

**BEFORE THE  
MAHARASHTRA REAL ESTATE REGULATORY AUTHORITY,  
MUMBAI**

**Complaint No.CC006000000057446**

**Harish Mahtani**

**Complainant**

**Versus**

**1. M/s. Lodha Developers Ltd.  
MahaRERA Regn No.P51900000567**

**Respondent**

**Coram : Shri M.V. Kulkarni  
Hon'ble Adjudicating Officer**

**Appearance :-**

**For Complainant – Adv.Koustubh Patil**

**For Respondents –Adv.Abir Patel**

**FINAL ORDER**

31.12.2020

1. The Complainant-allottee who had booked a flat with the respondent/promoter seeks withdrawal from the project and refund of his amount with interest and compensation.

2. As per detailed complaint, complainant is NRI citizen. He agreed to purchase Flat No. 5203 in A Wing of building Enchante admeasuring 1086 sq. ft. carpet area for a consideration of Rs. 3,25,91,295/- in the project New Cuffe Parade, of the respondent. The complainant desired to purchase residential flat with several amenities. Respondent represented that his project was being implemented in phase-wise manner and in the first phase, 4 buildings Evoq, Enchante, Dioro and Elisium were to be

constructed. It was represented that building Enchante will consist of 55 upper floors and payment was to be made slabwise. Complainant made initial payment and respondent issued allotment letter. Thereafter complainant made various payments in accordance with payment schedule. Respondent informed that as about 20% of total consideration was paid, agreement for sale will have to be executed and registered. Respondent informed that agreement was ready for stamping and registration and therefore, demanded stamp duty, registration and other taxes. Respondent prepared agreement for sale unilaterally and without giving opportunity to complainant to read and understand the terms, it was executed. It was represented that it was a standard agreement as per applicable laws. Complainant relied on the allotment letter as well as promotional material which was given to the complainant.

3. As per representation made by respondent, possession of the flat along with all amenities was to be given by 30.06.2016. The complainant therefore, made various payments as per demand notices. It was represented that construction was being done as per payment schedule. However payments were demanded when construction was not actually completed as per schedule. The respondent informed that civil aviation authority has reduced the height of the building and therefore, respondent will construct building only up to 45 floors. Said construction was already completed. Since the respondent had no permission for constructing 55 floors, the complainant was directed to take another unit. Then complainant was allotted Flat No. 3903 in A Wing in building Enchante, admeasuring 1086 sq. ft. and an agreement in respect of Flat No. 5203 was cancelled by executing a deed of cancellation. Respondent requested the

complainant to execute agreement for sale in respect of Flat No.3903, whereunder possession date will be the same as 31st December, 2016. The complainant was not given opportunity to read and understand the terms of agreement.

4. Respondent failed to deliver possession of the flat as per terms. Complainant received offer of possession letter, dated 19th Jan. 2018. Complainant visited the flat and found that it was not habitable and several works were going on. Possession letter was issued only to show that the flat was ready, when same was not ready. There is deficiency in carpet area. Complainant was not shown the sanctioned plan. Respondent has always been using dominant position and coercing the complainant to fall in line. Complainant has paid a total sum of Rs. 3,32,20,153/- for the price of the flat and other charges.

5. Complainant obtained sanctioned plan from MMRDA and found that area was only 749.49 sq. ft. and not 1086 sq. ft., as promised. Complainant appointed licenced surveyor and architect to measure the flat, who have made their reports. Floor plan was not in conformity with the plan which was sanctioned by MMRDA. The respondent without consent of the complainant, made alterations to the said floor plan. Respondent has illegally defined term carpet area in the agreement, and has included all passages, decks, balconies, service slabs, cupboards, niches, and/or any other area which the purchaser is exclusively entitled to use. This is in utter violation of D.C.Rules and regulations. Complainant has now learnt that the actual carpet area is 749.49 sq. ft. and there is shortfall of 336.51 sq. ft. and the respondent has cheated the complainant. Therefore, complainant seeks refund of Rs. 3,32,20,153/- with interest @

18% p.a. and also compensation of Rs. 50,000/- for the mental agony and harassment to him as well as legal charges.

6. This complaint along with sister complaints CC006/56889, , CC006/57445, CC006/57447 and CC006/57450 came up before me on 13.11.2019. Matter was adjourned for filing say by respondent to the application of the complainants dated 13.11.2019 and to file written explanation by respondent. It appears that complainants had preferred Writ Petition No. 3701 of 2019 against the respondent. By order, dated Sept. 11,2019. the Hon'ble High Court directed the Adjudicating Officer to take up complaints for adjudication in accordance with law. While adjudicating them, the Adjudicating Officer shall consider the objection to jurisdiction and powers of authority raised by Lodha Developers Ltd. All objections touching this aspect are kept open for being raised. The objections shall not be treated as preliminary nor shall any evidence only on the point of jurisdiction will be rendered. The complaint as a whole should be taken up and decided in accordance with law.

7. The complaints were adjourned to 17.01.2020. Again time was sought by the respondent and was granted on costs of Rs.2000/-. Respondent filed written explanation on 24.02.2020. Thereafter hearing could not be taken up and was adjourned due to corona pandemic. Virtual hearing was taken up on 17.09.2020 and arguments were partly heard on 03.11.2020, 05.11.2020 and 06.11.2020,19.11.2020,20.11.2020.

8. Respondent in his written explanation has alleged that the complaint is not maintainable. Respondent has obtained occupancy certificate for Ground + 40 floors for first phase of this building, including Flat No.A/3903 on 39th floor (said flat) on

8th Jan. 2017. As per Section 3 of the Real Estate (Regulation & Development) Act, 2016, only the phases of a project that have not obtained occupancy certificate, in 3 months, are required to be registered with the Authority. The query to that effect was answered that if the project has got O.C., it does not require registration. Therefore, respondent has not registered the project from Ground up to 40 floors. As per Standard Operating Procedure of MahaRERA under Circular No. 10/2018, dated 26.11.2018, complaint can only be filed against registered projects. Therefore, this complaint is not maintainable and there are various orders passed by the Authority in that respect. Therefore, as per order passed in Complaint No. 56052 it will not require any registration under the Act and only Section 11, 14(3) and 17 of RERA will apply, but Section 18 will not be attracted.

