

**BEFORE THE MAHARASHTRA REAL ESTATE
APPELLATE TRIBUNAL, MUMBAI.**

Appeal No. AT006000000041897

Jayesh Shenvi

Having address at: A-302,
Shrinath Apts,
Kandarpada Dahisar (West),
Mumbai – 400068

... Appellant
[Original Complainant /
Allottee]

Versus

D. K. Enterprises

Having address at: A63-101,
Karan Shantinagar CHSL,
Sector-1, near station, Mira road,
Thane - 400110.

...Respondent
[Original Respondent/
Promoter]

Adv. Avinash Pawar for Appellant.

Adv. Suraj N. Naik for Respondent.

CORAM : SUMANT M. KOLHE, MEMBER(J)
S.S. SANDHU, MEMBER (A)

DATE : 4th NOVEMBER, 2020

JUDGMENT

PER: SUMANT KOLHE, MEMBER (J)

Appeal is directed against the order dated 25th
October, 2019 passed by learned Member-1 of MahaRERA, in
Complaint No. CC006000000071958 whereby the complaint

for giving direction to Promoter to execute agreement for sale is dismissed.

2. In nutshell, the facts are as under.

Appellant is Allottee. Respondent is Promoter. I will refer the parties as Allottee and Promoter.

3. Promoter launched the project namely "**K. D. Hermitage**" at Bhayander, district- Thane in the year 2010. Allottee booked flat no. 705 (1BHK) situated on 7th floor in building no. 2 of the said project for total price of Rs. 21,30,000/-. Accordingly booking form was executed on 29.08.2010. Allottee paid booking amount of Rs. 51,000/- by cheque dated 25.08.2010 to the Promoter. Thereafter, Allottee paid Rs. 80,000/- by cheque on 31.12.2010 and Rs. 80,000/- by cheque dated 01.01.2011 and Rs. 81,500/- by cheque dated 02.01.2011.

Promoter stopped the construction work. Promoter did not execute the agreement for sale in favour of Allottee as per the booking. In the month of June, 2012 Promoter demanded payment of first slab by issuing letter. Again, in the month of July 2012 and in the month of December, 2012 Promoter demanded payment for second and third slab respectively by issuing letters to the Allottee. Thereafter Allottee made request to Promoter to execute the agreement for sale. Allottee wanted agreement for obtaining home loan from the bank. Promoter did not respond. There

was neither further demand of money from the Promoter nor any payment by Allottee to Promoter during the period from the year 2013- 2018.

Project was incomplete on the date of application of RERA i.e. on 01.05.2017. Promoter registered the project with MahaRERA. As Promoter received 10% of the price from Allottee, he is under obligation to execute the agreement for sale as per Section 13 of RERA. Allottee preferred complaint against Promoter for giving direction to Promoter to execute agreement for sale.

After hearing both the sides and perusing the documents on record, the learned Member-1 of MahaRERA rejected the complaint and refused to give direction to the Promoter to execute agreement for sale.

W/S

4. Feeling aggrieved by the order of the rejection of the complaint, Allottee has challenged propriety, correctness and legality of the impugned order.

5. Heard learned counsel for the Allottee. Heard learned counsel for the Promoter. Read the impugned order. Perused the documents on record.

6. Following point arise for my determination.

POINTS

i) Whether the impugned order is sustainable in law ?

ii) What order ?

7. My findings on the above points are as under.

FINDINGS

i) No.

ii) Appeal is allowed.

REASONS

8. Promoter launched the project in the year 2010. Allottee booked flat no. 705 situated on 7th floor in building no. 2 in the said project for total consideration of Rs. 21,30,000/- in the year 2010. Allottee paid booking amount of Rs. 51,000/- by cheque in the year 2010 to the Promoter. Thereafter Allottee further paid total amount of Rs. 2,81,500/- by three different cheques on or before January, 2011.

Promoter demanded slab wise payment from the Allottee as under.

<u>Slab</u>	<u>Payment demanded</u>	<u>Time of demand</u>
First	Rs. 3,46,500/-	January, 2011
Second	Rs. 4,32,500/-	July, 2012
Third	Rs. 5,35,500/-	December, 2012

Admittedly Allottee did not pay the amount as per the demand of Promoter.

Project is dully registered with MahaRERA as it was incomplete on 1st May, 2017 i.e. on the date of application of RERA. Project is governed by provisions of RERA. Allottee filed complaint with MahaRERA for giving direction to Promoter to execute the agreement for sale. Complaint came to be rejected.

9. Allottee alleged that Promoter received total amount of Rs. 2,92,500 from Allottee in the year 2010-11 but failed to execute agreement for sale and Promoter contravened provision of Section 13 of RERA. Promoter contended that Allottee failed to make slab wise payment as per three letters of demand of first three slabs. According to Promoter, he cancelled the transaction with Allottee and issued allotment letter of the flat no. 705 in favour of Mr. Khalid Gori on receiving advance amount from him.

