

BEFORE THE
MAHARASHTRA REAL ESTATE REGULATORY AUTHORITY
MUMBAI

COMPLAINT NO: CC00600000056052

Zairub Sayed ... Complainant

Versus

Macrotech Developers Limited ... Respondent
MahaRERA Regn. No. P51900000367

Coram: Shri. Gautam Chatterjee, Chairperson, MahaRERA

Complainant was herself present a/w Mr. Avinash Pawar, Adv.
Respondent was represented by Mr. Chirag Kamdar, Adv.; Mr. Abir Patel, Adv. and Mr. Akshay Pare, Adv. (i/b. Wadia Ghandy & Associates).

Order

February 03, 2020

1. The Complainant has stated that she has purchased an apartment bearing no: B-302A in the Respondent's project 'NEW CUFFE PARADE - LODHA ENCHANTE' situated at Wadala, Mumbai via registered agreement for sale dated April 9, 2014. The Complainant has stated that the Respondent has registered the project bearing no: P51900000367 only for 41st to 45th floor and that the floors below have not been registered as the part occupancy certificate for the same has been obtained. The Complainant alleged that this is in violation of section 3 of the Real Estate (Regulation and Development) Act, 2016 (hereinafter referred to as the *said Act*) as the said Act contemplates exemption from registration for the project having completion certificate and not "part occupancy certificate and that the said completion certificate should be for the whole project and not for part building or few floors. Further, she has alleged the Respondent has failed to handover possession of the said apartment in terms of the provisions of the said agreement. Specifically, she has stated that the carpet area of the said apartments is lesser than what was promised by the said agreement. Therefore, she prayed that the Respondent be directed to pay them interest for delayed possession and



compensation and damages as the Respondent has failed to fulfil its obligations under the said agreement and that the Respondent be penalized as per the provisions of section 59 of the Real Estate (Regulation and Development) Act, 2016 (hereinafter referred to as the *said Act*).

2. Since the phase of the project in which the apartment of the Complainant is located is not registered with MahaRERA by the Respondent, the Complaints were referred to this bench for deciding the preliminary issue of registration of the said phase of the project as per office note dated April 4, 2019.
3. During the hearing, held on 24th December, 2019 the learned counsel for the Complainant/Complainant submitted that the technicalities of the definition of the term "occupancy certificate" (OC) under various acts should be read harmoniously considering the agreements for sale provides for not only the apartment but also the amenities. Further, they submitted that the definition of "phases" under the said Act should be read in a manner that the object of conveyance, amenities and defect liability is also taken into consideration. They also submitted that the term 'phase of a project' cannot be for used for the same building, as floors cannot be separately registered, as the floor wise registration is also linked with part occupation certificate. They submitted that even though the occupancy certificate for the said project has been received, the amenities are yet to provided and therefore, the interpretation of the said Act that supports the interest of homebuyers should be adopted. They also referred to the Order dated October 26, 2018 of the Hon'ble Maharashtra Real Estate Appellate Tribunal in Appeal No. AT006000000010684 wherein the MahaREAT has upheld the learned Member and Adjudication Officer's view that the entire project comes under the jurisdiction of the said Act so long as the occupancy certificate is not issued by the Competent Authority.
4. During the hearing, the learned counsel for the Respondent contested the claims made by the Complainant and thereafter, the Respondent has made written submissions dated December 27, 2019 which is annexed to this Order as Annexure A.
5. As per section 4 of the said Act, it is obligatory on the part of the promoter to make an application to the Authority for registration of the Real Estate Project in such a manner and within such time and accompanied by such fee as may be specified by the rules. As per Section 4(2) (1) (C) of the said Act, it is obligatory on the part of the promoter to declare the

time period within which he undertakes to complete the project. As per Section 4(2) (1) (D) of the said Act, it is obligatory on the part of promoter to maintain separate account and deposit 70% of the amount realized for the Real Estate Project from the allottees from time to time. The said amounts to be utilized to cover the cost of construction and land cost and shall be used for that purpose only and the promoter is entitled to withdraw said amount in proportion to the percentage of completion of the project. Only after compliance of provisions of Section 4(2) of the said Act, the promoter is entitled for registration on the terms and conditions prescribed by the Authority. Also, Section 5(3) of the said Act states that registration granted shall be valid for a period under sub-clause (C) of clause (1) of sub-section (2) of Section 4, for completion of the project.

6. The provisions of Section 3 of the said Act, regarding registration of on-going project, therefore, has to be read along with Sections 4 and 5(3) of the said Act.

Explanation to section 3 of the said Act reads as thus:

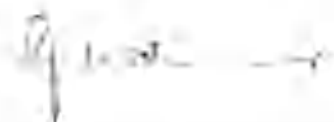
Explanation.

For the purpose of this section, where the real estate project is to be developed in phases, every such phase shall be considered a standalone real estate project, and the promoter shall obtain registration under this Act for each phase separately.

