BEFORE THE MAHARASHTRA REAL ESTATE APPELLATE TRIBUNAL, MUMBAI

Appeal No. AT006000000031756/19
In
Complaint No. CC006000000056380/18

M/s. New Sangeeta CHS Ltd)
Plot No.4709, 7th Road, Rajawadi,)
Ghatkopar (E), Mumbai 400 077.) .. **Appellant**

Versus

1. Mr. Kaushal M. Haria)
2. Mr.Girish K Chheda)
& Mr.Meghna D. Visaria)
& Devang H Visaria)
3. Ms. Velbai P Haria)
4. M/s. Valdariya Construction) .. **Respondents.**

Adv. Dr. Mr. Pawankumar K. Pandey for Appellant.
Mr. R.S. Prabhu C.A. along with Adv. Mr. Neel Gala for Respondent Nos.1 to 3.
Mr.Pinkesh Jain the Partner of Respondent No.4 in Person.

CORAM : SHRIRAM R. JAGTAP, MEMBER (J) & SHRIKANT M. DESHPANDE, MEMBER (A)

DATE : 20th December, 2024

(THROUGH VIDEO CONFERENCING)

JUDGEMENT

[PER : SHRIRAM R. JAGTAP, MEMBER (J)]

Jagtap

1. The captioned appeal emanates from the Order dated 6th August 2019 passed by the Member 1 of MahaRERA (For short "the Authority") in the complaint No.CC006000000056380/18 filed by

the allottees whereby the learned Authority has disposed of the complaint directing the appellant society to join the complainants as its member within a period of 30 days from the date of the order. The learned Authority has further directed the appellant to give possession of their respective flats to the complainants by obtaining Occupation Certificate as the society has taken entire project for self development as per the order of the Arbitrator. Besides, the Authority has imposed penalty of Rs.15 lakh on the appellant society for violation of Section 15 of RERA Act 2016.

2. For the sake of convenience appellant hereinafter will be referred to as "the Society". M/s. Valdariya Construction a proprietary concern hereinafter will be referred to as "the Developer". The complainants hereinafter will be referred to as "the Allottees".
3. The brief facts culled out from the pleadings of the parties, impugned order and material on record revealed that the Society is an owner of land bearing CTS No.4709 admeasuring 608.6 sq.mtrs. situated at Plot No.48, New Sangeeta Co-operative Housing Society Limited, Rajawadi, 7th Road, Ghatkopar(E), Mumbai 400 077. (For the sake of brevity it will be referred to as "said Property"). The society is also owner of structure/building standing on the said land. The members of the society decided to develop the said plot by demolishing the standing structure/old building on the said plot and to construct new building thereon by utilizing FSI of the plot and also by loading TDR for such new construction. As a result thereof Society had entered into development agreement dated 15.12.2011 with M/s. Valdariya Construction the proprietary concern and assigned the development rights. The society had also executed a

registered Power of Attorney in favour of developer. It is a re-development project. The developer has launched the project under the name and style as "New Sangeeta Co-operative Housing Society Ltd".

4. After completion of documentations viz. requisite permissions etc. the developer undertook the development of the said property. By virtue of the development agreement the developer agreed to construct a new building by demolishing existing building for the society. Besides, the developer also agreed to allot additional area to the members of the society. The project consists of two components viz rehab component and sale component. The developer was entitled to sell flats and car parking spaces to the new buyers in sale component in open market.
5. The Allottees have booked the flats in the sale component of the said project. The position regarding flat numbers, dates of agreement for sale, due date of possession, total consideration agreed between the parties and payment made by allottees towards part consideration are shown in the table below:

<u>Table of selective relevant details</u>

Name of Allottees.	Flat No.	Total consideration. Rs.	Payment made towards part consideration	Date of agreements (AFS)	Date of possession
Mr. Kaushal Haria	602	1,0150,000/-	94,51,000/-	9.5.2016	30.9.2017

Mr. Girish Chheda & Mrs. Meghna Visaria	202	96,60,000/	71,51,000/-	9.5.2016	30.9.2017
Ms. Velbai P Haria	302	96,00,000/-	84,26,000/-	9.5.2016	30.9.2017

6. As per the agreements for sale the developer had committed to hand over the possession of respective flats to allottees with Occupation Certificate on or before 30.09.2017 failing which the developer was liable to pay penalty of Rs.6000/- per day for delayed possession from 1.10.2017 till actual date of possession. After obtaining necessary permissions from the Competent Authority viz. M.C.G.M. such as IOD, Commencement Certificate etc. the developer started construction on site. In the month of March 2017 the developer had called upon the complainants/ allottees to pay instalments of balance consideration as the construction work had gone beyond 6th floor. The subject flats were on 2nd, 3rd and 6th floor. The construction work was not going on as per the required pace. The developer was facing financial crunch, however the developer has assured the complainants that the possession of subject flats will be delivered to allottees by specified dates. Accordingly, allottees have made substantial payment towards consideration of their respective flats to developer.
7. In the meantime a dispute arose between the developer and society. The matter went to Arbitrator. Upon termination of development agreement by developer the society took over the subject project. The society tried to appoint a new developer to

complete the remaining work. The society has adopted a modus operandi to defeat legitimate rights of allottees in respect of their flats. Because of internal dispute between developer and society the subject project has got seriously jeopardized. The society being owner of the said property is equally liable to discharge the liability of developer towards allottees and also bound by the agreements for sale executed between allottees and developer, since the same came to be executed pursuant to development agreement dated 15.12.2011 and power of attorney dated 14.02.2012. The developer and society are in hand-in-glove with each other and trying to evade their responsibility of providing flats to the complainants/allottees in the sale component. The conduct of the developer and the society redounded the allottees to file the complaint. The allottees sought following reliefs in their complaint.

