

**BEFORE THE
MAHARASHTRA REAL ESTATE REGULATORY AUTHORITY
MUMBAI**

COMPLAINT NO. CC006000000110702

Abhishek Rajendra Vispute

..Complainant

Versus

KARRM Infrastructure Pvt. Ltd.

..Respondent

MahaRERA Regn. No. P51700008284

Coram:

Hon'ble Shri Madhav Kulkarni.
Adjudicating Officer, MahaRERA.

Appearance:

Complainant: Adv. Amey Bakre

Respondents :

**O R D E R
(Dated 09.01.2021)**

1. The complainant an allottee who had booked a flat with the respondent / promoter seeks withdrawal from the project and refund of the amount with interest and compensation.
2. As per online complaint is resident of Arundhanti Apartment. Amboli estate, Khambalpada, Dombivali, Dist. Thane and booked Flat no 301 in the bldg. Parijat E wing and also flat no. 504 in A wing in the building Nishigandh in the project Karm Gardens at Ambernath. Complainant had gone through advertisement and visited the project on 23.02.2014. Complainant was shown the layout plan. Complainant booked flat no. 301 in Parijat E wing admeasuring 602 sq. ft. for Rs.37,08,336/- on that day

and paid Re.1/- He also on the same day issued cheque for Rs.74,167/- Then on 16.03.2014 complainant issued cheque for Rs.2,96,667/-. On 30.05.2014 loan amount of Rs.31,27,665/- was disbursed by DHFL to the Resp.. Agreement was executed on 21.05.2014. Possession was agreed to be delivered on or before June, 2015. In November, 2014, respondent approached the complainant and informed that new 25/75 scheme was launched and asked complainant to accept the scheme. Accordingly, complainant paid Rs.2.76 lakhs in November, 2014 towards the difference amount in price and also paid Rs.4,86,592/- towards other expenses on 26.11.2014. MOU was executed on 17.04.2015. Respondent orally agreed to deliver possession within one year since 17.04.2015. As per clause no. 4 of the MOU, respondent was to pay 75% of other charges i.e. Rs.3,03,196/- in 75 equal instalments per month. Out of it, Rs.1,61,726/- are yet to be paid. From May, 2014 till 21.07.2018 respondent made several delays in paying loan amount and it affected CIBIL record of the complainant.

3. Respondent instead offered flat no. 504 in building no. 2 A wing that is Nishigandh in Karm Garden at Chikholi, Tal. Ambernath, Dist. Thane. It was mutually agreed to revoke MOU dated 17.04.2017 by entering into MOU dated 26.07.2018. It mentions that complainant paid balance pre-EMI of Rs.1,55,867/-. Registered agreement was executed on 10.08.2018. MOU was revoked by registering document on 26.05.2019. As per registered agreement, possession was to be handed over on or before May, 2019. On 19.07.2018, complainant had issued cheque for Rs.2,27,459/- towards the difference amount. On 16.07.2019, respondent issued booking confirmation of flat no. 2 for consideration of Rs.34,22,400/-
4. Possession of flat no. 1 was to be given before June, 2015. Possession of flat no. 2 was to be given before May, 2019. Respondent has not handed

over possession of the two flat nor construction work is completed. Complainant is staying in rented premises and is paying loan instalments. The complainant therefore, seeks refund of Rs.33,62,618/- with interest at the rate of 12% p.a. Complainant also seeks rent that he had to pay, from the respondent.

5. As per online roznama, on 01.11.2019 the matter came to be transferred to Adjudicating Officer, Mumbai. The matter came up before me on 14.02.2020. Respondent was absent. Matter was adjourned for ex-parte hearing. Thereafter, no hearing could be taken up due to lockdown conditions due to Corona Pandemic. Virtual hearing was taken up on 03.09.2020. Respondent was absent. Arguments for complainant were heard. As I am working at Mumbai and Pune Offices in alternative weeks and due to huge pendency in this office and due to lockdown conditions due to Corona Pandemic, this matter is being decided now.
6. Following points arise for my determination. I have noted my findings against them for the reasons stated below:

POINTS	FINDINGS
1 Is the complainant allottee and respondent promoter?	Affirmative
2 If yes, has the respondents failed to deliver possession as per agreement, without there being circumstances beyond his control?	Affirmative
3 Is the complainant entitled to the reliefs claimed?	Affirmative
4 What Order?	As per Final Order.

