

BEFORE THE  
MAHARASHTRA REAL ESTATE REGULATORY AUTHORITY  
MUMBAI

**COMPLAINT NO: CC005000000010407**

Mustafa Husain Kanchwala ... Complainant.

Versus

Marveledge Realtors Pvt.Ltd.  
Vishwajeet Jhavar  
Mahesh Laddha  
( Marvel Edge Phase-1) ... Respondents.

MahaRERA Regn: P52100006995

**COMPLAINT NO: CC005000000010552**

Panna Asher  
Haresh Asher ... Complainants.

Versus

Marveledge Realtors Pvt.Ltd.  
Vishwajeet Jhavar  
Mahesh Laddha  
( Marvel Edge Phase-1) ... Respondents.

MahaRERA Regn: P52100006995

**COMPLAINT NO: CC005000000010561**

Mohit Nanik Khubchandani ... Complainant.

Versus

Marveledge Realtors Pvt.Ltd.  
Vishwajeet Jhavar  
Mahesh Laddha  
( Marvel Edge Phase-1) ... Respondents.

MahaRERA Regn: P52100006995

**COMPLAINT NO: CC005000000010647**

Multi-Act Realty Enterprises Pvt.Ltd. ... Complainant.

Versus



Marveledge Realtors Pvt.Ltd.  
Vishwajeet Jhavar  
Mahesh Laddha  
( Marvel Edge Phase-1)

... Respondents.

MahaRERA Regn: P52100006995

**COMPLAINT NO: CC005000000010574**

Modison Metals Ltd.

... Complainants.

Versus

Marveledge Realtors Pvt.Ltd.  
Vishwajeet Jhavar  
Mahesh Laddha  
( Marvel Edge Phase-1)

... Respondents.

MahaRERA Regn: P52100006995

**Coram:** Shri B.D. Kapadnis, Hon'ble  
Member & Adjudicating Officer.

**Complainant:** Mr.Karan Bhosale,Counsel  
a/w Mr.Rohan Agrawal.

**Respondent:** Adv. Mr. Bhanushalli.

**Coram:** Shri B.D. Kapadnis, Hon'ble  
Member & Adjudicating Officer.

**Complainant:**

**Respondent:** Adv. Mr. Bhanushalli.

**Final Order**

20<sup>th</sup> March 2018.

Whether the lessees are entitled to get refund of their amount with interest and/or compensation from the lessors on their failure to hand over the possession of the shops agreed to be leased on the agreed dates, is the important legal issue involved in these complaints.

  
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### **Factual Matrix.**

2. Mr. Mustufa Hussein Kanchwala and Abbasali Kanchwala, contend that the respondents agreed to deliver the possession of a shop bearing no. A-2010 on or before 31.12.2013 on lease in respondents' project Marvel Edge situated at village Lohagaon-Wadgaon Sheeri, Tal. Haveli, District Pune. Mr. Panna Ashar and Mr. Haresh Ashar also agreed to take a shop no. 3050 and respondents agreed to deliver the possession of a shop on 31.12.2013, Mr. Mohit Khubchandani also agreed to take a shop no. 6010, Wing-H and respondents agreed to deliver the possession of a shop on 31.12.2013. Shri Multi Act Reality also agreed to take a shop no. 5040, G-wing and respondents agreed to deliver the possession of a shop on 30.06.2014, Modison Metal Ltd. also agreed to take a shop no. G-6010 and respondents agreed to deliver the possession of a shop on 31.12.2013. The complainants have been complaining that the respondents have not handed over the shops situated in their commercial complex Marvel Edge on the agreed dates and therefore, they have been claiming refund of their amount with interest and/or compensation.

3. The parties have been heard on the primary issue of maintainability. The agreements for lease have been relied upon by the complainants, wherein it is contended that on payment of premium mentioned in their agreements, the respondents have agreed to lease the shops by delivering possession for 999 years on lease.

