

**BEFORE MAHARASHTRA REAL ESTATE APPELLATE TRIB5NAL, MUMBAI
APPEAL NO. U-4 OF 2021**

**In
(Source Complaint No.: SC10002135)**

Trade Centre Premises Co-operative]
Housing Society Ltd.]
Having its address at Trade Centre BKC,]
Bandra (East), Mumbai – 400 051.]
Email: nirmalspate1@gmail.com] ... *Appellant*

versus

Wadhwa Constructions]
a Partnership Firm registered under]
the provisions of the Indian Partnership Act, 1932]]
having its address at :]
301, Platina, C-59, BKC,]
Bandra (East), Mumbai – 400 098.] ... *Respondent*

Appellant(s) : *Adv. Mr. Bhuvan Singh along with
Adv. Mr. Mustafa Kachwala*

Respondent(s) : *Adv. Mr. Rubin Vakil along with
Adv. Mr. Dinesh Rane*

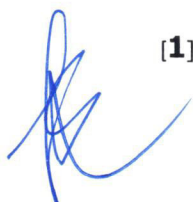
**CORAM : SHRI. SHRIRAM R. JAGTAP, MEMBER (J) &
DR. K. SHIVAJI, MEMBER (A)**

DATE : 02nd APRIL 2025

(THROUGH VIDEO CONFERENCE)

JUDGEMENT [PER: DR. K. SHIVAJI, MEMBER (A)]

Captioned appeal has been preferred under "The Maharashtra Real Estate (Regulation and Development) Act, 2016" (in short "the Act"), seeking reliefs *inter alia* to quash and set aside the order dated 9th November 2020 passed by learned Chairperson, Maharashtra Real Estate Regulatory Authority (in short- "MahaRERA"), whereby the relief prayed for in Source Complaint No. SC10002135 was rejected and was disposed

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of without issuing any direction to the respondent to register the subject real estate project under the provisions of the Act.

2. Appellant is a society formed by the real estate unit purchasers of the subject real estate project. Respondent is a partnership firm engaged in the business of real estate and is constructing a building known as "*Trade Centre'*" located at Kole-Kalyan, at Bandra Kurla Complex, Bandra (East), Mumbai (in short 'said Project'). For convenience, Appellant will be addressed hereinafter as Complainant.
3. Brief backgrounds giving rise to the instant appeal are as under; -
 - a. **Complainant's case:** A tripartite agreement was entered amongst Maharashtra Metropolitan Regional Development Authority (in short- "MMRDA"), Slum Rehabilitation Authority (in short- "SRA") and HDIL on 12th January 2004 for the lease of the subject project land and to construct free sale buildings thereon. Respondent got the development rights as sub-developer to construct the free sale building no.18 (in short- "subject building"), on the subject project land by executing development agreement with HDIL. Respondent entered into agreements for sale with various purchasers of the real estate units in the subject project building, which has approved plan for ground and up to 10 floors. Respondent obtained part-occupation certificates from the competent Planning Authority i.e. SRA on 2nd September 2008 for the 3rd to 10th floors, and on 21st October 2008 for the ground and part of the first floor. Appellant Society was also formed on 14th February 2017.
 - b. Respondent executed an undertaking-cum-indemnity dated 31st October 2017 *inter alia* to bring occupation certificate in respect of the part first floor and second floor of the subject building.
 - c. On account of the failure on the part of the respondent to fulfill its obligations *inter alia* of obtaining the full occupation certificate of the subject building, captioned complaint came to be filed by appellant

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before MahaRERA praying *inter alia* for direction to the respondent to handover full occupation certificate of the subject building to complainant.

- d. Promoter appeared before the MahaRERA and resisted complaint by submitting that it has not applied for registration because, the project was already completed as per the approved building plan much prior to the date of introduction of the Act of 2016 and thereafter, the building is in continuous occupation of the members of appellants.
- e. Upon hearing the parties, learned Chairperson, MahaRERA, vide impugned order dated 9th November 2020, rejected the reliefs prayed for in the complaint, by concluding *inter alia* that

".....6. From the above, it is clear that the Promoter has physically completed the building prior to the commencement of the said Act and thereafter has also handed over the apartments to the allottees. Consequently, the project has become an occupied building. Therefore, no directions can be issued to the Respondent/Promoter to register the said project as an on-going project as per the relevant provisions of the said Act.