9. Adjudicating Officer appointed under Section 71 of the Act has powers only to quantify the compensation. To decide whether project required registration under Section 3 of the Act, only the Authority is competent. It is settled through a catena of judgments of MahaRERA that the complaints of projects that are not registered under Section 3 are not maintainable. Therefore, complaint deserves to be dismissed.

10. As per agreement, dated 22nd Jan. 2014, date for fit out possession was June. 2016. The complainant was continuing in the project after 30th June, 2016. Complainant was offered possession on 22nd Jan. 2017. Complainant refused to take possession. The contractual date for possession is 30th June 2018 and O.C. has been obtained prior to it. Respondent is not responsible, as respondent offered possession as per terms of

agreement. The date of possession June, 2016 was subject to extension on account of factors described in clause 11.1 and 11.2 of the agreement. There was a grace period of one year for possession with O.C.. Even otherwise, the present complaint is barred by law of limitation.

11. Under clause 11.3 of the agreement, complainant was entitled to terminate the agreement, but he elected to continue with the project. Last payment was made by complainant was 29th June, 2017. Thus complainant made payment beyond June, 2016 and thus waived possession date of June 2016. The complainant has acquiesced and even accepted the extension of possession date after December, 2016.

12. It is denied that complainant was not given opportunity to read the agreement. As per clause 11.1, date for possession with O.C. was June, 2017. Clause 11.2 provides for further grace period of one year. Therefore, possession was due only by June, 2019. O.C. was obtained on 8th June, 2017 and possession was offered on 22nd June, 2017.

13. As per commencement certificate, dated 9th December, 2011 for the phase of the project, respondent was required to obtain NOC from Civil Aviation Authority for approval of height for construction. Respondent applied to Civil Aviation Authority for approval of height of 225 meters. Civil Aviation Authority granted NOC for the height of 139.90 meters on 30th Oct. 2013. Respondent addressed letter on 28th July, 2015 to the authorized committee. Because of grant of NOC up to height of 139.90 meters, respondent was unable to consume available FSI, though it was sanctioned. Though NOC up to 187.9 meters

was granted, it was cancelled by issuing 3 letters and height was reduced to 136.43 meters. Respondent was therefore, constrained to reduce the number of floors from 63 to 45. No prejudice is caused to the complainant in reducing the number of floors and to the amenities.

14. Carpet area of sanctioned plan is as per calculation adopted by planning authority i.e. MMRDA, which excludes parts of the flat for calculating carpet area. The carpet area of the flat is as per agreement and as per sanctioned plan.

15. The complainant is only an investor and is malafide using this forum to make a return of his investment by seeking exit from the project. Complainant is not entitled to claim the reliefs. The complaint therefore, deserves to be dismissed.

16. Following points arise for my determination. I have noted my findings against them of the reasons stated below:

**POINTS**

**FINDINGS**

- (i) Does the MahaRERA Authority and Adjudicating Officer have jurisdiction to try this complaint ? ..... Affirmative
- (ii) Is the complainant an allottee and respondent promoter ? .... .. Affirmative
- (iii) If yes, has the respondent failed to deliver possession as per agreement without there being circumstances beyond his control ? .. .. Negative.

- (iv) Has the respondent made unauthorized changes in the project including reduction of carpet area ?.. .. Negative.
- (v) Is the complainant entitled to the reliefs claimed ? .. .. Negative.
- (vi) What order? .. .. As per final order

### **REASONS**

17. **POINT No.(i)** : It is the contention of the respondent that the project New Cuff Parade and the phase therein of constructing ground + 40 floors in the building "Enchante" has received occupancy certificate on 8th Jan. 2017. Consequently, this project was not required to be registered under the RERD Act(henceforth RERA) and no complaint in respect of this project is tenable either before the Authority or before the Adjudicating Officer.

18. Let us firstly scrutinize the provisions under RERA *vis-a-vis* provisions under MOFA, which is a legislation of Maharashtra State. MOFA is applicable to flats for residence, office etc Section 3 of MOFA casts burden on the promoter to make full and true disclosure of the nature of his title to the land; disclosure of encumbrances, to give inspection of plans and specifications; reasonable notice or demand, if the promoter is a builder, the prescribed particulars as respects the design and materials to be used in construction; specify in writing the date by which possession of the flat is to be handed over; prepare and maintain list of flats with their numbers already taken or agreed to be taken and the names and addresses of the parties;



state in writing, the precise nature of organization to be constituted; not to allow possession until completion certificate is obtained, etc. Also selling the flat on the basis of carpet area only. Under Section 4, promoter is not empowered to obtain more than 20% of the sale price before entering into written agreement for sale and the agreement has to contain all the details. Section 5 casts burden upon the promoter to maintain separate account of sums taken and to be trustees therefor; and disburse them for the same purpose. Section 7 casts burden not to make alterations and additions in the plan without consent of persons who have agreed to take flats. Section 8 provides for refund of amount paid with interest for failure to give possession within prescribed time. Section 10 casts burden on promoter to take steps for formation of cooperative society and Section 11 casts burden to convey title and execute documents accordingly. For failure to comply with the provisions, punishments are provided under Section 13. Under Section 18, the Act is not applicable to MHADA and boards established under MHADA.

