

BEFORE THE
MAHARASHTRA REAL ESTATE REGULATORY AUTHORITY
MUMBAI

COMPLAINT NO: CC006000000000032

Avinash Saraf, Neha Duggar Saraf ... Complainant.

Versus

Runwal Homes Pvt. Ltd. ... Respondent.
MahaRERA Regn: P51800000271

Complainant Represented by Mr. Jairam Chandnani Adv.

Respondent Represented by Mr. Chirag Kamdar Adv.

Coram: Hon'ble Shri B.D. KAPADNIS.

13th October 2017

Final Order

The complaints have been claiming the amounts paid by them to the respondent towards the consideration of the booked flat bearing no. 3204, tower no. 7, wing - 'G' in a building known as Redwood in the respondent's Runwal Greens project having MahaRERA registration no. P51800000271, under section 18 of Real Estate (Regulation & Development) Act, 2016. (for short, RERA).

2. Pleadings:

The complainants contend that they have paid 97% of total consideration of the said flat. The respondent has specified in the agreement of sale that the possession of the flat shall be handed over to the complainants on or before August 2016 but it has failed to hand it over till the date of complaint. They further contend that under subvention scheme promoted by the respondent, respondent paid interest up to August 2016 under tripartite agreement. Thereafter the bank has recovered the instalments with interest from the complainants. Therefore, they demand the amount of consideration with interest at the rate of Rs. 21% p.a. from the respondent with compensation.

The respondent has filed explanation/ reply to contend that the project is at an advanced stage and shows its willingness to offer the flat

to the complainants for interior works by December 2017. It contends that the agreement of sale has been executed on 10.11.2014 whereas RERA has come into effect from 01 May, 2017. Hence, MahaRERA has no jurisdiction to entertain this complaint. It further contends that as per the agreement it is the responsibility of the complainants to bear the charges of stamp duty and registration namely Rs. 8,56,800/- and Rs. 30,000/- respectively. These amounts had been paid to the Govt. hence, they cannot be recovered from it. According to it, under tripartite agreement it was liable to pay interest till August, 2016 and it paid it. After 31st August 2016 it is the duty of the borrowers to pay the instalments of the bank and it is absolved of the said agreement. The date of possession envisaged in the agreement of the sale was subject to various reasons mentioned in the clause 17 of the agreement which were beyond the control of the respondent. The respondent constructed public parking lot under the said building and applied for its occupation certificate on 5 December, 2014 and received it on 30 May, 2015. The development control regulations for greater Mumbai were amended by notification dated 06.01.2012. The Authorities delayed in granting approvals and sanctions. These reasons were beyond the control of the respondent. When the complainants showed their willingness to cancel the booking, the respondent offered to refund the amounts received by it by its e-mail dated 01.03.2017 but the complainants insisted to pay interest at the rate of 21% and therefore, the matter could not be resolved.

3. An attempt to resolve the dispute amicably has failed.

4. Point for determination:

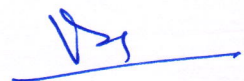
Whether the complainants are entitled to get back the amounts paid to respondent with interest and / or compensation? is the point for determination. Both the parties have filed their documents and their advocates have argued the matter. I answer the point in affirmative for below mentioned reasons.

5. Undisputed Facts:

There is no dispute between the parties regarding booking of the flat, the payment of money by complaints to respondent and the possession of the flat has not been given even after the lapse of agreed date of giving the possession i.e. on or before August 2016. The complainants have decided to withdraw from the project and they demand their money. On this backdrop it is necessary to look at the merits of the case.

6. Relevant Provision of Law:

RERA has come into force from 01.05.2017 in the state of Maharashtra. The respondent's project is governed by it and therefore it is



registered with MahaRERA. Relevant part of section 18 of RERA reads as under-

“18. Return of amount and compensation-(1) If the promoter fails to complete or is unable to give possession of an apartment plot or building,

(a) in accordance with the terms of the agreement for sale or, as the case may be, duly completed by the date specified therein; or

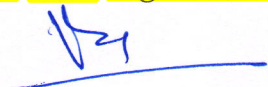
(b) *****

He shall be liable on demand to the allottees, in case the allottee wishes to withdraw from the project, without prejudice to any other remedy available, to return the amount received by him in respect of that apartment, plot, building as the case may be, with interest at such rate as may be prescribed in this behalf including compensation in the manner as provided under this Act.”

7. Jurisdiction:

The respondent’s learned advocate submits that the agreement of sale has been executed on 10.11.2014 i.e. during the Maharashtra Ownership of Flats (Regulation of promotion of Construction, Sale, Management and Transfer) Act 1963 (for short, MOFA) regime. He also refers to one interim order passed by me in C006000000000049 holding that RERA came into effect from 1st May, 2017 and it is prospective. He further submits that the date of possession mentioned in registration certificate is not crossed and therefore there is no breach of any provision of RERA. Hence, MahaRERA has no jurisdiction to entertain this complaint.

