

Sarnobat

MAHARASHTRA REAL ESTATE APPELLATE TRIBUNAL

APPEAL NO. 0006000000010422

Mrs. Vaibhavi Narayan Rane,)
Residing at 2-34, Harharwala Building,)
Sane Guruji Marg, Lalbaug,)
Mumbai – 400 012.)... Appellant/s.

Vs.

1. Right Channel Constructions Pvt.Ltd.)
2. Devendra Hanuman Pandey,)
3. Amit Hanuman Pandey,)
(Managing Directors))
4. Sanjay Hanuman Pandey, (Authorized)
Signatory))
101, 1st floor, Kailash Ram Kripa CHSL,)
Plot No. 6, Kailashpuri Road, Upper Govind)
Nagar, Malad (E), Mumbai 400 097.) ... Respondents.

Mrs. Vaibhavi Rane, Appellant present in person with

C.A. Mr. Ramesh Prabhu.

Mr. Hrishikesh Soni, Advocate for the Respondents.

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

DATE : FEBRUARY 15, 2019.

Appeal Under Section 44 of RERA ACT 2016.

ORAL JUDGMENT :

1. Appellant-original complainant has challenged the order dated 28.05.2018 passed by Ld. Chair Person of MahaRERA in Complaint No.CC006000000023902.

2. In brief the facts are as under :-

Appellant is the Allottee. She is original complainant, Respondents are the Promoters. I will refer the parties by their

original status as Promoter and Allottee.

3. Promoter had undertaken the development of project namely "Vrindavan", situated at Borivali, Mumbai. Registered agreements for sale in respect of Apartment No. 1303 in Vrindavan was executed on 02.09.2016 between Promoter and Allottee. Allottee agreed to purchase the said flat for total consideration of Rs.72,20,500/- as per the terms and conditions of agreement for sale, Promoter agreed to deliver the possession of the flat to the Allottee on 30.6.2017. Allottee has made payment to the Promoter as per the chart of payment submitted to him by the Promoter. Though the project was launched in the year 2010 it actually started in the year 2016. Promoter has failed to complete the project. Promoter has not delivered the possession of the flat on 30.06.2017 as mentioned in agreement for sale and amount of Rs 17,00,000/- is yet to be paid to the Promoter on the part of Allottee towards price of the said flat. Since Promoter failed to deliver the possession on agreed date, i.e. 30.06.2017, Allottee preferred a complaint against the Promoter and prayed for possession of the flat with occupancy certificate and interest on the total amount paid to the Promoter for every month default in handing over the possession. Allottee has also prayed for compensation to the extent of rent and loan instalments required to be paid by Allottee due to delay in getting the possession of the flat.

4. The Respondent had made out a case before the Authority that the construction work of the project could not be completed because of the reasons which were beyond his control.

It was also stated that the project is all most completed and possession of the flat will be handed over to the Allottee by August 31, 2018.

5. After considering rival cases of both the sides and after hearing both the sides, the Ld. Chairperson MahaRERA passed order and directed Promoter to hand over possession of the flat with occupancy certificate before 31.08.2018 to the Allottee. Respondent was further directed to pay interest on entire amount to the Allottee from September, 2018 till the date of handing over the possession in case the possession will not be given before 31.08.2018. The rate of interest was as per Rule 18 of the Maharashtra Real Estate (Regulation and Development) (Registration of Real Estate Projects, Registration of Real Estate Agents, Rate of Interest and disclosures on Website) Rules 2017.

6. Being dis-satisfied with the order of Ld. Chair Person of MahaRERA, Allottee has preferred this Appeal. The Ld. C.A. who appeared for the Appellant relied on Section 18 of RERA Act 2016 and submitted that as per proviso of this Section, Allottee does not intend to withdraw from the project but Promoter shall be directed to pay an interest for every month of delay till handing over the possession. He referred copy of registered agreement for sale and pointed out that Promoter had agreed to hand over the possession on 30.06.2017. He further argued that project is not yet completed as on today and occupancy certificate is also not obtained by the Promoter. According to him, Promoter is also liable to pay the amount of loan instalments as well as amount of rent which is paid