7. It was also explained that as stated in Para 86 of the judgement of Hon'ble Bombay High Court in Writ Petition No. 2737/- U Neelkamal Realtors. Vs. Union of India, RERA will apply after getting the project registered. Therefore, merits of the other grievances made by the Complainant have not been gone into. The Complainant has the liberty to raise the same in an appropriate forum.

8. In view of the above, the complaint for registration of the project stands disposed of."

- f. Aggrieved by this order of MahaRERA, instant appeal came to be filed, seeking various reliefs *inter alia* to quash and set aside the impugned order, to allow the captioned complaint as well as to pass such further and other order/s as may be deemed necessary and fit in the interest of justice on the facts of the case.

4. Heard Mr. Bhuvan Singh, learned counsel for parties *in extenso*.



- 5.** Learned counsel for the complainant submits that,
- a.** Respondent has entered into flat sale agreements with the members of the appellant society for purchase of the commercial units in the subject building, for which the part occupation certificate for the 2nd floor has not been received as yet.
 - b.** Respondent has executed an undertaking-cum-indemnity on 31st October 2017 in which, it is *inter alia* stated that respondent is the promoter/developer and as per Clause 5 thereof (at page 122), there is an undertaking of the respondent to "*bring occupation certificate in respect of part 1st floor and the 2nd floor of the building and render accounts to the ad-hoc Committee of the Society.....*".
 - c.** Under Section 11(4)(b) of the Act, it is the obligation on the part of the respondent to obtain the occupation certificate and it is well settled that without the occupation certificate, allottees occupation could not be legal and lawful in view of the judgement of the Hon'ble Supreme Court dated 11th January 2022 in Civil Appeal No.4000 of 2019 in the case of *Sumruddhi Co-operative Housing Society Ltd. Vs. Mumbai Mahalaxmi Construction Pvt. Ltd.*, wherein it has been held that failure to obtain occupation certificate amounts to deficiency in service and it is the statutory responsibility of the respondent.
 - d.** Respondent has been reminded to secure the full-occupation certificate, which has not yet been obtained despite its obligation in favour of appellant society: Therefore, reliefs sought in the complaint and in the appeal is to direct respondent to obtain full-occupation certificate of the subject building, which is the statutory obligation of the respondent.
 - e.** Even though the construction has been completed prior to the commencement of the Act, but has not obtained the full-occupation certificate, which is the statutory duty of the respondent. This issue was considered by the Hon'ble High Court in the case of *Macrotech*



Developers vs. State of Maharashtra reported in [2021 SCC Online Bombay 283], in paragraph nos. 43 and 56 that even a phase of the project or a part of the building for which, there is no occupation certificate, project would be required to be registered

- f. MahaRERA has wrongly held in the impugned order that if the construction is complete then, there is no need to get project registered. As such, registration under the Act is must, if the full-occupation certificate has not been obtained. Section 3 of the Act specifically stipulates that project would not be required to be registered only if it has been completed well before the date of commencement of the Act. Therefore, building is required to be registered even if part-OC has been obtained by the respondent to fulfill its legal obligations *inter alia* to secure full-OC.
- g. MahaRERA has wrongly held in the impugned order that if no registration is required, then MahaRERA cannot look at the objections of the complainant and complaint is not maintainable. This finding is contrary to the decision of the Hon'ble Bombay High Court in the case of *Mohd. Zain Khan vs. Maharashtra Real Estate Regulatory Authority & Ors. reported in [2018 SC Online Bombay 7812]* and also as per the judgment of the Punjab and Haryana Appellate Tribunal in the case of *M/s. Omaxe Ltd. Vs. Mrs. Arun Prabha.*, wherein it was held that, complaints are maintainable even against the unregistered project.
- h. Accordingly, the contentions of the respondent are not correct to say that the subject building is not an ongoing project because the construction is completed, and therefore, it is legally not tenable to say that the tribunal has no jurisdiction. Respondent is statutorily required to obtain full-occupation certificate as per the provision of Section 11 of the Act after registration of the subject building as an ongoing real estate project. Accordingly, urged that the respondent be directed to



obtain the full-OC of the said building by allowing the reliefs prayed for in the captioned complaint/appeal.

