BEFORE THE MAHARASHTRA REAL ESTATE APPELLATE TRIBUNAL, MUMBAI

Appeal No. AT006000000052572 of 2020

In

Complaint no. CC006000000089924

1. Kakad Housing Corporation

A partnership firm, having its office at,]
Kakad House, B-wing, 1st Floor,11,]
New Marines Lines,]
Mumbai-400 020] **...Appellant**

Versus

1. Rajkumari Singh
2. Ashutosh Singh

Both Adults, Indian Inhabitants,]
Residing at 38, Kirti Bhavan Building,]
Shradhaanand Road, Vile Parle (East),]
Mumbai-400 057.] **...Respondents**

Adv. Mr. Vikramjit Garewal for Appellant.
Adv. Mr. Alok Singh for Respondents.

CORAM : SHRIRAM R. JAGTAP, MEMBER (J) &

DR. K. SHIVAJI, MEMBER (A)

DATE : 03rd April, 2024

(THROUGH VIDEO CONFERENCING)

JUDGMENT

[PER : SHRIRAM R. JAGTAP (J)]

1) Feeling aggrieved by the order dated 4th March, 2020 passed by Ld. Authority in Complaint No. CC006000000089924 filed by allottees, the appellant, who is a promoter, has preferred instant appeal on the grounds enumerated in the appeal.

2) For the sake of convenience, parties to the appeal hereinafter will be referred as "Promoter" and "Allottees".

3) The brief facts culled out from the pleadings of the parties reveal that promoter undertook a project known as **"Kakad Paradise"** in a phased manner under Affordable Housing Scheme, which is duly registered with MahaRERA. The subject project consists of two wings. Wing "C" is comprising of two plinths, two stilts and ground plus 23 floors, and Wing "D" is comprising of one plinth and one stilt ground plus 23 floors. The allottees in or around June, 2015 approached the promoter and expressed their desire to buy two residential flats in the subject project. Accordingly, the allottees have booked a residential Flat No. 901 on the 9th Floor admeasuring 760 sq. ft. in Tower "C" of the subject project for a consideration of ₹50,67,000/-. Pursuant thereto, the promoter has issued Letter of Intent dated 10th July 2015 to

allottees. Pursuant to receipt of commencement certificate dated 4th December 2015, the promoter commenced the construction work of the subject project. As the area of Flat No. 901 was increased by 20 sq. ft. and consequential increase in sale consideration of the subject flat, the promoter issued a fresh Letter of Intent dated 7th January 2016 *inter alia* for booking of Flat No. 901 admeasuring 780 sq. ft. to allottees for the revised consideration of ₹52,01,000/-. The sale consideration was agreed to be paid in trenches as recorded in Letter of Intent.

4) The allottees have paid ₹16,22,111/- to promoter from time to time till 21st November 2016 towards part consideration of the subject flat. The allottees have claimed that the promoter had verbally agreed to hand over the possession of the subject flat on or before December, 2018. Despite having received ₹16,22,111/-, the promoter has failed and neglected to enter into an agreement for sale. The promoter sans executing an agreement for sale started demanding the balance amount from the allottees. By letters dated 10.09.2018 and 28.09.2018, the promoter has terminated the

transaction, cancelled the Letter of Intent and forfeited the amount paid by the allottees. Thereafter, allottees met the promoter and expressed their desire to pay balance amount by obtaining loan from Pratap Co-operative Bank Ltd. The allottees were informed by promoter that the promoter did not prefer the Pratap Co-operative Bank Ltd. because of its poor track record in making timely payment and asked the allottees to avail loan from its approved lenders/bankers and thereby denied to refund the amount paid by allottees and further suggested the allottees to deposit amount of ₹26,57,157/- within a period of 3 days in order to secure the flat.

5) Feeling aggrieved by this conduct of the promoter the allottees decided to withdraw from the project and filed complaint and sought relief of refund of amount with interest and also compensation for losses suffered by them.

6) The promoter put his appearance in the complaint and remonstrated the complaint by filing reply contending therein that the complainants are not allottees because the allotment of subject flat has been terminated on 10.09.2018 much prior

to filing of the complaint on account of breaches/defaults in paying the consideration amount and therefore, the complaint is liable to be dismissed on this ground alone. Besides, the parties have not entered into a valid and binding agreement for sale as per provisions of Section 13(2) of RERA Act, 2016. On this score also the complaint is liable to be dismissed.

