

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

**SECOND APPEAL NO. 136 OF 2022
WITH
INTERIM APPLICATION NO. 19309 OF 2022**

Sushila Sureshbabu Malge Proprietor of
Mount Mary Builders Thane & Anr. ...Appellants
Versus
Sana Hospitality Private Limited
through Authorized Officer, Mumbai ...Respondent

Ms. Yasmin E. Tavaría a/w. Mr. Abhishek Yadav, for the Appellants/
Appellants.

Mr. Jairam Chandnani a/w. Ms. Tanvi Mehta, Mr. Ashish Gupta, Mr.
Mohd. Mustafa Memon, i/b. Lexim Associates, for the Respondent.

**CORAM : MADHAV J. JAMDAR, J.
DATED : 24th NOVEMBER 2022**

P.C. :

1. Heard Ms. Tavaría, learned counsel appearing for the
Appellants and Mr. Chandnani, learned counsel appearing for
the Respondents.

2. By this Second Appeal filed under Section 58 of the Real
Estate (Regulation and Development) Act, 2016 (hereinafter
referred to as “the said Act”), the Appellants are challenging

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the legality and validity of the judgment and order dated 10th December 2021 passed by the learned Member, Maharashtra Real Estate Appellate Tribunal, Mumbai (*hereinafter referred to as "Appellate Tribunal" for short*) in Appeal No.AT006000000052139 of 2020 in Complaint No.CC006000000089795 of 2019.

3. It is the main contention of Ms. Tavaría that various documents produced by her in Appeal are not considered and therefore, the impugned judgment and order is perverse. Mr. Chandnani submitted that as the Appellants have not challenged the order dated 5th November 2019 passed by the learned Member, Maharashtra Real Estate Regulatory Authority in Complaint No.CC006000000089795 of 2019, the Appellate Tribunal rightly refused to take into consideration the said documents. He pointed out paragraph 8 of the impugned order where reasons are given for not considering the said documents.

4. The factual position on record shows that the complaint was filed before Maharashtra Real Estate Regulatory Authority (*hereinafter referred to as the "MahaRERA" for short*) seeking

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direction to the Respondents i.e. present Appellants to handover possession and to pay interest for the delayed possession in respect of booking of flat No. 1703 on 17th floor in project known as Green World at Airoli, Dist. Thane. For appreciating controversy, it is necessary to set out the relief sought by the Respondents in the said complaint, which reads as under:

- a) The promoter be directed **to forthwith put the complainant into the possession** of the flat no.1703 situated on 17th floor, in G Wing, admeasuring 661 sq.ft. or thereabout carpet, along with one (1) covered/stilt car parking space, in the building/project known as "GREEN WORLD" as provided under Section 19 of RERA Act, 2016
 - b) The promoter be directed **to pay to the Complainant compensation** as provided for under section 18 of THE REAL ESTATE (REGULATION AND DEVELOPMENT) ACT, 2016 (as maybe amended) read with rules framed thereunder by Government of Maharashtra (as maybe amended)
 - c) As provided for under section 72 read with section 71 of RERA:(i) Promoter may be directed to reimburse to the Complainant litigation cost of Rs.105,000/- to complainant by way of compensation, (ii) Promoter may be directed to pay to the Complainant a sum of Rs.40,00,000/- (Rupee Forty Lakhs only) for causing mental agony and trauma.
 - d) Maximum penalty maybe imposed on the Promoter as per provisions of RERA.
- (Emphasis added)

5. It is the contention of the Respondents that although the

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Appellants were served notice of said complaint along with copy of complaint, the Appellants chose to remain absent and therefore, *ex-parte* order was passed.

6. Ms. Tavaría submitted that email-ID given by the Respondents was incorrect and therefore, no notice has been received. However, in the compilation, there is notice issued by the Advocate of the Respondents dated 25th June 2019 and there is acknowledgment of 2nd July 2019 of the Proprietor of the Appellants. It is the contention of the Appellants that the signature on the said acknowledgment is not of Proprietor.

7. In any case, what is important to note as far as present Second Appeal is concerned that MahaRERA issued following directions to the Appellants by order dated 5th November 2019:

“4. In the light of these facts, the MahaRERA directs the respondent to pay interest for the delayed possession to the above named complainant from 1st July 2017 till the actual date of possession at the rate of Marginal Cost Lending Rate (MCLR) of SBI plus 2% as prescribed under the provisions of section-18 of the RERA.”

(Emphasis added)

It is significant to note that the said order dated 5th November 2019 directing payment of compensation for delayed possession

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to be paid from 1st July 2017 till the actual date of handing over possession is not challenged by the Appellants. However, the Respondents filed Appeal as the relief directing handing over possession was not passed in the complaint filed by the Respondents and only direction of payment of compensation was passed for delayed possession. Thus, scope of Appeal filed by the Respondent before Appellate Tribunal was only with respect to seeking order of possession as only compensation for delayed payment upto date of handing over possession was directed by MahaRera.

8. The Appellants appeared in the Appeal filed by the Respondents and have filed detailed say. The contentions raised by the Appellants are mentioned in paragraph 6 of the impugned order. The Appellate Authority in paragraph 8 has given reasons for not considering the contentions of the Appellants. The said paragraph 8 reads as under:

8. It is an admitted fact that complaint was heard and decided ex-parte vide order dated 05.11.2019 granting interest to Complainant w.e.f. 01.07.2017 till actual possession. Developer has raised contentions that they neither received any e-mail from the Authority or intimation for hearing from the Authority as well as Complainant as sought to

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be alleged to the contrary by Complainant. However, since the Developer has not filed the Appeal to raise any grievance against the impugned order to be justifiable in their written submissions, the contentions of Developer do not merit serious consideration and thus are inconsequential.”

