

March 19

BEFORE MAHARASHTRA REAL ESTATE APPELLATE TRIBUNAL, MUMBAI

APPEAL NO. AT00600000010989 OF 2019InComplaint No. CC00600000 55694

Smt. Sushama Sakharam Malvankar]
 Residing at L-1/701, Shivganga Apartment]
 Lok Kedar Society, J.S.D. Road,]
 Mulund (West), Mumbai – 400 080.] ... *Appellant*

~ versus ~

1. AAP Realtors Ltd.,]
 Opp. S. H. Kelkar & Company,]
 Balrajeshwar Road, Mulund (west),]
 Mumbai – 400 080.]

2. M/s. Samta Builders Pvt. Ltd.]
 Opp. Santoshi Mata Mandir, L.B.S. Road,]
 Mulund (west), Mumbai – 400 080.]

3. Shri Mangesh Sakharam Malvankar]

4. Mrs. Darshana Mangesh Malvankar]
 Residing at L-1/701, Shivganga Apartment]
 Lok Kedar Society, J.S.D. Road,]
 Mulund (west), Mumbai – 400 080.] ... *Respondents*

*Mr. Sushant Chavan i/b. Mr. Sandesh Deshpande, Advocate for Appellant.
 Mr. Vaibhav Charalwar, Advocate for Respondents.*

**CORAM : SHRI SHRIRAM R. JAGTAP, MEMBER (J) &
 DR. K. SHIVAJI, MEMBER (A)**

DATE : 19th MARCH 2024

(THROUGH VIDEO CONFERENCE)

JUDGEMENT

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

Present appeal has been filed under Section 44 of Maharashtra Real Estate (Regulation and Development) Act, 2016 (in short "the Act") against the order dated 03rd October 2018 passed by learned Chairperson,

Maharashtra Real Estate Regulatory Authority, (MahaRERA) in Complaint No. CC 006 0000000 55694, whereby, Respondent nos.1 & 2 were directed to handover possession of the subject apartment to Appellant together with Respondent Nos. 3 and 4 (Allottees) within 15 days.

2. Appellant is the mother of Respondent Nos. 3 and mother-in-law of Respondent no. 4. Appellant along with Respondent Nos.3 and 4 are the flat purchasers and complainants before MahaRERA. Respondent Nos. 1 and 2 are the developers, who are constructing real estate project known as "TIRUMALA HABITATS" located at Mulund (West), Mumbai (in short "the said project'). For convenience, appellant along with respondent nos. 3 and 4 will be collectively addressed hereinafter as allottees/ complainants. Respondent nos.1 and 2 will be collectively addressed hereinafter as promoters.
3. Brief background giving rise to the present appeal is as under; -
 - a. **Complainants case:** Allottees purchased flat no. 2001 in Tower (C) for total consideration of ₹ 02,08,83,300/- by executing and registering agreement for sale on 30th January 2016, wherein promoters have agreed to deliver the possession of the subject flat on or before 31st December 2016. Allottees have cumulatively paid ₹ 01,98,39,135/- to promoters and as per the agreement for sale, only an amount of ₹ 10,44,165/- had remained to be paid at the time of delivery of possession of the subject flat. On account of delay in delivery of the subject flat within the timelines as agreed in the agreement, captioned Complaint came to be filed by Allottees before MahaRERA, seeking various reliefs as mentioned in the said complaint *inter alia* for direction to promoters for possession and to pay interest on the paid amounts for the delay in delivery of possession on account of the breach of the contractual commitments as well as compensations under the provisions of the Act for their mental harassments.