(i) To restrain the respondents (developer and society) from selling out, creating third party rights in the subject flats and from creating encumbrances on the subject flats.

(ii) To direct the respondents jointly and severally to hand over the possession of subject flats including car parking spaces along with amenities to the complainants/ allottees with Occupation Certificate within period of 30 days.

(iii) To direct the respondents to pay interest at the rate of 18% p.a. on the consideration amount paid by the complainants/ allottees from 9.5.2016 till actual date of possession for delay in delivering the possession of flats.

(iv) To direct the society to issue share certificate to complainants/ allottees.

(v) To direct respondents (developer and society) jointly and severally to pay a sum of Rs.6000/- per day to complainants/ allottees from 30.9.2017 till handover of the possession of flats to the allottees.

(vi) To issue injunction against respondents restraining them from appointing new developer for carrying out construction of the subject project.

(vii) To direct respondents to pay Rs.10 lakh towards costs of the litigation.

8. The Developer has appeared in the complaint and remonstrated the complaint by filing written submissions contending therein that pursuant to the development agreement and deed of power of attorney executed by the society, he applied for requisite permissions to the M.C.G.M. He got the requisite permissions for construction and thereafter he sold flats to the complainants under registered agreements for sale dated 16.5.2016. However, on 07.02.2018 he terminated the development agreement with society due to circumstances created by the society. The Managing Committee of the society, after receipt of the termination notice issued by the developer, accepted termination and took over the possession of the site. The society had applied to the sole arbitrator for further construction of the project by appointing a new contractor/ promoter or self development. The Arbitrator was pleased to allow the said application and thereby authorized the society for self development. Pursuant to the said order of Arbitrator, the society has appointed a new developer/ contractor for completion of the project. The erstwhile developer i.e. respondent No.1 shall not be held responsible for any such

damages, interest and compensation to the complainants on account of delay in handing over the possession of subject flats. Since the society being an owner of the property is a promoter within the meaning of definition of "Promoter" provided under the provisions of RERA Act 2016.

9. The society/ appellant has appeared in the complaint and disputed the claim of complainants/allottees. The society has claimed that the complainants are investors and they are in collusion with the developer. The society is not aware of the transaction which took place between the complainants and developer. Section 18(i) (b) of the RERA Act 2016 provides that where the promoter gets discontinued for any reason, the promoter shall be liable to return the amount received by him in respect of the flats sold. Therefore, equally efficacious remedy is available to the complainants. The said provision clearly talks about the promoter. The society cannot be included as promoter. Besides the developer has not shown the society as co-promoter while registering the subject project with MahaRERA.

10. The society has further contended that flat No.602 has already been shown as allotted to a member of the society and therefore the agreement for sale cannot be implemented or executed. Apart from this without approved plans, the developer has sold flat No.602 to one of the complainants which is illegal. The developer has sold flats to the complainants below market price. The agreements executed by and between the complainants and developer are illegal and bogus. The society has further contended that the complainants can ask for refund of the amount from the developer, however they cannot seek injunction against the society.

With these contentions the society has prayed for dismissal of the complaint.

11. We have heard learned advocate Dr. Mr. Pawankumar K Pandey for appellant society, learned C.A. R.S.Prabhu along with Adv. Mr. Neel Gala for Respondent Nos.1 to 3 (allottees) and Mr. Pinkesh Jain the partner of respondent No.4 in person.

12. The submissions advanced by the parties are nothing but reiteration of contents of Appeal Memo, affidavit in reply and written submissions.

13. The learned adv. Dr. Mr. Pawankumar K. Pandey has placed his reliance on the following citations.

1. Vaideshi Akash Housing Pvt Ltd. Vs New DN Nagar CHS Union Ltd & Others (2015 (3) ABR 270 Goregaon Pearl CHSL Vs Dr. Seema Mahadev Paryekar & Ors. AOA(ST) No.22143 of 2019 Nirmala Jha Vs Vaidehi Akash Housing Pvt Ltd & Ors. NM No.1029 of 2015 in Suit No.511 of 2015 single Bench.
2. Parpati I Bhojwani Anr. Vs Vaidehi Akash Housing Pvt Ltd & Others NM No.1011 of 2017 in Appeal No.12 of 2015 Division Bench.
3. SSD Escatics Pvt Ltd Vs Goregaon Pearl CHSL Com Arb Petition (St) No.1072 of 2018 decided on 14/12/2018 by Hon. Bombay High Court SL to Appeal (Civil) 1365 of 2019 SSD Escatics Pvt Ltd Vs Goregaon Pearl CHS Ltd. Supreme Court confirmed the order dated 14/12/2018.
4. Chaurangi Builders & Developers Pvt. Ltd. V/s. Maharashtra Airport Development Ltd ARBPL NO 1999 of 2013
5. Heritage Lifestyle & Anr. Vs Cool Breeze Co-operative Bombay High Court Arbn Petn No.600 of 2013.

6. Satyabrata Ghose vs Mugnee Ram Bangur & Co. 1954 AIR 44 Three Bench judgment of Supreme Court.
7. Deepak Prabhakar Thakoor & Ors V/s. MHADA WP (L) No.1776 of 2023 Division Bench of Bombay High Court K Chellakannu & Ors. V/s. MHADA 27.10.2023 Division Bench.
8. Udayachal Goregaon CHS Ltd Vs Manoj Kumar Mistry & Ors. Appeal No.AT105569 by MahaRERA Appellate Tribunal
9. Samudra Darshan CHS Ltd V/s. Peter Almeida & Ors. Neumec Developers & Builders V/s. Antop Hill Warehousing Co. Ltd. Adarsh Industrial Estate Pvt Ltd. V/s. Malti Ashok Gupta D.N. Nagar Samrat CHS Ltd V/s. Umanath Agarwal & Anr. (decided on 19/06/2023) Decided by RERA Appellate Tribunal.