In this peculiar case, project is launched in 2010 and it is incomplete till the year 2020. Allottee booked flat no. 705 and paid the amount of Rs. 2,92,500/- towards price to Promoter. Total price of the flat is admittedly Rs. 21,30,000/-. This transaction took place in the year 2010-2011. In the year 2012 Promoter issued demand letter in the month of January, July and December and demanded slab wise payment from

the Allottee. However, Allottee did not comply the said demand of the Promoter.

It is pertinent to note that Promoter wanted to construct building of stilt + 12 upper floors.

Following are details of the building plan:

<u>Building Plan</u>	<u>No. of floors</u>	<u>Year of sanction</u> (Issuance of Commencement Certificate)
Original Plan	Stilt + 12 Upper floors	-----
First Plan	Stilt + 4 Upper floors	2009
Second Plan	Stilt + 6 Upper floors	2014
Third Plan	Stilt + 11 Upper floors	2018

Thus, Promoter had initially commencement certificate only to make construction of 4 floors in the year 2009 when Allottee booked flat no. 705 in building no. 2 of the project. Commencement Certificate of the revised plan for construction up to 6 floors was received by Promoter in the year 2014. Flat no. 705 which is booked by Allottee is situated on the 7th floor. So up to the year 2014 there was no commencement certificate with Promoter for making the construction of flat no. 705 of the Allottee. Then Promoter received further commencement certificate only in the month of August, 2018 to make construction of stilt + 11 upper floors. Thus, commencement certificate for making construction of flat no. 705 of Allottee was issued by Competent Authority only in the month of August, 2018. So,

at the time of booking of flat no. 705 in the year 2010 Promoter was not having commencement certificate to make construction of the 7th floor of the building. However, in the year 2010-11 Allottee paid and Promoter accepted total amount of Rs. 2,92,500/- from the Allottee towards the price of flat no. 705 for which Promoter was not having commencement certificate of competent authority. Promoter made demand of Rs. 3,46,500/- and Rs. 4,32,500/- and Rs. 5,35,500/- towards completion of first slab, second slab and third slab respectively from the Allottee in the year 2012 only. In fact, Promoter was not having commencement certificate to make construction of flat no. 705 at the time of making demand for slab wise payment in the year 2012. After receiving commencement certificate to make construction of stilt + 11 upper floors in the month of August 2018, Allottee has taken further step from his side to complete the transaction of project of flat no. 705 with the Promoter.

W/S

I would like to point out that Promoter did not issue allotment letter in favour of Allottee in the year 2010. However, Promoter has admitted that booking form was executed on 29.08.2010 as Allottee booked flat no. 705. Neither parties have produced copy of booking form on record. There is no document on record, executed between Allottee and Promoter and which shows the terms and conditions of transaction of the sale flat no. 705. However, it is not in dispute that Allottee booked flat no. 705 and paid an amount of Rs. 2,95,500/- to Promoter and Promoter received

commencement certificate for making construction of flat no. 705 only in the year 2018 when the project was registered with MahaRERA. There is absolutely nothing on record to show that Promoter informed the Allottee that the transaction in respect of flat no. 705 with Allottee was cancelled. Promoter was not justified in demanding slab wise payment in the year 2012 from Allottee when commencement certificate for construction of flat no. 705 was not issued by Competent Authority. Promoter has not refunded the amount of Rs. 2,95,000/- to Allottee or informed Allottee that it is forfeited. On this backdrop it can be easily said that the transaction between Allottee and Promoter in respect of flat no. 705 is still surviving and not yet properly and legally cancelled. Promoter cannot allot flat no. 705 to third party without properly and legally cancelling the booking of Allottee.

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10. Project is governed by provisions of RERA. Rights and obligations of Allottee and Promoter are also governed by provisions of RERA. Allottee has filed complaint under Section 31 of RERA. Allottee has sought the relief of execution of the agreement for sale as per Section 13 of RERA. Promoter is under obligation to execute the agreement for sale on receiving more than 10% of amount of the Price of the flat from the Allottee. In the present matter Promoter has received 2,95,500/- from the Allottee which is more than 10% of price of the flat no. 705. So, Promoter is under obligation as per Section 13 of RERA to execute the agreement for sale

in favour of Allottee as per the transaction between the parties.

11. In this case, I would like to point out that both parties have not taken proper care and caution while entertaining into the transaction. Promoter agreed to sale the flat of which he has not received the commencement certificate or sanction of the Competent Authority. Allottee agreed to purchase such flat which was having no sanction of Competent Authority and for which, Promoter has no commencement certificate to make construction of building of stilt + 12 floors. Promoter went on making construction of initially of stilt + 4 floors in the year 2009 and thereafter of stilt + 6 floors in the year 2014 and finally of stilt +11 floors in the year 2018. In such circumstance, it cannot be said that Allottee was sleeping over his right from nine years to perform his part of contract against Promoter. Commencement certificate for making construction of flat no. 705 was issued by Competent Authority to Promoter in August, 2018 and Allottee properly and correctly initiated the action for completing the transaction under the provisions of RERA in the year 2018.

