

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

Complaint No. CC006000000364546

Sakshi Enclave registered Flat Owners AOP

.... Complainant

Versus

M/s Sakshi Developers

Reliance Home Finance Limited

.....Respondents

MahaRERA Project Registration No. P51700009056

Coram: Shri. Mahesh Pathak, Hon'ble Member - I/MahaRERA

Ld. Adv. Ramiz Shaikh appeared for the complainant.

None appeared for the respondent.

ORDER

(Wednesday, 10th July 2024)

(Through Video Conferencing)

1. The complainant above named has filed this online complaint before the MahaRERA on 28-02-2023 seeking directions from MahaRERA to the respondent promoter to i) complete the said project and handover the possession of the respective flats to the members of the complainant along with interest; ii) to restrain respondent no. 2 from taking any coercive steps under the provisions of the SARFAESI Act or acting in furtherance of the notices issued under various provisions of the SARFAESI Act with respect to the units purchased by the members of the complainant bearing nos. 302, 501, 802, 901, 1002; iii) to restrain the respondent no. 2 from taking any coercive steps as per the provisions of the SARFAESI Act and further restrain respondent no. 2 from proceeding with the public auction of bearing nos. 302, 501, 802, 901, 1002; or the alternative, refund the entire amount along with the interest and compensation for delay prescribed under the provisions of the Real Estate (Regulation & Development) Act, 2016 (hereinafter referred to as

'RERA') in respect of the booking of the flats by its members in the respondent no. 1's registered project known as "SAKSHI ENCLAVE bearing MahaRERA registration No. P51700009056 located at Dahisar, Thane (hereinafter referred to as the "said flats").

2. This complaint was heard on several occasions and the same was heard finally on 15/02/2024 as per the Standard Operating Procedure dated 12-06-2020 issued by MahaRERA for hearing of complaints through Video Conferencing. Both the parties have been issued prior intimation of this hearing and they were also informed to file their written submissions if any. Accordingly, the complainant appeared for the hearing and made his submissions. However, despite the notice of hearing, the respondents remained absent.

3. After hearing the arguments of both the parties, the following Roznama were recorded -

On 09/11/2023

"The complainant is present. The respondent is absent. The respondent has also not filed any reply to the complaint. The arguments of the complainant have already been noted in the previous hearings. The complainant has also served the copy of the complaint on the respondent no. 2, which is a financial institution. The respondents are granted a last opportunity to file their replies to this complaint within a period of 3 weeks i.e. by 30-11-2023. The complainant may file a rejoinder to the said replies of the respondents within a further period of 3 weeks i.e. by 21-12-2023. The complainant contends that even though the respondent no. 2 has obtained symbolic possession, as per the case law, the MahaRERA has jurisdiction and overriding effects over SARFAESI Act. Therefore, this complaint is tenable as far as the prayers for handing over the project under sections 7 and 8 of the RERA is concerned. Therefore, it is more important for the respondents specifically the respondent no. 2 to file its reply to the complaint. The complainant has also pointed out

that the mortgage in favour of the respondent no. 2 was created even though the respondent no. 1 had already sold the flats (bearing no. 302, 501, 802, 901, 1002) to the members of the complainant AOP. In view of the above, this matter is adjourned to a suitable date after 21-11-2023 for final arguments by both the sides. List the matter for next hearing on 15-02-2024."

15/02/2024:-

"The complainant is present. Both the respondents are absent. The arguments of the complainant have already been recorded in the previous hearing. Despite directions, the respondents are neither appearing nor filing any reply to this complaint. The complainant has also uploaded proof of service of the complaint on both the respondents. The matter was kept today for final arguments by both sides. Therefore, the respondents are given one last chance to file their replies along with their written arguments within a period of one week i.e. by 22-2-2024. The complainant may file a rejoinder along with its written arguments within a further period of one week i.e. by 29-2-2024 even if the respondents do not file any replies. Accordingly, this matter is reserved for orders suitably after 20-2-2024 based on the arguments of the complainant as well as the reply, rejoinder and written arguments filed in the complaint. In case, the respondent does not file any reply or written arguments, the MahaRERA will be constrained to decide the matter ex-parte against the respondents."

