

Dusane

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

**SECOND APPEAL NO.370 OF 2023
WITH
INTERIM APPLICATION (ST.) NO.16924 OF 2023
IN
SECOND APPEAL NO.370 OF 2023**

Neelkamal Realtors Suburban ...Appellant
Pvt. Ltd.

V/s.

Mr. Manoj Gangwani & Ors. ...Respondents

**WITH
SECOND APPEAL NO.376 OF 2023
WITH
INTERIM APPLICATION (ST.) NO.16933 OF 2023
IN
SECOND APPEAL NO.376 OF 2023**

Neelkamal Realtors Suburban ...Appellant
Pvt. Ltd.

V/s.

Mr. Bhartendu Vatsya ...Respondent

**WITH
SECOND APPEAL NO.377 OF 2023**

Neelkamal Realtors Suburban ...Appellant
Pvt. Ltd.

V/s.

Mr. Rajesh Motiram Chhabria ...Respondent

**WITH
SECOND APPEAL NO.371 OF 2023**

**WITH
INTERIM APPLICATION (ST.) NO.16927 OF 2023
IN
SECOND APPEAL NO.371 OF 2023**

Neelkamal Realtors Suburban Pvt. Ltd. ...Appellant

V/s.

Praveen Harkawat ...Respondent

**WITH
SECOND APPEAL NO.374 OF 2023**

Neelkamal Realtors Suburban Pvt. Ltd. ...Appellant

V/s.

Mr. Gopal Shetty ...Respondent

**WITH
SECOND APPEAL NO.372 OF 2023
WITH
INTERIM APPLICATION (ST.) NO.16931 OF 2023
IN
SECOND APPEAL NO.372 OF 2023**

Neelkamal Realtors Suburban Pvt. Ltd. ...Appellant

V/s.

Mr. Saurabh Masekar ...Respondent

**WITH
SECOND APPEAL NO.373 OF 2023
WITH
INTERIM APPLICATION (ST.) NO.16922 OF 2023
IN
SECOND APPEAL NO.373 OF 2023**

Neelkamal Realtors Suburban ...Appellant
Pvt. Ltd.

V/s.

Mr. Rohan Kisan Patil ...Respondent

WITH
SECOND APPEAL (ST.) NO.15465 OF 2023

Neelkamal Realtors Suburban ...Appellant
Pvt. Ltd.

V/s.

Mr. Richard D'Souza ...Respondent

WITH
SECOND APPEAL (ST.) NO.15468 OF 2023

Neelkamal Realtors Suburban ...Appellant
Pvt. Ltd.

V/s.

Mr. Chandrakant Shetty ...Respondent

WITH
SECOND APPEAL (ST.) NO.15471 OF 2023

Neelkamal Realtors Suburban ...Appellant
Pvt. Ltd.

V/s.

Ulanda John Fernandes ...Respondent

WITH
SECOND APPEAL (ST.) NO.15487 OF 2023

Neelkamal Realtors Suburban ...Appellant
Pvt. Ltd.

V/s.

Mr. Bhupendra Vira ...Respondent

**WITH
SECOND APPEAL (ST.) NO.15489 OF 2023**

Neelkamal Realtors Suburban Pvt. Ltd. ...Appellant

V/s.

Ms. Sandhya Agarwal ...Respondent

**WITH
SECOND APPEAL (ST.) NO.15517 OF 2023**

Neelkamal Realtors Suburban Pvt. Ltd. ...Appellant

V/s.

Brian Aranha ...Respondent

Mr. Yohaán Shah i/by Negandhi Shah &
Himayatullah for Appellants in all Appeals.

Ms. Shivani Shukla i/by Mr. Anil D'Souza a/w Ms. Pooja Idgar for Respondents in SA 371 of 2023 and 374 of 2023.

Mr. Girish S. Godbole, Senior Counsel i/by Yohan Shah i/by Negandhi Shah & Himayatullah for Appellants in SA 370 of 2023.

Mr. Abhishek Tripathi for Respondents in SA 373 of 2023.

Ms. Humera Syed i/by Mr. Bishwajeet Mukherjee for Respondents in SA No. 376 of 2023.

Mr. Sumeet Palsuledesai i/by M/s M.V. Kini & Co. for
Respondent in SA 377 of 2023.

