Nalawade

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BEFORE MAHARASHTRA REAL ESTATE APPELLATE TRIBUNAL, MUMBAI

APPEAL NO. AT004000000031625 OF 2019
In
Complaint No. CC004 0000000 10024

1. SACHIN TOMAR
2. SHIVAJI TOMAR
701, Aakash CHS, Plot No.8/9,
Sector 42, Behind HDFC Bank,
Navi Mumbai – 400706. ... *Appellants*

~ versus ~

ENSAARA METROPARK LUXORA INFRASTRUCTURE PVT. LTD.
5th Floor, Sun Plaza, Hari Om Nagar,
Off. Eastern Express Highway,
Mulund (East), Mumbai – 400081. ... *Respondent*

Mr. Darshan Naik, Advocate for Appellants.
Mr. Faiza Dhanani a/w. Mr. Vikramjit Garewal, Advocate for Respondent.

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

DATE : 01st MARCH 2024

(THROUGH VIDEO CONFERENCE)

JUDGEMENT

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

Present appeal has been preferred under The Maharashtra Real Estate (Regulation and Development) Act, 2016 (in short "the Act") against the order dated 21st March 2018 passed by learned Chairperson, Maharashtra Real Estate Regulatory Authority, ('MahaRERA') in Complaint

No. CC 004 0000000 10024, wherein appellants have sought reliefs *inter alia* to set aside the impugned order dated 21st March 2018 and to grant reliefs under Section 18 of the Act for refund of the paid amounts and the HDFC Bank's housing loan processing fees of Rs. 11,000/- charged by the bank with interest and compensations thereon.

2. Appellants are flat purchasers and Complainants before MahaRERA. Respondent is developer/ Promoter, who is developing a duly registered project known as "ENSAARA MEETROPARK PHASE I" located at Besa-Pipla Road, Mouza- Pipla, Tehsil and District - Nagpur ('said project'). For convenience, Appellants and Respondent will be addressed hereinafter as Complainants and Promoter respectively in their original status before MahaRERA.

3. Brief background giving rise to the present appeal is as under; -

a. **Complainants case**: Complainants booked flat no. A-302, in promoter's said project and received an allotment letter dated 25th November 2015 from the promoter. Clause/ Point 5 of Annexure A attached to the allotment letter stipulates that promoter shall endeavor to provide possession of the flat by 31st March 2017 or a date up to three months thereafter.

b. On account of delay in delivery possession of booked flat within the agreed timeline, complainants requested promoter for cancellation of the allotment letter and sought refund of the entire paid amounts together with interest. However, in the wake of failure to receive refunds despite promoter's initial willingness to refund the entire paid amounts till October-November 2017, captioned complaint came to be filed by appellants/ allottees before MahaRERA seeking *inter alia* for refund of the entire paid amounts of ₹ 5,30,331/- along with interest from the date of payments till the realisation of the entire amount besides compensations.

c. Promoter resisted complaint before MahaRERA by submitting that complaint is not maintainable because there is no agreement for sale executed between the parties and therefore, the cancellation of the said allotment should be governed by the terms and conditions of the allotment letter.

d. Upon hearing the parties, MahaRERA disposed of the complaint by holding that " ..... ***if*** *the Complainants are* ***willing to*** *continue in the said project, are directed to execute the agreement for sale as per the provisions of section 13 of the Real Estate (Regulation and Development) Act 2016 and the rules and regulations made thereunder within 30 days from the date of this Order. The Respondent shall handover possession of the said apartment, with Occupancy Certificate, to the Complainants* ***before the period ending December 31, 2019****. Consequently, the matter is hereby disposed of.* "

e. Aggrieved by the order of MahaRERA, complainants have preferred the captioned appeal to set aside the impugned order and for further reliefs *inter alia* to get refund of the paid amounts as elaborated herein above.