7. Moreover, Rule 2(p) of the Maharashtra Real Estate (Regulation and Development) (Registration of real estate projects, Registration of real estate agents, rates of interest and disclosures on website) Rules, 2017 reads as thus:

2(p) "Phase of a Real Estate Project" may consist of a building or a wing of the building in case of building with multiple wings or defined number of floors in a multi-storied building/wing;

8. The part occupancy certificate for a phase of the project was obtained on June 8, 2017 i.e. during the window period of three months w.e.f. May 01, 2017. This three-month window period was available to promoters of on-going projects for making application to the Authority for registration u/s 3 of the Act. Sections 4 (2) (1) (C) and 5 (3) of the said Act required the application for registration of a project or its phase to give a prospective date by which the said project or its phase will be completed. Since before the window period of three months for making application for registration of an on-going project, a phase of the building had received part OC, which essentially is the habitability certificate for the said floors to occupy, no application for registration complying with Sections 4 (2) (1) (C) and 5 (3) of the said Act was possible. Accordingly, the Respondent has registered only those floors



for which the part occupancy certificate was not obtained during the window period of three months w.e.f. May 01, 2017.

9. In para 115 of the judgement of Hon'ble Bombay High Court in Writ Petition No. 2737/- U Neelkamal Realtors. Vs. Union of India, it has observed that the object and purpose of the Real Estate (Regulation and Development) Act, 2016 is to complete the development work within the stipulated time frame. Further, in Para 86 of the judgement, it has been stated that RERA will apply after getting the project registered.
10. Therefore, though the phase of the building, which had received part OC will not require RERA registration but in the interest of the allottees who have been allotted apartments in such phases of the building and have taken possession of their respective apartments, it is necessary to apply the provisions of Sections 11, 14(3) (regarding defect liability) and 17 (regarding conveyance) of the said Act, for all occupants in a building which is divided into phases, irrespective of whether a certain phase in the building, is registered or otherwise.

11. Section 11(4) of the said Act reads as thus:

The promoter shall –

(a) be responsible for all obligations, responsibilities and functions under the provisions of this Act or the rules and regulations made thereunder or to the allottees as per the agreement for sale, or to the association of allottees, as the case may be, till the conveyance of all the apartments, plots or buildings, as the case may be, to the allottees, or the common areas to the association of allottees or the competent authority, as the case may be;

Provided that the responsibility of the promoter, with respect to the structural defect or any other defect for such period as is referred to in sub-section (3) of section 14, shall continue even after the conveyance deed of all the apartments, plots or buildings, as the case may be, to the allottees are executed.

(b) be responsible to obtain the completion certificate or the occupancy certificate, or both, as applicable, from the relevant competent authority as per local laws or other laws for the time being in force and to make it available to the allottees individually or to the association of allottees, as the case may be;

(c) be responsible to obtain the lease certificate, where the real estate project is developed on a leasehold land, specifying the period of lease, and certifying that all dues and charges in regard to the leasehold land has been paid, and to make the lease certificate available to the association of allottees;

(d) be responsible for providing and maintaining the essential services, on reasonable charges, till the taking over of the maintenance of the project by the association of the allottees;

(e) enable the formation of an association or society or co-operative society, as the case may be, of the allottees, or a federation of the same, under the laws applicable;

Provided that in the absence of local laws, the association of allottees, by whatever name called, shall be formed within a period of three months of the majority of allottees having booked their plot or apartment or building, as the case may be, in the project;

(f) execute a registered conveyance deed of the apartment, plot or building, as the case may be, in favour of the allottee along with the undivided proportionate title in the common areas to the association of allottees or competent authority, as the case may be, as provided under section 17 of this Act;

(g) pay all outgoings until he transfers the physical possession of the real estate project to the allottee or the associations of allottees, as the case may be, which he has collected from the allottees, for the payment of outgoings (including land cost, ground rent, municipal or other local taxes, charges for water or electricity, maintenance charges, including mortgage loan and interest on mortgages or other encumbrances and such other liabilities payable to competent authorities, banks and financial institutions, which are related to the project);

notwithstanding anything contained in any other law for the time being in force, it shall not affect the right and interest of the allottee who has taken or agreed to take such apartment, plot or building, as the case may be;

12. Section 14(3) of the said Act reads as thus:

14 (3): In case any structural defect or any other defect in workmanship, quality or provision of services or any other obligations of the promoter as per the agreement for sale relating to such development is brought to the notice of the promoter within a period of five years by the allottee from the date of handing over possession, it shall be the duty of the promoter to rectify such defects without further charge, within thirty days, and in the event of promoter's failure to rectify such defects within such time, the aggrieved allottees shall be entitled to receive appropriate compensation in the manner as provided under this Act.

13. Section 17 of the said Act reads as thus:

17, (1) The promoter shall execute a registered conveyance deed in favour of the allottee along with the undivided proportionate title in the common areas to the association of the allottees or the competent authority, as the case may be, and hand over the physical possession of the plot, apartment or building as the case may be, to the allottees and the common areas to the association of the allottees or the competent authority, as the case may be, in a real estate project, and the other title documents pertaining thereto within specified period as per sanctioned plans as provided under the local laws: Provided that, in the absence of any local law, conveyance deed in favour of the allottee or the



association of the allottees or the competent authority, as the case may be, under this section shall be carried out by the promoter within three months from date of issue of occupancy certificate.

(2) After obtaining the occupancy certificate and handing over physical possession to the allottees in terms of sub-section (1), it shall be the responsibility of the promoter to handover the necessary documents and plans, including common areas, to the association of the allottees or the competent authority, as the case may be, as per the local laws: Provided that, in the absence of any local law, the promoter shall handover the necessary documents and plans, including common areas, the association of the allottees or the competent authority, as the case may be, within thirty days after obtaining the occupancy certificate.

