# IN THE HIGH COURT OF JUDICATURE AT BOMBAY

## CIVIL APPELLATE JURISDICTION

## SECOND APPEAL NO. 153 OF 2026

## WITH

## INTERIM APPLICATION (ST) NO. 9456 OF 2026

M/s Sai Enterprises
701, 7th Floor, Centre Plaza,
Shivaji Chowk, Daftary Road,
Malad (East), Mumbai – 400 097.
And also at Sethia Pride,
CTS No. 161/1 & 2, W.E. Highway,
Opp Poisar Metro Station,
Kandivali (East), Mumbai 400 101. ..Appellant

**Versus**

1. Sangeeta Ravi Punjabi
37, Prem Court, 4th Floor,
Peddar Road, Mumbai – 400 026.

2. M/s Super Constructions
G-35, Shagun Arcade,
A.K. Vaidya Marg, Dhindoshi Depot,
Malad (East), Mumbai – 400 097.



3. Najma Haroon Malkani
Flat No. 704, Sahyadri Apartments,
Malkani Estate, Malad (East),
Mumbai – 400 097.

4. Alamgri Ali Mohammad Malkani,
Flat No. 105, Sunshine Apartments,
Malkani Estate, Malad (East),
Mumbai – 400 097.

5. M/s Frission Finance and Investment Pvt Ltd
A-203 Prabhu Darshan, Opp City Hospital,

173/D, S.V. Road, Jogeshwari (W),
Mumbai – 400 102.

6. Ramaswrny Seshan Pallaur
Director, M/s Frission Finance and Investment
Pvt Ltd
A-203, Prabhu Darshan,
Opp City Hospital, 173/D,
S.V. Road/Jogeshwari (West),
Mumbai – 400 102.

7. Sunil Tansukhrai Vankawala,
Director,
M/s Frission Finance and Investment
Pvt Ltd,
A-203, Prabhu Darshan, Opp City Hospital,
173/D, S.V. Road, Jogeshwari (West),
Mumbai – 400 102.

8. Trichur Ramaswamy Ananth Narayan,
Director, M/s Frission Finance and
Investment Pvt Ltd
A-203, Prabhu Darshan Opp City
Hospital, 173/D, S.V. Road,
Jogeshwari (West), …Respondents
Mumbai – 400 102.

Mr. Rubin Vakil, with Abir P (through VC) and Kartik Joshi, i/b Wadia Ghandy & Co, for the Appellant.
Mr. Manish Gala, with Minil Shah and Nilesh Gala, for Respondent No.1.

CORAM: N. J. JAMADAR, J.
RESERVED ON : 1st APRIL 2026
PRONOUNCED ON : 22nd APRIL 2026

JUDGMENT:

**1.** This Appeal is directed against a judgment and order dated 26th November 2025 passed by the Maharashtra Real Estate Appellate

Tribunal, Mumbai ("the Appellate Tribunal"), whereby the Appeal preferred by Respondent No.1-allottee against an order dated 3rd August 2021 passed by the Maharashtra Real Estate Regulatory Authority ("the Authority") in Complaint No. CC006000000057896, came to be allowed and the Respondents therein including Respondent No. 8-the Appellant herein have been directed to allot a flat admeasuring 775 sq ft and execute a registered Agreement for Sale in favour of Allottee in "Sethia Imperial Avenue" ("the project"), upon receipt of balance consideration, and also to pay interest to the Allottee on the amount of Rs. 12,78,750/- parted with by the Allottee from 26th September 2013 till the delivery of possession of the subject flat, at the rate of State Bank of India's Marginal Cost of Lending Rate plus 2%.

**2.** The Appeal arises in the backdrop of the following facts.

2.1 M/s Super Constitution, Respondent No.2, had started development of a project known as "Sun Gates" on the plot of land bearing CTS No. 9, 9-A, 9A/1 to 57, 123A and 123B of village Bandongiri, Malad (East), Taluka Borivali, under a slum rehabilitation scheme.

2.2 Upon receipt of part consideration of Rs.12,78,750/-, Respondent No.2 issued an allotment letter, thereby allotting Flat No. 1701, admeashing 775 sq ft at the rate of Rs.5,500/- per sq ft, aggregating to

the value of Rs.42,62,500/-, upon the terms and conditions incorporated therein, on 25th September 2010.

2.3 On 28th April 2013, Respondent No.2 executed a Development Agreement with the Appellant and thereunder sold 50% FSI of the sale component of the said project to the Appellant. Under a further Agreement dated 5th April 2016, Respondent No.2 sold the balance 50% FSI also to the Appellant.

