

**IN THE KARNATAKA REAL ESTATE APPELATE TRIBUNAL,
BENGALURU**

DATED THIS THE 28th DAY OF SEPTEMBER, 2021

PRESENT

HON'BLE SRI B SREENIVASE GOWDA, CHAIRMAN

AND

HON'BLE SRI K P DINESH, JUDICIAL MEMBER

AND

HON'BLE SRI P S SOMASHEKAR, ADMINISTRATIVE MEMBER

APPEAL NO. (K-REAT) 383/2020

BETWEEN:

Mr. Magesh Nandakumar
Malles Ashirwad Flats
A3, Third Floor, 18/176,
Rangarajapuram Main Road, Kodambakkam,
Chennai – 600 024.
Email: magesh.nandakumar@gmail.com ...APPELLANT

(By Sri. Shiva Bhushan for Argus Partners, Advocate for
allottee)

AND

1. M/s Puravankara Limited,
Having its registered office at
130/1, Ulsoor Road, Bangalore – 560 042
Represented by its Managing Director.
2. The Real Estate Regulatory Authority,
Constituted under the Real Estate
(Regulation and Development), Act, 2016,
having its office at #1/14, 2nd Floor,
Silver Jubilee Block, Unity Building,
CSI compound, 3rd Cross, Mission Road
Bengaluru-560 027.
Represented by its Secretary ...RESPONDENTS

(By Sri. Sameer Sharma for M/S. JSM Law partners Adv for R-1)
(R-2 –RERA-Served unrepresented)

This appeal is filed under Section 44 (1) of the Real Estate (Regulation and Development) Act, 2016, against the impugned order dated 4th June, 2020 passed by the Adjudicating Officer in CMP/190805/0003715, praying to direct the respondent No.1 to pay the appellant interest at the rate of prevailing State Bank of India Highest Marginal Rate plus two percent, per month from 23.06.2018 on the amount paid by the appellant to 1st respondent till the date of grant of possession of flat to the appellant.

This appeal, having been heard and reserved for Judgment coming on for pronouncement of judgment this day, the Hon'ble Chairman pronounced the following:

J U D G M E N T

This appeal is by an allottee of a flat, being aggrieved by the impugned order dated 4th June, 2020 passed by the second respondent-Adjudicating Officer, in CMP/190805/0003715, directing the first respondent-promoter to execute the sale deed within a month from the date of the order and in case of failure to execute the sale deed, the promoter to pay delay compensation of Rs.10,000/- per month till the execution of sale deed.

For the purpose of convenience, the appellant hereinabove will be referred to as "allottee" and the 1st respondent will be referred to as "promoter" hereinafter.

Facts of the case:

2. As stated in the memorandum of appeal, the allottee, with an intention to move to Bengaluru from Chennai had approached the promoter in the year 2013 and decided to purchase a flat

bearing No. SFA 1603 on the 16th floor of Wing-A of the project known as "Purva Sunflower" for a total sale consideration of Rs.1,24,54,745/-. Accordingly, an agreement for sale and construction agreement were entered into between them on 03.07.2013. The promoter assured the allottee that the project would be completed and ready for occupation by April 2016 and accordingly paid initial payment of Rs.19,13,786/-. As per clause (v) of the agreement dated 03.07.2013, the possession of the flat was required to be handed over to the allottee within 36 months from the date of agreement or from the date of issuance of commencement certificate from the BBMP whichever is later extendable by six months as per documents No.3 and 4. As per document No.5, commencement certificate was issued on 22.01.2015 and 36 months from the said date would be 22.01.2018 and if extendable period of six months is taken into consideration, possession ought to have been delivered on or before 22.07.2018.

3. As the promoter failed to handover the possession of the flat, the allottee filed a complaint on 24.04.2018 bearing CMP/180424/0000775 before the RERA praying for delay compensation which came to be disposed of on 22.06.2018 by the learned Adjudicating Officer, directing the promoter to deliver possession to the allottee within 30.06.2018 and directed the allottee to pay the installments, if any, payable to the promoter.

It is stated that in pursuance of the said order dated 22.06.2018, the allottee has discharged his part of obligation by making payment of installments due for the month of June, 2018 and requested the promoter to handover the possession of the flat through e-mail dated 25th June, 2019.

4. When things stood thus, the first respondent-promoter had filed a complaint against the allottee in CMP/1806929/0000979 before the RERA alleging that the allottee herein is not paying interest on delayed payments. The said complaint filed by the promoter was ordered to be closed by order dated 30.10.2018, passed by the learned Adjudicating Officer directing both the allottee and the promoter to adhere to the directions issued in his earlier order dated 22.06.2018 passed in CMP/190805/0003715 filed by the allottee.