4. Pursuant to the aforesaid direction, the complainant has filed (in hard copy) the written submission on the record of MahaRERA on 29-02-2024 along with annexures. The same has been taken on record. However, the respondents have not uploaded any documents on the record of MahaRERA. Hence the MahaRERA has perused the available record.
5. It is the case of the complainant that the complainant is an association of

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person consisting of members who have purchased the flats under registered agreements from the respondent no. 1. The said complaint is being filed through Mr. Mangesh Shinde – President of the AOP who is duly authorized. Further, the respondent no. 1 is the developer who has undertaken construction of the said project. The said project was proposed to be completed on 31-12-2017 and the extended date of completion permitted under RERA was 30-09-2020. The respondent no. 2 is the assignee of the respondent no. 1 from whom the respondent no. 1 has obtained construction finance. Based on the representation, assurances & promises made by the respondent no. 1, the member of the complainant purchased 15 flats in the said project. The details of the complainants such as flat bearing no. agreement for sale, date of possession, total consideration, consideration paid by the complainants, consideration amounts are as per the table given below:-

Sr. no.	Name	Flat no.	Date of agreement of sale	Total Consideration	Total consideration paid
1	Suresh Verma and Mrs Usha Verma	102	05-12-2018	Rs.55,00,000/-	Rs.55,00,000/-
2	Geeta Agarwal & Rohit Agarwal	201	24-04-2017	Rs.72,50,000/-	Rs.40,00,000/-
3	Mangesh B. Shinde	202	06-05-2015	Rs.49,20,000/-	Rs.43,00,075/-
4	Mr and Mrs Redkar (illegible)	301	22-03-2018	Rs.97,00,000/-	Rs.97,45,032/-
5	Ramlal and Mrs Chauhan (illegible)	302	26-03-2015	Rs.35,64,000/-	Rs.33,24,280/-
6	Dharmesh Shah	401	02-06-2017	Rs.72,00,000/-	Rs.60,53,160/-

	and Manisha Shah				
7	Bino0 Kapoor and S K Kapoor (illegible)	402	30-01-2017	Rs.46,00,000/-	Rs.46,00,000/-
8	Pradeep J Acharya & Sangeeta P Acharya	501	03-06-2015	Rs.65,00,000/-	Rs.63,44,055/-
9	Kamlesh D Raychand & Reena K Raychand	502	22-11-2017	Rs.70,00,000/-	Not mentioned
10	Hemant N Shah HUF and Mrs Shah (illegible)	601	22-02-2017	Rs.72,00,000/-	Rs.44,77,500/-
11	Reshma (unreadable)	701	22-01-2020	Rs.49,00,000/-	Rs.44,00,000/-
12	Ajay J. Gurav and Pooja A. Gurav	702	12-10-2017	Rs.70,00,000/-	Rs.61,83,551/-
13	Mamta Dinesh Jain and Dinesh K Jain	802	13-04-2016	Rs.38,81,000/-	Rs.31,81,210/-
14	Nikhil R. Pandya and Shilpa N. Pandya	901	28-07-2017	Rs.92,10,000/-	Rs.89,92,965/-
15	Sandhya P. Joshi	1002	05-12-2019	Rs.55,00,000/-	Rs.50,00,000/-

Despite paying the consideration as mentioned above, the respondents have not

given possession of the flat due to the inordinate delay in construction of the said project by respondent no. 1. The respondent no. 1 has constructed 11 floors out of 11 sanctioned floors till date. However, further construction of the said project viz. internal works, installation of lift etc. halted since long time for the reason best known to the respondents. The complainant has waited patiently for the construction and completion of the said project which was due to be completed on 31-12-2017 and further on 30-09-2020 as per information published on RERA. It has gravely defaulted on his obligation to the individual members of the complainant as set out in the registered sale agreement executed between the members and the respondent no. 1. Further, the majority of the members of the complainant, were kept in dark by the respondent no. 1 in respect of the construction loan obtained by the respondent no. 1 by creating a security charge in favour of the respondent no. 2. The respondent no. 2 has created a charge in favour of the respondent no. 2 in respect of the flat bearing nos. 201,202,301, 502,601,602,801,901,902,1001 and 1101. The members of the complainant were shocked to learn about the notice issued by the respondent no. 2 under the provision of the SARFAESI Act. The respondent no. 2 had by public notice in newspaper – Free Press Journal on 18-01-2023 published possession notices as per Rule 8 (1) of the security interest (enforcement) Rule, 2022 under the said Act cautioning the public in general not to deal with the property which is subject matter to the charge of the respondent no. 2. Further, the respondent no. 2 has taken symbolic possession of the property on 13-01-2023. The respondent no. 1 had mortgaged the entire plot of the land on which the said project has been constructed along with 10 flats with the respondent no. 2. Upon taking search of the RERA website, the complainant learnt that the said encumbrance has been registered with RERA against mortgage of unsold stock in the said project. The respondent no. 1 had suppressed the fact of construction loan at the time of entering upon the sale agreement with the members of the complainant. The members of the complainant learnt about the said charge only through the said