4. Heard learned counsel for parties *in extenso.*

5. Learned counsel for Complainants sought various reliefs by submitting as follows: -

a. Complainants had intimated their decision to exit from the project by their letter dated 23rd March 2017, which was duly accepted by promoter. But even after initial willingness for refund, promoter has not refunded the paid amounts. Thus, Complainants are entitled for the reliefs prayed herein including for complete refund of the paid amounts under the Act more particularly under Section 18 of the Act.

b. MahaRERA has failed to appreciate the Objects/ Reasons and the purpose enshrined in the preamble of the Act, which clearly specifies that the Act

is a welfare legislation. Therefore, impugned order suffers from conspicuous and glaring errors of law. As such, even the pleadings of the complainants were ignored and have not been taken into consideration, MahaRERA has completely relied on erroneous assertions of the promoter that no relief under Section 18 of the Act could be granted in the absence of registered agreement for sale executed between the parties. Accordingly, the complaint has been disposed of erroneously merely on technical objection by promoter and has not been decided on merits.

c. MahaRERA has failed to appreciate that agreement is meeting of minds and is a form of contract relating to offer, acceptance, consideration, time-schedule, clarity of title and has essence of time. The said allotment letter already issued by promoter itself and is couched in such a fashion that it incorporates all these requisite elements of an agreement.

d. Allotment letter issued by promoter in the instant case is quite comprehensive and contains 17 different clauses including an elaborate terms and conditions of the transaction in addition to 5 annexures comprising of the payment schedules, possession date, lay-out plan, infrastructure and amenities details, floor plan of building '3B' of third floor attached along with the allotment letter. Therefore, allotment letter is quite comprehensive and contains all the essential terms and conditions of agreement as mutually agreed for the said transaction. Careful perusal of the allotment letter makes it crystal clear that the allotment letter is as good as an agreement for sale. Agreement for sale defined under Section 2 (c) of the Act further shows that the said allotment letter satisfies all the requirements of an agreement under the Act more particularly in view of the spirits and intentions of this legislation. Therefore, Section 18 of the Act is attracted, and complaint is maintainable under the law.

e. Further referred the judgment of The Hon'ble Bombay High Court in the case of Neelkamal Realtors Suburban Pvt. Ltd. -vs- Union of India & Ors. [(2017) SCC Online Bom 9302] wherein, it has been held that if the project is registered then, all the provisions of RERA are squarely applicable to the project and therefore, the timelines prescribed therein for possession are enforceable under Section 18 of the Act.

f. Hon'ble Tribunal in catena of cases has held that mere non-execution of the agreement for sale cannot be allowed to operate in favour of promoter and as such, the provisions of Section 18 can be invoked even in terms of oral or informal agreements executed between the parties, such as booking letter/confirmation letter, letter of allotment, correspondence etc. capable of being construed as agreement.

g. The Hon'ble Bombay High Court has observed in G. Swaminathan -vs- Shivram Co-operative Housing Society and Ors. 1983(2) Bom CR 548 that registration of agreement for sale is not condition precedent to seek remedy under Section 8 of MOFA and under Section 18 of RERA.

h. MahaRERA has failed to observe that promoter has not raised any objection to contractual obligations. Therefore, the impugned order issued by MahaRERA is not in accordance with the law. As such the impugned order is neither specific nor clear as to whether the reliefs sought therein are granted or rejected. Thus, the impugned order is not proper and not correct. Admittedly, possession of the subject flat had not been given before the due date and as per the MahaRERA website, the initial possession date mentioned on the website for 2017, which has been further extended to 31st December 2019.

i. After patiently waiting for possession, complainants finally lost hope in the project and had to issue the said termination letter on 23rd March

2017 for refund of the paid amounts, which is hard-earned money of the complainants and a part of it is borrowed as loan from the HDFC bank.

j. Promoter acknowledged and accepted the said termination letter and agreed to refund the entire amounts, vide their email dated 21st June 2017 and suggested to refund it in instalments. This was not acceptable to complainants and the same has been communicated in writing by email dated 05th July 2017 (page 39 of the appeal memo) and also over phone.

k. Even though, the booking of the flat was done during the Maharashtra Ownership of Flats Act, 1963 (MOFA) but the RERA Act of 2016 is in addition to MOFA, and the project is also registered with MahaRERA. Therefore, the provisions of the Act are squarely applicable and the paid amount of ₹ 5,30,313/- along with HDFC loan processing charges are required to be refunded along with interest from the date of payments.

l. In support of the above contentions, learned counsel for Appellants has referred and placed reliance on the following judgments: -

   i. In the case of Imperia Structure Ltd. -vs- Anil Patani passed by The Hon'ble Apex Court in [2020 SCC Online SC894]