5. Thereafter, by paying the entire dues to the promoter, the allottee addressed an e-mail letter dated 28.05.2019 requesting the promoter to pay delay compensation for the delay caused in handing over the possession of the flat. According to the allottee, the commencement certificate was issued on 22.01.2015 and possession of the flat was required to be handover to him by the promoter on 23.06.2018 and the payment schedule is as per the

statements reflected in document No.10 produced before this Tribunal.

6. As, there was no response from the promoter with regard to delivery of possession and payment of delay compensation, the allottee filed a complaint on 05.08.2019 against the promoter before RERA claiming delay compensation of Rs.15,08,750/-. The learned Adjudicating Officer, after hearing the parties and perusing the documents produced by them, by the impugned order dated 4th June, 2020, allowed the complaint filed by the allottee in part and directed the promoter to execute the sale deed within a month from the date of order and to pay the delay compensation of Rs.10,000/- per month till the execution of sale deed.

7. Being aggrieved by the impugned order, only insofar as it relates to mode and quantum of compensation awarded and also not awarding any interest on the delay compensation as contemplated under Section-18 of the RERA Act read with Rule-16 of the Rules, the allottee has preferred the above appeal. However, the 1st respondent-promoter has not filed any appeal challenging the impugned order.

Submissions of the parties:

8. We have heard Sri. Shiva Bhushan for Argus Partners, learned counsel appearing for the appellant-allottee, Sri. Sameer

Sharma for M/S. JSM Law partners learned counsel for the 1st respondent-promoter. The second respondent-RERA though served, remained unrepresented.

9. Sri. Shiva Bhushan, the learned counsel appearing for the allottee, while reiterating the grounds urged in the memorandum of appeal submits that the learned Adjudicating Officer, even after noticing the fact that as per the terms of the agreement of sale entered into between the allottee and the promoter on 03.07.2013, the promoter ought to have delivered the possession of the flat to the allottee within 42 months from the date of commencement certificate i.e., on 23.06.2018. But the promoter has failed to deliver possession of the flat to him on one or the other pretext. In the first complaint No.CMP/180424/0000775 filed by the allottee seeking payment of delay compensation, the promoter contended that the same was premature inasmuch as the allottee was in due for two installments to the promoter at that point of time. In pursuance of the directions issued by the Adjudicating Officer vide order dated 22.06.2018, the allottee paid a sum of Rs.16,13,148/- towards outstanding two installments amount to the promoter on 06.05.2019 and 07.05.2019 respectively. As a counterblast to the complaint No.CMP/180424/0000775 filed by the allottee, the promoter has filed another complaint being CMP/180629/0000979 claiming compensation of Rs.3,95,099/- for the alleged delay on the

part of the allottee in paying the installments payable to the promoter. The said complaint filed by the promoter came to be disposed of on 30.10.2018 by the Adjudicating Officer, directing both the parties to adhere to the directions issued in the earlier order passed in complaint No.CMP/180424/0000775 filed by the allottee. This order and the previous order have not been carried in appeal by the promoter as well as the allottee.

10. The learned counsel further submitted that since the promoter has failed to comply with the directions issued by the learned Adjudicating officer in complaint No.CMP/180424/0000775, the allottee filed another complaint in CMP/190805/0003715 seeking compensation of Rs.15,08,750/- towards delay compensation and interest. The learned Adjudicating Officer has allowed the second complaint filed by the allottee, directing the promoter to execute the sale deed within one month from 04.06.2020 and in case of failure, the promoter to pay delay compensation of Rs.10,000/- per month till the execution of the sale deed. While passing the said order, the learned Adjudicating Officer has failed to consider the claim made by the allottee for delay compensation as per the provisions of Section 18 of the Karnataka Real Estate (Regulation and Development) Act, 2016 (for short 'the RERA Act') and Rule-16 of the Karnataka Real Estate (Regulation and Development) Rules, 2017 (for short, 'the RERA

Rules'). Hence, he prays for allowing the above appeal directing the promoter to pay interest to the allottee at the rate prevailing on the basis of State Bank of India highest marginal interest plus two percent per month with effect from 23.06.2018 till this date.

