THE MAHARASHTRA REAL ESTATE REGULATORY AUTHORITY
MUMBAI.

COMPLAINT NO: **SC10001357.**

Mr. Dayaram Shetty and Ms. Harinakshi Shetty. ... Complainants.

Versus

1.M/s. Mahimkar Builders and Developers Pvt. Ltd. & Anr.
...Respondents.

Coram: Shri B.D. Kapadnis, Member-II.
Appearance:
Complainants: Adv. Mr. Nilesh Gala.
Respondent no.1: Adv. Mr. Ritesh Jain.
Respondent no.2: Exparte.

FINAL ORDER
29th October, 2020

Pleadings of the parties.

The complainants have filed this source complaint on 31.01.2019 by contending that the respondent no.1 has been making the construction of real estate project on the land admeasuring 3063 sq. mtrs. on the old survey no. 430 and new survey no. 1/6434, CS no. 717 and 6/717 of Mazgaon, Division E ward, Mumbai. The construction of the said project was started in the year 2009 and the respondents have constructed ground plus 7 storeys and part of 8th floor on the said property. The complainants contend that said constructed building has 21 flats. Out of 21, 11 flats are sold and the building has not received the occupation certificate till the date of the complaint. Therefore, it is ongoing project.

2. The respondents entered into an agreement for sale with the complainants on 13.07.2018 for selling the flat no. 501 admeasuring the carpet area of 558 sq. ft. along with one covered car parking at the rate of Rs. 19,000/- per sq. ft. Total consideration of the flat is Rs. 1,06,00,000/-.

The respondents have also collected the GST and thus the complainants paid Rs. 1,27,02,000/- by cheque dated 24.09.2018. The respondent no.1 did not register the project though it required registration u/s 3 of RERA. Thereafter the project has been registered on 18.05.2020. Therefore, by order dated 08.07.2019 passed by the Hon'ble chairperson, the complaint is disposed by recording that the project has been registered vide project registration no. P51900021304.

3. The complainants contend that the respondents have cheated them because the carpet area of the said flat on actual measurement is 495 sq. ft. which is 63 sq. ft. less than the sanctioned plan. As per Development Control Rules the respondent no. 1 has availed of 31 car parking spaces as against 21 flat owners of the project. But the respondent no. 1 has not been allowing anybody to enter the car into the premises by contending that there is no formal association of the allottees or the society to allot car parking spaces. The complainants contend that the respondent no. 1 collected GST at the rate of 12% instead of 8% as agreed and has not refunded the excess amount collected from them. The respondent no. 1 has made the illegal construction on 8th floor and therefore, the building is not going to get occupation certificate. Duplex flat on the 8th floor has been constructed by making illegal encroachment on the refuge area of the building and the respondent no. 1 is using the portion of the open terrace for office purposes. The respondent no. 1 has been illegally demanding a sum of Rs. 25,000/- from each allottee for giving its no objection for changing its name on the electricity bill to the names of the respective allottees. Therefore, the complainants pray to direct the respondent no. 1 to obtain the occupation certificate and execute the conveyance deed. The complainants pray for compensation towards the less carpet area of 63 sq. ft. at the rate of Rs. 19,000/- per sq. ft. with interest from July 2018. The complainants seek refund of GST with interest along with the payment

proof of the balance to the government. The complainants claim the direction to direct to respondent no.1 to earmark the covered car parking allotted to the complainants. The respondent no. 1 has sold more than 51% of the flats without forming the society and therefore, the complainants seek the direction directing the respondent no. 1 to form the society / association of the allottees. The complainants also seek the injunction to restrain the respondent no. 1 from changing / amending / submitting new plans to MCGM without written consent of all the purchasers.