10.Kapilkunj CHS Ltd Vs State of Maharashtra WP No.2157 of 2021 on 13/12/2023.

14. The learned R.S.Prabhu C.A. along with Adv. Mr. Neel Gala for Respondent Nos.1 to 3 (allottees) has placed his reliance on the following citations.

1. Goregaon Pearl Co-operative Housing Society Limited Vs. Sandeep Grover and Ors. (Supreme Court of India – Civil Appeal No.5188 of 2023).

2. Sandeep Grover & Anr. Vs. Sai Siddhi Developers & Anr. (National Consumer Disputes Redressal Commission, New Delhi – Consumer Case No.1710 of 2016).

3. Wadhwa Group Housing Private Ltd. Vs. Mr. Vijay Choksi (High Court Bombay – Second Appeal (L) No.21842 of 2023).

15. On examination of the pleadings of the parties, submissions advanced by the learned counsel appearing for the respective parties, impugned order and material produced on record by the parties, following points arise for our determination and we have recorded our findings thereon for the reasons to follow:-

Sr. No.	**Points**	**Findings**
1	Whether the appellant/ society falls in the definition of the term "Promoter" under Section 2 (zk) of RERA Act?	In the affirmative
2	Whether the appellant/ society is liable to perform obligations of the developer towards allottees/ third party purchasers?	In the affirmative
3.	Whether the impugned order warrants interference in the appeal?	In the affirmative
4.	What order?	As per final Order

16. On ensemble of the pleadings of the parties as above reveals that the society is an owner of the said property and had entered into an agreement with the developer for re-development of its

property. Re-development envisages construction of the society's building to accommodate its members and also construction of flats/ premises to be sold to outsiders. The development agreement authorizes the developer to construct such building and sell flats/ premises therein to outsiders. Such authority or entitlement is to the developers' account and in his own right, and as an independent contractor. After obtaining requisite permissions from the concerned authorities the developer launched the subject project, allottees/ flat purchasers booked subject flats in the project and paid substantial amounts to the developer which are used for constructing rehab building and sale component. The society being land owner falls in the definition of term "Promoter" and therefore the developer is required to show the society as promoter on the web page of MahaRERA. It is seen from the submissions of the society that terms of the development agreement executed by and between the society and the developer have clearly provided in an uncertain manner that the developer is entitled to construct free sale component on his own account as independent contractor and developer alone would be liable and responsible to the flat buyers in case of delay in construction and other issues and shall bear all the related consequences. The society is kept absolved of any obligation relating to the developer towards allottees. The terms of the development agreement create no vested rights or obligations of allottees which the society is liable to discharge as promoter nor there is any document to establish that society has privity of contract with allottees/ flat purchasers. Thus the society cannot be termed as promoter liable to perform obligations towards allottees and hence does not call for registration as promoter or society cannot be shown as promoter on the web page of the developer. Third party purchasers have no right over the assets of the society.

17. We have given thoughtful consideration to the submissions advanced by the learned counsel appearing for the respective parties. The subject project has been registered as ongoing project u/s. 3 of RERA Act. Thus RERA Act 2016 applies even to the ongoing projects. Therefore before adverting to the submissions advanced by the learned counsel appearing on behalf of parties, it is appropriate to first appreciate the need for a New Regulatory Regime i.e. the enactment of RERA Act 2016.

Object and Reasons of RERA Act 2016

18. The need for regulation was essential because of urbanization and need for housing of growing population in urban areas. While taking a bird's-eye view of the scheme of the RERA Act 2016 the Hon'ble Apex Court in **M/s. NEWTECH PROMOTERS AND DEVELOPERS PVT. LTD. V/s. STATE OF UP & ORS. ETC. in Civil Appeal No(s). 6745-6749 of 2021 (Arising out of SLP (Civil No(s). 3711-3715 of 2021**) has observed as under:

7. At the given time, the real estate and housing sector was largely unregulated and the consequence was that consumers were unable to procure complete information for enforced accountability towards builders and developers in the absence of an effective mechanism in place. Though, The Consumer Protection Act, 1986 was available to cater the demand of home buyers in the real estate sector but the experience shows that this mechanism was inadequate to address the needs of the home buyers and promoters in the real estate sector.

8. At this juncture, the need for Real Estate (Regulation) Bill was badly felt for establishing an oversight mechanism to enforce accountability to the real estate sector and providing an adjudicating machinery for speedy dispute redressal mechanism and ***safeguarding the***

Sgatop

investments made by the home buyers through legislation to the extent permissible under the law.

9. *The statement of object and reasons of the Act indicates that the primal position of the regulatory authority is to regulate the real estate sector having jurisdiction to ensure compliance with the obligation cast upon the promoters. The opening statement of objects and reasons which has a material bearing on the subject reads as follows.*
"The real estate sector plays a catalytic role in fulfilling the need and demand for housing and infrastructure in the country. While this sector has grown significantly in recent years, it has been largely unregulated, with absence of professionalism and standardization and lack of adequate consumer protection. Though the Consumer Protection Act, 1986 is available as a forum to the buyers in the real estate market, the recourse is only curative and is not adequate to address all the concerns of buyers and promoters in that sector. The lack of standardization, has been a constraint to the healthy and orderly growth of industry. Therefore, the need to regulating the sector has been emphasized in various forums.

2. In view of the above, it becomes necessary to have a Central legislation, namely, the Real Estate (Regulation and Development) Bill, 2013, in the interest of the effective consumer protection, uniformity and standardization of business practices and transactions in the real estate sector. The proposed Bill provides for the establishment of the Real Estate Regulatory Authority (the Authority) for regulation and promotion of real estate sector and to ensure sale of plot, apartment or building, as the case may be, in an efficient and transparent manner and to protect the interest of consumers in real estate sector and establish the Real Estate Appellate Tribunal to hear appeals from the decisions, directions or orders of the Authority."