- b. Promoters resisted the complaint by submitting before MahaRERA that Section 18 of the Act for payment of interest for delay will not be applicable herein because, promoters have already obtained occupation certificate of the said project even before filing of the complaint and this has already been informed to allottees.
 - c. Upon hearing the parties, learned Chairperson, MahaRERA passed the impugned order dated 03rd October 2018 directing promoters to handover possession of the subject apartment to allottees within 15 days.
 - d. Aggrieved by this order of MahaRERA, appellant has preferred the captioned appeal, seeking various reliefs including to quash and set aside the impugned order dated 03rd October 2018 and to allow the captioned Complaint no. CC 006 0000000 55694 in its entirety.
- 4.** Parties have filed the written submissions. Advocate Sushant Chavan h/f Advocate Sandesh Deshpande submits that appellant does not wish to make further oral submissions and the written submissions already filed by appellant be considered as oral arguments. Heard Advocate Vaibhav Charalwar, learned counsel for Respondents.
- 5.** Appellant has prayed for the aforesaid reliefs by citing following grounds; -
- a. On account of delay in delivery of possession of the subject flat on or before the agreed timeline of December 2016, allottees were constrained to issue legal notice dated 24th February 2018 to promoters. Only after five months, Promoters refuted it by responding it that occupation certificate dated 22nd May 2018 has been obtained.
 - b. MahaRERA has passed the said impugned order dated 03rd October 2018 for handing over the possession of the subject flat without awarding remaining reliefs sought in the complaint.
 - c. After issuing legal notice, allottees visited the site and found that project works are still incomplete, there were certain lacunas in the works



including that all the lifts were not functional, there was no drinking water and no electricity supply in the subject flat. Allottees have intimated these to promoters by clearly pointing all these details of incomplete works on the part of the promoters. Appellant has also sent various e-mails dated 09th July 2018, 13th July 2018, 14th August 2018 and 08th September 2018 pointing out these deficiencies and lacunas in the project construction. In view of the various works remaining incomplete, it was impossible to stay in the said flat. However, promoters sent several reminders to appellant vide intimations dated 23rd March 2018, 20th June 2018 07th July 2018, 23rd July 2018 and 03rd August 2018 calling upon appellant to pay the dues/charges.

- d. However, since the respondent Nos.3 and 4 are son and daughter-in-law of the appellant respectively, are staying abroad for their livelihoods and under compelling circumstances, appellant was constrained to take possession of the subject flat by executing a declaration cum undertaking dated 06th January 2019.
- e. Accordingly, Promoters have failed to deliver the possession of the subject flat as stipulated in the agreement for sale before 31st December 2016 even after delay of more than 3 years. Therefore, in view of the provisions of the Act *inter alia* Section 18 of the Act and in view of the settled position of law, allottees are entitled for interest for the delay in delivery of possession together with compensations.
- f. However, MahaRERA by its order dated 03rd October 2018, has directed promoters only to handover possession of the subject flat within 15 days and rejected other prayers of the complainants on the ground that occupation certificate has already been obtained and flat is ready for possession. This is despite the fact that several amenities were not provided therein by simply relying upon the occupation certificate. MahaRERA has failed to consider that allottees have paid almost the



entire consideration including the registration fee and stamp duty etc. As such, promoters have committed breach of contractual obligations.

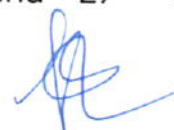
- g. After passing of the impugned order dated 03rd October 2018 and after the receipt of the promoters letter dated 13th October 2018 for taking possession of the subject flat upon the intimation that the subject flat was ready for occupation, appellant again visited the site and found that the subject flat was still incomplete, in the same position as that of the time, when the legal notice dated 24th February 2018 was issued. Therefore, respondent no.3 sent e-mail dated 17th October 2018 to promoters by intimating various lacunas/ non-completion of works and that the said occupation certificate is not valid, is illegal and void.
- h. Therefore, MahaRERA has failed to consider various submissions of the allottees, and the impugned order is illegal, is bad in law, is contrary to the principle of equity and is liable to be quashed and set aside. Accordingly, allottees urged that the reliefs sought in the appeal be allowed by indicating that promoters have used and utilized the paid amounts for additional two years without handing over the possession of the subject flat and placed reliance on the following citations.
- a. *Mr. Suryakant Yashwant Jadhav and Anr. Vs. Bellissimo Hi-Rise Builders Pvt. Ltd. And Ors. passed by this Tribunal on 12th January 2021.*
- b. *Neelkamal Realtors Pvt. Ltd. Vs. Union of India (writ petition No.2737/77) passed by the Hon'ble Bombay High Court.*

