ಕರ್ನಾಟಕರಿಯಲ್ಎಸ್ಟೇಟ್ ನಿಯಂತ್ರಣ ಪ್ರಾಧಿಕಾರ,
Karnataka Real Estate Regulatory Authority,
1/14, 2nd Floor, Silver Jubilee Block, Unity Building Backside, CSI Compound,
3rd Cross, Mission Road, Bengaluru-560027

PROCEEDINGS OF THE AUTHORITY

Dated 16th MAY 2022

COMPLAINANTS.....

1. **CMP/200812/0006335**

MR. HEMANTH SURENDRAN,

Flat No. 005, VMAKS Heights,
Kammasandra Village,
Attibele Hobli, Anekal Taluk,
Bengaluru – 560100.

2. **CMP/211011/0008426**

SAURABH BHARGAVA,

VMAKS Heights Apartment,
#309, Hilalige Road,
Electronic City Phase II,
Bengaluru – 560100.

3. **CMP/211013/0008437**

SIVA NAGARJUNA BORRA,

#311, VMAKS Heights Apartment,
Ananth Nagar Phase 2,
Electronic City Phase 2,
Bengaluru – 560100.

(By Sri. Shivayogi Hallur Adv.)

V/S

RESPONDENT.....

VMAKS BUILDERS PVT LTD.,
#1(123), 4th Main, 16th B Cross,
3rd Block, Jayanagar East,
Bengaluru – 560011.

(In Person)

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The complainants have filed these complaints under Section 31 of the RERA Act against the project 'VMAKS Heights' developed by VMAKS Builders Pvt. Ltd.,

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These three complaints are taken up together for disposal as they are arising out of the same project.

In Complaint No. 6335, 8426, and 8437, the complainants have sought for the relief of direction to the builder to get NOC from the financier and compensation for mental agony.

Brief facts of the complaint in Cmp. No. 6335 are as under:

At the time of execution of sale deed, the builder has obtained the conditional NOC from one Anand Rati Global Finance. But till the date builder has not complied with the conditions. Now, the financier got issued the notice for possession to the builder in which flat of this complainant is also included. Now, the financier is proceeding under SARFESIA Act as the builder has failed to fulfil the conditions of the financier.

Brief Facts of the complaint in Cmp. No. 8426 are as under:-

He has purchased the flat in May 2017 with respondent. Now they are harrased by a third party Anand Rati Financer who is claiming on his flat. The builder has mortgaged his flat to Anand Rati against the loan he has availed. He was not aware of the same at the time of purchase. He has paid the entire sale consideration. The builder has given false NOC.

Brief Facts of the complaint in Cmp. No. 8437 are as under:-

That the complainant has purchased the flat No. 311 of VMAKS Heights on 10/02/2017 by paying some advance. HDFC co-funded the said flat and released the full amount as per request of builder NOC. NOC states that the project is free from encumbrance. The sale deed was executed on 06/05/2017. As per SARFAESI notice received by Anand Rati on 20/01/2020, he has received a notice that his flat

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was mortgaged by the builder to Anand Rati under list of unregistered flats fraudulently, even after execution of the sale deed and mortgaged to HDFC. On enquiry, builder said that the issue will be sorted out, but it was not happened since a year. Recently Anand Rati had obtained a court order on 06/04/2021 to get the actual possession of the property.

Hence, these complaints.

After registering the complaints, in pursuance of the notice respondent Mahesh Babu has appeared before the Authority. But, he has not contested the matters by filing objections and producing documents.

In support of their claim, the complainants have produced in all 9 documents such as:-

1. Copy of Hon'ble High Court Judgement in W.P. No.18422/2021, dated 08/10/2021.
2. Copy of sale deed dated 15/09/2017
3. Copy of letter dated 24/05/2017 issued by the builder to the banker of complainant.
4. Copy of NOC from the Anand Rathi Global Finance Ltd., to the builder in respect of flat No. 005 dated 21/06/2017.
5. Copy of possession notice issued by the financer dated 31/12/2019.
6. Copy of NOC dated 12/06/22020 issued by the builder to the complainant.
7. Copy of Legal notice dated 19/06/2020 issued to the builder by the complainant.
8. Copy of postal receipts and acknowledgement
9. Copy of photographs

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On perusal of the records, grievance of the complainants is that builder has fraudulently mortgaged the flats allotted to them with Anand Rati Global Finance and they were unaware of this aspect at the time of purchase. As of now, upon failure of the builder to comply with the undertaking in W.P. No. 18422/2021, the banker has now trying to enforce mortgage created on the properties which include the flats allotted to the complainants. The properties are now became subject matter of the proceedings under SARFAESI Act. Now, the question is whether the RERA can entertain complaints against the builder when the properties in question are subject matter of proceeding under SARFAESI Act?

In this regard, it is relevant to cite decision of the Hon'ble Apex Court in Appeal No. 1861-1871/2022 of Union of India V/s. Rajasthan Real Estate Regulatory Authority in which it is held that

> *(iii) As held by the Supreme Court in the case of Bikram Chatterji (Supra) in the event of conflict between RERA and SARFAESI Act the provisions contained in RERA would prevail.*
>
> *(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."*

Further, Section 11(4)(h) of RERA Act reads as under:-

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> *After he executes an agreement for sale for any apartment, plot or building, as the case may be, not mortgage or create a charge on such apartment, plot or building, as the case may be, and if any such mortgage or charge is made or created then notwithstanding anything contained in any other law for the time being in force, it shall not affect the right and interest of the allottee who has taken or agreed to take such apartment, plot or building, as the case may be;*

Whenever the mortgage is created subsequent to Agreement of Sale, it amounts to violation of obligation imposed on the builder / promoter under Section 11(4)(h) of the RERA Act and such mortgage will not be binding on the allottees as non obstanta clause in the said provision overrides all the other laws for the time being in force including SARFAESI Act. Therefore, any such transaction subsequent to Agreement of Sale would be a nullity and it doesn't affect the rights of allottees in any way.

In the present case, as evident from the records, Agreement of Sale in Cmp. No. 8426, was much prior to the date of mortgage i.e., 28/12/2017 and the Sale deed has also been executed on the same day. In Cmp. No. 6335, sale deed was executed on 15/09/2017 i.e., prior to mortgage. So also in Cmp. No. 8437, Sale deed was executed on 06/05/2017. Hence, they are not binding on the rights of the complainants herein.

Further, complainants have sought for the relief of compensation for mental agony. However, the said relief being beyond the jurisdiction of this Authority, it cannot be granted. Complainants are at liberty to file a fresh complaint before Adjudicating officer in Form O.

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Therefore, this Authority is of the considered opinion that the complaints deserve to be allowed. Hence, we proceed to pass the following

ORDER

In exercise of the powers conferred under Section 31 of the Real Estate (Regulation and Development) Act, 2016, the complaints bearing No. CMP/200812/0006335, CMP/211011/0008426 and CMP/211013/0008437 are hereby allowed.

Respondent is directed to get NOC from Anand Rati Global Finance. As regards compensation for mental agony, complainants are at liberty to file a fresh complaint before Adjudicating officer in Form O.

(Neelamani N Raju)
Member-2
K-RERA

(D. Vishnuvardhana Reddy)
Member-1
K-RERA

(H.C. Kishore Chandra)
Chairman
K-RERA

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