BEFORE THE
MAHARASHTRA REAL ESTATE REGULATORY AUTHORITY
MUMBAI

COMPLAINT NO. CC006000000089695

Rajesh Kumar Singh &
Seema Singh ..Complainants

Versus

M/s R.S Enterprises
through Prop Mr Suresh Ramchand Vankvani ..Respondent

MahaRERA Regn. No. P52000007221

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

Appearance:
Complainant:In Person
Respondents :Adv. Tanmay Ketkar

O R D E R
(Dated 04.02.2021)

1. Two complainants /allottees who had booked a flat with the respondent / promoter seek compensation from respondent.
2. As per uploaded complaint, complainants booked flat no. 403 on 4th floor, in the project Vankvani Ela in Sector 18, Ulwe, Tal. Panvel, Dist., Raigad Complainants paid earnest money of Rs.,11.46 lakhs by cheques dated 28.0-3.2015 for rs.5 lakhs, 01.05.2015 for rs.3.lakh, 31.05.2015 for Rs,.1 lakh. 10.01. 2017 for Rs.1 lakh. 10.01.2017 for Rs.1.46 lakhs. For balance amount of Rs.30 lakh, complaints sought loan from SBI Nerul branch. Total amount paid to respondent is Rs.40.86 lakhs. i.e. 98% of total consideration.

Agreement for sale was executed on 21.02.2017. As per para no. 17, possession was to be delivered before March, 2018. Respondent failed to deliver possession as per agreement. Actual flat area is 504.32 sq. ft. and not 579 sq. ft. Thus there is deficit of 74.68 sq. ft area. AT the rate of Rs.7,161/- per sq. ft., complainants are entitled for Rs.5,34,784/-. This was revealed on occupation certificate dated 24.01.2019 which was issued by CIDCO. The complainants are also entitle to rent of Rs.11,000/- per month as respondent failed to deliver possession as per agreement. On the other hand respondent is demanding Rs.2.75 lakhs as development charges before handing over possession. Recovery of Rs.3.75 lakhs by respondent is illegal and complainants seek to recover said amount from respondent.

3. By order dated 15.01.2020, Hon'ble Member has transferred this matter to AO. Thereafter hearing could not be taken up due to lockdown conditions during Corona pandemic. Virtual hearing was taken up on 22.09.2020 and was adjourned to 29.10.2020. Arguments were heard on that day. As I am working at Mumbai and Pune Offices in alternative weeks and due to huge pendency in this office, this matter is being decided now.

4. Reply has been uploaded by respondent on 28.02.2020. It is alleged that OC was received in January, 2019. The project was completed in June, 2018. Respondent applied for NOC PSIDC on 20.03.2018. Delay occurred due to elections. The agreement was executed before RERA came into force. Therefore, definition of carpet area under RERA is not applicable. No car parking was sold to the complainants. By letter dated 20.03.2017 complainants agreed to pay development charges. Delay in delivery of possession occured due to *force majeure* circumstances. The complaint therefore, deserves to be dismissed and the carpet area is as per agreement.

5. Following points arise for my determination. I have noted my findings against them for the reasons stated below:

	POINTS	FINDINGS
1	Are the complainants allottees 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	Are there defects and deficiencies in the flat to be allotted to complainants?	Negative
4	Are the complainants entitled to the reliefs claimed?	Affirmative
5	What Order?	As per Final Order.

REASONS

6. **Point Nos. 1 to 4 –** At the outset, we will have to see what the law laid down by the Hon'ble Bombay High Court is, regarding the jurisdiction of the Adjudicating Officer appointed u/s 71 of Real Estate Regulation and Development Act. (Henceforth, RERA). Section 71 reads as follows:

1. 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 inquiry 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.

2. 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.

3. While holding an inquiry, 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 inquiry and if in inquiry 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.

7. 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.

8. 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.

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 covered under the Act.

11 .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 2/3 rd 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.

12. 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 may be 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.

13. 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.

14 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.

15 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.