7) The promoter has further contended that the complainants along with Mr. Ramchandra V. Singh, who is brother of complainant no. 2 in or around June, 2015 approached the promoter for booking of two residential flats in the subject project. The complainants were apprised by promoter that the possession of the subject flat would be given on receipt of the occupation certificate. The promoter has denied that the promoter had verbally agreed to hand over the possession of the subject flat on or before December, 2018.

8) The promoter has further contended that as per the terms and conditions enumerated in the Letter of Intent, if there was default in payment of installments of consideration on their respective due dates, and if the same remained unrectified within 15 days' notice, the allotment in respect of

subject flat at the discretion of the promoter could be terminated and in that event, the promoter would in its discretion either exercise its option to refund the amounts paid without interest and subject to deducting any expenses, charges, costs, etc. incurred or forfeit the entire amount as per the circumstances prevailing at that time and upon such termination, the promoter would be free to deal with the subject flat.

9) The promoter has further contented that the complainants had expressed their desire to change the area of the subject flat and based on the wishes and desire of the complainants, the promoter issued a revised Letter of Intent dated 7th January 2016 on the same terms and conditions wherein the area of the subject flat was increased to 980 sq. ft. and the consideration was also revised to ₹52,01,000/- and at that time the complainants had paid a sum of ₹10,40,200/- towards the part consideration of the subject flat.

10) The promoter has further contended that though the complainants made some payment, they did not make the payment in pursuant to the demand letters sent to them from

20.02.2018 onwards. By letter dated 08.06.2018, the promoter informed the complainants to make the payment and execute the agreement for sale. When the complainants failed to respond, the promoter terminated the transaction i.e. allotment of subject flat by notice dated 10.09.2018 and further informed the complainants to take the refund of their amount after deduction of non-refundable government taxes etc. by 10th September 2018 failing which the said amounts would stand forfeited. The complainants did not come to collect the amount, therefore, the promoter by notice dated 28.11.2018 forfeited the amounts paid by the complainants towards the sale consideration of the subject flat and reiterated that the allotment in respect of subject flat stood revoked and terminated. The promoter has also communicated to allottees that Mr. Ramchandra V. Singh had defaulted in making the payment of amounts as per the terms of the agreed allotment in respect of flat no. 907 and accordingly allotment of flat no. 907 was also terminated.

11) The promoter has further contended that the complainants along with Mr. Ramchandra V. Singh approached Mr. Anand

Upadhhay, the representative of the promoter to withdraw their termination and forfeiture notice issued with regard to the subject flat, flat no. 907 and vide an e-mail dated 11th March 2019, the complainants agreed that due to their financial difficulty and constraint they had not been able to pay the amounts due and payable till date in respect of both the flats and further requested the promoter to reconsider the decision regarding termination of allotment of both the flats. The complainants had put forth two proposals to promoter either to consider refund of the amounts paid till date in respect of both the flats with interest thereon or in the alternative release the moneys paid in respect of the allotment of one flat and adjust the same towards the consideration payable in respect of other flat. The promoter vide e-mail dated 5th April, 2019 responded the proposal of complainant contending therein that without prejudice to termination of allotment of subject flat as and by way of subject case, offered to options to complainants vis.

i) take refund of an amount of ₹15,31,666/- in respect of both the flats after deduction of GST, penalty and other charges, etc. or

ii) continue with the allotment of the subject flat after adjusting the amount of ₹7,65,843/- to be refunded in respect of flat no. 907 and make time bound payment of balance amount of ₹26,57,157/-, since substantial construction of the super structure of the building was already completed and further apprised the complainants to execute the agreement for sale in respect of subject flat.

12) The promoter has further contended that by e-mail dated 08th April 2019, the complainants *inter alia* rejected the proposal of the promoter and made a counter proposal and requested for further time for making payment of the outstanding consideration in respect of both the flats to which the promoter vide its response reiterated that its offer as made on 5th April 2019 would stand as it is and the complainants have to accordingly respond by 9th April 2019. Despite this, the complainants chose not to exercise any one of the options

extended to them by promoter in its e-mail dated 05.04.2019 nor did the complainants make payment of the outstanding amounts payable in respect of both the flats or executed agreement for sale in respect thereof. The complainants informed promoter that their loan is sanctioned by Pratap Co-operative Bank Ltd. But the promoter did not prefer the said bank because of its poor track record in making timely payment and asked the complainants to avail loan from its approved lenders. Therefore, the promoter is not liable to refund the amount to complainants. The complainant issued legal notice dated 06.06.2019 through their advocate wherein various allegations were made *inter alia* regarding the delay and termination of the allotment in respect of both flats, being nothing but an afterthought and the same are completely devoid of merits. The promoter has replied the said notice on 24.06.2019 *inter alia* denying all the allegations made in the notice and called upon the complainants to collect the amounts of ₹7,65,843/- each in respect of both the flats. With these contentions, the promoter has prayed to dismiss the complaint.