4. The respondent no. 1 has pleaded not guilty and filed the reply. The respondent no. 1 contends that this Authority has no jurisdiction to adjudicate upon the dispute based upon the cause of action mentioned in the complaint. This Authority has disposed of the source complaint by its order dated 08.07.2019 rectified on 15.11.2019 because the respondent no. 1 registered project. On the point of area of the flat, the respondent no. 1 contends that the MCGM record shows that the area of the complainants' flat is 530. 05 sq. ft. This is more than the area mentioned in the agreement for sale. The respondent denies that it sold the car parking to the complainants. The respondent no. 1 did not collect any price consideration for the car parking space. Therefore, the complainants were informed that the allotment of the car parking shall be done by the society or the association of the allottees. On the point of collection of 12% GST, the respondent no.1 contends that it is wrongly mentioned in the agreement for sale that the GST would be charged at the rate of 8%, however, it accepts that it has collected the GST at the rate of 12% from the complainants. It shows its willingness to refund the remaining 4% of the GST amount on completion of the project. The respondent no. 1 denies that it made illegal construction. The respondent no. 1 contends that it has demanded the charges for electric meter on actuals and the flat purchasers are liable to bear and pay the said amount required under law. The amount of security

always stands in the name of the flat purchaser. The respondent no. 1 is in process of completing the project and in obtaining the occupancy certificate. The respondent no. 1, therefore, requests to dismiss the complaint.

5. None appears for respondent no.2 and hence complaint proceeds exparte against him.

6. I have heard the Ld. Advocates of the parties on virtual platform. I shall discuss the issues argued by them as under---

Scope of source complaint.

7. RERA has been enacted by the parliament to establish Real Estate Regulatory Authority for regulation and promotion of real estate section and 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 interest of consumers in real estate sector. Section 34 (f) of RERA lays down that it is the function of the Authority to ensure the compliance of the obligations cast upon the promoters, allottees and the real estate agents under the Act and rules, regulations made thereunder. Section 35(1) of it empowers the Authority to call upon any promoter, allottee or the real estate agent by passing a reasoned order to furnish any information or explanation relating to their affairs as the Authority may require. The territorial jurisdiction of the Authority is on the entire state of Maharashtra with limited human resources and therefore it is practically impossible for it to reach out all the projects spread throughout the state to verify whether they require registration under the Act or not. Therefore in order to get tip off of those projects which require the registration under the Act, the mechanism of source complaint is devised where the informant without paying any fee can bring to the notice of the Authority unregistered projects which are eligible for registration and the option is given to the

informant either to participate in the enquiry conducted on his information or to abstain from it. This is mainly to detect those projects which require registration but are not registered u/s 3 of the Act and to punish the defaulters. Its scope is limited to this purpose only. It is different from the complaint to be filed u/s 31 of the Act. Only the aggrieved person can file the complaint u/s 31 against the promoter, allottee or the real estate agent, as the case may be, for any violation or contravention of the provisions of RERA or the rules and regulations made thereunder. It requires court fee. 'Source complaint 'is in fact a misnomer. It therefore causes confusion in the minds of aggrieved persons and when they file source complaint, they expect that all the disputes falling u/s 31 of the Act should be addressed. Therefore, it is necessary to change the caption from source complaint to source information. The Secretory of the Authority shall bring this fact to the notice of Hon'ble Chairperson for making necessary change if he deems it fit.

Maintainability of the complaint.

8. This source complaint has been filed on 31.01.2019 and the project has been registered on 18.05.2019 vide project registration no. P51900021304. Therefore, the complaint is disposed of by order dated 08.07.2019 by the Hon'ble chairperson. Thereafter on 15.01.2020, he has issued office note contending that the complainants have prayed the reliefs u/s 12,14,18,19 of RERA in addition to the prayer of registration of the project. Complainants complain about less carpet area, delay in obtaining occupation certificate, encroachment in refuge area etc. Since the promoter registered the project, complaint is sent to member-2 for deciding the remaining issues. This is how the complaint is placed before me. This authority can take suo motu cognizance or cognizance on any complaint under section 34(f) and 35 of RERA where there is contravention, violation

or non-compliance of the provisions of it. I don't want to be too technical to adopt pedantic approach as it may defeat justice. Hence, I hold that this complaint is maintainable provided the complainants deposit Rs.5,050/- towards complaint fee.

