

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

**APPEAL NO. AT006000000154529 OF 2023
IN
COMPLAINT NO. CC006000000192337**

Blooming Mining Private Limited]
Through its Director Manoj Kumar Kasera]
son of late Kishan Lal Kasera, having]
its registered Office at 1, Old Court]
House Corner, Kolkata-700 001.]

...Appellant

-VS-

(1)M/s Real Gem Buildtech Pvt. Ltd.]
D.B. House, Yashodham, Gen. A.K.]
Vaidya Marg, Goregaon (East)]
Mumbai-400 063.]

**(2)M/s Kingmakers Developers Pvt.]
Ltd.**]
Reg. Office-702, Natraj, M.V. Road]
Junction, Western Express Highway,]
Andheri (East), Mumbai- 400 069.]

(3)M/s Bhisma Realty Ltd.]
Sir Vithaldas Chambers, 16,]
Mumbai Samachar Marg,]
Mumbai- 400 001.]

...Respondents

Adv. Mr. Suresh Kumar Sahani for Appellant.

Adv. Mr. Abir Patel i/b Wadia Ghandy & Co., for Respondent No.1.

Adv. Ms. V. Jain for Respondent No.2.

Adv. Mr. Vikram Jakhadi for Respondent No.3.

G. J. J.

**CORAM : SHRIRAM R. JAGTAP, MEMBER (J) &
DR. K. SHIVAJI, MEMBER (A).**

DATE : 14th September, 2023.

(THROUGH VIDEO CONFERENCING)

JUDGMENT

[PER : SHRIRAM R. JAGTAP, MEMBER (J.)]

This appeal emanates from order dated 25th April 2023 passed by the learned Chairperson, MahaRERA (for short "the Authority") in complaint No.CC06000000192337 filed by the respondents, whereby the learned Authority directed the appellant to execute an agreement for sale, to make payment as per current stage of the apartment and the project and fulfill its obligations within three weeks from the date of order, failing which the respondents herein (complainants) shall then proceed to cancel allotment of the subject flat as envisaged in Section 11(5) of RERA, 2016.

2] The appellant is an allottee, the respondent no.1 is a developer, the respondent no.2 is appointed as "Development Manager" for the said project and the respondent no.3 is the land-owner of the project.

3] The factual matrix of the matter is that-

(i) The respondent nos.1 and 3 have launched a project viz. "Orchid Crown". On 28.3.2012 the appellant had booked an apartment

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No.3601 admeasuring 2250 sq.ft. on 36th floor in Tower-C along with three car parkings in the project of the respondents for consideration of Rs.13,25,51,000/- and paid booking amount of Rs.20.00 lakhs to the respondents. Subsequently, vide letter dated 29.10.2012 booking of the flat was shifted to Flat No.2601 on 26th floor in Tower-A of the said project (other terms remaining same) for total consideration of Rs.12,53,04,478/- out of which the appellant has paid Rs.7,55,60,106/- along with taxes and other charges amounting to Rs.33,52,116/- to the respondents. The appellant availed housing loan of rupees six crores from HDFC Ltd. A tripartite Memorandum of Understanding dated 31.4.2013 came to be executed between appellant, HDFC Ltd. and respondent no.1. The respondents committed to handover possession of the subject flat in 2015 to the appellant which was delayed to one year i.e. 2016 though no date of possession was mentioned in the allotment letter or any other documents executed between the parties. The respondent unilaterally, vide email dated 8.3.2019, revised carpet area of the subject flat to 2475 sq.ft. without consent of the appellant.

(ii) Under Clause 8(a) of the allotment letter, the respondent no.1 is entitled to terminate the agreement between the parties and refund monies paid by the appellant after forfeiting 20% of total amount collected. However, refund of money would only be out if the



sale proceeds received by the respondents after sale of the subject flat to third party. The Development Control Regulation of Greater Mumbai, 1991 were amended subsequent to which the plans of the subject project underwent modifications and amendments. The appellant agreed to such modifications and subsequently came forward and signed Amendment to Request for allotment on 31.3.2015 for change in specifications for the said apartment.