13) After hearing the parties, the learned Authority has disposed of the complaint directing the promoter to execute an agreement for sale within the period of 1 month. We have heard Ld. Adv. Vikramjit Garewal for promoter and Adv. Alok Singh for allottees.

14) An abridgment of agreement of Adv. Vikramjit Garewal for appellant is that allottees have booked two flats in the project of promoter. Vide Letter of Intent dated 07th January 2016, the allottees have booked subject flat admeasuring 780 sq. ft. for a lump sum consideration of ₹52,01,000/-. The parties are governed by the terms and conditions enumerated in Letter of Intent dated 07.01.2016. Some significant terms and conditions governing the booking of subject flat under the Letter of Intent inter alia are that:

i) The time for payment of installments, deposits, charges was of an essence and in the event of delay, interest at the rate of 21% per annum shall be payable by the home buyers **(Clause 7)**.

ii) On being given a 15 days' prior notice, the agreement for sale shall be executed after payment of stamp duty

by the allottees and the same shall be registered **(Clause 12)**.

iii) In the event of default in payment of any installments and/or observing/performing any of the terms and conditions, then a 15 days' notice shall be given to the allottees and the promoter at its option shall refund the amounts without interest and subject to deducting expenses, costs, charges, etc. (without taxes), as per the circumstances prevailing at the relevant time **(Clause 13)**.

iv) The Letter of Intent does not purport to be an agreement for sale/purchase of the said flat and that the rights of the allottees shall become effective only on the execution of agreement for sale, though the obligation to pay the consideration amount shall have to be discharged irrespective of the aforesaid **(Clause 15)**.

15) The learned Advocate has further submitted that until the termination of Letter of Intent the allottees have paid an aggregate amount of ₹15,62,300/- towards the consideration

of the subject flat and ₹59,811/- towards service tax paid to the revenue authorities till November, 2016. As per clause 7 of Letter of Intent, the allottees were supposed to pay installments on time but the allottees did not make the payment of installments on time and thereby breached the terms and conditions of Letter of Intent. The promoter had issued letters to allottees asking them to pay installments followed by numerous reminders in February 2018, April 2018, May 2018, July 2018 and August 2018. Despite this, the allottees neither paid the installments nor responded to any of the said letters/reminders and thus miserably failed to comply with their obligations as per the Letter of Intent. The aggregate outstanding amount due and payable by the allottees, as per the Letter of Intent coupled with demand letters/reminders was an amount of ₹14,26,364/- as of 10th August, 2018.

16) The learned Advocate has further submitted that the promoter had vide its letter dated 8th June, 2018 called upon the allottees to come forward for the execution and registration of the agreement for sale in respect of the subject

flat. Despite receipt of the said letter, the allottees neither came forward for the execution of the agreement for sale nor did they respond to the same or pay the stamp duty amounts required for registering the agreement for sale. In the meantime, the work of the project continued and accordingly, the promoter sought further amounts from the allottees. The promoter also repeatedly called upon the allottees to come forward for execution of the agreement for sale. However, the allottees failed and neglected to do so. There was stoic silence from the allottees end from February, 2018 till March, 2019 and interestingly chose to ignore and not responded any of the letters/notices being issued by the promoter. Considering the conduct of the allottees, the promoter cannot have been expected to wait endlessly for the allottees to respond and come forward for executing the agreement for sale including making payment of the balance amounts and as such the promoter was constrained to terminate the booking of the allottees. Learned advocate has further sorely submitted that in any event, even post such termination without prejudice meetings were held and sufficient

opportunity was granted to the allottees to come forward for execution of the agreement for sale subject to payment of balance consideration. However, the allottees again did not do so. Thus, it is crystal clear that the allottees never had the financial capacity to purchase the subject flat. By notice of termination dated 10th September 2018, the promoter asked the allottees to take refund of the monies paid by them after deducting administrative charges and interest on the overdue amounts. Vide letter dated 28.11.2018, the promoter pointed out that the allottees were avoiding the calls of representative of the promoter. Besides, they were not responding to any of the letters of the promoter. Since February, 2018 until March, 2019 the allottees did not bother to communicate and/or respond to the promoter.

17) The learned advocate has poignantly submitted that finally, after a period of one year and knowingfully well that the allottees had no means to pay any amounts to the promoter, the allottees vide their e-mail dated 11th March 2019 admitted that they had defaulted in complying with their obligations of making payment of the installments of the consideration due

and payable as they did not have the requisite finance for the same. It is significant to note that the allottees did not challenge the termination of the Letter of Intent nor made any grievance with respect to non-execution of the agreement and for the first time sought to exit/withdraw from the project and they had also accepted that they had no means to pay the monies.

