

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

COMPLAINT NO: CC006000000057656

Suresh V. Swamy

... Complainant.

Versus

Larsen and turbo Ltd.
(Emerald Isle - T8)

... Respondents.

MahaRERA Regn: P51800002230.

Coram: Shri B.D. Kapadnis,
Hon'ble Member & Adjudicating Officer.

Appearance:

Complainant: Adv. Anil D'souza.

Respondents: Adv. Manish Gala.

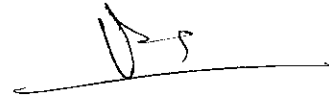
FINAL ORDER

22nd April 2019.

The complainant has filed this case for getting interest on his investment on respondents' failure to hand over the possession of his booked flat No. 301, Tower T8 of respondents' registered project Emerald Isle situated at village Tungwa, Taluka Kurla on agreed date, September 2017.

2. The respondents have filed their reply to contend that the Authority has no jurisdiction to entertain this complaint because-

- a. The O.C. for Tower T8 is received on 21.12.2018 and project is completed. On completion of the project the jurisdiction of the Authority comes to an end.
- b. The respondents issued possession demand letter on 26.12.2018 and thereafter the complainant filed this complaint on 13.01.2019.
- c. The agreement for sale has been executed on 5th June 2015 as per the provisions of Maharashtra Ownership of Flats Act and therefore, the



provisions of RERA are not applicable to it as the Act has come into force from 01.05.2017.

- d. Section 18 of RERA is prospective in nature and it is not mandatory in nature. It does not apply to the matter where the project has received occupation certificate and /or where the possession of the apartment is already offered.
- e. As per clause 56 & 57 of the agreement, the complainant has not given the notice of dispute.
- f. As per the above mentioned clauses the dispute is to be referred to the Arbitrator under Section 7 of Arbitration and Conciliation Act 1996.

3. The respondents further contend that while registering the project, they have declared the date of completion of Tower-T8 of the project as 31st December 2018, in accordance with the provisions of Section 4 of RERA. They contend that the occupancy certificate has been received on 21st December 2018 i.e. before the declared date of completion 31st December 2018. There is no delay in completing the project and hence, the complaint is not maintainable. They further contend that they have been prevented by sufficient causes which were beyond their control from completing the project in time. Environmental clearance for construction of the building upto 18 floor was granted by the order dated 04.02.2013. The respondents sought further expansion of the project and applied for environmental clearance up to 25 floor on 15.02.2016. They received it on 25.08.2017. They also received stop work notice dated 21st June 2017 from the Municipal Corporation which was challenged in Writ Petition No. 1783 of 2017 and the Hon'ble High Court directed the Corporation not to take any action in furtherance of notice on 29.06.2017. The Corporation withdrew the notice on 29.07.2017 but because of the notice, the respondents were required to demobilize the site and it took time to mobilize it which resulted in the cumulative delay of twelve months and twenty-three days. The



respondents contend that the complainant is not entitled to claim interest on the tax amount. They further contend that full occupation certificate of Tower-8 is obtained and the work of its beautification is going on. The project is developed in a phase wise manner and the common amenities shall be provided in phases. The complainant agreed that he shall not raise objection of the incomplete common amenities. Therefore, they request to dismiss the complaint.

4. Following points arise for determination and I record my findings thereon as under:

POINTS	FINDINGS
1. Whether the jurisdiction of the Real Estate Regulatory Authority is co-extensive with the registration of the Project?	Negative.
2. Whether Section 18 of RERA is retroactive in operation?	Affirmative.
3. Whether RERA applies to the agreement for sale executed under Maharashtra Ownership flats Act?	Affirmative.
4. Whether the Authority has jurisdiction to entertain the complaint despite arbitration Clause in agreement?	Affirmative.
5. Whether the respondents have failed to hand over the possession of the flat on agreed date?	Affirmative.
6. Whether the complainant is entitled to get interest on his investment for delayed possession u/s 18 of RERA?	Affirmative.