Muazzama Ansari a/w Nilesh S. Das for Respondent
in SAs 15517 of 2023.

CORAM: MADHAV J. JAMDAR, J.

DATE: 28th July 2023

P.C.i:

1. Heard the respective learned Counsel appearing for the Appellant and the Respondents in respective Second Appeals.

2. Mr. Girish Godbole, learned Senior Counsel appearing for the Appellant submitted that the following substantial questions of law arise in these Second Appeals:

(i) Whether the Learned Member MahaRERA- 1 under Section 18 of the Real Estate (Regulation & Development) Act, 2016 has any jurisdiction to try and entertain the Complaint filed by the Respondent under section 18 read with Sub Section 1 of Section 71 of the said Act ?

(ii) Whether the Learned Member MahaRERA- 1 was competent to adjudicate the complaint filed by the Respondent under Section 18 of RERA in terms of the Judgment dated 6th December, 2017 passed in Writ Petition No. 2737 of 2017 between **Neelkamal Realtors Suburban Pvt. Ltd. & Anr. Vs. Union of India & Ors.** , reported in **(2017) SCC Online Bom 9302** ?

(iii) Whether the Learned Member MahaRERA-1 is bound to consider the factors stipulated u/s.72 of the said RERA Act which also effectively means that the Respondents/Complainants must prove their case by oral and documentary evidence, the actual loss and consequential disproportionate gain to the Appellants and unfair dis-advantage to the Respondents on account of the default complained of and considering these factors the decision needs to be taken?

3. Before considering the substantial questions of law raised by the learned Senior Counsel, it is necessary to set out certain factual aspects. It is an admitted position that 31st

December 2014 was the date of handing over possession of respective flats. The agreement provides for a one year grace period. Even after considering the said grace period, 31st December 2015 is the date of handing over possession as per the agreement between the parties.

4. The Respondents in all these Second Appeals i. e. the Complainants filed respective complaints seeking MahaRERA's direction to Appellant to pay interest to the Respondents for the delayed possession under the provisions of Section 18 of the Real Estate (Regulation & Development) Act, 2016 (hereinafter referred to as "**RERA**"). In fact by considering reasons for delay raised by the present Appellant, MahaRERA directed the Appellant to pay interest to the respective complainants from 1st May 2017 for every month till the actual date of possession at the rate of Marginal Cost Lending Rate (MCLR) of State Bank of India (SBI) plus 2% as prescribed under the provisions of Section 18 of the RERA and the Rules made thereunder.

5. The Appellants have filed respective appeals before the learned Maharashtra Real Estate Appellate Tribunal, Mumbai. By the impugned order passed by the learned Appellate Tribunal, all these appeals were dismissed.

6. Mr. Girish Godbole, learned Senior Counsel for the Appellant and learned Counsel appearing for the respective

Respondents have relied on the decision of the Supreme Court in **Newtech Promoters and Developers Pvt. Ltd. Vs. State of U.P. and Ors.**¹.

7. It is the contention of Mr. Girish Godbole, learned Senior Counsel that in the said judgment, the dispute involved is totally different and not similar to the one which is arising in these Second Appeals. He relied on certain paragraphs of the said judgment to contend that the dispute in the present matter is not covered by the said judgment. On the other hand, it is the contention of respective learned Counsel appearing for the Respondents that the dispute involved in the present Second Appeal is completely covered by **Newtech Promoters (Supra)**.

8. For appreciating the contention raised by Mr. Girish Godbole, learned Senior Counsel, it is necessary to set out paragraph 31 of **Newtech Promoters (Supra)**, which reads as under:

"31. After we have heard learned Counsel for the parties at length, the following questions emerge for our consideration in the present batch of appeals are as under:-

1. Whether the Act 2016 is retrospective or retroactive in its operation and what will be its legal consequence if tested on the anvil of the Constitution of India ?

¹ 2021 SCC OnLine SC 1044

2. Whether the authority has jurisdiction to direct return/refund of the amount to the allottee under Sections 12, 14, 18 and 19 of the Act or the jurisdiction exclusively lies with the adjudicating officer under Section 71 of the Act ?

3. Whether Section 81 of the Act authorizes the authority to delegate its powers to a single member of the authority to hear complaints instituted under Section 31 of the Act ?

4. Whether the condition of pre-deposit under proviso to Section 43(5) of the Act for entertaining substantive right of appeal is sustainable in law ?