10. *It was introduced with an object to ensure greater accountability towards consumers, to significantly reduce frauds & delays and also the current high transaction costs, and to balance the interests of consumers and promoters by imposing certain responsibilities on both, and to bring transparency of the contractual conditions, set minimum standards of accountability and a fast-track dispute resolution mechanism. It also proposes to induct professionalism and standardization in the sector, thus paving the way for accelerated growth and investments in the long run.*

19. A close examination of objects of RERA Act shows that this Act regulates only the sale and transfer of Real Estate Development products namely plots, buildings and apartments for orderly growth of real estate market, **by protecting the interests of**

Jagtap

different buyers in planned manner and by facilitating informed choice of the consumers/ buyers.

RERA ACT 2016 IS RETROACTIVE IN NATURE

20. The subject project came to be launched prior to the Notification of RERA Act 2016. Besides, the agreements for sale with regard to the flats in sale component also came to be executed prior to the enactment of RERA Act 2016. The subject project being ongoing has been registered with MahaRERA u/s 3 of RERA Act, 2016. The provisions of RERA Act are retroactive in nature and apply retroactively to the transactions relating to incomplete project registered under RERA Act. Thus the provisions of RERA Act 2016 would equally apply to the transactions executed by the parties in the instant matters. It has been held by the Hon'ble Supreme Court in **M/s. Newtech Promoters and Developers Pvt. Ltd. Vs. State of U.P. and Ors.** that:

"*41. The clear and unambiguous language of the statute is* ***retroactive in operation*** *and by applying purposive interpretation Rule of statutory construction, only one result is possible, i.e., the legislature consciously enacted a* ***retroactive statute*** *to ensure sale of plot, apartment or building, real estate project is done in a efficient and transparent manner so that the interest of consumers in the real estate sector is protected by all means and Sections 13, 18(1) and 19(4) are all beneficial provisions for safeguarding the pecuniary interest of the consumers/allottees. In the given circumstances, if the Act is held prospective then the adjudicatory mechanism Under Section 31 would not be available to any of the allottee for an on-going project. Thus, it negates the contention of the promoters regarding the contractual* *terms having an overriding effect over the retrospective applicability of the Act, even on facts of this case."*

The Hon'ble Apex Court has further held that:-

> *"54. From the scheme of the Act 2016, its application is retroactive in character and it can safely be observed that the projects already completed or to which the completion certificate has been granted are not under its fold and therefore, vested or accrued rights, if any, in no manner are affected. At the same time, it will apply after getting the on-going projects and future projects registered under Section 3 to prospectively follow the mandate of the Act 2016."*

21. Therefore we are of the view that once project is registered with MahaRERA all the rights and liabilities of the parties existed prior to the Act coming into force also come under the purview and ambit of provisions of RERA Act 2016. Therefore considering the peculiar circumstances of the case, it would be necessary to understand and evaluate the provisions of RERA Act 2016, which have a bearing on the issue at hand.

WHETHER THE SOCIETY IS A PROMOTER UNDER SECTION 2(ZK) OF RERA ACT

22. It is to be noted that there are five major players in the real estate development industry namely (i) promoter, (ii) land owner, (iii) allottee, (iv) real estate agent and (v) competent authority. In the instant case admittedly society is land owner. Therefore the seminal issue that emanates for our consideration is whether society falls in the definition of the term 'promoter'. This issue goes to the root of the matter. It decides the fate of rights of flat purchasers against the society and also obligations of the society towards home buyers who

have purchased flats in sale component. Section 2 (zk) defines the term 'promoter'. The definition is quite exhaustive, it covers every person who is associated with construction of the building. The Section has got seven clauses covering the different category of promoters out of them only clauses (ii), (iii) (b) and (iv) cover plots. Whereas the clauses (i), (iii) (a), (iv), (v) and (vi) cover both apartments and buildings. It is clear from the expression "Causes to be constructed" in sub-clause (i) and explanation to this clause and the words "as holder of power of attorney for the owner of the land" in sub clause (v) and other provisions of the Act, that land owner is also covered. The core of the provision and purpose of the Act seems to be to cover all those who are involved in the development for sale or sale or both.

23. It is seen from the definition of promoter that land owner is covered by the definition of promoter. The words "causes to be constructed" in the definition of promoter is capable of covering the land owner also, in respect of construction of apartments and buildings.

24. While explaining the scope of definition of promoter the Hon'ble Bombay High Court in a case of **Wadhwa Group Housing Private Ltd. Vs. Mr. Vijay Choksi & Another Second Appeal (Stamp) No.21842 of 2023** has held as under:

"*17. The project 'The Nest' has been registered as an ongoing project under Section 3 of RERA Act. To decide liability of Appellant to refund amount paid for purchase of flat in the real estate project, it would be necessary to determine whether*

Appellant falls in the definition of the term 'promoter'. Section 2(zk) of RERA defines the term "Promoter" thus:

(zk) "promoter" means,-

(i) *a person who constructs or causes to be constructed an independent building or a building consisting of apartments, or converts an existing building or a part thereof into apartments, for the purpose of selling all or some of the apartments to other persons and includes his assignees; or*

(ii) *a person who develops land into a project, whether or not the person also constructs structures or any of the plots, for the purpose of selling to other persons all or some of the plots in the said project, whether with or without structures thereon; or*

(iii) *any development authority or any other public body in respect of allottees of-*

(a) buildings or apartments, as the case may be, constructed by such authority or body on lands owned by them or placed at their disposal by the Government; or

(b) plots owned by such authority or body or placed at their disposal by the Government;

(c) for the purpose of selling all or some of the apartments or plots,

or

(iv) *an apex State level co-operative housing finance society and a primary co-operative housing society which constructs apartments or buildings for its*

