

BEFORE THE
MAHARASHTRA REAL ESTATE REGULATORY AUTHORITY
MUMBAI

COMPLAINT NO: CC005000000000317

Mr. Ganesh Lonkar ... Complainant.

Versus

D.S. Kulkarni Developers Ltd.
(DSK Mayurban) ... Respondents.
MahaRERA Regn: P52100004304

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

Complainant: in person.

Respondens: Adv.Mr. C.D.Patwardhan.

Final Order
26th December 2017.

Whether the Arbitration Agreement will oust the jurisdiction of MahaRERA and whether the complaint filed by a co-purchaser is maintainable?, are the important legal issues involved in this complaint filed under Section 18 of Real Estate(regulation and Development) Act 2016. (hereinafter referred to as RERA.)

2. The complainant contends that he and his wife Mrs. Sharmila booked a flat no. A-602 in DSK Mayurban, situated at Pune and the respondents promised to give its possession on or before 30th June 2017. The respondents have failed to deliver the possession of the flat on the agreed date. The complainant wants to continue in the project. According to him, as per the registered agreement for sale, the respondents are supposed to make payment of pre-EMIs of housing loan taken from Tata Capital Housing Finance Ltd. (TCHFL) till the possession of the flat is handed over. TCHFL have issued notices to the complainant for payment of EMIs after 30th June 2017. Therefore, complainant prays that the respondents be directed to hand over the possession of their flat at the earliest and to pay EMIs from December 2016 onwards. Complaint also claims interest on the amount paid by him to the respondents.



3. The respondents have pleaded not guilty and they have filed their explanation to contend that co-purchaser Mrs. Sharmila Ganesh Loankar has not been added as a party to this complaint. Therefore complaint suffers from non-joinder necessary party. The respondents have further contended that as per clause-49 in the agreement for sale, this dispute is to be referred to the Arbitrator and therefore, this authority has no jurisdiction to adjudicate upon the present dispute. It is further contended by the respondents that though it has been agreed by parties that the possession shall be handed over on or before 30th June 2017, they have agreed that respondents shall be permitted and allowed by the purchasers to extend the possession date and time for further period of 6 months as prescribed under Section 8(b) of Maharashtra Ownership Flats (Regulation and Promotion of Construction, Sale, Management and Transfer) Act 1963. Therefore, the extension period of 6 months allowed by this clause expires on 29th December 2017 and hence, the complaint is premature. The respondents contend that the project is delayed because of reasons which were beyond their control. Therefore, they request to dismiss the complaint.

4. Following points arise for consideration and I answer them as under:

POINTS.	FINDINGS.
a. Whether the Arbitration Agreement ousts the jurisdiction of MahaRERA?	Negative.
b. Whether the complaint suffers from non-joinder of necessary party?	Negative.
c. Whether the respondents have delayed the possession of the flat without there being reasons beyond their control?	Affirmative.
d. Whether the respondents are liable to pay pre -MIIS till the possession is delivered?	Affirmative.

- e. Whether the complainants are entitled to get interest on the amount paid to respondents? Affirmative.

REASONS:

Arbitration agreement.

5. The learned advocate of the respondents Mr. C.D. Patwardan brings to my notice clause-49 of the agreement which shows that the parties have agreed to refer the dispute arising out of said agreement to the Arbitrator. On this back drop Mr. Patwardhan submits that the complainant must take the matter to the Arbitrator instead of bringing it before MahaRERA. MahaRERA does not get jurisdiction to adjudicate upon it. In order to appreciate this issue in its prospective, it is necessary to look at Section 8 of Arbitration and Conciliation Act 1996 which reads as under:

"8. Power to refer parties to arbitration where there is an arbitration agreement.

- 1. A judicial authority before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so applied not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration.*
- 2. The application referred to in subsection (1) shall not be entertained unless it is accompanied by the original arbitration agreement or a duly certified copy thereof.*
- 3. Notwithstanding that an application has been made under sub-section (1) and that the issue is pending before the judicial authority, an arbitration may be commenced or continued and an arbitral award made.*

6. On the plain reading of this provision it becomes clear that judicial authority before which action is brought is to refer the parties to the arbitration only when a parity so applies not later than submitting his first statement on the substance of the dispute. Here in this case though there is a clause to refer the dispute to the Arbitrator, neither the complainant nor respondents have submitted any application before this authority to refer their matter to the Arbitrator. This plea has been taken by the respondents only when they have filed their explanation / reply to the complaint and they have not filed any separate application earlier for referring the matter to Arbitrator. Second requirement of section 8 of the said Act is, such application

must be accompanied by the original arbitration agreement or duly certified copy thereof. Neither the original agreement or its certified copy has been produced in this proceeding. In view of these facts, I do not find it necessary to refer this matter to the Arbitrator as contended by the respondents.


7. Another aspect of this issue is, there is presumption that Parliament knows all the laws enacted by it. The Arbitration and Conciliation Act is of 1996 whereas the Real Estate (Regulation and Development) Act, 2016 is the later enactment. While enacting the Real Estate Act, the parliament has specifically provided in its section 89 that the provisions of the Real Estate Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force. So the provisions of RERA have overriding effect over the provisions of section 8 of Arbitration and Conciliation Act, 1996. In view of this legal position, I have come to the conclusion that despite Arbitration Agreement of parties MahaRERA gets the jurisdiction to adjudicate upon the disputes which relate to the subject of an Arbitration Agreement. Hence, I do not agree with Mr. Patwardhan when he submits that MahaRERA does not get jurisdiction in this matter.