18) Learned Advocate has further submitted that by e-mail dated 08-04-2019, the allottees refused to agree with the options set out by the promoter in e-mail dated 05.04.2019. The allottees for the first time, after termination of the Letter of Intent submitted that they were ready to register the agreement for sale and ready to pay the due amount, however, needed some time to arrange the same or alternatively sought refund of the entire amount with interest. Despite the allottees being in default, they accepted refund of the entire monies with interest and thereby tried to pressurize the promoter. The allottees further tried to depict the picture that they have availed loan from Pratap Co-operative Bank Limited and they are ready to deposit the

balance amount. The promoter immediately responded the said contention of the allottees contending that the track record of the said bank is poor and further directed the allottees to avail the loan from the list of approved banks. However, the allottees did not make further payments, nor come forward to execute the agreement for sale and chose to file complaint against the promoter.

19) Learned Advocate has further submitted that the learned Authority did not take into consideration the fact that by notice dated 06.06.2019, the allottees were seeking an execution of agreement for sale in respect of the subject flat for the first time and after termination of the Letter of Intent and in the light of the arguments made in the complaint, the said request stood automatically withdrawn as the allottees chose to exit from the project and sought refund of their monies. The relief for seeking refund and the relief for an agreement for sale are completely contrary to/inconsistent with each other and therefore, once the allottees have chosen the remedy of seeking refund the same has to be carried to its logical conclusion. Therefore, it can be said that the

learned Authority has incorrectly applied the law to the facts of the case. The learned Authority has exceeded his jurisdiction while granting the relief of execution of agreement for sale which was never sought by the allottees. The general rule is that the relief should be founded on pleadings made by the parties. In the instant case, no such relief was sought by allottees in their complaint. The court cannot consider such a case not specifically pleaded. The learned Authority did not issue notice to the promoter. It is settled position of law that the relief to be granted can be only with respect of prayers made in the pleadings. When an Authority exercises suo-motu power it must put parties to notice. It was incumbent upon the Authority to issue show cause notice to the promoter in case it intended to exercise its suo-motu power of granting relief of execution of agreement for sale. However, the promoter was never afforded an opportunity to put forth its case resulting in violation of principle of natural justice. The learned Authority cannot grant relief without giving an opportunity to promoter.

Learned advocate has placed his reliance on the following citations.

Bacchaj Nahar Vs. Nilima Mandal & Anr. [(2008) 17 SCC 491]

M/s. D.N. Roy and S.K. Bannerjee and others Versus The State of Bihar and others 1970 (3) SCC 119

Learned Advocate has placed reliance on the judgment of this Tribunal.

M/s. Neumec Developers and Builder Vs. Antoop Hill Warehousing Company Limited

With these contentions learned Advocate has prayed to allow the appeal and the complaint be dismissed with cost.

20) To refute the contentions of promoter and while supporting the impugned order to have been correctly passed, the learned Advocate Alok Singh for allottees urged following contentions:

a) The allottees booked two flats in the subject project launched by the promoter and paid ₹10,48,869/- for each flat which was more than 20% of the sale consideration. On 24.07.2015, the promoter issued two distinct Letter of

Intents to the allottees with assurance that the project will be completed on or before December, 2018. Vide letter dated 20.06.2016, the promoter demanded an additional sum of ₹2,71,752/- for each flat. Besides, vide letter dated 05.10.2016, the promoter again demanded ₹2,71,752/- from allottees for each flat. The allottees accordingly made the payments as demanded by the promoter. It is crystal clear that by the end of 2016, the allottees had already paid almost 30% of total value of each flat to promoter. It is not in dispute that till December, 2016 no construction work had been commenced and despite this, promoter again demanded further payments from allottees vide letter dated 20.02.2018 after almost 17 months of last payment. By that time also construction work had not started and because of this, the allottees got worried and sought time for payment of additional sum.

b) By letter dated 10.09.2018, the promoter terminated both the Letter of Intents. Thereafter, the allottees physically visited the office of promoter on several occasions to know the reason for the termination of Letter of Intents.