(iii) The respondent no.2 vide email dated 19.11.2018 called upon the appellant to execute and register an agreement for sale to which no response was received. The reminders have been sent by emails dated 22.2.2019, 6.3.2019 and by letter dated 14.5.2019 to which the appellant reverted to respondent no.2 on 7.6.2019, to provide it with a draft agreement for sale together with details of stamp duty, registration charges etc. The respondent no.2 once again provided a copy of draft agreement for sale on 10.6.2019 to appellant. However, the appellant failed to come forward to execute agreement for sale and to make balance payment of Rs.2,46,95,304/-, as a result thereof the respondent no.2 for and on behalf of all respondents terminated allotment of subject apartment vide letter dated 27.6.2019. On 15.7.2019 the appellant has replied to the said letter and requested the respondents to revoke the said letter, refund total amount of



Rs.8,57,52,352/- out of which Rs.7,89,67,778/- together with interest, to pay damages of Rs.5.00 Crores to the appellant.

(iv) The appellant has filed a complaint bearing No. 1680 of 2019 in the National Consumer Dispute Redressal Commission, New Delhi and sought various reliefs. Whereas the respondents had filed complaint bearing No. No.CC06000000192337 against the appellant before MahaRERA, Mumbai and sought reliefs to the effect that to direct the respondent (present appellant) to execute and register an agreement for sale in respect of subject flat, to hold that the respondent (present appellant) has violated provisions of Sections 13 and 19(6) of RERA, 2016 and penalize the respondent i.e. appellant in accordance with the provisions and rules thereunder, alternatively in the event of respondent i.e present appellant is unwilling to execute agreement for sale, the learned Authority be pleased to confirm termination of allotment of subject flat vide letter dated 27.6.2019.

(v) The present appellant did not appear in the said complaint filed by the respondents. Therefore, the said complaint had proceeded exparte against the appellant. After hearing the respondents, the learned Authority was pleased to pass impugned order which is challenged in the present appeal.

Signatures

4] We have heard learned Advocate Mr. Suresh Kumar Sahani for appellant, learned Advocate Mr. Abir Patel for respondent no.1, learned Advocate Ms. Jain for respondent no.2 and learned Advocate Mr. Vikram Jakhadi for respondent no.3.

5] While assailing the impugned order, the learned Advocate Mr. Sahani for appellant has submitted that in 2012 the appellant booked flat in the project of the respondents. However, till date the respondents have not executed agreement for sale with respect to subject apartment. Being dissatisfied with the conduct of the respondents, the appellant has filed complaint bearing No. 1680 of 2019 in the National Consumer Dispute Redressal Commission, New Delhi and sought various reliefs. The notice of the said complaint was duly served upon the respondents. The respondents were aware of filing of the said complaint by appellant in the National Consumer Dispute Redressal Commission, New Delhi and despite this they had filed complaint bearing No.CC06000000192337. The appellant was not duly served with the notice of the said complaint. There is no material on record to show that the respondents had served the notice of their complaint on the appellant. Besides, no notice of RERA was served upon the appellant. In spite of this the learned Authority in gross contravention of principles of natural justice passed the impugned

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order on 25.4.2023. The learned Authority did not give opportunity to the appellant to be heard in the complaint.

6] The learned Advocate Mr. Sahani further submitted that a perusal of copy of the complaint filed by the respondents before MahaRERA would show that there is no mention of the complaint bearing No.1680 of 2019 filed by the appellant in NCDRC, New Delhi. The respondents have suppressed this material fact from the learned Authority and obtained desired order from the Authority. It is no more res integra that similar issue cannot be adjudicated under different forums at the same time as there is every possibility of clashing with conflicting judgments/orders.

7] It is not in dispute that the complaint filed by the respondents was referred to MahaRERA Conciliation and Dispute Resolution forum. The appellant had received link of the said forum for virtual zoom meeting on 23.3.2022, as a result thereof the appellant had appeared before the forum. The learned Advocate, who had appeared on behalf of appellant before the said Conciliation forum, had brought to the notice of the forum that the appellant has not been put to any kind of notice about the complaint filed by the respondents. The appellant has already filed the complaint before the NCDRC, New Delhi and notice of the same has already been issued to vendor. After

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considering the submissions of the parties, the Conciliation forum referred the matter back to MahaRERA for adjudication. However, no notice of RERA was received by the appellant and therefore, the appellant was unaware of the date of hearing or stage of the said complaint. It was incumbent on the part of the respondents to serve their complaint to appellant. Moreover, it was expected of MahaRERA to serve summons/notice of the complaint on the appellant. Without giving sufficient opportunity to the appellant to be heard, the learned Authority has disposed of the complaint and thereby violated the principles of natural justice.