Non-joinder of necessary party.

8. Mr. Patwardhan argues that the complaint is not maintainable for non-joinder of necessary party as according to him, Smt. Sharmila Ganesh Loankar and complainant Mr. Ganesh Loankar have jointly purchased the flat but Sharmila Loankar is not a party to this proceeding. I find no substance in this submission also because there is no conflict of interest between the co-purchasers. A complaint filed by one of them is maintainable in law. Necessary party means a party without whose presence a matter cannot be adjudicated upon effectively, completely and in a just manner. Present complainant can be decided effectively, completely and in a just manner even in the absence of Mrs. Sharmila as she has no interest adverse to the interest of her husband, the complainant.

Delayed possession:

9. The agreement for sale clearly shows that the respondents shall hand over the possession of the flat on or before 30th June 2017, this period to extend to six months as per the provisions of 8(b) of Maharashtra Ownership Flats Act, 1963 if the reasons causing delay subsist. The respondents have simply contended that the project is delayed because of the reasons which were beyond their control. Respondents have assigned very vague causes of



delay and therefore, they cannot be considered. Hence respondents are not entitled to get benefit of six months' grace period u/s. 8(b) of the said Act. It is admitted by the Respondents that they have not handed over the possession on the agreed date of possession. According to them the agreement specifically provides that this period can be extended to next 6 months and this extended period expires on 29th December 2017, however they are not able to deliver possession on or before 29th December 2017 also. Since respondents have failed to deliver the possession of the flat on the agreed date, the case clearly comes under section 18 of RERA.

Entitlement of complainant.

11. Section 18 of RERA allows the allottee to recover interest on the amount paid by him to the promoter, on the promoter's failure to deliver the possession of a flat on the agreed date. The complainant wants to continue in the project and therefore the complaint is entitled to get the interest at the prescribed rate, namely MCLR of SBI which is currently 8.05% + 2 % on their investment for every month of delay from the date of default till handing over of the possession.

12. The respondents have admitted that the complainant purchased the flat under subvention scheme and the respondents have agreed to pay pre-MIIs (monthly interest instalment) to TCHFL till the possession of the flat is handed over. In view of this contention coupled with the terms and conditions contained in the agreement to that effect, I find that respondents are liable to pay pre MIIs till the handing over possession of the plot to the complainant.

13. The complainant has contended that he has paid Rs. 4,54,000/- on 28.10.2014. Therefore, the complainant is entitled to get interest on this amount. The respondents have collected Rs. 13,17,780/- on 12.11.2014, Rs. 11,79,730/- on 28.12.2014, Rs. 7,01,007/- on 19.10.2016, from TCHFL which were sanctioned as home loan to the complainant. Since the respondents are liable to pay pre- MIIs till the possession of the flat is delivered, the complainant is not entitled to get any interest on these amount. However, the complainant is entitled to get Rs. 20,000/- towards the cost of complaint. Hence the following order.



ORDER

1. The respondents shall pay interest at the rate of 10.05% on Rs. 4,54,000/- from 1st July 2017 onwards for every month of delay till handing over of possession.
2. The respondents shall pay all pre- MIIs of the loan taken by the complainant till the possession of the booked flat is handed over.
3. The respondents shall hand over the possession of the complainant's flat at the earliest.
4. The respondents shall pay the complainant Rs. 20,000/ toward cost of the complaint.

Mumbai.

Date: 26.12.2017.



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

**MAHARASHTRA REAL ESTATE REGULATORY AUTHORITY
MUMBAI.**

COMPLAINT NO: CC005000000000317

Ganesh Lonkar Complainant.

V/s.

D.S. Kulkarni Developers Ltd. Respondents.

MahaRERA Regn: - **P52100004304**

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

**ORDER ON THE COMPLAINANT'S APPLICATION FILED UNDER
SECTION 63 OF RERA.**

18th April 2018.

The complainant has filed the application under Section 63 of Maharashtra Real Estate (Regulation and Development) Act, 2016 (RERA) to contend that the Authority has passed an order on 26.12.2017 directing to the respondents to pay interest on complainant's Rs, 4,54,000/- from 01.07.2017 onwards for every month of delay till handing over the possession of the flat and to pay all pre-MIs of the loan taken by the complainant with cost of the complaint. The respondents have not complied with the order of the Authority.

2. The show cause notice to the respondents has been issued under Section 63 of the Act but the respondents have not appeared to show cause as to why the penalty under Section 63 of the Act should not be imposed upon them.

4. The respondents have not preferred an appeal to challenge the order passed in favour of complainant. The respondents have not shown any




cause for non-compliance of the order. It is necessary to impose penalty under section 63 of the Act . Hence the order-

5. The respondents shall pay the penalty of Rs. 1,000/- per day from today under Section 63 of RERA till the compliance of the order or till the amount of penalty reaches to 5% of the estimated cost of the real estate project, whichever is earlier.

6. The respondents shall submit the compliance report to stop the accruing penalty.

Mumbai.

Date: 18.04.2018.


18-4-18
(B.D. Kapadnis)
Member & Adjudicating Officer,
MahaRERA, Mumbai.