

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

Virtual Hearing held through video conference as per
MahaRERA Circular No.: 27/2020

Complaint No. CC006000000195959

1. MOHINI MILIND KALE
2. MILIND MADHUKAR KALE

...COMPLAINANTS

Vs

**BRIGHT SKY HEIGHTS BUILDER AND
DEVELOPERS PRIVATE LIMITED**

...RESPONDENT

MahaRERA Project Registration No. P51700009788

O R D E R

(03.04.2025)

(Date of Hearing: 23.07.2024)

Coram: Shri. Ravindra Deshpande, Member II, MahaRERA

Adv. Rajendra Pawar for Complainant

None for Respondent

1. The Complainants have filed the present complaint on 09.02.2021 seeking a refund of the entire amount received by the Respondent along with interest thereon.
2. In nutshell, facts of the present complaint are as follows:
3. The Complainants purchased a two BHK flat in the project named "GALAXY WING 5" having registered under MahaRERA Project Registration No. P51700009788 (hereinafter referred to as the "**said project**") having carpet area of 611 Sq Ft vide registered Agreement for Sale dated 21.03.2017 (hereinafter referred to as the "**said Agreement**").
4. As against the agreed possession date on December 2019, which should have been mentioned as December 2018, even to the date of filing the present complaint, the

Respondent failed to give the possession of the flat without giving any reasons and in spite of making all the payment as demanded. The Complainants, therefore, on account of facing mental and financial stress for the reason of non-possession of the flat, filed the present complaint under section 31 of the Real Estate (Regulation and Development) Act, 2016 (hereinafter referred to as the "**said Act**"). The Complainants do not wish to continue with the said project and requested this Authority to direct the Respondent to refund the entire amount.

5. The Respondent has filed the reply and contested the present complaint. The Respondent has not disputed the status of the Complainants as an allottee in the said project. The brief facts of the reply of the Respondent are as follows:-
6. Vide the said Agreement, the flat being No. 1202 having area 552 sq. ft. on the 12th floor of the C - Wing in the phase I of the project known as Galaxy previously known as Saptashree Galaxy ("Project") was purchased by the Complainants. Under the said Agreement, the Respondent had committed to handover the possession of the Flat on or before December, 2018 subject to such terms and conditions of the said Agreement.
7. As the Respondent was unable to handover the possession of the said flat, the provisions of the said Act would come into effect. In fulfilment of their obligations under the said Act, the Respondent had offered an amount of Rs. 3,500/- (Rupees Three Thousand Five Hundred Only) each month to the Complainants. In case the Respondent was unable to handover the possession of the said flat by December, 2020, an amount of Rs. 1,000/- (Rupees One Thousand Only) was agreed to be paid additionally from January, 2021 onwards till the actual handing over possession of the said flat, which came to be recorded by the letter dated 20.09.2019 addressed by the Complainant No. 2 to the Respondent. It was agreed that the amounts so incurred would be adjusted against the final amounts due and payable by the Complainants and that till the date of the said Reply, an

amount of Rs. 30,61,485/ (Rupees Thirty Lakh Sixty-One Thousand Four Hundred and Eighty-Five Only) was paid by the Complainants whereas an amount of Rs. 18,36,890/- (Rupees Eighteen Lakh Thirty-Six Thousand Eight Hundred and Ninety Only) was to be due and payable at the time of offering of the possession of the said flat.

8. It is the law of the land that once a Complainant chooses between the two different available reliefs, the other relief is abandoned and the same acts as an estoppel against any future claim and the Complainants have chosen to stay in the said project and therefore they are now estopped from withdrawing from the said project.
9. The act of the Complainants of suppressing of material facts shows that the Complainants have come to this Authority with unclean hands and therefore the Complainants are guilty of suppressio veri, suggestio falsi. In view thereof, no case whatsoever has been made out by the Complainants against the Respondent. The Complainants are not entitled to any reliefs as prayed or otherwise against the Respondent. The complaint is misconceived and devoid of any merit and prayed that the complaint be dismissed with costs in respect of the Respondent herein. The complaint has been initiated with a sole purpose to taking advantage of the situation of the Respondent, by creating a vicious circle of willfully subdued facts and spinning a web to wrongfully force the Respondents to handover the possession of the said flat and the Shop to the Complainants and prayed that the complaint be dismissed at threshold and the Complainant be charged as per the laws laid down for approaching this Authority with an intention to claim what they do not have right to.
10. In pursuance of the said reply, the Complainants have filed a rejoinder dated 21.07.2021 to the reply of the Respondent, wherein, mainly the Complainants have

repeated and reiterated the contents of the complaint filed by the Complainants. The brief facts of the rejoinder of the Complainants is as follows: -