REASONS

Jurisdiction

5. The learned advocate of the respondents submits that occupancy certificate for Tower T8 has been received on 21 December 2018 and hence, this Authority loses its jurisdiction over the matter. It appears that the learned advocate is labouring under the impression that the Authority holds the jurisdiction till the registration of the project exists. For this purpose it is necessary to look at section 5 (3) of RERA which provides that the registration granted under the section shall be valid for a period declared by the promoter under sub-clause (C) of clause (1) of sub-section (2) of section 4 for completion of the project or phase thereof, as the case may be. This provision therefore does not show that on the receipt of the occupancy certificate the registration of the project shall lapse. Even if it is taken for granted that it lapses on the completion of the project, the issue involved is; whether the Authority loses its jurisdiction on completion of the project or not. I answer the question in negative for following reasons:

- a) Section 7 of RERA provides for cancellation/revocation of the registration of the project. However, section 8 thereof casts obligation on the Authority to carry out remaining development work on lapse or revocation of registration of project.
- b) Section 14 (3) of RERA provides that in case of any structural defect or any other defect in workmanship, quality or provision of services or any other obligations of the promoter as per the agreement for sale relating to such development is brought to the notice of the promoter within five years from the date of handing over the possession, the promoter is duty bound to rectify such defects without further charge within 30 days. In the event of promoter's failure to rectify such defects within such time, the



aggrieved allottees shall be entitled to receive appropriate compensation in the manner as provided under the Act.

- c) Section 17 of RERA requires the promoter to execute a registered conveyance deed in favour of the allottee of the apartment and register the conveyance deed in favour of the society regarding undivided proportionate title in the common areas within three months from the issuance of the occupancy certificate. The promoter is duty bound to hand over documents, plans to society of the allottees within 30 days from obtaining the occupancy certificate.

6. These express provisions of RERA indicate that these obligations are to be discharged by the promoter after receipt of the occupancy certificate or completion of the project. Section 33 of the Act provides that it is the function of the Authority to ensure the compliance cast upon the promoter, allottee or real estate agent under the Act, Rules and Regulations made thereunder. The Real Estate Regulatory Authority while performing its role as regulator has the duty to see that the promoter discharges the duties imposed by the Act and if he fails then, the Authority has the jurisdiction to rectify the error.

7. Now, this discussion takes me to section 31 of the Act which provides that any aggrieved person can file a complaint with the Authority or the Adjudicating Officer against any promoter, allottee or real estate agent if they violate or contravene any provision of RERA or Rules or Regulations framed thereunder. Therefore, if the cause of action arises which gives right in favour of the aggrieved person and creates obligation or liability on promoter, allottee or real estate agent as per the provisions of the Act, the Authority retains its jurisdiction because section 79 of the Act bars the jurisdiction of Civil Court from entertaining any suit or proceedings in respect of any matter which the Authority or the Adjudicating Officer or the Appellate Tribunal is empowered by or under



the Act to determine. Therefore, I hold that the jurisdiction of the Authority is not lost only because of the receipt of the occupancy certificate or on the completion of the project or when the possession is offered.

RERA applies to MOFA agreement.

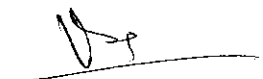
8. The learned advocate of the respondents submits that the agreement has been executed during MOFA regime and therefore, it cannot be governed by RERA. For this purpose, it is necessary to look at Para - 119 of Neelkamal Realtors Suburban Pvt. Ltd. & Anr.-v/s- Union of India's judgement 2017 SCC online Bom. 9302. In the context of the agreed date of possession the Hon'ble Division Bench of the High Court observes-

"Under provisions of section 18, the delay in handing over the possession would be counted from the date mentioned in the agreement for sale entered into by the promoter and the allottee prior to its registration under RERA---- the RERA does not contemplate the re-writing of the contract."