REASONS

7. **POINT Nos.1 to 3** :- At the outset, we will have to see what is the law laid down by the Hon'ble Bombay High Court regarding the jurisdiction of the Adjudicating Officer appointed u/s 71 of Real Estate Regulations and Development Act.(Henceforth, RERA). Section 71 reads as follows:

- I. For the purpose of adjudging compensation, u/s 12, 14, 18 and 19, the authority shall appoint in consultation with appropriate government, one or more judicial officer as deemed necessary who is or has been a District Judge, to be an Adjudicating Officer for holding an enquiry in the prescribed manner, after giving any person concerned a reasonable opportunity of being heard. Provided that any person whose complaint in respect of matter covered u/s 12, 14, 18 and 19 is pending before consumer disputes redressal forum or the consumer disputes redressal commission or the national consumer redressal commission established u/s 9 of Consumer Protection Act on or before commencement of this Act, he may with the permission of such forum or commission as the case may be, withdraw the complaint, pending before it and file an application for adjudging compensation. Under sub section 1, Complaint shall be dealt with by Adjudicating Officer as expeditiously as possible and dispose of the same within a period of 60 days from the date of the application.
- II. Provided that if any such application could not be disposed of within said period of 60 days, the AO shall record his reasons in writing for not disposing of the application within that period.
- III. While holding an enquiry, AO shall have power to summon and enforce attendance of any person acquainted with the facts and circumstances of the case, to give evidence or to produce any document which in the opinion of Adjudicating Officer, may be useful for or relevant to the

subject matter of enquiry and if in enquiry he is satisfied that person has failed to comply with provisions of any of the sections specified in sub-section 1, he may direct to pay such compensation or interest as the case may be, as he deems fit in accordance with the provisions of any of those sections.

8. Section 72 reads that while adjudging the quantum of compensation, or interest as the case may be u/s 71, the AO shall have due regard to the following factors viz.

- a. The amount of disproportionate gain or unfair advantage wherever quantifiable, made as a result of the default;
- b. The amount of loss caused as result of the default;
- c. The repetitive nature of the default;
- d. Such other factors which the adjudicating officer considers necessary to the case in furtherance of justice.

9. Section 31 provides for filing of complaints with the authority or the adjudicating officer.

(1) Any aggrieved person may file a complaint with the authority or the AO as the case may be for any violation or contravention of the provisions of this Act or Rules and Regulations made thereunder against any promoter or an allottee or real estate agent as the case may be.

(2) The form, manner and fees for filing complaint, under sub-section 1 shall be such as may be prescribed

10. Section 12 provides for awarding compensation where any person makes an advance on the basis of information contained in advertisement etc. and sustains loss or damage by reason of incorrect/ false statement.

11. Under the proviso, if the person affected, intends to withdraw from the proposed project, he shall be returned his entire investment alongwith

interest at such rate as may be prescribed and compensation, in the manner provided under the Act.

12. Section 14 provides for adherence to sanctioned plans and project specifications by the promoter and no alterations can be made without previous consent of that person except minor additions and alterations. Any other alterations and additions, are not permissible, without written consent of at least 2/3rd of allottees other than promoter. Under Sub-section 3 in case of structural defects etc. ,if it is brought to the notice of promoter, within a period of 5 years, by the allottee, from the date of handing over possession, it shall be duty of promoter to rectify such defects without further charge within 30 days and in the event of promoters failure to rectify, such defects, within such time, aggrieved allottee is entitled to receive appropriate compensation in the manner as provided under this Act.

13. Under Section 18 (1), if the promoter fails, to complete or is unable to give possession of an apartment, plot or building,

(a) in accordance with terms of agreement for sale or as the case maybe duly completed by the date specified there in or

(b) due to dis-continuance of his business as a developer, on account of suspension, for revocation of registration, under this Act, or for any other reason, he shall be liable on demand, to the allottee in case the allottee wishes to withdraw from the project, without prejudice to any other remedy available, to refund the amount received by him in respect of the apartment, etc, with interest at such rate as may be prescribed in this behalf including compensation in the manner provided under this Act. Under the proviso, if allottee does not intend to withdraw, he shall be paid, interest for every month of delay, at such

rate as may be prescribed. Under sub-section 2 promoter shall compensate allottee in case of any loss caused due to defective title to the land. Under Sub- section 3 if the promoter fails to discharge any other obligations imposed on him under this Act or the rules or regulations made thereunder or in accordance with the terms and conditions of the agreement for sale, he shall be liable to pay such compensation to the allottees, in the manner as provided under this Act.

14 .Section 19, provides for rights and duties of the allottee and under Sub-section 4 he shall be entitled to claim refund, with interest and compensation, if promoter fails to comply or is unable to give possession of apartment etc. in accordance with the terms of agreement for sale or due to discontinuance of his business as a developer on account of suspension or revocation of registration under the provisions of this Act.