19. As against this, provisions of RERA are more rigorous and projects come within public domain i.e. on RERA website even before allottee approaches promoter and has more chances to scrutinise project details. This enactment broadly provides for 3 functions viz registration of big projects, imposing penalties for defaults in obligations cast by this Act & compensation for defaults recognised by this Act. Under RERA, Section 2(2n), "Real Estate Project means development of a building or a building consisting of apartments, or converting an existing building or a part thereof into apartments, or the development of the land into plots or apartments, as the case may be, for the purpose of selling all or some of the said apartments or plots or

building, as the case may be, and includes common areas, the development works, all improvements and structures thereon, and all easement, rights and appurtenances belonging thereto. Under Section 2(e) "apartment" also includes office, showroom, shop, godown, premises, suit, tenement, unit etc. for residential or commercial use or use ancillary to the purpose specified. Similar definition of "flat" is found under MOFA. Definition of "allottee" is found under Section 2(d) of RERA and promoter u/s2(zk).They are not restricted to RERA registered projects.

20 . Section 3(1) of the RERA prohibits advertising, marketing, offering for sale etc. any real estate project or part of it in any planning area without registering the real estate project with the Real Estate Regulatory Authority. Under Subsection 2 registration is exempted for projects with area up to 500 sq.mtr.or no.of apartments in all phases not exceeding 8. For projects ongoing on the date of commencement of the Act, for which completion certificate has not been issued, the promoter shall be required to apply to Authority for registration. Under further proviso, if the Authority thinks necessary in the interest of allottees, it may direct promoter of a project developed beyond planning area, which required requisite permission of the local authority, to register it with the RERA Authority.

21. Section 5 provides for powers of the Authority to grant registration. Section 6 provides for powers to extend registration and Section 7 provides for revocation of registration and Section 8 casts obligation on the Authority for taking steps upon lapse or revocation of registration viz. to take steps for completion of the project. Section 4 provides for requisites while filing application for registration of real estate projects which requires brief details of the enterprises, details of the project,

authenticated copy of approvals, sanctioned plan and/or lay out plan of development works to be executed. Then legal title to the land, then an undertaking to complete the project or phase thereof, then to deposit 70% of the amount realized from allottees in a separate account. Under Section 11, it is the duty of the promoter to create web page and to enter necessary details also to issue allotment letter at the time of booking and shall be responsible to make available to the allottee information like sanctioned plan, stage wise schedule of the completion of the project, etc. The promoter is responsible to obtain completion certificate or occupancy certificate from the competent authority. Under Section 13, promoter shall not obtain sum more than 10% of the cost of the apartment without entering into written agreement for sale.

22. As per preamble to the RERA, this is an Act to establish Real Estate Regulatory Authority for regulation and promotion of real estate sector and to ensure sale of plot, apartment or building, as the case may be or sale of real estate project, in an efficient and transparent manner and to protect the interest of consumer in the real estate sector and to establish adjudicating mechanism for speedy dispute redressal and; also to establish the appellate tribunal to hear appeals from decision, direction or orders of the Real Estate Regulatory Authority and adjudicating officer and for matters connected therewith or incidental thereto. Thus preamble speaks of regulation and promotion of real estate sector as a whole and this is a central legislation, its provisions are applicable throughout the nation with exceptions given in the Act.

23. Section 12 casts obligation on promoter to pay compensation, if he takes advance or deposit on the basis of information contained in advertisement or prospectus etc. and loss is caused to the allottee by reason of incorrect or false statement included therein and to return the entire investment with interest and compensation, if the allottee intends to withdraw from the project. Section 14 casts burden on promoter for adherence to sanctioned plan and project specifications, as sanctioned by the competent authorities and not to make additions, alterations without the consent of the person concerned and in respect of common areas without the consent of the 2/3rd of the allottees. For the violations, promoter is liable to pay compensation. Section 15 casts obligation on promoter in respect of transfer of real estate project to third party, section 16 regarding insurances of real estate project and section 17 regarding transfer of title. Section 18 provides for refund of money with interest and compensation, if promoter fails to complete or unable to give possession of apartment or building in accordance with the terms of agreement or due to discontinuance of business as a developer on account of suspension or revocation under the Act. If the allottee does not intend to withdraw, then to pay interest for every month of delay and also compensate allottees in case of loss caused due to defective title. Also if the promoter fails to discharge any of the obligation under the Act or in accordance with the terms and conditions of agreement for sale, he shall be liable to pay compensation to the allottee in the manner provided under the Act. Section 19 provides rights and duties of allottees. Under Sub-Section (4) allottees are entitled to claim refund of the amount with interest and compensation, if promoter is unable to deliver possession in accordance with terms of agreement or due

to discontinuance of his business as a developer on account of suspension or revocation of registration under the provisions of this Act. Only section 11 casts burden on promoter of RERA registered project to create his web page. Other aforesaid provisions are not restricted only to RERA registered projects.

24. Constitution of Real Estate Regulatory Authority is provided under Section 20 and its functions are provided under Section 32 including protection of interest of allottees and promoters and real estate agents. Section 34 also provides for functions of authority including registration and regulation of registered real estate projects, to publish and maintain website of records of all registered real estate projects, to maintain database on its website for public viewing, etc. Section 35 provides for powers of authority to call for information and to conduct investigation and Section 36 to issue interim orders, Section 37 to issue directions for discharging its functions under the provisions of Act or rules or regulations and Section 38 provides for powers of authority to impose penalty or interest in regard to contravention of obligation. Chapter VIII provides for offences, penalties and for adjudication. Power to inflict penalties is conferred upon the Authority under Section 38. Power to adjudge compensation under Section 12, 14, 18 and 19 is conferred upon the Adjudicating Officer under section 71.