9. These observations are sufficient to hold that the provisions of RERA are applicable to the agreements for sale though they have been entered into prior to the registration of project under RERA. Therefore, the Act applies to the agreements which have been executed even before it came into operation i.e. executed during MOFA regime, hence, there is no force in this submission.

Whether Arbitration Clause bars jurisdiction of the Authority?

10. The learned advocate of the respondents by relying upon Balaji Infinity Society-v/s-Balaji Infinity (complainant no. CC005/1071), Sunil Daga-v/s-Larsen & Turbo Ltd. (complainant no. CC006/12373) submits that after receiving the possession of the flat or



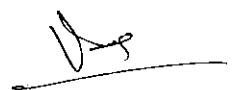
on completion of the project, Section 18 of RERA is not applicable. However, this view has not been accepted by the Maharashtra Real Estate Appellate Tribunal in Appeal No. 006/10425, Ms. Rekha Sinha-v/s-Larsen & Toubro Ltd. In this case the Appellate Tribunal has held that the allottee is entitled to get the interest for delayed possession even after obtaining the possession of the booked flat. I follow this view because Section 18 of RERA confers right on allottee to claim interest on his investment when the promoter fails to hand over the possession of the flat on agreed date. This right accrued to the allottee must have the remedy to enforce it. The right without remedy is meaningless. This is one aspect of the matter. The other aspect is, the respondents have relied upon the part occupancy certificate dated 21st December 2018 which shows that it is conditional certificate. It requires the respondents to comply with all balance conditions and also direct them to take all safety precautionary measures in accordance with relevant IS Code in consultation with registered structural consultant. The respondents themselves have admitted that the amenities shall be provided in a phase wise manner and the work of beautification of the building was going on. Hence, the complainant was justified in not taking the possession though in order to show his bonafides he made the payment as per demand letter. Now the complainant wants to take possession without prejudice to his rights conferred by law.

Whether arbitration clause bars the jurisdiction of the authority?

11. The respondents have taken the plea that the complainant has not given notice of dispute and therefore, the matter could not be referred to the Arbitrator though there is arbitration clause. The complainant refers to the emails produced at page nos. 145 to 174 and particularly the email dated 27th March 2018 showing that he raised



the dispute. So far as barring of the jurisdiction of this Authority in view of the Arbitration Clause contained in the agreement is concerned, I have already dealt with it while passing interim order dated 11th September 2018 in the case of Parth Bharath Suchak-v/s-M/s. Renaissance Infrastructure (CC006/54729) wherein this Authority has referred to HDFC Bank Ltd-v/s-Satpal Singh Baxi-MANU/DE/5308/2012 in which the Supreme Court also held that if particular enactment creates special rights and obligations and gives special power to the Tribunal which are not in Civil Court such as tribunal constituted under Rent Control Act and the Industrial Disputes Act, the dispute arising under the said enactments cannot be arbitral otherwise other disputes are arbitral. In Hemangi Enterprise-v/s-Kamaljeet Singh Ahluwalia 2017 STPL 13221 SC, the Supreme Court found that the dispute between the parties was that of the tenant and landlord relating to leave and license agreement and therefore exclusive jurisdiction to deal with such dispute is conferred upon the Court of Small Causes and therefore, though there was the Arbitral Clause in the agreement, the Court held that the dispute was not arbitral. I have recorded that the Real Estate Regulatory Authority established under Section 20 of RERA has special powers under Section 31 of it to adjudicate the dispute between the aggrieved person on one hand and the promoter, allottee, real estate agent on the other for violation or contravention of the provisions of RERA, Rules and Regulations made thereunder. Section 32, 34, 35 are the special provisions. Section 79 of RERA bars the jurisdiction of Civil Court from entertaining any matter which the Authority is empowered under the Act to determine. Section 59 to 69 relate to the offences and penalties. Special Forum of Adjudicating Officer whose qualification is that of District Judge has been set up by Section 71 of RERA to decide the matters arising out of Section 12, 14, 18 & 19. This case arises out of



Section 18 of the Act for which a separate special forum has been provided by RERA and hence, the jurisdiction lies with the Authority and it cannot be delegated to the Arbitrator despite the provisions of the Arbitration and Conciliation Act and the Arbitration Clause of the agreement. Hence, I do not find any force in the respondents' submission that this Authority has no jurisdiction. I find that the Authority has jurisdiction to entertain this complaint.