Members or in respect of the allottees of such apartments or buildings; or

(v) *any other person who acts himself as a builder, colonizer, contractor, developer, estate developer or by any other name or claims to be acting as the holder of a power of attorney from the owner of the land on which building or apartment is constructed or plot is developed for sale; or*

(vi) *such other person who constructs any building or apartment for sale to the general public.*

Explanation.- For the purpose of this clause, where the person who constructs or converts a building into apartments or develops a plot for sale and the person who sells apartments or plots are different persons, both of them shall be deemed to be the promoters and shall be jointly liable as such for the functions and responsibilities specified, under this Act or the rules and regulations made thereunder;

Thus, definition of the term 'Promoter' under Section 2(zk) of RERA is wide enough to include every person who is associated with construction of the building such as builder, colonizer, contractor, developer, estate developer or ***by any other name or even the one who claims to be acting as the holder of a power of attorney from the owner of the land.*** *One of the principal objectives of RERA is to bring transparency in real estate sector and to protect the interests of the consumers in the real estate project. The term 'Promoter' has been so widely defined that it virtually includes every person associated with construction*

Sagtap

of the building. Thus, even a person who is merely an investor in the project alongwith the Promoter and who is entitled to benefit in the real estate project is also covered by definition of the term 'Promoter'. In the present case, I need not delve deeper into the enquiry as to whether Appellant is covered by the expression 'Promoter' or not. While registering the project as ongoing project under Section 3 of the RERA, Appellant's name has been included in the list of Promoters. Therefore, Appellant cannot run away from the fact that it is the promoter in respect of the project 'The Nest'. Explanation to Section 2(zk) makes all persons who construct or convert building into apartments or develop a plot for sale, as well as a person who sells apartments or plots to be promoters making them jointly liable as such for the functions and responsibilities specified under the Act, or the Rules and Regulations made thereunder. Thus, a person who does not actually construct or causes to be constructed a building but merely takes part in the joint venture and sells flats, becomes a Promoter. Appellant admits that it is entitled to a share in the joint venture in the constructed area, which it is entitled to sell. Thus, the Appellant is entitled to sell flats in the project and accept consideration for such sale. There is therefore no doubt to the position that, both Appellant as well as the second Respondent are Promoters and are jointly liable in respect of the responsibilities under the RERA and Rules and Regulations made thereunder.

19. *In my view therefore, mere falling of flat in the share of the second Respondent under the Joint Development Agreement, would not excuse the Appellant from the responsibilities and liabilities under*

the RERA, Rules and Regulations made thereunder qua that flat. ***RERA does not demarcate or restrict liabilities of different promoters in different areas. The liability is joint for all purposes under the Act, Rules and Regulations.***

25. Normally, in the re-development project there can be hardly cash consideration for rehab component. In other words there is no cash contribution on the part of the members of the society in construction of such building. The society executes a power of attorney in favour of developer or by virtue of Development Agreement the society authorizes the developer to construct building/s of flats/ premises to be sold to outsiders. This amounts to "causes to be constructed". A careful examination of definition of promoter reveals that term "promoter" has been so widely defined that it virtually includes every person associated with construction of building. Even a person who claims to be acting as holder of power of attorney from the owner of the land is also a promoter within the meaning of section 2(zk) of RERA Act. It is further seen, even a person who is merely investor in the project along with the promoter and who is entitled to benefit in the real estate project is also covered by the definition of promoter. In the present case society has invested its land by authorizing developer to construct rehab component and sale component, it means the society is deriving the benefit in the subject project in the form of construction of rehab building to accommodate its members.

26. The obligations to obtain insurance in respect of title of the land and building as a part of the real estate project (**section 16(1)(i)**), to execute a registered conveyance deed in favour of

the allottee along with undivided proportionate title in the common areas to the association of the allottees or the competent authority as the case may be (**section 17**) and to compensate the allottee in case of any loss caused to him due to defective title of the land (**section 18 (2**) cannot be discharged unless land owner is also a promoter. Therefore for the foregoing reasons, we have come to the conclusion that society being land owner is a "promoter" within the meaning of section 2(zk) of RERA Act 2016.

27. There is one more reason as to why we have come to the conclusion that society is a "promoter". It is not in dispute that the Arbitrator has accorded permission to the society to complete the project. Pursuant thereto society applied to the authority for registration of the project. The society has decided to complete the project by itself meaning thereby the society itself is acting as developer. **Clause (v) of section 2(zk) of RERA Act 2016 includes a person who acts himself as builder/ developer becomes promoter**. The cumulative effect of above discussion and relevant provisions of RERA Act 2016 viz. sections 2(zk), 16(1)(i), 17 and 18(2) is that society being land owner falls in the definition of the term "promoter".

OBLIGATION OF PROMOTER U/S. 15 OF RERA ACT

28. The society being promoter is bound to play certain role in the redevelopment project. The society has to perform certain obligations under the provisions of RERA Act, 2016. The society cannot escape from the responsibilities and liabilities under the RERA Act. It has been held by the Hon'ble Bombay High Court

in a case of **Wadhwa Group Housing Private Ltd. Vs. Mr. Vijay Choksi & Another Second Appeal (Stamp) No.21842 of 2023**, that RERA does not demarcate or restrict liabilities of different promoters in different areas. The liability is joint for all purposes under the Act, Rules and Regulations.