16 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 be 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 for sale entered into between the promoter and allottee prior to registration of RERA. In view of scheme of RERA we find that this contentions 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, promoters 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 provisions 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……

17 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.

18. In my humble opinion the scope of compensation can not be restricted, if provision of Sec.72 of RERA is considered. There is no special provision empowering the authority to award refund but there are general powers u/s.37 &38.The word compensation is not defined in RERA. In general

terms it would mean making good loss suffered due to financial stress, physical stress or mental stress. Wording used in sec.12 is investment. Wording used in sec. 18 is amount received ...including compensation.

19 In my humble opinion as laid down by Hon'ble Bombay High Court in the Lavasa case and Neelkamal case, the main functions 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 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 .The complainants have placed on record a part of copy of agreement dated 21.02.2017. Flat no. 403 admeasuring 529 sq. ft. +50 sq.ft terrace was agreed to be sold for consideration of Rs.40.86 lakhs. The agreement is admitted by respondent. I therefore, answer point no. 1 in the affirmative.

21 .As per clause no. 17 date for delivery of possession was March, 2018. It means that possession was expected within about 13 months since execution of agreement. The complainants started making payment from 28.03.2015, when Rs.5.00 lakhs were paid i.e. booking amount. It means that respondent had a period of 3 years for delivering possession since booking by initial payment. It is the contention of the respondent that respondent initiated process of occupation certificate by applying for NOC PSIDC on 20.03.2018. OC was received in January, 2019 due to election. The Lok Sabha and Vidhan Sabha elections in Maharashtra were held in May and October, 2019 respectively. Therefore, the reasons given by the respondent cannot be accepted. Respondent was required to obtain occupation certificate well before March, 2018. The delay cannot be attributed to force majeure.

21 .Respondent appears to have issued possession letter on 27.02.2020 which is duly signed by complainants. There is possession payment receipt dated 13.08.2020 for Rs.82,920/- It is clear that complainants made final payment after the possession was received. Anyway there is delay from 01.04.2018 to 27.02.2020 in delivering possession on the part of the respondent. Therefore, complainants are entitled to claim interest on the amount paid till then as per Rule18 of Maharashtra Rule. I therefore answer point no.2 in the affirmative.

22 .It is the contention of the complainants that carpet area of the flat is less by 74.68 sq. ft. than the agreed area. Complainants have placed on

record layout of the building plan but the measurements are not clear. On the other hand as per architect's area statement placed on record by the respondent shows that that carpet area is 529. Sq. as per development permission. There is nothing on record to substantiate the contention that area of the flat is less than what was the agreed upon.There is no grievance that terrace is not provided.

23 .Complainants claim that respondent extracted development charges, car parking charges, fitness centre charges to the extent of Rs.3.75 lakhs. In the first instance complainants have not uploaded the whole of the agreement. Generally development charges are recovered from allottee by the promoter. This is because a promoter is required to develop the plot by making excavations and fillings and by putting a fencing and other required material for protecting and developing the plot. Had the complainants been uploading the whole of the agreement, things would have become clear. Likewise, after formation of a society, an allottee is required to pay parking charges to it. Till then it is for the promoter to look after the parking issue. Likewise it is difficult to believe that complainants were forced to pay Gym charges against their will. I therefore, answer point no. 3 in the negative.

24 .In view of the discussion above, complainants are entitled to claim interest on Rs.40.86 lakhs from 01.04.2018 to 27.02.2020 at the rate of 10.40% p.a. I therefore, answer point no. 4 in the affirmative and proceed to pass following order :

O R D E R

1) Respondent to pay interest on Rs.40.86 lakhs at the rate of 10.40% p.a. to the complainants u/s 71(3) of RERA, from 01.04.2018 till27.02.2020

2) Respondent to pay Rs.20,000/- to the complainants as costs of this complaint.

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

Madhav Vitthal Kulkarni

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Date: 2021.02.09 16:28:21 +05'30'

(Madhav Kulkarni)
Adjudicating Officer
MahaRERA

Mumbai
Date : 04.02.2021