

Complaint No. CC006000000055911
BEFORE THE MAHARASHTRA REAL ESTATE REGULATORY
AUTHORITY MUMBAI

Complaint No. CC006000000055911

Rajendra Eknath Pawar

.... Complainant

Versus

Bright Sky Height Builder & Developer Private Limited Respondent

MahaRERA Project Registration No. P51700009788

Coram: Shri. Mahesh Pathak, Hon'ble Member - I/ MahaRERA

Ld. Adv. Raj Patel appeared for the complainant.

Ld. Adv. Kunal Maskar appeared for the respondent.

ORDER

(Monday, 28th November 2022)

(Through Video Conferencing)

1. The complainant above named has filed this complaint seeking directions from the MahaRERA to the respondent to refund the entire amount paid by him along with interest under the provisions of section 18 of the Real Estate (Regulation & Development) Act, 2016 (hereinafter referred to as 'RERA'), in respect of the booking of a flat bearing no. 1203 in the building no. 5, of the respondent's registered project known as "**Galaxy Wing 5**" bearing MahaRERA registration No. **P51700009788** located at Padale Village, Dist. Thane.
2. The aforesaid complaint was transferred by the MahaRERA to the Ld. Adjudicating Officer/ MahaRERA on 29-10-2018 for further appropriate decision under the provisions of sections 71 and 72 of the RERA since the

complainant had prayed for refund along with interest and compensation under section 18 of the RERA.

3. Accordingly, the Ld. Adjudicating Officer/ MahaRERA heard the arguments of both the parties and passed an order on 26-02-2019. The said order reads as under: -

"1) The complainant is allowed to withdraw from the project.

2) The respondent to refund all the amounts received from the complainant including taxes except stamp duty which can be refunded as per rules together with interest @ 10.70% p.a. from the date of payments till final realisation as provided under Rule 18 of the MahaRERA Rules.

3) The respondent to pay Rs. 20,000/- to the complainant as costs of this complainant.

4) The complainant to execute cancellation Deed at the cost of the respondent.

5) The respondent to pay the above amounts within 30 days from the date of this order."

4. Being aggrieved by the aforesaid order dated 26-02-2019 passed by the Ld. Adjudicating Officer/ MahaRERA, the respondent had preferred an Appeal No. AT006000000021461 before the Maharashtra Real Estate Appellate Tribunal on 21-06-2019.
5. In the said appeal, after hearing the arguments advanced by both the parties, the Hon'ble Appellate Tribunal was pleased to pass an order on 04/11/2020 and set aside the said order dated 26/02/2019 passed by the Ld. Adjudicating Officer/ MahaRERA and remanded the matter back to

the MahaRERA on the issue of jurisdiction.

6. Accordingly, the Ld. Adjudicating Officer/ MahaRERA vide an interim order dated 05/12/2020 referred this complaint to the MahaRERA.
7. Thereafter, the aforesaid complaint was heard by the Ld. Erstwhile Member-1/ MahaRERA and an order was passed on 29-12-2020. The said order reads as under: -

“10. The respondent though appeared for the hearing through its advocate has failed to bring any new facts on record of MahaRERA. Even it has failed to upload the relevant submissions on record of MahaRERA within stipulated period of time granted by MahaRERA. Hence the MahaRERA has no other alternative, but to decide this matter on merits since it is to be decided on time bound manner.

11. Considering the aforesaid facts and available record, the MahaRERA has observed that the complainant has purchased the his flat in the respondent's project by executing the registered agreement for sale dated 3-10-2014. According to the said agreement, the respondent was liable to handover possession of the said flat to the complainant on or before 31-12-2016. Admittedly, the possession is not given to the complainant on the agreed date of possession mentioned in the said agreement. It shows that the respondent has violated the provisions of section 18 of the RERA. Even till date the project is incomplete and no occupancy certificate has been obtained for this project. Hence the MahaRERA feels that the refund claimed by the complainant under section 18 of the RERA is justified, since he waiting for 6 years to have possession after executing the agreement for sale with the respondent. Therefore, the MahaRERA agrees with the decision given by the Ld.

Adjudicating Officer, MahaRERA/Mumbai dated 26-02-2019 in this complaint.