14. In light of the above, the below three points need to be considered:

- i. Formation of an association or society or co-operative society, as the case may be:
In a project (phase) such as this, the association or society or co-operative society, as the case may be, will have to be formed of the entire building and not in a floor/ phase wise manner and as such the occupants of the floor/phase not registered with the Authority cannot be expected to be seeking remedy elsewhere.
- ii. Conveyance:
The promoter is under an obligation to execute a registered conveyance deed of the apartment, plot or building, as the case may be, in favour of the allottee along with the undivided proportionate title in the common areas to the association of allottees or competent authority, as the case may be, as provided under section 17 of the said Act.
- iii. Defect liability under section 14(3)
Redressal of grievances related to structural defect or any other defect in workmanship, quality or provision of services or any other obligations of the promoter as per the agreement for sale relating to such development, of all the occupants of the same building will have to be provided by MahaRERA only. Therefore, in such situations wherever a building, registered in a phase wise manner for different floors of the building, which ultimately have to be handed over to one entity, every member of the society will be treated eligible for seeking relief under the provisions of section 14(3) of the said Act, after taking possession of their apartments.

14. Section 18 of the said Act reads as thus:

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

(a) in accordance with the terms of the agreement for sale or, as the case may be, duly completed by the date specified therein; or

(b) due to discontinuance of his business as a developer on account of suspension or revocation of the registration under this Act or for any other reason, he shall be liable on demand to the allottees, in case the allottee wishes to withdraw from the project, without prejudice to any other remedy available to return the amount received by him in respect of that apartment, plot, building, as the case may be, with interest at such rate as may be prescribed in this behalf including compensation in the manner as provided under this Act:

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

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

Simple present tense used in the starting line of Section 18 clearly indicated that the provision shall apply only till the project is incomplete or the promoter is unable to give possession. Keeping in view the object and purpose of the Real Estate (Regulation and Development) Act, 2016 which is to complete the development work within the stipulated time frame, once the project construction is complete or possession is given, as the case may be, the said provision ceases to operate.

In view of the above facts, the Respondent cannot be held liable to pay interest on delay to the Complainants, as per section 18 of the said Act. In fact, in accordance with section 19 (10) every allottee is expected to take physical possession of the apartment, plot or building as the case may be, within a period of two months of the occupancy certificate issued for the said apartment, plot or building, as the case may be.

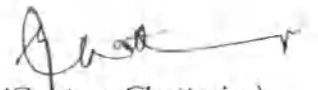
15. On review of the Respondent's registration webpage, it is observed that the Respondent has registered the project from 41st floor to the 43rd Floor. Further, the Respondent has already initiated the process of formation of legal entity for the project 'Enchante' consisting of 39] apartments (including the ones registered and not registered with this Authority).

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Accordingly, all the allottees of the said project, irrespective of if their floors have been registered or not by the Respondent with this authority shall have a remedy under the provisions of section 14(3) as members of the legal entity so formed by the Respondent.

16. In view of the above facts, the Complainants are advised to take possession of their apartments. For grievances, if any, relating to defect liability etc. the same may be raised by the Complainants after taking possession of their apartments, in accordance with the provisions of section 14(3) of the said Act.

17. Consequently, the matters are hereby disposed of.



(Gautam Chatterjee)
Chairperson, MahaRERA

ANNEXURE 'A'

BEFORE THE ADJUDICATING OFFICER, MAHARASHTRA COMPLAINT NO. CC006000000057449

Zahida Khan & Riyaz Khan

... Complainants

V/s

Lodha Developers Ltd.

... Respondent

WRITTEN SUBMISSIONS ON BEHALF OF THE RESPONDENT

1. The present Written Submissions are filed in support of oral arguments made by the Respondent at the hearing held on 24th December, 2019.
2. The issue for consideration before this Hon'ble Tribunal, pursuant to the preliminary objection raised by the Respondent, is whether a Developer is required to register a real estate development for which the Occupation Certification / Part Occupation Certificate / Completion Certificate has been obtained prior to the deadline contemplated under the Real Estate (Regulation and Development) Act, 2016 ("RERA").
3. It is not in dispute that the Respondent herein obtained the Part Occupation Certificate on 8th June, 2017 for floors 1 to 40 of four buildings i.e. B-3 (Eveq), B-4 (Enchante), C-5 (Dioro) and C-6 (Elisium) in the layout of New Cuffe Parade for the projects that are subject matter of this and following Complaint Nos. ("said Complaints") :

1	CC006000000078572	P51900000314	NEELAM KAUR
2	CC006000000057094	P51900000314	RUPINDER SINGH ARORA
3	CC006000000057136	P51900000314	VIPUL JASWANTLAL

			SANGHAVI AND JASWANATLAL NANALAL SANGHAVI
4	CC006000000057204	P51900000314	MRS VEENAKUMARI SEHGAL AND MR. LALIT SEHGAL
5	CC006000000057378	P51900000314	GUL MUKHEY
6	CC006000000057206	P51900000314	FALGUNI HEMANT SHETH AND HEMANT DEVIDAS SHETH
7	CC006000000057207	P51900000314	MRS USHA ASHOK JOHARI AND MR. PRASUN ASHOK JOHARI
8	CC006000000057370	P51900000314	ROYSTON MACHADO & ZANIA MACHADO
9	CC006000000057423	P51900000314	NIMESH INDRAVADAN SHAH
10	CC006000000057917	P51900000314	ARZANA SHARUKH DARUWALLA AND SHARUKH HOSHI DARUWALLA
11	CC006000000078405	P51900000314	ABHAY KUMAR