- 6.** Per contra, learned counsel for respondent submits *inter alia* that the captioned appeal is not maintainable in view of the followings: -
- a.** Respondent has already completed the construction of the subject building as per the sanctioned plan, has received the part-occupation certificates for all the floors except small part on the second floor and its real estate units are in absolute possession, occupation and continued usage of the members of the appellant society of their respective units since 2008 itself, which is much prior to the commencement of the Act.
 - b.** By a tripartite agreement dated 12th January 2004 executed amongst MMRDA, SRA and HDIL, MMRDA has granted lease of the project land and HDIL was permitted to construct building in accordance with the SRA scheme and as per the applicable Development Control Regulations. HDIL is solely liable and responsible for procuring occupation certificate of the subject building and therefore, HDIL is required to be made party in the captioned appeal as well as in the captioned source complaint. Despite the respondent having already completed the entire building as per the sanctioned Plan in the Year 2008 itself and it is the HDIL, who has failed to comply with its obligations as set out in the said development agreement due to which the occupation certificate only in respect of second floor remained to be obtained. This is despite the fact that HDIL was obligated to comply with its obligations and procure occupation certificate. Therefore, it is in the interest of justice, it is necessary that the direction be issued for making HDIL, a party to the present proceeding.
 - c.** Thus, despite being a necessary party, HDIL has not been made a party and appeal is liable to be dismissed with costs on the ground of non-joinder of the necessary parties.



- d. By the development agreement of 2005, HDIL has granted development rights to respondent for exploitation of the maximum free sale potential as per the SRA's scheme. While purchasing their respective units, members of the appellant society were fully aware of it and also of the obligations of HDIL.
- e. Section 3 of the Act is not applicable in the instant appeal because it stipulates prior registration of the subject project under the Act, only when, there is no pending construction and/or sale in respect of the subject project. Learned counsel further submits that no advertising and/or sale activity in respect of the subject project and/ or in respect of the 2nd floor of subject building are pending. The judgment cited by the appellant has no bearing in the existing matter because the factual positions are different. So, registration under the Act is not warranted.
- f. Unit purchasers are in continuous possessions, occupation and usage of the same real estate units since 2008 itself. Therefore, appellant seems to be taking undue advantage of the provisions of the Act by filing the captioned source complaint to harass respondent by filing the belated complaint after 13 years, since the construction has been completed as well as after the respondent has duly formed the Society of the unit purchasers of the subject building.
- g. The FAQ's issued by MahaRERA on their website clearly demonstrate that,

.... *"An on-going project is one, where construction is still not complete, OC is yet to be obtained and building has not been occupied by allottees. Such on-going projects have to be registered with MahaRERA. Buildings without OC/BCC but occupied by allottees have to approach Competent Authority under MOFA for deemed conveyance and thereafter approach planning Authority for OC."*

55. What if Part OC is received for the project: is it exempt from registration?



Ans: The phase for which the part OC is received does not require registration. The phase for which the construction is on-going, and the part OC is not obtained requires registration"

- h.** Therefore, MahaRERA having been fully satisfied with the merits of the submissions of the respondent, has rightly rejected the prayers made in the captioned source complaint by issuing the impugned order. Learned counsel for the respondent accordingly urged that the captioned appeal be dismissed with exemplary cost.
- 7.** From the rival pleadings, submissions and documents relied upon by parties, following points arise for our determination and we have recorded our findings against each of them for the reasons to follow: -

	POINT(S)	FINDING(S)
1.	Whether the said project is an ongoing project?	In the affirmative.
2.	Whether Respondent is liable to register the said project under the provisions of the Act?	In the affirmative.
3.	Whether Complainant is entitled for other reliefs as prayed for?	As per the Order.
4.	Whether impugned order is sustainable in law?	In the negative.
5.	Whether impugned order calls for interference in this Appeal?	In the affirmative

REASONS

Point nos. 1 and 2: project completion status

- 8.** These points are interconnected and interrelated. Hence, these have been taken up for consideration together.
- 9.** It is not in dispute that respondent is constructing the subject building and the members of the appellant - society are the purchasers of the real estate units of the building. The subject building has the approved plan for the construction of ground plus up to 10 stories. The building has got

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part-occupation certificate for the ground and 1st floor on 21st October 2008 and for 3rd up to 10th floor has been obtained on 2nd September 2008 respectively.

