

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

COMPLAINT NO:CC006000000023556

Sangeeta Toshniwal ... Complainant.

Versus

Oberoi Constructions Ltd. ... Respondent.
MahaRERA Regn: P51800004199

Coram:

Hon'ble Shri Madhav Kulkarni.

Appearance:

Complainant: In person with
Adv. Shruti Desai

Respondent: Representative Shri Jivan
Nair with Adv. Nirman
Sharma

Final Order

17th December, 2018

1. The complainant who had booked a flat with respondent / builder seeks withdrawal from the project and refund of the amount paid with interest @ 15% per annum.
2. The online complaint filed by the complainant does not give the necessary details of the transactions with the respondent. They are required to be fished out from the documents on record. The Agreement is dated 11th March 2015. The complainant booked Flat No. 1802 at Village Majas, Taluka Andheri, Dist. Mumbai Suburban in the project of the respondent by name Prisma admeasuring 2075 sq.ft. for a consideration of Rs. 5,79,96,250/. Early date of possession was Dec. 2016 subject provisions in Clause No. 37 of the Agreement. Under that clause if the construction of the said premises is not completed by the Early date, the Developer shall complete the construction of the said premises and hand over possession

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within a further period of 12 months after early date. Usual circumstances under which the developer was entitled to further extension of time are also mentioned. The complainant has alleged that possession of the flat has been delayed by the respondent and the ground taken is not tenable in law. She therefore seeks refund of principal amount of Rs.4,07,36,565/- excluding taxes and further Rs. 1,57,56,776/ towards interest amount @ 15% p.a. up to 12th January 2018 and further interest till recovery of amounts.

3. On 9th May 2018 Hon'ble Chairperson, MahaRERA transferred this matter to the Adjudicating Officer. Plea of the respondent was recorded on 18th July 2018. Arguments were heard on 18.07.18; 1.8.18, 26.9.18, 25.10.18. The respondent has filed his written explanation. It is alleged that Occupancy Certificate has been obtained as per time line provided before MahaRERA Authority. As per Clause 37 of the Agreement dated 11th March 2015, the respondent was entitled to extension of time for completion of construction for the reasons set out therein. The construction was delayed due to delay in getting renewal of Civil Aviation NOC from Airport Authority due to the norms and Rules and Regulations laid down by Bombay High Court in PIL No. 86/2014. It is contented that complainant is only entitled to refund of amount and/ or compensation under Section 18 of RERA and or MahaRERA Rules under which promoter if fails to complete or is unable to give possession of premises in accordance with the terms of the Agreement. In view of Clause 39 of the Agreement complainant is not entitled for reliefs sought. On the other hand, the complainant is required to make payment of the balance outstanding amount with interest.

4. On the basis of rival contentions of parties following points arise for my determination. I have noted my findings against them for the reasons stated below.

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Points	Findings
1. Has the respondent failed to deliver possession of the flat to the complainant without there being circumstances beyond his control?	Affirmative
2. Is the complainant entitled to the reliefs claimed?	Affirmative
3. What order?	As per final order

Reasons.

5. Point no. 1, 2

Ms. Shruti Desai, learned Counsel for complainant has vehemently argued before me that as per Agreement early date for possession was Dec. 2016 and late date for possession was December 2017. The complainant has made payment of 70% of the consideration amount. The complainant is also required to pay EMIs including interest on the home loan. The complainant had booked the flat because her daughter was becoming Chartered Accountant. The respondent never informed the complainant about the delay. Objection from Airport Authority was never discussed nor it is produced on record. Adjacent building is having 37 floors. Mr. Nirman Sharma, learned counsel for the respondent has submitted on the other hand that the building is ready and Occupation Certificate is received. The Agreement was registered, before RERA came into effect. 30% of the consideration amount is still pending. Mr. Sharma has submitted that out of the three towers, two towers are completed. Shri Sharma solicited my attention clause 37 & 38 of the agreement. Shri Sharma has submitted that 80% of the project is occupied. The complainant resides in the adjacent building and is

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aware of all the circumstances. Permission for construction of 126 meters height is obtained in two phases. Firstly, permission for 91 meters was obtained. Further permission was pending due to writ petition which amount to force majeure.

6. On behalf of complainant following judgements were relied upon.

- 1) Unitech Residential Resorts Versus Atul Gupta
Civil Appeal No. 6044/2015 of Supreme Court of India

It is held that delay in completion and therefore complainant is not interested in taking flat and fundamentally asking to get back money with interest and compensation. The Appellant is directed to deposit the money.

