

BEFORE MAHARASHTRA REAL ESTATE APPELLATE TRIBUNAL, MUMBAI**APPEAL NO. AT00500000041865**

In
COMPLAINT No. CC005000000022699

1. Mr. Ravindra L. Wadnerkar]	
2. Mr. Devendra Ravindra Wadnerkar]	
101, Laxmi Govind Sadan,]	
Behind Bank of Baroda Soc.,]	<i>... Appellants</i>
M.C. Chagala Marg, Bamanwada,]	
Mumbai – 400 099.]	
<i>versus</i>]
M/s. D S Kulkarni & Associates]	
Yerwada Central Prison, 44,]	
Samrat Ashok Path, Sector No. 5,]	
Mohanwadi, Yerwada, Pune – 411 006.]	<i>... Respondent</i>

*Mr. Nakul Jain, Advocate for Appellants.
None for Respondent.*

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

DATE : 22nd AUGUST 2023

(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) seeking direction to respondent for refund of the paid amounts together with interest by challenging the order dated 4th April 2019 passed by learned Chairperson, Maharashtra Real Estate Regulatory Authority, (MahaRERA) in Complaint No. CC 005000000022699.



- 2.** Appellants are Complainants before MahaRERA and flat purchasers in a duly registered project namely "DSK PUSHPABAN" in short "the said project", which is located at Pirangut village, Mulshi Taluka in Pune district and is being developed by Respondent. 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 instant appeal is as under; -
- a. Complainants case:** - Complainants booked flat no. B-807 in wing B of the promoter's said project in the year 2015, executed agreement for sale dated 7th July 2015 for total consideration of ₹37,87,000 and cumulatively paid ₹17,90,481.90 over a period of time. Clause 12 of the said agreement for sale stipulates for promoter to deliver possession of the said flat on or before 31st May 2018 with grace period of 6 months and further reasonable extension under certain conditions as mentioned in clause 13 of the agreement. On account of failure to deliver possession of the subject flat by promoter within the stipulated timeline, captioned complaint came to be filed before MahaRERA on 21st February 2019 seeking refund of entire paid amounts together with interest.
- b.** Learned Chairperson, MahaRERA passed the impugned order dated 4th April 2019, whereby, the captioned complaint came to be disposed of with following observations/conclusions; -
- "2. The key persons managing the Respondent Company have been arrested for economic offences. The Government of Maharashtra, through two official gazettes no. EOF 1217/C.R.646/Pol 13 and No. EOI. 1217/C.R. 646/part I/Pol 13. dated May 05, 2018 (hereinafter referred to as the "said notifications"), has provisionally attached certain properties/ land and bank accounts standing in the name of DSK Group. The list includes Properties/ land on which real estate project of DSK Group, registered with MahaRERA are underway and also lands which were duly mortgaged with financial institutions such as SBI, ICICI Bank etc. The list of properties and*

bank accounts attached under the said Notifications are appended to the said notifications. As per the requirement of the Maharashtra Protection of Interest of Depositors (in Financial Establishments) Act, 1999 (Mah XVI of 2000) (hereinafter referred to as "the MPID Act"), the Competent Authority has filed application before the MPIDC Court (Pune), Confirms the aforementioned provisional attachment and the same is pending for adjudication.

3. *Keeping in mind, the ultimate objective of the Real Estate (Regulation and Development) Act, 2016 being project completion and handing over houses to allottees, MahaRERA felt that said properties/ lands of the DSK Group that are part of the projects registered with MahaRERA, be delisted from the said Notifications to enable MahaRERA to use the provisions of Section 7 and 8 of the Act to complete the balance work.*

.....Therefore, in the interest of the home buyers, MahaRERA vide Letter dated January 29, 2019, has requested the State Government to delist the properties/ lands, on which MahaRERA registered projects are underway.