Contravention of Section 3 of the RERA

9. Section 3 of RERA prohibits a promoter from advertising, marketing, booking, selling, or offering for sale, or inviting 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. Its proviso provides 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. Sub- section (2) of section 3 further provides that,

(2) Notwithstanding anything contained in sub-section (1), no registration of the real estate project shall be required –

(a) where the area of land proposed to be developed does not exceed five hundred square meters or the number of apartments proposed to be developed does not exceed eight inclusive of all phases:

10. On this touchtone now it is necessary to look at the facts of the case. There is no denial of the fact, that the respondent no. 1 has been constructing the real estate project on the land admeasuring 3063 sq. mtrs. consisting of 21 flats from the year 2009 in planning area for sale. It is also the fact that the respondent no. 1 has not received the occupation certificate of the said project. Therefore, the project of the respondent no. 1 is the real estate project within the definition provided by section 2 (zn) of the RERA.

11. The respondent no.1 applied for registration of project on 17.06.12019 and registration certificate has been issued on 21.06.2019. The respondent no. 1 has entered into an agreement for sale of flat no. 501 with the complainants on 13.07.2018 and on that day the project was not registered with MahaRERA. This shows that the respondent no. 1 has agreed to sell flat no. 501 without registering its project with the Real Estate Regulatory Authority. This is clear case of violation of section 3 of RERA.

12. It is a matter of record that after filing of the complaint on 31.01.2019 only the respondent no. 1 applied on 17.06.12019 to register the project. It did not apply voluntarily but applied only when the fact of non-registration of the project came to light. Therefore, the respondent no. 1 has contravened section 3 of RERA. In this context, section 59 of RERA provides that, if the promoter contravenes section 3 he shall be liable to penalty which may extend up to 10% of the estimated cost of the real estate project as determined by the Authority. Considering the estimated cost of the project estimated by the respondent no. 1 while registering the project, I find that in the facts and circumstances of the case, it is necessary to impose the penalty of Rs Seventy lakh under section 59 r/w 3 of the RERA which is much less than 10% of the estimated cost of the project.

13. Before parting with this issue, I put on record that though the first registration certificate of the project has been issued on 21.06.2019, it is not in the record of the Authority. In fact, Authority must keep all earlier certificates in its record or in case of its renewal/extension its remark be put on the first certificate. I am informed that when registration certificate is renewed/extended, a fresh certificate is issued and the computer system automatically deletes the first one. It causes inconvenience to the Authority and others also to know when the earlier certificate was issued. I have to take help of respondent no.1's application for locating the date of issuance

of certificate in this case. Secretory of the Authority will bring this fact also to the notice of Hon'ble chairperson for necessary correction.

Car Parking

14. Mr. Gala submits that, the respondent no.1 has agreed to sell the flat with a car parking. According to him, the Development Control Rules provide, that when the area of the flat is more than 495 sq. ft. then one car parking must be provided for it. The flat no. 501 booked by the complainants is of 558.02 sq. ft. and therefore, car parking is must for this flat. I have gone through para 2 of the agreement for sale, there is mention of flat no. 501 having the area of 558.02 sq. ft. only which is agreed to be sold by the respondent no. 1. Moreover, in its sixth schedule, the property to be sold has been described in details. It does not contain the car parking space. Therefore, I find that the complainants have failed to prove that the respondent no. 1 agreed to sell one car parking separately. However, the fact remains that the respondent no. 1 has not denied the complainants' right to get one car parking. It is the contention of the respondent no. 1 that after formation of the co-operative society of the allottees, the society shall allot the car parking space to the complainants. I do not find anything wrong in this contention. Therefore, the complainants are not entitled to get relief of ear marking of car parking space from respondent no.1. However, their right to get one covered car parking is recognised by the Authority and the society on its formation shall allot one covered car parking space to the complainants in the same building.