29. It is not in dispute that developer has terminated the development agreement and the society has determined to complete the project by itself. The society has taken over the project from the developer M/s. Valdariya Construction. It means that the society has stepped into the shoes of erstwhile promoter/ developer and has applied for registration of the project with real estate regulatory authority to comply with all the pending obligations. Perusal of section 15(2) r/w definition of promoter u/s. 2(zk) of RERA Act clearly indicates that the society being promoter becomes liable to independently comply with all pending obligations of the developer under the provisions of RERA Act and Rules and Regulations therein and as per the agreements for sale entered into between erstwhile developer and the allottees. Section 15(2) of RERA Act reads as under

15. **Obligation of promoter in case of transfer of a real estate project to a third party.**

(2) *On the transfer or assignment being permitted by the allottees and the Authority under sub-section (1), the intending promoter shall be required to independently comply with all the pending obligations under the provisions of this Act or the rules and regulations made thereunder, and the pending obligations as per the agreement for sale entered into by the erstwhile promoter with the allottees.*

Provided that any transfer or assignment permitted under provisions of this section shall not result in extension of time to the intending promoter to complete the real estate project and he shall be required to comply with all the pending obligations of the erstwhile promoter, and in case of default, such intending promoter shall be liable to the consequences of breach or delay, as the case may be, as provided under this Act or the rules and regulations made thereunder."

The new developer is liable to independently comply with all pending obligations of erstwhile developer. In our view, the appellant society is thus liable to discharge all statutory pending obligations of the erstwhile developer M/s. Valdariya Construction as per agreement for sale entered into under the provisions of MOFA/RERA Act 2016. On examination of material on record reveals that various rights are already accrued and crystalized in favour of the allottees under agreements for sale which would not come to an end even on termination of development agreement by the developer or the society as the case may be.

SECTION 19(b) OF SPECIFIC RELIEF ACT

30. Section 19 of Specific Relief Act 1963 says that specific performance of a contract may be enforced against either party thereto or any other person claiming under him by a title arising subsequently to the contract. Section 19 (b) of Specific Relief Act clarifies the position that even if the property, subject matter of agreement for sale, is sold to third party, their rights are also subject to the enforcement of the agreement for sale. In view of clause(b) of Section 19, the society, who stepped into the shoes

of developer after the execution of the agreement for sale, can be subjected to a decree of specific performance as the agreement for sale can be enforced specifically against such society. The equitable property rights created by an agreement to sell bind the developer and other third person. By virtue of agreement for sale various rights have already been accrued and crystalized in favour of the allottees. Therefore we are of the view that the allottees can enforce their agreements for sale against the society as the society stepped into the shoes of erstwhile developer.

31. Nodoubt society is not party to the agreements for sale entered into between the developer and allottees. However, at the same time it cannot be ignored that by virtue of the development agreement and power of attorney the society had authorized the developer to construct building or flats to sell the same to prospective home buyers in open market to generate funds for construction of rehab buildings. It means the society is ultimate beneficiary of funds contributed by the allottees. The agreements for sale create rights and interests of the allottees in the subject project. These rights entitle the allottees to enforce agreements for sale against the person who steps into the shoes of developer. We would like to reiterate that society has determined to complete the project itself. Considering the peculiar circumstances of the case, we are of the view that the allottees are entitled to enforce agreements for sale against the society.

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The developer is agent of the society

(Section 226 of the Contract Act 1872).

32. On the basis of redevelopment agreement dated 15.12.2011 and power of attorney dated 14.02.2012 the society had appointed a developer as its agent giving full authority to construct flats of sale component and to sale the same to home buyers. A careful examination of power of attorney dated 14.02.2012 more particularly clause 19 reveals that the society has authorized the developer to sell, transfer, assign and accept bookings, token monies and advances from the prospective purchasers. Clause 19 stipulates as under.

> *"To sell, transfer, assign, accept bookings, token monies and advances for the developer for part of property i.e. balance area available after provision for existing members/occupants of the said property in one or more parts of such person or persons and to sell ownership basis their part of premises or give on lease basis and to allot parking/garage as the said attorney may think fit and proper for the purpose to enter into agreement to give valid discharge for payment to receive sum, earnest money and/or full consideration and to execute deed of transfer and other assurances to party the registration thereof in all respects including lodging such documents before the sub registrar and admitting execution thereof and to comply with all formalities to complete registration thereof and handover/ give possession thereof and effect transfer of the said property in favor of prospective buyers and to give no objection letters, documents for loan borrowing, mortgage of such premises from banks or other financial institutions or other persons and all necessary documents and do all necessary acts in that behalf".*

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Clause 19 of the power of attorney signifies that society has given full authority to the developer to sell the flats from sale component to prospective home buyers.

33. A close examination of development agreement dated 15.12.2011 reveals that clause 31 authorizes the developer to sell, allot, transfer, assign, accept bookings, token monies and advances for the developers part of the property. Clause 36 of the said agreement provides that subject to providing flats, shops, garages to its members the developer shall be at liberty to sell and/or allot as per approved lay out/flats/shop/garage etc. in the building to any person and to enter into any package deal or agreement at such price and as such terms and conditions as the developer may deem fit and may also form a Co-operative society or condominium or limited company without making society responsible for any liability incurred. This clause also gives full authority to developer to sell flats, shops, garages etc. to the prospective purchasers. Apart from this, clauses 39 and 40 of the re-development agreement provide that the proposed new building as also all the constructed **portions will be the property of the society** and flats therein shall be allotted to the said old members as also the said new members **or any prospective purchasers**, incoming members of the society and agreeing to obey rules and bye laws of the society. It is significant to note that clause 40 of the said re-development agreement shows that society has agreed that the prospective purchasers of the premises in the new building shall be inducted as member of the society after completion of necessary formalities required under the bye laws of the society and MCS Act, 1960. Clause 40 of the re-development agreement stipulates that.

"The prospective purchasers of premises in the new building shall be inducted as member/s of the society after completion of necessary formalities as required under the bye laws of the society and MCS Act, 1960. Such purchasers shall not be required to make any payment to the society save and except entrance fees and share capital, society will issue share certificate in favour of such purchasers after completing all the formalities. In addition to the above each of the new member shall pay amount to the developer as decided and incorporated in the sale agreement to be executed by the developer and new member as and by way of their contribution towards maintenance, share capital or meter charges, development charges etc.

