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**MAHARASHTRA REAL ESTATE APPELLATE TRIBUNAL ALLOWS PURCHASERS TO CHANGE RELIEFS FROM SEEKING POSSESSION TO REFUND WITH INTEREST IF DUE PROCESS OF LAW WAS FOLLOWED****1. INTRODUCTION**

Through a common order<sup>1</sup> passed in 2 (Two) separate appeals filed by Naresh Joshi and Sarang Joshi (“**Complainants**”) against Nahar Homes LLP (“**Promoter**”), the Hon’ble Maharashtra Real Estate Appellate Tribunal (“**MREAT**”) held that Section 18 of the Real Estate (Regulation and Development) Act, 2016 (“**Act**”) does not explicitly limit changing of prayers from seeking possession of premises to refund of monies, if due process of law is followed. Further, the MREAT directed the Promoter to refund the paid amounts including taxes to Complainants within 45 (Forty Five) days with interest.

**2. BACKGROUND**

The Complainants had executed registered sale agreements dated March 31, 2015 (“**Agreements**”) for booking 2 (Two) flats bearing numbers 703 and 803 (“**Flats**”) in B1-Building, "F- Residences" at Haveli, Pune (“**Project**”). A housing loan was provided by Indiabulls Housing Finance Limited under 10:80:10 subvention scheme<sup>2</sup> by executing tripartite agreement with the respective Complainants and the Promoter (“**Tripartite Agreements**”), wherein the Promoter agreed to pay pre-EMI interest till the handing over of the possession of the Flats to the Complainants.

Aggrieved by delay in handing over timely possession along with an occupation certificate (“**OC**”) and the default in payment of the pre EMI by the Promoter, the Complainants filed complaints before the Maharashtra Real Estate Regulatory Authority (“**MahaRERA**”) on October 31, 2019, seeking various reliefs including a direction to the Promoter to comply with the terms and conditions of the Tripartite Agreement, handing over the possession of the Flats along with parking and OC as well as for compensation for delay in providing possession of the Flats. The relief sought was later amended to refund of monies with interest instead of the aforementioned reliefs.

The Adjudicating Officer (“**AO**”) through 2 (Two) separate orders dated April 03, 2019, allowed the Complainants to withdraw from the Project and directed the Promoter to refund the amounts paid by each of the Complainants along with an interest calculated at the rate of 10.75% (Ten point Seven Five percent) from October 15, 2018, together with costs subject to certain conditions stipulated in the said orders. These orders were subsequently rectified by the AO vide 2 (Two) separate orders dated May 03, 2019, to include refund of the relevant taxes paid by the Complainants. Aggrieved by these orders, the Complainants

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<sup>1</sup> Order dated 16<sup>th</sup> December 2022 in Appeal No. APPEAL NO. AT006000000053252 and AT006000000053263

<sup>2</sup> 10:80:10 scheme is where the purchaser has to pay up only 10% (Ten percent) of the sale consideration upfront for booking the unit, 80% (Eighty percent) of the sale consideration will be paid through a bank loan during the period of construction and the final 10% (Ten percent) of the sale consideration will be paid after getting possession of the unit by the purchaser.

preferred 2 (Two) separate appeals<sup>3</sup> before the Hon'ble MREAT which were disposed of by the Hon'ble MREAT through 2 (Two) separate orders dated February 15, 2020 and the complaints were remanded back to MahaRERA to decide afresh.

The Chairperson of the MahaRERA ("**Authority**") disposed of the complaints through an order passed in May 2021 ("**Impugned Order**") observing that the Complainants cannot amend the reliefs sought at such a belated stage to withdraw and seek refund of monies from the Promoter and that the withdrawal from the Project shall be guided by the terms and conditions of the respective Agreements and concluding that if Complainants intended to continue in the same Project, then the Promoter was directed to handover possession of the Flats at the earliest. Aggrieved by the Impugned Order, the Complainants filed appeals before Hon'ble MREAT ("**MREAT Appeals**") inter alia on the following grounds:

- (a) The Promoter committed serious actions and omissions, while carrying out construction of the Project. Hence the OC was denied by the local authority through an order dated August 13, 2018.
- (b) Acting on the advice of MahaRERA, the Complainants chose to modify the reliefs inter alia seeking withdrawal from the Project and not possession of the said Flats and had accordingly filed handwritten applications dated November 22, 2018 for refund and other reliefs as mentioned in appeals. The Authority failed to appreciate that amendment applications for withdrawal from the Project were allowed vide order dated January 25, 2019 including refund of paid amounts together with interest from October 15, 2018 by AO vide its order dated April 03, 2019.
- (c) The Promoter had accepted the amended reliefs since the Promoter did not file any appeal/review/revision against such order dated April 03, 2019 and had neither raised issue of amendment of prayer in their written reply/ submissions.
- (d) The Authority had erred in observing that the Promoter had completed the construction of the Flats within the timeline mentioned under clause 11 of the Agreements, which stipulated delivery of possession of Flats by March 31, 2018, whereas the OC was provided to the Complainants only on January 31, 2019.