4. *In view of the said Notifications and the subsequent proceedings in the MPID Court, it has become untenable for MahaRERA to issue any directions/ orders regarding project completion with the help of the Association of Allottees under Section 7 and 8 of the RERA Act or even give adjudication with regard to refund of amounts paid or rulings with regard to awarding interest on delay, under the provisions of Section 18 of the RERA Act, at this stage.*
5. *Therefore, it is ordered that while Complainant's right as allottees in the MahaRERA registered project shall continue to be protected. Liberty is hereby granted to the Complainants to file fresh complaints at an appropriate stage."*

4. Dissatisfied and aggrieved by this order of MahaRERA, Complainants have preferred the instant appeal seeking various reliefs including for withdrawal from the project and for refund of amounts paid to promoter together with interest on various grounds as enumerated in the appeal memo.
5. Since the Respondent is in Judicial custody, Promoter respondent was served by letter dated 23rd June 2022 through Superintendent, Yerwada Central



Prison, Pune and Respondent was intimated about the next hearing date of hearing as that of 15th July 2022 of the captioned appeal to appear/ or to be represented before the Tribunal. However, Respondent acknowledged the receipt of aforesaid letter dated 23rd June 2022 and requested Registrar by its letter dated 01st July 2022 to not to proceed any further unless and until Respondent is given full opportunity to represent in the present appeal.

- 6.** Despite the above good service, Respondent Promoter failed to appear/ nor been represented before the Tribunal and based on the affidavit dated 08th August 2022 filed by Complainants, appeal has been proceeded *ex-parte* against Respondent. Complainants have again filed another affidavit dated 06th December 2022 and served the copy of the same to promoter seeking his reply, if any. However, promoter has not lodged any objection/reply thereon.
- 7.** Heard leaned counsel for Complainants.
- 8.** Complainants submit that the impugned order is not sustainable and is bad in law. Therefore, it is required to be set aside for the following reasons: -
 - a.** It is not in dispute that as per the Clause 12 of the Agreement for Sale, delivery of possession of the subject flat was to be made before 31st May 2018. Despite contractual commitments, promoter has failed to hand over possession within agreed timeline. The said project is still incomplete. Thereby, Promoter has failed to fulfil its contractual obligations and has also violated the Section 18 of the Act. As a result of this non-compliance on the part of the promoter, complainants are entitled under Section 18 of the Act, for refund of the entire paid amounts together with interest by withdrawing from the project.
 - b.** Reliefs sought by Appellants in the captioned Complaint is for refund of the paid amounts by withdrawing from the project. Therefore, the scope of the inquiry in the Complaint before MahaRERA was limited to deciding whether the complainants are entitled for refund of the paid amounts from Promoter.

However, MahaRERA misconstrued and did not deal with the entitlement for refund at all. Instead of this, MahaRERA observed in the impugned order that it is not possible to give any direction/ order regarding the project completion. Hence, these observations are exceeding the jurisdiction of the Authority and have travelled beyond the ambit of the reliefs sought in captioned complaint itself. Thereby, MahaRERA has illegally assumed the jurisdiction of Executing Court and has observed that it is not possible to issue an order/ refund of paid amounts. Therefore, impugned order is bad in law and is legally not sustainable.

- c.** MahaRERA was not expected to dwell into at this stage, as to how to recover the paid amounts for refund. Because it is for the executing court to deal with regarding the manner in which, the recovery of the refund money is realized.
- d.** In support of the above contentions, Complainants have referred and placed reliance by submitting a copy of judgement of the coordinate bench of this Tribunal in *Appeal No. AT00500000031726* in *Complaint No. CC00500000022669* dated 01st December 2020, wherein this Tribunal has allowed refund of the paid amounts to Appellants Allottees therein, in a case, having similar background facts and circumstances.
- e.** In view of the above, Complainants seeks *inter alia* direction to Respondent to refund the paid amounts together with interest by setting aside the impugned order dated 4th April 2019.
- 9.** Upon hearing the learned counsel for Appellants, perusal of material on record, solitary point that arises for our determination is whether, impugned order dated 04th April 2019, passed by MahaRERA calls for interference in this appeal as prayed for by Complainants and to this our finding is in the affirmative for the reasons to follow; -