I find, the cause of action for claiming possession after the lapse of the agreed date of possession becomes a recurring cause of action. The claimants’ right to claim their money back or to claim possession continues from August 2016 till the date of filing of this complaint. **If the cause of action survives after coming into force of RERA, MahaRERA gets jurisdiction over all the disputes pertaining to the eligible real estate projects requiring registration u/s. 3.** The on-going projects bring with them the legacy of rights and liabilities created under the statutes of the land in general and The Indian Contract Act and MOFA in particular. Section 79 of RERA bars the jurisdiction of the civil court from entertaining any suit or proceeding in respect of any matter which the Authority, Adjudicating Officer or Appellate Tribunal is empowered by or under RERA to determine. Hence, the Authority gets **the jurisdiction over such matters which the civil court had. The Authority can take cognizance of**



the agreements executed under MOFA also and is equally competent to grant the relief relating to it. This view gets the support from Section 88 of RERA which provides that its provisions shall be in addition to, and not in derogation of, the provisions of any other law for the time being in force. MOFA has not been repealed. In this context, section 71(1) of RERA can be looked into. It provides that for the purpose of adjudicating compensation u/ss. 12,14,18 & 19 of RERA, an Adjudicating Officer can be appointed by the Authority. Its proviso provides that any person whose complaint in respect of matters covered by sections 12, 14, 18, 19 of RERA is pending before the Consumer Disputes Redressal forum, State Consumer Disputes Redressal Commission or National Consumer Dispute Redressal Commission on or before the commencement of RERA, he may, with the permission of the said forum withdraw the complaint pending before it and file it before the Adjudicating Officer under RERA. This provision therefore, indicates that sections 12, 14, 18, 19 RERA are retroactive. The right to claim return of amounts paid by the allottee to the promoter is preserved by Section 18 of the Act.

Moreover, relevant part of section 18 of RERA reads,

'18. Return of amount and compensation-

(1) If the promoter fails to complete or is unable to give possession of an apartment plot or building, -

(a) in accordance with the terms of the agreement for sale or, as the case may be, duly completed by the date specified therein;'

On plain reading of this provision it becomes clear that date of completion referred to in this provision means the date specified in the agreement. The word "therein" refers to the "agreement" and not the date of completion revised by the promoter unilaterally while registering the project. Hence I find myself unable to accept the submission of respondent's learned advocate that as till the date of completion mentioned in registration certificate is not crossed, this Authority has no jurisdiction. Considering all these aspects, I find that the Authority has jurisdiction to entertain this complaint as the complainants' right to claim back their money in the case of withdrawal from the project still subsists under RERA.

8. Is the time of delivery of possession is extended?

The parties are not at dispute that the respondent agreed to deliver the possession of the flat on or before 31st August, 2016 as mentioned in the agreement of sale. However, the respondent submits that on 13.09.2016 itself the respondent informed the complainant that because of the circumstances beyond its control it would not be able to deliver the possession as agreed but offered to deliver it on 18th June, 2017. The



complainants did not reply the letter. The respondent by its e-mail dated 01.03.2017 indicated the complainants that it would offer the possession by October 2017. E-mails were sent between 01.03.2017 to 20.04.2017 but the complainants did not object to the extended time hence, the complainants by their conduct agreed to extend the period of delivery of the possession of the flat. I do not find any force in the submission because a party cannot take unilateral decision and impose it upon the other party. The facts revealed from the correspondence do show that the complainants waited for the completion of the project and when they lost the hope, they decided to withdraw from project. They did not mention anywhere that they agreed to the new dates unilaterally declared by respondent. This leads me to hold that the project is delayed and the respondent failed to deliver the possession of the flat on the date agreed by the parties.

The respondent contends that the project is at an advanced stage and shows its willingness to offer the flat to the complainants for interior works by December 2017. The learned advocate of the complainants has brought to my notice that National Consumer Disputes Redressal Commission has held that the possession without occupation certificate is mere paper possession and possession without such certificate is illegal. In this context Division Bench of Hon'ble Bombay High Court in its ordinary original civil jurisdiction in M/s. Sion Kamgar Co-operative Housing Society Ltd. V/s Municipal Corporation for Greater Mumbai and others, (writ petition no. 829 of 2013 decided on 15th October, 2013) held that occupying the building without occupation certificate cannot be permitted in law. Therefore, this offer has been rejected by the complainants and have exercised their right to claim back their money.

9. Reasons of Delay:

The respondent constructed public parking lot under the said building and applied for its occupation certificate on 5 December, 2014 and received it on 30 May, 2015. It is very difficult to hold that only because of this reason the respondent had to stop the construction of the upper floors of a building. After getting commencement certificate and the approved plans it was entitled to make the further construction. In other words, the occupation certificate of public parking lot could not act as the obstacle in the process of construction.

The second reason assigned by the respondent about delay is, the development control regulations for greater Mumbai were amended by notification dated 06.01.2012. The Authorities delayed in granting approvals and sanctions. These reasons were beyond the control of the



respondent. Even this reason is not justifiable because the parties entered into an agreement on 10.11.2014. It means that the agreed date of possession had been agreed upon after the period of two years and ten months. In this context, Mr. Chandnani has brought to my notice that the National Consumer Disputes Redressal Commission has observed in **Kamal Sood V/s DLF Universal Ltd.(FA/557/2003) decided on 02.04.2007 that it was the duty of the builder to plan in advance, obtain necessary permission and thereafter, promise to deliver the possession of flat in the stipulated time. It is unfair trade practice on the part of the builder to collect money from the prospective buyers without obtaining the required permission.** I am also of the same opinion. Hence, I do not find that the reasons assigned by the respondent were the real reasons which delayed the project.