2.4 Pursuant to the aforesaid Agreements, a Development Agreement dated 17th October 2017, came to be executed between Respondent Nos. 3 and 4, the owners of the subject land, Respondent No.2-first developer, and the Appellant-the second developer.

2.5 In accordance with the terms of the said Development Agreement dated 17th October 2017, the Appellant claims, Respondent No.2-first developer had agreed to settle all the debts and claims of the investors and the Appellant was only to provide the agreed consideration for refund of the amount along with interest to the parties with whom the first developer had entered into the transactions.

2.6 Thus, on 23rd March 2018, Respondent No.2 informed Respondent No.1-Allottee that the project was stalled, it was handed over to the Appellant and the Allottee shall approach either Respondent No. 2 or the Appellant, for refund of the amount paid by the Allottee. In response, as emerges from the record, the Allottee addressed

communications on 27th April 2018 and 18th June 2018 conveying her willingness to complete the transaction and accept the flat after payment of balance consideration.

2.7 On 29th January 2019, the Appellant addressed a communication to the Allottee (R2) apprising her that on account of the passage of time and phenomenal increase in the construction cost, it was impossible to complete the transaction on the agreed terms. Thus, the Allotment dated 25th September 2010 was sought to be terminated and the Allottee (R1) was called upon to collect the amount paid by her along with interest at the rate of 10.55% per annum. It was further added that if the Allottee wished to purchase the flat in the project, the Appellant would allot the same to the Allottee by giving a discount of 10% on the then prevailing price of the flat.

2.8 The Allottee filed a complaint, being Complaint No. CC006000000057896, before the Authority. By an order dated 3rd August 2021, the Authority disposed the Complaint directing the parties to act in accordance with the terms and conditions of the Development Agreement dated 17th October 2017, executed by and between the Appellant-Respondent No.2 and Respondent Nos 3 and 4, the owners.

2.9 Being aggrieved, the Allottee preferred an Appeal before the Appellate Tribunal.

2.10 By the impugned order, the Appellate Tribunal was persuaded to allow the Appeal. It was *inter alia* held that the Appellant was bound by the allotment made by Respondent No.2, the first developer under the terms of the Development Agreement dated 17th October 2017 itself, the Appellant had undertaken the responsibility to discharge the debts and liabilities of the Allottees of Respondent No.2. The contentions of the Appellant that there was no privity of contract, the complaint was barred by the law of limitation, and that it was impossible to perform the contract on account of the subsequent developments, were repelled by the Appellate Tribunal.

2.11 Being aggrieved by, and dissatisfied with, the impugned order, the Appellant-second developer is in Appeal.

**3.** Heard Mr. Rubin Vakil, the learned Counsel for the Appellant, and Mr. Manish Gala, the learned Counsel for the Respondent No.1. With the assistance of the learned Counsel for the parties, I have perused the material on record.

**4.** Mr. Rubin Vakil, the learned Counsel for the Appellant, mounted multi-pronged challenges to the impugned order. First, Mr. Vakil would urge, the Appellate Tribunal committed a manifest error in law in fastening the liability on the Appellant in the absence of any privity of contract between the Appellant and the Allottee. Second, the Appellate Tribunal completely misconstrued the nature of the Development

Agreement dated 17th October 2017. The Appellant was not a transferee in interest of Respondent No.2, the first developer. The Appellant had only purchased the FSI in the sale component in two tranches. Third, even if the Development Agreement dated 17th October 2017 is construed rather generously, yet, no prudent person can infer that the Appellant had agreed to provide apartments to the purported Allottees of the first developer (R2). Fourth, the Appellate Tribunal completely misread the termination letter dated 29th January 2019 to infer an obligation on the part of the Appellant to allot an apartment to the Allottee. Lastly, the Appellate Tribunal completely lost sight of the fact that the identity of the project, which was then being developed by the first developer (R2), was completely lost and no flat of the dimension agreed to be allotted to the Allottee was available in the buildings constructed in accordance with the approval of the Planning Authority.

**5.** In the above circumstances, the Appellate Tribunal could not have directed the Appellant to allot the flat and execute the Agreement and also pay interest on the consideration parted with by the Allottee, submitted Mr. Vakil.

**6.** In opposition to this, Mr. Gala, the learned Counsel for Respondent No.1-Allottee, submitted that the defence of the Appellant is dishonest and mala fide. On 30th September 2025, the Appellant had disclosed the inventory of unsold flats in the project. Sensing the fact

that the Appellant may be called upon to allot the flat, post-haste the unsold flats were shown to have been sold surprisingly on the same day, i.e., 14th November 2025, a fortnight prior to the impugned judgment and order. The impossibility of performance thus sought to be pleaded was brought about by deceitful means.