With these contentions the appellant has prayed to set aside the impugned order.

8] To refute the contentions of the appellant and while supporting the impugned order to have been correctly passed, the learned Advocate Mr. Abir Patel for respondent no.1 has submitted that the appellant is not an individual purchaser, but a Company dealing in mining that has purchased subject flat in the project of respondents. The respondent no.1 has obtained occupation certificate on 8.8.2023 in respect of Tower-A in which the subject flat is located. The appellant is a party in breach. Request for Allotment is a contract that governs the transaction between the parties. Clause (8) of the Request for

Allotment stipulates that it is not an agreement for sale and that the parties therein had agreed to enter into agreement for sale containing the comprehensive terms for sale. The intention of the parties to execute and register an agreement for sale also evident from the Clauses 6(iii), 6(v) and 6(vi) of Request for Allotment which cast an obligation on the appellant to formalize the transaction by entering into agreement for sale. However,, the appellant has deliberately failed to comply with the obligation contained in the Request for Allotment (RFA). The learned Advocate has further submitted that Tower-A of the subject project in which the subject flat is situated is ready with occupation certificate. The appellant has only paid Rs.7,55,60,106/- which represents 63% of the agreed consideration amount. The draft agreement for sale was shared to the appellant on 31.3.2015 by the respondent no.1. There was no response from the side of the appellant. By email dated 19.11.2018 followed by reminder emails and letters the respondent no.1 had again called upon the appellant to execute and register the agreement for sale in compliance of Section 13 of RERA, 2016. On request of the appellant, draft agreement for sale was sent by letter dated 10.6.2019 to the appellant, but to no avail. The appellant by not signing the agreement for sale is withholding further payments, even though the respondent no.1 has received occupation

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certificate in respect of subject flat. It is settled position of law that a party in breach is not entitled to claim any equities from the Court.

9] Learned Advocate Mr. Patel has further submitted that owing to constant and deliberate defaults by the appellant, the respondent no.1 has left with no option, but to issue termination letter dated 27.6.2019 in terms of Clause (a) of the Request for Allotment. In response to above termination, the appellant vide its letter dated 13.7.2019 disputed termination and sought an exit from the project. The letter dated 13.7.2019 is nothing but backlash to the termination by the respondent no.1. The termination is valid, subsisting and binding and issued in terms of the contract executed between the parties.

10] The learned Advocate has invited our attention to the Roznamas (pages-512 to 518) and submitted that despite service of notice the appellant chose not to appear or even put its say before the learned Authority. The appellant was given fair, reasonable and sufficient opportunity to file its pleadings. It is not in dispute that the matter was referred to MahaRERA Conciliation and Dispute Resolution forum. Screen shots/photographs of online hearing would clearly indicate the presence of the appellant in the proceeding referred to Conciliation Forum. This itself is sufficient to show that the appellant had noticed the complaint and had sufficient time to appear and answer



the claim of the respondents. However, the appellant is very conveniently cover up its deliberate failure to appear before the Authority by filing this appeal. The appellant has, under the garb of this appeal, attempted to adjudicate its own case. The appellant cannot be permitted to open up new issues which were never before the Authority below. The respondents cannot be made to defend the new issues for the first time in the appeal. This would seriously prejudice to the respondents.

11] The learned Advocate has further submitted that on examination of material produced on record by the appellant would show that whole case of the appellant with regards to unilaterally challenge of plans is an excuse to create false dispute and cover up its own breaches. There is absolutely no violation of any provisions of law or terms of the contract. The appellant has itself agreed to amendments in the plans, Request for Allotment and acted in furtherance of the same. The appellant's case of delay in possession is false and not based on any contractual commitment. In letter dated 31.8.2015 the appellant has alleged that it was promised to handover possession of the subject flat in 2015. Barring bald allegations and claims the appellant has not produced single document to strengthen its contention.