12	CC006000000057426	P51900000314	SMT. SUJATA SATISH BORA
13	CC006000000057592	P51900000314	RAMONA MAHTANI
14	CC006000000057816	P51900000367	VIREN DOSHI AND BEENA DOSHI
15	CC006000000078556	P51900000367	VALLABH LALJI PATEL AND ANOTHER
16	CC006000000079035	P51900000367	NARENDRA PRAJAPATI AND SWETA PRAJAPATI
17	CC006000000110730	P51900000367	JIGNESH PATEL
18	CC006000000110729	P51900000367	SATYEN VALLABH PATEL
19	CC006000000089855	P51900000367	SALILKUMAR SHAH
20	CC006000000057582	P51900000314	ATLANTIS IT SOLUTION PRIVATE LIMITED
21	CC006000000089796	P51900000314	SAMEER MASOOD DIVKER AND RAFIYA SAMEER DIVKER
22	CC006000000056771	P51900000314	MR. PARMINDER SINGH THAPAR AND MRS. ROSHNA THAPAR

23	CC006000000078557	P51900000314	SHALINI SHUKLA AND ANOTHER
24	CC006000000078859	P51900000314	VIJAY TILAK
25	CC006000000057449	P51900000367	ZAHLDA KHAN & RIYAZ KHAN
26	CC006000000057451	P51900000367	CHARUDATTA DEOCHAKE
27	CC006000000078387	P51900000367	VIPUL JAYANTILAL BAFNA
28	CC006000000057692	P51900000629	AMIT DHANNALAL JALAN
29	CC006000000056052	P51900000367	ZAINUB SAYED
30	CC006000000057698	P51900000314	VISHAL BAKSHI
31	CC006000000078845	P51900000314	AAMIR KHAN

4. Section 3 (1) of the said Act, which provides for registration of ongoing projects reads as follows:-

3. (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:

5. The first proviso to Section 3 (1) makes it clear that ongoing projects on the date of commencement of the RERA, and for which the Completion Certificate has not been issued, are required to be registered within a period of 3 months from the date of commencement of the RERA.
6. The underlying rationale therefore for ongoing developments to be registered under the provisions of the RERA appears to be that the project is ongoing and has not received a Completion Certificate from the competent authority. Once such a Completion Certificate is issued, such development would not fall within the ambit of the RERA, RERA not being retrospective in application.
7. Further, the explanation to Section 3 of the RERA provides that where a project is being developed in phases, every such phase shall be treated as a separate standalone real estate project and required to be registered separately. The explanation to section 3 of the RERA reads thus:

"3. ...

Explanation.— For the purpose of this section, where the real estate project is to be developed in phases, every such phase shall be considered a stand alone real estate project, and the promoter shall obtain registration under this Act for each phase separately."
8. The Maharashtra Real Estate (Regulation and Development) (Registration of Real Estate Projects, Registration of Real Estate Agents, Rates of Interest and Disclosures on Website) Rules, 2016 ("the said Rules") further clarifies the requirement of registration.

In this regard, Rule 4 (1) of the said Rules is relevant and reads as follows:-

"4. Disclosure by promoter of ongoing real estate projects.- (1) The promoter of an ongoing real estate project, in which all buildings as per sanctioned plan have not received occupancy certificate or completion certificate, as the case may be as provided by clause (b) of sub-section (2) of section 3, shall be required to submit application for registration for each such phase of the project, within a period of three months from the date of commencement of section 3.

Explanation.-For the purpose of this sub-rule, - (1) the expression "phase of the project" means the building or buildings in a project in respect of which occupancy or completion certificate has not been received;

....."

9. A perusal of the said Rules would clearly demonstrate that registration is required only for each such phase of the project i.e. the building or buildings in the project in respect of which the Occupancy Certificate or Completion Certificate has not been received. This is clear from a conjoint reading of Rule 4 (1) along with *explanation one* thereto. The expression "building" has been defined in Section 2 (j) of the RERA to include any structure or erection or part of structure or erection which is intended to be used for residential, commercial or for the purpose of any business, occupation, profession or trade or for any other limited purposes.
10. This definition clearly contemplates that even part of a structure or erection may be treated to be a building for the purpose of the RERA and therefore for the purposes of the said Rules as well as. This attains some significance in light of Development Control Regulations, 1991 where Regulation 6 (8) contemplates that the planning authority may issue a Part Occupation Certificate for the

building or part thereof before completion of the entire work as per the development permission.