12. In view of these facts, the MahaRERA, directs the respondent to refund the entire amount paid by the complainant along with interest at the rate of MCLR plus 2% as prescribed under section 18 of the RERA read along with relevant Rules made thereunder.

13. With these directions, the complaint stands disposed of."

8. Being aggrieved by the aforesaid order passed by the Ld. Erstwhile Member-1/ MahaRERA, the respondent promoter again preferred an Appeal No. AT006000000052994 before the Hon'ble Appellate Tribunal. In the said appeal the Hon'ble Appellate Tribunal was pleased to pass an order on 28-07-2022, which reads as under: -

"14. In view of the above facts and circumstances of the case, we find that sufficient time was not given to parties to upload their pleadings and those crucial two days of time window were weekend holidays, difficulty of uploading their documents to MahaRERA was pointed out by email well before the date of passing of the impugned order by MahaRERA and parties could not upload documents on web portal. Therefore, we are of considered view that impugned order is liable to be set aside. In the interest of justice as well as for just and fair decision, it will be proper that parties be given opportunities to upload their documents/ pleadings and also be heard.

15. In view of the foregoing observations, impugned order warrants reconsideration of the matter afresh for passing an appropriate order in accordance with the law after giving opportunities to the parties of being heard. We have not touched the merits of the case and above observations shall not influence the judgment of MahaRERA while re-

adjudicating the matter.

16. Therefore, without going into the merits of the case, we remand the matter to MahaRERA to consider all the contentions / issues afresh, Accordingly, we proceed to pass order as under;

ORDER

- (i) The appeal is partly allowed.*
- (ii) Impugned order dated 29th December 2020 passed by MahaRERA in Complaint No. CC 006000000055911 is set aside.*
- (iii) The matter is remanded to MahaRERA to be heard and be decided afresh as expeditiously as possible in accordance with the law.*
- (iv) All contentions of the parties are kept open.*
- (v) Parties to bear their own costs.*
- (vi) Parties to appear before MahaRERA on August 17, 2022.*
- (vii) Copy of this order be sent to MahaRERA and respective parties as per the provisions of the Section 44(4) of the Act of 2016".*

9. Pursuant to the aforesaid directions of the Hon'ble Appellate Tribunal, this complaint was heard on 17-08-2022, 20-09-2022 and same was heard finally on 12-10-2022 as per the Standard Operating Procedure dated 12-06-2020 issued by the MahaRERA for hearing of complaints through Video Conferencing. Both the parties have been issued prior intimation of this hearing and they were also informed to file their written submissions if any. Accordingly, both the parties appeared for the hearing and made their respective submissions. The MahaRERA heard the arguments of the parties and also perused the available records.

10. After hearing the arguments of both the parties, the following Roznama was recorded: -

"Both the parties are present. Both the parties have uploaded their reply and written submissions and have argued the matter at length today. The complainant avers that there is an inordinate delay in the project, as the agreement for sale was signed in October 2014 and the possession was promised in December 2016. However, the complainant also avers that the project is still not complete and the reasons given by the respondent for such delay are neither justifiable nor there is any document/ notification etc., to support the respondent's contention that the delay was reasonable and caused due to delay in the government permissions. The complainant also refutes the contention of the respondent that the complaint is not filed in the correct format and therefore, not maintainable. The respondent has argued that, there is a case law as well as the orders of MahaRERA, which state that the proper format needs to be used for filing such complaints. On the substantive issue of the delay, the respondent avers that the extension of time was reasonable as the further C.C. was delayed from 2017 till 2021. The respondent mentions that, the issue of Flamingo Sanctuary in Thane led to the delay in Environmental Clearance and also the introduction of Unified DCPR in December 2020. Moreover, the respondent also mentions that even after the complaint has been filed, the complainant has made further payments and as an afterthought decided to withdraw from the project. The respondent also points out that 51% of the allottees have consented for the extension of the project with MahaRERA and the date of completion is now June 2023. In view of the above, this matter is reserved for order."

11. In the present case sufficient opportunity of hearing as well as for submission of documents has been granted to both the parties.

Accordingly, the complainant has uploaded his complaint on record of the MahaRERA along with annexures on 03/08/2022. The respondent has uploaded an application for dismissal of this complaint on record of the MahaRERA on 17/08/2022. The complainant has uploaded his reply to the said application on 30-08-2022. Thereafter the complainant has uploaded the written submissions on record of the MahaRERA on 01-09-2022 and the respondent has uploaded the same on 19-09-2022. The said submissions are taken on record.

