Arjun

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO.603 OF 2024

M86 Residency Private Limited …Appellant
Earlier known as Wadhwa Residency Pvt. Ltd.

Versus

Ketan Kataria & Anr. …Respondents

WITH
INTERIM APPLICATION NO.11621 OF 2024
IN
SECOND APPEAL NO.603 OF 2024

M86 Residency Private Limited …Applicant
Earlier known as Wadhwa Residency Pvt. Ltd.

IN THE MATTER BETWEEN:

M86 Residency Private Limited …Appellant
Earlier known as Wadhwa Residency Pvt. Ltd.

Versus

Ketan Kataria & Anr. …Respondents

Mr. Ashish Kamat, Senior Advocate a/w Vikramjit Garewal, Abir P. & Kartik Joshi, for the Appellant.

Mr. Manish Gala a/w Nilesh Gala, Minil Shah, Samyak Dedhia & Khyati Bora, for Respondent No.1.

Ms. Rahila Memon i/b S.I. Joshi & Co., for Respondent No.2.

CORAM: MADHAV J. JAMDAR, J.
DATED: 15 JULY 2025

JUDGMENT:

1. Heard Mr. Ashish Kamat, learned Senior Counsel appearing for the Appellant, Mr. Manish Gala, learned Counsel appearing for Respondent No.1 and Ms. Rahila Memon, learned Counsel appearing for Respondent No.2.

2. The challenge in this Second Appeal is to the Order dated 18th July 2024 passed by the Maharashtra Real Estate Appellate Tribunal, Mumbai ("**Appellate Tribunal**"), by which the learned Appellate Tribunal has directed the present Appellant i.e. Promoter to pre-deposit the entire amounts received from both the sources i.e. total amounts received from the Respondent No.2 - Financier under the subvention scheme and also the amounts received directly from the Respondent No.1-Allottee together with interest on the entire amounts received from both the sources for the period starting from the date of receipts of these amounts till the date of actual deposit in the Tribunal as directed in the impugned Order dated 24th February 2022 i.e. Order passed by the Maharashtra Real Estate Regulatory Authority, Mumbai ("**Authority**").

3. The operative part of the said Order dated 24th February 2022 of the learned Authority reads as under :-

> "*36. Considering these facts and evidence brought on record of MahaRERA, the following order is passed:*
>
> *a. The complainant is allowed to withdraw from the project.*

b. ***The respondent no. 1 promoter is directed to refund the entire amount paid by the complainant along with interest at the rate prescribed under RERA i.e. Marginal Cost of funds based Lending Rate (MCLR) of the State Bank of India + 2% within 3 months.***

c. *With regard to the payment of interest, MahaRERA further directs that the respondent no. 1 promoter is entitled to claim the benefit of "Moratorium Period" as mentioned in the notification/ order no. 13 and 14 dated 02-04-2020 and 18-05-2020 issued by MahaRERA and the notification / order which may be issued in this regard from time to time.*"

(Emphasis added)

4. It is also relevant to note Paragraph 30 of the Order of the learned Authority, which reads as under :-

"*30.* ***It is admitted fact that the complainant has booked the said flat for total consideration amount of Rs. 1,90,00,000/-*** *and the said booking was done under the MOFA regime on 10-10-2014.* ***The respondent no. 1 promoter has issued the allotment letter for the said booking on 22-01-2015.*** *Even, it is an admitted fact that there is no registered agreement for sale executed by and between the parties and* ***said booking was done under subvention scheme of 20:80 sanctioned by the respondent no. 2 viz L & T Housing Finance Ltd. Till date, the complainant has paid an amount of Rs. 1,80,50,000/- towards consideration value by availing home loan and also paid other charges towards stamp duty, registration and taxes etc.*** *other charges and also Further though the occupancy certificate (OC) was obtained for this project including the complainant's flat on 19-06-2018,* ***the complainant has filed this complaint before MahaRERA prior to the date of OC agitating his claim of refund on 11-06-2018****. Hence, the MahaRERA is prima facie of the view that on the date of filing of this complaint, the project was incomplete and no OC was obtained for the complainant's flat. Hence, the present complaint is maintainable.*"

(Emphasis added)

5. Thus, what the Authority has said is that the total amount paid by the Complainant is Rs.1,80,50,000/-. It is admitted position that said amount of Rs.1,80,50,000/- includes the amount paid by allottee directly to the Appellant from his own fund i.e. Rs.53,23,433/- and balance amount is through housing loan availed from the Respondent No.2. The Authority directed that payment of refund of the entire amount by the Promoter to the Respondent No.1-Complainant along with interest at the rate prescribed under RERA i.e. Marginal Cost of funds based on Lending Rate (MCLR) of the State Bank of India + 2% within 3 months. It has been further directed that the Appellant-Promoter is entitled to claim the benefit of the “Moratorium Period” as mentioned in the notifications dated 2nd April 2020 and 18th May 2020 issued by the MahaRERA.