Section 18 of RERA is retroactive and mandatory.


12. The learned advocate of the respondents submits that the provisions of RERA are prospective as held by the Hon'ble High Court in Neelkamal Realtors' Case. Therefore, he submits that section 18 is prospective and it cannot operate against the respondents for the commissions or omissions occurred prior to RERA coming into force. In this regard, paragraph 121 and 122 of the judgement of Neelkamal Realtors attract my attention. In these paragraphs the Hon'ble High Court has dealt with section 3, 6, 8 & 18 of RERA and they have recorded that these provisions are to some extent retroactive or quasi retroactive and the parliament has power to legislate even such provisions. Therefore, I hold that section 18 is retroactive in nature.

13. The learned advocate of the respondents submits that section 18 is not mandatory I have gone through the provisions of section 18, the relevant portion thereof reads as under:

"18. Return of amount and compensation-

(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 for sale or, as the case may be, duly completed by the date specified therein; or



b) due to discontinuance of his business as a developer on account of suspension or revocation of the registration under this Act or for any reason.

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 the Act:

Provided, that where an allottee does not intend to withdraw from the project, he shall be paid, by the promoter, interest for every month of delay, till the handing over of the possession, at such rate as may be prescribed."

14. In Neelkamal Realtors, the Hon'ble High Court has observed that the purpose of section 18(1)(a) is to ameliorate the buyers in real estate sector and balance the rights of all the stake holders. The promoter is supposed to be conscious of getting the project registered under RERA. Having sufficient experience in the open market, the promoter is expected to have a fair assessment of the time required for completing the project. If the promoter defaults to hand over the possession to the allottee in the agreed time limit or extended one, then the allottee shall reasonably expect some compensation.

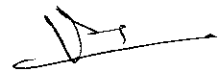
15. After reading the provisions of section 18 and the observation of the High Court it becomes clear that when the promoter fails to hand over the possession of the apartment on the date agreed by him for doing so, the allottee gets option either to continue in the project and claim interest on his investment till getting the possession or withdraw from it. Section 18 provides that when the allottee does not intend to withdraw from the project, he shall be paid, by the promoter interest for every



month of delay till the handing over of the possession, at such rate as may be prescribed. The word 'shall' indicates that this provision is mandatory and it is the absolute right of the allottee which accrues on account of promoter's failure either to complete the apartment or to give its possession in accordance with the terms of the agreement for sale or on the date specified therein for completion of it. This right cannot be denied to the allottee by contending that the interest of the promoter would be prejudiced. Therefore, I disagree with the learned advocate of the respondents when he submits that section 18 is not mandatory particularly, the allottees right to claim interest by continuing in the project.

Delayed possession.:

16. The learned advocate of the respondents submits that while registering the project with MahaRERA the respondents have declared that 31st December 2018 is the completion date of tower T-8 of the project and occupancy certificate of the tower is received on 21.12.2018 i.e. before crossing the declared date of completion and hence, section 18 is not attracted. For this purpose, also one has to look at the judgement of the Hon'ble High Court passed in Neelkamal Realtors' case. In Para-119 of the judgement the Division Bench has clarified that under provisions of section 18, that the delay in handing over the possession would be counted from the date mentioned in the agreement for sale entered into by the promoter and the allottee prior to its registration under RERA. Under the provisions of RERA, the promoter is given a facility to revise the date of completion of project and declare the same under section 4. The RERA does not contemplate re-writing of contract between the flat purchaser and promoter. In view of these observations, I find that the promoter has revised the date of completion of the project while registering the project unilaterally without the consent of the allottees. The respondents are

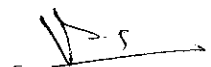


therefore, bound by the contractual obligation to hand over the possession of the flat on agreed date and not by the declared date.

