

**(1984) 12 BOM CK 0018**

**In the Bombay High Court**

**Case No :** Criminal Revision Application No's. 234 and 235 of 1983

Abdul Jabbar Ibrahim

APPELLANT

Vs

Serkop Builders and Others

RESPONDENT

**Date of Decision :** 17-12-1984

**Acts Referred:**

Criminal Procedure Code, 1973 (CrPC) — Section 468  
Maharashtra Ownership Flats (Regulation of the Promotion of Construction, Sale, Management and Transfer) Act, 1963 — Section 10, 11, 13, 4, 5

**Citation :** (1985) 2 BomCR 274 : (1985) 87 BOMLR 258 : (1985) MhLj 163

**Hon'ble Judges :** S.N. Khatri, J

**Bench :** Single Bench

**Advocate :** K.H. Chopda, P.P. for State, V.H. Gumaste and Ashok P. Mundargi, for the Appellant; P.R. Vakil and S.V. Marwadi, for the Respondent

**Final Decision :** Allowed

## Judgement

S.N. Khatri, J.—The common question of law that arises in these two revision petitions is whether a promoter is not liable to be prosecuted for offences under sections 4, 5, 7, 10 and 11 r.w. section 13 of the Maharashtra Ownership Flats (Regulation of the Promotion of Construction, Sale, Management and Transfer) Act, 1963 (hereinafter for short "the Act") for the reasons that the agreement of sale between him and the purchasers of the flat concerned is not reduced to writing and registered as required by section 4 of the Act. The learned Additional Chief Metropolitan Magistrate has dismissed the private complaints of the two petitioners for the aforesaid reason. They have now come up in revision to this Court. This order dispose of both petitions.

2. Abdul Jabbar (petitioner in Criminal Revision Application No. 234 of 1983) and Sheikh Ahmed Sange (Petitioner in Criminal Rev. Application No. 235 of 1983) filed two separate complaints before the learned Magistrate against M/s. Serkop Builders and their four partners for offences under the aforesaid sections and section 406 of Indian Penal Code on these allegations. The accused-respondents

are promoters of the building called Mehrab Apartments situate at Kurla West. They orally agreed to sell one flat in the building to each of the petitioners at the rate of Rs. 77/- per sq. ft. The oral agreement with Abdul Jabbar took place on 31st March, 1977 for a price of Rs. 25,795/- and that of Sheikh Ahmed Sange on 7th June, 1977 for a price of Rs. 55,055/-. The two petitioners made the initial payment of Rs. 2,795/- and Rs. 9,000/- on these dates respectively. The promoters undertook to reduce the terms of the oral agreement to writing immediately on receipt of the initial payments and get the agreements registered as required by section 4 of the Act, but failed to do so.

3. The petitioners further averred in their complaints that the promoters have subsequently recovered the entire amount of the price due from each of them and have even put the petitioners in possession of the flats in October 1978. The promoters further recovered from each of the petitioners Rs. 445/- and also other flat purchasers to cover the expenses for formation of a co-operative society as required by section 10 of the Act. The petitioners' grievance was that the promoters did not comply with the requirements of section 4 by executing a registered agreement in their favour. The promoters also committed breach of sections 5, 7, 10, and 11 which are punishable u/s 13 of the Act with one year's imprisonment and fine. In as much as the promoters did not apply the item of Rs. 445/- towards the formation of the Co-operative Society, of the flat takers, they were alleged to have committed an offence punishable u/s 406 Indian penal code as well as under the latter part of section 13 r.w. section 5 of the Act.

4. The learned Magistrate issued process against the promoters under sections 4, 5, 7, 10 and 11 r.w. section 13 of the Act. No separate process was issued u/s 406 Indian Penal Code, presumably because the offence of criminal breach of trust is punishable under the latter part of section 13 r.w. section 5 with a higher sentence of four year's imprisonment than the one of three years prescribed u/s 406 Indian Penal Code.

5. Before recording of evidence commenced, the promoters presented an application to the learned Magistrate for dismissal of the complaints on two grounds, namely, (1) that the prosecution on all counts was barred by time and (2) that the promoters would not be held criminally liable for breach of the various provisions of the Act, inasmuch as admittedly the agreement between the parties was not reduced to writing and registered as required by section 4 of the Act.