   ..."*23. In terms of Section 18 of the RERA Act, if a promoter fails to complete or is unable to give possession of an apartment duly completed by the date specified in the agreement, the Promoter would be liable, on demand, to return the amount received by him in respect of that apartment if the allottee wishes to withdraw from the Project. Such right of an allottee is specifically made "without prejudice to any other remedy available to him". The right so given to the allottee is unqualified and if availed, the money deposited by the allottee has to be refunded with interest at such rate as may be prescribed. The proviso to Section 18(1) contemplates a situation where the allottee does not intend to withdraw from the Project. In that case he is entitled to and must be paid interest for every month of delay till the handing over of the possession. It is upto the allottee to proceed either under Section 18(1) or under proviso to Section 18(1). The case of Himanshu Giri came under the latter category. The RERA Act thus*

definitely provides a remedy to an allottee he wishes to withdraw from the Project or claim return on his investment.

....30. It is true that some special authorities are created under the RERA Act for the regulation and promotion of the real estate sector and the issues concerning a registered project are specifically entrusted to functionaries under the RERA Act. But for the present purposes, we must go by the purport of Section 18 of the RERA Act. Since it gives a right "without prejudice to any other remedy available', in effect, such other remedy is acknowledged and saved subject always to the applicability of Section 79."

m. Section 8 of MOFA also confers statutory rights upon allottees complainants to claim refund with interest upon failure on the part of the promoter to handover possession as per the agreed timeline.

n. Possession delivery date stipulated in the allotment letter cannot be changed without the prior consents of the complainants. Whereas in the instant case, promoter has unilaterally extended the possession delivery date to 2017 and thereafter even extended to December 2019, while registering the project with MahaRERA. Therefore, unilateral extension of possession date is not permissible under the law.

o. Complainants have never acquiesced nor accepted the revised possession date. Moreover, promoter has not issued even a single demand letter. As such, promoter has not offered for alternative flat and documentary evidence to this effect has not been produced on record.

p. It is unreasonable to make complainants to wait indefinitely for possession beyond the period of three years as per the settled position of law including as the judgment of The Hon'ble Supreme Court in the cases of Fortune Infrastructure & Anr. -vs- Trevor D'Lima & Ors [(2018) 5 SCC 442], Pioneer Urban Land Infrastructure Ltd -vs- Govindan Raghavan [(2019) 5 SCC 725], Kolkata West International City Pvt. Ltd. -vs- Devasis Rudra [(2019) SCC Online SC 438] and Arifur Rahman Khan and Aleya

Sultana & Ors. -vs- DFL Southern Homes Pvt. Ltd. [(2020) SCC Online SC 667], allottees have been held entitled for refund by the Tribunal in the judgments of Rohit Chawla -vs- M/s. Bombay Dyeing & Mfg. Co. Ltd. In Appeal No. AT006000000011016, Mrs. Amrita Kaur & Anr. -vs- East & West Builders Ors. in Appeal No. AT006000000010977 of 2019 and APL Yashomangal Developers & Anr. -vs- Yashwant Dashrath Sawant & Anr. In Appeal No. AT006000000000245 of 2018. Accordingly, sought to allow the appeal.

6. Per Contra, learned counsel for promoter sought to dismiss the present appeal with costs by denying averments of allottees as follows; -

a. The impugned order dated 21st March 2018 was issued by MahaRERA based on the expressed willingness of the complainants to continue in the said project, and in turn had agreed to execute the agreement. Therefore, the captioned appeal is not maintainable.

b. Moreover, complainants themselves have cancelled the allotment letter vide complainants letter dated 23rd March 2017, even before the commencement of the Act. Therefore, complainants are not allottees under the provisions of the Act of 2016.

c. Since the said project expands over 287.5 acres of land and is also subjected to various government approvals. Hence delay, if any in the project execution is not attributable to promoter and the same is due to delay in getting various government permissions. Due to revisions of development plan of the Nagpur Development Corporation since 2015, certain new road under DP have crossed the project and promoter has been taking efforts to resolve the same and revise its own plan to ensure less damage to flat purchasers. Promoter has been putting its best efforts for timely project completion. Even then, promoter was ready and willing

to provide apartment, but complainants are seeking to treat the Tribunal as a recovery forum, which should not be permitted.

d. As per the clause 5 of Annexure A to allotment letter, promoter has categorically stated that it will endeavour to provide flat by 2017 and has not given any definitive date of possession. Therefore, promoter denies any promise for the possession to be delivered by March 2017.