by the Allottee from July 2017 till possession is given to the Allottee. He relied on "Nilkamal case law" of Hon'ble Bombay High Court which is decided on 06.12.2017 to substantiate his submission. On the other hand, the Ld. advocate for the Respondent argued that the project is all most completed and Promoter has applied for OC and it will be received in short time. According to him, since the project was incomplete on 01.05.2017 i.e. the date on which RERA Act 2016 came into force, Promoter has registered the said project with RERA and extended the date for completion of said project till December, 2019. He argued that Section 18 of RERA Act has no retrospective application and Allottee is not entitled to take the benefit of the said provision for claiming interest and compensation for delay in completion of the project. He also referred the observations made by Hon'ble Bombay High Court in " Nilkamal" case law.

7. In such circumstances, the following points arise for my determination:

POINTS :

- 1) Whether Section 18 of RERA Act 2016 is applicable to the present dispute?
- 2) Whether the Allottee is entitled to recover the interest for every month of delay on the amount paid to the Promoter from date of delivery of possession as mentioned in an agreement for sale till the possession of flat is handed over to the Allottee ?
- 3) Whether Allottee is entitled for compensation on account of payment of loan instalments and payment of rent and for

mental agony and harassment as Promoter failed to hand over the possession on 30.06.2017 as per registered agreement.

4) What Order ?

FINDINGS :

1) Affirmative.

2) Partly affirmative. Allottee is entitled for interest for every month of delay from 01.01.2018 till handing over the possession.

3) Negative.

4) As per final order.

REASONS :

AS TO POINT NOS. 1 TO 4 :

8. At the outset I would like to point out that registered agreement for sale had taken place between Promoter and Allottee on 02.09.2016 in respect of flat No. 1303 in the project namely Vrindavan situated at Borivali, Mumbai. Allottee agreed to purchase the said flat for total consideration of Rs.72,20,500/-. It is revealed from copy of registered agreement for sale and particularly para 36 of the said agreement that the Promoter agreed to hand over the possession of the flat to the Allottee on or before 30.06.2017. Promoter agreed to pay interest on the amount received by him from Allottee as per Section 8 of MOFA Act 1963 if Promoter fails to hand over the possession as per date agreed in agreement. Admittedly, project was not completed on 30.06.2017 and Promoter could not give possession of the flat to the Allottee on or before

30.06.2017. Thus, there is a breach of obligation on the part of Promoter in handing over the possession of the flat to the Allottee as per the date agreed under registered agreement for sale.

9. RERA Act 2016 come into force on 01.05.2017. Admittedly, the project was incomplete on that day. In view of Section 3 and 4 of MahaRERA Act 2016 Promoter was required to register the said on going project with MahaRERA. While making registration of the project with MahaRERA, the Promoter extended the date of completion of said project till December, 2019. Now it is submitted that Promoter has applied for occupation certificate as the project is completed. However, the Allottee has disputed the fact that the project is completed. It is not in dispute that Allottee is still liable to pay about Rs.17,00,000/- towards price of the flat to the Promoter. According to the Allottee, he made payment as per the chart of instalments prepared by the Promoter. When the project is incomplete and it is ongoing project, on 01.05.2017 and it is duly registered with RERA, Section 18 of RERA Act 2016 is made applicable to this project. As per Section 18 if the Promoter fails to complete the project or is unable to give possession in accordance with the terms of an agreement for sale, and if the Allottee wishes to withdraw from the project then, Promoter is liable to return the amount received by him along with interest and compensation. If Allottee does not intend to withdraw from the project, Promoter shall pay an interest for every month of delay till the handing over of the possession. It is true that an agreement for sale between the parties had taken place in the year 2016 and RERA Act come into force in the year 2017. As far as application of RERA Act to the ongoing

projects is concerned, their Lordships have laid down in case law of Nilkamal that;

119. " Under the provisions of Section 18, the delay in handing over the possession would be counted from the date mentioned in the agreement for sale entered into by the promoter and the allottee prior to its registration under RERA.

