BEFORE THE
MAHARASHTRA REAL ESTATE REGULATORY AUTHORITY
MUMBAI.

COMPLAINT NO: CC006000000023768

Riyaj Jethan
Hitesh Shah
Seema Shah ... Complainant.

Versus

Bhoomi and Arcade Associates ... Respondent.
MahaRERA Regn: P9900007415

Coram:
Hon'ble Shri Madhav Kulkarni.

Appearance:
Complainant: In person.
Respondent: Absent.

Final Order
27th September, 2018

1. The complainant who had booked flats with respondent / builder seek withdrawal from the project and refund of the entire amount paid with interest, as the respondent failed to deliver possession of the flat as per agreement.

2. The complainants have alleged that Complainant No.1 booked flat No.1304 and Complainant No.2 Flat No.301 in C Wing in the project Acropolis '2' at village Dongri Taluka-Vasai, District- Thane. Price agreed for the respective flats was Rs. 45,42,195/- & Rs. 24,14,905/- area of flat being 545.88 sq.ft., 359.55 sq.ft. The flat located on 5th floor. Agreement of sale of flat No. 1 was registered at serial no. 2073/2013 of flat no. 2 2072/2013 on 31.05.2013 on 13.05.2015. At the time of agreement, the complainant paid Rs. 3,63,376/- for flat No.1 , Rs.2,33,192/- for flat No.2. . Under the scheme the complainant was required to pay 8% of consideration and balance 92% was to be paid up front

by availing bank loan. Interest on loan was to be paid by developer for initial 20 months. The agreements were registered on 31st March 2016. The financing company advanced 92% loan in respect of flat no 1 & 2. The early date of possession was 31st March 2016 and 31 March, 2017 was late date of possession. The respondent failed to deliver possession on the said date. The complainant had to seek rental accommodation and burdened with rental expenses. The quality of work of respondent is not up to the mark. Now the respondent has given different date for delivery of possession as the respondent is showing different size of flats. The complainant therefore, desires to withdraw from the project and seeks refund of the amount paid with interest.

3. The respondent has resisted the compliant by filing explanation. It is alleged the complainant has no locus standi to file this complaint. India Bulls & ICICI Bank are necessary parties and the complaint is bad for their non-joinder. The complainant was all along made aware that CIDCO had issued N.A. permission for development in 2009 but failed to have infrastructure in place. The complainant was aware of the risk in the investment in this project. The complainant had agreed to take possession after occupation certificate or completion certificate was received from concerned Authority. Clause 8 of the agreement is very specific about it. So the respondent cannot be penalised for the delay in obtaining occupation certificate.

4. The Housing Development and Infrastructure Limited was granted environment clearance for rental housing scheme of MMRDA at village Chikaldongri in Vasai-Taluka. HDIL granted development rights in respect of 18,755.60 sq.mtr. to the promoter. Environment clearance was valid for 5 years from 17th June,2010. On 29th April 2015 environmental clearance was extended up to 17th July, 2017. HDIL failed to obtain consent from Pollution Control Board for the operations. Pollution Control Board did not consider promoter's applications in that respect. On 8th August, 2017 it granted consent to operate

for the entire land of HDIL on certain new preconditions. On 25th April, 2017, the promoter applied to Vasai-Virar Municipal Corporation for grant of occupation certificate for its 'G' to 'O' wings which rejected occupation certificate for 'G' to 'L' wings. Application with respect of 'L'&'O' wings is still pending. The promoter applied to the chief fire officer of municipal corporation for N.O.C. which would expire on 31st July, 2015. There was a difficulty in getting electric connection. In late 2017 work for setting up transformer was started by MSEDCL. Work of granting permanent connection is still pending. Architect has certified that 100 % work is completed in the year 2016 itself. The fire department of municipal corporation is sitting on the application for grant of NOC since the year 2015. The promoter is therefore, unable to get occupation certificate.

5. As per clause 10 of the agreement the complainant is entitled to refund of the amount if the developer failed to give possession by late date by giving 30 days' notice in writing together with simple interest at the rate of 9 % p. a. If the complainant is agreeing to said terms the respondent be permitted to sell the flats to a 3rd party.

6. 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.

	Points	**Findings**
1.	Has the respondent failed to deliver possession of flats booked by complainant as per agreement 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

23.9.18

Reasons.

7. Point no. 1 & 2- As far as complainant booking flats is concerned the respondent is not denying the same. Date of possession alleged by complainant is also not denied by the respondent. The respondent has enumerated the reasons for the delay in delivering possession. The respondent is relying on relevant clauses in the agreement in defending delay. On behalf of complainant reliance was placed on clauses 8 & 10 of the agreement. The respondent is also relying on clause 10 of the agreement. Copies of agreement of sale are placed on record by complainant. Clauses of the 8 of the agreement gives the date of possession as 31st March 2016 and late date of possession as 31st March 2017. They are subject to force majeure and timely availability building material and orders of Government and Judicial Authorities.

