

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPEAL NO. 499 OF 2022

Ashish Kumar Khanduri

...Appellant

Versus

M/s. Dhanista Builders And Developers And Ors.

...Respondents

....

Mr. M.J. Bhatt a/w Mr. Gautam Jain, Advocate for Appellant.

Mr. Kiran Kulkarni a/w Ms. Neha Bachim, Adv. Shreya Gharat i/by
Kulkarni & Associates, Advocate for Respondent Nos. 1 to 5.

Mr. Y.Y. Dabake, APP for the Respondent-State.

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CORAM : PRAKASH D. NAIK, J.

DATE : 12th JULY, 2023.

P.C.:-

1. This is an appeal under Section 11 of MPID Act, 1999 challenging the order dated 24th November, 2021 passed by the designated Court under the MPID Act, City Civil and Sessions Court, Mumbai, dismissing the complaint filed by Appellant.

2. The brief facts germane to the proceedings initiated by the Appellant is that the Appellant had entered into transaction of purchase of residential flat in the proposed building to be constructed in the property by the Gardenia Apartments at L&T, Powai with the proposed Accused. The memorandum of understanding was executed between the parties on 13th August, 2014. The Appellant deposited Rs.18,68,708/-. Subsequently, the Appellant had claimed the refund of the amount with interest at the rate of

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18% per annum assured under the scheme and the Agreement/MOU dated 13th August, 2014. The Accused failed to keep their promises and return deposit of the Appellant as well as other persons. Since the Police did not take cognizance of the complaint, the Appellant filed Miscellaneous Application No.284 of 2020 before the designated under the MPID Act. The Application/complaint has been rejected on the order 24th November, 2021.

3. Vide order dated 24th November, 2021 it is apparent that the complaint was primarily dismissed on two grounds viz. the amount deposited by the Appellant is not covered under the definition of 'deposit' under Section 3 of the MPID Act and that the grievance of the Appellant/Complainant is considered in another FIR registered with Vikhroli Police Station wherein the statement of the Appellant has been recorded and on completing investigation charge-sheet was filed.

4. Learned Advocate for the Appellant submitted that impugned order passed by the Special Judge, MPID is erroneous and contrary to law. The Respondents floated scheme for sale of flats. He adverted to the clauses of memorandum of understanding and submitted that clause Nos. 4, 6 and 7 as well as clause 14 stipulates that the interest would be provided on the deposits and the said amount could be converted into part consideration only after obtaining L.O.I. The clause No.14 also provides that if the developers fails to maintain the time schedule of development the intending purchaser can take back deposit/loan to together with interest at the rate of

18% per annum. All these clauses clearly indicate that the money which was accepted by the Accused by way of deposit and it qualifies the definition of deposits as provided under the MPID Act. It is further submitted that the FIR registered by Smt. Swati Thorat was in respect to another project and the list of victim provided in the charge-sheet filed in respect to the said FIR. Provides names of other persons the Appellant is not a victim in respect to the transaction which is subject matter of the FIR registered with Parksite Police Station vide C.R. No.120 of 2018. The Appellant was called by the Police and statement and his statement was recorded. Recording of statement that the Appellant grievance is made in the said proceedings. The said FIR relates to the offences 406, 420 r/w 34 of IPC and Section 4 of MOFA Act. The said FIR does not invoke the provisions of MPID Act. It is further submitted that the Appellant is concerned with the project situated at Powai. Since the Police did not take cognizance of his complaint he filed a private complaint and sought direction from the Court. The learned Magistrate ought not to have dismissed the complaint. For every transaction there is separate cause of action and assuming that the FIR is registered with Parksite Police Station at the instance of another person, it was relating to different transaction and even otherwise the Appellant has right to initiate action by filing separate FIR. Reliance is placed on the decision of the High Court of Orissa in the case of *Pradeep Kumar Sethy V/s. State of Odisha and Another, 2020 SCC*

OnLine Ori 920 and another decision of Delhi High Court in the case of *State V/s. Khimji Bhai Jadeja, 2019 SCC OnLine Del 9060*.

5. Per-contra learned Counsel for the Respondents submitted that there is no infirmity in the impugned order passed by the learned Judge dismissing Miscellaneous Application/complaint filed by the Appellant. From the memorandum of understanding it is apparent that the transaction was towards purchase of flat clause No.7 stipulates that the Appellant and similar other persons have booked the flats to the projects developed by the Respondents. Merely providing the interest in the event the construction is not completed would not amount to deposit withing the meaning of definition of deposits stipulated of the MPID Act. Thus learned Judge has rightly dismissed the complaint. It is further submitted that the FIR was registered at the instance of Smt. Swati Thorat on 6th March, 2018 with Partsite Police Station and during the course of investigation of the said case statements of aggrieved persons were recorded. The Police had investigated the transactions relating to the project at Vikhroli as well as Powai. The Statements of witnesses included the persons who had booked the flat in the same project by the Appellant had also booked the flat. He pointed out statements of various witnesses recorded during the course of investigation in the said FIR who are the aggrieved persons in the same project. Thus, it was not necessary to issue directions for registration of fresh FIR or any other directions or initiating actions in respect to the

complaint filed by the Appellant. Learned Counsel relied upon the decisions in the case of *Amithbhai Anilchandra Shah V/s. The Central Bureau of Investigation, (2013) 6 SCC 348* and in the case of *T.T. Antony V/s. State of Kerala & Ors., (2001) 6 SCC 181*.

6. Perused the documents on record and also perused the affidavit-in-reply filed by the Respondents the impugned order passed by the learned Sessions Judge stipulates primarily to reasons for dismissing the application filed by the Appellant seeking directions against the Respondents. The learned Judge has observed that Vikhroli Parksite Police Station had registered C.R. No.120 of 2018 at the instance of Smt. Swati Thorat. It is clear that the police investigated about the allegations against Accused in respect of the same transaction and charge-sheet is filed. The second ground for rejection of Application/complaint filed by the Appellant is based on the memorandum of understanding dated 13th August, 2014. Reference is made to clause 7 of the said MOU and it is observed that the Accused were under obligation to return the money of the purchaser with interest if the development work could not be started on or before December-2014 or after six months of the flat booking. This stipulation would mean that if the said development work was started before the deadline then the amount of the Appellant was credited in advance or part payment of the sale consideration. Learned Judge than adverted to the definition of deposit stipulated in Section 2(c) of the MPID Act and

observed that the definition of term deposit that mere receipt of money is not sufficient and there has to be a condition to return the money after specified period in cash or in kind and in the form of specified service with or without benefit in the form of interest bonus, profit or any other form. In the present case the deposit in question was intended as part payment of purchase price. The agreement/MOU clearly provide that upon failure to start the development work, the said deposit was to be repaid alongwith interest. Therefore, the deposit was part of the price of the flat and it does not come within a purview of definition of deposit under Section 2(c) of MPID Act. I do not find any infirmity in the reasoning of the learned Judge . Clause 7 and 14 of the MOU makes it clear and it in consonance with the observations made by learned Judge. It is also pertinent to note that during the investigation in this FIR lodged by Smt. Swati Thorat. Statements of several persons including the Appellant the flats in respect to the project at Powai who were recorded and therefore their grievances were dealt with. Learned counsel for the Respondents had pointed out that the trial in the said case has commenced and the prosecution has examined about ten witnesses.

7. In the light of all the aforesaid circumstances, I do not find any reason to interfere in the impugned order.

ORDER

. Criminal Appeal No. 499 of 2022 is rejected.

(PRAKASH D. NAIK, J.)