e. Complainants have not complied with the terms of the allotment letter. Therefore, they have no liberty to cancel allotment letter. Moreover, as per the allotment letter, promoter is entitled to deduct 5 percent of the deposited amount, if it is to be refunded.

f. Perusal of the impugned order further shows that complainants themselves were reconsidering their options of purchasing the flat, which is contrary to the contents of the present appeal. Moreover, Promoter is ready and willing to handover premises to complainants in a building, which was already constructed.

g. Allotment letter is not stamped and /or registered document and is merely a proposal made by promoter and accepted by complainants appellants. (para 24 page 139). Any document executed between the parties ought not be termed as an agreement and bind a party to seek relief of such nature.

h. MahaRERA has correctly recorded that since there is no agreement, the application was beyond the ambit of Section 18 and cancellation ought to be governed under the allotment letter. In support of the above contentions, learning counsel placed reliance on the judgement/ citations of the Hon'ble Supreme Court in the case of the State of Maharashtra v/s. Ramdas Srinivas Nayak and Anr. in Special Leave Petition (criminal) no. 1523 of 1982 dated 28th July 1982.

7. Upon hearing complainants, perusal of material on record, following points arise for our determination in this appeal and we have recorded our findings against each of them for reasons to follow: -

	POINTS	FINDINGS
1.	Whether complainants are allottees under the provisions of the Act?	In the affirmative.
2.	Whether section 18 of the Act will operate in the absence of written agreement for sale?	In the affirmative.
3.	Whether the appeal is maintainable under the provisions of the Act?	In the affirmative.
4.	Whether complainants are entitled for refund as prayed for by allottees in the Appeal?	In the affirmative.
5.	Whether impugned order is sustainable in law?	In the negative.
6.	Whether impugned order calls for interference in this appeal?	As per Order.

R E A S O N S

Point 1, Whether complainants are allottees : -

8. It is not in dispute that the promoter has issued an allotment letter dated 25th November 2015, and has also accepted initial payments from complainants. Point 5 of annexure A attached to the allotment letter stipulates that promoter shall endeavor to provide possession by 31st March 2017 or a date up to three months thereafter.

9. The promoter itself has further submitted that the said project has been duly registered as an ongoing project after the said Act came into force as on 01st May 2017. Whereas The Hon'ble Bombay High Court in para 86 of its judgement in the case of Neelkamal Realtors Suburban Pvt. Ltd. & Anr. Vs. Union of India & Ors. (supra) *has held inter alia that ".....The RERA (the Act of 2016)* ***will apply after getting the project registered****. In that sense, the application of RERA is prospective in nature.....".*

10. The Hon'ble Supreme Court In para 54 of its judgment dated November 11, 2021, in the case of ***M/s. Newtech Promoters and Developers Pvt. Ltd vs. State of UP & Ors. (supra)*** has also held that " *54. From the scheme of the Act 2016, its application is retroactive in character, and it can safely be observed that the projects already completed or to which the completion certificate has been granted are not under its fold and therefore, vested or accrued rights, if any, in no manner are affected. At the same time,* ***it will apply after getting the ongoing projects and future projects registered under Section 3 to prospectively follow the mandate of the Act 2016.***"

11. Therefore, as per the settled positions of law, provisions of the Act are squarely applicable in the instant case. Accordingly, appellants and respondent are Allottees and Promoter respectively under the provisions of the Act. Consequently, the said sale transaction including the Allotment letter dated 25th November 2015 in the instant case is also entirely covered under the Act and are within the purview of the Act of 2016, even though the allotment letter has been issued during the MOFA regime. Moreover, in case of conflict/s, provisions of the said Act of 2016 will prevail as per Section 88 of the Act.

12. However, learned counsel for the promoter further contended that allotment letter issued by the promoter has been cancelled by none other than the complainants themselves in March 2017 itself, even before the commencement of the Act of 2016. Therefore, complainants ceased to be allottees and they cannot claim reliefs under the provision of the Act. However, contentions of promoter are legally not maintainable because of following reasons; -

a. Promoter has duly issued the allotment letter and has also confirmed the receipt of the payments as a part of the initial consideration towards the booking of the flat in the proposed building being developed by promoter.

b. The amount paid by complainants continues to be with the promoter itself even till now.

c. Rights of allottee created to complainants by the said booking cannot be taken away without following the due process of law.