**7.** Mr. Gala took the Court through the recitals in the Development Agreement dated 17th October 2017 to bolster up the case that under the terms of the very Agreement, the Appellant had undertaken the responsibility to not only discharge the liabilities of the first developer (R2) but even indemnify the first developer (R2) and the owners (R3 and R4). In no circumstances, the Allottee's rights can be extinguished by referring to the an instrument to which the Allottee was never a party. The Appellate Tribunal was thus fully justified in directing the Appellant to discharge its statutory and contractual obligations. Thus, no substantial question of law arises for consideration, submitted Mr. Gala.

**8.** At the outset, it is necessary to note that there is no dispute over the fact that the first developer (R2) had agreed to allot Flat No. 1701, admeasuring 775 sq ft for a consideration of Rs.42,62,500/- under the Allotment Letter dated 25th September 2010, and accepted a consideration of Rs.12,78,750/-, which constituted 30% of the agreed consideration. Nor there is any controversy over the fact that the said

Agreement to allot was subsisting, on the date the Respondent No.2 addressed a letter dated 23rd March 2018 to the Allottee expressing its inability to develop the project and calling upon the Allottee to accept the refund. Incontrovertibly, the Allottee expressed her willingness to complete the transaction, pay the balance consideration and accept the delivery of the flat. Thus, on 29th January 2019, the Appellant professed to terminate the allotment dated 25th September 2010 vide communication dated 29th January 2019.

**9.** Cumulatively, the aforesaid facts lead to an inescapable inference that the Agreement to allot the subject flat continued to subsist till 29th January 2019, at the least. Implicit in the action of the Appellant of termination of the allotment is an admission that the said Agreement to allot did subsist. In this backdrop, the submissions primarily premised on the absence of privity of contract between the Appellant and the Allottee, which constituted the fulcrum of the Appellant's defence, deserve to be appreciated.

**10.** Mr. Vakil placed reliance on Clauses 10 to 12 of the Development Agreement dated 17th October 2017 to drive home the point that the liability of the Appellant was restricted to the discharge of debts and claims of investors, whose names were mentioned in the Annexure VII to the said Development Agreement. Indubitably, the name of the Allottee forms part of the said Annexure VII.

**11.** In addition to the Clauses 10 to 12 of the Development Agreement, it would be contextually relevant to note the recitals (EE) and Clause 4 of the said Development Agreement. They read as under:

> "EE" (A) SECOND DEVELOPER shall irrevocably agree and undertake to takeover, pay, discharge and settle, within period of 12 months from date hereof, the debts and liabilities of the First Developer towards the investors etc. to the tune of Rs.17,94,00,325/- (Seventeen Crores Ninety Four Lakhs and Three Hundred Twenty Five Only) out of that the owners, First Developer and Second Developer has already paid Rs.5,25,16,370/- (Five Crores Twenty Five Lakhs Sixteen Thousand and Three Hundred Seventy Only) to the investors as mentioned in Annexure 'VII' (Part 1 and Part 2) and the liabilities as mentioned in Annexure VII (Part 3) annexed hereto or more in lieu of the liability of the Second Developer to pay to the First Developer towards full satisfaction of the balance consideration of Rs.13,90,94,988/- (Thirteen Crores Ninety Lakhs Ninety Four Thousand and Nine Hundred Eighty Eight Only) under the First Agreement within the period of 12 months (twelve months). In the event, if any investor (s) is/are unable to get settled due to his absence or due to any unreasonable demand, the Second Developer shall take over the liability and hereby indemnifies and keep indemnified the owners and First Developer.
>
> … … …
>
> (4) The Owners and the First Developer have agreed to accept consideration in following manner:
> The Allottee and Second Developer shall irrevocably agree and undertake to takeover, pay, discharge and settle, within period of 12 months from date hereof, the debts and liabilities of the First Developer towards the investors etc to the tune of Rs.17,94,00,325/- (Seventeen Crores Ninety Four Lakhs and Three Hundred Twenty Five Only) out of

that the owners, First Developer and Second Developer has already repaid R.5,25,16,370/- (Five Crores Twenty Five Lakhs Sixteen Thousand and Three Hundred Seventy OnlY0 to the investors as mentioned in Annexure 'VII' (Part 1 and Part 2) and the liabilities as mentioned in Annexure VII (Part 3) annexed hereto or more in lieu of the liability of the Second Developer to pay to the First Developer towards the balance consideration of Rs.13,90,94,988/- (Thirteen Crores Ninety Lakhs Ninety Four Thousand and Nine Hundred Eighty Eight Only) under the First Agreement within the period of 12 months (Twelve months). In the event, if any investor (s) is/are unable to get settled dues in his absence or due to any unreasonable demand, the Second Developer shall take over the liability and hereby indemnifies and keep indemnified the Owners and the First Developer, if the payment of amount of settlement exceeds Rs.13,90,94,988/- than such excess payable towards settlement shall be borne and paid by the Second Developer alone.