public notice published by the respondent no. 1. The said public notice includes 5 flats i.e. 302,501,802, 901,1002 of the members of the complainant. The respondent no. 2 is an assignee of the respondent no. 1 and is included within the definition of promoter as per RERA. Therefore, this authority has jurisdiction to entertain the present complaint against the respondent no. 2 as it has taken recourse to the provision of SARFAESI Act. However, the respondent no.1 has failed to comply with the terms of the sale agreement and oral assurances and promises given to the members of the complainant and failed to complete the said project and handover the possession of the said flats. Being aggrieved and dissatisfied with the conduct of the respondent, it filed the present complaint. Hence, the complainant prayed to MahaRERA to allow this complaint and grant reliefs as sought for in this complaint.

6. The complainant has also filed its written submission (in hard copy) on record of MahaRERA on 12-03-2024, wherein it has stated that the agreements for sale entered between its members and other such buyers, are nowhere mentioned and or highlighted in the mortgage deed created in favour of the respondent no. 2. Moreover, upon checking the MahaRERA website, it came to know about such mortgage of flats in lieu of construction loan of Rs. 3 crores availed by the respondent no. 1 against mortgage of unsold flats. The complainant has relied on the judgement passed by the Hon'ble Apex Court in Bikram Chatterji & Ors Vs Union of India and confirmed in Union bank of India Vs Rajasthan Real Estate Regulatory Authority & Ors (2022 SCC Online SC 1885) wherein it has held that in the event of conflict between RERA and SARFAESI Act, the provisions of RERA would prevail. Therefore, the entitlement of its members will prevail over the charge created by the respondent no. 1 in favour of the respondent no. 2. The complainant therefore stated that it has approached the MahaRERA for protecting the rights and interest of its members (in respect of the said flats) and land on which the proposed building is standing that has been mortgaged with

the respondent no. 2. Moreso, the said agreements for sale are signed with its members prior to the execution of the said mortgage deed. Also, the respondents despite service of this complaint have chosen not to appear in the present matter to seek refuge under the provision of SARFAESI Act for exercising the charge on the mortgaged flats and plot of land.

7. In this case, the record also shows that the complainant has filed this online complaint before MahaRERA on 28-02-2023, however, till date the respondent no.1 promoter has not bothered to upload its reply to this complaint, though the complaint was visible to the respondent no. 1 in its project login. Even as per the SOP dated 12-06-2020, the respondent no. 1 was liable to upload its reply in digital form in this complaint. However, till date the respondent no.1 has not complied with the said direction. Furthermore, the notices for virtual hearings dated 03/08/2023, 09/11/2023 and 15/02/2024 have been duly served upon the respondent no.1, however it failed to appear for the said hearings. Further, on the last date of hearing held on 15/02/2024, one weeks' time was granted to it to file its reply as a last chance. However, despite specific directions being issued, the respondent no. 1 has failed to upload any reply / written submissions on record of MahaRERA. It shows that the respondent no. 1 is not willing to contest this complaint. Hence the MahaRERA has no other alternative but to proceed with the matter ex-parte against the respondent no. 1 on merits.
8. The MahaRERA has examined the submissions made by the complainant which is the association formed by the allottees of this project. Hence, for the sake of brevity, the complainant is hereinafter referred to as the 'association'. The respondent no. 1 a partnership firm of the promoter, which has registered this project is herein after referred to as the promoter and the respondent no. 2, which is the financial institution who availed the project load to the promoter is hereinafter referred to as the bank for the sake of brevity.

9. The association being aggrieved person has filed this complaint under section 31 of the RERA seeking following reliefs from the MahaRERA :-

"a. Be pleased to appoint the Complainant to complete the said project and hand over the possession of the respective flats to the members of the Complainant in accordance with law.

b. I pray that the Hon'ble Regulatory Authority may be pleased to restrain Respondent No. 2 from taking any coercive steps under the provisions of the SARFAESI Act or acting in furtherance of the Notices issued under various provisions of the SARFAESI Act with respect to the units purchased by the members of the Complainant being Unit Nos. 302, 501, 802, 901, 1002 in the proposed building known as Sakshi Enclave being constructed at land bearing survey no. 267, hissa no. 1/1, CTS No. 857, 857/1, 857/2 of village Dahisar, Taluka: Borivali, Mumbai Sub-Urban District.