12. It is the case of the complainant that, he has purchased the said flat vide a registered agreement for sale dated 03-10-2014 and as per the clause 13 of the said agreement, the date of handing over the possession was agreed as December 2016. Further, the respondent has just constructed 13 floors of the building no. 5 and raised the payment demands to the complainants which they have paid as demanded from time to time and till date they have paid Rs.29,50,100/- towards the completion of thirteen slabs. Further, even till date the possession of the said flat has not been given without giving any reasons and hence they do not wish to continue and wish to terminate the said agreement for sale. Therefore, the complainants pray that the respondent be directed to repay the EMI amounts paid and restrain it from making any further demands and to declare that the agreement for sale stands terminated with interest and compensation.
13. The respondent has refuted the claim of the complainant and has stated that the complainant has not purchased but has agreed to purchase the said flat under the said agreement executed under the MOFA which was

agreed to be purchased by him in Phase-I of the project earlier named as Saptashree Galaxy and lately as Galaxy. Further, construction of the building no. 5 was completed up to 13th floor and accordingly demand letters for payment instalment were sent to the complainant, however at present the construction is completed up to 16th floor and it is continuing the progress of work to meet the date of possession. Further, the complainant has not given any notice to the respondent about terminating the said agreement and directly filed the present complaint.

14. The complainant has filed his rejoinder on 03/08/2022 stating that the respondent has unilaterally changed the date of possession to December 2019. Further, it took 12 months to construct three slabs of the said building and the construction work of the said building was being stopped for almost a year without giving any valid reason. Further, he has never defaulted in making the payments as per the schedule of the payment mentioned in the said agreement. Further, he raised the dispute for the payment of service tax only after the ruling passed by the Hon'ble Delhi High Court in the matter of Suresh Kumar Bansal vs. Union of India. Further, the construction of the said Building no. 5 is again stopped and since last six to seven month there is no construction happening at the said site. The complainant therefore prayed that the present complaint be allowed and he may be compensated as per prayer clause of the complaint.
15. The respondent has filed its written submissions on 03-08-2022 repeating what is stated hereinabove and further stating that the complainant has produced on record receipts of payments dated 23-02-2018 issued by

Bright Sky Heights Builders & Developers Pvt. Ltd. It has stated that the complainants had been informed by it about the change of name and its changed address. In view of the above, they are not entitled to any relief as prayed for.

16. The respondent has filed its miscellaneous application on 17-08-2022 stating that the complaint is defective in nature and cannot be adjudicated by the MahaRERA on the ground that the complaint is not in the proper form i.e., it is neither filed in form 'A' or form 'B'. Further, there are overlapping reliefs since he has filed the complaint for composite reliefs which is not permissible under the Act. Also, there is no violation of any section of the RERA by it. Hence it has prayed that the complaint be dismissed.
17. The complainant has filed his reply on 30-08-2022 to the said miscellaneous application repeating what has already been stated above and stating that various supreme court judgements cited by the respondent are not relevant to the present case. As regards to the format of the complaint, he has referred to the order dated 20-12-2019 passed in the matter of Aditya Gupte vs Swaraj Homes Builders and Developers wherein it was noticed by the MahaRERA that the complaint was not made in proper format but in the present case, the MahaRERA did not make any such observation. As regards the complaint for composite reliefs, he has denied that he has filed a composite application and relied upon the judgement of the Apex Court in the matter of Newtech Promoters and Developers Pvt. Ltd. vs State of UP and Ors. in which it was held that *"if composite application is filed, can be segregated at the*

appropriate stage." Further, the respondent has challenged the maintainability of the complaint on frivolous grounds after a lapse of 4 years to delay the hearing. In view of the above, he has submitted that the reliefs sought by the respondent be rejected.

