
PROMOTER HAS TO OBTAIN CONSENT OF 2/3RD ALLOTTEES FOR CHANGE IN THE LAYOUT/USAGE OF THE PROJECT : MREAT

1. INTRODUCTION

Recently, vide its order, Hon'ble Maharashtra Real Estate Appellate Tribunal ("**MREAT**") in the case of Dilip J Mehta ("**Complainant/Allottee**") vs. Akshar Developers ("**Promoter**") & Ors.¹ directed the Promoter to deliver possession of alternative units in lieu of units already booked of equal area at the already agreed price of total consideration as per the allotment letter dated August 09, 2006, after adjusting the payments already made and adjustment of interest accrued in favour of Complainant.

2. FACTS

Complainant booked two units being unit nos.67 and 68 admeasuring approximately of 4090 sq. ft. each ("**said Units**") in Akshar Decorum Business Park- phase I ("**said Project**") being developed by the Promoter for a consideration of Rs. 59,30,500 per unit. No agreement for sale was executed between the Complainant and Promoter. According to clause 14 of the allotment letter dated August 09, 2006 issued by the Promoter ("**Allotment Letter**"), possession of the said Units was agreed to be handed over by March, 2009 subject to certain reasonable extension as mentioned in the Allotment Letter.

Owing to change in the project layout/plan, further extension of possession delivery date and failure to deliver possession of the said Units before the agreed date, Complainant filed a Complaint ("**Complaint**") before Maharashtra Real Estate Regulatory Authority ("**Authority**") seeking various reliefs inter alia to direct Promoter to execute agreement for sale, deliver possession of said Units and to pay interest for delay in delivery of possession.

Authority dismissed the Complaint for want of merits vide Order dated August 22, 2019 ("**Impugned Order**"). Complainant filed an appeal before Hon'ble MREAT challenging the Impugned Order inter alia on following grounds:

- (a) There is a delay to handover possession for more than 11 years as the agreed date was March, 2009 as per the Allotment Letter. Therefore, Promoter is liable to pay interest under Section 18 of the Real Estate (Regulation and Development) Act, 2016 ("**Act**").
- (b) The said Units are not available in the revised plan due to the change in plan undertaken by the Promoter. Promoter gave false promises and assurances by showing and representing rosy picture of the said Project. But the project is under construction and is not the way as it was represented. Therefore, Promoters has violated the Section 12 of the Act.
- (c) Promoter unilaterally and without even the knowledge of the Complainant, without complying with the mandatory requirements of full disclosures and without prior consent

¹ Order dated 19th October 2022 in Appeal No.AT00600000041924

of Complainant, changed the project usage from warehousing to commercial as well as extended the project completion timeline. Hence, Promoter breached the provisions of Section 14 of the Act.

Promoter resisted the appeal inter alia on the following grounds:

- (a) There is no delay in delivery of possession as Promoter has already completed the said Project and obtained occupancy certificate for phase I and II on November 03, 2018, well before due date of phase-I as per the RERA registration which is December 30, 2021.
- (b) Impugned Order correctly shows that there is no cogent proof in support of the allegation of alleged violation of Section 12 of the Act.
- (c) MahaRERA has rightly denied relief under Section 18 of the Act due to non-existence of the agreement for sale.
- (d) The said Units ceased to exist after City and Industrial Development Corporation ("CIDCO") granted the change in usage from warehouse to commercial after which the revised plans were sanctioned. Therefore, said Units are not the part of the sanctioned plans and not been constructed.
- (e) Complaint is barred by the limitation because Promoter was supposed to give possession in March, 2009 and cause of action arose in March, 2009 itself.
- (f) Promoter is agreeable to offer Complainant, alternative units of commensurate area in the said Project at prevailing market price with adjustment for the amount already received. Alternatively, Promoter is agreeable to refund the paid amount without any interest or compensation.

3. ISSUES:

Hon'ble MREAT dealt with various issues in the matter. However, the important issues are discussed hereinbelow:

- (a) Whether the Promoter violated Section 12² of the Act?
- (b) Whether the Promoter violated Section 14³ of the Act?

² Section 12 - Obligations of promoter regarding veracity of the advertisement or prospectus

Where any person makes an advance or a deposit on the basis of the information contained in the notice advertisement or prospectus, or on the basis of any model apartment, plot or building, as the case may be, and sustains any loss or damage by reason of any incorrect, false statement included therein, he shall be compensated by the promoter in the manner as provided under this Act:

Provided that if the person affected by such incorrect, false statement contained in the notice, advertisement or prospectus, or the model apartment, plot or building, as the case may be, intends to withdraw from the proposed project, he shall be returned his entire investment along with interest at such rate as may be prescribed and the compensation in the manner provided under this Act.