11. On the other hand, Sri. Sameer Sharma, the learned counsel appearing for the promoter vehemently opposed the submissions made by the learned counsel for the allottee. He made two fold submissions. Firstly, he contended that the present appeal is filed by the allottee with incorrect facts since the allottee has not challenged the earlier order dated 22.06.2018 passed by the Adjudicating Officer in CMP/180424/0000775, the same has attained finality and hence, there is an estoppel for the allottee to file the second complaint seeking the same relief and, therefore, it is hit by the principles of *res judicata*. Secondly he submitted that as per clause-8 of the agreement, the promoter was required to deliver possession of the flat only after the allottee makes final payment of all charges payable to the promoter and clause-5 of the said agreement permits the promoter to levy interest at 2% per annum on the delayed payment and prays for dismissal of the appeal.

12. In view of the above submissions made across the bar and after hearing the learned counsel for the parties and on perusal of

the records, the following questions/issues arise for our consideration:

- i) Whether the second complaint filed by the appellant-allottee in CMP/190805/0003715 was hit by the principles of *res judicata*?
- ii) Whether the impugned order dated 04th June, 2020 passed by the Adjudicating Officer in complaint No. CMP/190805/0003715 is sustainable under law?
- iii) What order?

13. Re issue (i): Before advertizing this issue, it is just and necessary to refer to the prayers made by the appellant-allottee in two complaints filed by him as well as the prayer made by the promoter in the complaint filed by him and the reliefs granted by the learned Adjudicating Officer, as noted in the orders passed by the Adjudicating Officer which have been extracted in the below mentioned tabular:

In the first complaint filed by the allottee-allottee (CMP/180424/0000775)	
<u>Prayer sought for</u>	<u>Relief granted by the Adjudicating Officer</u> <u>22.06.2018:</u>
To direct the promoter/promoter to pay delay compensation, as they failed to deliver possession as per the terms of the agreement.	“ಮೇಲೆ ಚರ್ಚಿಸಿದ ಕಾರಣಗಳಿಗಾಗಿ ಫಿಯಾದು ಸಂಖ್ಯೆ: (CMP/180424/0000775) ಅನ್ನು ಫಿಯಾದುದಾರರಿಗೆ ದಿನಾಂಕ: 30.06.2018ರ ಒಳಗಾಗಿ ಡೆವಲಪರ್ ಇವರು ಫ್ಲಾಟ್‌ನ

	<p>ಸ್ವಾಧೀನವನ್ನು ಕೊಡತಕ್ಕದ್ದು. ಅದೇ ಸಂದರ್ಭದಲ್ಲಿ ಫಿರ್ಯಾದುದಾರರು ಡೆವಲಪರ್ ಗೆ ಕೊಡಬೇಕಾದ ಕಂತುಗಳನ್ನು ಕೊಡತಕ್ಕದ್ದು ಎಂದು ಹೇಳಿ ಈ ಪ್ರಕರಣವನ್ನು ಮುಕ್ತಾಯಗೊಳಿಸಲಾಗಿದೆ.</p> <p>ಫಿರ್ಯಾದುದಾರರಿಗೆ ಮತ್ತು ಎದುರುದಾರರಿಗೆ ಈ ಆದೇಶದ ಬಗ್ಗೆ ಮಾಹಿತಿಕೊಡುವುದು.”</p>
<p>In the second complaint filed by the allottee-allottee (CMP/190805/0003715) which is impugned in the present appeal</p>	
<p><u>Prayer sought for</u></p> <p>To direct the promoter-promoter to pay compensation of Rs.15,08,750/- to the allottee</p>	<p><u>Relief granted by the Adjudicating Officer</u></p> <p><u>04.06.2020:</u></p> <p>(a) The complaint filed in CMP/190805/0003715 is hereby allowed in part. (b) The promoter is hereby directed to execute the sale deed within a month commencing from today. In case failure, the promoter has to pay the delay compensation of Rs.10,000/- per month till the execution of sale deed. (c) The complainant shall comply S.19 (10) of the Act by co-operating with the promoter. (d) Intimate the parties.</p>
<p>Complaint filed by the promoter in CMP/180629/0000979</p>	
<p><u>Prayer sought for</u></p> <p>To direct the allottee to pay a sum of Rs.3,95,099/- towards interest amount on account of the delayed payments.</p>	<p><u>30.10.2018</u></p> <p>The complaint No. CMP/180629/0000979 has been closed by directing the parties to comply as per the order passed in complaint No. CMP/180424/0000775 dated 22.06.2018.</p>