However, they were told that they have no alternative than to accept refund of the sale consideration paid by them. By e-mail dated 11.03.2019, the allottees brought to the notice of promoter that the subject project got delayed by almost 3 years. The allottees, out of bonafide, offered two options to promoter:

i) Either to refund the entire sale consideration received by the promoter with interest. Or

ii) To adjust the amount paid for two flats to one flat.

c) However, by e-mail dated 05.04.2019, the promoter communicated to allottees to accept refund of ₹7,65,843/- for each flat after deducting almost ₹9 Lakhs for each flat under frivolous and baseless heads. The promoter deducted ₹5,20,100/- for expenses incurred for cancellation of allotment whereas, there was no allotment but only a Letter of Intent for both the flats. There was no execution and registration of the agreement for sale despite payment of more than 30% of the sale consideration of the flats. Thus, it is crystal clear that the deductions were completely illegal and signify the malafide

intention of the promoter. Besides, the deduction of ₹2,40,550/- on account of GST over service tax is also wrong as GST made applicable since 2017 and the payments were prior to enforcement of GST.

d) By e-mail dated 08.04.2019, the allottees rejected the offers of the promoter and requested for a meeting with promoter to discuss and resolve the issues. The promoter by e-mail dated 08.04.2019 communicated the allottees that his offers were as per MahaRERA guidelines and suggested the allottees to meet his representative. Accordingly, on 24.04.2019, the allottees visited the office of Mr. Kakad, the representative of promoter and told him that they are in process of availing loan from various banks and requested him to kindly wait for at least one week. Mr. Kakad verbally agreed to the same.

e) The allottees succeeded in availing loan from Pratap Co-operative Bank, Santacruz (East) but in physical meeting held on 30.04.2019, the promoter bluntly refused to accept the money from Pratap Co-operative Bank without citing any valid reason.

f) The refusal of the promoter to accept finance from any valid and legal banking entity was per se wrong and reeks of the promoter's predetermined intention to not honor the Letter of Intents executed by the parties. The promoter was insisting allottees to avail loan from its bankers. However, vide e-mail dated 02.05.2019, the promoter communicated to the allottees that the booking of allottees stands cancelled.

g) The termination of the booking of the flats is allegedly based on non-fulfillment of the demand notices issued by the promoter. Section 13 of RERA Act, 2016 provides that the promoter shall not accept a sum more than 10% of the cost of the flat/apartment without first entering into a written agreement. Even section 4 of MOFA bars the promoter from accepting any sum more than 20% of the value of the flat/apartment without entering into a written agreement. Therefore, the demand notices issued by the promoter from time to time to allottees were *void ab initio*. The learned Authority has rightly observed in the order that the payments were made in 2016 and that time the

parties were governed by MOFA. Section 4 of the said Act prevents the promoter from accepting any sum of money or advance payment or deposit more than 20% of the sale price without entering into a written agreement. Section 13 of RERA also abstains the promoter from accepting a sum more than 10% of the cost of the apartment without entering into a written agreement.

h) After considering the material placed on record by the parties, the learned Authority arrived at a conclusion to direct the promoter to execute an agreement for sale. The communications between the parties clearly indicate that promoter was admitting that he is ready to execute an agreement for sale. After hearing parties and after having examined their rival claims and contentions as well as the pleadings on record, the learned Authority passed the impugned order which clearly indicate that the impugned order came to be passed on admissions of fact have been made by promoter in the pleadings. It means impugned order came to be passed under Order 12 Rule 6 of Civil Procedure Code. From the perusal of the provisions of

Order 12 Rule 6 of Civil Procedure Code, it is clear that whenever a party makes admission either orally or in writing the court may at any stage of the trial, without waiting for determination of the question in controversy between the parties, may pass such an order or give such judgment which it may deem fit and proper at its discretion having regard to such admission. Therefore, it can be said that on the basis of admissions of promoter, the learned Authority directed the promoter to execute and registered the agreement for sale in favour of allottees.

i) No doubt the allottees did not claim relief of execution of agreement for sale but at the same time, it cannot be ignored that the allegations made in the complaint clearly indicate that the allottees were also intending to seek relief of execution of agreement for sale. It is well settled principle of law that if a plea is not specifically made and yet it is covered by an issue by implication, and the parities knew that the said plea was involved in the trial, then the mere fact that the plea was not expressly taken in the pleadings would not necessarily disentitle a party from

relying upon it if it is satisfactorily proved by evidence. The general rule no doubt is that the relief should be founded on pleadings made by the parties. But where the substantial matters relating to execution of agreement for sale are touched, though indirectly or even obscurely, in the issues and parties produced material on record with regard thereto then it can be said that the Authority has not exceeded its jurisdiction while granting the reliefs. Therefore, the order passed by the learned Authority directing the promoter to execute an agreement for sale is sustainable in law and does not require interference in this appeal. The learned Adv. Mr. Alok Singh has placed his reliance on the following citations.