d. Complainants have cancelled the booking primarily on account of purported delay in delivery of possession of the booked flat within the agreed timeline and promoter itself is accountable for alleged delay. Now, promoter itself is contending that complainant is no longer an allottee on this very ground itself. This contention is not acceptable, because these delays are not attributable to complainant at all. It is a settled position of law that he, who prevents a thing from being done, shall not avail himself of the non-performance, he has occasioned. As has been clarified by the Hon'ble Supreme Court in the case *of* ***Kusheshwar Prasad Singh Vs. State of Bihar and Ors. [Supreme Court] Civil Appeal No. 7351 of 2000***: *"It is sound principle that he, who prevents a thing from being done shall not avail himself of the non-performance he has occasioned. To put it differently, "a wrongdoer ought not to be permitted to make a profit out of his own wrong."*

e. Request of complainants sent to promoter for cancellation of booking and refund is still pending and refund has not been made as yet. As such, promoter has not agreed to the request of the complainants for one-time complete refund and this issue of refund time schedules/time period including the mode and the manner for complete refund of the paid amounts are still not finalized/mutually among the parties despite the e-mail exchanges between the parties. These clearly reveals that the request for refund made in the March 2017, has still not been mutually agreed and accepted between the parties and is the subject matter of the dispute in this appeal itself. Complainants are consistently requesting for

the refund of the entire paid amounts including the loan processing charges paid to HDFC of Rs. 11,000 together with the interest thereon. As such the promoters own e-mail dated 5th July 2017 (even after the commencement of the Act of 2016, RERA) sent to complainants in pursuance to the tele-conversation between the parties clearly reveals that "*as you have said you are not wanting to take your refund in installments as offered by us, we are returning your refund cheque of ₹1,00,000 to our accounts department. And as per our discussion, we shall handover to refund your full amount in October / November 2017.*"

f. Therefore, the contentions of the learned counsel for the promoter that complainants have cancelled the allotment letter even before the commencement of the Act of 2016 is factually incorrect on the face of the record. This shows that the process of cancellation has started but has remained incomplete and stuck in the process till now. As such the request made by the complainants for cancellation and complete refund in one go has not been agreed by the promoter itself even till the email of the promoter dated 5th July 2017 and till date.

g. Accordingly, complainants continue to be allottees, their rights accrued under the Act will continue without change and the provisions of the Act will continue to be applicable for the said transaction and we answer point 1 in the affirmative.

Point. 2.Operation of Section 18 in absence of agreement for sale; -

13. Perusal of para 4 of the impugned order dated 21st March 2018 reveals that complainants were clearly told and explained during the course of hearing by MahaRERA itself that relief for the refund sought in the complaint, cannot be granted in the absence of the agreement for sale executed between the parties. Para 4 is being reproduced here for ready reference. ....."*4. During the course of hearing, it was explained to the*

complainants that relief under section 18 ***cannot be granted to them as there is no registered agreement for sale is executed*** *between the parties. The complainants, thereafter, expressed willingness* ***to consider*** *continuing in the said project. The respondent also agreed to enter into registered sale agreement* ***if the complainants desired****."*

14. Whereas the judgement of this Tribunal in the case of **Jyoti K. Narang and Anr. V/s. CCI Projects Pvt. Ltd. in appeal No. AT 10841,** wherein, it has been authoritatively held that section 18 is applicable even in the absence of an agreement for sale. Accordingly, it was contended by learned counsel for the complainants that MahaRERA has erred in holding that provisions of section 18 of the Act shall not apply in the absence of registered agreement for sale.

15. Moreover, The **Hon'ble Bombay High Court in its Judgement dated** 30 August 2021 in the case of **The Bombay Dyeing & Manufacturing Company Limited Vs, Ashok Narang & Ors**. held in para 41 that,

"41. Section 2(c) defines an agreement for sale entered into between the promoter and the allottee. It is necessary to note that Section 2(c) does not say that an agreement has to be in writing entered between the promoter and the allottee....."

".... Thus, there is a considerable force in the argument on behalf of the respondents that Section 18 read with Section 2(c) of the Act of 2016, which defines an agreement for sale in terms, ***do not provide for the requirement of a written agreement of sale****....."*

".....Had the legislature intended, the agreement referred to in Section 18 also to be in writing, nothing prevented it from doing so."

16. Section 18 (1) of the Act further shows that,

"If the promoter fails to complete or is unable to give possession.

