

**INFORMATION MEMORANDUM:**

Under RERA, the Promoter of real estate project cannot withhold the refund if the buyer wants to cancel the booking because the possession is delayed by the Promoter.

**Rohit Chawla & Ors vs. M/s. Bombay Dyeing & Mfg. Co. Ltd****Decided on 31/12/2019**

Consumers of the project ought to be compensated by the builder for undue delay in project even if the agreement for sale is executed prior to RERA.

**Facts of the case:**

Bombay Dyeing (the "Promoter") launched a luxurious project named as "Island City Center" at Spring Mills Compound, Wadala, before the enactment of RERA. The Promoter in its detailed advertisement while booking promised numerous facilities and the due date of possession was taken as 2017.

On the basis of the representations and assurances of Promoter, Allottees had agreed to purchase flats from Phase-II of the project which consisted of two towers i.e "ICC Tower One" and "ICC Tower Two". Promoter had accordingly issued allotment letters wherein a list of amenities to be provided in the said unit were separately attached.

The flats were allotted to the Allottees under subvention scheme in which 80% of consideration was to be paid by the Allottee at the time of the possession. The Allottees had already paid 19% of the consideration to the Promoter in the year 2012-2013.

When RERA was enacted, the construction status of the said project was far from completion. Therefore, the Promoter unilaterally changed the date of completion of the project to 31.08.2019 while registering the project under RERA.

The Allottee found that there is no facility provided in the project as promised while booking. Hence they filed a complaint with

MahaRERA Authority for cancellation of allotment letters and for refund of entire amount paid by them along with interest and compensation under section 18 for breach of agreement.

## **Order passed by MahaRERA Authority:**

The MahaRERA Authority did not agree with complainants and directed the Promoter to execute and register agreement for sale as per section 13 of the Act within 30 days. It directed that if the Allottee intent to withdraw from the project then such withdrawal would be guided by the terms and conditions of the allotment letters. No order was passed for interest and compensation sought by the Allottee.

Aggrieved by the said order of the Authority, the Allottee filed appeal before the Maharashtra RERA Appellate Tribunal.

## **Issue before Appellate Tribunal:**

1. Whether Section 12 of RERA applies prospectively or retrospectively or retroactively?
2. Whether Promoter committed breach of Section 12 of RERA Act?

3. Whether Allottee are entitled for refund along with interest and compensation from the Promoter under Section 18? if yes, then what will be rate of interest?

## **Allottees' contentions:**

They urged that:

1. Section 12 and Section 18 of RERA Act are made applicable retroactively as RERA is social and beneficial legislation.
2. Even if the transaction had taken place prior to enactment of RERA, provisions of RERA regarding compensation including section 12 and section 18 will apply to such transaction.

## **Promoter's contentions:**

The Promoter opposed the Complainants appeal stating:

1. Retroactivity will not affect any rights that have already accrued before the Act came into force else it will impose new liability which did not exist before such enactment.
2. Reliance was placed in the case of *G.J Raja vs Tejraj Surana*<sup>1</sup> and *CIT-A New*

<sup>1</sup> Cr. Appeal no. 1160 of 2019

*Delhi vs Vatika Township Pvt Ltd*<sup>2</sup> to hold that amendment apply only to offence giving rise to case after 2018 and it cannot be applied retrospectively.

3. Reliance was also placed on the case of *Hitendra Vishnu Thakur vs State of Maharashtra*<sup>3</sup>, to hold that a statute which not only changes the procedure but also creates new rights and liabilities shall be construed to be prospective in operation unless otherwise provided either expressly or by necessary implication.
4. It urged on the remanding the matter to Authority as they did not get opportunity to contest the matter on merit for deciding the complaints under section 12 and 18 of Act.

### Key Principles:

1. Allottee entitled to cancel the booking where the developer has delayed the possession.
2. Section 18 compensates an allottee for depriving him of the use of the funds paid by him. Hence, interest is imperative.

<sup>2</sup> (2015) 1 SCC 1

<sup>3</sup> (1994) 4 SCC 602

## Verdict of Appellate Tribunal:

The Appellate Tribunal granted relief to the aggrieved Allottee and ruled that since the project is registered under section 3 of the Act, the Promoter is governed by the provisions of RERA. It observed that:

- (i) As per the principles laid down in the case of *Neelkamal Realtors Suburban Pvt. Ltd vs Union of India*<sup>4</sup> a promoter is not absolved of the liability under the agreement for sale. Section 12 and 18 of RERA is compensatory and is retroactively applicable. It pointed out Interest is not penalty.
- (ii) On the question of remanding the matter it stated that opportunity of hearing was given to both the sides and thus there is no requirement of remanding the matter.
- (iii) On the question of breach of section 18 by the Promoter, Tribunal placed reliance upon the case of *Fortune Infrastructure vs Travor Dlima*<sup>5</sup>, to hold that when no date of possession is mentioned in the agreement the promoter is expected to hand over the possession within reasonable time and the period of 3 years

<sup>4</sup> (2017) SCC Online Bom 9302

<sup>5</sup> (2018) 5 SCC 442

is held to be reasonable time. Thus the Promoter herein committed breach of section 18 by failing to give the possession in the year 2017.

(iv) On breach of section 12 by the Promoter, Tribunal stated that ample documentary evidence on records shows that the Promoter has failed to keep up with his commitments and therefore committed breach of section 12. Thus entitling the Allottees to withdraw from the project and to claim refund alongwith interest from the Promoter.

(v) On the status of Occupation certificate reliance was placed in the case of *Pioneer Urban Land Vs. Govindan Raghvan*<sup>6</sup> to hold that once the builder fails to fulfil the obligation of obtaining Occupation certificate and offering possession of flat within the time as stipulated in the agreement, the buyer could not be compelled to take possession of the flat when it was offered almost 2 years after grace period under agreement expired.

This decision of Appellate Tribunal is in line with the Neelkamal's case of the Mumbai High Court. It upholds retrospective applicability of section 18 while upholding eligibility of interest. The tribunal has refused to accept the distinction raised by the Developer that the cause of action arose before enactment of RERA and hence remedy under RERA was not available on that date. This is an important decision to that extent.

However, this decision has tilted the pendulum to the other extreme. The buyers who feel that the property prices have come down in the current market conditions will queue up for cancellation of their allotment and seek refund with interest. Law is dynamic and should be applied considering the market conditions and state of economy. If the builders face cancellations where will they get money to repay the buyers. The money collected, if applied in the project will not be available. Secondly, it raises another question. From what date the interest is payable. Will the buyer be paid interest for the period during he had the title of flat in its name? The request of the buyers for refund will sabotage the project creating more issues for continuing buyers. Don't throw the baby out with the bathwater.

## **Acelegal Analysis:**

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<sup>6</sup> (2019) 5 SCC 725

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