10. Refund of the amounts paid by the complainants & compensation:

Section 18 of RERA imposes the liability on the promoter to return the amounts received by him in respect of the apartment of which he fails to give the possession on time. The complaints have been claiming refund of the consideration of the booked flat. Annexure 13 of the complaint discloses that from 09.10.2014 to 18.01.2017 the complainants have paid Rs. 1,74,17,986/- towards consideration. The complainants are entitled to get them back.

Complainants claim interest at the rate of 21% p.a. This cannot be accepted for the obvious reason that section 18 of RERA allows the interest at specified rate and the rules framed under the Act provide that it shall be at highest marginal cost of lending rate of interest of S.B.I. plus 2%. Hence, the complainants **cannot get interest more than the rate fixed by the statute that too from 1.5.2017 onwards.**

Annexure 13 of the complaint shows that the complainants paid Rs. 8,86,800/- towards the stamp duty and registration charges on 15.11.2014. Learned advocate of the respondent submits Rs. 8,56,800/- & Rs. 30,000/- collected from the complainant for stamp duty and registration of the agreement of sale cannot be refunded as the said money went to the Govt. Moreover, clause 63 of the agreement of sale clearly provides that these charges shall be borne by the purchaser. Mr. Chandnani brings to my notice that on the cancellation of agreement of sale the party purchasing the stamp is entitled to get the refund of its purchase price. He also agrees that the money spent for registration of the documents cannot be refunded but claimants are entitled to get its compensation. To conclude, I hold that all amounts paid by the allottee will have to be refunded. **Respondent becomes liable to shoulder the responsibility of returning the amounts**



received by it because of its failure to deliver the possession on the agreed date. Cancellation of the agreement is inevitable because of its default and therefore, the allottee cannot be held liable to bear any burden when the transaction is frustrated. Section 72 of RERA mandates that while adjudging the quantum of compensation or interest u/s. 71 the Adjudicating Officer shall have due regard to the factors (a) the amount of disproportionate gain or unfair advantage, wherever quantifiable, made as a result of default and (b) the amount of loss caused as a result of default. I have acted on these principles.

Annexure 13 shows that the complainants paid the bank Rs. 11,00,000/- towards the interest from 30.09.2016 to 31.07.2017. There is issue of subvention scheme and tripartite agreement. Admittedly the respondent promised to pay service interest on the amounts drawn till August 2016 and the respondent has paid it. It is true, it is mentioned in the said agreement that the liability to pay the interest thereafter would be that of the borrower and the promoter shall be absolved. In this context, one has to keep in mind that when the parties entered into the said agreement it was anticipated that by August 2016 the possession of the flat would be delivered and therefore, the agreement was executed on its basis. In view of this fact, I find that because of the default of respondent, the borrower cannot be made liable to pay the interest on bank loan. The promoter has to sustain this loss by compensating the complainants.

In view of the factors to be considered as laid down by section 72 of RERA' I find that respondent has used the money paid by the complainants from time to time. They are at loss of the interest or a reasonable return on their investment. On the other hand, if respondent would be absolved from this liability, it would get unfair advantage for it which is not permissible in law. Hence complainants are entitled to get compensation at the rate of 9% on the money paid by them from the date mentioned in Annexure 13, till 30th April 2017.

11. Conclusion.

After considering all the legal and factual aspects of the matter, I find that the complainants are entitled to get-

- a. The consideration amount of Rs. 1,74,17,986/-, Rs. 8,86,800/-, stamp duty and registration charges and Rs. 11,00,000/-, the amount of interest paid by complainants to bank during 30.09.2016 to 31.07.2017, with interest at S.B.I.'s highest marginal cost of lending rate plus 2% from 01.05.2017 till their payment.



b. The compensation at the rate of 9% from respective dates of payment on the above mentioned amounts.

c. Rs. 20,000/- towards the cost of the complaint.


d. The complainants shall execute the deed of cancellation of agreement of sale and respondent shall bear its cost.

Hence the following order.

ORDER.

The respondent shall pay the complainants--

1. Rs. 1,94,04,986/- with interest at S.B.I.'s highest marginal cost of lending rate plus 2% from 01.05.2017 till the payment.
2. The compensation at the rate of 9% on the amounts mentioned in annexure 13 from respective dates of their payment till 30.4.2017.
3. Rs. 20,000/- towards the cost of the complaint.
4. Annexure 13 shall form the part of the order.
5. The complainants shall execute the deed of cancellation of agreement of sale and respondent shall bear its cost.


13.10.17.

Mumbai
Date: 13.10.2017.

(B.D. Kapadnis)
(Member & Adjudicating Officer)
MahaRERA, Mumbai.