14. That on careful evaluation/consideration of the order dated 22.06.2018 passed by the learned Adjudicating Officer on the first

complaint filed by the allottee in CMP/180424/0000775, it is very clear that the case of the complainant has not been considered on merit and none of the reliefs prayed therein including the prayer for delay compensation has been granted by the learned Adjudicating Officer. On the other hand, the said complaint has been closed without formulating the points/issues for consideration and further it was not heard and decided on merits. It was simply disposed of directing both the parties to comply with their respective obligations enumerated in the agreements entered into between them. Apart from that, in the subsequent order dated 30.10.2018 passed by the learned Adjudicating Officer in a complaint filed by the promoter in CMP/180629/0000979 also, the Adjudicating Officer, while disposing of the said complaint has declined to grant any of the reliefs sought for by the promoter and categorically reiterated its earlier observations by directing the parties to adhere to their obligations as per the earlier order dated 22.06.2018 passed in complaint No.CMP/180424/0000775 filed by the allottee. Thus it is clear that the first complaint CMP/180424/0000775 filed by the allottee is neither considered and disposed of on merits nor any reliefs sought therein has been granted by passing a speaking order. It is, for the first time, in the present/second complaint No. CMP/190805/0003715 filed by the allottee, the learned Adjudicating Officer has granted partial relief awarding delay compensation of

Rs.10,000/- per month till the execution of sale deed as against the claim of the allottee for grant of delay compensation of Rs.15,08,750/- including prevailing interest. Thus, it cannot be termed that the cause of action and the relief granted in the above two complaints filed by the allottee are one and the same and would attract the principles of *res judicata* and there is any estoppel for the allottee to file the second complaint on which, the impugned order has been passed.

15. The law is now well settled that the principle of *res judicata* would be made applicable only in the cases where, *inter alia*, the particular points or issues have been framed and they were heard and decided on merit. But, in the case on hand, the first complaint filed by the allottee has been disposed of/closed merely directing the promoter to handover possession of the flat on or before 30.06.2018 and directing the allottee to pay the remaining installments and thereby, both the allottee as well as the promoter were directed to strictly adhere to the terms of the agreement entered into between them and no appeal has been filed by the promoter, challenging the said order. As such, this Tribunal is of the considered view that the first contention of the learned counsel for the promoter to the effect that principles of *res judicata* are applicable to the case and there is an estoppel for the allottee to file the present complaint in CMP/190805/0003715, is not sustainable

and the same is liable to be rejected. Accordingly, we answer point No (i) in the negative holding that the principles of *res judicata* is not applicable to the case on hand.

16. Re. point (ii): Thus, it takes us to the next issue as to whether the impugned order dated 04th June, 2020 passed by the learned Adjudicating Officer in complaint No. CMP/190805/0003715 is sustainable under law?.

Before adverting this issue, it is just and necessary to extract the provisions of Section-18 of the RERA Act and Rule-16 of the RERA Rules which are relevant for us to decide the above issue which reads thus:

"18. (1) If the promoter fails to complete or is unable to give possession of an apartment, plot or building, -

- (a) In accordance with the terms of the agreement for sale or, as the case may be, duly completed by the date specified therein; or
- (b) Due to discontinuance of his business as a promoter on account of suspension or revocation of the registration under this Act or for any other reason,

He shall be liable on demand to the allottees, in case the allottee wishes withdraw from the project, without prejudice to any other remedy available, to return the amount received by him in respect of that apartment, plot, building, as the case may be, with

interest at such rate as may be prescribed in this behalf including compensation in the manner as provided under this Act:

Provided that where an allottee does not intend to withdraw from the project, he shall be paid, by the promoter, interest for every month of delay, till the handing over of the possession, at such rate as may be prescribed.

2) The promoter shall compensate the allottees in case of any loss caused to him due to defective title of the land, on which the project is being developed or has been developed, in the manner as provided under this Act, and the claim for compensation under this sub-section shall not be barred by limitation provided under any law for the time being in force.

3) if the promoter fails to discharge any other obligations imposed on him under this Act or the rules or regulations made there under or in accordance with the terms and conditions of the agreement for sale, he shall be liable to pay such compensation to the allottees, in the manner as provided under this Act.

Further, Rule 16 of the Rules which relevant for the purpose of deciding the issue in this appeal reads thus:

Rule 16: Rate of interest payable by the promoter and the allottee.- The rate of interest payable by the promoter to the allottee or by the allottee to the promoter, as the case may be, shall be the State

Bank of India highest marginal cost of lending rate plus two percent.”