25. The contract between the allottee and promoter contemplates paying of the price of the unit by the allottee in anticipation of receiving possession of the unit from the promoter as per promises. There could be situations where promoter fails to deliver possession within the period prescribed under the agreement or quality of the unit, of which possession is delivered

is not as per the terms of agreement. One of the courses open to the allottee in such situation is to seek specific performance of contract or claim damages for breach of contract in a civil court. Other remedy is to approach the consumer court to get relief in respect of defect in goods or deficiency in services. RERA was enacted for purpose of regulation and promotion of real estate sector and the sale in real estate project in an efficient and transparent manner and to protect interest of consumer in real estate sector and to establish adjudicating mechanism for speedy dispute redressal. Ongoing projects in planning area are required to be registered with the authority. There could be situations where the authority may not be aware of a big project coming up beyond planning area and therefore, not in a position to enforce its registration with the authority. There could be situations where mega projects are taken up beyond the planning area or beyond the jurisdiction of local authority. If such projects are beyond the control of the authority, the allottees in such projects would not have the speedy remedy available under the RERA and they will be required to approach other forum. The question is whether a promoter of unregistered project be allowed to escape rigour of this enactment? The answer has to be no. This will be against the spirit of this enactment. As referred earlier, there are some provisions under this enactment for enforcing of agreements irrespective of whether the project has been registered with Authority or not.

26. The point about unregistered projects was raised before Hon'ble Bombay High Court in Writ Petition No. 908 of 2018 - Mohad. Jakir Khan v/s. MahaRERA and others. The order of Hon'ble High Court, dated 31.07.2018 reads that, the matter came to be disposed off by consent of parties. The petitioner

was making grievances in respect of failure of MahaRERA and Appellate Authority to take cognizance of complaint entered by complainants in respect of unregistered projects. It was submitted on behalf of MahaRERA that on completion of process of upgradation of software quality for receiving online complaints in respect of unregistered projects by MahaRERA, it would be open for the petitioners to register the complaint in accordance with the procedure prescribed in that behalf. Writ Petition came to be disposed off in view of statement made on behalf of MahaRERA.

27 . So far as non-registered projects required to be registered under the provisions of RERA, the procedure to be followed has been laid down in the enactment itself. However, there are situations contemplated in the enactment where there are breaches of terms, committed by the parties to an agreement and the consequences to be followed, even though the project is not registered with the authority. In such circumstances, in my humble opinion, the authority and the adjudicating officer will have jurisdiction for redressal of the grievance as provided under the Act.

28. In the case at hand, earlier, the complainants had filed complaint No.12 and it was dismissed for want of jurisdiction, as respondents stated that already occupancy certificate was received. The complainants then filed Writ Petition No. 2639 of 2018. The complainants have alleged that Hon'ble High Court disposed off that complaint by giving direction to planning authority to check adequate safety measures and supervise work. Copy of that order is not placed on record by parties.

29 .The order passed by full bench of Authority in the present and sister complaints reads that- provisions of RERA are

applicable only to registered projects as clarified by Hon'ble High Court in Writ Petition No. 2737/2017 - Neelkamal Realtors v/s. Union of India. Therefore, issue of registration of project has to be decided first before entertaining any complaint regarding the project.

30. It is the contention of the respondent that since there was a full bench order where it is held that the authority will not get jurisdiction if the project is not registered, the judgment of single member in Asher's case, is a judgment per incuriam. On the other hand, it is submitted on behalf of complainant that the judgment in Haresh Asher was upheld by the Appellate Tribunal and it has achieved finality. What was held by the learned Member and Adjudicating Officer was that though occupancy certificate was received, amenities as per agreement were not provided and therefore, the authority was having jurisdiction to decide this issue. What was submitted on behalf of respondent was that the order passed by learned Member was interim order and not a final order. Later on complaint came to be withdrawn and therefore, there is no finality to this order. The fact however remains that the finding of Hon'ble Member that the authority is having jurisdiction as the amenities were not yet provided as per agreement, was upheld by the Hon'ble Appellate Tribunal. Challenge to said finding was not pursued before Hon'ble High Court.

31 .We will have to see what are the relevant provisions regarding powers of A.O.

Section 71 reads as follows:

1. For the purpose of adjudging compensation, u/s 12, 14, 18 and 19, the authority shall appoint in consultation



with appropriate government, one or more judicial officer as deemed necessary who is or has been a District Judge, to be an Adjudicating Officer for holding an enquiry in the prescribed manner, after giving any person concerned a reasonable opportunity of being heard. Provided that any person whose complaint in respect of matter covered u/s 12,14, 18 and 19 is pending before consumer disputes redressal forum or the consumer disputes redressal commission or the national consumer redressal commission established u/s 9 of Consumer Protection Act on or before commencement of this Act, he may with the permission of such forum or commission as the case may be, withdraw the complaint, pending before it and file an application for adjudging compensation. Under sub section 1, Complaint shall be dealt with by Adjudicating Officer as expeditiously as possible and dispose of the same within a period of 60 days from the date of the application.

2. Provided that if any such application could not be disposed off within said period of 60 days, the AO shall record his reasons in writing for not disposing off the application within that period.
3. While holding an enquiry, AO shall have power to summon and enforce attendance of any person acquainted with the facts and circumstances of the case, to give evidence or to produce any document which in the opinion of Adjudicating Officer, may be useful for or relevant to the subject

matter of enquiry and if in enquiry he is satisfied that person has failed to comply with provisions of any of the sections specified in sub-section 1, he may direct to pay such compensation or interest as the case may be, as he deems fit in accordance with the provisions of any of those sections.

32 ...Section 72 reads that while adjudging the quantum of compensation, or interest as the case may be u/s 71, the AO shall have due regard to the following factors viz.

- (a) The amount of disproportionate gain or unfair advantage wherever quantifiable, made as a result of the default;
- (b) The amount of loss caused as result of the default;
- (c) The repetitive nature of the default;
- (d) Such other factors which the adjudicating officer considers necessary to the case in furtherance of justice.

33 ..Section 31 provides for filing of complaints with the authority or the adjudicating officer.

- (1) Any aggrieved person may file a complaint with the authority or the AO as the case may be for any violation or contravention of the provisions of this Act or Rules and Regulations made thereunder against any promoter or an allottee or real estate agent as the case may be.
- (2) The form, manner and fees for filing complaint, under sub-section 1 shall be such as may be prescribed

34 .Section 12 provides for awarding compensation where any person makes an advance on the basis of information contained in advertisement etc. and sustains loss or damage by reason of incorrect,/ false statement.