6. On the question of limitation, the learned Magistrate held that the prosecution was barred by time in so far as the offence u/s 4/13 was concerned, inasmuch as it was lodged within one year from the date on which the petitioners made the initial payments in 1977. As regards the prosecution on other counts, the learned Magistrate felt that the complaints were not time barred. The second objection of the petitioners found favour with the learned Magistrate in toto. Following the decision of the Division Bench of this Court (Chandurkar & Bhonsale, JJ.) reported in 1981 Bom.L.R. 339. The Association of Commerce House Block

Owner Ltd. v. Vishandas Samaldas, (hereinafter referred to as the Division Bench Decision") the learned Magistrate held that the provisions of section 4 were mandatory and the failure of the parties to reduce the agreements to writing and get them registered rendered the agreements entirely ineffective and invalid. Further relying on the unreported decision of Desai, J., in Criminal Application No. 911 of 1980, A.K. Velu v. K.S. Ramkrishna and another, dated 30th July, 1981, the learned Magistrate further concluded that an agreement which is not duly registered u/s 4 of the Act cannot form foundation of any criminal liability, in that such an agreement is ineffective and invalid for all purposes, including the liability for criminal prosecution. In the result, he dismissed both complaints.

7. Now before me Shri Gumaste for the petitioners contends that the aforesaid two decisions do not lay down the correct law and require reconsideration at the hands of a larger Bench. On the other hand Shri Vakil for the promoters lays his main stress on the point that the complaints were barred by time on all courts and rightly dismissed by the learned Magistrate. According to him, it is not at all necessary to go in to the two rulings criticised by Shri Gumaste. In the premises, I would like to take up Shri Vakil's contention first.

8. The prosecution for breach of section 4 of the Act is clearly barred by time. This section casts an obligation on the promoter to enter into a written agreement before he accepts any sum of money as advance payment or deposit. Admittedly, the first payment was made by petitioner Sheikh Ahmed on 7th June, 1977 and by Abdul Jabbar on 31st March, 1977. Both complaints were filed before the learned Magistrate in October 1980, that is, well beyond one year's time prescribed u/s 468 Criminal procedure Code for offences punishable with imprisonment upto one year. No exception can, therefore, be taken to the learned Magistrate's finding that the prosecution u/s 4 of the Act is barred by time. The Magistrate has not recorded any unequivocal finding one way or the other on the question of limitation on other charges under sections 5, 7, 10, and 11. So I will take up this particular question now.

9. Section 5 ordains the promoter to maintain a separate account in any bank of sums taken by him from persons intending to take or two have taken flats as advance or deposit including any sums towards the share capital of a Co-operative Society or a company or towards the outgoings. The latter part of this section casts express obligations on him to hold and disburse the said moneys for the purpose for which they were given and make full and true disclosure of all transactions in respect of the account to the officer designated by the State Government in this behalf. The plain meaning of this provision is that each receipt of money is to be accounted for in the respective flat taker's account and this obligation operates independently of the fact whether a written agreement as contemplated by section 4 is or is not executed. The breach of the latter part of section 5, namely, disbursing the moneys for the purpose for which they are received, is made punishable with four years' imprisonment under the second part of section 13. Two inferences flow from this provision; (1) the obligation to

open and operate the account is not limited or linked with any particular stage of the transaction (for example, registration of the agreement), and (2) breach of trust in respect of such items is punishable with four years. The first liability in its essential nature is a continuing liability. The second liability does not attract any period of limitation u/s 468 Criminal Procedure Code, the offence being punishable with more than three years. Viewed from any angle, the prosecution of the promoters in the present two cases u/s 5/13 of the Act is not barred by time.

10. So far as the prosecution under sections 7, 10, and 11 is concerned, it is not possible to decide the question in the absence of requisite evidence. Section 7 inter alia prohibits a promoter from making any additions or alterations in the building without the flat taker's consent. The petitioners have not stated in their complaints when the garage in respect of which grievance is made by them was constructed by the promoters. Section 10 casts an obligation on the promoters to take steps to form a Co-operative Society or a company as soon as the minimum number of persons required to form such an organisation have taken flats. Section 11 further ordains the promoter to take all necessary steps to complete his title and convey it to the aforesaid organisation by executing necessary documents. The details as to by which date the minimum number of persons had taken flats and other allied facts are not given in the complaints. This question cannot, in the circumstances, be disposed of at this stage. The learned Magistrate will have to decide it after the parties are given opportunity to lead necessary evidence.

