitled for considering relief for the entire period of delay. Consequently, Respondent cannot advocate denial of rightful entitlement to Appellants on suffering the delay in possession on the ground that they were aware of encroachments on land as mentioned in the agreement. Having no experience, Appellants are not obligated to know the potential effect of encroachments on timely completion of the project.

18. As far as the claim regarding delay caused due to litigations is concerned, the facts on record reveal that in the litigation by the society seeking demolition of encroaching structure, there was no stay order therein either to stall construction activities of the project or to demolish the



structures by MCGM and its officers. Also, there was no litigation either to prevent demolition of re-erected structures after their demolition on 27.01.2017 pursuant to the order dated 13.01.2017 of the Hon'ble High Court. Further there was no any status-quo order against the project after status-quo granted in favour of encroacher petitioner on 10.08.2018 in W.P. No.3515 of 2018 ceased to exist on passing of subsequent order on 21.08.2018. There was also no stoppage of work due to litigations to cause delay in completion of building. Therefore, in our view the factors such as litigations and encroachments were not directly responsible for delay though they may have to some extent indirectly influenced the MCGM resulting in granting phase wise approvals. Some delay on account of these factors as claimed to be beyond the control of Respondent may deserve some consideration for an extension in period of possession. However, Respondent cannot absolve itself of major part of the delay that appears to have occurred due to its lack of diligent, efficient and timely action on its part. As an instance in this regard it is seen that Respondent submitted proposal for CC for 11th floor on 22.11.2017 and the same was revised and submitted on 31.07.2018 (i.e. after 8 months). The approval is granted by MCGM immediately on 04.08.2018. However, after this, even though there was neither any status quo in Writ Petition No. 3515 of 2018 since 21.08.2018 nor any other delaying factors, no concrete steps seem to have been taken by Respondent to obtain further approvals to complete the project within the date given by the Authority i.e. 31.03.2019. On the contrary, Respondent appears to be pursuing proposals for



approvals as per the revised DCRs 2034 for his own profit and benefits even though the Appellants continue to wait indefinitely for possession since 2017.

20. Having due regard to the observations hereinabove, we hold that except some reasonable extension on account of MCGMs' decision to accord phase-wise approvals due to encroachments/litigations as noted above, Respondent is not entitled for reliefs for entire period of delay as it failed to exercise due diligence while committing date of possession and to take expeditious steps particularly after August 2018 to obtain approvals to complete the project in the time prescribed by the Authority. We also observe that the Appellants cannot be deprived of compensatory reliefs for the delay caused in pursuing the approvals as per new DCRs 2034 by Respondent for its own benefits. Therefore, for the aforesaid factors cited by Respondent to be beyond his control we consider it appropriate and justifiable to grant six months' period in the date of possession in addition to the grace period of six months already considered hereinabove. In view of these observations and conclusions we do not approve the date of possession prescribed as 31.03.2019 in impugned order by the Authority as the same is unreasonable and inequitable being tilted only in favour of Respondent and detrimental to the interests of Appellants who stayed invested heavily in the project since 2015.

21. We also do not accept the contention of Respondent that Appellants have given concessions for not claiming interest till 31.03.2019 as recorded in para 4 of the impugned order. There



is no basis for such claim as well as for whatever is recorded in the order to that effect. In our view such concessions, if at all were made, ought to have been recorded in a written undertaking to avoid disputes at the appellate stage. We also do not accept that the Appellants agreed for lodging claim for compensation at an appropriate stage. The Act being a social and beneficial legislation for protection of interests of allottees, priority requires to be given to amelioration of their hardships and sufferings. In this context, we are of the view that as the Respondent has failed to deliver possession by 31.03.2019 and has not given any definite date for possession, we cannot leave the Appellants to wait for an indefinite period for possession and to face another round of litigation to claim compensatory reliefs at appropriate stage in future for the delay in possession that has already become a reality.

22. In accordance with the overall extension of 12 months including the agreed grace period of 6 months considered as above, the date of possession would be 30.06.2018 for the purpose of determining the interest for delay in possession. Accordingly, the Appellants would be entitled for interest under Section 18 of the Act on the amounts already paid with effect from 1.07.2018 till the actual possession with occupancy certificate is handed over as specifically recorded in the order below. The interest payable shall not be @ 24% as demanded by Appellant in the appeal but at the rate prescribed under the Act and Rules framed thereunder. Accordingly, the point Nos. 1 to 3 are answered as partly affirmative.



23. In view of the above observations and findings, the impugned order deserves to be set aside. We therefore answer the point No.4 in the affirmative and pass the order as follows:

ORDER

1. Appeal No. AT006000000010888 is partly allowed.
2. Impugned order dated 16.10.2018 passed in Complaint No.23293 is set aside.
3. Respondent is directed to pay interest @ 2% above the SBI's highest Marginal Cost of Lending Rate to the Appellants on the amount paid to the Respondent w.e.f.1-07-2018 till the Respondent hands over the possession of the flat to the Appellants.
4. Interest payable by Respondent for delay in delivery of possession as above shall be adjusted against the payment of balance consideration towards the flat to be paid by Appellants as per schedule of payment mentioned in clause 4 of the agreement at the time of handing over possession of the flat with occupancy certificate to the Appellants.
5. Respondent shall pay cost of Rs. 20,000/- to the Appellants and shall bear his own cost.
6. Copy of the order be sent to both the parties and the Authority as per Section 44 (4) of the RER Act.


(S.S. SANDHU)


(SUMANT KOLHE)

SDR/-