Under the proviso, if the person affected, intends to withdraw from the proposed project, he shall be returned his entire investment alongwith interest at such rate as may be prescribed and compensation, in the manner as provided under the Act.

35 Section 14 provides for adherence to sanctioned plans and project specifications by the promoter and no alterations can be made without previous consent of that person except minor additions and alterations. Any other alterations and additions, are not permissible, without written consent of at least 2/3<sup>rd</sup> of allottees other than promoter. Under Sub-section 3 in case of structural defects etc. ,if it is brought to the notice of promoter, within a period of 5 years, by the allottee, from the date of handing over possession, it shall be duty of promoter to rectify such defects without further charge within 30 days and in the event of promoters' failure to rectify such defects, within such time, aggrieved allottee is entitled to receive appropriate compensation in the manner as provided under this Act.

36 Under Section 18 (1), if the promoter fails, to complete or is unable to give possession of an apartment, plot or building,

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

(b) due to dis-continuance of his business as a developer, on account of suspension, for revocation

of registration, under this Act, or for any other reason, he shall be liable on demand to the allottees in the case the allottee wishes to withdraw from the project, without prejudice to any other remedy available, to refund the amount received by him in respect of the apartment, etc, with interest at such rate as may be prescribed in this behalf, including compensation in the manner provided under this Act. Under the proviso, if allottee does not intend to withdraw, he shall be paid, interest for every month of delay, at such rate as may be prescribed. Under sub-section 2 promoter shall compensate allottee in case of any loss caused due to defective title to the land. Under Sub-section 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.

37 Section 19, provides for rights and duties of the allottee and under Sub-section 4 he shall be entitled to claim refund, with interest and compensation, if promoter fails to comply or is unable to give possession of apartment etc. in accordance with the terms of agreement for sale or due to discontinuance of his business as a developer on account of suspension or revocation of registration under the provisions of this act.

38 The judgment of the Hon'ble Appellate Tribunal in Appeal No. 52542 in the matter of Pankaj Agarwal v/s. Real Gem

Buildtech Pvt. Ltd. will have to be considered as it was relied upon by the respondents. In that matter complaint was preferred before the Hon'ble Chairperson in respect of compensation along with other reliefs. A prayer was made by complainants to transfer the complaint to A.O. and Hon'ble Chairperson rejected that prayer. Hon'ble Appellate Tribunal has upheld that order. On behalf of respondent, paras 53, 56,58 and 59 of that judgment were cited. Those paras are as follows :-

39 "53. From Section 71 and 72, it is clear that adjudicating officer shall adjudicate the compensation under Section 12, 14, 18 and 19 of RERA after considering the factors laid down in Section 72 for determination of quantum of compensation or interest.

Section 71 starts with wording that for the purpose of adjudicating compensation under Section 12, 14, 18 and 19 of RERA, District Judge is to be appointed as Adjudicating Officer. So very purpose of appointment of District Judge is to adjudicate compensation only.

Section 72 lays down the factors for which the adjudicating officer shall have due regard while adjudicating compensation or interest, as the case may be.

In Section 71, the only word used is compensation. In Section 72 the word used is compensation or interest. Concept of word 'interest' used in Section 72 has no nexus with the concept of word 'interest' used under Section 12 and 18 whenever allottee claims refund with interest and compensation on withdrawing from the project or whenever

allottee claims only interest for every month of delay in handing over possession on staying with the project. So, this claim of interest is further qualified as interest at such rate, as the case may be, prescribed in this behalf.

Rule 18 of Maharashtra Real Estate (Regulation and Development) (Registration of Real Estate Projects, Registration of Real Estate Agents, Rates of Interest and Disclosures on website), 2017 provides the rate of interest. This rate of interest has no nexus with the word 'interest' used in Section 72 of RERA.

40 "56. According to allottees, matters filed for claiming refund with interest and compensation ought to be decided by Adjudicating Officer whereas according to promoters, those are to be decided by Authority on the point of refund with interest and only on establishing entitlement for compensation, matter can be referred to Adjudicating Officer for adjudging compensation only.

On the above controversy, we have contradictory views of Haryana Real Estate Appellate Tribunal and Maharashtra Real Estate Appellate Tribunal viz. Sameer Mahawar Case as against Sanvo Resort Case and Mohit Melwani Case .

41 "58. While holding inquiry for entitlement and quantum of compensation under Section 71(3), the Adjudicating Officer, on his satisfaction that person has failed to comply with provision of any Section 12, 14, 18 and 19 of RERA, he may direct to pay such compensation or interest, as the case may be.

For claiming only, the compensation as per above four provisions application shall be filed to Adjudicating Officer as per Rule 7 of Maharashtra Rules, 2017 and in the form B as provided under this Rule.

42 "59. Following are the provisions of compensation under Section 12, 18, 19 of RERA are as under :-

Proviso of Section 12 provides to claim compensation along with return of investment with interest.

Section 18(1) provides for claiming compensation along with refund with interest on the withdrawal from the project.

By way of protection of allottee, provision under Section 18 is made for awarding interest for every month default in handing over possession when allottee has chosen to stay with the project.

Now claim only for such interest for every month default in giving possession is adjudged by Authority and it does not fall within jurisdiction of Adjudicating Officer as per Section 71 and 72 of RERA.

43 . It may be noted that there is no definition of compensation in this enactment. In general terms it would mean making good the loss suffered by a person due to financial stress, physical stress or mental stress.