6. Per Contra, learned counsel for promoters submits that; -

- a. Allottees were informed on 13th October 2018 as well as by an e-mail dated 15th October 2018 about the readiness of the subject flat for occupation after the receipt of the occupation certificate dated 22nd May 2018 and were requested to take possession of the subject flat by making payment of the outstanding amounts. Respondent no. 3, vide email dated 16th October 2018 raised some issues regarding certain purported

deficiencies and incompleteness about the construction of the subject flat. However, these issues were neither the subject matter in the complaint nor for any such determinations before MahaRERA for passing of the impugned order. Thus, appellant has raised entirely new and fresh issues at the stage of filing appeal, which are impermissible in law. As such, MahaRERA has correctly passed the impugned order by rejecting the complaint. Therefore, appeal is not maintainable in law and is liable to be dismissed with costs.

- b. Respondent no.3 portrayed absolute non-cooperation in the process of delivery of possession of the subject flat and never expressed their intentions to pay the outstanding amounts, which had become due and payable. Respondent Nos.3 sent a very vague and evasive reply by email dated 16th October 2018, by stating that they would make the payment only after respondent no.4 visits and examines the subject flat. Even though, MahaRERA has ordered to handover possession within 15 days, even then, allottees have failed to clear their outstanding dues.
- c. On 17th October 2019, respondent no.3 sent another email enlisting various frivolous allegations about purported inadequacies in the subject flat after the visit of respondent no.4 with a view to delay in making the payment of their outstanding dues. These accusations and allegations of allottees are baseless, false and devoid of any merits.
- d. Despite the offer and willingness of promoters to handover possession of the subject flat and even after the categorical submissions of respondent nos.3 and 4 for payments immediately on handing over the possession, allottees have failed to do so. Therefore, allottees were again requested to take possession vide letter 27th November 2018.
- e. Eventually, respondent no.3 made payment of the outstanding amounts due to promoters in four tranches on 17th December 2018, 20th December 2018, 26th December 2018 and 27th December 2018.



Respondent no.3 vide email dated 06th January 2019 to respondent no.1, stated that appellant will be taking possession on behalf of allottees after giving a declaration cum undertaking dated 06th January 2019 (said declarations) to promoters in respect of the said flat. Accordingly, allottees have taken possession of the subject flat after giving the said declarations of appellant and also of respondents nos. 3 and 4.

- f. Whereas Clause 20 of the said declarations (being reproduced below for ready reference) clearly stipulates that appellant has accepted the possession of the subject flat and allottees have given up/ waived all claims, issues, demands, complaints etc, arising from the complaint or otherwise.

".....20. We state and undertake that, we have no complaints and grievances and any matter whatsoever nature against Promoter and/or Transcon in respect of the construction of the said flats, amenities and/or building and all the issues, claims, demands, objections, complaints of whatsoever nature including but not limited to the fit-out possession of the said flat. We further state and undertake that if any claim, then the same is/are resolved and which shall be fully settled and to me/our utmost satisfaction and I/we hereby waived the said claim...."

- g. The impugned order is free from any material defect, is not contrary to the facts on record, promoters have not committed any breach of the contractual obligations as per the agreement and therefore, MahaRERA has not erred in rejecting the complaint on the ground that Mumbai Municipal Corporation has granted occupation certificate. The subject building has been provided with all agreed amenities such as water and electricity etc, which are fully functional in the said flat. Therefore, there are no lacunas nor any incompleteness in the work of the said flat as falsely alleged by allottees. Promoters have already obtained necessary permissions from concerned Authorities for water supply, electricity and



gas connection, which are fully functional, and many other residents are already residing in the said building. Therefore, the alleged grievances of allottees regarding the inhabitable conditions of allottees are devoid of merits.