R E A S O N S

- 10.** It is not in dispute that Complainants have booked the subject flat in the Promoter's said project by executing agreement for sale dated 07th July 2015 for total consideration of Rs. 37,87,000 and clause 12 of the agreement stipulates delivery of the possession of the said flat on/ or before 31st May 2018 with a grace period of six months with further reasonable extensions under certain conditions mentioned in the agreement.
- 11.** Complainants have filed an affidavit based on the proof of payments of Rs. 17,90,481.90/- . Promoter has failed to hand over possession of the subject flat on or before the agreed timeline as stipulated in the agreement and thereby, promoter has failed to fulfill its contractual commitments. 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 wish to withdraw from the project and demand refund, then, promoter shall be liable to return the amount received by him with interest and/or compensation to the allottees. Relevant abstract is being reproduced for ready reference.
- 12.** *"18. Return of amount and compensation. — (1) If the promoter fails to complete or is unable to give possession of an apartment, plot or building, —*
- (a) in accordance with the terms of the agreement for sale or, as the case may be, duly completed by the date specified therein; or*
- (b) due to discontinuance of his business as a developer on account of suspension or revocation of the registration under this Act or for any other reason,*
- he shall be liable on demand to the allottees, in case the allottee wishes to withdraw from the project, without prejudice to any other remedy available, to return the amount received by him in respect of that apartment, plot, building, as the case may be, with interest at such rate as may be prescribed in this behalf including compensation in the manner as provided under this Act:*



In the case on hand, promoter has failed to deliver possession as agreed under the agreement and Complainants have sought to withdraw from the project besides prayers for refund *inter alia* other reliefs mentioned in the complaint. Accordingly, Complainants are entitled to get refund of money paid by him together with interest thereon from promoter.

- 13.** Contentions of complainants remained uncontroverted, because the appeal has proceeded *ex parte* against Respondent Promoter, who remained absent even after having been duly served and also despite intimation about the date of hearing before the Tribunal. However, Complainants have filed affidavit in support of their claims for refund with interest from promoter.
- 14.** Learned counsel for Complainants further submits that Appellants have not prayed for protection of their rights as Allottees under the Act in respect of the subject flat and have sought for refund of the paid amounts together with interest by withdrawing from the project. Perusal of the impugned order, more particularly paras 2, 3, 4 and 5, clearly demonstrate the manner in which the recovery amounts are to be realized and MahaRERA has observed certain impediments in view of the notifications of Government of Maharashtra under the Maharashtra Protection of Interest of Depositors (in Financial Establishments), Act 1999 and has also observed certain constraints in issuing directions regarding the project completion with the help of association of the Allottees or even to give adjudication regarding refund of the paid amounts. Accordingly, MahaRERA has concluded in para 5 of the impugned order that "*while the Complainants rights as allottees in the MahaRERA registered project shall continue to be protected, liberty is hereby granted to the Complainants to file fresh complaints at an appropriate stage*".
- 15.** Perusal of records more particularly the impugned order shows that MahaRERA has travelled beyond the ambit of the reliefs sought in captioned complaint and has assumed the jurisdiction of Executing Court. Because

complainants have not claimed for protection of rights in respect of their subject flat in the aforesaid project and have specifically prayed for refund of the paid amount together with interest by withdrawing from the said project. It is up to the Executing Authority to deal with, as to how to recover the paid amounts for refund. Therefore, impugned order to that effect is improper, factually incorrect and legally not sustainable under the law. As such, MahaRERA has travelled beyond the scope of reliefs sought herein by complainants. Therefore, the impugned order suffers from infirmities and legally not sustainable. In view above, we are of the considered view that impugned order deserves to be set aside and calls for interference in this appeal. Accordingly, we answer the solitary point in the affirmative and proceed to pass, order as follows: -

O R D E R

- a) Captioned Appeal No. AT005000000041865 is partly allowed.
- b) Impugned order dated 04th April 2019 passed in Complaint No. CC 00500000022699 is set aside.
- c) Respondent promoter is directed to refund the entire paid amounts of Rs. 17,90,481.90 to Complainants together with interest at the rate of highest marginal cost of lending rate of State Bank of India plus 2% per annum from the date of payments till the complete realization of the amount and will also pay to Complainants, the amount paid for stamp duty, registration charges and service tax payments, if any.
- d) No order as to costs.
- e) In view of the provisions of Section 44(4) of the Act of 2016, copy of this order shall be sent to the parties and to the learned Chairman, MahaRERA.



(DR. K. SHIVAJI)



(SHRI RAM R. JAGTAP, J.)