### **Factual aspects.**

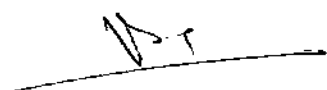
4. I have gone through 'agreements for lease' submitted by the complainants. The complainants have been described as 'lessee/s' and the respondents have been referred to as 'lessors' through out the agreements. It further shows that the lessors agreed to grant lease of the said units/shops together with lease of undivided shares in the land to the



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lessee/s for the period of 999 years in consideration of premium. It is further agreed in Clause 6(b) that the possession of the shops/ units would be handed over to the complainants on the dates mentioned above. It has been submitted on behalf of the complainants that these are not the agreements for lease but they are the agreements for sale. The learned advocates of the complainants have therefore, brought to my notice that in Clause-30 of the agreement for sale, it is provided that simultaneously with the execution of the agreement, lessee/s has deposited with the lessor a sum being 1% of the sale purchase price of the said unit towards payment of value-added-tax. The learned advocate of the respondents Mr. Bhanushalli brings to my notice Article 25 & 36 of the Maharashtra Stamp Duty Act. The Article 36 makes the provision regarding the Stamp Duty payable on lease and sub-lease, whereas Article 25 relates to the sale. In Article 36, stamp duty is based on the market value of the leased property and its period. If period of lease exceeds 29 years or in perpetuity the duty is 90% of the market value of the property. He further submits that 1% of the market value was payable as value-added-tax and therefore, in this context the word 'sale/purchase price' of the unit appear. I am convinced with this argument.

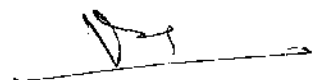
5. The complainants have referred to Clause 36 of the agreement which entitles lessee/s to transfer, assign or part with lessee/s' interest or leasehold-rights, therefore, it has been submitted on behalf of the complainants that the right to transfer the rights acquired by the complainants under their agreements are transferable and no permission of the respondents is required for transferring them because only a notice of 15 days by way of intimation to the respondents is to be given. On careful reading of Clause 36, it becomes clear that the lessee/s can exercise the right of transfer, assign his leasehold interest only on receiving the possession of his unit, his transferee is also bound by the terms and conditions of the agreement



for lease executed by the complainants and the respondents. Therefore, the absolute right like the owner having the title of the property has not been conferred upon the complainants.

6. The complainants have relied upon Clause Nos. 38 & 39 of the agreement. Clause 38, provides that the lessor shall be entitled to carry out the work of construction/completion of remaining portion of the complex even after giving possession of the unit to the lessee/s. The Clause-39 provides that if the lessee/s carry out internal finishing work then they shall ensure that such work shall not cause nuisance, noise or pollution and it shall be minimum. Therefore, these clauses do not show that the transaction is of outright sale.

7. On the other hand, Clause 42 of the agreement provides that the lessor shall execute deed of lease on receipt of full premium. All the terms and conditions of the agreements co-relate with the agreements for lease. The respondents have brought to my notice that the amount of consideration has been referred to as 'premium' and in lease the consideration is termed as premium. The agreement shows that it is for the specific period namely 999 years. The lease can be in perpetuity also. The opening words of the agreement do show that the 'lessor agreed to grant lease and the lessee/s agreed to make payment of premium to the lessor.' Only deed of lease is to be executed by the respondents on completion of the unit and not the sale deed. Even the transferee of the lessee/s is bound by same terms and conditions of the agreements. Clause-11 of the agreement specifically retains the ownership of the land and structure constructed thereon with the lessor. The Clause-15 provides that the lessor reserves the rights for road hoardings, Neon light hoardings on the said commercial complex and to run, manage and control the hotels, guest houses, service apartments situated in the complex. After going through all these factual aspects of the matter, I find that if the entire document is



read as a whole the agreements are for lease and therefore, I record this factual finding.

### **Legal aspects.**

8. Before entering into the arena of controversy, it is necessary to view the relevant provisions of Transfer of Property Act.

**Section: 54 Sale defined - "Sale" is a transfer of ownership** in exchange for a price paid or promised or part-paid and part-promised.

**Sale how made -** Such transfer, in the case of tangible immovable property of the value of one hundred rupees and upwards, or in the case of a reversion or other intangible thing, can be made only by a registered instrument.

**105. Lease defined. -** A lease of immovable property is a **transfer of a right to enjoy, such property**, made for a certain time, express or implied, or in perpetuity, in consideration of a price paid or promised, or of money, a share of crops, service or any other thing of value, to be rendered periodically or on specified occasions to the transferor by the transferee, who accepts the transfer on such terms.

**Lessor, lessee, premium and rent defined. -** The transferor is called the lessor, the transferee is called the lessee, the price is called the premium, and the money, share, service or other thing to be so rendered is called the rent.