(a) *In accordance with the terms of the agreement for sale* ***or as the case may be*** *duly completed by the date specified therein;"*

This Section also provides eligibility for other documents too as mentioned in the phrase" **or as the case may be**".

Accordingly, agreement for sale need not be in writing and any other document containing requisite contents of the agreement will suffice.

In the case on hand, a detailed booking application dated 25th November 2015 is of 14 pages long, contains 17 different clauses including the elaborate terms and conditions of the transaction and in addition, it has 5 annexures comprising of payment schedules, possession date, layout plan, infrastructures and amenities details, floor plan of building "3B" of 3rd floor attached therewith. Allotment letter is duly agreed by both the sides, and it does exist. Therefore, the contents of the allotment letter reflect agreed positions between the parties, which are quite akin to an agreement for sale. In view of this, it is clear that parties have entered into a transaction for the sale and purchase of above units. Therefore, intentions of parties matter more and not the nomenclature of transaction instruments. This **Tribunal** in the case of **R. R. Pagariya & Ors. Vs. Rashmi Reality Builders Pvt. Ltd in appeal no. AT 00523 dated 20th August 2021** ***inter alia*** **specifically in para 12,** has held that even the MOU may be considered as valid instrument for the purpose of provisions of sections 18 of the Act. Accordingly, considering the intention of parties, which matters more and not the nomenclature, we hold that reliefs sought by complainants under Section 18 of the Act, cannot be denied merely for want of written agreement for sale as its nomenclature, despite having detailed and duly comprehensive agreed allotment letter containing all the required ingredients of agreed terms and conditions of sale. In view of above and considering the settled positions of law that written agreement for sale is not prerequisite for the allottee's right to accrue under section 18 of the Act., it is clear that impugned order suffers from infirmities and

we hold that section 18 of the Act will continue to operate even in the absence of agreement for sale in the instant case. Accordingly, we answer point 2 in the affirmative.

Point. 3, Maintainability of the appeal because of the alleged consent order:

17. Learned counsel for the promoter further contended that the impugned order is not maintainable in view of the consent expressed by complainants during the hearing in complaint proceeding before MahaRERA to continue with the project and to sign and execute agreement for sale. Therefore, the impugned order is a consent order passed by MahaRERA and it cannot be challenged by the complainants themselves now by changing their minds and seeking refund by withdrawing from the said project. However, the contentions of the learned counsel for the promoter cannot be accepted on account of the followings; -

a. Bare perusal of the paras 4 and 5 impugned order clearly reveals *inter alia* that "..... *The respondent also agreed to enter into registered sale agreement* ***if the complainants desired***. "

Moreover para 5 of the impugned order clearly further shows that "....***if the complainants are willing to continue*** *in the same project.....".*

b. Accordingly, it is more than evident that complainants have not given any explicit expressed consents to continue in the project. As such, perusal of record more particularly the email exchanges undertaken between the parties clearly reveal that complainants have been constantly/consistently pursuing for the refund of complete paid amounts along with loan processing charges levied by HDFC together with interest and promoter itself has sent an email to complainants even on 5th July 2017 (after the RERA Act came into force) acknowledging that complainants have asked for refund of the complete amount and not in installments. Besides, the

promoter has replied that it will endeavour to refund the full amount in October / November 2017.

c. Perusal of impugned order further reveals that Complainants were given to understand during the complaint proceeding before MahaRERA that the relief under section 18 cannot be granted in the absence of the registered agreement for sale. However, as it has been determined here in above, that this presumption is legally not sustainable.

d. Moreover, the perusal of records reveals that there is no written consent filed by complainants to continue in the project.

18. Therefore, it is more than evident that the impugned order is not a consent order and complainants have not given expressed consents in writing to continue in the project. Accordingly, we find that contentions of the learned counsel for promoter are contrary to the facts on the record and cannot be accepted. Thus, we answer point 3 in the affirmative as above.

Point Nos. 4, 5 and 6: Claim for refund.

19. **Possession delivery status:** Learned counsel for the promoter submits that the impugned order is not passed on merits rather the complaint has been disposed on technical grounds. Therefore, the matter be remanded to MahaRERA for adjudication afresh on merits. However, it is pertinent to note that the booking of the subject flat has taken place more than 8 years back and in view of the Objects and Reasons of the Act and also in the interest of justice as well as to avoid undue delay, it is advisable that as far as possible, matter be adjudicated on merits without relegating the parties to the lower forum. Accordingly, the matter was heard in extenso.