Under the provisions of RERA, the promoter is given a facility to revise the date of completion of project and declare the same under Section 4. The RERA does not contemplate rewriting of contract between the flat purchaser and the promoter."

120. "Under the provisions of Section 4(2)(1)(D), the promoter would deposit 70% of the amount realized for the real estate project from the allottees in a separate account which means that 30% of the amount realized by the promoter from the allottees will be retained by him. In such case, if the promoter defaults to hand over possession to the allottee in the agreed time limit or the extended one, then the allottee shall reasonably expect some compensation from the promoter till the handing over of possession. In case the promoter defies to pay the compensation, then the same would amount to unjust enrichment by the promoter of the hard earned money of the allottees which he utilized. Such provisions are necessary to be incorporated because it was noticed by the Select Committee and the Standing Committee of the Parliament that huge sums of money collected from the allottees were not utilized fully for the project or the amounts collected from the allottees were diverted to other sectors than the concerned project."

127. The requirement to pay interest under Section 18 is not penal since payment of interest is compensatory in nature due to delay suffered by the flat purchasers (Alok

Shanker Pandey vs. Union of India (Supra)(2007)3, SCC, 545. Even assuming that the interest is penal in nature, levy of interest is not retrospective but is only based on antecedent facts; it operates prospectively."

128. RERA is enacted to protect the interest of consumer in the real estate sector. It was enacted in the public interest.

256. Section 4(2)(1)(C) enables the promoter to revise the date of completion of project and hand over possession. The provisions of RERA, however, do not rewrite the clause of completion or handing over possession in agreement for sale. Section 4(2)(1)(C) enables the promoter to give fresh time line independent of the time period stipulated in the agreements for sale entered into between him and the allottees so that he is not visited with penal consequences laid down under RERA. In other words, by giving opportunity to the promoter to prescribe fresh time line under Section 4(2)(1)(C) he is not absolved of the liability under the agreement for sale.

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257. "Section 18(1)(b) lays down that if the promoter fails to complete or is unable to give possession of an apartment due to discontinuance of his business as a developer on account of suspension or revocation of the registration under the Act or for any other reason, he is liable on demand to the allottees, in case the allottee wishes to withdraw from the project, without prejudice to any other remedy available, to return the amount received by him in respect of that apartment with interest at such rate as may be prescribed in this behalf including compensation. If the allottee does not intend to withdraw from the project he shall be paid by the promoter interest for every month's delay till handing over of the

possession. The requirement to pay interest is not a penalty as the payment of interest is compensatory in nature in the light of the delay suffered by the allottee who has paid for his apartment but has not received possession of it. The obligation imposed on the promoter to pay interest till such time as the apartment is handed over to him is not unreasonable. The interest is merely compensation for use of money."

258. The object of Section 18 is to recompense an allottee for depriving him of the use of the funds paid by him. The promoter who has received money from the allottee but has failed to adhere to his contractual or statutory obligations, cannot claim that he is entitled to utilize the monies without paying any interest with respect thereto to the allottee.

261. Under the provisions of RERA, 30% amount paid by the allottees is enjoyed and used by the promoter. It is, therefore, not unreasonable to require the promoter to pay interest to the allottees whose money it is when the project is delayed beyond the contractual agreed period. Even under Section 8 of MOFA on failure of the promoter in giving possession in accordance with the terms of the agreement for sale, he is liable to refund the amount already received by him together with simple interest @ 9% per annum from the date he received the sum till the date the amount and interest thereon is refunded. In other words, the liability under Section 18(1) (a) is not created for the first time by RERA.

"The allottee cannot be said to be acting gratuitously. The promoter enjoying the benefit is bound to make compensation to the allottee."

10. Considering the above observations made by Hon'ble Bombay High Court and the objects of RERA Act 2016 as well as

intention of legislature in enacting this Act, it can be easily said that Section 18 of RERA Act 2016 is applicable to the present dispute even though the transaction between the parties had taken place in the year 2016 i.e. prior to enforcement of RERA Act 2016.