- 2) CC No. 468 before MahaRERA decided on 8th February 2018.
- 3) CC No. 32 before MahaRERA decided on 13th October 2017
- 4) CC No. 44049 before MahaRERA decided on 12th June 2018
- 5) Appeal No. 78 before MahaRERA Real Estate Appellate Tribunal Sea Princes Realty Versus Manoj Votavat, etc. decided on 04th April 2018.

Shri Nirman Sharma on the other hand relied on following judgements.

- 1) KRCS Balakrishna vs. State of Madras in AR 1961 Supreme Court Page 1152. Interpretation of Section 5 of Madras General Sales Tax Act was the matter involved.

In para 6 it is observed that this shows that giving of license was subject to certain conditions being observed by the licensee and the words subject to do not mean conditional upon but liable to the Rules and the provisions of the Act.

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2) Writ Petition No. 9119/2003 - High Court of Orissa decided on 03.08.2006. It is held that supply of animal feed to animals Agreement entered into between the parties become impossible to perform as well as unlawful and thus amounted to frustration on the same. Provisions of Section 56 of contract act does not cover every case of frustration but it applies to the subsequent unforeseen events or contingencies for which neither of the parties is responsible.

7. On this background we will have to scrutinize the terms of the Agreement. There are mails dated Nov. 2017; 04th July, 2018 sent by the respondent. The respondent apologised for delay in reply and informed that construction was in full progress and was likely to be completed by January 2018. The flat booked by the complainant was on 18th floor and its height must have been more than 150 feet - 180 feet i.e. 60 meters \pm above sea level. The Agreement is dated 11th March 2015. Early date for handing over possession was December 2016, i.e. within one year and 9 months since the execution of agreement. The late date was December 2017, i.e. two years and 9 months since the execution of agreement. The period stood extended under sub clause (d) due to delay in grant of approvals, permissions and sanction from MCGM and or any other authorities.

8. The respondent has placed on record permission from Airport Authority of India dated 25th March 2008 which is for the height of 124 metres AMSL. Same permission was extended vide letter dated 03rd June 2011 for a further period of two years. Same permission was extended for one year vide letter dated 14th March 2013. Same permission was extended till 24th March 2016 vide letter dated 26th Feb. 2014. Then vide letter dated 7th June, 2016 permission was restricted up to 91.36 metres. Vide letter dated 10th July 2017 permission was given up to 128.38 metres. The agreement makes mention of plan of

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the property, property registration card, ULC orders IOD, Commencement Certificate, the letter from MCGM, Title certificate, floor plans. The agreement is silent about permission from Airports Authority. The agreement neither makes mention of the height of the building Prisma nor about receiving any permission from Airport Authority.

9. No doubt the respondent is in Real Estate business with a motive of maximising his profits. He is entitled to avail all business opportunities. He must however make the allottee aware of the circumstances under which he has undertaken the construction including the permission he intends to get and the permission he has actually received. Since the flat booked by the complainant is on 18th floor of which the height could be 180 \pm feet, even a permission of 90 mtrs could be sufficient to carry out that construction. Said permission was available with the respondent. If he had the intention of seeking further permission to increase the height of construction, he was required to make the complainant fully aware of it. Even otherwise part completion and occupancy certificate in that respect is permissible under law. Under such circumstances the dead line to give possession by December 2017 was binding on the respondent. He has committed breach of this term. Moreover, he never informed the complainant about the state of affairs regarding permission from Airports Authority and the height of the proposed construction. Consequently, it cannot be held that the respondent was prevented from handing over possession as per agreement due to the circumstances beyond his control. I therefore answer point No.1 in the affirmative.

10) The price agreed was Rs. 5,79,96,250/-. The complainant claimed that she paid Rs. 4,07,36,565/ excluding taxes. The respondent

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has admitted in his written submission that complainant has made payment of Rs. 4,31,09,660/-. It is contented that Rs. 1,98,71,371/ is yet to be paid. Since payment of Rs. 4,07,36,565/- as claimed by the complainant is admitted by the respondent, the complainant will be entitled to refund of this amount together with interest as provided under Rule 18 of Maharashtra Rules. I therefore answer point No.2 in the affirmative and proceed to pass the following order.

ORDER

- 1) The complainant is permitted to withdraw from the project
- 2) The respondent to pay Rs. 4,07,36,565/- to the complainant together with interest at the State Bank of India's highest marginal cost of lending rate which is at present 8.70% plus 2% equal to 10.70% p.a. from the date of payment of those amounts till realisation.
- 3) The respondent to pay Rs. 50,000/- as cost of this complaint to the 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.

Mumbai.
Date: 17.12.2018

MD 17-12-2018
(Madhav Kulkarni)
Adjudicating Officer,
MahaRERA