HARI STEEL & GENERAL INDUSTRIES LTD. V. DALJIT SINGH (2019) 20 SCC 425

BHAGWATI PRASAD V. CHANDRAMAUL (1966) 2 SCR 286: AIR 1966 SC 735

NETA VERSUS NEW PINK CITY GRAH NIRMAN SAHAKARI SAMITI LTD. JAIPUR 1996 SCC Online Raj 35

With these contentions learned Adv. Mr. Alok Singh has prayed to dismiss the appeal with cost.

21) We have given thoughtful consideration to the submissions advanced by learned advocates appearing for respective parties. After considering the submissions advanced by advocates appearing for respective parties, pleadings of the parties, material on record and impugned order following points arise for our determination and we have recorded our findings thereupon for the reasons to follow:

Sr. No.	**Points for consideration**	**Findings**
1.	Whether impugned order dated 4th March, 2020 passed in complaint no. CC006000000089924 warrants interference in this appeal?	In the affirmative.
2.	Whether allottees are entitled to reliefs under Section 18 of RERA Act, 2016?	In the affirmative.
3.	What order?	As per final order.

REASONS

22) On ensembling the pleadings of the parties reveals that the allottees have booked the subject flat in the project of the promoter for a consideration of ₹52,01,000/-. The allottees have

paid ₹16,20,869/- to promoter from time to time which is more than 20% of the sale price. Having received more than 20% of the sale price, the promoter did not execute an agreement for sale in favour of allottees. On the contrary, the promoter started asking the allottees to make further payments towards consideration. Because of failure of allottees to make further payments, the promoter terminated the Letter of Intent and asked the allottees to collect refund without interest. It is not in dispute that even after termination of Letter of Intent, the allottees approached the promoter and expressed their desire to make further payment and further apprised the promoter that they have availed loan from Pratap Co-operative Bank Ltd. However, the promoter refused to accept the offer of allottees only on the grounds that the track record of Pratap Co-operative Bank Limited is poor in making timely payment and further asked the allottees to avail loan from its approved lenders. This oppressive conduct of promoter constrained the allottees to file complaint under Section 18 of RERA Act, 2016 for refund of amount with interest and compensation.

23) A perusal of impugned order would show that the learned Authority has rightly held that despite having received more than 20% of the sale price without entering into a written agreement, the demands of promoter asking the allottees to make further payments towards balance consideration from 20.02.2018 onwards were illegal and consequent thereto, termination of allotment is also illegal. However, the learned Authority accorded relief to the allottees directing the promoter to execute an agreement for sale holding that the transaction between the parties still subsist. It is significant to note that the allottees have not claimed relief under Section 13 of RERA i.e. allottees have not claimed relief of direction to promoter to execute a registered agreement for sale in favour of them. The general rule is that the relief should be founded on pleadings made by the parties. We would like to reiterate that the allottees did not ask the relief of execution of agreement for sale by promoter in their favour in their complaints. After considering the allegations made in the complaint, it is crystal clear that the allottees have decided to exit from the project and therefore, they asked the relief of

refund of amount with interest and compensation under Section 18 of RERA Act, 2016.

24) It is worthy to note that the impugned order discloses that the learned Authority has exercised suo-motu power while granting the relief of execution of agreement for sale by promoter in favour of allottees. However, the learned Authority did not issue notices to parties before granting such relief. It was incumbent upon the authority to issue show cause notice to the promoter in case it intended to exercise its suo-motu power of granting relief of execution of agreement for sale. The promoter was never afforded an opportunity to put forth his case resulting in violation of principle of natural justice. The learned Authority cannot grant such relief without giving an opportunity to the promoter. Therefore, we are of the view that impugned order warrants interference in this appeal. Accordingly, we answer point no. 1 in the affirmative.

25) Once it is held that the impugned order is not sustainable in law and warrants interference in this appeal then it is liable to be set aside. In such circumstances, only pivotal question calls for our consideration is whether the entitlement of reliefs sought by

allottees in their complaint in the light of the provisions primarily under Section 18 of RERA Act, 2016 can be decided in this appeal. Under Section 107 (2) of the Code of Civil Procedure 1908, the appellate court has same powers and shall perform as nearly as may be same duties as are conferred and imposed by the Civil Procedure Code 1908 on courts of original jurisdiction in respect of suits instituted therein. Therefore, this Tribunal, being first Appellate court, has same powers under Section 107(2) of Civil Procedure Code 1908 as that of the courts of original jurisdiction, can exercise such powers as that of the trial court and grant the reliefs sought by the allottees. Therefore, we are of the view that remanding the matter to learned Authority for deciding a fresh would cause the parties to face one more round of litigation. Therefore, it would be appropriate that instead of remanding the matter back to learned Authority for deciding a fresh, after considering the pleadings of the parties and submissions of the parties, the entitlement of the reliefs sought by allottees in their complaint in the light of the provisions primarily under Section 18 of RERA Act, 2016 can be decided in this appeal.