11. Consequently, therefore an Occupation Certificate in the City of Mumbai may be issued for part of a building or structure. This is known as a 'Part Occupation Certificate'. The validity of such Part Occupation Certificate, in fact of the very part Occupation Certificate issued on 8th June, 2017 in relation to the aforesaid four buildings that are subject matter of the said Complainants, has been confirmed by the Division Bench of Hon'ble Bombay High Court in decision dated 16th October, 2018 passed in Writ Petition (L) No. 2639 of 2018. In this regard paragraph 19 and 20 are relevant and reads as follows:

"19. In the meantime, in view of the completion of the construction of the building, respondent no.5 approached the MMRDA seeking part occupancy certificate so that the possession of the ready flats could be handed over to the flat purchasers who were awaiting possession of their units. The MMRDA on 8 June 2017 granted part occupation certificate exercising power under sub-regulation (8) of regulation 6 of the Development Control Regulations which reads thus:

Regulation 6:- Sub-regulation (8): Part occupancy certificate:

When requested by the holder of the development permission, the Commissioner may issue a part occupancy certificate for a building or part thereof, before completion of the entire work, as per the development permission, provided sufficient precautionary measures are taken by the holder to ensure public safety and health. The occupancy certificate shall be subject to the owner's indemnifying the Commissioner in the form in Appendix XXIII. (emphasis supplied)

20. A plain reading of the above provision makes it clear that a part occupancy certificate of the building or part thereof before completion of the entire work, as per the development permission can be granted subject to precautionary measures which may be provided by the authorities. By exercising these statutory powers, part occupancy certificate was granted in favour of respondent no.5. Accordingly acting on the occupancy certificate, possession of the tenements was also handed over to the flat purchasers since November 2017. Considering the aforesaid clear provision as contained in the Development Control Regulations, we do not see any substance in the contention as urged on behalf of the petitioner that the MMRDA in any manner was prohibited from granting part occupancy certificate and the issuance of part occupancy certificate was illegal. The contention of the petitioner that till the height of the building was brought to its permissible level, part occupancy certificate ought not to have been granted, also cannot be accepted, in view of the above provisions of the Development Control Regulations" (Emphasis supplied)

12. The Respondent submits that the concept of Part Occupation Certificate for part of a building / structure has been specifically recognized in law. The said Rules have expressly provided for a requirement to register a Real Estate Project in a phase-wise manner, such that each phase may consist of a building or wings of the building in case of buildings with multiple wings or defined number of floors in the multistoried buildings / wings. This is clear, *inter alia*, from Rule 2 (i) (p) of the said Rules.
13. In these circumstances, it is submitted that the given the express provision permitting for registration of part of a building/ structure and the aforesaid four buildings having received Part Occupation Certificate upto 40th floor, the Respondent proceeded to register only the remaining floors of these buildings under the provisions of RERA.

14. It is settled by the Hon'ble Bombay High Court in *Neelkamal Developers Pvt. Ltd. & Anr vs Union of India & Ors.* that provisions of RERA are retroactive, that too only to a limited extent. While the RERA provided a legal remedy to flat purchasers as contemplated in the various provisions thereof, for what are now considered as statutory obligations of the Developers, flat purchasers already had protected rights both under the provisions of the MOFA Act, 1963 as well as under their own individual contracts. These contractual rights are in no way hampered or fettered by the provisions of the RERA. In fact, in paragraph 86 of the aforesaid judgment, the Hon'ble Bombay High Court has expressly held that the provisions of RERA would apply only after projects are registered. This position has been reiterated by the Two Member Bench of the Maharashtra Real Estate Appellate Tribunal in the case of *Mohd. Zain Khan vs Enmoy Properties Limited* as well at para 13 (vii), pg. 28 thereof.
15. Section 88 of the RERA specifically provides that the provisions of thereof are in addition to and not derogation of the provisions of any other law for time being in force. It is accordingly submitted that the Complainants would not be left remediless merely on account of the fact that the Respondent is not required to register that portion of the development which was already duly completed before the deadline for registration came into effect under the proviso to Section 3 of the RERA.
16. The Respondent submits that attention was drawn to certain provisions of the said Act, in particular Section 14 (3) and 17 to contend that such provision being prospective in their application i.e. being applicable even after receipt of the Occupation Certificate ought to be made applicable even to those projects which had received the Occupation Certificate or Part Occupation Certificate prior to the registration deadline stipulated under Section 3 of the said Act.

17. This contention is erroneous for the following reasons:-

- (i) It is submitted that the question of registration of an ongoing real estate project has to be tested on the anvil of Section 3 of the RERA read with the relevant Rules, as set out hereinabove. The question of whether or not a ongoing project needs to be registered and if it is to be registered, to what extent it is required to be registered, is a matter of interpretation of the relevant Section and Rules. A distinction cannot be created between ongoing projects which have received Full Occupation Certificate and ongoing projects which have received Part Occupation Certificate. The interpretation of the relevant section and rules must be based on a reading thereof and cannot change depending on the fact specific scenario in the Complaint placed before the Hon'ble Authority.
- (ii) It is submitted that while sections referred to hereinabove viz. Section 14 (3) and 17 are indeed operating even after issuance of an Occupation Certificate, when a cut off has been prescribed by the legislature this Hon'ble Authority would not have jurisdiction to, notwithstanding such cut off, apply certain selective provisions of the RERA to the development. To do so, would be to rewrite the provisions of the RERA and the said Rules.
- (iii) As already set out hereinabove, any flat purchaser which falls outside scope of the RERA, and whose development falls outside the scope of the RERA and is aggrieved by what he claims are violations of his agreement or violation of any statutory provisions set out in the MOFA or any other law for the time being in force, has other civil remedies available to him and is free to adopt such remedy.