- 10.** Learned counsel for the respondent submits that members of the appellant society have occupied the subject building and 2nd floor of the subject building has been constructed as per the approved plan, but this floor has not received occupation certificate from the competent planning authority. He further submits that the said building has neither got the full-occupation certificate, nor has it received completion certificate as on the date on which the Act came into force i.e., 1st May 2017 and as such has not secured it even as of now. In that view of the matter, provisions of Section 3 of the Act (being reproduced below) will be attracted.

It will be apposite to reproduce Section 3 of the Act as under; -

"3. Prior registration of real estate project with Real Estate Regulatory Authority.—(1) No promoter shall advertise, market, book, sell or offer for sale, or invite persons to purchase in any manner any plot, apartment or building, as the case may be, in any real estate project or part of it, in any planning area, without registering the real estate project with the Real Estate Regulatory Authority established under this Act:

Provided that projects that are ongoing on the date of commencement of this Act and for which the completion certificate has not been issued, the promoter shall make an application to the Authority for registration of the said project within a period of three months from the date of commencement of this Act:

Provided further that if the Authority thinks necessary, in the interest of allottees, for projects which are developed beyond the planning area but with the requisite permission of the local authority, it may, by order, direct the promoter of such project to register with the Authority, and the provisions of this Act or the rules and regulations made thereunder, shall apply to such projects from that stage of registration.

(2) Notwithstanding anything contained in sub-Section (1), no registration of the real estate project shall be required—

(a) where the area of land proposed to be developed does not exceed five hundred square meters or the number of apartments proposed to be developed does not exceed eight inclusive of all phases:

Provided that, if the appropriate Government considers it necessary, it may, reduce the threshold below five hundred square meters or eight apartments, as

the case may be, inclusive of all phases, for exemption from registration under this Act;

(b) where the promoter has received completion certificate for a real estate project prior to commencement of this Act.

- 11.** Diligent perusal of the provisions of Section 3 of the Act, clearly demonstrates that if any building, which has not received the completion certificate from the competent planning authority as on the date commencement of the Act then, such real estate project is mandatorily required to be classified as on-going real estate project. Admittedly, the subject building has not received completion certificate so far. Therefore, in accordance with para 33, and 37 of the judgement of The Hon'ble Supreme Court of its in the case of **M/s Newtech Promoters and Developers Pvt. Ltd Vs, State of UP & Ors. [Civil Appeal Nos.6745-6749 of 2021]** (being reproduced below), and as per the provisions of the Act, the subject project is an ongoing project and is mandatorily required to be registered with MahaRERA under Section 3 of the Act by filing an application within 3 months from the date of commencement of the Act, i.e. 1st May 2017.

*"33. Under Chapter II of the Act 2016, registration of real estate projects became mandatory and to make the statute applicable and to take its place under sub Section (1) of Section 3, it was made statutory that without registering the real estate project with a real estate regulatory authority established under the Act, **no promoter shall advertise, market, book, sell or offer for sale, or invite persons to purchase in any manner** a plot, apartment or building, as the case may be in any real estate project but with the aid of proviso to Section 3(1), it was mandated that **such of the projects which are ongoing on the date of commencement of the Act and more specifically the projects to which the completion certificate has not been issued, such promoters shall be under obligation to make an***

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application to the authority for registration of the said project within a period of three months from the date of commencement of the Act. With certain exemptions being granted to such of the projects covered by subsection (2) of Section 3 of the Act, as a consequence, all such home buyers agreements which has been executed by the parties inter se has to abide the legislative mandate in completion of their ongoing running projects."

"37. Looking to the scheme of Act 2016 and Section 3 in particular of which a detailed discussion has been made, all "ongoing projects" that commence prior to the Act and in respect to which completion certificate has not been issued are covered under the Act. It manifests that the legislative intent is to make the Act applicable not only to the projects which were yet to commence after the Act became operational but also to bring under its fold the ongoing projects and to protect from its inception the inter se rights of the stake holders, including allottees/home buyers, promoters and real estate agents while imposing certain duties and responsibilities on each of them and to regulate, administer and supervise the unregulated real estate sector within the fold of the real estate authority."

