

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

Complaint No.CC005000000022675

- 1. Mr. Subhodh Kulkarni**
- 2. Mrs. Priya Subodh Kulkarni**

**Through Power of Attorney Holder
Dr. Amod Laxman Rairikar**

R/at 209/2, Navi Peth,
Shastri Road, Lokmanyagar,
Pune-411 030.

.. Complainants

Versus

1. VIVID BUILDCON

Office No.304, 305, 306, Business Court,
Mukund Nagar, Pune-411 037.

2. Mr. Vijay Nibajiya,

Office No.304, 305, 306, Business Court,
Mukund Nagar, Pune-411 037.

3. Mr. Deepak Oswal

R/at 309, Dharampuri,
A/P Wai, Tal. Wai, Dist.Satara.

4. Sell And Marketing Pvt. Ltd.,

5. Mr. Mihir Bhate

6. Mr. Makarand Paradkar.

All R/at 510, Siddharth Tower,
Kothrud, Pune-411 052.

.. Respondents

WKK

Coram : Shri W.K. Kanbarkar
Hon'ble Adjudicating Officer

Appearance :-

Complainant : Adv. Pranali Sawant
Respondent : Nos. 1 to 3 : Adv. A.B. Londhe
Nos. 4 to 6 : Adv. R.R.Chavan

FINAL ORDER
(30.10.2019)

1. Present complaint is moved under Section 18 of the Real Estate (Regulation & Development) Act, 2016 (hereinafter called as "RERA Act") for withdrawal from the project and for refund of amounts paid together with interest and compensation, as sought therein.
2. The facts set out in the complaint in brief is as under :-

Complainants have booked Bungalow Plot No.44 vide registered agreement, dated 27.02.2015 for consideration of Rs. 39,06,000/- situate at Kavathe-Wai, District Satara. Respondent Nos. 1 to 3 are the promoters/builders of the project "Wind Flower" and respondent No.4 Sell And Marketing Pvt. Ltd. is agent of the promoters and respondent Nos.5 and 6 are the

WKK

partners of respondent No.4. Complainants also paid total amount of Rs.55,52,194/- and out of which Rs.47,18,236/- paid to promoters directly by way of cheques whereas amount of Rs. 8,33,958/- paid through respondent No.4. As per agreement, symbolic possession of the booked bungalow was taken for the purpose of furniture so that bungalow can be rented as per agreement. Complainants have furnished the bungalow by spending approximately Rs. 4,00,000/- and contacted promoters for compliance of agreement, but no positive response was paid. Complainants subsequently came to know that the bungalow has been directly rent out by the promoters without any intimation to the complainants. So complainants have requested the promoters for physical possession of the bungalow as per agreement, but no response paid by the promoters. Complainants have paid Rs. 55,52,194/- in the year 2015, but not yet received possession of the said bungalow. As per agreement, the promoters have promised to pay Rs. 20,000/- by way of rent for a period of 36 months, but no such rent is ever paid and thereby committed breach of the agreement. Complainants have suffered much financial loss and mental and physical harassment. Thus the present complaint for refund of Rs. 55,52,194/- together with interest and further for recovery of compensation of Rs. 5,00,000/- for physical and mental harassment and Rs.

WKK

4,00,000/- towards the amount spent by complainants for furniture and fixtures and for cost of the litigation.

3. Plea of Respondent Nos. 1 to 3 recorded. Respondent Nos.1 to 3 filed their written explanation and resisted the complaint claim on various grounds. Possession of the said bungalow was delivered around July, 2015 to the complainants without any objection. Complainants wanted to lease out the bungalow after furnishing the same and hence on insistence and demand of complainants possession of the bungalow was given to them. Therefore, the complainants are estopped by their act and conduct and thereby they cannot raise frivolous objections. Denied that promoters through respondent No.4 advertised their project on large scale and respondent No.4 acted as an agent of the promoters. Further denied that respondent Nos.5 and 6 are the partners of respondent No.4. It is further denied that the complainants were asked by the promoters to pay amount of Rs. 8,33,958/- to respondent No.4 being promoters' agent. Denied that the complainants have paid Rs. 47,18,236/-. Further denied that the complainants have paid Rs. 55,52,194/- i.e. in excess of Rs. 1,00,000/-. Denied that the complainants have furnished bungalow by spending approximately Rs. 4,00,000/-. Denied that as per agreement, promoters had agreed to deliver possession by 31.03.2015 after obtaining completion certificate.