5. Whether the authority has power to issue recovery certificate for recovery of the principal amount under Section 40(1) of the Act ?"

In paragraph 31, the questions considered by the Supreme Court in **Newtech Promoters (Supra)** are mentioned.

9. In this case, it is an admitted position that as per the agreement between the parties, 31st December 2014 is the date of handing over possession with a one year grace period, which expired on 31st December 2015. In spite of that, the MahaRERA authority had granted interest w.e.f. 1st May 2017. It is also an admitted position that the Appellant - developer has not handed over the possession of the respective flats to the respective Respondents – flat purchasers till date.

10. For appreciating the substantial questions of law raised by Mr. Girish Godbole, learned Senior Counsel, discussion in paragraphs 75 to 78 of **Newtech Promoters (*Supra*)** is very relevant and the same reads as under:

"75. The legislature in its wisdom has made a specific provision delineating power to be exercised by the regulatory authority/adjudicating officer. "Refund of the amount" and "compensation" are two distinct components which the allottee or the person aggrieved is entitled to claim if the promoter has not been able to hand over possession with a nature of enquiry and mechanism provided under the Act. So far as the claim with respect to refund of amount on demand under Sections 18(1) and 19(4) of the Act is concerned, it vests within the jurisdiction of the regulatory authority. Section 71 carves out the jurisdiction of the adjudicating officer to adjudge compensation under Sections 12, 14, 18 and 19 after holding enquiry under Section 71(3) of the Act keeping in view the broad contours referred to under Section 72 of the Act.

76. The submission made by learned counsel for the appellants that the proviso under Section 71(1) empowers the adjudicating officer to examine the complaints made under Sections 12, 14, 18 and 19 pending before the Consumer Disputes Redressal Forum/ Commission is in different context and it was one time mechanism to provide a window to the consumers whose composite claims are pending before the Consumer Forum/Commission to avail the benevolent provision of the Act 2016 for the reason that under the Consumer Protection Act, there is no distinction as to whether the complaint is for refund of the amount or for compensation as defined under

Section 71(1) of the Act, but after the Act 2016 has come into force, if any person aggrieved wants to make complaint for refund against the promotor or real estate agent other than compensation, it is to be lodged to the regulatory authority and for adjudging compensation to the adjudicating officer, and the delineation has been made to expedite the process of adjudication invoked by the person aggrieved when a complaint has been made under Section 31 of the Act to be adjudicated either by the authority/adjudicating officer as per the procedure prescribed under the Act.

77. The further submission made by the learned counsel for the appellants is that the return of the amount adversely impacts the promotor and such a question can be looked into by the adjudicating officer in the better prospective. The submission has no foundation for the reason that the legislative intention and mandate is clear that Section 18(1) is an indefeasible right of the allottee to get a return of the amount on demand if the promoter is unable to handover possession in terms of the agreement for sale or failed to complete the project by the date specified and the justification which the promotor wants to tender as his defence as to why the withdrawal of the amount under the scheme of the Act may not be justified appears to be insignificant and the regulatory authority with summary nature of scrutiny of undisputed facts may determine the refund of the amount which the allottee has deposited, while seeking withdrawal from the project, with interest, that too has been prescribed under the Act, as in the instant case, the State of Uttar Pradesh has prescribed MCLR + 1% leaving no discretion to the authority and can also claim compensation as per the procedure prescribed under Section 71(3) read with Section 72 of the Act.

78. This Court while interpreting Section 18 of the Act, in Imperia Structures Ltd. Vs. Anil Patni held that

Section 18 confers an unqualified right upon an allottee to get refund of the amount deposited with the promoter and interest at the prescribed rate, if the promoter fails to complete or is unable to give possession of an apartment as per the date specified in the home buyer's agreement in para 25 held as under:

"25. In terms of Section 18 of the RERA Act, if a promoter fails to complete or is unable to give possession of an apartment duly completed by the date specified in the agreement, the promoter would be liable, on demand, to return the amount received by him in respect of that apartment if the allottee wishes to withdraw from the Project. Such right of an allottee is specifically made "without prejudice to any other remedy available to him". **The right so given to the allottee is unqualified** and if availed, the money deposited by the allottee has to be refunded with interest at such rate as may be prescribed. The proviso to Section 18(1) contemplates a situation where the allottee does not intend to withdraw from the Project. In that case he is entitled to and must be paid interest for every month of delay till the handing over of the possession. It is up to the allottee to proceed either under Section 18(1) or under proviso to Section 18(1). The case of Himanshu Giri came under the latter category. The RERA Act thus definitely provides a remedy to an allottee who wishes to withdraw from the Project or claim return on his investment."