44 .Observations of Hon'ble Bombay High Court on this point will have to be considered. In the case of Lavasa Corporation Ltd., Vs. Jitendra Tulsiani, in 2<sup>nd</sup> appeal, 9717 of 2018 with Civil Application No. 683 of 2018, in para 76 Hon'ble High Court has observed as follows :

Moreover, if the Appellant is permitted to raise such defence, it would be as good as allowing Adjudicating Authority established under RERA, to go behind the registration certificate for holding that said registration under RERA, is not applicable to the project of the appellant. Can the Adjudicating Authority, do so? The answer has to be in the negative, if the scheme of RERA, is considered. It is pertinent to note that under RERA, there are two different authorities established; one is real estate regulatory authority defined u/s 2 (1) and established u/s 20 of the RERA. It is conferred with the jurisdiction to entertain the application, for registration of the projects. As can be seen from, provisions Section 3 and 4 of "RERA ,application for registration of real estate project is to be made to real estate regularity authority established under chapter 5 which deals with establishment and incorporation of the authority.....

As per para 77- "as against it, the adjudicating authority under the RERA is defined, in Section 2(a) as Adjudicating Officer appointed under sub-section 1 of Section 71. This Adjudicating Authority as can



be seen from Section 71(1) of the Act is established for the purpose of adjudging compensation under Section 12,14,18 and 19 of the said Act. Section 31 provides that the complaints are to be filed by aggrieved persons under RERA with the Adjudicating Authority for any violation or contravention of the provisions of this Act.

As per para 78- therefore, the authority which grants registration under RERA is different than the authority which is established to adjudicate the grievances of the aggrieved persons under the said Act. One authority cannot encroach on the jurisdiction exercised or to be exercised by another authority. Here in the case, the registration certificate to the appellant is granted by the Regulatory Authority, established u/s 20 of the said Act and now the appellant is calling upon the AA established u/s 71 of the RERA to go behind registration certificate and to hold that provisions of RERA are not applicable to the appellant.

Hon'ble High Court framed point no. 2 as- whether appellate tribunal has committed an error in holding that AA under RERA has jurisdiction to entertain the complaints filed by respondent u/s 18 of the RERA. Point no. 3 was framed as- whether Adjudicating Authority under RERA can go behind registration certificate of the appellant so as to hold that it has no jurisdiction, though the project is registered under the said Act. Hon'ble High Court answered point no. 2 and 3 in the negative. In para 62, reference is

made to Judgement of Hon'ble Apex Court in the case of TELCO Vs. State (2000)5 SCC 346 about the interpretation of enactment viz. that which will achieve the object of the Act.

45 Then there is landmark judgement of Division Bench of Hon'ble Bombay High Court in the case of Neelkamal Realtors Vs. Union of India. Writ Petition no. 2737 of 2017 dated 06.12.2017. The validity of almost whole of the RERA was scrutinised by the Hon'ble Bench. Except the provision u/s 46 (1)(b), all other provisions have been upheld.

46 The discussion on jurisdiction of Adjudicating Officer by Hon'ble Justice N.H.Patil, starts from paragraph 123. It reads –The petitioners have challenged validity of Sections 18(1),(2),(3) and 40. As discussed above and in view of the object and scheme of RERA and considering the law laid down in respect of retrospectivity/retroactivity, we are of the view that the challenge made by petitioners to these provisions as being violative of Articles 14 and 20 is not sustainable in law. The petitioners have failed to establish that the abovesaid statutory provisions need to be struck down. We find that RERA has adequate mechanism, which balances the rights and obligations of the promoter, real estate agent and the allottee. The adjudicatory mechanism is prescribed at each level. The provisions of Section 71(1) refer to power to adjudicate. Such powers will be exercised by a person who has been a District Judge, after holding appropriate inquiry. It was submitted that there is no mechanism for adjudication in respect of amount of interest. If we peruse Section 71(3), it

is made clear that adjudicatory authority would direct payment of compensation or interest as the case may be. Harmonious reading of these provisions would indicate that adequate mechanism and safeguards are prescribed by the RERA.

- 47 As per para 124-The entire scheme of RERA is required to be kept in mind. It is already submitted during the course of hearing that in many cases, helpless allottees had approached the consumer forum, High Court, Apex Court in a given fact situation of the case. The courts have been passing orders by moulding reliefs by granting interest, compensation to the allottees and issuing the directions for the timely completion of the project, transit accommodation, during completion of project, so on and so forth. Under the RERA, now this function is assigned to the Authority, Tribunal. An Appeal lies to the High Court. Under one umbrella, under one regulation and under one law, all the issues are tried to be resolved. Provisions of Section 71 refer to power to adjudicate. District Judge is conferred with power to adjudicate compensation u/s 12, 14, 18 and 19. A promoter could very well put up his case before the adjudicator who deals with the issues in the light of the fact situation of each case. Therefore, there should not any apprehension that mechanically compensation could be awarded against a promoter on failure to complete the development work.
- 48 The proviso to section 71(1) provides that any person whose complaint in respect of matters covered under sections 12,14,18 and 19, is pending before consumer

disputes redressal forum, or consumer disputes redressal commission or the national consumer redressal commission, established under Section 9 of Consumer Protection Act, on or before commencement of this Act, he may with the permission of such forum or commission as the case may be withdraw the complaint pending before it and file an application before the AO under this Act.

49 Para 125 reads that- the proviso to Section 71(1) as quoted above, is clear indicator that even pending complaint, before consumer forum could be transferred to adjudicator under RERA. A submission was advanced that allottee is free to approach whatever forum in respect of defaults committed if any, in compliance with agreement of sale entered into between the promoter and allottee prior to registration of RERA. In view of scheme of RERA we find that this contention of Petitioners cannot be upheld. It would be unreasonable to expect allottee to resort the proceedings in different forums prior to registration of project in respect of the agreement executed prior to the registration under RERA and post registration. Under the scheme of RERA, the adjudicatory mechanism is prescribed under one umbrella. We do not notice any illegality in the same.

Section 71(1) is framed in the larger interest of consumers. The adjudicator who would be a judicial member of the rank of district judge would be dealing with all issues and the pleas raised by promoter, allottee and other stake holders before adjudicating claim for compensation. The orders are subject to judicial review by higher forum. Therefore, promoter

should have no apprehension that they would be remediless or there is no scope under scheme of RERA for consideration of their claim.