NKS

Further denied that the complainants are entitled to compensation of Rs. 5,00,000/- for mental and physical harassment and further Rs. 4,00,000/- towards furniture and fixtures. The claim of the complainants is not just, proper and maintainable with costs.

4. Plea of the Respondent Nos.4 to 6 is recorded and resisted the complaint claim by filing written explanation. Denied that the present opponent Nos.5 and 6 have deducted the remuneration payable to them for acting as an agent out of Rs. 8,33,958/-. Further denied that present opponents have deducted amount of Rs. 4,58,955/- as remuneration of present transaction and Rs. 1,45,290/- as a remuneration for another transaction. Further denied that the Opponent Nos.4 and 5 have paid the balance amount of Rs.2,29,713/- to Respondent Nos.1 and 2. It is denied that respondent Nos.1 to 3 have not received amount of Rs. 8,33,958/- from respondent Nos.4 to 6 which is duly received by them from the complainants.
5. On the above controversial contentions, the following points have arisen for my determination and findings thereon are as under :-

POINTS

FINDINGS

- (1) Whether the Complainants are entitled to refund of amount paid by them ? ... In the Affirmative.

WKK

- (2) Whether the complainants are further entitled to recover compensation of Rs.5,00,000/- towards mental and physical harassment ? .. In the negative.
- (3) Whether the complainants are entitled to refund of Rs. 4,00,000/- spent by them on furnitures and Fixtures of said bungalow ?.. In the negative.
- (4) What order ? .. As per final order

REASONS

6. **POINT No. 1 to 3** :- Respondent No. 1 Vivid Buildcon is a partnership firm and respondent Nos.2 and 3 are the partners of the said firm. Respondent Nos.1 to 3 are the promoters of the said project "Wind Flowers" and in pursuance of agreement, dated 13.02.2015, complainants have booked bungalow/plot in the said project for consideration of Rs. 39,06,000/-. Promoters have agreed to hand over symbolical possession of the bungalow plot on receipt of entire consideration amount and physical possession of the said bungalow plot to confirm on receipt of completion certificate from the competent authority on or before 31.03.2015. Respondent Nos.1 to 3 have denied about the consideration of Rs. 39,06,000/- but the agreement speaks about consideration of Rs. 39,06,000/- settled between the parties. According to complainants, they have paid total Rs. 55,52,194/- and out of them paid

WKK

Rs. 47,18,236/- by way of 7 cheques to developers and Rs.8,33,958/- paid to the developers through authorized agents Respondent Nos. 4 to 6. Respondents-Promoters admit that they have received amount of Rs.46,18,236/-, but denied that they have received Rs. 47,18,236/-. According to respondents, cheque amount of Rs. 1,00,000/-, dated 08.05.2015 vide receipt No.034 in the name of Bank of Maharashtra, Swargate Branch is not received by these respondents/promoters and the bank account statement of the complainants also not tally Rs.47,18,236/-. One thing speaks that letter, dated 23.06.2016 issued by the complainants to the developers amount of payment of Rs. 46,18,236/-. Developers also submit that said amount of Rs. 1,00,000/- by cheque was never received by them, but the said cheque was returned to the complainant and therefore, another cheque of Rs. 1,00,000/- was issued by the complainants on 13.05.2015, but the earlier cheque of Rs. 1,00,000/-, dated 08.05.2015 never encashed. In view of said above position on record that complainants have established that they have paid amount of Rs. 46,18,236/- to the respondents/promoters.