11. As the Respondent failed to give possession of the said flat on the agreed date as mentioned in Clause 13 of the said Agreement, the Complainants frequently started visiting the site office of the Respondent and that on 20.09.2019, the Complainants visited the site office of the Respondent and met one Mr. Dinesh Ahir, the Official of the Respondent. The Complainants enquired about the completion of the said building and the revised date of possession of the said flat, Mr. Dinesh Ahir informed the Complainants that due to some disputes between the partners, the construction of the said building was stopped and it might have taken another year or two to complete the construction of the said building and handing over the possession of the said flat. Mr. Ahir further informed the Complainants that if they are agreed then the Respondent has a proposal and willing to compensate the Complainants by way of monthly monetary consideration of Rs. 4500/- till the date of actual possession of the said flat and that after certain discussions, the Complainants agreed to take that compensation till the date of possession of the said flat. Thereafter, the Respondent handed over them a copy of the letter dated 20.09.2019 and asked them to sign the same as they agreed for the compensation. The said letter was prepared and printed in English language and that the educational qualification of both the Complainants was Secondary School Certificate (SSC) from vernacular i.e. Marathi medium and they have very basic knowledge of the English language and do not understand the legal terminology at all. Due to the lack of knowledge of the contents of the said letter, the Complainants specifically asked for the Marathi translation of the said letter, which they never did. The Complainants therefore signed that letter without having knowledge of the contents of that letter and handed over it to the Respondent.

12. That the said letter dated 20.09.2019 was obtained fraudulently with malafide intentions by the Respondent and therefore it is denied in toto. The said letter was signed under protest and without prejudice to the legal rights of the Complainants. The Respondent induced the Complainants to sign that letter by showing rosy picture of compensation which were never ever fulfilled.
13. That the construction of the said building is stopped and since last twelve months, there is no construction took place at the site and the reason for the same was best known to the Respondent and prayed to allow the present complaint and to compensate the Complainants.
14. The matter was listed on 09.05.2024, when, the Complainants were represented through their Advocate. However, none was present on behalf of the Respondent even though the link for hearing and notice for hearing duly served upon them. Considering the principle of natural justice and to have fair trial, the matter was adjourned to 03.06.2024 and it was further recorded in the Roznama that if the Respondent remains absent, then the matter would be heard in the absence of Respondent. Thereafter, the matter was lastly listed on 23.07.2024, when, the Complainants were represented through an advocate and none appeared on behalf of the Respondent. As a result, it was recorded in the Roznama that on last date order was passed that if on next date, the Respondent remains absent then the matter would be proceeded in the absence of the Respondent. The Advocate for Complainant submitted that AFS was executed on 21.03.2017 in respect of flat no 1202 on 12th floor for total consideration of Rs. 48,98,375/- and Rs. 28,00,000/- was paid by the Complainant. The date of possession was agreed as December 2018, but till no possession was given, and the building was still under construction. The reply filed by Respondent was without any ground. The Respondent had agreed to pay the Complainants compensation of Rs. 3,500/- per month from September 2019 till possession. The Respondent also agreed to exceed

the amount of compensation to Rs. 1000/- per month from January 2021 till the date of receipt of OC. Till 23.07.2024, the Complainant did not receive any penny from the Respondent and sought cancellation of AFS and Refund of amount. The Complainant was also given the liberty to file written submissions on or before 08.08.2024 and thereafter, this matter was Reserved for Order. The Complainants have not filed Written Submission pursuant to the directions of this Authority.

15. Considering the rival contentions of the parties, the following points arise for my determination. My findings thereon are recorded as under for the reasons stated below: -

REASONS

Sr. No.	Points	Findings
1.	Whether the Complainant is entitled to the reliefs as sought in the complaint?	Affirmative
2.	What order?	As per final Order

16. At the very outset, it is necessary to mention here that it is admitted fact that the Complainant is an Allottee and the Respondent is Promoter as per Section 2(d) and z(k) of the said Act. It is also not in dispute that the said Agreement executed between the parties on 21.03.2017 and that the promoter Respondent was required to handover the possession of the said flat to the Complainant on or before December 2018 and the Respondent failed to do the same. The Respondent offered to Complainants compensation by way of monthly monetary consideration of Rs. 4,500/- till the date of actual possession of the said flat, which is recorded in a letter dated 20.09.2019 addressed by the Complainant No. 2 to the Respondent and that an amount of Rs. 30,61,485/- (Rupees Thirty Lakhs Sixty-One Thousand Four Hundred and Eighty Five Only) was paid by the Complainants. To decide the issue of refund with interest, it is imperative that the relevant section 18 of the

said Act is perused, which is in respect of "Return of amount and compensation".