17. On a plain reading of the preamble/object of enactment of the RERA Act, it is apparent that since the allottees of a real estate projects did not get possession for years together and huge sums of money of the allottees is locked in and that sizable section of allottees have invested their hard earned money, life savings, by borrowing money through loan from various financial institutions with a hope that sooner or later they would get possession of their apartment/flat/unit, and as there was no law regulating the real estate sector, development work/obligations of promoters and the allottees, the Parliament felt and consider that it is necessary to enact central law on the subject. The primary object of introduction of the RERA Act was to provide an adjudicating mechanism for speedy dispute redressal and also to establish the Appellate Tribunal for regulation and promotion of the real estate sector and to ensure that sale of plot, apartment or building, as the case may be, or sale of real estate project, in an efficient and transparent manner and to protect the interest of consumers in real estate sector. If the provisions of the Act are not implemented in its letter and spirit, the very object of the enactment of the RERA Act would be defeated. As such, there is a duty/responsibility cast upon the Adjudication Officer of the RERA, being a quasi judicial

authority to adjudicate/determine each and every issue that were raised before it, strictly in accordance with the relevant provisions of law, by passing a reasoned and speaking order with reference to each of the issues.

18. In view of the provisions referred to supra whether the learned Adjudicating Officer was justified in granting compensation of Rs.10,000/- per month till the execution of the sale deed in favour of the allottee-allottee without awarding interest as per the provisions of the Act and the Rules made thereunder.

19. In the instant case, indisputably, there was an agreement for sale and construction agreement entered into between the allottee and the promoter in respect of flat No "SFA-1603" on the 16th floor of the project known as "Purva Sunflower" undertaken by the promoter on 3rd July, 2013 for total sale consideration of Rs.1,24,54,745 (Rupees one crore twenty four lakhs fifty four thousand seven hundred forty five only). In terms of the said agreements, the promoter was required to hand over possession of the flat allotted to the allottee latest by 23.06.2018. Admittedly, as per the memo dated 18th August, 2021 filed in Court by the allottee, possession of the flat has been handed over to him on 13.08.2021. Under such circumstances, the learned Adjudicating Officer ought to have determined the interest payable to the

allottee for every month of delay till handing over the possession, as contemplated under proviso to sub-section (1) of Section-18 of the RERA Act and Rule-16 of the RERA Rules. Rule-16 of the RERA Rules categorically provides for granting interest payable by the promoter to the allottee and the same shall be on the basis of the State Bank of India Highest Marginal Cost of lending rate plus two percent. On careful perusal of the impugned order, the learned Adjudicating Officer has merely directed the promoter to pay delay compensation of Rs.10,000/- per month till the execution of sale deed without awarding interest for every months delay. According to the allottee, as per the terms of sale agreement and construction agreement dated 03.07.2013, the possession of the flat was required to be delivered to the allottee within forty two (42) months from the date of commencement certificate inclusive of grace period of six months as stated in the agreements. According to the allottee, the possession of the flat was delivered to him on 13.08.2021. As such, the allottee is entitled to claim interest from 23rd June, 2018 (date due for delivery of possession) till 13th August, 2021 the date on which possession of the flat was handed over. On appreciation of the materials on record as well as the impugned order passed by the learned Adjudicating Officer it is seen that the learned Adjudicating Office has not considered the provisions of the RERA Act and the Rules in proper perspective.

20. For the foregoing reasons, this Tribunal is of the considered view that the appeal must succeed in part and the impugned order passed by the learned Adjudicating Officer is not sustainable in law and the same is liable to be modified. Accordingly, we answer issue No. (ii) also in the negative and pass the following:

ORDER

- i) The appeal is partly allowed;
- ii) The impugned order dated 4th June, 2020 passed by the learned Adjudicating Officer in CMP/190805/0003715 is hereby modified;
- iii) The appellant-allottee is entitled for interest for every month of delay with effect from 23.06.2018 to 13.08.2021 i.e. till handing over of the possession, at the rate prevailing as per the State Bank of India Highest Marginal Cost of lending rate plus two percent on the sale consideration as shown in the sale deed;
- iv) The promoter is hereby directed to pay delay compensation by way of interest as stated above within one month from today, failing which the appellant is at liberty to recover the same by taking appropriate steps, in accordance with law.

v) In view of disposal of this appeal all pending IAs if any, stand disposed off;

vi) The Registry to comply with the provisions of Section-44 (4) of the RERA Act and to return the records to RERA if any;

vii) No order as to the costs.

Sd/-
HON'BLE CHAIRMAN

Sd/-
HON'BLE JUDICIAL MEMBER

Sd/-
HON'BLE ADMINISTRATIVE MEMBER

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