11. As Allottee intends to continue with project, she has claimed interest for the period from July 2017 till she gets possession. So, period of delay is considered by Allottee from the date of delivery i.e. 30.06.2017 as mentioned in agreement. While making registration of this incomplete project with MahaRERA as per Section 3 of RERA Act, Promoter extended the date of completion of project up to December, 2019. So total period as per extended date by Promoter for completion of project is from 30.06.2017 to 31.12.2019 i.e. of 30 months. As per the order passed by Ld. Chairperson MahaRERA Authority Promoter was directed to hand over the possession on or before 31.08.2018 and failing which the Promoter was directed to pay interest from 01.09.2018 till actual possession is handed over. So Ld. Chairman MahaRERA prepounded the date of completion of project.

12. I would like to point out that incomplete project should be completed is also one of the major object of RERA Act 2016. So responsibilities of completing the project are to be shouldered by Promoter by carrying out obligations and duties as per Section 11 of RERA Act 2016. Prior to enactment of RERA Act, 2016 MOFA Act was in force. RERA Act 2016 is in addition to MOFA Act. Whatever was lacking in MOFA Act is duly enacted in RERA Act 2016. RERA Act is complete enactment as it mandates the

importance of date of delivery of possession in agreement and failure to adhere the said date, to face the consequences thereof and it also provides separate forum like Authority and Tribunal to redress the grievances of aggrieved party, in time bound period. Real Estate Sector should be developed and at the same time it should be regulated. Regulatory Authority under RERA Act, 2016 is doing the said duty as per the provisions of the Act. Since incomplete and ongoing projects are also covered under RERA Act 2016 and are duly registered with RERA Authority, all such projects are also governed by the provisions of the said Act. In the present case, it appears that there is a delay of about 18 months till today in handing over the possession of the flat to the Allottee. Since application is already moved for obtaining occupancy certificate and the extended date for completion of project is given as December, 2019 by the Promoter while making registration of project with MahaRERA Authority, I am of the opinion that it is just and proper to strike the balance between statutory right of the Allottee to recover interest on amount paid to promoter for every month delay in handing over possession from the date mentioned in Agreement till actual possession is given by the promoter on one hand and the obligation imposed by statute on promoter to complete the project on given date as per agreement and genuine reasons for which promoter could not complete the project as per agreed date. Thus, it is necessary to ascertain as to whether there were genuine reasons for causing delay in giving possession to the Allottee. In real estate sector, whenever a project is launched, promoter has to obtain some mandatory permissions from competent Authority. Unless commencement certificate or building

permission certificate as defined under Section 2(m) of RERA Act 2016 is obtained, development work cannot be started as per sanctioned plan. Similarly, on completion of development or construction work, promoter is required to obtain completion certificate as defined under Section 2 (q) of RERA Act 2016 from competent Authority to show that construction or development is made as per sanctioned plan and lay out. Thereafter, promoter is further required to obtain occupancy certificate as defined under Section 2(af) of RERA Act 2016 from competent Authority to show that construction is provided with civic infrastructure such as water, sanitation and electricity. So, on basis of occupancy certificate, we may say that construction is ready for occupation and it is ready for habitation. Now competent Authority is defined under Section 2(p) of RERA Act 2016 as local Authority. So, every Local Authority plays vital and important role in respect of development in Real Estate Sector. Thus, promoter takes initiative in making construction or development but he has to depend upon some independent competent Authorities or bodies for commencing and for completing such construction as per existing rules, regulation and Act, governing such construction. For some projects, certificate of no objection from Environment department or Irrigation department is also required to be obtained. Thus, promoter must be cautious and careful while giving date of possession in agreement and promoter must consider all above mentioned formalities to be completed as per Local Laws with competent Authority or Local Authority. Section 11(3)(b) of RERA Act, 2016 speaks about such responsibilities of promoter. One of the object of RERA Act 2016 is to safeguard the interest of customers and to