50 .Para 126 reads -The another plea, raised is, as to why a promoter shall pay interest for the past contractual rights, in case of failure, to complete the project after registration under RERA, till possession is handed over. Under the scheme of RERA, it is clear by now that a promoter has to self assess and declare time period during which he would complete the project. But in case, in spite of making genuine efforts, a promoter fails to complete the project, which the concerned authority, adjudicator, forums , tribunal would certainly look in to genuine cases and mould their reliefs accordingly. We do not find that on that count provisions of Section 18(1)(a) are to be declared as contrary and violative of Article 14, 19(g) ..... The payment of interest u/s 18 is compensatory in nature.

The provisions of Section 18 must be read with Sections 71 and 72. The adjudicator would consider each case on its merits and unless such cases emerge and decisions are taken by authority, it would not be appropriate at this stage to hypothetically consider a situation and decide constitutional validity of statutory provisions.

51 .Para 127 reads - it was submitted on behalf of Union of India that MOFA provides for interest to be paid in certain cases (Section 8) and constitutional courts too had granted interest to flat purchaser in case of defaults by the promoter. The requirement to pay interest u/s 18 is

not penal since payment of interest is compensatory in nature due to delay suffered by the flat purchaser.....

51A . Hon'ble Justice Ketkar in para 264 has observed as- so far as challenge to Section 59, 60, 61, 63, 64 are concerned, these provisions fall in chapter VIII entitling offences, penalties, and adjudication..... Payment of interest and compensation, u/s 12, 14, 18 and 19 needs to be adjudicated by AO as per Section 71. The amount of interest and compensation is payable by the promoter to the allottee or by allottee to the promoter u/s 19 (7) As against this under Section 76 the sums realised by way of penalties imposed by appellate tribunal or the authority in the union territories, are to be credited to the consolidated fund..... Section 76 does not include determination of AO u/s 71 of RERA. This is also pointer to indicate that the interest and compensation determined by AO u/s 12, 14, 18 and 19 is not by way of penalty but is essentially compensatory in nature.

52 .In my humble opinion as laid down by Hon'ble Bombay High Court in the Lavasa case, and Neelkamal case, the main functions of the authority are to register real estate projects and to extend the registration or otherwise, encourage timely completion of real estate projects and to inflict penalty in case of default in compliance of the provisions of this enactment. The AO on the other hand is to lessen the burden of the authority in awarding compensation in case of defaults under the provisions of sections 12,14,18 and19 of this enactment. Therefore, Section 31 permits aggrieved person , for violation or contravention of said provisions of this Act or Rules and

Regulations made thereunder, to file a complaint with the authority or the AO. The complaint for compensation u/s 12, 14, 18 and 19 can be directly filed with the AO in case of violation or contravention of provisions of the act, rules and regulations. Section 72 clause b mandates to consider the amount of loss caused as a result of the default, as a factor to be considered while adjudging quantum of compensation or interest by AO. Sub-clause c mandates considering the repetitive nature of the default. In my humble opinion the amount that the allottee pays to the promoter is monetary loss suffered, in the event of default by promoter, which can be compensated by the AO with interest. Awarding interest is also provided under Section 71 sub-section 3. The default of the promoter will be repeated everyday till the allottee receives either possession and amenities as per promise or gets back the amounts paid by him. The only question appears to be one of nomenclature and there should no legal bar to award compensation by AO u/s 72 sub-section a to d.

53 . Thus there is a dichotomy of complaints to be filed and the complainant has a discretion to either file a complaint with the Authority or Adjudicating Officer. As per Maharashtra Rules. Complaint to be filed with the Authority is in Form A and to the Adjudicating Officer in Form B.

54 . Since it is the discretion of the complainant either to file a complaint with the Authority or an application before the Adjudicating Officer for compensation for violations under Section 12, 14, 18 and 19, there is every possibility that a complainant may file an application before the Adjudicating Officer to seek compensation along with other reliefs. Under such circumstances if Adjudicating Officer is required to refer that complaint to the Authority, it is beyond any provision RERA, Rules and Regulations. The A.O. in my humble opinion will consider only compensation aspect of the complaint. The Authority can transfer any complaint or application to the Adjudicating Officer as per provisions under Regulations. In view of law laid down by Hon'ble High Court in Neelkamal Realtors case, interest is to be awarded as compensation. Likewise the amount of loss caused as a result of default will have to be made good, whatever terminology that is required to be applied. So far as nature of default is concerned, the default continues from day-to-day and requisit interest will be awarded to the allottee as compensation. Also a discretion has been given to the Adjudicating Officer under Sub-Section(d) of Section 72 to consider such factors as the Adjudicating Officer considers necessary to the case in furtherance of justice.

55. In view of the discussion above, in my humble opinion a complaint even when the project is not registered with the Authority is very much tenable before the Authority or the Adjudicating Officer in respect of violation of the provisions under this Act by allottees and promoters and real estate agents and also where there is a case of breach of terms of contract committed by allottees, promoters or real estate agents,



provided for by this Act.I therefore answer point no.1in affirmative.