11. Shri Gumaste has advanced a submission that in view of the addition of sub-section (3) to section 468 Criminal Procedure Code by India Act No. XLV of 1978, which came into force on 18th December, 1978, the prosecution on all the counts will be within limitation, inasmuch as one of the offences, namely, the one punishable under the latter part of section 5 read with the latter part of section 13 of the Act has no prescribed limitation. The newly added sub-section (3) of section 468 reads as follows :

"(3) For the purposes of this section, the period of limitation, in relation to offences which may be tried together, shall be determined with reference to the offence which is punishable with the more severe punishment or, as the case may be, the most severe punishment."

This provision cannot be pressed in aid by Shri Gumaste for the simple reason that long before 18th December, 1978 when it came into force, prosecution on atleast one count, that is, section 4/13 of the Act had got clearly barred by time. There is nothing in the Criminal Procedure Code or in the Amending Act to indicate that this provision was not prospective in operation. The petitioners are thus not entitled to claim any benefit under this amended provision.

12. This takes me to the question raised by Shri Gumaste about the correctness of the two decisions of this Court, which were relied upon by the learned

Magistrate to conclude that the promoters did not incur any liability for criminal prosecution, inasmuch as the agreements of sale were not reduced to writing and registered u/s 4 of the Act. The Division Bench decision arose out of a suit filed by a purchaser in the Bombay City Civil Court on the footing of a written agreement which was not got registered. The Division Bench held that the provisions of section 4 of the Act were mandatory and that non-compliance of these provisions rendered the agreement between the parties entirely invalid and ineffective. To quote the learned Judges, in their own words :

"On a careful scrutiny of the provisions of section 4 of the Ownership Flats Act, it is clear that section 4 contains an absolute enactment which must be obeyed absolutely. If such absolute enactment is not obeyed, the consequence will be that the agreement between the promoter and the purchaser will be wholly invalid and altogether void creating no rights between the parties. It is no doubt true that in a given case, it will be the intending purchaser who might suffer if he connives at the failure of the promoter not to have the agreement registered, but for that, the intending purchaser will himself have to be blamed because there is enough provision in the Registration Act which will enable the intending purchaser to have the document registered. Once section 4 is held to be mandatory and the consequences of non-compliance with its provision will be to invalidate the transaction there is no question of such a transaction being binding between the parties."

13. The matter before Desai, J., involved prosecution of a purchaser by the promoter u/s 12(2) of the Act for the former's failure to pay his proportionate share of taxes and to co-operate with the promoter in formation of the co-operative society. Here again the transaction between the parties was entered into under a written agreement which was not registered. While agreeing with the purchaser's contention that no criminal liability flowed from an unregistered agreement, the learned Judge observed :

"During the course of arguments it was submitted that the position has now been crystalised as far as this High Court is concerned, by the decision of a Division Bench of this Court. (Chandurkar & Bhosale, JJ.) . I have gone through paragraphs 40 to 52 of the aforesaid decision and it bears out the submission of the learned Advocate. .... According to the decision of the Division Bench it (agreement) was compulsorily registrable and if it is not registered it must be treated as invalid, ineffective and cannot be the foundation of any rights. Equally so, it cannot constitute the foundation of any liability on either the revision petitioner or accused No. 2 in the said case." (emphasis mine).

14. A perusal of the Division Bench Decision shows that the Court has restricted its discussion merely to the limited question whether in view of section 4 of the Act, a person claiming to be a purchaser under an unregistered agreement, of sale had a right to sue for specific performance of the contract. The further question as to what extent absence of a registered written contract could effect the validity of prosecution under sections 4, 5, 7, 10, and 11 or other sections of

the Act, did not even remotely arise for consideration before the two learned Judges constituting the Division Bench. Needless to say that this is verify the central question that has to be decided by this court in the present matters. It is not open to this Court to extend the ratio of the Division Bench decision automatically to the question arising in this case. As I shall endeavour to show, the sweep and operational field of sections 5, 7, 10 and 11 is far wider than and qualitatively different from that of section 4, sections 5, 7, 10 and 11 contemplate situations and/or stages in a transaction between the promoter and taker of flat, which may in point of time, much precede the execution of the written agreement and its registration as contemplated by section 4. In order to appreciate this, a quick review of the different provision of the Act will not be out of place.