Alleged transfer of flat by Promoter in favour of third party will not defeat the contractual right of Allottee to seek relief of performance from Promoter on the basis of transfer of flat booked originally by Allottee as Promoter never cancelled the said transaction by informing to the Allottee.

12. For the reasons stated above, I am of the opinion that Allottee is entitled for relief of execution of the agreement for sale in respect of flat no. 705 from the Promoter as per Section 13 of RERA. So impugned order rejected the complaint of the Allottee for the execution of agreement is illegal and improper. So, I set-aside impugned order and answer point no. 1 accordingly.

[PER : S. S. SANDHU, MEMBER (A)]

13. I have perused draft order. Necessary facts have already been recorded by my learned brother. These reveal that Appellant booked flat in 'K.D.Hermitage' at Bhayander, District Thane in the year 2010. Allottee booked flat No. 705 situated on 7th floor in building No. 2 of the said project for a total price of Rs. 21,30,000/- on 29.08.2010. Allottee paid booking amount of Rs. 51,000/- by cheque dated 25.08.2010 and thereafter Rs. 80,000/-, Rs. 80,000/- and Rs. 81,500/- by cheques dated 31.12.2010, 01.01.2011 and 02.01.2011 respectively. Amount paid is not disputed by Promotor. It is also not disputed that Promotor did not execute the agreement for sale in favour of Allottee. Promotor demanded further amount by Notices in the months of June 2012, July 2012 and December 2012 for first, second and third slabs respectively.



14. In response to the above Notices Allottee made no efforts to make payments. During hearing, learned counsel for Allottee argued that Allottee made repetitive requests for execution of agreement but Promotor paid no heed. It was fairly admitted by learned counsel that the said requests were made orally. At the same time, it is gathered from submissions of parties that even Promoter also made no efforts after December 2012 to demand further payments and to offer execution of agreement to Allottee.

15. Facts in the matter reveal that Promotor initially had sanctions only to construct stilt+ four floors. In 2014 he got plan revised for construction of stilt+ six floors and finally stilt+ eleven floors in the year 2018. This shows that Promotor not only took payment from Allottee for a flat at 7th floor without having any sanction for the same at the material time but he neither informed Allottee about revision of plans nor taken his consent for the same. All along till deciding to file the complaint Promotor kept Allottee in the dark and uninformed for the need for making further payments and execution of necessary agreement for sale.



16. Considering overall facts on record and submissions of parties, it is noticed that though Promotor has stated in para 3 of the impugned order that flat booked by Allottee was cancelled and sold to a third party, no evidence appears to have been submitted before the Authority and in

this Appeal to show that Allottee was given a Notice prior to cancellation of flat or after cancellation of the flat. This unilateral cancellation of flat is against the contractual norms. No doubt there are lapses on the part of Allottee for not making payment of amount as demanded in the year 2012, Promotor also cannot be held justified for asking further amount in the absence of requisite sanctions for undertaking construction up to 7 floors on which Allottee's flat was situated.

17. In view of the above observations, as both the parties have committed certain lapses with regard to their respective obligations, equity demanded that Promotor ought to have intimated Allottee about making further payment on receipt of approvals for construction of additional floors as per revised plan or on completion of the building so as to enable execution of the agreement. Without doing so, one sided cancellation of booking without prior information/intimation to Allottee cannot extinguish the rights of Allottee in the booked flat. Therefore, observations of learned Member in the impugned order that claim of Allottee for directions to Promotor to execute agreement is time barred cannot be accepted.



18. In the light of above observations, since Promotor itself obtained necessary approvals for construction only by the year 2018 and neither sought payments from Allottee after December 2012 for execution of agreement nor informed



or taken consent of Allottee for revised plans, Allottee is entitled for execution of agreement as prayed for. Accordingly, agreeing with my learned brother, I am of the view that impugned order is liable to be set-aside by giving directions to Promotor to execute agreement for sale.

19. In the result, we allow the appeal and pass the following order.

ORDER

- i) Appeal is allowed.
- ii) Impugned order dated 25th October, 2019 passed in Compliant No.CC0060000000071958 is set aside.
- iii) Complaint No. CC0060000000071958 is allowed as under.
 - a) Promoter shall execute and register the agreement for sale in respect of flat no. 705 in favour of Allottee as per the terms and conditions of the transaction between the parties within three months from the date of this order.
 - b) In peculiar circumstance of the dispute, parties to bear their own costs.



W/S

- iv) Copy be sent to Authority and both the parties as per Section 44(4) of RERA.


(S.S. SANDHU)


(SUMANT KOLHE)

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