15 .Hon'ble Appellate Tribunal, has taken a view in the matter of Pankaj Agarwal that adjudicating officer has no jurisdiction to grant refund of the amount with interest and has power only to grant compensation and that jurisdiction vests only with the authority.

16 .However, observations of Hon'ble Bombay High Court will have to be seen. In the case of Lavasa Corporation Ltd. Vs. Jitendra Tulsiani, in 2nd appeal, 9717 of 2018 with Civil Application No. 683 of 2018, in para 76 Hon'ble High Court has observed as follows :

Moreover, if the Appellant is permitted to raise such defence, it would be as good as allowing Adjudicating Authority established under RERA, to go behind the registration certificate for holding that said registration under RERA, is not applicable to the project of the appellant. Can the Adjudicating Authority, do so? The answer has to be in the negative, if the

scheme of RERA, is considered. It is pertinent to note that under RERA, there are two different authorities established; one is real estate regulatory authority defined u/s 2 (1) and established u/s 20 of the RERA. It is conferred with the jurisdiction to entertain the application, for registration of the projects. As can be seen from, provisions Section 3 and 4 of "RERA application for registration of real estate project is to be made to real estate regulatory authority established under chapter 5 which deals with establishment and incorporation of the authority.....

As per para 77- "as against it, the adjudicating authority under the RERA is defined, in Section 2(a) as Adjudicating Officer appointed under sub-section 1 of Section 71. This Adjudicating Authority as can be seen from Section 71(1) of the Act is established for the purpose of adjudging compensation under Section 12,14,18 and 19 of the said Act.

Section 31 provides that the complaints are to be filed by aggrieved persons under RERA with the AA for any violation or contravention of the provisions of this Act.

As per para 78- therefore, the authority which grants registration under RERA is different than the authority which is established to adjudicate the grievances of the aggrieved persons under the said Act. One authority cannot encroach on the jurisdiction exercised or to be exercised by another authority. Here in the case, the registration certificate to the appellant is granted by the Regulatory Authority, established u/s 20 of the said Act and now the appellant is calling upon the AA established u/s 71 of the RERA to go behind registration certificate and to hold that provisions of RERA are not applicable to the appellant.

Hon'ble High Court framed point no. 2 as- whether appellate tribunal has committed an error in holding that AA under RERA has jurisdiction to entertain the complaints filed by respondent u/s 18 of the RERA?

Point no. 3 was framed as- whether Adjudicating Authority under RERA can go behind registration certificate of the appellant so as to hold that it has no jurisdiction, though the project is registered under the said Act? Hon'ble High Court answered point no. 2 and 3 in the negative. In para 62, reference is made to Judgement of Hon'ble Apex Court in the case of TELCO Vs. State (2000)5 SCC 346 about the interpretation of enactment viz. that which will achieve the object of the Act.

17 .Then there is landmark judgement of Division Bench of Hon'ble Bombay High Court in the case of Neelkamal Realtors Vs. Union of India. Writ Petition no.2737 of 2017 dated 06.12.2017.The validity of almost whole of the RERA was scrutinised by the Hon'ble Bench. Except the provision u/s 46 (1)(b), all other provisions have been upheld.

The discussion on jurisdiction of Adjudicating Officer by Hon'ble Justice N.H.Patil, starts from paragraph 124. It reads – the entire scheme of RERA is required to be kept in mind. It is already submitted during the course of hearing that in many cases, helpless allottees had approached the consumer forum, High Court, Apex Court, in a given fact situation of the case. The courts have been passing orders by moulding reliefs by granting interest, compensation to the allottees and issuing the directions for the timely completion of the project, transit accommodation during completion of project, so on and so forth. Under the RERA, now this function is assigned to the Authority, Tribunal. An Appeal lies to the High Court. Under one umbrella, under one regulation and under one law, all the issues are tried to be resolved. Provisions of Section 71 refer to power to

adjudicate. District Judge is conferred with power to adjudicate compensation u/s 12, 14, 18 and 19. A promoter could very well put up his case before the adjudicator who deals with the issues in the light of the fact situation of each case. Therefore, there should not any apprehension that mechanically compensation would be awarded against a promoter on failure to complete the development work.

The proviso to section 71(1) provides that any person whose complaint in respect of matters covered under sections 12,14,18 and 19, is pending before consumer disputes redressal forum, or consumer disputes redressal commission or the national consumer redressal commission, established under Section 9 of Consumer Protection Act, on or before commencement of this Act, he may with the permission of such forum or commission as the case may be withdraw the complaint pending before it and file an application before the AO under this Act.