18. The complainant has filed written submissions on 01-09-2022 stating that till the date of filing he has paid equated monthly instalment and have relied upon the judgement of the Supreme Court in the matter of M/s. Newtech Promoters and Developers Pvt. Ltd. vs State of UP & Ors. wherein it has expressed serious concerns over the unqualified rights of allottees to seek refund under section 18 of the Act. He has further relied upon the judgement of the Supreme Court in the matter of Fortune Infrastructure vs. Trevor D'Lima that *"the person cannot be made to wait indefinitely for possession of the flat allotted to him, and is entitled to seek refund of the amount paid by him along with compensation."* The complainant has further relied upon certain judgements in support of his case. Further the respondent has attempted to take refuge under clause 13 of the said agreement which states that *"the promoter shall give possession and the promoter shall be entitled to reasonable extension of time .. if the completion of the building is delayed on account of i. war, civil commotion or act of God; ii. any Notices, Orders Rules, Notification of the Government, TMC and/or other Public, Local, Competent Authority, Court etc; iii. shortage of Cement, Steel, building material etc."*, but the respondent has remained silent on providing the reasons for delay since it is well aware that the delay in handing over possession would not fall under the aforementioned contractual clause, nor it informed about the revised date of possession. In view of the above, he prayed for the final

relief of refund of entire amount.

19. The respondent has filed its written submissions on 19-09-2022 repeating what has been stated above and stating that clause 13 of the agreement clearly stated the force majeure conditions for which it shall be entitled to reasonable extension of time. Further it had to obtain certain Environment clearance certificate from the concerned Authority as a precedent to obtain further commencement certificate and further reasons of the Covid-19 pandemic which affected the construction activities. It has further stated that the complainant has made default in making payment towards the consideration of the said flat for which it did not charge interest due to his personal difficulties to arrange for the funds in time. Further, the complainant has admitted that as per rule 6 of the MahaRERA Rules, a complaint has to be filed in the Form A. In the circumstances, it has stated that the complaint ought to be dismissed with costs.
20. The MahaRERA has heard the submissions made by both the parties and also perused the available record. In the present case, by filing this complaint the complainant has approached the MahaRERA mainly seeking refund of the entire amount paid by him along with interest for the delayed possession under section 18 of the RERA. The said claim has been refuted by the respondent mainly raising the technical issue about the complaint not filed in a proper format by filing a miscellaneous application on record of the MahaRERA, to which the complainant has also filed reply denying the same.

21. As far as the said miscellaneous application filed by the respondent is concerned, the MahaRERA is of the view that the same is an afterthought and has been filed at a belated stage when this complaint has been heard twice and disposed of by the Ld. Adjudicating Officer/MahaRERA as well as the MahaRERA. Even, the Hon'ble Appellate Tribunal has heard the appeals twice and remanded the matter for fresh hearing firstly on jurisdiction issue and second time on the ground of principles of natural justice. Admittedly, the present complaint was filed by the complainant in the year 2018 and the same was heard on merits on several occasions. However, the respondent has raised this issue for the first time on 17-08-2022. Hence, the MahaRERA prima facie feels that the same cannot be considered by the MahaRERA. Moreover, it is a settled principle of law that mere technicalities should not come in the way of justice. The MahaRERA, therefore does not find any merits in the miscellaneous application filed by the respondent and hence the said miscellaneous application filed by the respondent stands rejected.
22. On the substantial issue of refund sought by the complainant, the MahaRERA has noticed that, it is the case of the complainant that there is an inordinate delay on the part of the respondent in completion of this project. Further there is a registered agreement for sale duly signed by and between the parties dated 03-10-2014. As per the same, the respondent has agreed to handover the possession of the said flat to the complainant on or before 31-12-2016. However, admittedly the possession was not handed over to the complainant on the said date of possession and the project is still not complete. Further the reasons of delay cited by the respondent are neither justifiable nor there is any

supportive document/ notification etc. produced by the respondent in this regard. Hence, the complainant prayed to grant refund along with interest under section 18 of the RERA.