The Promoter contested the MREAT Appeals on the below mentioned grounds amongst others:

- (a) The Promoter had to take steps to mitigate factors for timely project completion including by filing of Writ Petition before the Hon'ble High Court. Therefore, there was no delay on the part of the Promoter.
- (b) Despite factors not attributable to the Promoter, the OC was provided on January 31, 2019, even though the Promoter had applied for the same on April 18, 2018.
- (c) The Complainants were at default and had not taken possession of the Flats even after the receipt of the OC.

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<sup>3</sup> Appeal no. AT- 005000000031587 and AT- 005000000031588.

- (d) The Promoter was entitled to deduct 10% (Ten percent) of the value of the Agreements in addition to the interest already paid by the Promoter besides the cost of registration of the Agreements and stamp duties, as per the Agreements.

### 3. ISSUES CONSIDERED BY MREAT

#### 3.1 Whether the Promoter was successful in establishing that the possession of Flats was delivered within the agreed timeline in terms of the Agreements?

Answering the question in the negative, the Hon'ble MREAT held that the Promoter had failed to deliver possession of the Flats within the agreed timelines on the following grounds:

- (a) Clause 11 of the Agreements specifically stipulates delivery of possession of the Flats within 36 (Thirty Six) months from the date of the Agreements (March 31, 2015). Accordingly, the agreed timeline for delivery of possession of the Flats was by March 31, 2018.
- (b) Against the stipulated timeline for delivery of possession of the Flats on March 31, 2018, the Promoter had admitted that the application for OC along with the necessary documents had been submitted to the competent authority on April 18, 2018 on account of certain reasons and factors which were not attributable to the Promoter and therefore the OC was provided only on January 31, 2019.
- (c) Delivery of possession of the Flats with OC was to be given on or before March 31, 2018, as per the Agreements. However, the same was breached and delivery of the Flats was not provided until January 31, 2019.
- (d) The Hon'ble MREAT relying on the judgement passed by Hon'ble Supreme Court in Fortune Infrastructure and another vs. Trevor D' Lima and others<sup>4</sup> case held that delivery of the legal possession of the Flats was not given by the Promoter even after adding 3 (Three) years of reasonable time.

#### 3.2 Whether the Complainants are entitled to withdraw from the Project and refund with interest under Section 18 of the Act despite having opted earlier to continue in the Project?

Answering the question in the affirmative, the Hon'ble MREAT held that the Complainants can change the reliefs sought if due process of law is followed on the following grounds:

- (a) Referring to Section 18 of the Act and relying upon the judgment passed by the Hon'ble Supreme Court in M/s Newtech Promoters and Developers Pvt. Ltd v. State of Uttar Pradesh<sup>5</sup> case reiterated that if promoter fails to hand over possession of the apartment, plot or building within stipulated time under the terms of the agreements, then, the allottee's right under the Act to seek refund/ claim interest for delay is unconditional and absolute, regardless of unforeseen events or stay orders of the court/tribunal.

<sup>4</sup> Fortune Infrastructure and another v. Trevor D' Lima and others, (2018) 5 SCC 442.

<sup>5</sup> M/s Newtech Promoters and Developers Pvt. Ltd v. State of Uttar Pradesh, 2021 SCC Online 1044.

- (b) The observation made in paragraph 15 of the Impugned Order, which states that Complainants cannot at belated stage amend their prayers as an afterthought and seek withdrawal from the Project, is legally not sustainable.
- (c) It was on the basis of the advice of MahaRERA that the Complainants opted to withdraw from the Project by filing formal applications for amendment seeking reliefs for refunds through their handwritten letters dated November 22, 2018 for each complaint separately which was subsequently allowed.
- (d) Having allowed the amendments to the reliefs sought, the same cannot be denied subsequently merely on the alleged ground of belated stage.
- (e) Section 18 of the Act neither bars nor imposes any restriction, whatsoever, against such switch of prayers by Complainants, if due process of law has already been followed.
- (f) The amendment applications for withdrawal from the Project were filed in the complaint proceedings itself, much before the final decision in Impugned Orders and amendments have already been allowed before the final decision. Therefore, denying the prayers even on the basis of the purported belated stage is not tenable in terms of the provisions of Section 18 the Act.
- (g) The Promoter had not objected to the said change in the reliefs sought by the Complainants. The Promoter had rather submitted that in case of withdrawal from the Project, such withdrawal shall be governed by the terms and conditions of Agreements and not as per the Section 18 of the Act. Hon'ble MREAT also observed that Promoter had not filed any appeal/ review/ revision etc., against such orders/change of prayers.

## 5. **INDUSLAW VIEW**

This judgement by MREAT reiterates the rights of the purchasers of any flats/apartments under Section 18 of the Act to seek refund of the monies in the event the promoter/developer fails to handover possession within the date mentioned in the agreement for sale. This judgment further clarifies that upon the promoter failing to handover possession by the agreed date and in the event the purchaser has initially, in the complaint, sought for interest on the monies paid and subsequently desires to exit from the project by claiming refund of monies with interest, he/she can do so by filing necessary applications and following due process of law.

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