bring transparency in transaction by regulating real estate sector with establishment of Regulatory Authority. However, it should be achieved not at the costs of creating fear in the minds of promoter and ultimately discouraging them from making construction of homes and development in Real Estate Sector. Our own home is dire need of public at large. So, while implementing the various provisions of RERA Act 2016, the completion of incomplete project to meet out need of members of Society should be given equal importance. Their Lordships have made it clear in "Neelkamal Case" (Bombay High Court) decided on 06.12.2017 that to complete the incomplete projects is also object of RERA Act 2016. So all the incomplete projects are also registered with MahaRERA Authority. Now, whenever, dispute arises between promoter and Allottee in respect of incomplete project and provisions of RERA Act 2016 are to be applied to resolve the dispute, I am of the opinion that balance will have to be strike out between rights of Allottee on one hand and obligation of promoter on other hand. Unless rights of Allottees and obligations of promoters are equally considered and protected as provided under RERA Act 2016, the object of regularizing the real estate sector without disturbing the development will not be achieved. So, as observed by Hon'ble Bombay High Court in Neelkamal Case, every dispute between promoter and Allottee will have to be decided on the basis of facts and circumstances of that case. So whenever, relief under Section 18 of RERA Act 2016 is claimed for recovery of amount with interest and compensation, it is always desirable to find out whether the Allottee wants to continue with project or wants to withdraw from the project.

13. If Allottee wants to continue, it shows his bonafide requirement of home inspite of suffering delay in getting possession of home inspite of suffering from additional financial burden (such as payment of rent for more period, payment of loan installments for more period etc.) without any fault on his part. Hence, provision for payment of interest on the amount paid to Promoter for period of delayed possession is made to compensate the Allottee under Section 18 of RERA Act, 2016.

14. Equally promoter can also get interest from Allottee in case Allottee makes default in payment of installment as agreed to the promoter. After all, Allottee needs home and pays to promoter his life earning to purchase home and still Allottee does not get possession as per agreed date. In such situation, we must ascertain the state of affair and progress of work of project and time consumed and likely to be consumed for completion as well as genuine efforts made by the promoter if any to complete the project and amount of price paid by Allottee till date. Considering above factors which may differ from case to case we may determine the period of delay and amount of interest and compensation as per Section 18 of Rera Act 2016 in a dispute between promoter and Allottee. It is observed by their Lordships in Para 126 of Neelkamal Case (Bombay High Court) decided on 06.12.2017 that " In case, inspite of making genuine efforts, a promoter fails to complete the project, then the concern authorities, adjudicators, forums, tribunals would be certainly look into genuine cases and mold their reliefs accordingly."

15. In this matter, Allottee wants to continue with the project. So Allottee has given paramount consideration for home. It is equally true that the substantial amount paid by Allottee towards price of the flat to the Promoter is used by the Promoter. After all the amount is paid for purchase of the flat. If strict and word to word meaning of Section 18 of RERA Act 2016 is considered then, Allottee will be entitled to recover the interest from the date mentioned in the agreement for sale which may be prior to 01.05.2017 i.e. the date of enforcement of RERA Act 2016. However, development of Real Estate Sector depends upon participation of promoter and Allottee. Development cannot be made by one side only. To make construction of homes by launching project by the promoter and demand of Allottee to purchase the homes in such project are two different aspects but both depends upon each other to make development of Real Estate Sector. At the same time, transaction of sale and purchase between promoter and Allottee must be transparent along with mandate of giving possession of homes to Allottees on agreed date as per agreement and to reduce the frauds and to safeguard interest of Allottees as per provisions of RERA Act, 2016. So survival of Real Estate Sector is equally important with the protection of rights of Allottee to get the home. If we consider the enactment of RERA Act 2016 in this perspective, I am of the opinion that balance will have to be strike out between Promoter and Allottee as far as period of delay in completing the project as well as amount of interest on account of delay is to be considered. RERA Act 2016 is beneficial and welfare legislation. Allottee can claim refund of total amount with interest and compensation, in case Allottee has chosen to

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withdraw from project. Whenever, Allottee has chosen to continue with project, the top priority of Allottee is to get early possession of flat or home and also interest for delayed period of possession. However, by that time, Promoter may not be financially in position to pay interest for delay of that project to Allottee. Sometime, Promoter may be further compelled to stop the work of completion of project if he is required to pay huge interest for delay in delivery of possession. So amount of interest to Allottee for delay in completing project should be determined by keeping in mind that completion of project should not be withheld due to financial crises of Promoter for that project. Thus, Promoter and Allottee are expected to understand each other and discharge their obligations and duties to get completed the project and consequently early possession of home so as to fulfill dream of Allottee. However, for striking out balance between obligation of Promoter to pay interest and right of Allottee to recover the same, neither party should take disadvantage of such situation which will ultimately result in non-completion of project and making Allottee to wait for more time to get home.