56. **POINT No.(ii)** : It is the contention of the complainant that initially there was agreement to Flat No. 5203 in A Wing in the building Enchante, admeasuring 1086 sq. ft. for a consideration of Rs. 3,25,91,197/-. Said flat was on 52nd floor. However, as the respondent got the permission to construct only up to 40 floors, complainant was offered alternate flat No. 3903 in A Wing in the building Enchante having carpet area 1086 sq.ft. It appears that there was no change in the price of the flat. Exhibit A is the application form and in preference clause, first preference is 304 and second preference is 303 in A Wing. There is a copy of Cheque for Rs. 6,30,000/- without any date. Then there is a letter of allotment dated 27th December, 2013 in respect of Flat No.5203 in A Wing in building Enchante in project New Cuff Parade at Wadala Link Road. Consideration was shown as Rs. 3,25,91,295/-. There is note that carpet area of the unit shall be calculated on bare shell basis and shall be subject to variance of +-5% due to design and construction tolerances. Further there is note that company shall endeavour to make available possession for fit out by June, 2016 with a grace period of 12 months. Usual circumstances under which extension shall be applicable are also mentioned. Then there is letter with Exhibit D dated 9th Sept. 2015. It was informed that Civil Aviation Authority have not given clearance for constructing higher floors, therefore transfer was proposed to alternative available unit as per choice. Then there is letter of allotment, dated 1st Feb. 2016 in respect of Unit No. 3903 in pursuance of transfer letter, dated 07.10.2015.The consideration value was shown as Rs. 3,10,81,879/-. Then there is deed of cancellation dated 20.05.2016 in respect of Flat No. 5203.

57. Copy of agreement for sale, dated 22nd Jan. 2014 is placed on record. This agreement is in respect of Flat No. A/5203 on 52nd floor, having carpet area of 1086 sq. ft. Total consideration agreed was Rs.3,25,91,295/-. Date of possession was given as 30th June, 2016. Copy of commencement certificate issued by MMRDA on 12.02.2014 upto plinth level is placed on record. Copy of commencement certificate of the said phase for Ground + 53 and 55 floors is also placed on record. Copy of commencement certificate dated 08.03.2013 is also placed on record and copy of extension of commencement certificate dated 06.11.2013 is also placed on record. Copy of agreement for sale, dated 20.05.2016 is also placed on record. This agreement is in respect of Flat No. A/3903 on 39th floor having carpet area 1086 sq.ft. The consideration agreed is Rs. 3,10,81,879/-. This agreement is not denied by the respondent. I therefore hold that the complainant is an allottee and respondent is promoter and therefore, answer Point No.(ii) in the affirmative.

58. **POINT No.(iii)** :- Now there is an agreement, dated 20.05.2016 in respect of Flat No. A/3903 and the terms of this agreement are binding on the parties. As per Annexure II of this agreement, clause No. VI, date of possession for fit out was 31.12.2016. Respondent is relying on clause 11 of the agreement. Clause 11.1 gives the date for fit out possession as per date set out in Annexure II. The clause further reads that company shall endeavour to make all necessary submissions to obtain occupancy certificate in respect of unit of the building and make available the free common areas and amenities in respect of building within a period of one year from the date of offer of

possession i.e. fit out possession. As per clause 11.2, company shall without being liable to the purchaser may entitle to a grace period of one year beyond the aforesaid dates mentioned in clause 11.1, the date on which O.C. is issued or deemed to be issued. As per agreement, date of possession shall be deemed to be the date of offer of possession. Since the date of fit out possession is 31.12.2016, the date for offer of possession is 30.12.2017 and with one year grace period, the date comes to 31.12.2018.

59. It is the contention of the respondent that O.C. was received on 8th June,2017, therefore, possession was offered well within the agreed period. It is also the contention of the respondent that complainant continued to make payments beyond 31.12.2016 and thus agreed to extend the date of possession. Also the term fit out possession will have to be scrutinized. This possession is offered before obtaining O.C. and therefore, the occupier cannot legally start enjoying the premises. He can carry out the work of interior decoration and of furnitures and fixtures. The time required for such purpose will vary from case to case and it was for the complainant to show that he required possession for how many months for carrying out the said work.

60. No doubt, the complainant has made payment of total consideration. It is contended on behalf of complainant that he has terminated the agreement. Why he terminated such agreement is not understood. If the alleged delay in delivery of possession is the reason, then the complainant is not justified in terminating the agreement because possession was offered well before the deadline.If there is other reason,then the dispute is beyond the jurisdiction of this forum. Complainant has admitted

that possession was offered by letter, dated 31st Jan. 2018. The vague statement that several works were going on and the flat was not habitable, is not sufficient justification to refuse to accept the possession. Complainant has deliberately not given the date on which he made all payments and if he has made payment after December, 2016, then he has accepted that the possession date was beyond December, 2016. Consequently, complainant fails to prove that respondent failed to deliver possession as per agreement, without there being circumstances beyond his control. I therefore, answer Point No. (iii) in the negative.

61. **POINT No. (iv)**:- It is the contention of the complainant that he was promised the carpet area of 1086 sq. ft. He obtained sanctioned plan from MMRDA under RTI Act because respondent has not provided the sanctioned plan. The complainant came to know that the carpet area was only 749.49 sq. ft. Thus the complainant received less carpet area. Also the construction is not in conformity with the plan sanctioned by MMRDA. The term carpet as defined in the agreement is illegal. It must be remembered that this agreement was executed before enforcement of RERA , 2016. Therefore, the definition of carpet area in the RERA cannot be applied to the agreement in question. Also about the allegation that there is a change in the construction as compared to the sanctioned plan, this is a vague allegation. If at all complainant will be getting possession of carpet area, less than what was agreed and if at all complainant is suffering loss due to change in the construction, as against the sanctioned plan, the complainant will be entitled to claim compensation from the respondent. However, complainant has chosen to seek refund of the amount paid, with interest and has

not claimed compensation for the above defects. Consequently, complainant will have to file separate complaint for compensation after he takes possession of the flat. I therefore, answer Point No.(iv) in negative.

62. **POINT No. (v)** :- In view of the discussion above, complainant is not entitled to the reliefs claimed. I therefore, answer Point No. (v) in the negative and proceed to pass following order.

**ORDER**

- (1) The complaint stands dismissed.
- (2) No order as to costs.

**Mumbai**

**Date :- 31 / 12 / 2020**

Madhav Vitthal Kulkarni  
Digitally signed by  
Madhav Vitthal Kulkarni  
Date: 2021.01.03  
12:55:13 +05'30'

**( M. V. KULKARNI**

**ADJUDICATING OFFICER,  
MAHARERA**