c. I pray that the Hon'ble Regulatory Authority may be pleased to restrain the Respondent No. 2 from taking any coercive steps as per the provisions of the SARFAESI Act and further restrain Respondent No. 2 from proceeding with the public auction of Unit Nos. 302, 501, 802, 901, 1002 in the proposed building known as Sakshi Enclave and/or of the land bearing survey no. 267, Hissa no. 1/1, CTS No. 857, 857/1, 857/2 of village Dahisar, Taluka: Borivali, Mumbai Sub-Urban District on which the incomplete building known as Sakshi Enclave is situate.

d. In the alternative, the Hon'ble Regulatory Authority may be pleased to direct the Respondent No. 1 to return to the members of the Complainant all the amounts paid in respect of the Units at Annexure 4 along with 18% interest per annum from date of payment until realization.

e. I pray that the Hon'ble Regulatory Authority may be pleased to direct the Respondent No. 1 to suitably compensate the members of the Complainant for the inordinate delay in the project and for loss caused due to the action being initiated by Respondent No. 2.

f. That such orders be passed as the Hon'ble Regulatory Authority may deem fit in

the circumstances of the case."

10. The association by filing this complaint is mainly seeking three substantive reliefs from the MahaRERA viz. i) for taking over of this project under section 8 of the RERA as the promoter has failed to complete the same within the stipulated time period, ii) directions to the promoter to handover possession of the flats along with interest under section 18 of the RERA and iii) to restrain the bank from taking any coercive steps by auctioning the flats bearing Nos. 302, 501, 802, 901, 1002 allotted to its members under SARFAESI Act.
11. The association has mainly contended that the promoter has failed to complete this project as per the timeline and hence, it wants to take over this project under section 8 of the RERA. Also, the promoter after selling of few flats bearing nos. 302, 501, 802, 901, and 1002 to its members has created a mortgage deed on 11-07-2016 and obtained project loan of Rs. 3 crores from the said bank. As the promoter failed to repay the said project loan, the said bank has initiated the action under the SARFAESI Act. Hence, the association has also prayed for injunction order against the said bank restraining it from initiating auction for sale of the said flats allotted to its members.
12. In the present case on bare perusal of the submissions made by the association, the MahaRERA has noticed that by filing this complaint which in fact is a group complaint, the association is seeking common as well as individual sort of reliefs. In this regard, the MahaRERA is of the view that such individual reliefs for possession to its members along with interest etc. cannot be agitated by the association. However, it is for the individual allottees to raise such issues by filing individual complaint. Moreover, the said issue has already been clarified by the MahaRERA vide a roznama dated 03-08-2023 passed in this complaint. Hence, the MahaRERA is not inclined to grant relief sought by the

association at point no. (ii) mentioned above.

13. As far as the relief sought by the association at point no. (iii) above towards injunction against the bank from initiating any action under the SARFAESI Act, the MahaRERA has noticed that the association has mainly contended that the RERA supersedes the provisions of the SARFAESI Act. Hence, it has prayed to grant the said relief in its favour.

14. As far as the said relief sought by the association, the MahaRERA has perused the order dated 14-02-2022 passed by the Hon'ble Supreme Court of India in Special Leave to Appeal (C) Nos. 1861 - 1871 /2022. In the said order, the Hon'ble Apex Court has made following two crucial observations on the issue of applicability of RERA on the proceeding filed under SARFAESI Act:-

" (iv) RERA would not apply in relation to the transaction between the borrower and the banks and financial institutions in cases where security interest has been created by mortgaging the property prior to the introduction of the Act unless and until it is found that the creation of such mortgage or such transaction is fraudulent or collusive

(v) RERA authority has the jurisdiction to entertain a complaint by an aggrieved person against the bank as a secured creditor if the bank takes recourse to any of the provisions contained in Section 13(4) of the SARFAESI Act."

15. However, in this case, from the submission made by the association in this online complaint, it appears that the said Mortgage Deed between the respondent no. 1 and the respondent no. 2 bank was executed on 11-07-2016 i.e. prior to commencement of the RERA on 1-05-2017. Hence, in view of the aforesaid observations made by the Hon'ble Apex Court, the MahaRERA prima facie feels that the MahaRERA has no jurisdiction to issue any order in respect of the action initiated by the bank under the SARFAESI Act. Moreover, the association has also not provided any documents regarding the fact that

the said mortgage deed is collusive or fraudulent or uploaded any order passed by the competent court of law in this regard. Hence, the MahaRERA is not inclined to consider the request of the association about injunction against the bank under the SARFAESI Act as sought for at point no. (iii) above.

16. As far as the relief sought by the association at point no. (i) for handing over of this project under section 8 of the RERA, the MahaRERA has noticed that the promoter while registering this project with the MahaRERA has mentioned the proposed date of completion of this project as 31-12-2017 and revised date of completion as 31-03-2019, which is extended till 30-09-2020. However, till date the project is incomplete, and the promoter has failed to obtain OC for this project. It shows that this captioned project has lapsed and the same is not yet renewed by the promoter.