12] While assailing the contention of the appellant that similar issue cannot be adjudicated under different forums as there is every possibility of clashing the conflicting judgments/orders, the learned Advocate has submitted that on examination of complaints filed by the respondents and the appellant would show that reliefs claimed in both complaints are distinct. Parties to the real estate project have remedies available is Consumer Protection Act, 1986 and the Real Estate (Regulation & Development) Act, 2016. The Hon'ble Lordship of Delhi High Court in **M/s M3M India Pvt. Ltd. & Anr. Vs. Dr. Dinesh Sharma & Anr.** [(2019) SCC Online Del 9949] has held that the remedies available to the respondents therein under Consumer Protection Act and RERA concurrent and there is no ground for interference with the view taken by the National Commission in the matters. The learned Advocate has placed reliance on the following citations-

- (1) **M3M India Pvt. Ltd. & Anr. Vs. Dr. Dinesh Sharma & Anr.** [(2019) SCC Online Del 9949].
- (2) **Ashok Kapil Vs. Sana Ullah** (Dead) & Ors. [(1996) 6 SCC 342].
- (3) **Rajasthan State Industrial Development And Investment Corp. & Anr. Vs. Diamond Gem Development Corp. Ltd. & Anr.** [(2013) 5 SCC 470].

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(4) **Damand Singh And Others Vs. State
of Punjab And Others.**

[(1985) 2 SCCC 670].

With these contentions the learned Advocate Mr. Patel for respondent no.1 has prayed to dismiss the appeal with exemplary costs.

13] Succinct of argument of learned Advocate Ms. Jain for respondent no.2 is that the respondent no.2 is only an agent of the respondent nos.1 and 3. The respondent nos.1 and 3 have jointly appointed the respondent no.2 as Development Manager under the Development Management Agreement dated 18.3.2018 to act on their behalf and manage the affairs of the project for a fixed remuneration as mentioned in the Development Management Agreement. The respondent no.2 as such has no equity in the subject project. The respondent no.2 had neither sold the subject flat to appellant nor received any consideration for the same. There is no privity of contract between appellant and respondent no.2 who is only interacted with appellant that too after being appointed as Development Manager by the respondent nos.1 and 3. The respondent no.2 has limited role to play in the project.

With these contentions the learned Advocate has prayed



that appeal be dismissed and costs be awarded to the respondent no.2 for being subjected to unnecessary litigation expenses by the appellant.

14] Epitome of argument of learned Advocate Mr. Vikram Jakhadi is that he is adopting legal submissions advanced by the learned Advocate Mr. Abir Patel for respondent no.1. He has further submitted that it is not in dispute that during conciliation proceeding held on 23.3.2022 before the said forum, the appellant was very much present. The Roznamas produced on record by the respondent no.1 depict clear picture that sufficient and reasonable opportunity was extended to appellant to defend his case. The decree passed in the complaint filed by the respondents is exparte. Under the circumstances the appellant ought to have filed an application under Order 9 Rule 13 of the Code of Civil Procedure instead of filing the present appeal for setting aside impugned order.

15] The learned Advocate has further submitted that the respondent no.3 is a landlord and there is no privity of contract between appellant and respondent no.3. The respondent no.3 has neither received any consideration from the appellant with respect to subject flat nor issued any allotment letter to appellant.

16] The learned Advocate has further submitted that sufficient opportunities were provided by the learned Authority to the appellant



to appear in the complaint filed by the respondents. Apart from this the appellant was aware about the complaint pending before the Authority and Conciliation Forum. The representative of the appellant and its counsel had attended Conciliation Forum on 23.3.2022. Under the circumstances, it was legal responsibility and the obligation of the appellant to keep a track of the complaint which was filed against it. The appellant had slept over its right and the law helps to only vigilant and not those who sleep over their rights. It is well settled law that no Court or the Tribunal can come to the aid of those who sleep over their rights.

With these contention learned Advocate Mr. Vikram Jakhadi has prayed to dismiss the appeal with costs.

17] After considering the submissions advanced by the learned counsel appearing for respective parties, pleadings of the parties and material on record, following points arise for our determination and we have recorded our findings to each of them for the reasons to follow-

POINTS

ANSWER

1) Whether the appellant was duly served with notice?

In the negative

2) Whether the appellant has established that no sufficient and reasonable

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opportunity of hearing was given to

it?

In the affirmative

3) Whether impugned order calls for

interference in this appeal?

In the affirmative

4) What order?

As per final order

REASONS

18] On examination of pleadings of the appellant would show that whole appeal revolves around issue of violation of principles of natural justice by the learned Authority. While assailing the impugned order, the appellant has emphasized two issues viz. (1) the appellant was not duly served with notice and (2) no opportunity of being heard was extended to the appellant by the learned Authority. It is significant to note that the learned Advocate for appellant did not argue the appeal on merit, but he made submissions only on the above points. Therefore, pivotal question falls for our consideration is whether there was proper service of summons or notice on the appellant.