Para 125 reads that- the proviso to Section 71(1) as quoted above, is clear indicator that even pending complaint, before consumer forum could be transferred to adjudicator under RERA. A submission was advanced that allottee is free to approach whatever forum in respect of defaults committed if any, in compliance with agreement of sale entered into between the promoter and allottee prior to registration of RERA. In view of scheme of RERA we find that this contention of Petitioners cannot be upheld. It would be unreasonable to expect allottee to resort the proceedings in different forums prior to registration of project in respect of the agreement executed prior to the registration under RERA and post registration. Under the scheme of RERA, the adjudicatory mechanism is prescribed under one umbrella. We do not notice any illegality in the same.

Section 71(1) is framed in the larger interest of consumers. The adjudicator who would be a judicial member of the rank of district judge would be dealing with all issues and the pleas raised by promoter, allottee and other stake holders before adjudicating claim for compensation. The orders are subject to judicial review by higher forum. Therefore, promoter should have no apprehension that they would be remediless or there is no scope under scheme of RERA for consideration of their claim.

Para 126 reads - another plea, raised is, as to why a promoter shall pay interest for the past contractual rights, in case of failure, to complete the project after registration under RERA, till possession is handed over. Under the scheme of RERA, it is clear by now that a promoter has to self assess and declare time period during which he would complete the project. But in case, in spite of making genuine efforts, a promoter fails to complete the project, which the concerned authority, adjudicator, forums , tribunal would certainly look in to genuine cases and mould their reliefs accordingly. We do not find that on that count provision of Section 18(1)(a) are to be declared as contrary and violative of Article 14, 19(g) The payment of interest u/s 18 is compensatory in nature.

The provisions of Section 18 must be read with Sections 71 and 72. The adjudicator would consider each case on its merits and unless such cases emerge and decisions are taken by authority, it would not be appropriate at this stage to hypothetically consider a situation and decide constitutional validity of statutory provisions.

Para 127 reads - it was submitted on behalf of Union of India that MOFA provides for interest to be paid in certain cases (Section 8) and constitutional courts too had granted interest to flat purchaser in case of defaults by the promoter. The requirement to pay interest u/s 18 is not

penal since payment of interest is compensatory in nature due to delay suffered by the flat purchaser.....

18 .Hon'ble Justice Ketkar in para 264 has observed as- so far as challenge to Section 59, 60, 61, 63, 64 are concerned, these provisions fall in chapter VIII entitling offences, penalties, and adjudication..... Payment of interest and compensation, u/s 12, 14, 18 and 19 needs to be adjudicated by AO as per Section 71. The amount of interest and compensation is payable by the promoter to the allottee or by allottee to the promoter u/s 19 (7) As against this under Section 76 the sums realised by way of penalties imposed by appellate tribunal or the authority in the union territories, is to be credited to the consolidated fund..... Section 76 does not include determination of AO u/s 71 of RERA. This is also pointer to indicate that the interest and compensation determined by AO u/s 12, 14, 18 and 19 is not by way of penalty but is essentially compensatory in nature.

19 .In my humble opinion as laid down by Hon'ble Bombay High Court in the Lavasa case and Neelkamal case, the main function of the authority are to register real estate project and to extend the registration or otherwise, encourage timely completion of real estate projects and to inflict penalty in case of default in compliance of the provisions of this enactment. The AO on the other hand is to lessen the burden of the authority in awarding compensation in case of default under the provisions of the enactment. Therefore, Section 31 permits aggrieved person by violation or contravention of provisions of this Act or Rules and Regulations made thereunder to file a complaint with the authority or the AO. The complaint with the AO for compensation u/s 12, 14, 18 and 19 can be directly filed with the AO in case of violation or contravention of the provisions of the act, rules and regulations. Section 72 clause b mandates

the amount of loss caused as a result of the default as a factor to be considered while adjudging quantum of compensation or interest by AO. Sub-clause c mandates considering the repetitive nature of the default. In my humble opinion the amount that the allottee pays to the promoter is the loss suffered in the event of default by promoter which can be awarded by the AO with interest. Awarding interest is also provided under Section 71 sub-section 3. The default of the promoter will be repeated everyday till the allottee receives either possession and amenities as per promise or gets back the amounts paid by him. The only question appears to be one of nomenclature and there is no legal bar to award compensation by AO u/s 72 sub-section a to d.