6. In this background of the matter, Mr. Ashish Kamat, learned Senior Counsel for the Appellant submits that following substantial questions of law are involved in this Second Appeal :-

> **i.** Whether the Appellate Tribunal can direct the Appellant to deposit the amount that has not been paid by the Respondent No. 1, towards compliance of deposit requirement under proviso to Section 43(5) of the Real Estate (Regulation & Development) Act, 2016?
>
> **ii.** Whether the Appellate Tribunal can pass an order to

deposit the amount towards compliance of deposit requirement under proviso to Section 43(5) of the Real Estate (Regulation & Development) Act, 2016 contrary to what was prayed for and granted in the Complaint?

iii. Whether the Appellate Tribunal can rewrite a registered contract and hold that the entire amount is paid by the Respondent No.1 when the Tripartite Agreement entered into by the parties specifically lays down that the refund of the amount paid by the Respondent no. 2 is to be paid to the Respondent No.2 only?

7. It is the main submission of Mr. Ashish Kamat, learned Senior Counsel for the Appellant that the learned Appellate Tribunal cannot direct deposit of the amount that has been paid by the Respondent No.2 for the purpose compliance under proviso to Section 43(5) of the *Real Estate (Regulation and Development) Act, 2016* ("**RERA**"). Learned Senior Counsel submitted that what has been granted by the learned Authority is only payment made by the Complainant. Therefore, the Appellate Tribunal cannot pass order directing deposit of the amount which has been received by the Appellant from both the sources i.e. total amounts received from the Respondent No.1-Complainant and Respondent No.2-Financier under the subvention scheme. It is his submission that the direction which the learned Appellate Tribunal has issued has the effect of rewriting a registered Tripartite Agreement. To substantiate the said contention, Mr. Ashish Kamat, learned Senior Counsel relied on Clauses 7 and 8 of the Tripartite Agreement dated 28th January 2015 executed between the Appellant, Respondent No.1 and Respondent No.2. He also relied on Working Sheet of amount paid by the Respondent No.1 to the Appellant and submitted that only Rs.53,23,433/- has been paid by the Respondent No.1 to the Appellant and that the said amount of Rs.53,23,433/- along with interest has been deposited with the Appellate Tribunal. He therefore submitted that the Second Appeal deserves to be admitted.

8. On the other hand, Mr. Manish Gala, learned Counsel for Respondent No.1 submitted that total amount which has been paid by the Respondent No.1 through his own fund is Rs.53,23,433/- and through housing loan taken from Financial Institution i.e. Respondent No.2 an aggregate amount of Rs.1,36,30,530/- has been paid. He submitted that as far as the loan which has been taken from the Respondent No.2 is concerned, Respondent No.1 has repaid till date approximately Rs.1,29,00,000/-. He submitted that the learned Appellate Tribunal rightly directed the Appellant to deposit amount received from both the sources and therefore no interference in the impugned Order is warranted.

9. Ms. Rahila Memon, learned Counsel for Respondent No.2

adopted the contentions raised by learned Counsel of the Respondent No.1.

10. As noted herein above, the Order of the Authority clearly records that the Complainant has paid total amount of Rs.1,80,50,000/- from his own contribution and also by availing home loan. In view of the said factual position, the Authority has directed the Appellant-Promoter to refund the entire amount paid by the Complainant along with interest at the rate prescribed under RERA.