16. In this matter, though the date of possession was mentioned as 30.06.2017 in registered agreement for sale and project was incomplete on that date and possession was not given to the Allottee and Promoter is liable to pay interest from 01.07.2017 onwards till Allottee gets the possession of the flat in view of Section 18 of RERA Act 2016, it will be equitable and proper to saddle the Promoter with payment of interest for every month default on the amount paid by the Allottee from 01.01.2018 till

promoter hands over the possession of the flat to Allottee. Promoter has applied for occupation certificate. Admittedly, promoter could not adhere to the date of giving possession i.e. 31st August, 2018 as directed by Ld. Chairperson MahaRERA in it's order.

17. Allottee has prayed for compensation on account of repayment of loan and payment of rent for enhanced period of delivery of possession. However, as per Section 18 of RERA Act, 2016 if Allottee has chosen to withdraw from project then, Allottee is entitled to get back the amount paid towards price and interest thereon and compensation. However, if Allottee has chosen to continue with project, he is entitled for interest on amount paid to promoter for delayed period of possession. This proviso of Section 18(1) of RERA Act does not speak about compensation also. Moreover, as per Section 18(2), Allottee is entitled for compensation in case of loss or damage sustained due to defective title of Land and as per Section 18(3) of RERA Act, Allottee is entitled to claim compensation if promoter fails to discharge any other obligation imposed on him under the Act or rules or regulates or in accordance with terms and conditions of Agreement for Sale. The case of present Allottee falls within the ambit of Proviso of Section 18(1) of RERA Act which relates to claim of interest on account of delayed possession where Allottee continues with project. So, any compensation towards repayment of loan and rent due to enhancement of period of delivery of possession cannot be considered in this matter and Ld. Chairperson RERA has correctly granted the claim of Allottee for interest only and not for compensation. So, I answer point No.1 in affirmative and point No.2

as partly affirmative and point No. 3 in negative.

18. In view of the above discussion, I am of the opinion that it is just, proper and equitable to partly allow the appeal to the extent of period of delay in delivery of possession for determining interest. Promoter shall pay the interest to the Allottee from 01.01.2018 till the Allottee gets the possession of the flat from Promoter. With this modification regarding period of payment of interest, the rest of the order passed by Ld. Chairman RERA as revealed from para 3 of its judgment is confirmed.

19. The Ld. Chairperson of MahaRERA has correctly and properly appreciated the dispute and passed order by prepounding the date of completion of project after verifying it's state of affair. Order of Ld. Chairperson of RERA is quite legal and just except on the point of determination of interest for delayed period for handing over possession.

20. In the result, I pass the following order.


ORDER

- i) Appeal is partly Allowed.
- ii) The order dated 28.05.2018 passed by Ld. Chairperson MahaRERA in Complaint No. CC006000000023902 is modified to the extent that promoter shall pay interest from 01.01.2018 instead of September, 2018 on the amount received from Allottee till Allottee gets possession of Flat.

- III) The total amount of interest to be paid to the Allottee by Promoter as directed above shall be adjusted against the balance price of Flat, to be paid by Allottee to the Promoter after obtaining the occupancy certificate of the project by the Promoter.
- IV) Besides the above mentioned modification regarding period of payment of interest, the rest of the order passed by Ld. Chairman MahaRERA as revealed from para 3 of its judgment is confirmed.
- V) Promoter shall pay Rs.2,000/- towards proportionate cost of this appeal to the Allottee and shall bear his own costs.

mys

15.02.2019.


15/02/19.
[SUMANT M. KOLHE,]
JUDICIAL MEMBER,
Maharashtra Real Estate
Appellate Tribunal,(RERA)
Mumbai.