Sub-section (1) states that:

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 to sell or, as the case may be, duly completed by the date specified therein; or

(b) not relevant for this case.

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:

17. Thus, it is seen that as per Section 18 of said Act, if promoter fails to complete the project or to give possession as per agreed terms and conditions mentioned in the Agreement for Sale, there is an option to an allottee for withdrawal from the project and to claim refund of the total amount paid to the promoter alongwith interest and compensation. In the present case, as per the said Agreement, the Respondent was required to handover the possession of the said flat to the Complainant on or before December 2018. Admittedly, the Respondent has failed to do so and on account of the failure of the Respondent to adhere to the date of possession as mentioned in the said Agreement, the Complainant had opted to stay in the project by accepting the compensation amount offered by the Respondent as stated in the letter dated 20.09.2019 addressed by the Complainant No. 2 and it is the contention of the Respondent that vide letter 20.09.2019, the Complainants chose to accept the compensation offered by the Respondent and hence, the Complainants are now estopped from withdrawing from the said project. In this behalf, the Respondent has also relied upon a judgment dated 07.01.2020 passed by the Member 1 of MahaRERA. However, the facts of the said

case and the present case are different. In the case in the said judgment, the Respondent had offered fit out possession to the Complainant therein, whereas, in the present case, the fit-out possession is not offered to the Complainants, hence, the said judgment is not applicable to the present case.

18. Not only this, it is the contention of the Respondent that the agreed compensation was to be paid/adjusted by the Respondent to the Complainants against the final amounts due and payable by the Complainants and that till date an amount of Rs. 30,61,485/- (Rupees Thirty Lakhs Sixty-One Thousand Four Hundred and Eighty-Five Only) was paid by the Complainants to the Respondent and an amount of Rs. 18,36,890/- (Eighteen Lakhs Thirty-Six Thousand Eight Hundred and Ninety Only) was due and payable by the Complainant at the time of offering of the possession of the said flat. From the pleadings of the parties, it is observed that the letter addressed by the Complainant No. 2 was dated 20.09.2019, whereas, the filing date of the present complaint was 09.02.2021. It is also pertinent to note here that the Proposed Completion Date of the said Project was 31.12.2019 and thereafter one extension was granted under Section 6 upto 30.12.2020 and subsequently, 3 extensions under Section 7 of the said Act were granted to the said project upto 30.06.2025. During this extended period, the Respondent have failed to obtain the Occupation Certificate. As a result, admittedly the said project is not yet complete as on today. The Allottees cannot be kept waiting for eternity to enjoy the flat booked by them with their hard earned money. In the present case, the Respondent is trying to take advantage of the lack of knowledge of the Complainants of English language to achieve their ulterior motive by using the contents of the letter dated 20.09.2019 which has been signed by the Complainant No. 2 and Complainant No. 1 has put her thumb impression on the same and by signing the said letter, the Complainant are in away abstaining themselves from taking any action against the Respondent without knowing the repercussions of the same. The illiteracy of the Complainants of English language cannot be

negated by this Authority since on the said letter itself, a note is mentioned whereby a Marathi translation of the said letter is sought for. Not only this, the Complainants have also brought before this Authority a letter addressed by the Complainant No. 2 to the Respondent whereby the Complainant No. 2 inter alia requested the Respondent to handover the possession of the said flat booked by the Complainants, which letter has the round seal of the Respondent and which is addressed by the Complainant No. 2 in Marathi Language and if the Complainants would have known the English language, the said letter requesting possession of the said flat could have been addressed by the Complainants in English language only. As a result, in my opinion, the Respondent cannot take benefit of the letter dated 20.09.2019 since, it appears that the Complainants were made to sign the said letter on dotted lines without informing the Complainants the actual meaning of the contents of the said letter.

19. In my considered view, the said Act has been enacted to protect the interest of the consumers. As per Section 18 of the said Act, if the Promoter fails to handover the possession of the said Act as per the terms of the said Agreement, the Complainant is entitled to chose the option of either to stay in the project by accepting the interest for delayed possession or to withdraw from the project and the Complainants by filing the present complaint chose to withdraw from the said project. Hence, the Respondent is liable to refund the amount paid by the Complainant to the Respondent. This Authority would also like to draw reference to judgment passed by the Apex Court in the landmark case of M/s. Newtech Promoters and Developers Pvt. Ltd. V/s. State of Up & Ors. in Civil Appeal No(s). 6745 - 6749 and 6750-6757 of 20212, wherein, the Apex Court has clarified in paragraph Nos. 25 and 78 that that if the Promoter fails to give possession of the apartment, plot or building within the time stipulated under the terms of the agreement, then, Allottee's right under the Act to seek refund/claim interest for delay is unconditional and absolute, regardless of unforeseen events or stay

orders of the Court/Tribunal. The relevant paragraph No. 25 is reproduced herein below for ready reference: -