11. Thus, in view of the above position, it is necessary to set out Sub-Section (5) of Section 43 of the RERA, which reads as under :-

> "43….
> (5) Any person aggrieved by any direction or decision or order made by the Authority or by an adjudicating officer under this Act may prefer an appeal before the Appellate Tribunal having jurisdiction over the matter:
>
> Provided that **where a promoter files an appeal with the Appellate Tribunal, it shall not be entertained without the promoter first having deposited with the Appellate Tribunal** at least thirty per cent of the penalty or such higher percentage as may be determined by the Appellate Tribunal, **or the total amount to be paid to the allottee including interest and compensation imposed on him, if any, or with both, as the case may be, before the said appeal is heard**.
>
> Explanation.— For the purpose of this sub-section "person" shall include the association of allottees or any voluntary consumer association registered under any law for the time being in force."
>
> (Emphasis added)

Thus, what is contemplated under Sub-Section (5) particularly proviso to Sub-Section (5) of Section 43 is that where a promoter files an appeal with the Appellate Tribunal, it shall not be entertained, without the promoter first having deposited with the Appellate Tribunal, the total amount to be paid to the allottee including interest and compensation imposed on him, if any. Thus, it is clear that the scheme of the RERA do not contemplate that at this stage the Appellate Tribunal to consider the merits and the legality and validity of the Order of the Authority and then determine the amount which is required to be deposited. In view of this position, it is not necessary to consider the contentions of Mr. Ashish Kamat, learned Senior Counsel for the Appellant raised concerning the merits.

12. However, even if the said submissions are also considered, then also it is clear that the Order of the learned Appellant Tribunal directing the entire payment to be deposited for due compliance under proviso to Section 43(5) need not be interfered.

13. Mr. Ashish Kamat, learned Senior Counsel has relied on Clauses 7 and 8 of the Tripartite Agreement dated 28th January 2015 executed between the Appellant, Respondent No.1 and Respondent No.2. The said Clauses read as under :-

> "*7.* ***That if the Borrower fails to pay the balance amount representing the difference between the Loan sanctioned by LTHFL and the actual purchase price of the Flat or in the event of death of the Borrower or in the event of cancellation of the Flat for any reason whatsoever the entire loan amount***

> ***advanced by LTHFL to the developer in respect of the mortgage of the unit will be refunded by the Developer to LTHFL forthwith, subject to forfeit of earnest money. The Borrower hereby subrogates all his rights for refund with respect to the said Flat in favour of LTHFL.***
>
> *8. Further if the Borrower commits breach of any of the terms and conditions of this Tripartite Agreement it shall be treated as an event of default under the agreement for sale / allotment letter for sale or any such agreement or document signed by and between the Borrower and the Developer for the sale of the said residential Flat.*
>
> ***That in the event of occurrence of default under the loan agreement which would result in the cancellation of the allotment as a consequence thereof and/or for any reason whatsoever if the allotment is cancelled; any amount payable to the Borrower after forfeit of the earnest money on account of such cancellation shall be directly paid to LTHFL to the extent of entire amount paid by LTHFL to the developers. However it is further agreed between the Parties that such payment made by the Developer directly to LTHFL shall not absolve the Borrower from his liability to pay the residual amount, if any, from the outstanding under the loan agreement.***"

14. In view of above Clause Nos.7 and 8 it is required to note submissions of learned Counsel for the Respondent No.1 that an aggregate amount of Rs.53,23,433/- has been paid by the Respondent No.1 to the Appellant through his own contribution and an aggregate amount of Rs.1,36,30,530/- has been paid by the Respondent No.1 to the Appellant availing home loan from the Respondent No.2. This payment was made on various dates from 10th October 2015 to 24th January 2017. He has further stated that towards repayment of loan availed through Respondent No.2, an amount of Rs.1,29,00,000/- has already been repaid to the Respondent No.2 and further amounts are being paid through the monthly instalments.

15. Thus, the total amount which the Respondent No.1 has paid towards purchase price of the said flat to the Appellant is Rs.53,23,433/- + Rs.1,36,30,530/- to the Appellant. The Respondent No.1 has repaid substantial amount of Rs.1,29,00,000/- to the Respondent No.2. Even the above Clause Nos.7 and 8 also clarifies that it is the responsibility of the Respondent No.1 to pay the said amount.

16. Admittedly, the Appellant has deposited the said amount of Rs.53,23,433/- along with interest i.e. total amount of Rs.85,22,583/-. Thus, it is necessary that the Appellant shall deposit before the learned Appellate Tribunal balance amount of Rs.1,36,30,530/- along with the interest as directed by the learned Authority. The same be done within a period of 4 weeks.

17. Thus, there is no substance in the substantial questions of law raised by learned Counsel for the Appellant. Accordingly, Second Appeal is dismissed, however with no order as to costs.

18. In view of dismissal of the Second Appeal, nothing survives in the Interim Application and the same is also disposed of.

[MADHAV J. JAMDAR, J.]