(emphasis supplied)

11. Therefore, it is very clearly held that the proviso to Section 18(1) of RERA contemplates the situation where in case the allottee does not wish to withdraw from the project then he shall be paid, by the promoter, interest for every month of delay, till

handing over of the possession, at such rate as may be prescribed and it is for the allottee to decide whether he is withdrawing from the project or he is continuing in the project. However, it is very clear that if he continues in the project, he has got an unqualified right to claim interest for the period of delay till handing over of possession. The same is also clear from paragraph 25 of **Newtech (Supra)**, which reads as under:

"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.**"

(Emphasis added)

12. The Supreme Court in paragraph 86 of **Newtech (Supra)** held that a conjoint reading of Sections 18 and 19 clearly manifests that when the question is raised regarding payment of interest for delayed delivery of possession, it is the regulatory authority which

has the power to examine and determine the outcome of a complaint.

13. Thus, it is clear that as the Respondents in their complaint have only sought interest for the delay in handing over possession as held in **Newtech (Supra)** with summary nature of scrutiny of undisputed facts like date prescribed for handing over possession in the agreement and whether actually possession has been given by said due date, it is the Regulatory Authority which will decide the complaint of said nature and the complaint cannot be decided by the Adjudicating officer. Thus, reliance of learned Senior Counsel on the decision of a Division Bench of this Court in **Neelkamal Realtors (Supra)** is also of no use as the question has been decided by the Supreme Court in **Newtech (Supra)**.

14. It is also clear that as held in **Newtech (Supra)**, it is the unqualified right of the flat purchaser/allottee to get interest for delayed possession and for ascertaining the quantum of the same, a very limited enquiry is required to be carried out as set out hereinabove and therefore, factors which are enumerated in Section 72 of the RERA are not required to be taken into consideration. Therefore, there is no substance in any of the substantial questions of law raised by Mr. Girish Godbole, learned Senior Counsel appearing for the Appellant.

15. Mr. Girish Godbole, learned Senior Counsel appearing for the Appellant also contended that during the period between the years of 2013-2014, restrictions were imposed on stone crushers vide

judgment dated 1st October 2013 passed in Application No. 14 of 2012 in the case of ***Pandurang Sitaram Chalke Vs. State of Maharashtra***², and therefore there has been a delay. However, it is clear that the Supreme Court in ***Newtech (Supra)*** has stated that it is the unqualified right of the allottee to get interest for the period of delay till handing over possession at the rate prescribed and therefore, the said aspect has no relevance. In any case, as per admitted position by taking into consideration the grace period, the Appellants were duty bound to give possession of the new premises by 31st December 2015, yet the Authority has granted interest from 1st May 2017. It is clear that the said restrictions were imposed from 1st October 2013 to February, 2014. However, against said period of less than 1 year, the authority has granted the Appellant a benefit of about 2.5 years. It is an admitted position that the restriction was only from 1st October 2013 to February, 2014 i. e. for a period of less than one year.

16. Therefore, there is no substance in any of the substantial questions of law raised by Mr. Godbole, learned Senior Counsel. Accordingly, the Second Appeals are dismissed, however, with no order as to costs.

17. In view of dismissal of the Second Appeals, nothing survives in the Interim Applications, and the same are also disposed of.

18. At this stage, learned Counsel appearing for the Appellant has requested for a stay of this order. However, it is an admitted

² 2013 SCC Online NGT 55

position that as per the agreement, the Appellant was obligated to handover possession of the flats to the flat purchasers by 31st December 2014 with a grace period of one year. It is also an admitted position that till date, the possession of the said flats is not handed over to the respective purchasers. Therefore, no ground is made out for staying of this order. Hence, the request for stay is rejected.

(MADHAV J. JAMDAR, J.)

Note : Corrected by showing corrected appearance as per speaking to minutes of order dated 25th September 2023.

BHALCHANDRA
GOPAL
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