20. It is not in dispute that the said booking of the flat has taken place on 25th November 2015 by issuance of the allotment letter wherein, promoter has agreed in the allotment letter to deliver possession of the subject flat by 31st March 2017 and in any case up to 3 months thereafter i.e. by 30th

June 2017. However, admittedly, the Project has not been completed and consequently the subject flat has not been handed over to complainants with occupancy certificate even before the period ending 31st December 2019 as ordered by MahaRERA in the impugned order and even after adding 3 years of the reasonable period from the date of the booking as per the judgement of the Hon'ble Supreme Court in the case of Fortune infrastructure & Anr. Vs. Trevor D'Lima & Ors [2018) 5 SCC 442]. As such, this project has not received an occupancy certificate till today. Therefore, Promoter has failed to hand over legal possession of the subject flat on or before the agreed timeline as stipulated in the booking. Therefore, Section 18 of the Act is attracted.

21. Whereas, Section 18 of The Maharashtra Real Estate (Regulation and Development) Act, 2016 ('the Act'), stipulates that in case of failure/delay in delivery of possession and if, allottees intend to withdraw from the project, then Promoter shall return the paid amount received by him in respect of the booking of the real estate unit/ subject flat with interest at prescribed rate without prejudice to any other remedy available, including compensation in the manner as provided under this Act.

22. However, learned counsel for promoter further contended that the delay in project completion and resultant delay in delivery of possession of the booked flat was on account of the various factors beyond the control of the promoter, more particularly because, the said project is of vast area of around 287.5 acres and there has been certain revision in the development plan causing certain roads crossing the project and also requires several government approvals. These are taking time and causing delay in the project completion. Therefore, the delays are beyond the control of the promoter and not attributable to promoter.

23. But these contentions of the promoter are legally not tenable on account of the followings; -

a. In view of para nos. 25 and 78 of the judgement in the case of **M/s. Newtech Promoters and Developers Pvt. Ltd vs. State of Uttar Pradesh & Ors. [2021 SCC Online 1044] dated 11th November 2021,** wherein, it has been clarified that *if the Promoter fails to give possession of the apartment, plot or building within the time stipulated under the terms of the agreement, then,* ***Allottee's right under the Act to seek refund/ claim interest for delay is unconditional & absolute, regardless of unforeseen events or stay orders of the Court/Tribunal.*** In view of above, it has been held that the rights of Allottee under Section 18 of the Act are unconditional and absolute, **regardless of unforeseen events including due to any other reasons even factors beyond control of the Promoter** and "*It is up to the Allottee to proceed either under Section 18(1) or under proviso to Section 18(1).*" Hence it is the complete discretion of the allottee and not to the promoter to seek refund or otherwise.

b. The Hon'ble Bombay High Court, in the case of (Promoter company itself) **Neelkamal Realtors Suburban Pvt. Ltd. & Anr. Vs. Union of India & Ors. [(2017) SCC Online Bom 9302]** in **para 119**, further held that "*While the proposal is submitted, the Promoter is supposed to be conscious of the consequences of getting the project registered under RERA. Having sufficient experience in the open market, the* ***Promoter is expected to have a fair assessment of the time required for completing the project****....*". Accordingly, it is evident that Promoter is inherently better equipped about market related information and is structurally at advantageous position in as far as the information about the said project completion are concerned. But promoter has failed to deliver possession in time.

c. Timely completion of the project and consequent timely delivery of possession of the subject flat is the contractual commitment of the promoter but has failed to fulfill.

d. **Party in breach, cannot take advantage of its own wrong:** It is pertinent to note in the instant case that promoter has violated the statutory provisions of Section 18 of the Act by not delivering possession of the subject flat within the agreed timelines as per the agreement. The said delay being attributable to Promoter and Promoter itself cannot take advantage of its own deficiencies/ non-performances and despite being party in breach, more particularly in view of the judgement of The Hon'ble Supreme Court in the case *of* ***Kusheshwar Prasad Singh Vs. State of Bihar and Ors. [Supreme Court] Civil Appeal No. 7351 of 2000" (supra).***

24. In the Judgment of the Hon'ble Supreme Court of India in the case of *M/s. Newtech Promoters and Developers Pvt. Ltd. versus State of U.P & Ors (super).,* it has been observed with regard to some of the relevant statement of objects and reasons as mentioned in para 11 as that "*11. Some of the relevant Statement of Objects and Reasons are extracted as under: "*

4...(f) the functions of the Authority shall, inter alia, include –

(iii) to ensure compliance of the obligations cast upon the promoters, the allottees and the real estate agents under the proposed legislation.