³ Section 14 - Adherence to sanctioned plans and project specifications by the promoter

(1) The proposed project shall be developed and completed by the promoter in accordance with the sanctioned plans, layout plans and specifications as approved by the competent authorities.

(2) Notwithstanding anything contained in any law, contract or agreement, after the sanctioned plans, layout plans and specifications and the nature of the fixtures, fittings, amenities and common areas, of the apartment, plot or building, as the case may be, as approved by the competent authority, are disclosed or furnished to the person who agree to take one or more of the said apartment, plot or building, as the case may be, the promoter shall not make –
(i) any additions and alterations in the sanctioned plans, layout plans and specifications and the nature of fixtures, fittings and amenities described therein in respect of the apartment, plot or building, as the case may be, which are agreed to be taken, without the previous consent of that person:

- (c) Whether complainant is entitled for reliefs under Section 18 of the Act on account of alleged delay in delivery of possession?

3.1. Whether Promoter violated Section 12 of the Act?

Answering the question in the affirmative, Hon'ble MREAT held that the Promoter violated the Section 12 of the Act on the following grounds:

Hon'ble MREAT held that considering the pleadings, submissions and documents relied upon by the parties and that the plan/layout promised at the time of issuance of Allotment Letter, stands changed on account of alterations by Promoter, that too without the consent of Complainant is contrary to the information provided and promised in the Allotment Letter. Hon'ble MREAT held that since all the changes are not in consonance with the provisions stipulated in Section 12 of the Act, Promoter has breached the provisions of Section 12 of the Act.

3.2. Whether Promoter violated Section 14 of the Act?

Answering the question in the affirmative, Hon'ble MREAT held that the Promoter violated the Section 14 of the Act on the following grounds:

- (a) Promoter argued that Complainant has given express consent for any change in the sanctioned plans in view of Clause 6 of the Allotment Letter which tantamount to an express waiver for changes in the project and relied upon the judgement passed in *Waman Srinivas Kini vs. Ratilal Bhagwandas & Co.*⁴ to state that waiver is the abandonment of a right which normally everybody is at liberty to waive. A waiver is nothing unless it amounts to release. It signifies nothing more than an intention not to insist upon the right. It may be deduced from acquiescence or may be employed.
- (b) Hon'ble MREAT held that consent provided as per Clause 6, is apparently only for change in plan and not for any change in end usage of the project altogether. Whereas, in the present case, changes undertaken are not only in the plan and layout but also in the project usage itself, which has altered the very nature of the project from warehouse to commercial and has changed the very fundamentals of the project function. Consent for such fundamental change in the nature of business function and originally agreed usage

Provided that the promoter may make such minor additions or alterations as may be required by the allottee, or such minor changes or alterations as may be necessary due to architectural and structural reasons duly recommended and verified by an authorised Architect or Engineer after proper declaration and intimation to the allottee.

Explanation. — For the purpose of this clause, "minor additions or alterations" excludes structural change including an addition to the area or change in height, or the removal of part of a building, or any change to the structure, such as the construction or removal or cutting into of any wall or a part of a wall, partition, column, beam, joist, floor including a mezzanine floor or other support, or a change to or closing of any required means of access ingress or egress or a change to the fixtures or equipment, etc. (ii) *any other alterations or additions in the sanctioned plans, layout plans and specifications of the buildings or the common areas within the project without the previous written consent of at least two-thirds of the allottees, other than the promoter, who have agreed to take apartments in such building.*

Explanation. — For the purpose of this clause, the allottees, irrespective of the number of apartments or plots, as the case may be, booked by him or booked in the name of his family, or in the case of other persons such as companies or firms or any association of individuals, etc., by whatever name called, booked in its name or booked in the name of its associated entities or related enterprises, shall be considered as one allottee only.

(3) In case any structural defect or any other defect in workmanship, quality or provision of services or any other obligations of the promoter as per the agreement for sale relating to such development is brought to the notice of the promoter within a period of five years by the allottee from the date of handing over possession, it shall be the duty of the promoter to rectify such defects without further charge, within thirty days, and in the event of promoter's failure to rectify such defects within such time, the aggrieved allottees shall be entitled to receive appropriate compensation in the manner as provided under this Act.

⁴ 1959 Suo (2) SCR 21

of the project at the time of booking, are not seen given by the Complainant in the Allotment Letter as claimed by Promoter. Therefore, the change of project usage undertaken by promoters is beyond and is without the consent of Complainant.