26) We would like to reiterate that having received more than 20% of the sale price, the promoter did not execute an agreement for sale in favour of allottees. The material on record and pleadings of the parties clearly indicate that the promoter instead of executing an agreement for sale in favour of allottees started asking the allottees to make further payments towards balance consideration. Both Sections 4 of MOFA and 13 of RERA Act, 2016 cast obligation on promoter to execute an agreement for sale before receiving 20% and 10% amount respectively of the total consideration. Nothing is placed on record to show that the promoter had forwarded draft agreement with terms and conditions stipulated therein to allottees for execution prior to filing of the complaint. No doubt, the promoter vide its letter dated 8th June, 2018 called upon the allottees to come forward for the execution and registration of the agreement for sale in respect of subject flat but at the same time, it cannot be ignored that the promoter did not forward draft agreement with terms and conditions stipulated therein to allottees.

27) It is significant to note that even after letter dated 08.06.2018, the promoter was demanding monies from allottees. Section 4

(1A) (II) of MOFA provides that before accepting advance payment or deposit more than 20% of the sale price, the promoter is liable to enter into written agreement for sale and mention in it the date by which possession of the flat is to be handed over to the allottees. Section 13(2) of RERA Act, 2016 also casts similar liability on the developer. Therefore, we are of the view that the promoter cannot take advantage of his own wrong and in fact the promoter has contravened the provisions of Section 4 of MOFA and provisions of Section 13 of RERA Act, 2016. As indicated above, nothing is placed on record to show that the promoter had shared draft agreement with terms and conditions stipulated therein to allottees along with letter dated 08.06.2018.

28) It is not in dispute that the promoter has terminated the Letter of Intent by notice dated 10th September, 2018 and asked the allottees to take refund of monies paid by them after deducting administrative charges and interest on the over due amount. The allottees were fade up with this oppressive conduct of the promoter, therefore they decided to exit from the project.

29) According to the allottees, the promoter while issuing Letter of Intent verbally assured them that he will hand over the possession of the subject flat by December, 2018. There is no material on record to show that the promoter had verbally assured the allottees that he will hand over the possession of the subject flat by December, 2018. Admittedly, no agreement for sale came to be executed by the parties. In the absence of formal agreement executed by the parties, the date of possession can be deciphered from any documents such as allotment letter, broacher, pamphlet, e-mail communications, Letter of Intent, etc. A perusal of Letter of Intent would show that there is no mention of date of possession. In the case of **M/s Fortune Infrastructure (now known as M/s Hicon Infrastructure) & Anr. Vs. Trevor D'Lima & Ors.** [(2018) 3 S.C.R. 273], the Hon'ble Apex Court has held that when the date of possession is not mentioned in the agreement, the promoter is expected to hand over possession of the unit within a reasonable time and a period of three years held to be reasonable time. In the instant case, the allottees had booked subject flat in July, 2015. The revised Letter of Intent came to

be issued on 07.01.2016. The allottees had deposited substantial amount to promoter from time to time. Therefore, in view of the ratio and dictum laid down by the Hon'ble Apex Court the promoter was supposed to hand over possession of the subject flat to allottees by 06.01.2019. However, it is not in dispute that the promoter failed to complete the project till that date. Therefore, we are of the view that allottees are entitled to reliefs under Section 18 of RERA, Act, 2016.

30) It is specific contention of the promoter that the absence of registered agreement for sale ought to invalidate a plea for reliefs under Section 18 of RERA Act, 2016 and therefore, the allottees are not entitled to relief of refund of amount with interest. We do not find substance in the said contention of the promoter. We should not be oblivious of the fact that RERA Act, 2016 as a welfare legislation, has been enacted mainly to safeguard the interest of the allottees. Mere non-mentioning date of possession or non-execution of agreement for sale cannot be allowed to operate in favour of promoter who, like appellant, is not responsive to the cause of allottees and is violation of the provisions of Section 11(3) of RERA Act, 2016. While explaining the scope of Section 18 of RERA Act, 2016 the Hon'ble Apex Court in **M/s Newtech Promoter and Developers Pvt. Ltd. V/s. State of Uttar Pradesh** [2021 SCC

Online 1044] dated 11 November 2021 Civil Appeal Nos. 5745, 6749 and 6750 to 6757 of 2021]-