17. In this regard, it is pertinent to note that there is a procedure prescribed by the MahaRERA vide Circular No. 8 of 2019 dated 28-03-2019 for initiating action as contemplated under sections 7 and 8 of the RERA as well as the circular for lapsed project under no. 24 of 2021 dated 21-09-2021.

18. However, on bare perusal of the said MahaRERA Circular No. 8 of 2019, it appears that the following procedure was laid down for revocation of the project registration:-

“Therefore, it is felt necessary to issue necessary direction which shall be followed for revocation of project registration and thereafter.

- *MahaRERA shall only consider those complaints for revocation of project, when Association of Allottees is involved.*

Wherein Association of Allottees is Association or society or co-operative society or a federation or any other body by whatever name called, whether registered consisting of a majority of Allottees i.e. not less than 51%

including members to whom plot or apartments or building has been allotted sold or otherwise transferred including such rehab portion. which are included in MahaRERA registered project.

- *While filing the complaint, the Association of Allottees shall also provide the following documents:*
 - *Declaration confirming that the complainants has/have not filed any complaint with regard to the project under consideration which is pending with NCLT/Debt Recovery Tribunal or any other court/Forum under any Act including IBC/SARFAESI ACT/DRT ACT/ MPID ACT etc. and that no such proceedings are pending, to the best of their knowledge.*
 - *List of all stakeholders with available contact details including competent Authority, Promoter-Landowner / Investor. Architects certifying Form 1 and 4, Engineer certifying Form 2 and CAs certifying Form 3 & 5, Banks listed in encumbrance certificate, and any other parties with third party interest in the project.*
- *On receiving this complaint, MahaRERA shall serve notice to the promoter, stating the grounds on which it is proposed to revoke the registration. The promoter is provided thirty days' notice to present his case.*

Copy of the said notice shall also be sent to the competent Authority, Association of allottees, Promoter-Landowner / Investor, Architects certifying Form 1 and 4, Engineer certifying Form 2 and Chartered Accountant certifying Form 3 & 5, Banks listed in encumbrance certificate, and any other parties with third party interest in the project
- *While a complaint under Section 7 or 8 is being heard by Chairperson/ Member, all other pending complaints including complaints under section 7, against that project shall be brought under the same Chairperson/ Member. Further complaints received for the same project shall be clubbed together and be heard along with other complaints of revocation.*

- *For any action to be taken under section 7 or 8, the MahaRERA may constitute Designated Resolution Panel (DRP) consisting of one member from promoter's Associations and one member from consumer forum. The member of the said panel would be selected out of the existing conciliation forum members who has adequate professional experiences in the Real Estate sector or is a Chartered Accountant, or Architect, or Engineer, or lawyer. The said panel with the help of Association of Allottees shall prepare a blue Print for completion of the project. The Blueprint shall consist of the following:*
 - *Financial Blueprint detailing current financial status of project including Cash in Hand, liabilities, expected revenue and so on. It shall also contain financial estimate to complete the project and detailed roadmap towards arranging the finances.*
 - *Construction Blue print determining the amount of construction work needed to complete the project. Accordingly, detailed roadmap with timelines for completion of work including selection of contractor.*
 - *Overall, Designated Resolution Panel with the help of Association of Allottees shall prepare the detail blueprint for project completion.*
 - *The existing professionals attached to the MahaRERA Registered Project namely Architect, Engineer, Chartered Accountant shall assist the said panel in the preparation of the blue print".*

19. The aforesaid circular makes it clear that there are certain pre conditions the AOA has to comply with, before filing a complaint for revocation and taking over of the project. Admittedly, all these pre-conditions have not been complied with by the association before filing of this complaint under the provisions of sections 7 and 8 of the RERA. Hence, this complaint filed under the provisions of sections 7 and 8 of the RERA seems to be premature to seek reliefs under section 8 of the RERA as mentioned in point no. (i) above.
20. In view of these observations, the MahaRERA prima facie feels that the present complaint filed by the association cannot be considered by the

MahaRERA as far as the aforesaid 3 substantive reliefs sought by it in this complaint. However, the association is always at liberty to comply with the necessary pre-conditions to take over this project as prescribed by the MahaRERA vide the aforesaid circular no. 8/2019 dated 28-03-2019 and shall take further necessary steps for taking over this project under section 8 of the RERA since this project has already lapsed on 30-09-2020.

21. In view of these observations the present complaint stands disposed of.


(Mahesh Pathak)

Member - 1/MahaRERA