18. In other words, it is submitted that provisions of the RERA would only apply to new projects and ongoing project as defined under the RERA and the said Rules and would not apply for any development which falls outside these definition. To suggest otherwise would tantamount to re-writing the provisions of the RERA and the Rules.
19. It is pertinent to note that even assuming that a project that has part occupancy certificate is required to be registered, the RERA and the rules made thereunder require a promoter to furnish information and make several declarations for the purposes of registration. Information such as project cost, time of completion etc. are required to be furnished. For a project that has already been completed, it would not be possible for the promoter to furnish the requisite information required for registration.
20. A contention has been raised that the decision rendered on 12th September, 2018 by this Authority in Haresh Ashar V/s Crown Buildmart would answer the preliminary objection raised by the Respondent as to whether or not a development which has received Part Occupation Certificate is nevertheless required to be registered. This contention is incorrect for following reasons:-
- (i) The decision in Haresh Ashar's case was subject matter of Appeal before the Hon'ble Maharashtra Real Estate Appellate Tribunal in Appeal No. AT006000000010684 where a single judge of the Appellate Tribunal vide Order dated 26th October, 2018 confirmed the Order dated 12th September, 2018. This Order of the Appellate Tribunal is without jurisdiction and contrary to Sections 42 and 43 of the RERA. The Hon'ble Bombay High Court has in two decision i.e. L&T Parel Projects LLP vs Rekha Sinha and Man Global Limited vs Ram Joukari held that the Appellate Tribunal must necessarily function as a bench comprising of at least two members of which at least one member must be

a judicial member. In these circumstances, Order dated 26th October, 2018 is in a nullity.

- (ii) The Hon'ble Bombay High Court has in the case of Sanjay Phulwaria and Maharashtra Real Estate Authority & Ors. in Writ Petition No. 3701 of 2019, by its Order dated 11th September, 2019 specifically considered this very contention in paragraphs 6 to 8 of the aforesaid order and notwithstanding this argument being specifically raised, permitted this Respondent to raise the objection of jurisdiction before this Hon'ble Authority.
- (iii) It would therefore be incumbent upon this Authority to consider the issue of jurisdiction in its entirety and on all aspect and not merely dismiss the same on the basis of Order dated 12th September, 2018 and 26th October, 2018 particularly where the Order dated 26th October, 2018 is entirely without jurisdiction.
- (iv) The Order dated 12th September, 2018 does not answer the question as to whether or not the development which admittedly has obtained Part Occupation Certificate prior to cut off date contemplated in Section 3 of the RERA, is required to be registered under the provisions thereof. While the said Order dated 12th September, 2019 purports to state that MahaRERA can exercise the jurisdiction for such developments, the question as to whether such development must be registered or not has been considered. It is this issue which this Hon'ble Authority is presently concerned with.
- (v) Finally, it is submitted that the issue of jurisdiction is an issue which goes to the root of the Authority's power to grant reliefs. Jurisdiction cannot be confirmed even by consent. Where the legislature does not prescribe for such

developments to be registered, requiring to do so would be contrary to law and *per incuriam* the relevant provisions.

(vi) Admittedly, the Complaint in the Hareesh Ashar's case has been settled as recorded in Order dated 27th February, 2019. Subsequently, the Complainant in that case has also filed an Affidavit before this Hon'ble Authority withdrawing the very complaint that was filed in the first case. In the circumstances and considering that the parties before this Hon'ble Tribunal are not the same no question of res-judicata or constructive res-judicata can apply even though it concerns the same development.

(vii) There are three other Orders in the case of Akash Gupta V/s. Bellisimo Crown Buildmart Ltd, dated 18th December, 2017, Pravin Shah V/s. Bellisimo Crown Buildmart Ltd. and Sanjay Fulwaria V/s. Bellisimo Crown Buildmart Pvt. Ltd. which were in fact decided even prior to the Order dated 12th September, 2018 which specifically hold that this Authority does not have jurisdiction over un-registered development. This Hon'ble Authority must therefore decide the issue afresh taking into consideration all necessary contentions and arguments.

2). The Respondent submits that this Authority's jurisdiction and the manner in which complaints are to be filed is evident from two circulars issued by this Authority. The first circular is relating to the Standard Operating Procedure for adjudicating a Complainant in registered project. This Circular being Circular No. 09/2017 dated 24th July, 2017 specifically provides that Complaints will only be entertained in relation to projects registered with the Authority. The second Circular being Circular No.23 / 2018 dated 26th November, 2018 relating to the handling Complainants for non-registered project. In respect of unregistered projects, the Authority has prescribed an entirely different process that must be

adopted by any Complainant to raise grievance in relation to any development which has not been registered with the Authority, but which the complainant claims ought to be registered.

22. In the present case, the Complainants have filed the Complaint under the first of two circulars by submitting the registration number for developments other than those in which their flats are located. As noted hereinabove, the concept of a building being divided into two parts or phases is recognized not only by the DCR which contemplates grant of a Part Occupation Certificate but also by the RERA itself. Where one part of the building is registered as a project and another part has not been registered, the flat purchaser in that part of development which has not been registered, cannot rely on the registration number for the registered phase to file a complaint before this Authority. If at all they claim the project in which they have purchased a flat requires registration, they must necessarily follow the procedure set out in the second Circular. This has admittedly not been done in the present case and the Complaints are therefore liable to be dismissed on this ground alone.

23. It is pertinent to note that all of the complainants in these proceedings have been offered possession of their respective flats. In fact, the four towers that are subject matter of these proceedings have already obtained full occupation certificate. There are in all 1254 allottees in the development of which 954 have already taken possession.