- h. Appellant has deliberately suppressed the material facts to fulfill their oblique motives about the waiver of all claims in para 20 of the said declaration and therefore, appellant is guilty of *suppressio veri and suggestio falsi*, despite the knowledge that part occupation certificate dated 22nd May 2018 has already been obtained and has also accepted the possession. Even then, appellant has preferred this captioned appeal on alleged grounds of non-completion of work. Therefore, allottees have not approached this Tribunal with clean hands and suppression of these facts has caused grave prejudice to promoters.
- i. In view of the foregoing reasons, the present appeal is thoroughly misconceived, untenable, and not maintainable in law because allottees have already acted upon after accepting the impugned order passed by MahaRERA and allottees have already taken possession of the said flat. Hence, the same cannot be challenged because it is a settled law that an order passed by consent of parties is not appealable. Therefore, the captioned appeal be dismissed with compensatory costs by placing reliance on the following citations.
- a. *Arce Polymers Private Limited vs. Alphine Pharmaceuticals Private Limited & Ors.* [(2022) 2 SCC 221].
- b. *Himachal Pradesh State Forest Company Limited vs. United India Insurance Limited* [(2009) 2 SCC 252].
- c. *All India Power Engineer Federation & Ors. Vs. Sasan Power Limited & Ors.* [(2017) 1 SCC 487].

7. After considering the pleadings advanced by the respective parties, material on record, short point that arises for our determination is whether appeal is



maintainable in law, to this, our finding is in the negative for the reasons to follow: -

REASONS

- 8.** It is not in dispute that complainants have booked the subject flat in the promoter's said project by executing and registering agreement for sale, wherein promoters have agreed to deliver possession of the subject flat before December 2016. The said project is duly registered with MahaRERA. However, promoters have failed to deliver possession of the subject flat before the agreed time and therefore, captioned complaint came to be filed on 9th August 2018. Accordingly, the provisions of the Act are applicable to this said transaction. Admittedly, appellant along with the respondent nos. 3 and 4 are allottees as well as respondent nos. 1 and 2 are collectively promoters under the provisions of the Act.
- 9.** Captioned complaint came to be filed on account of *inter alia* delay in delivery of possession on 9th August 2018 seeking *inter alia* possession, interest for delay and compensations. The complaint came to be disposed of by MahaRERA by directing promoters to deliver possessions within 15 days.
- 10.** Based on the offer for possession after the receipt of the part occupation certificate, appellant visited the site on 17th October 2018 and found certain alleged lacunas and incompleteness of the flat including certain deficiencies in the construction of the flat. However, subsequently, appellant/allottees have taken over the possession of the subject flat by giving written declaration and undertaking on 6th January 2019. But the appellant has filed the captioned appeal on 3rd May 2019 by challenging the order of MahaRERA dated 3rd October 2018 seeking *inter alia* interest for delay and compensations. However, the claims of the appellant in the captioned appeal seeking these reliefs are legally not sustainable on account of the followings; -



- a. Project has received part Occupation certificate from the competent authority under the provisions of the Act on 22nd May 2018. It is incumbent upon and is the accountability of the concerned competent authority to ensure completeness of the said project before issuance of the part occupation certificate and only after completion of the same in all respects, said certificate is expected to have been issued.
- b. Appellant on behalf of allottees has taken possession without raising any protest or grievances at the time of taking possession of the subject flat. As such, it is the appellant, who has taken possession of the flat on behalf of allottees after initially raising certain grievances but has given an expressed written undertaking *inter alia* clause 20, which clearly shows that all such grievances raised earlier by the allottees stand waived. After giving expressed undertaking wherein, allottees themselves, have explicitly waived all such claims and thereafter, same allottees cannot turn back and raise the very same ground seeking the very same captioned reliefs under the captioned appeal.
- c. Careful perusal of the sequence of events reveals that the said Complaint has been filed on 9th August 2018 only after the receipt of the occupation certificate on 22nd May 2018. Whereas MahaRERA has passed the impugned order directing allottees to take possession within 15 days on 3rd October 2018. Thereafter, certain grievances of incompleteness of the said flat were raised by complainants on 17th October 2018. However, appellant has taken over the possession of the flat on 6th January 2019 after giving an explicit and expressed undertaking while taking possession of said flat with confirmation of no further grievance at all.
- d. Careful perusal of the declaration cum undertaking dated 06th January 2019 clearly reveals that allottees have also corrected the said draft declaration by crossing and have deleted the para no. 19 of the draft by putting remarks "*as discussed, removing*", *vide page no.180*. This clearly