… …. …

10. That it is mutually agreed and understood between the first developer and second developer that with effect from 1st April 2016, the First Developer in consultation with the Second Developer will settle all the claims ___ investors as per the list annexed herewith as "Annexure VII", herein referred to as the said ___ to whom they have given allotment in writings of their cumulative investments or otherwise. The Funds as may be required for such settlement _____ defined in clause 4(a) will be provided by the Second Developer along with any additional amount payable to them as may be settled with the Second Developers and such investor with consultation of the First Developer. Such claims shall be settled by the Second Developer within period of 12 months from the date of this Deed and that the Second Developer shall provide proof of payment/settlement to the First Developer.

11. It is agreed by the parties hereto that in the event the investors of the First Developer as per list Annexed herewith desire to continue of his/her/their investment with the Second Developer when the balance receivable consideration & all other charges under the MOFA, shall be receivable by the Second Developer of such terms and conditions which may agree upon between such investor/s and the Second Developer and further writings. MoU or Agreements will be executed between the Second Developer. It is agreed, admitted and confirmed by the Second Developer that the Owners/First Developer or their nominees has made payment of Rs.21,69,500/- for such settlement on behalf of Second Developer and that the Second Developer shall reimburse the same to the Owners/First Developer or their nominees of confirmation of the same on execution of this Agreement. The Second Developer do hereby agree and undertake to indemnify and keep indemnified the Owners/First Developers including the respective heirs, executors, administrators and/or successors against any loss, damage, fine, penalties, legal proceedings and expenses that may be suffered by, imposed on or taken against the Owners/First Developer by any of the investors/creditors mentioned in Annexure 'VII'.

12. The Owners/First Developer hereby confirm and record that there is no other investors save and accept shown in investors' list being Annexure VII hereto and the First Developer further undertake that if any investor left or whose name is not in the list shall be settled by the First Developers only at their own cost and expenses."

**12.** A conjoint reading of the aforesaid clauses indicates that the parties had agreed that the Appellant (Second Developer) shall pay, discharge and settle, within a period of 12 months from the date of the

said Agreement, the debts and liabilities of the first developer towards the investors to the tune of Rs. 17,94,00,325/-. Part of the said amount was already paid. The balance amount was to be paid by the second developer for the said purpose.

**13.** What followed is of critical salience. The parties agreed that "if any investor (s) is/are unable to get settled due to his absence or due to any unreasonable demand, the second developer shall take over the liability." This recital clearly indicates that the parties were alive to the fact that some of the investors may not agree to the settlement of their claim in the manner proposed by Respondent No.2 and the Appellant and, thus, a provision was made that the second developer-Appellant would take over the liability arising out of the said claim.

**14.** The aforesaid intent of the parties is further fortified by the express 'indemnity' given by the second developer. The Appellant further agreed that it would indemnify and keep indemnified the owners and first developer against any loss, damage, fine, penalties, legal proceedings and expenses that may be suffered by, imposed on or taken against the owners/first developer by any of the investors/creditors mentioned in Annexure VII.

**15.** In the face of the aforesaid clear and explicit recitals in the Development Agreement, the submission on behalf of the Appellant that the liability of the Appellant-second developer was confined to payment

of the consideration to facilitate the refund of the amount calculated by the first developer (R1) cannot be acceded to, even without delving into the aspect of the binding character of the said Development Agreement inter se developers on the rights of Allottees.

**16.** On first principles, since the Allottees were not parties to the Development Agreement dated 17th October 2017, the contract can never be said to have been novated and, thus, the mutual understanding between the first and second developer would not impinge upon the rights of the Allottees.

**17.** From a perusal of the Development Agreement dated 17th October 2017, it also becomes abundantly clear that Respondent No. 2 and the Appellant intended to run roughshod over the rights of the Allottees by terming them as investors. True, in the ultimate analysis, the nomenclature is of no consequence. However, the repeated reference to the Allottees, from whom the first developer (R2) had accepted valuable consideration many years ago, and had also issued the allotment letter with particulars of the apartment and the dimensions thereof, as "investors" betrayed a devious design to trample upon the rights of the Allottees.

