IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO. 318 OF 2025

WITH

INTERIM APPLICATION NO. 1790 OF 2025

M/s S M Infrastructures ..Appellant

Versus

Fakhre Alam Shaikh …Respondent

Mr. Sagar Joshi, with Pooja Gaikwad, for the Appellant.
Ms. Padma Chinta, with Anwar Landge, for the Respondent.

CORAM: N. J. JAMADAR, J.
RESERVED ON : 24th DECEMBER 2025
PRONOUNCED ON : 5th JANUARY 2026

ORDER

1. This Appeal is directed against a judgment and order dated 18th November 2024 passed by the Maharashtra Real Estate Appellate Tribunal ("the Tribunal) in Appeal No. AT006000000052200/20, whereby the Appeal preferred by the Appellant-Promoter against a judgment and order dated 10th December 2019 passed by the learned Member, Maharashtra Real Estate Regulatory Authority ("MahaRERA") in Complaint No. CC006000000110847, came to be dismissed by affirming the said order passed by MahaRERA.

2. The Appellant developed a project, "Hatkesh Tower" at Survey No. 98, Hissa No. 3 situated at Village Ghodbunder, Taluka and District

Thane ("the subject project"). Under an Allotment Letter dated 26th August 2014, the Appellant agreed to sell Flat No. A-1/203, ("the subject flat") in the subject project to the Respondent-Allottee for a consideration of Rs.35,60,000/-. A booking amount of Rs.6 lakhs was received by the Promoter thereunder.

3. The Promoter continued to receive payment towards the consideration, in tranches, by addressing demand letters during the period 2014 to 2017. In all a sum of Rs.22,91,000/- was received towards the consideration and Rs. 75,701/- towards the service tax. The Promoter, however, did not execute and register the Agreement for Sale and continued to demand and receive the aforesaid amount from the Allottee.

4. Yet, despite receiving a substantial part of the consideration, by a communication dated 28th June 2019, the Promoter professed to cancel the allotment, and terminate the contract purportedly for the reason that the Allottee had committed default in payment of the outstanding amount.

5. The Allottee thus filed the complaint before MahaRERA. The Promoter resisted the complaint. It was, *inter alia,* contended that, on account of default on the part of the Allottee, the Promoter had terminated the contract and allotted the subject flat to another allottee and, thus, third party interest in the subject flat was created and, resultantly, the prayers in the complaint to direct the promoter to execute and register instrument and complete the transaction had become infructuous.

6. After appraisal of the pleadings and material on record, by an order dated 10th December 2019, MahaRERA was persuaded to allow the complaint and quash and set aside the unilateral termination of the contract by the promoter and direct the promoter to execute a registered instrument to sell the subject flat to the Allottee in accordance with the terms of the contract contained in the Allotment Letter.

7. The learned Member, MahaRERA, also directed the promoter to pay penalty of Rs. 5 Lakhs as the promoter had violated the provisions contained in Section 13(1) of the Real Estate (Regulation and Development) Act, 2016 ("the Act, 2016"), by accepting substantial consideration without executing a registered agreement.

8. Being aggrieved, the promoter preferred an Application before the Tribunal.

9. By the impugned judgment and order, the Tribunal dismissed the Appeal finding no fault with the order passed by the MahaRERA. The Tribunal was of the view that the promoter had accepted substantial consideration without executing a registered instrument, and it was nowhere the case of the promoter that the registered agreement could be executed for default on the part of the Allottee. Instead the purported termination letter referred to the alleged default in the payment of the outstanding amount.

10. Being further aggrieved, the promoter has preferred this Appeal.

11. I have heard, Mr. Sagar Joshi, the learned Counsel for the Appellant, and Ms Padma Chinta, the learned Counsel for the Respondent, at some length. With the assistance of the learned Counsel for the parties, I have perused the material on record.

12. Mr. Joshi, the learned Counsel for the Appellant, would urge that the Tribunal as well as MahaRERA have committed manifest error in ignoring the repeated communications by the promoter calling upon the Allottee to execute the registered instrument. Despite the repeated communications there was no desired response from the Allottee. The promoter was thus constrained to terminate the contract as, despite ample opportunities, the Allottee committed default in taking steps to execute the registered instrument and pay the outstanding amount. As in the intervening period third party rights were created and all the flats in the subject project were sold, the MahaRERA and the Tribunal could not have directed the promoter to execute a registered instrument in favour of the allottee and deliver the subject flat. The impossibility of the promoter to perform the contract, was not adequately dealt with by the Tribunal, submitted Mr. Joshi.