- (c) Hon'ble MREAT observed that Clause 6 of the Allotment Letter further shows that the consent provided therein, is in the nature of general and of blanket consent secured upfront in the beginning itself without even sharing the information for proposed changes as well as without full disclosures of underlying exact and specific expected changes.
- (d) Hon'ble MREAT also referred to the judgement passed in the case of Madhuvihar Cooperative Housing Society and Ors. vs Jayantilal Investments and Ors.⁵, wherein it has been held that the consent of allottee under Section 7 of the Maharashtra Ownership of Flats Act, 1963 ("MOFA") must be an informed consent. Hon'ble MREAT also referred to the judgement passed by Hon'ble Bombay High Court in the case of Dosti Corporation v/s. Sea Flama Co-operative Housing Society Limited and Ors.⁶, wherein it was held that contention that blanket consent or authority obtained by the builder/promoter at the time of entering into the agreement for sale or at the time of handing over possession of the flat is not consent within the meaning of Section 7 (1) of MOFA.
- (e) Hon'ble MREAT also observed that whereas, Section 14 of the Act warrants and mandates previous consent of the allottee before undertaking any change in the plan, at the same time, for any change in the layout also requires and mandates for prior written consent of 2/3rd of the allottees. Hon'ble MREAT also observed that there is no whisper about such mandatory prior consent of 2/3rd of allottees by Promoter before undertaking such a major change in the layout/ plans and in project usage.

3.3. Whether complainant is entitled for reliefs under Section 18 of the Act on account of alleged delay in delivery of possession?

Answering the question in the affirmative, Hon'ble MREAT held that the Complainant is entitled for reliefs under Section 18 of the Act on the following grounds:

- (a) After referring to Section 18 of the Act, Hon'ble MREAT held that Section 18 also provides eligibility for other documents too as mentioned in the phrase "or as the case may be". Therefore, agreement for sale need not be in writing and any other document containing requisite contents of the agreement will suffice.
- (b) Hon'ble MREAT observed that in the present case, a detailed allotment letter duly agreed by both sides, does exist and the contents of the Allotment Letter reflect agreed positions between the parties, which are akin to an agreement for sale. All the terms and conditions mentioned in Allotment Letter makes it clear that parties entered into a transaction of sale and purchase of said Units.
- (c) Hon'ble MREAT held that considering the intentions of parties matter more and not the nomenclature, reliefs sought by Complainant under Section 18 of the Act, cannot be denied merely for want of written agreement for sale despite having allotment letter containing all the ingredients of agreed terms and conditions of sale. Hon'ble MREAT also reiterated the settled positions of law that written agreement for sale is not prerequisite for the allottee's right to accrue.
- (d) Hon'ble MREAT further observed that there is no dispute that the possession of the said Units has not been delivered to Complainant till date despite having agreed in the

⁵ 2010 (6) Bom CR 517

⁶ Order dated 7th April 2016 passed in Appeal From Order No. 117 of 2016

allotment letter to deliver possession by March, 2009 therefore it is more than evident that there is huge delay in delivery of possession.

- (e) Accordingly, Hon'ble MREAT held that Complainant is entitled for interest on account of delayed possession under Section 18 of the Act at prescribed rate from the agreed date for possession of March, 2009 and Promoter is obligated to pay interest from April 01, 2009 till the actual delivery date of the possession.

4. INDUSLAW VIEW

Consent as contemplated under Section 14 of the Act has to be an informed consent which is to be obtained upon a full disclosure by the developer of the entire project including construction timeline, nature units to be constructed, amenities to be provided, etc with supporting documents which will enable the purchaser to take an informed decision at the time of buying the unit. If a plot/land is capable of loading additional Floor Space Index ("FSI") or Transferrable Development Rights ("TDR") then the same has to be clearly mentioned in the Agreement and merely stating that the developer would be entitled to FSI in future would not amount to consent. A blanket consent or authority obtained by the promoter at the time of entering into agreement of sale would not be a consent contemplated under the provisions of the Act. If the construction sought to be made was not a part of the layout placed before the allottee at the time of booking the Unit or executing the agreement for sale then consent under Section 14 of the Act would be necessary. Blanket consent or authority obtained by the Promoter without giving adequate disclosures and information at the time of booking or executing agreement for sale would not amount to giving consent under Section 14 of the Act. This order once again fortifies the position that the promoter/developer cannot amend or alter the sanctioned plan or layout or usage of the project without the consent of 2/3rd of the allottees.

Authors: Avikshit Moral | Mahek Chheda

Practice Areas: Real Estate

Date: November 07, 2022

DISCLAIMER

This alert is for information purposes only. Nothing contained herein is, purports to be, or is intended as legal advice and you should seek legal advice before you act on any information or view expressed herein.

Although we have endeavored to accurately reflect the subject matter of this alert, we make no representation or warranty, express or implied, in any manner whatsoever in connection with the contents of this alert.

No recipient of this alert should construe this alert as an attempt to solicit business in any manner whatsoever.