34. On conjoint reading of the aforesaid clauses of the re-development agreement and clause 19 of the power of attorney reveals that these documents create relationship between society and developer as principle and agent. The developer has acted as agent of the society while entering into transaction with the allottees. Contracts entered into by an agent on behalf of principle bind the principle as if made by himself. Though the society is not party to agreements for sale entered into between the developer and allottees but the effect of the act of developer in terms of power of attorney is such that society, who authorized the developer to perform such act, is bound by the actions of the developer. Section 226 of Contract Act 1872 reads as under.

226. ***Enforcement and consequences of agent's contracts***. – *Contracts entered into through an agent, and obligations arising from acts done by an agent, may be enforced in the same manner, and will have*

the same legal consequences, as if the contracts had been entered into and the acts done by the principal in person.

Therefore we have no hesitation to hold that there is direct contractual obligations between the allottees and society, and they are bound to perform the obligations arising out of the agreements for sale entered into between the allottees and developer by virtue of power of attorney given and by reason of section 226 of Contract Act 1872.

35. A power of attorney is document of convenience. It is a document which aids all kinds of transactions to be carried out by the agent in the absence of the principle. Section 226 of Contract Act 1872 and section 2 of power of attorney Act make it abundantly clear that principle is liable for the actions of his agent. Therefore we are of the view that allottees can enforce their agreements for sale u/s.226 of the Contract Act 1872 against society.

THE ALLOTTEES PLAY ROLE OF FINANCER

36. The allottees play role of a financer in the project. The home buyers used to invest their hard-earned money, money obtained from loans or financial institutions with the belief that they will be able to get a roof in the form of their apartments/ flats/units. The Hon'ble Apex Court in a case of **M/s.NEWTECH PROMOTERS AND DEVELOPERS PVT. LTD. VERSUS STATE OF UP & ORS. ETC.** has held that:

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"The buyers borrows money to pay for a house and simultaneously plays the role of a financer as building projects collect money upfront and this puts the buyer in a very vulnerable position- the weakest stakeholder with a high

financial exposure. The amendment to the Insolvency and Bankruptcy Code, 2018 recognized the home buyers as financial creditors and the present enactment is the most important regulatory intervention in favour of the home buyers and it's had an impact and with passage of time, has become a yardstick of laying down minimum standards in the market."

37. In the instant case rehab building is constructed out of monies contributed by the flat purchasers. It means the society is major beneficiary of the funds contributed by the allottees. One of the principle objectives of the RERA is to bring transparency in real estate sector and **to protect the interest of home buyers**/ consumers in the real estate project. Considering the objectives of the RERA it can be said that the allottees cannot be left at lurch by the society under the garb of absence of privity of contract between the society and flat purchasers. It has been held by the Hon'ble Bombay High Court in a case **Wadhwa Group Housing Private Ltd. Vs. Mr. Vijay Choksi & Another Second Appeal (Stamp) No.21842 of 2023**.

> *"The Appellant's contention about absence of privity of contract between it and the Complainant is totally misplaced. Definition of the term 'promoter' under Section 2(zk) of the RERA would indicate that even persons/entities with whom a flat purchaser does not enter into contract are also covered by definition of the term 'promoter'. Therefore, it is not necessary that there has to be an agreement between every Promoter and the flat purchaser. As observed above,* ***it is a matter of indoor management between the Promoters and the flat purchaser who is not supposed to know the***

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intricacies of the arrangements made between several promoters amongst themselves. When a claim is raised in respect of a real estate project by a flat purchaser, all promoters become jointly liable qua that flat purchasers, irrespective of whether there is privity of contract with each of the promoter or not. This is the scheme of RERA and mere absence of privity of contract with a particular promoter does not relieve such promoter in respect of the liabilities under RERA."

38. It is specific contention of the society that Clause 31 of re-development agreement stipulates that society and its office bearers shall have no privity of contract with the flat purchasers from the developer. Therefore society is not liable to discharge the obligations of developer towards allottees. We do not find substance in the said contention. We have already observed that society is a promoter within the meaning of definition of Section 2(zk) of RERA Act. At the cost of repetition we would like to reiterate that RERA Act does not demarcate or restrict liabilities of different promoters in different areas. The liability of promoters is joint for all purposes under the Act, Rules and Regulations. Since liability of a promoter is the liability of all the co-promoters, an interse arrangement between promoters to discharge liability of third person does not bind the third person unless the third person is also a party to the inter-se arrangement between the promoters. Besides in view of the ratio and dictum laid down by the Hon'ble Bombay High Court as above we are of the view that appellant society being

promoter cannot seek to escape the liability on specious plea that there is no privity of contract between society and the flat purchasers.

39. A careful examination of the impugned order reveals that the learned Authority has issued two directions to the society viz. (i) society has to join the complainants as its members and (ii) society has to give possession of flats to the complainants by obtaining Occupation Certificate. It is specific contention of appellant society that there is no privity of contract between the society and the flat purchasers and therefore society is not liable to discharge obligations of erstwhile promoter and these directions are contrary to the provisions of law. We do not find substance in the contention of the society. We have already observed that the society being land owner is a promoter within the meaning of Section 2(zk) of RERA Act 2016. RERA does not demarcate or restrict liabilities of different promoters in different areas. The liability is joint for all purposes under the Act, Rules and Regulations. This signifies that society is liable to discharge obligations of co-promoters as per provisions of RERA Act 2016. Besides, it is not in dispute that society has determined to complete the project by itself. The society, thus, stepped into the shoes of erstwhile developer and therefore as per provisions of Section 15 of RERA Act the society is obligated to discharge all statutory pending obligations of erstwhile developer. Besides the agreements for sale entered into between erstwhile developer and allottees

create rights and interests of allottees in the subject project. In view of Section 19(b) of Specific Relief Act 1963 the allottees can enforce performance of contract against the society. Besides on the basis of development agreement dated 15.12.2011 and power of attorney dated 14.02.2012 the society had appointed developer as its agent with full authority to construct flats of sale component to sell the same to home buyers. The developer has acted as a agent of the society while entering into transaction with allottees. The contract entered into by agent on behalf of principle binds the principle as if made by himself. Therefore we are of the view that society is bound to perform the obligations arising out of agreements of sale entered into between the allottees and developer by virtue of power of attorney given and by reason of section 226 of Contract Act 1872.