20 .Also the term compensation is not defined in this Act. In general terms it mean making good loss suffered by financial stress, physical stress or mental stress. There is no special provision about power of authority to award refund but general powers are conferred u/sec. 37 and 38. Therefore I am of the opinion that AO has power to make good all losses suffered by allottee.

21 Initially booking by complainant was in respect of flat no. 301 in the building Parijat but was changed to flat no. 504 in the building Nishigandh, in the project of the respondent Karm Gardens at village Chikhaloli, Tal., Ambernath Dist. Thane. Complainant claims that he booked flat no. 301 by issuing cheque for Rs.74,167/- on 30.2.2014. Agreement was executed on 31.05.2014. Complainant has placed on record, two receipts dated 26.11.2014 for Rs.2.76 lakhs and other for Rs.4,86,592/- both in respect of flat no. 301. Copy of MOU dated 17.04.2015 is also placed on record. Copy of agreement of sale dated 10.8.2018 is placed on record. This in respect of flat no. 504. The price

agreed as per index II register was Rs.34,22,400/- It is clear that complainant had initially booked nos. 301 and then changed to no. 504. I therefore, answer point no. 1 in the affirmative.

22 .Complainant selectively uploaded the pages of agreement dated 10.08.2018. As per payment receipt, dated 26.02.2014, for Re.1/- the flat amount was Rs.37,08,336/-. Why total agreement is not uploaded is not understood. Possession of flat no. 301 was promised within one year since 17.04.2015 that means by 16.04.2016. Agreement in respect of Flat no. 504 was executed on 10.08.2018 and possession was promised by May, 2019. Respondent has not challenged the said contention. No justification of any kind is given by the respondent for not giving possession as per agreement. In fact there is agreement dated 21.05.2014 which in respect of flat no. 301. As per clause no. 7 date for possession is June, 2015. There is MOU dated 17.02.2015 in respect of flat no. 301 about 25/75 scheme for a revised consideration of Rs.39,84,325/- including additional consideration of Rs.2.76 lakhs. Then there is a letter dated 26.07.2018 about relinquishing benefits under 25/75 scheme in lieu of purchase of flat no. 504. Agreement for Sale dated 10.08.2018 is in respect of 2nd flat and date of possession is mentioned as 31.05.2019. Again there is letter dated 26.07.2018 relinquishing benefit to 25/75 scheme and adjusting against flat no.2 Revised consideration was Rs.31,32,429/- which is 75% of the total consideration.

23 .It appears that complainant sought loan from DHFL. As per calculation sheet total payment made is Rs.33,62,418/-. Respondent has not denied receiving amount of Rs.33,62,418/-. Respondent has also failed to deliver possession within reasonable period as per agreement. I therefore, answer point no. 2 in the affirmative.

24 .Complainant has cancelled the agreement. Amount paid Rs.33,12,418/- is the loss suffered by the complainant. He is entitled for refund of the said amount with interest as compensation u/s 71(3) 72(b) and (c) of RERA. Complainant claims he had to pay house rent as he did not receive possession of the flat booked by him. Complainant is resident of Arundhati Apartment, Bhoir Wadi, Kalyan Dombivali Municipal Corporation. He is the tenant of flat no. A-102. Leave and Licence agreement dated 18.02.2019 is placed on record for the period from 01.03.2019 to 28.02.2022. 1st year rent was Rs.10,000/- per month, in the next year Rs.10,500/- p.m. and 3rd year Rs.11,000/- per month. Rent agreement dated 01.08.2017 is placed on record in respect of room no.402, Baliram Enclave Tisgaon Kalyan. Rent agreed was Rs.8,000/- per month. In my opinion a compensation of Rs. One lakh towards rent amount will be just and proper. I therefore, answer point no. 3 in the affirmative and proceed to pass following order:

ORDER

- 1) Respondent to pay Rs.33,62,418/- to the complainant together with interest @10.40 p.a. as compensation u/s 71(3), 72(b) and 72(c) from the date of payments till final realization subject to complainant executing cancellation deed at the cost of respondent.
- 2) Respondent to pay Rs. one lakhs to the complainant as rent amount paid by complainant.
- 3) Respondent to pay Rs.20,000/- to the complainant as costs of this complaint.

4) Respondent to pay above amounts within 30 days from the date of this Order.

Mumbai
Date : 09.01.2021

Madhav Vitthal Kulkarni
Digitally signed by
Madhav Vitthal Kulkarni
Date: 2021.01.19
17:15:21 +05'30'

(Madhav Kulkarni)
Adjudicating Officer
MahaRERA