(Emphasis added)

9. The other relevant paragraphs of order passed by the learned Appellate Tribunal are paragraph Nos.10, 11 and 12.

The said paragraphs read as under:

“10. Another pertinent grievance of the Complainant is that **even though claim for interest for delayed possession is recognised, the Authority gave no directions for handing over possession** despite being aware of the fact that the OC had already been obtained on 27.02.2019 before filing the complaint on 19.06.2019. It is also shown that **Complainant had also demanded possession from Developer vide letters dated 22.10.2018 and 13.06.2019. It is noted that Developer has not denied receipt of the said letters and in fact have expressly declined to offer any comment with reference thereto in their final written submissions**(page, 456).

11. Considering the fact that the Authority has already granted interest ‘till possession’ in the impugned order and Developer has not filed any Appeal to challenge the same, it is quite logical to infer that possession has to be granted to put an end to the dispute. Grant of interest is only an intermediary relief pending the ultimate relief of possession in the case where Allottee is not seeking exit from the

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project. In such a case, an allottee cannot be made to wait infinitely for possession without any sufficient reasons. In the instant case, as may be noted from the foregoing observation, OC has been obtained even before filing of the complaint and **there is no valid reasons for not handing over the possession. RERA casts obligation on promoter to intimate handing over of possession on receipt of OC and as per Section 19(10) an allottee has to take possession within a period of 2 months from receipt of OC.**

12. In the circumstances placed before the Authority, it was expected that the **Authority being competent under provisions of RERA should have given directions to Developer to hand over possession as the OC was already obtained.** It is obvious from the order that no such directions are given and no reasons are assigned by the Authority for not doing so. In our view, therefore, **Complainant is entitled for possession** and Developer is required to be directed to put the Complainant in possession or else face adverse consequences.”

(Emphasis added)

10. Thus, this the case where MahaRERA has directed payment of compensation for delayed possession till actual date of possession, however, has not granted relief of handing over possession, therefore, Respondents filed Appeal. The learned Appellate Tribunal by modifying the said order of MahaRERA directed that developer should hand over the possession within 60 days from the date of order. As the Appellants have accepted

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order dated 5th November 2019 directing the Appellants to pay the compensation from 1st July 2017 till actual date of possession, there is no useful purpose will be served by considering the various contentions raised by the Appellants.

11. It is the contention of the Respondents that Appellants agreed to sell total 11 flats to the Respondents and towards said transaction Respondents paid total amount of **Rs.4,50,00,000/-** in March 2016 to the Appellants. It is further contention of the Respondents that said transaction regarding 10 flats was cancelled and therefore, amount of Rs.5,84,38,685/- was returned back to the Respondents and the payment for one flat was retained by the Appellants.

12. In any case, admitted position on record is that MahaRERA directed payment of monthly compensation till handing over of the flat in question. The said order has not been challenged by the developer i.e. Appellants and in fact the said order is accepted by the developer. Thus, there is no illegality committed by the Appellate Court in issuing direction in Appeal to handover the possession of the said flat in time-bound manner.

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13. Ms. Tavaría, learned counsel appearing for the Appellants submitted that as far as the Appeal is concerned, the same is on the facts and law and therefore, the fact that the Appellants have not challenged order of MahaRERA is of no significance. To substantiate the said contentions, she has relied on following decisions of the Supreme Court.

- i. **Jagdish Prasad Patel (Dead) through Legal Representative & Anr. vs. Shivnath & Ors.** ¹
- ii. **Malluru Mallappa(D) through Legal Heirs vs. Kuruvathappa & Ors.** ²
- iii. **Hasmat Ali vs. Amina Bibi & Ors.** ³

There cannot be any dispute about the propositions that the First Appeal is on both facts and on law. However, this is the case where Appellants have not challenged the order of MahaRERA granting compensation till handing over possession of the flat and therefore, the said order of the learned MahaRERA has become final and binding on the Appellants. The scope of Appeal filed before the

¹(2019) 6 SCC 82

² Civil Appeal No.1485 of 2020 in SLP (C) No.18092 of 2014.

³ Civil Appeal No.7109 of 2021 in SLP (C) No.25119 of 2019.

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learned Appellate Tribunal is only with respect to relief of possession to be handed over to the Respondent. The learned Appellate Tribunal by recording cogent reasons have allowed the said Appeal.

14. Mr. Chandnani pointed out Section 43(5) of the said Act, where if a promoter is aggrieved person and wishes to file Appeal then, promoter was required to deposit 100% of the amount directed to be paid as compensation. This is a case where the Appellants do not want to comply with mandatory requirement of Section 43(5) and perhaps therefore, they have not filed Appeal and in the Appeal filed by the Respondents i.e. flat purchaser, they want to indirectly challenge the order passed by the MahaRERA, which is not permissible. Thus, there is no illegality committed by the learned Appellate Tribunal.

15. The Second Appeal is dismissed with costs.

16. In view of the dismissal of the Second Appeal, the Interim Application does not survive and stands disposed of.

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[MADHAV J. JAMDAR, J.]

**Note: This order is modified as per order dated 21st December 2022.
The correction is shown in bold in paragraph No. 11.**