23. The respondent has mainly contended on the substantive issue of the delay that the extension of time was reasonable as the further commencement certificate was delayed from 2017 till 2021. It has further stated that, the issue of Flamingo Sanctuary in Thane led to the delay in Environmental Clearance and also the introduction of Unified DCPR in December 2020. It has further stated that, even after the complaint has been filed, the complainant has made further payments and thereby accepted the said delay and hence the refund sought by him is an afterthought. The respondent also pointed out that 51% of the allottees have consented for the extension of the project with the MahaRERA and the date of completion is now June 2023. Hence, it has prayed for dismissal of this complaint.
24. Admittedly, there is a registered agreement for sale dated 03-10-2014 duly signed by both the parties. According to the said agreement for sale, the respondent has agreed to handover possession of the said flat to the complainant on or before 31-12-2016. Admittedly, till date the possession has not been handed to the complainant. It shows that the respondent has violated the provision of section 18 of the RERA. To justify the said delay, the respondent promoter has mainly stated that the said delay occurred mainly due to the Flamingo Sanctuary in Thane leading to the delay in Environmental Clearance and also the introduction of Unified DCPR in December 2020. However, the said reasons of delay are not

covered under the force majeure reasons. As a promoter, having sound knowledge in the real estate sector, the respondent was fully aware of the market risks when it had launched the project and signed the agreements with the home buyers. Hence it was the duty of the respondent promoter to get all permissions in time and to complete the project in a time bound manner. If the project was getting delayed for the reasons cited by the respondent, in that event, the respondent should have approached the complainant allottee and should have informed the said delay to him and should have revised the date of possession mentioned in the agreement for sale. However, no such steps seem to have been taken by the respondent. Hence the reasons for delay cited by the respondent cannot be accepted as a plausible explanation. Further, even if the revised date of completion i.e., 31-12-2019 mentioned by the respondent on the MahaRERA webpage is considered favourably, however even on that date the project was incomplete and the possession was not handed over to the complainant.

25. In this regard, it is necessary to peruse the provision of section 18 of the RERA, which reads as under:

“18 (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) due to discontinuance of his business as a developer on account of suspension or revocation of the 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 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:

Provided that where an allottee does not intend to withdraw from the project, he shall be paid, by the promoter, interest for every month of delay, till the handing over of the possession, at such rate as may be prescribed."

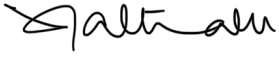
26. The aforesaid explicit provision under section 18 of the RERA clearly provides that on failure of the promoter to handover possession of the flat to the allottee on the agreed date of possession mentioned in the agreements for sale, the allottee has two choices, either to withdraw from the project or to continue in the project. If the allottee intends to withdraw from the project, the promoter, on demand of the allottee is liable to refund the entire amount paid by the allottee along with interest and compensation as prescribed under RERA. If the allottee is willing to continue in the project, in that event, the promoter is liable to pay interest for the delayed possession.
27. It is very clear from the above discussion that the reasons cited by the respondent for the delay in completion of the project do not give any plausible explanation for the said delay caused in the project. Moreover, one of the reasons of the delay cited by the respondent promoter about the change in DCPR occurred after the date of possession mentioned in the agreement for sale got over in the year 2020. Hence, the said reasons of delay are not acceptable. Hence, the MahaRERA prima facie feels that

the respondent promoter has violated the provisions of section 18 of the RERA.

28. In view of the above facts and discussion, the following order is passed:
- a. The respondent promoter is directed to refund the entire amount paid by the complainant towards the consideration of the said flat along with interest at the rate of SBI's Highest Marginal Cost Lending Rate (MCLR) plus 2% as prescribed under the provisions of section-18 of the Real Estate (Regulation and Development) Act, 2016 and the Rules made there under, from the date of payment till the actual realisation of the said amount to the complainant.
 - b. Needless to state here that the actual amount as provided under section 18 of the RERA means the amount paid by the complainant towards the consideration of the said flat only, excluding the stamp duty, registration charges and taxes etc. paid to the government.
 - c. However, in view of the mitigating circumstances beyond the control of the respondent promoter and also to ensure that the said project is not jeopardised due to the outflow of finances and is completed keeping in mind the interest of the other buyers of the said project at large, the amount of refund along with interest be paid within a period of 3 months in equal instalments from the date of this order as this complaint is filed for refund in the year 2018.
 - d. With regard to the payment of interest to the complainant, the MahaRERA further directs that the respondent promoter is entitled to claim the benefit of "moratorium period" as mentioned in the Notifications / Orders nos. 13 and 14 dated 2nd April, 2020 and 18th May, 2020 issued by the MahaRERA and the Notification/Order

which may be issued in this regard from time to time.

29. With the above directions, the present complaint stands disposed of.


(Mahesh Pathak)

Member - 1/MahaRERA