8. Promoters have denied that respondent No.4 Sell And Marketing Pvt. Ltd. is their authorized agent and respondent No.5 Mihir Bhate and respondent No.6

WKT

Makarand Paradkar are the partners of respondent No.4. In this context, brochure of the said project of the developers which is part of record clearly speaks that project is marketed by respondent No.4 Sell And Marketing Pvt. Ltd. One thing is clear from the said brochure of the project of the promoter that respondent No.4 Sell And Marketing Pvt. Ltd. is authorized agent of respondent Nos.1 to 3 developers. Complainants submit that respondent No. 4 had advertised the said project on large scale. According to respondent Nos. 5 and 6 they are the authorized agents of promoters/respondent Nos. 1 to 3 and in that capacity and also being partners of respondent No.4, respondent Nos.5 and 6 have acted on behalf of the promoters. According to complainants they have paid Rs. 8,33,958/- to the developers through the respondent Nos.4 to 6, as part consideration. Of-course, promoters have denied that they have received any such part consideration amount directly or through respondent Nos.4 to 6. In this context, respondent Nos.4 to 6 submit that they have retained by way of remuneration of agents amount of Rs. 4,30,000/- towards the present transaction and they have further retained remuneration of Rs. 2,29,713/- towards another transaction and remaining amount out of Rs. 8,33,958/- paid to the promoters by cash in the year 2015. On behalf of respondent Nos.4 to 6 have raised two inconsistent stands that amount of remuneration

WKK

retained by way of commission. Remuneration and commission are two different concepts. Apart from the aforesaid position, one thing is clear that respondent Nos.4 to 6 have received amount of Rs. 8,33,958/- from the complainants. Present agreement is silent about the entitlement of for retention of any such amount by respondent Nos.4 to 6 by way of remuneration or by way of commission. In the present case, agreement is also silent that either remuneration or the commission has to be paid by the purchasers/allotttees out of the consideration amount, if any. Respondent Nos.4 to 6 were the authorized agents of the respondent Nos. 1 to 3 and document on record is silent that they were authorized by the complainants either to retain or receive any amount out of consideration by way of remuneration or commission, as the case may be. Documents on record is silent that respondent Nos.4 to 6 have paid any amount to the promoters, even though they have contended in that regard. Under such circumstances, there are laches on the part of respondent Nos.4 to 6 being authorized agents of the promoters /respondent Nos.1 to 3. So promoters/respondent Nos.1 to 3 are liable for the act of their authorized agents/respondent Nos.4 to 6 . Complainants submit that as per oral instructions from the promoters, amount towards part consideration was paid to the respondent Nos.4 to 6/authorized agents. Under such circumstances, the complainants have

MICK

established that they have made payment of Rs. 46,18,236/- directly to the promoters and further made payment of Rs. 8,33,958/- to the promoters through their authorized agents. Accordingly, complainants have established that they have made total payment of Rs. 54,52,194/-. It is well settled principle of law that a man cannot be permitted to take an undue advantage of his own ground to gain favourable interpretation of law, and such rule is laid down in the matter reported in A.I.R. 2007 S.C. Page 122.

9. Complainants have borne amount towards stamp duty payment of Rs. 1,64,300/- and borne Rs. 30,940/- towards registration fees and process fees for the said agreement. Thus the complainants have made total payment of Rs. 56,47,434/- including stamp duty and registration charges.
10. Promoters have agreed to hand over physical possession of said bungalow by 31.03.2015 after obtaining completion certificate. Admittedly, completion certificate for the said project is yet to be obtained. However, legal possession of the booked bungalow is not yet given to the complainants by the promoters in spite of said agreement. Promoters submit that date of possession as per RERA website is 31.03.2021, but said date is not the date of possession of the said bungalow to be delivered to the complainants as per agreement.

WIKI

So also, complainants submit that without their knowledge and permission, promoters have rented the said bungalow and in that regard to the letters of the complainants, promoters have not paid any response. Under such circumstances, the complainants wish to withdraw from the said project as the promoters have violated the terms and conditions of the agreement. In this context, on behalf of promoters made submission that the complainants are not allottees within the scope of RERA Act, but the subject matter of the bungalow is for commercial purpose. Agreement is silent that the complainants have booked the said flat for commercial purpose. Thus the complainants are entitled to withdraw from the said project and they are further entitled to refund of Rs. 56,47,434/- excluding stamp duty together with interest at State Bank of India's Highest Marginal Cost Lending Rate which is at present 8.35% + 2% above i.e. 10.35% p.a. from the respondents/promoters from the date of payment till actual realization. Complainants have referred judgment of apex court in Civil Appeal No.1223 of 2018 with Civil Appeal No.1677 of 2019, in which held, "Flat purchasers had to service a loan that he has obtained for purchasing flat by paying interest @ 10% to the bank. In the meanwhile the respondent/flat purchaser also located an alternate property at Gurgaon. In these circumstances, the respondent/flat purchaser was intended to be granted the relief prayed for i.e. refund