13. Mr. Joshi would urge that the Appellant-Promoter, in the peculiar circumstances of the case, is willing to refund the consideration along with interest to compensate the Respondent-Allottee.

14. In opposition to this, Ms. Chinta, the learned Counsel for the Respondent, would urge that the material on record would clearly indicate that the promoter was in a position to allot the subject flat to the Allottee, as originally agreed.

15. After the purported termination of the contract, the promoter had allegedly allotted the subject flat to a third party. However, the record would indicate that Mr. Tufal Riyaz Rahi, one of the partners of SM Infrastructures, the promoter, himself has purchased the subject flat from the firm for a consideration of Rs. 62 Lakhs, which was to be adjusted against capital account of the said partner. This conduct of the promoter, after the filing of the complaint, demonstrates the falsity in the claim of the promoter that it was not in a position to allot the subject flat to the Respondent-Allottee.

16. Ms. Chinta would further submit that, the Allottee had parted with a valuable consideration during the period 2014 to 2017 and, thus, the offer of refund of the consideration, alongwith the interest, can never be a solace to the Allottee.

17. As the Appeal is governed by the regime of Section 100 of the Code of Civil Procedure, 1908 (“the Code”), the aspect as to whether any substantial question of law arises for consideration is required to be examined.

18. The thrust of the submission of Mr. Joshi was that in a series of communications from the year 2015 to 2017 the promoter has repeatedly informed the Allottee that the Agreement was ready for stamp duty and registration. Therefore, non-consideration of the said factor by the Tribunal and MahaRERA gives rise to a substantial question of law.

19. I find it difficult to accede to the aforesaid submission of Mr. Joshi.

20. In view of the provisions contained in Section 13(1) of the Act, 2016, a promoter is proscribed from accepting a sum of more than 10% of the cost of the apartment, as an advance payment or an application fee, from a person without first entering into a written agreement for sale with such person and registering the said agreement for sale.

21. As is evident, under the Allotment Letter itself, the promoter had accepted a sum of Rs. 6 Lakhs, against the agreed consideration of Rs. 35,60,000/-. It was thus incumbent upon the promoter to execute a registered agreement for sale in favour of the Allottee, before demanding any further payment. In contrast, the letters addressed on behalf of the promoter indicate that the promoter kept on demanding the stage-wise balance consideration, without executing an Agreement for Sale. As noted above, a substantial amount of more than Rs. 23 Lakhs was received by the promoter.

22. It is true, in the demand letters, the Allottee was informed that the Agreement was ready for stamp duty and registration. However, beyond the said statement which has been repeated as a *mantra,* there was no material on record to show that any positive and effective steps were taken by the promoter to execute and register the Agreement for Sale.

23. The Allottee, on his part, has offered an explanation that the draft Agreement for Sale was duly executed and delivered to Jaydeep D Dubey and, yet, the said Agreement was not registered. Reliance was placed on the Affidavit of Mr. Jaydeep D Dubey.

24. The Tribunal was not prepared to accede to the submission on behalf of the Appellant that the promoter had no concern with the said Jaydeep Dubey.

25. The Tribunal was justified in taking the said view. The demand letters take the wind out of the sails of the Promoter. In the demand letters, the Allottee was requested to contact Jaydeep Dubey.

26. What erodes the claim of the promoter is the absence of any communication which in terms records that despite having been supplied with the draft of the Agreement for Sale, there was default on the part of the Allottee in executing the Agreement for Sale. Moreover, the termination letter dated 28th June 2019 does not even make a reference to such default on the part of the Allottee. On the contrary, it was asserted that despite repeated demands outstanding dues were not cleared and, therefore, the promoter decided to cancel the allotment.

27. The fact that after the lodging of the complaint, third party rights were sought to be created and under an Instrument dated 25th October 2021, the subject flat was purchased by one of the partners of the firm for a consideration of Rs. 62 Lakhs, which was to be adjusted against capital account of the said partner, further exacerbates the situation. The promoter, in a sense, disabled itself from discharging its obligation by a deliberate act which betrayed an intent to defeat the rights of the Allottee.

28. In these circumstances, MahaRERA and the Tribunal were justified in returning the findings that the promoter committed default in the discharge of its obligations. No question of law, much less a substantial question of law, arises for consideration. Thus the Appeal does not deserve to be entertained.

29. The Appeal thus stands dismissed with costs.

30. In view of the dismissal of the Second Appeal, the Interim Application also stands disposed.

[N. J. JAMADAR, J.]