40. There is one more reason as to why we are of the view that the impugned order does not warrant interference with regard to the directions given by the Authority to society. A careful examination of Clause 40 of development agreement reveals that it stipulates that

> *"The prospective purchasers of premises in the new building shall be inducted as member/s of the society after completion of necessary formalities as required under the bye laws of the society and MCS Act, 1960. Such purchasers shall not be required to make any payment to the society save and except entrance fees and share capital, society will issue share certificate in favour of such purchasers after completing all the formalities. In addition to the above each*

of the new member shall pay amount to the developer as decided and incorporated in the sale agreement to be executed by the developer and new member as and by way of their contribution towards maintenance, share capital or meter charges, development charges etc.

It means the directions given by the Authority are in consonance with Clause 40 of development agreement entered into between the society and the developer.

41. It is specific contention of the complainant society that transactions between the allottees and developer are suspicious. These allottees have booked flats in the sale component and posed that they have paid almost 95% amount towards consideration of the flats. Besides, dates of agreements for sale of these allottees are the same. The allottees have not produced their bank statements to show that they have paid 95% of the amount towards consideration of the flats to developer. This signifies that the entire transaction between the allottees and developer is sham and bogus. Per contra R.S.Prabhu CA for allottees has submitted that transactions between the developer and allottees are not sham and bogus. All the payments have been made by cheques only. He has invited our attentions to the receipts issued by the developer in favour of allottees. Considering rival contentions of the parties we are of the view that there is initial burden on the allottees to show that they have made payments to developer and the transactions between them and developer are not sham

and bogus. The allottees have produced receipts on record to strengthen their contentions that they have made payments to developer. A careful examination of receipts which are on page Nos.281, 282, 283, 284, 285, 287, 288, 289, 290, 291, 292, 294, 295, 296, 297, 298, 299, 300, 301, 302, and 303 revealed that the allottees have paid part consideration to the developer by cheques. It means the allottees have discharged their initial burden to prove that they have made payments to the developer by cheques and transactions between them and developer are not sham and bogus. Considering the above contentions of the allottees and peculiar circumstances of the case, it was expected of society to produce some material on record to rebut the above contentions of allottees. However, society has not produced material on record to rebut the above contentions of the allottees. In the absence of cogent material on record it is difficult to digest that transactions between the allottees and developer are sham and bogus.

42. It is further contention of the society that by termination letter dated 07.02.2018, the developer undertook the liability of repayment of amount taken by the developer from the home buyers. This itself is sufficient to show that society is in no way concerned with the transactions that took place between the allottees and developer. The allottees can enforce their agreements for sale only against the developer and not against the society. We do

not find substance in the said contention. We have already observed that society being land owner is promoter within the meaning of section 2(zk) of RERA Act 2016. The society stepped into the shoes of erstwhile developer and therefore society is liable to discharge the liabilities of developer. Section 18 of RERA Act spells out the consequences if the promoter fails to complete or is unable to give possession of an apartment/plot/ building either in terms of agreement for sale or complete the project by the date specified therein, the allottee/ home buyer holds an unqualified right to seek interest on the amount paid by him at such rate as may be prescribed in this behalf. Section 18 gives two options to allottee viz. (1) if the allottee decides to remain in the project, allottee is entitled to seek interest on the amount paid by him at such rate as may be prescribed in this behalf. (2) If allottee wishes to withdraw from the project, allottee is entitled to claim refund of amount with interest as well as compensation. In the instant case the allottees have decided to remain in the project, therefore we are of the view that the undertaking given by the developer vide termination letter does not help society to escape from discharging its liability towards the flat purchasers. If the allottees would have decided to withdraw from the project certainly the developer is bound by the undertaking given by the developer vide termination letter dated 07.02.2018.

43. The facts of the cited cases by the appellant society are different from the facts of the case in hand. Therefore, citations are not applicable to the present case.

44. So far as imposition of penalty of Rs.15 lakh is concerned we are of the view that the impugned order warrants interference to that extent only. There is no violation of Section 15 of RERA Act. The society being one of the promoters is under obligation to complete the project. For that society is not required to obtain consent of 2/3rd allottees or permission from the Authority. It is not in dispute that the society has decided to complete the project by itself. There is no material on record to show that the society intends to appoint new developer for completion of the project. Under such circumstances, we are of the view that there is no violation of Section 15 of RERA Act 2016 by the society. Therefore we are of the view that impugned order warrants interference to that extent only. Consequently, we proceed to pass following order.

ORDER

1. Appeal No. AT006000000031756/19 is partly allowed.
2. Impugned order dated 6th August 2019 passed in Complaint No.CC006000000056380/18 stands set aside to the extent of direction to appellant society to pay penalty of Rs.15 lakh to MahaRERA as provided u/s. 61 of RERA Act 2016 for violation of Section 15 of RERA Act.

3. Rest of the part of the impugned order dated 6th August 2019 is upheld.

4. Parties shall bear their own costs.

5. Copy of this order be communicated to respective parties and MahaRERA as per provisions of Section 44(4) of RERA Act 2016.

(SHRIKANT M.DESHPANDE) **(SHRIRAM R. JAGTAP)**

vss