WKIS

of the entire amount deposited by him with the interest." In the instant case, appropriate and reasonable interest is awarded on the amount which is to be refunded to the complainants.

11. Complainants have not substantiated their claim for recovery of Rs. 5,00,000/- as compensation towards mental and physical harassment caused to them by the promoters. So also, complainants have further failed to substantiate they have borne Rs. 4,00,000/- towards furniture and fixtures for the said bungalow. Therefore, the claim of the complainants for recovery of compensation of Rs. 5,00,000/- and for further refund of Rs. 4,00,000/- as aforesaid not maintainable at law and liable to be dismissed. Moreover, the present case is not suitable for grant of any compensation to the complainants.
12. The complainants are entitled to claim refund of amount of Rs. 1,64,300/- towards stamp duty from the competent authority as per the provisions of under Maharashtra Stamp Amendment Act, 2015 and in case if the complainants unable to receive the said stamp duty refund within stipulated period, then the respondent Nos. 1 to 3/promoters being promoters they shall pay the stamp duty amount of Rs.1,64,300/- to the complainants within the period of 30 days after the expiry of stipulated period of refund under the

WKK

Maharashtra Stamp (Amendment) Act, 2015. Further the complainants are entitled to Rs.25,000/- towards cost of the present proceedings. Complainants submit that respondent Nos.4 to 6 are just formal parties and no relief is claimed against them. However, complainants are not entitled to refund of any amount or to claim any compensation from the respondent Nos.4 to 6 and the complaint is liable to be dismissed against respondent Nos.4 to 6. I therefore, answered Point No.1 in the affirmative and Point Nos.2 and 3 in the negative. In the result, I proceed to pass the following order.

ORDER

- (1) Complainants are entitled to withdraw from the project "Wind Flower" situate at village Kavathe-Wal, District Satara.
- (2) The Respondent Nos.1 to 3/promoters shall refund the amount of Rs. 56,47,434/- to the Complainants together with interest at the State Bank of India's Highest Marginal Cost Lending Rate i.e. $8.35\% + 2\% = 10.35\%$ p.a. from the date of actual payments received by them from the Complainants till realization of the entire amount.

WKS

- (3) Respondent Nos.1 to 3 shall pay Rs.25,000/- to the Complainants/Allottees as cost of this complaint.
- (4) The Respondent Nos.1 to 3 shall pay the aforesaid amounts within 30 days from the date of this order.
- (5) Complainants are entitled to refund of Rs.1,64,300/- towards payment of stamp duty as per the provisions of Maharashtra Stamp (Amendment) Act, 2015 and in case, they are unable to claim refund within the stipulated period, then the Respondent Nos.1 to 3 shall pay the said amount of Rs.1,64,300/- to the complainants within 30 days from the expiry of stipulated period under the law.
- (6) The Complainants shall execute cancellation deed of the agreement after receipt of all the amounts mentioned in the order, at the cost of the Respondent/Developers.
- (7) Charge of the amount due and payable be kept on the booked bungalow/plot till realization of the entire amount.

WFK

- (8) Claim of the complainants for recovery of compensation of Rs. 5,00,000/- hereby stands dismissed.
- (9) Claim of the complainants for refund of Rs. 4,00,000/- towards furniture and fixtures hereby stands dismissed.
- (10) Complaint against respondent Nos,4 to 6, hereby stands dismissed.

Pune
Dated :-30/10/2019

WKK
30-10-2019
(W.K.Kanbarkar)
Adjudicating Officer,
MahaRERA, Pune