19] It is pertinent to note that the respondent no.1 has placed on record Roznamas of complaint proceedings (pages 512 to 518). On careful examination of Roznama dated 1.10.2020 (page-518) would show that there is no mention of service of summons/notice of the complaint on the appellant. On the contrary it is seen that the



respondents (complainants) were directed to serve notice of hearing to the appellant and the matter was adjourned to 21.10.2020 for (1) appearance of the appellant(respondent), (2) reply and (3) for hearing. This indicates that the respondents did not serve summons or notice of the complaint on the appellant. At the same time the matter was referred to Conciliation Forum for conciliation.

20] A perusal of Roznama dated 2.3.2022 (page-517) would show that appellant was shown as absent. The complaint was referred to Conciliation Forum. The Roznama dated 23.3.2022 of Conciliation Forum (page-515) would show that the parties to the complaint were present. This Roznama depicts clear picture about non-service of summons/notice of the complaint on the appellant. Gurdeep Singh Associates on behalf of appellant had appeared before the Conciliation Forum and made submissions that the appellant has not been put to any kind of notice about the complaint filed by the vendor (respondents). He had further made submissions that the appellant has already filed a complaint before National Consumer Dispute Redressal Commission, New Delhi and the notice has already been issued to vendor (present respondents). It is worthy to note that since conciliation was failed, therefore, matter was referred back to the MahaRERA. However, Conciliation Forum did not mention the date of



appearance of parties before MahaRERA in the Roznama. It means parties, who had appeared before the Conciliation Forum, were not apprised of the date of their appearance before the MahaRERA. Under the circumstances, it was expected of respondents to issue summons or notice of the complaint afresh to the appellant. Apart from this, it was also expected from the learned Authority to communicate next date of hearing to the appellant by email or by any other mode.

21] On examination of Roznama dated 11.8.2022 (page-514) would show that there is no mention of service of summons or notice of the complaint on the appellant (respondent). Despite this the appellant (respondent) was marked absent. Moreover, there is no mention that MahaRERA had communicated the next date of hearing to the appellant by email or otherwise. Despite this the learned Authority had recorded in the Roznama that the respondent is absent. It further transpired from the Roznama dated 19.9.2022 that on that date the respondent (present appellant) did not appear in the complaint proceeding. On scanning the Roznamas placed on record by the respondents (pages 512 to 518) would show that the appellant was not duly served with summons or notice of the complaint. The respondents have not produced cogent and sufficient material on record to show that the service of summons or notice of the complaint



was duly effected on the appellant.

22] On careful examination of the Roznamas would show that there is no specific mention that despite service of summons/ notice of the complaint, the respondent (appellant) has not appeared as a result thereof matter has been proceeded exparte against the respondent (appellant). All Roznamas do not depict the clear picture of service of summons or notice of the complaint on the appellant. Moreover, there is no material on record to show that the appellant had received any notice, intimation or email about hearing of the complaint either from the respondents or from MahaRERA.

23] In the absence of service of summons or notice of the complaint the learned Authority had proceeded exparte against the appellant. This itself is sufficient to show that no opportunity of being heard was given to the appellant by the learned Authority. This amounts to sheer violation of principles of natural justice on the part of learned Authority. It is well settled position of law that no party should be condemned unheard. This principle is violated by the learned Authority. As a cumulative result of the above observations, we are of the view that impugned order cannot be sustained in the eyes of law and calls for interference in this appeal.

24] We, therefore, feel it appropriate to refer the complaint for



de-nova consideration of the learned Authority. In that view of the matter, we answer points accordingly and consequently, proceed to pass following order-

ORDER

- 1] Appeal No.AT006000000154529 of 2023 is partly allowed.
- 2] Impugned order dated 25th April, 2023 passed by the learned Chairperson, MahaRERA in Complaint No.CC006000000192337 is set aside.
- 3] The Complaint is remanded back to the Authority to be decided afresh after hearing all the parties in the captioned appeal.
- 4] Parties to the appeal shall remain present before MahaRERA in the complaint proceeding on 19.10.2023 failure of which the learned Authority is at liberty to proceed with the complaint according to law.
- 5] All rights and contentions of the parties are kept open.
- 6] Parties shall bear their own costs.
- 7] A Copy of this judgment be sent to the learned Authority and parties as per Section 44(4) of RERA, 2016.


(DR. K. SHIVAJI)

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(SHRIRAM R. JAGTAP)