Formation of the society

15. There is no denial to the fact that the respondent no. 1 has agreed to sell 11 units out of 21 therefore, more than 50% of the units in the project are agreed to be sold. In this context, now it is necessary for me to refer

section 11(4)(e) of the RERA which casts the responsibility on the promoter to form the association or society or co-operative society, as the case may be, of the allottees. The respondent no.1 has also mentioned in the agreement for sale executed in favour of the complainants that it is going to form society. Ld. Advocate of the respondent no. 1 submits that the respondent no. 1 has started the process of formation of the society. It appears that more than 1½ years have passed after filing of the complaint, but till date the society has not been formed. Therefore, I find that, the respondent no. 1 has committed the breach of section 11(4) (e) of RERA. Section 61 of the RERA provides that if the promoter contravenes any other provisions of the Act, other than that provided under section 3 or section 4, or the rules or regulations made thereunder, he shall be liable to a penalty which may extend up to 5% of the estimated cost of the real estate project as determined by the Authority. The respondent no. 1 has not assigned any cogent reason as to why he has not formed the society so far. Therefore, it is necessary to direct the respondent no. 1 to form co-operative society of the allottees as agreed by him within the period of one month from this order and the respondent no. 1 shall pay penalty of Rs. Thirty Lakh under section 61 r/w 11(4)(e) of RERA.

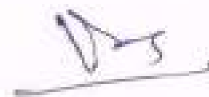
Refund of excess GST

16. The agreement for sale clearly shows that the respondent no.1 agreed to charge 4% as the State GST and 4% Central GST and it is also not disputed that the respondent no. 1 has collected the GST at the rate of 12%. The respondent no. 1 submits that it is ready to refund the excess amount of GST collected from the complainants. However, the Ld. Advocate of the respondent no. 1 Mr. Jain submits that, it would be possible only when the occupation certificate or the completion certificate would be obtained. I find that, since the respondent no. 1 has collected GST amount 4% in

excess, the respondent no. 1 is under contractual obligation to refund the said amount with interest at prescribed rate. The prescribed rate of interest is 2% above SBI's highest MCLR which is currently 7% p.a. Therefore, the respondent no. 1 is bound to refund the amount of GST collected in excess with interest.

Revision of building plan- illegal construction on 8th floor, illegal encroachment on refuge area-- S.14 of RERA.

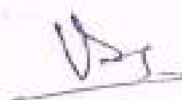
17. It is the allegation of the complainants that the respondent is in the attempt of revising the plans because it has constructed duplex flat at the top of the building illegally and unauthorizedly by encroaching upon refuge area. Mr. Jain submits that the plans have been revised in the year 2012 itself. In this context, when one refers to section 14 of the RERA, one finds that it is the liability of the promoter to develop the project and complete it in accordance with the sanctioned plans / layout plans and the specifications as approved by the competent authorities. It further provides, if any additions and alteration in a sanctioned plan / layout plan affecting a particular flat are required, then in that case, written consent of the allottee is necessary and when such alterations and additions in the sanctioned plans / layout plans and specifications of the buildings or the common areas within the project are to be carried out, then they cannot be carried out without previous written consent of at least 2/3rd of the allottees other than the promoter who has agreed to take the apartments in such building. After giving thought to this provision, I find that, the respondent no. 1 shall not revise the plan without following the provisions of section 14 of the RERA. It is the liability of the respondent no. 1 to develop the project as per the sanctioned plan and layout plan. If any additions are made therein or refuge area is encroached upon, then the respondent no. 1 is liable to remove them. The respondent no. 1 has already



applied for occupancy certificate and therefore, the planning authority i.e. Municipal Corporation is expected to verify whether the building is developed or constructed in accordance with sanctioned and layout plans or not, if there are any other additions or violations then the planning authority is at liberty to take action against the respondent no. 1 in accordance with the law. But that action may not bring any relief to the allottees. Therefore, it is hereby clarified that additional construction, encroachment if any, shall be removed by the respondent no. 1. The refuge area be kept vacant as shown in building plan.

Area of the Flat.