25. It is also important to note that the project has been registered under the Real Estate (Regulation & Development) Act, 2016, which provides several welfare provisions to protect interests of consumers including for greater accountability towards consumers to inject greater efficiency, transparency and accountability as contemplated in the statement of Objects and Reasons of the Act. Regulation 39 of Maharashtra Real Estate Regulatory Authority (General) Regulation, 2017 further stipulates as the inherent powers of the Authority. It reads as under; -

"Nothing in the Regulations shall be deemed to limit or otherwise affect the inherent power of the Authority to make such orders as may be necessary for meeting the ends of justice or to prevent the abuse of the process of the Authority."

Similarly, Regulation 25 of Maharashtra Real Estate Appellate Tribunal, 2019 speaks about saving of inherent powers of the Tribunal; -

"25(1) Nothing in these Regulations shall be deemed to limit or otherwise affect the inherent power of the Tribunal to make such orders as may be necessary for meeting the ends of justice or to prevent the abuse of the process of the Tribunal."

It means the Regulatory Authority as well as the Appellate Tribunal have inherent powers under the Regulations framed under RERA Act, 2016 to pass appropriate Orders, which are necessary to meet the ends of justice.

26. Whereas it is distressing to note that, there is undue and inordinate delay in delivery of the possession of the subject flat. As a result of this, complainants have sought for refund of the paid amounts and other associated charges levied by the HDFC together with interest.

27. Upon consideration of the findings herein above and in view of above facts, circumstances and context of the case, diligent analysis of the material on record and more particularly in view of deficiencies and non-compliances on the part of promoter including the contractual and statutory breaches on the part of the promoter under Section 18 of the Act, impugned order dated 21st March 2018 passed by MahaRERA is not sustainable, suffers from infirmities and warrants interference in this appeal as determined herein above. Complainants are entitled for refund of the paid amounts of ₹ 5,30,331 with interest. Complainants have also sought a refund of the paid amount of ₹ 11,000/-, which they have incurred as processing fees, while availing the loan from HDFC bank because of the failure of the promoter to hand over the possession of flat on the agreed date and even thereafter the complainants could not utilize

the loan for making further payments to the promoter. However, they have to spend ₹ 11,000/- as processing fees while obtaining loan from HDFC bank. Therefore, considering the peculiar circumstances of the case, we are of the view that the complainants are entitled to loan process fees of ₹ 11,000/- from promoter. Therefore, for the foregoing reasons, we have come to the conclusion that complainants are entitled for refund of the paid amount of ₹ 5,30,313/- and also the HDFC bank's housing loan process fees together with interest thereon at prescribed rate from the date of payments made by the complainants. Complainants have also sought the relief of compensation under Section 18 of RERA Act, 2016 only on the grounds of delay in delivery of possession of the subject flat. However, the complainants have miserably failed to establish in what way they have suffered loss on account of the failure of the promoter to hand over the possession of the subject flat to them. It is not the case of the complaints that due to delay in delivery of possession of the subject flat, they have booked flat in another project, and they are required to pay higher consideration than the consideration of the booked flat, as a result thereof, they have suffered certain loss. Under the circumstances, we are of the view that the complainants are not entitled to compensation. Accordingly, we answer point nos. 4, 5 and 6 as above and proceed to pass order as follows; -

ORDER

a. Captioned appeal is partly allowed.

b. Impugned order dated 21st March 2018, passed in Complaint No. CC 0060000000 10024 is set aside.

c. Respondent promoter is directed to refund the paid amounts of ₹5,30,331 and also the HDFC Bank's housing loan processing fees of Rs. 11,000/- together with interest at the rate of highest

marginal cost of lending rate of State Bank of India plus 2% from the date of receipt of payments within 30 days from the date of this order, failing which, promoter will pay interest at this rate on the total amount due and outstanding as on 31st March 2024 till its actual realisation.

d. No order as to costs.

e. In view of the provisions of Section 44(4) of the Act of 2016, a copy of this order shall be sent to the parties and to MahaRERA.

(Dr. K. SHIVAJI) **(SHRIRAM. R. JAGTAP, J.)**