- 12.** Despite above, the subject project has not been registered till now despite the statutory responsibility casts on the respondent under Section 3 of the Act to comply with this by registering the project. However, learned counsel for respondent submits that the said project is not required to be registered under Section 3 of the Act, because the construction of the subject building including that of its 2nd floor has been completed strictly as per the approved plan and as per the commencement certificate in the year 2008 itself, i.e., well before the date of commencement of the Act (i.e., 1st May 2017). He further submits that based on the part-occupation

certificates received from the competent authority except for the 2nd floor, the entire building is fully occupied and is continued to be in possession of the members of the appellant society right from 2008 onwards.

- 13.** However, perusal of para 45 of the judgment of The Hon'ble Supreme Court (being reproduced below) in the case of Newtech Promoters and Developers (supra), clearly reveals *inter alia* that all such ongoing projects to which completion certificate has not been issued must be brought within the fold of the Act of 2016.

*...45. At the given time, there was no law regulating the real estate sector, development works/obligations of promoter and allottee, it was badly felt that **such of the ongoing projects to which completion certificate has not been issued must be brought within the fold of the Act 2016 in securing the interests of allottees, promoters, real estate agents in its best possible way obviously, within the parameters of law.** Merely because enactment as prayed is made retroactive in its operation, it cannot be said to be either violative of Articles 14 or 19(1)(g) of the Constitution of India. To the contrary, the Parliament indeed has the power to legislate even retrospectively to take into its fold the preexisting contract and rights executed between the parties in the larger public interest."*

- 14.** However, learned counsel for respondent submits that, the part-occupation certificate of 2nd floor and full-occupation certificate of the entire building has not been granted on account of the non-compliance on the part of the HDIL. Therefore, the respondent is not at all be faulted and cannot be blamed for the non-receipt of the full-occupation certificate. He further submits that, the real estate units in the subject building have been purchased as per the agreements executed with the members of the appellant society as per The Maharashtra Ownership of

Flats Act, (in short- "The MOFA Act"), which is still in operation. Therefore, appellant is expected to take recourse under the MOFA provisions and not under the Act of 2016.

- 15.** But these contentions of the respondent are legally not tenable, because the Act is retroactive, and appellant is well within its rights to choose/elect any one out of these two remedies (namely under MOFA or under the RERA Act) available to appellant. Moreover, Clause-U(iii) of the agreement for sale executed between the respondent and respective members of the appellant society for the purchase of the units in the subject building stipulates for the respondent to secure occupation certificate upon the completion of the construction of the free sale portion building. In addition, respondent has further executed an undertaking dated 31st October 2017 (which is after the Act of 2016 came into force), in its Clause 4 to secure occupation certificate of the subject building including for the part 1st floor and 2nd floor. Moreover, this is the statutory rights vested with the appellant society to insist for the compliance by the respondent. Therefore, the contentions of the respondent are legally not maintainable.
- 16.** Moreover, perusal of Section 3 of the Act of 2016 reveals that compliance of the provisions under Section 3 are not contingent upon any complaint. In addition, MahaRERA is statutorily required to ensure compliance of such obligations under the Act, by exercising its power under Section 34 of the Act, if required, even by taking Suo Moto cognizance of such non-compliances on the part of respondent for registration of all such on-going projects.
- 17.** In the light of the foregoing discussions, we are of the considered view that the subject building is an on-going real estate project and therefore, respondent is statutorily and mandatorily required to register by filing

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application within 3 months from the commencement of Act i.e. 1st May 2017, under Sections 3 and 4 of the Act.

18. It is pertinent to note that, the Act is a social legislation with primary objective is to protect the interests of the real estate consumers and to ensure that sale of the real estate units happen in efficient and transparent manner by making registration of such projects statutorily mandatory. However, as determined herein above, admittedly, the subject project has not been registered under the Act by the respondent despite its statutory responsibility casts on it under the Act. The subject project despite being an on-going project, respondent is liable to discharge its obligations *inter alia* the formation of the society, deed of conveyance etc. Therefore, by not submitting the application within three months from the date of commencement of the Act i.e., 1st May 2017 before MahaRERA for registration of the subject project despite being its statutory responsibility, respondent has violated the provisions of the Proviso to Sections 3 and 4 of the Act. Consequently, respondent is liable for the punishment under Section 59 of the Act for its non-registration and also for the penalty under Section 60 of the Act for the contravention of its Section 4. Despite providing opportunities, respondent has failed to provide cogent response for not filing of the application and for not registering the said project.