18. The complainants have produced the agreement for sale executed by the respondent no. 1 in their favour which shows that the flat no. 501 booked by them in the project is having the area of 558.02 sq. ft. (built up 780 sq. ft.) Now, the complainants allege that the actual size / area of the flat is less than the agreed area by 63 feet. The respondent no. 1 on the contrary submits that the BMC has assessed the flat for the purpose of assessing the taxes and they recorded that the area of the flat is 571 sq. ft. Mr. Gala submits that, for the purpose of tax assessment the balcony is also included in the area and therefore, area appears to be more. He brings to my notice the sanctioned plan showing that the area of flat no,501 is 46.05 sq. meter (495.59 sq. feet). Therefore, I agree with complainants that the area of the flat is lesser by 62.5 sq. meter. The respondent is bound to refund its proportionate consideration at the rate of Rs. 19,000/- per sq. ft. which comes to Rs. 11,87,500/-, with simple interest at prescribed rate from the date of receipt of the amount till its refund.



Demand of Rs. 25,000/- for changing the name on the electricity bill to the names of the respective allottees.

19. There is no dispute on the point that the promoter cannot add costs in disguised manner and cannot earn the profits unethically. Respondent no.1 can charge only the actual charges charged for transfer of meters and the security deposit for which it will have to provide receipts to allottees. Respondent no. 1 is therefore directed to collect only the transfer fee and security amount taken by the electricity company and shall provide its receipt/s to complainants.

The occupation/completion certificates and the conveyance deed.

20. Section 11(4)(b) of RERA casts obligation on the promoter to obtain completion certificate, occupancy certificate or both as per local laws as applicable to the competent authority. Section 17 of it obliges him to execute conveyance deed of an apartment to its allottee and conveyance deed of common areas to the association of allottees or local competent body as the case may be. Respondent no.1 is directed to do the needful for its compliance at the earliest. To conclude, I pass the order –

ORDER

A. The complainants shall deposit Rs. 5,050/- towards the complaint fee.

B. The respondent no. 1 shall pay the penalty of Rs. 70,00,000/- under section 59 read with section 3 of the RERA.

C. The respondent no. 1 shall pay Rs. 30,00,000/- towards penalty under section 61 read with section 11 (4)(e) of the RERA.

D. Society / Association of the allottees shall provide one covered car parking space to the complainants in the same building.

E. The respondent no. 1 shall form the Association / co-operative society of the allottees within one month from this order.

F. The respondent no. 1 shall refund 4% of GST amount collected in excess from the complainants with simple interest at the rate of 9% p.a. from the date of the receipt till refund.

G. The respondent no.1 shall remove all unauthorized / illegal construction which is not in accordance with the layout and sanctioned plans.

H. The respondent no. 1 shall refund Rs. 11,87,500/- with simple interest at the rate of 9% p.a. from the date of the receipt amount till refund towards the lesser area of the flat.

I. The respondent no. 1 shall collect only the transfer fee of electricity meter /bills and security amount from the complainants and shall provide them the receipts thereof.

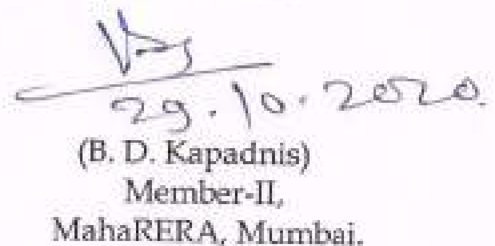
J. The respondent no. 1 shall obtain occupation / completion certificate at the earliest and thereafter shall execute the conveyance deed as per section 17 of RERA.

K. The respondent no. 1 shall keep the entire refuge area vacant as shown in building plan.

L. The respondent no. 1 shall pay the complainants Rs. 20,000/- towards the cost of the complaint.

M. Secretory of the Authority shall bring the observations contained in para 7 and 13 of this order to the notice of Hon'ble chairperson for necessary improvement in the system programming, if he thinks it fit.

N. The complaint is dismissed against the respondent no. 2.



Date: 29.10.2020.

(B. D. Kapadnis)
Member-II,
MahaRERA, Mumbai.