24. Another aspect that may be considered by this Hon'ble Authority is that the Respondent has been guided by and has relied upon FAQ 11 of Additional FAQ-2 issued by the Authority itself to not register the project. In this regard, FAQ 11 is set out hereinbelow:

"Q.11: If O.C. / B.C.C. are issued in May/June/July, does project have to be registered?"

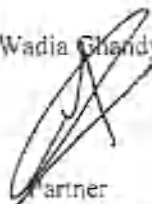
Ans: On-going projects have time till 30th July to register. If before doing registration, the project has got OC/BCC, the project has been completed as per section 3(3) of the Act. Hence, it does not require registration."

25. The Respondent submits that the effect of permitting Complaints such as the present one and directing the Respondent to register the Real Estate development which is outside the definition and scope contemplated by the RERA merely on the basis that one part of building has been registered and some provisions of the RERA appear to continue to operate even after the procurement of an occupation certificate would result in serious and drastic consequences. It is submitted that these are projects which were admittedly initiated and commenced prior to the promulgation of the RERA in May 2017. The act is not retrospective in nature and does not seek to rewrite contracts executed between the parties. It is submitted that in the event that this Hon'ble Authority is to come to the conclusion that the development must also be included within the ambit of the RERA, the same would tantamount to overreaching the legislative intent clearly stipulated under the RERA. Such a step would revive cases of persons who have slept over their rights and who's claims are time barred and burden the entire system with mischievous litigants.

26. It is therefore submitted in light of the above that the said Complaints must be dismissed as this Authority has no jurisdiction to entertain complaints for projects that require no registration.

Dated this ^{27th} Day of December 2019

For Wadia Ghandy & Co.



Partner
Advocates for Respondent

BEFORE THE ADJUDICATING OFFICER,
MAHARASHTRA

COMPLAINT NO. CC006000000057449

Zahida Khan & Riyaz Khan	... Complainants
V/s	
Lodha Developers Ltd.	... Respondent

WRITTEN SUBMISSIONS
ON BEHALF OF THE RESPONDENT

Dated this day of December 2019

M/s. Wadia Ghandy & Co.
Advocates for the Respondent,
N.M. Wadia Building,
123, M.G. Road,
Fort, Mumbai – 400 001

DJM-HC-10640

**THE MAHARASHTRA REAL ESTATE REGULATORY AUTHORITY
MUMBAI.**

COMPLAINT NO: CC006000000056052

Zainub Sayed

... Complainant.

Versus

Lodha crown buildmart

... Respondents.

(NEW CUFFE PARADE - LODHA ENCHANTE 41st to 43rd Floor)

Appearance:

Complainant: Adv. Pawar.

Respondents: Adv. Nirman Sharma.

COMPLAINT NO: CC006000000056890

Bhavesh Nandani

... Complainant.

Versus

M/S. Lodha Developers Ltd

... Respondents.

(NEW CUFFE PARADE - LODHA ENCHANTE 41st to 43rd Floor)

MahaRERA Regn: P51900000367

COMPLAINT NO: CC006000000056891

Bhavesh Nandani

... Complainant.

Versus

M/S. Lodha Developers Ltd

... Respondents.

(NEW CUFFE PARADE - LODHA EVOQ 41st Floor)

MahaRERA Regn: P51900000567

Coram: Shri B.D. Kapadnis,

Hon'ble Member & Adjudicating Officer.



Appearance:

Complainants: Adv. Kaustubh Patil.

Respondents: Adv. Nirman Sharma.

COMMON ORDER

2nd April 2019.

In all the three cases the complainants have complained that the respondents have constructed lesser area of their booked flats than agreed and therefore, the matters were referred to the Technical Expert Mr. Hadadare who has filed his reports. After perusing the reports, I find that the balcony and elevation treatment have been included in carpet area and though the elevation treatment areas are indicated separately in plan, the respondents have sold them as per carpet area defined in their agreements. The report further shows that the height of the elevation treatment is brought to the height of the floor and the planks are placed on them to make them habitable and fit for human use.

2/- The part occupancy certificate relied upon by the respondents, shows that it is conditional. The conditions are,

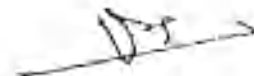
1. That the provisions in the proposal which are not confirming to the applicable Development Control Regulations and other Acts are deemed to be not approved;
2. That the certificate under Section 270-A of Bombay Municipal Corporation Act shall be obtained from Hydraulic Engineer and a certified copy of the same shall be submitted to this office;
3. That any change in user in future would require prior approval of MMRDA;
4. That if any user mentioned in completion/as built plans is found changed at any time without prior permission of MMRDA, then this part occupation certificate granted to your premises will be treated as cancelled and appropriate action will be taken.



5. The buildings u/r shall be painted by owner/holders once in five years to maintain outer beauty of these building as per Regulation 16.3 of WTT's DCR - 2010.
6. The applicant shall complete the unfinished internal works before applying for grant of full Occupation Certificate of the building u/r or before handing over the physical possession of premises for habitation whichever is earlier, as ensured by the applicant in his undertaking dt. 26/05/2017.