8. Clause 10 of the agreement reads as 13th for any reason whatsoever if the developers are unable or failed to give possession of the premises to the purchaser on or before early date or late date, the purchaser shall have option of making time the essence of contract in this respect by giving 30 days' notice and thereafter, the developer shall refund amount of earnest money with simple interest at the rate of 9 % p. a. from the date of payment.

9. Shree Patel learned counsel for respondent has submitted before me that 90% of consideration of amount has been paid by financial institute. There are tripartite agreements. In the event of cancellation first right of refund goes to the bank. He has enumerated the difficulties faced by respondent in delivering possession.

10. On the other hand it is submitted on behalf of complainant that date for delivery of possession was 31st March 2016 which is clear from

Clause 8 of the Agreement. The complainant wants to withdraw as the respondent failed to deliver possession on the dates agreed and therefore complainant issued notice in that respect as required under Clause 10 and thus the complainant is entitled to the refund of the amounts with interest.

11. The Agreements in favour of the complainant were executed in the 13th Jan. 2013 & 26th Nov. 2014. Early date of possession promised by the Respondent was 30th September 2015. The complainant was to pay 8% of the price and the balance was to be made up by seeking bank loan. Now defence being raised by the respondent is that Housing Development and Infrastructure Limited which had obtained development rights for a large piece of land at Dongri had to allot the relevant piece of land to the respondent for Development by obtaining all relevant clearances. However, HDIL failed to obtain clearance from Pollution Control Board. Likewise, application for grant of Occupation Certificate from Vasai Virar Municipal Corporation was not granted.

12. No doubt the agreements show that the land was acquired from HDIL which had evolved group housing schemes. On that basis the respondent floated present scheme. However, HDIL is not a party to the present agreements. The respondent was himself dealing with HDIL. Now, he cannot hide behind the said party to defend delay in delivery of possession. Likewise, obtaining of occupation certificate from Municipal Corporation was look out of the respondent. The respondent being a professional builder must have been knowing the ways in which the Municipal Corporation and its staff members work. It was for the respondent to fix the date of possession by taking into consideration all these circumstances. Once he gives promise to deliver possession on a certain date that promise is binding upon him. No doubt the concerned

sentence finds the words subject to receipt from concerned authority occupation or completion certificate interalia of the said premises and also a proviso that all amount till then due and payable by the purchaser _____ have been paid. Grant of completion certificate is not an unforeseen even. Once a builder completes all formalities as provided under rules rejection of occupation certificate is not possible. The rejection occurs only when compliance under Rules is not made. Likewise, clearance from Pollution Control Board will not be withheld if all compliances under Rules are made. If some compliances are not done by the respondent, he has to blame himself for that. Once he had given early date of possession and late date of possession to the complainant he was bound to honour the word and deliver possession as per agreement. Now he cannot claim extension of time for delivery of possession. In fact, in Clause 10 of the agreement liberty was given to the allottee to make time essence of contract by giving 30 days' notice and seek refund of the amount of earnest money with interest @ 9% p.a. Now complainant has approached this authority under Section 18 of RERA for refund of the amount with interest. As discussed above, it is the respondent who has failed to deliver possession as per agreement without there being circumstances beyond his control. Consequently, the complainant is entitled to claim refund of the amount with interest under Section 18 of RERA. The complainant claims to have been paid 8% of the price as earnest month. Balance 92% is claimed to have been paid by seeking loan. The respondent is not denying having received such payments. Agreement with the Finance Company is not placed on record. Likewise, the stamp duty paid by the complainant can be refunded to him on his withdrawal from the project. Consequently, the complainant will be entitled to refund of entire amount paid by him to the respondent except

the stamp duty together with interest as per Rule 18 of RERA from the date of payments. I therefore answer to Point No.1 & 2 in the affirmative and proceed to pass following Order.

ORDER

1) Subject to the complainant repaying the loan of Financial Institution respondent shall pay to the complainant amounts received in respect of flat No. 1304 & 301 except the stamp duty which can be refunded together with interest at the State Bank of India's highest marginal cost of lending rate which is at present 8.65% plus 2% from the date of receipt of those amount.
2) The respondent shall pay complainant Rs. 50,000/- towards the cost of this complaint.
3) The respondent shall pay those amount within 30 days since the date of this order.
4) The complainant shall execute cancellation Deeds at the cost of the respondent.
5) Office to recover deficit Court fees as per rules from complainants.

Mumbai.
Date:27.09.2018

27-9-2018
(Madhav Kulkarni)
Member & Adjudicating Officer
MahaRERA