19. It is also the statutory duty casts upon MahaRERA to ensure these compliances even by taking Suo Moto cognizance or otherwise under the provisions of Section 34 of the Act. Therefore, the findings recorded by MahaRERA in para 6 of the impugned order dated 9th November 2020 are not according to the provisions of the Act, suffer from infirmities, are legally not sustainable and are liable to be modified to these extents. Accordingly, we answer point nos. 1 and 2 in the affirmative as above.


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Point nos.3, 4 and 5.

20. These points are interconnected and interrelated and hence, have been considered together as follows.

21. By filing the captioned complaint and the above appeal, appellant society has prayed for direction to the respondent to secure and handover the full-occupation certificate of the subject building. The foregoing discussions clearly reveal that the subject real-estate project is an ongoing project and is liable to be registered before MahaRERA under the provisions of the Act. However, admittedly, the subject project has not been registered before MahaRERA so far. Therefore, learned counsel for the respondent vehemently contended that the provisions of the Act are not applicable and thus, the reliefs prayed for by appellant society for the direction to secure full-occupation certificate cannot be considered without the registration of the subject building.

22. In this context, The Hon'ble Supreme Court in para 54 of its judgement dated November 11, 2021, in the case of *M/s. Newtech Promoters and Developers Pvt. Ltd vs. State of UP & Ors (supra)*, has 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.**"*

23. In this context, it is also pertinent to note that the Hon'ble Bombay High Court in its judgement in para no. 86 in the case of **Neelkamal Realtors Suburban Pvt. Ltd. & Anr. Vs. Union of India & Ors. [(2017) SCC Online Bom 9302]** has also held as follows.



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Para 86: ".....After assessing, we find that the projects already completed are not in any way affected and, therefore, no vested or accrued rights are getting affected by RERA. The **RERA will apply after getting the project registered.** In that sense, the application of RERA is prospective in nature."

- 24.** Considering the above binding judgment of the Hon'ble Bombay High Court, more particularly that the provisions of the Act will be applicable for the projects only after its registration. In view thereof, other reliefs sought by complainant for direction to respondent to secure full occupation certificate as well as for the completion certificate of the subject building, would to be considered appropriately in accordance with the law only after the registration of the project before MahaRERA under the provisions of the Act. It is also being made clear that we have not gone into the merits of the remaining reliefs other than registration of the project and therefore all the rights and contentions of the parties in this regard are kept open for these prayers. Thus, appellant has liberty to raise the same at appropriate time before the competent authority.
- 25.** Upshot of aforesaid discussions demonstrate that the impugned order is not sustainable in the eyes of law, suffers from infirmities and warrants interference in this appeal to these extents. Accordingly, we answer the point nos. 3, 4 and 5 as above and proceed to pass order as follows; -

: O R D E R :

- (i) The appeal is partly allowed.
- (ii) para 6 of the impugned order dated 9th November 2020, passed by MahaRERA in Source Complaint No. *SC10002135* stands modified as follows; -
- (a) Subject real estate project (building number 18) is an ongoing project. Accordingly, it is statutorily and mandatorily required to be registered under Sections 3 / 4 of the provisions of the Act before MahaRERA and respondent is being directed to register

the subject building within 60 days by filing an appropriate application before MahaRERA under the provisions of the Act.

- (b) Respondent is being further directed to pay the penalty under Sections 59 and 60 of the Act of an amount of ₹ 5,00,000/- (Five Lakhs) and is being directed to deposit the penalty amount in the Tribunal within 60 days.
- (c) Liberty is being granted to appellant to raise its grievance relating to non-receipt of full occupation/ completion certificate of the subject building at appropriate time before the competent authority.
- (iii) Parties to bear their own costs.
- (iv) A copy of this order will be sent to MahaRERA and its respective parties as per the provisions of Section 44(4) of the Act of 2016.


(Dr. K. SHIVAJI)


(SHRIRAM R. JAGTAP, J.)