15. Section 3 provides that a promoter who intends to construct or constructs a block of building or flats, shall in all transactions with "persons intending to take for taking" one or more flats, be liable to furnish the prescribed information and produce documents about the property. Section 4 which enjoins upon a promoter to enter into a written contract with the purchaser and register it, describes the prospective purchaser as "persons who are to take or have taken such flats". Section 5 directs a promoter to maintain a separate account in a bank for money taken from persons intending to take or who have taken flats". Section 6 which imposes an obligation on the promoter to pay outgoings till the society/company of flat takers is formed, deserves the flat takers as "persons who have taken over flats or are to take over flats". Section 7 prohibits a promoter from effecting any alteration in the structures of flats "which are to be taken" or any alteration in the structure of the buildings without previous consent of all persons" who have agreed to take flats". Sections 10 and 11 describe the prospective purchaser in the same terminology. Section 9 forbids a promoter from mortgaging a flat without the previous consent of the flat taker, where "the agreement referred to in section 4 is registered". So also section 12(1) imposes the liability to contribute the outgoings on a purchaser "who has executed an agreement to take a flat". The breach of this section is made a penalty u/s 12(2) only against a purchaser who has executed an agreement and not against a person who has taken or intends to take a flat.

16. The above survey will show that there are at least five stages contemplated by the clear language of the Act in the course of the transaction between a promoter and prospective purchaser .

- (1) Inceptive-when a promoter starts his project for construction of the flats (section 3);
- (2) Prospective purchaser enters into an oral deal with the promoter;
- (3) Execution of written contract;
- (4) Registration of the written contract; and

(5) Follow-up action.

The detailed provisions of the Act will leave no doubt that substantive liabilities are cast on a promoter qua each of the aforesaid five stages, having due regard to the demands of the particular situation. It is not as if the liabilities (in particular, criminal liability for prosecution) arise against a promoter only contemporaneously with or subsequent to the execution of the written agreement and/or its registration. The legislature has cast certain obligations on the purchasers also. The dominant idea is to protect the legitimate interests of honest purchaser by keeping the matters straight between the promoters and purchaser. The legislature has advisedly used different terminology in different sections with the clear objective of effectively meeting the contingencies of the different situations. It will be bold to say that the use of different terminology is merely accidentally. Be that as it may, I am clear that there is no warrant in the Division Bench decision for the proposition that a promoter cannot be liable for criminal prosecution under the various sections of the Act, unless there is a written agreement duly executed by him and registered under the provisions of the Indian Registration Act.

17. The decision of Desai, J., is also clearly distinguishable on facts. As already stated above, the prosecution in that case was u/s 12(2) of the Act where only those purchasers who have executed written agreements are made liable. The question of criminal prosecution under sections 4, 5, 7, 10 and 11 did not arise in that case. Its decision will have to be restricted to its own facts. I shall leave the matter, without expressing my own view on the correctness of Desai, J.'s decisions. Perhaps it might require reconsideration in future in a proper case.

18. In sum, I hold that neither the Division Bench decision nor Desai, J.'s decision governs the two cases before me. On a plain interpretation of the language of sections 4, 5, 7, 10 and 11, I am clear that the penal liability for breach of these provisions will flow even in cases where there is no written agreement of sale or where the agreement, if reduced to writing remains unregistered. In this view, the learned Magistrate's finding that the two complaints are not maintainable will have to be set aside and the cases remanded to him for final disposal in the light of the observations made above.

19. Both petitions are allowed. Both impugned orders are hereby set aside. The matters are remanded to the learned Magistrate to decide them afresh on merits in the light of the observations made above. The parties shall appear before the learned Magistrate on 18th January, 1985. Rule made absolute in both petitions. Shri Marwadi for the respondents requests for leave to appeal to the Supreme Court. Leave refused.