"...25. The unqualified right of the allottee to seek refund referred under Section 18(1)(a) and Section 19(4) of the Act is not dependent on any contingencies or stipulations thereof. It appears that the legislature has consciously provided this right of refund on demand as an unconditional absolute right to the allottee, if the promoter fails to give possession of the apartment, plot or building within the time stipulated under the terms of the agreement regardless of unforeseen events or stay orders of the Court/Tribunal, which is in either way not attributable to the allottee/home buyer, the promoter is under an obligation to refund the amount on demand with interest at the rate prescribed by the State Government including compensation in the manner provided under the Act with the proviso that if the allottee does not wish to withdraw from the project, he shall be entitled for interest for the period of delay till handing over possession at the rate prescribed..."

20. Paragraph No. 78 of the said judgment is as follows: -

"...78. This Court while interpreting Section 18 of the Act, in Imperia Structures Ltd. Vs. Anil Patni and Another 5 held that Section 18 confers an unqualified right upon an allottee to get refund of the amount deposited with the promoter and interest at the prescribed rate, if the promoter fails to complete or is unable to give possession of an apartment as per the date specified in the home buyer's agreement in para 25 held as under:

"25. In terms of Section 18 of the RERA Act, if a promoter fails to complete or is unable to give possession of an apartment duly completed by the date specified in the agreement, the promoter would be liable, on demand, to return the amount received by him in respect of that apartment if the allottee wishes to withdraw from the Project. Such right of an allottee is specifically made "without prejudice to any other remedy available to him". The right so given to the allottee is unqualified and if availed, the money deposited by the allottee has to be refunded with interest at such rate as may be prescribed. The proviso to

Section 18(1) contemplates a situation where the allottee does not intend to withdraw from the Project. In that case he is entitled to and must be paid interest for every month of delay till the handing over of the possession. It is up to the allottee to proceed either under Section 18(1) or under proviso to Section 18(1). The case of Himanshu Giri came under the latter category. The RERA Act thus definitely provides a remedy to an allottee who wishes to withdraw from the Project or claim return on his investment."..."

21. In view of the aforesaid, in my opinion, the right of the Complainants to withdraw from the said project is an unqualified right and can be opt by the Complainant on the Respondent's failing to abide by the terms of the said Agreement i.e. failure to handover the said flat as agreed in the said Agreement. If the Respondent was aware that the completion of the said project and handing over of the said flat was going to take more time than what was agreed in the said Agreement, the Respondent was well within its right to execute a supplementary Agreement with the Complainants to extend the date of possession, which has not been done by the Respondent in the present case. The fact that the Respondent failed to handover the possession of the said flat on or before December 2018 is not negated by the Respondent. Furthermore, the Respondent has also tried to use little knowledge of the Complainants of English language to its advantage is apparent since the letter addressed by the Complainant No.2 requesting for possession of the said flat was in Marathi language, the Complainant No. 1 signed on the said letter by putting her thumb impression, which proves that the Complainants were not aware as to on which document they were putting signatures on. Not only this, the said letter dated 20.09.2019 itself has a noting written on it calling for translation of the contents and which has neither been negated by the Respondent in its reply nor any documentary proof has been submitted by the Respondent contradicting the said note on the said letter. All these facts make the Complainants entitled for the cost of the present complaint. Hence, I answer the point No. 1 in affirmative and proceed to pass the following order:

ORDER

1. The complaint is allowed as follows:
2. The complainant is allowed to withdraw from the said project.
3. The Respondent is directed to refund the amount paid to it towards consideration of the said flat (i.e. the amount of **Rs. Rs. 30,61,485/ (Rupees Thirty Lakh Sixty-One Thousand Four Hundred and Eighty-Five Only)** with simple interest from 01.01.2019 at the prescribed rate as per Rule 18 of the Maharashtra Real Estate (Regulations and Development) (Registration of Real Estate Projects, Registration of Real Estate Agents, Rates of interest and Disclosures on website), Rules 2017 within 30 days from the date of this Order.
4. The Complainant is also directed to cancel the said Agreement upon the receipt of refund of the amount mentioned in the forgoing paragraph.
5. The Respondent shall bear the cost of cancellation of Agreement.
6. The Respondent shall pay Rs. 20,000/- as cost of this complaint to the Complainants.

RAVINDRA
PADMAKAR
AO
DESHPANDE

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by RAVINDRA
PADMAKARAO
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(Ravindra Deshpande)
Member II, MahaRERA

Date : 03.04.2025