**18.** In Clause(d) of Section 2 of the Real Estate (Regulation and Development) Act, 2016 ("the RERA, 2016"), "allottee" in relation to a real estate project *inter alia* means a person to whom a plot, apartment

or building, as the case may be, has been allotted, sold (whether as freehold or leasehold) or otherwise transferred by the promoter. Respondent No.1 was thus an Allottee as all the attributes of allotment of the apartment were squarely met.

**19.** The thrust of the submission of Mr. Vakil that, under the terms of the Development Agreement dated 17th October 2017, the liability of the Appellant was restricted to refunding the amount along with interest, is not borne out by the very terms of the Development Agreement. Moreover, the submission is in the teeth of the statutory mandate contained in the RERA, 2016 and, in fact, has the propensity to render the protection to the consumers in the real estate sector envisaged by the RERA, 2016, completely nugatory. Under no circumstances, the promoter can be permitted to present a *fait accompli* to an Allottee in flagrant violation of the contractual and statutory obligations.

**20.** Suffice to note that, under Section 18 of the RERA, 2016, it is the choice of the Allottee to either seek a refund, alongwith interest and compensation, or seek the delivery of the apartment in accordance with the terms of the contract, and, in the latter case also the promoter is liable to pay interest at such rate as may be prescribed.

**21.** The decision of the Supreme Court in the case of **Newtech Promoters and Developers Private Limited Vs State of Uttar Pradesh and**

Ors,[1] underscores an absolute and unqualified right of the Allottee to be paid interest on the amount paid by Allottee in the event the Allottee elects to seek the refund. The choice given to the Allottee under the proviso to Section 18(1) of the RERA, 2016 cannot be diluted on the premise that the only right of the Allottee is to seek the refund of the amount paid along with interest. In substance, the right to seek the apartment, agreed to be sold, is the primary right of the Allottee. Therefore, the submission on behalf of the Appellant that the Appellate Tribunal could not have directed the Appellant to deliver the possession of the apartment to the Allottee does not merit countenance.

**22.** The desperate submissions on behalf of the Appellant that the apartment, of the dimension agreed to be allotted to the Allottee by the first developer, is not available in the buildings constructed by the Appellant in accordance with the sanctioned plan, and that before the passing of the impugned order all the apartments in the project have been sold and, therefore, it is is impossible for the Appellant to comply with the directions of the Appellate Tribunal, can only be said to be disingenuous.

**23.** Firstly, it is imperative to note, the first developer professed to offer a refund of the amount paid by the Allottee by expressly conceding that the the project could not be developed on account of operational difficulties and paucity of funds to develop the project. Secondly, the

**1** (2021) 18 SCC 1.

Appellant professed to terminate the allotment on the specious ground that it was impossible to allot the apartment to the Allottee at the agreed consideration in view of the increase in the cost of construction. Alleged impossibility of performance was thus a subterfuge. Financial unviability can never be a ground to sustain the defence of impossibility of performance. No case of supervening impossibility so as to attract the doctrine of frustration of contract was sought to be urged on behalf of the Appellant. (**Delhi Development Authority Vs Kenneth Builders And Developers Private Limited and Ors**)[2]

**24.** What exacerbates the situation is the manner in which the unsold apartments were shown to have been sold on 14th November 2025, a fortnight before the passing of the impugned order. In the disclosure made on 30th September 2025, a number of apartments were shown as unsold. In the further disclosure, many of those apartments were shown to have been sold on the same day, i.e., 14th November 2025. Thus, I find substance in the submission of Mr. Gala that the clearance of the entire inventory cannot be a matter of sheer coincidence.

**25.** Mr. Vakil attempted to salvage the position by canvassing a submission that there was no restraint on the sale of the unsold units. This submission is required to be noted to be repelled.

**26.** Having clearly undertaken the liability to satisfy the claims of the Allottees, who did not agree to settle their claims and having also

**2** (2016) 13 SCC 561.

agreed to indemnify the first developer and the owners, it would be naive to believe that the Appellant could not foresee the situation that may unfold. The alleged impossibility of performance, now sought to be urged, was thus brought about by disingenuous conduct of the Appellant and Respondent No.2, which commenced with terming the Allottees as “investors”.

**27.** For the foregoing reasons, this Court does not find any infirmity in the impugned order. No question of law, much less a substantial question of law, arises for consideration. The Appeal, therefore, deserves to be dismissed with costs.

**28.** Hence, the following order:

**: O R D E R :**

(i) The Appeal stands dismissed with costs of Rs. 1,00,000/- (Rupees One Lakh), to be paid by the Appellant to Respondent No.1, within a period of four weeks from today.

(ii) In view of the dismissal of the Second Appeal, the Interim Application does not survive and accordingly stands dismissed.

**[N. J. JAMADAR, J.]**