> *"Para 25. The unqualified right of the allottee to seek refund referred under Section 18(1)(a) and Section 19(4) of the Act is not dependent on any contingencies or stipulations thereof. It appears that the legislature has consciously provided this right of refund on demand as an unconditional absolute right to the allottee, if the promoter fails to give possession of the apartment, plot or building within the time stipulated under the terms of the agreement regardless of unforeseen events or stay orders of the Court/Tribunal,* ***which is in either way not attributable to the allottee/home buyer****, the promoter is under an obligation to refund the amount on demand with interest at the rate prescribed by the State Government including compensation in the manner provided under the Act with the proviso that if the allottee does not wish to withdraw from the project, he shall be entitled for interest for the period of delay till handing over possession at the rate prescribed.*

31) Therefore, we are of the view that for mere non-execution of agreement for sale, allottees are not precluded from invoking Section 18 of RERA Act, 2016. The provisions of Section 18 of RERA Act, 2016 can equally be invoked in terms of oral or formal agreement executed by the promoter/developer such as booking application form/ confirmation letter/ letter of allotment/ letter of intent/ correspondence etc. capable of being construed as an agreement. Admittedly, the subject project is an ongoing project. As per view taken by this Tribunal in catena of cases all

provisions of RERA Act, 2016 are applicable to this project. Accordingly, the letter of intent issued by the promoter to allottees prior to RERA Act, 2016 is enforceable under Section 18 of RERA Act, 2016.

32) Section 18 of RERA confers an unqualified right upon the allottee to get refund of amount with interest if developer fails to complete the project or is unable to give possession of the subject unit by agreed date. Section 18 of the Act spells out the consequences that, if the promoter fails to complete or is unable to give possession of an apartment or to complete the project by the date specified in the agreement for sale, the allottee/home buyer holds an unqualified right to seek refund of the amount with interest at such rate as may be prescribed in this behalf. We have already observed that the promoter has violated the provisions of Section 4 of MOFA and Section 13 of RERA Act, 2016. Apart from this having received more than 20% of sale price, the promoter instead of executing an agreement for sale had demanded payments from allottees. Therefore, we are of the view that the allottees are entitled to seek relief of refund with interest under Section 18 of RERA Act, 2016.

33) The allottees have also claimed relief of compensation on the grounds that they have suffered loss on account of delay in delivery of possession. On examination of the averments made in the complaint reveals that allottees have not specifically pleaded as to how and in what way they have suffered loss. It is worthy to note that it is not the case of the allottees that after termination of letter of intent or soon after communication of their intention to exit from project to promoter, they have booked flat in another project on higher price than the value of the subject flat. There are no allegations in the complaint that in order to fulfill demands raised by the promoter, allottees have to sale their property for meagre price and because of termination of letter of intent they have suffered loss. In the absence of pleadings with regard to loss allegedly suffered by allottees, it is hard to digest that the allottees have suffered loss on account of delay in delivery of possession. Therefore, we are of the view that allottees are not entitled to compensation as sought for.

34) It is not in dispute that the allottees have paid ₹16,20,869/- till November, 2016. It means the allottees have made the said payment prior to coming in to force the GST. Admittedly, the

GST came into force from 01.07.2017. It is not in dispute that after 2016, the allottees have not made any payment to the promoter. Therefore, we are of the view that GST is not applicable to the present case. Therefore the allottees are entitled to refund of amount of ₹16,20,869/- from the promoter with interest.

35) For the foregoing reasons, it is crystal clear that the promoter has not only failed to execute and register the agreement for sale but also failed to hand over possession of the subject flat to the allottees within a reasonable period. We have already observed that the impugned order is not sustainable in law and calls for interference in this appeal. We therefore answer the points accordingly and consequently proceed to pass the following order.

ORDER

a) Appeal no. AT006000000052572 of 2020 is partly allowed.

b) Impugned order dated 4th March, 2020 passed in complaint no. CC006000000089924 is set aside.

c) Complaint No. CC006000000089924 is partly allowed with costs.

d) The promoter shall refund the amount paid by the allottees with interest at the rate of MCLR (Marginal Cost Landing Rate) of SBI plus 2% from the dates of payment of the said amount till realization of the entire amount.

e) The charge of the amount shall remain on the subject flat till realization of the above amount.

f) The promoter is directed to pay cost of ₹10,000/- to allottees.

g) Copy of this order be communicated to learned Authority and respective parties as per Section 44(4) of RERA Act, 2016.

(DR. K SHIVAJI)
Pathrikar

(SHRIRAM R. JAGTAP)