9. Upon considering the definitions of sale and lease, I find that in sale, ownership which is known as bundle of rights including right to possess and enjoy is permanently transferred and it is vested in purchaser for all times to come. In lease, there is transfer of a right to enjoy property, it may be in perpetuity. This right of enjoyment of property may be acquired by one-time payment of premium howsoever it may be large in quantum. Its nature would not change because of its long term or large sum of premium. This is the basic difference between sale and lease. Therefore, it is difficult for me to accept the contention of the complainants that since it is the lease of 999 years it amounts to sale or deemed sale.

10. Complainants have been seeking refund of their amount under Section 18 of RERA because the respondents have failed to deliver the possession of the shops on agreed dates. Hence it is necessary to look at Section 18 which reads as under:

**"Section 18 Return of amount and compensation-**



(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.

(2) The promoter shall compensate the allottees in case of any loss caused to him due to defective title of the land, on which the project is being developed or has been developed, in the manner as provided under this Act, and the claim for compensation under this subsection shall not be barred by limitation provided under any law for the time being in force

(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."

11. The learned advocates of the complainants submit that agreement for lease is covered under (1) (a) of Section 18 as it is covered in the Clause "as the case may be ". I do not find this interpretation is proper for the following reasons. If such type of interpretation is accepted then one has to accept that in sub-clause(a) there are three clauses namely i) in accordance with the terms of the agreement for sale ii) or, as the case may be, iii) duly completed by the date specified therein. On analysing this provision carefully three situations will emerge for claiming refund or interest from promoter.



- a) If the promoter fails to complete or is unable to give possession of an apartment, plot or building, – in accordance with the terms of the agreement for sale. (indicates manner)
- b) If the promoter fails to complete or is unable to give possession of an apartment, plot or building, – as the case may be,
- c) If the promoter fails to complete or is unable to give possession of an apartment, plot or building, – duly completed by the date specified therein. (indicates default in giving possession on agreed date)

12. In my humble opinion circumstance (a) & (c) carry meaning but the circumstance (b) carries no meaning. The legislature has contemplated only two situations in this clause namely i) the promoter fails to complete the building in accordance with the terms of the agreement for sale or ii) the promoter fails to complete or is unable to give possession of an apartment, plot or building, – duly completed by the date specified in agreement, as the case may be.

13. Section 18(1) refers to agreement for sale. Agreement for sale is defined in 2 © of the Act as “agreement for sale” means an agreement entered into between the promoter and allottee. Hence agreement for lease is not covered under it. Agreements for lease of the complainants simply demonstrate that the respondents shall hand over the possession of the shops (to be constructed) on the dates mentioned in the agreements and lease deeds thereof shall be executed.

14. Section 3 of RERA prescribes that promoter cannot sale any part of the project without registering the project, if it is eligible for registration. Promoter can sell his leased property even after lease. Hence only because promoter has registered the project with MahaRERA, does not mean that the transactions of the complainants with them are that of sale. Frequently asked question no.6 saying that projects granting lease for more than five years require registration does not have any legal basis and it is not based upon any legal principle. Hence it needs to be ignored.

15. Considering all these aspects of the matter, I find that lease agreements do not come within the ambit of section 18 of RERA.

16. When this judgement is being typed under my dictation, at this stage the copy of the judgement passed by the Hon'ble Maharashtra Real Estate Appellate Tribunal in Jitendra Jagdish Tulsiani-v/s- M/s. Lavasa Corporation Ltd. Bearing no. AT00500000000008 is placed in my hands where the Hon'ble Appellate Tribunal has held that the long term lease takes the colour of sale and hence MahaRERA has jurisdiction to entertain such complaints. Theoretically this judgement of the Appellate Tribunal

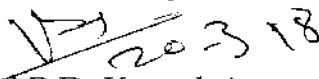
may not act as precedent but judicial discipline and propriety makes it binding on the Authority and therefore, its view will have to be followed. Therefore, in this changed circumstance, I find that the complaints are maintainable. Hence, the following order.

**ORDER**

Complaints are maintainable.

Complaints arise out of Section 18 of RERA and the project is situated in Pune, hence, they be sent to Adjudicating Officer, Pune.

Mumbai.  
20/3/2018.

  
Shri B.D. Kapadnis,  
Member & Adjudicating Officer.  
MahaRERA, Mumbai.