signifies the proper application of mind of allottees, before taking possession of the subject flat and for giving the said declaration cum undertaking.

- e. Whereas Para nos. 16 and 20 of the judgment of the Hon'ble Supreme Court in the case of *Arce Polymers Private Limited vs. Alphine Pharmaceuticals Private Limited & Ors. (supra)*, it has been held that; -

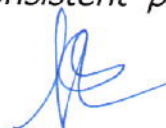
"16. Waiver is an intentional relinquishment of a known right. Waiver applies when a party knows the material facts and is cognizant of the legal rights in that matter, and yet for some consideration consciously abandons the existing legal right, advantage, benefit, claim or privilege. Waiver can be contractual or by express conduct in consideration of some compromise. However, a statutory right may also be waived by implied conduct, like, by wanting to take a chance of a favorable decision. The fact that the other side has acted on it, is sufficient consideration. "

*"20. Reference in this regard can be also made to the ratio in *Krishnan Lal v. State of J & K and Martin & Harris Ltd. V. Addl. District Judge. In Bank of India v. O.O. Swarnakar and in Lachoo Mal v. Radhey Shyam*, this Court elucidated the general principle that everyone has a right to waive and to agree to renounce an advantage of law or rule made solely for the benefit and protection of the person in private capacity. If a party gives up the advantage that could be taken of a particular position in law, it cannot later be permitted to change and turn around so as to avail of that advantage."*

- f. The Hon'ble Supreme Court in para 20 of its judgment in the case of *All India Power Engineer Federation & Ors. Vs. Sasan Power Limited & Ors. (supra)*, has further held that; -

... *"20. In P. Dasa Muni Reddy v. P. Appa Rao, this Court held: (SCC p.729, para 13)*

"13. Waiver is an intentional relinquishment of a known right or advantage, benefit, claim or privilege which except for such waiver the party would have enjoyed. Waiver can also be a voluntary surrender of a right. The doctrine of waiver has been applied in cases where landlords claimed forfeiture of lease or tenancy because of breach of some condition in the contract of tenancy. The doctrine which the courts of law will recognise is a rule of judicial policy that a person will not be allowed to take inconsistent positions to gain



advantage through the aid of courts. Waiver sometimes partakes of the nature of an election. Waiver is consensual in nature. It implies a meeting of the minds. It is a matter of mutual intention. The doctrine does not depend on misrepresentation. Waier actually requires two parties, one party waiving and another receiving the benefit of waiver. There can be waiver so intended by one party and so understood by the other."


g. It is pertinent to note that, appellant has not controverted any of the grounds raised by promoters by filing any rejoinder or otherwise.

11. In view of the foregoing and findings herein above, we are of the considered view that none of the grounds raised by appellant in the captioned appeal are sustainable in the eyes of law and promoters have effectively controverted the grounds raised in the appeal. Therefore, captioned appeal is devoid of merits, lacks substance and allottees are not entitled to the reliefs sought in the appeal. Consequently, the appeal having no merit, deserves to be dismissed. Accordingly, we answer the solitary point in the negative and proceed to pass the order as follows; -

ORDER

- (i) Captioned Appeal No. AT0060000000 10989 stands dismissed.
- (ii) No order as to costs.
- (iii) 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)


(SHRIRAM R. JAGTAP, J)