3. Therefore, it appears that the construction was not completed when the part occupancy certificate dated 08.06.2017 had been issued by the Planner, Town & Country Planning Division of MMRDA. It is also necessary to ascertain as to whether the balcony and elevation treatment can be included in carpet area and whether it is permissible under law. If it amounts to fungible FSI, whether the respondents have paid necessary charges to the planning authority for using it. In order to ascertain all these legal and factual aspects, it is necessary to summon the Planner, Town & Country Planning Division of MMRDA who has issued the part occupancy certificate bearing No. TCP/WTI/Block-C/CC/Vol-X/1153/2017 dated 8th June 2017 to disclose-

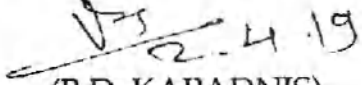
- 1) Whether the part of the building of which part O.C. is issued was incomplete and if it was incomplete, to what extent?
- 2) Whether he noted the inclusion of balcony and Elevation Treatment in the floor area at the time of issuance of part O.C.?
- 3) He shall clarify whether the Elevation Treatment can be raised to make it habitable. If no, whether it is violation of the approved plan?
- 4) Whether inclusion of balcony and Elevation Treatment in usable area amounts to fungible FSI, if yes, whether the respondents have made payment of necessary charges thereof to MMRDA?



4. He shall produce the copies of the documents submitted by the promoter on the basis of which part O.C. has been issued such as promoters undertaking, indemnity bond, architects certificate etc.

5. The witness to appear before Member-II & Adjudicating Officer, MahaRERA on 25th April 2019 at 11.00 a.m. The summons be served through the Metropolitan Commissioner, MMRDA, Mumbai.

Date: 02.04.2019.


(B.D. KAPADNIS)
Member-II & Adjudicating Officer,
MahaRERA, Mumbai.

**THE MAHARASHTRA REAL ESTATE REGULATORY AUTHORITY
MUMBAI.**

COMPLAINT NO: CC006000000056052

Zainub Sayed

... Complainant.

Versus

Lodha Crown Buildmart

... Respondents.

(NEW CUFFE PARADE -

LODHA ENCHANTE 41st to 43rd Floor)

MahaRERA Regn: P51900000367.

Appearance:

Complainant: Adv. Avinash Pawar.

Respondent: Adv. Sunilraja Nadar.

COMPLAINT NO: CC006000000056890

Bhavesh Nandani

... Complainant.

Versus

M/S. Lodha Developers Ltd.

... Respondents.

(NEW CUFFE PARADE -

LODHA ENCHANTE 41st to 43rd Floor)

MahaRERA Regn: P51900000367.

Appearance:

Complainant: Adv. Kaustubh Patil.

Respondent: Adv. Sunilraja Nadar.

COMPLAINT NO: CC006000000056891

Bhavesh Nandani

... Complainant.

Versus

Lodha Developers Ltd.

... Respondents.

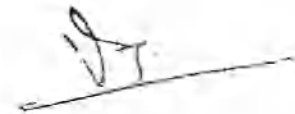
(NEW CUFFE PARADE - LODHA EVOQ 41st Floor)

MahaRERA Regn: P51900000567.

Appearance:

Complainant: Adv. Kaustubh Patil.

Respondent: Adv. Sunilraja Nadar.



ORDER
5th March 2019.

Heard the learned advocates of the parties in all the three complaints. It is the allegation of the complainants that the respondents have constructed the flats of smaller size than the agreed one. The learned advocate of the respondents submits that the carpet areas has been defined in the agreements/allotment letters and the parties have agreed thereon. Hence, the said yardstick should be applied. The advocates of the complainants submit that the booking has been done when MOFA Act was holding the field which specifies carpet area and therefore, yardstick should be the carpet area specifies by the MOFA. After giving thought to the rival contentions, I find that it is necessary to refer the three matters to the Technical Expert of the Authority to find out whether the flats of smaller size have been constructed by the respondents than the agreed one. However, when the matters would be decided on merits, it would be decided as to which yardstick should be applied in computing the area of the flat. To be on safer side, it is necessary to apply yardstick of the carpet area specified by MOFA and mentioned in the agreements/allotment letters to find it out whether the flats are really of smaller size. Hence the following order.

P

ORDER

The three matters are hereby referred to the Technical Expert of the Authority.

The Technical expert shall report to the Authority as to whether the respondents have constructed flats of smaller size than the agreed one by applying yardstick of the carpet area specified by MOFA and mentioned in the agreements/allotment letters separately,

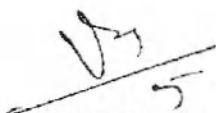


The parties are directed to appear before the expert as and when required by him and they shall produce necessary documents.

The expert shall submit the report within ten days.

Mumbai.

Date: 05.03.2019.


(B. D. Kapadnis)
Member & Adjudicating Officer,
MahaRERA, Mumbai.

Maharashtra Real Estate Regulatory Authority
MUMBAI



Date: 23/1/2019

CC006000000056052

zainub sayed.....Complainant

VS

Lodha Crown BuildmartRespondent

SUB : interim application

Dear sir,

As one of the reliefs sought is with regards to deficiency in carpet area of the flat provided by the promoters , the complainants pray to authority to direct promoters to permit the complainants to measure the flat along with an measuring Expert .

Thanks And Regards

Advocate for the complainants

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Allowed. complaint
to give notice in
advance to the respondents
and the measurement
be made in the presence
of the representative
to Respondents