17. The complainant has brought to my notice the copy of the agreement for sale executed by the respondents in his favour. It shows that the respondents agreed to deliver possession of the flats on or before 31st March 2017 with grace period of six months. It means that they agreed to deliver the possession on or before 30th September 2017. Admittedly, the respondents have failed to hand over the possession of the flats on the agreed date, hence I record my finding to this effect.

Reason of delay:

18. Mr. Gala draws my attention to the reasons of the delay. He submits Environmental clearance for construction of the building up to 18 floor was granted by the order dated 04.02.2013. The respondents sought further expansion of the project and applied for environmental clearance up to 25 floor on 15.02.2016. They received it on 25.08.2017. They also received stop work notice dated 21st June 2017 from the Municipal Corporation which was challenged in Writ Petition No. 1783 of 2017 and the Hon'ble High Court directed the Corporation not to take any action in furtherance of notice on 29.06.2017. The Corporation withdrew the notice on 29.07.2017 but because of the notice, the respondents were required to demobilize the site and it took time to mobilize it which resulted in the cumulative delay of twelve months and twenty-three days. Therefore, he requests to hold that the project is not delayed by excluding the time spent in the litigation and obtaining environmental clearance. I do not agree with him because the respondents had the environmental clearance for making the construction upto 18th floor in the year 2013 only. However, they have expanded the project up to 25th floor and applied for their environmental clearance in the year 2016. This fact was within the knowledge of the respondents while specifying the date of possession in the agreement. They



cannot blame the authority because they applied late for further clearance. On the point of litigation, it is necessary to look at para-100 of Neelkamal Realtors' judgement which deals with Rule 6(a) of Maharashtra Rules 2017 pertaining to the registration. Mr. Gala has referred to this Rule which permits exclusion of time consumed due to stay or injunction orders from any court of law or tribunal or competent authority or statutory authority in deciding the timeline for construction of the project. On these lines Mr. Gala requests to exclude the period taken by the litigation referred to above. However, the Hon'ble High Court has discussed the issue in the judgement and refused to exclude such time consumed from consideration and went to the extent of directing the State Government to undertake a fresh survey of Rules. Moreover, the delay is caused because of the commission or omission of the respondents and the complainant is not responsible for the same. Hence, I hold that the respondents have failed to prove that they were prevented by sufficient cause from completing the project in time.

Entitlement of the complainant:

19. Under section 18 of RERA the complainant is entitled to get interest on his investment at prescribed rate on respondents' failure to hand over the possession of the flats on the agreed date. The rules framed under the Act have prescribed the rate of interest. It is 2% above State Bank of India's highest marginal cost of lending rate. The said rate is currently 8.75%. Hence, the allottee is entitled to get simple interest @ 10.75% per annum from the date of default till handing over of the possession of the flat.

20. Complainant has filed the statement of payment marked Exh."A" which shows that he paid Rs. 1,29,42,112/- to the respondents towards the cost of the flat before the agreed date of possession and hence, he is entitled to get the interest on this amount only. The complainant wants to continue in the project and therefore, he has to bear the taxes. Hence, he cannot claim



interest on the tax amount, registration charges, stamp duty and other charges related thereto.

21. Considering the facts and circumstances of the case and the pleas taken by the respondents to oppose the complainant's claim, I find that the respondents have raised the legal issues which have already been settled by the Hon'ble High Court and they have tried to avoid their responsibility and have tried to make this case complicated unnecessarily. Hence, they are liable to pay Rs. 35,000/- towards the cost of the complaint. Hence, the order.

ORDER


The respondents shall pay the complainant simple interest @ 10.75% per annum on Rs. 1,29,42,112/- from the date of default that is from 1st October 2017 till handing over the possession of the flat.

The respondent shall pay the complainant Rs. 35,000/- towards the cost of the complaint.

The complainant is at liberty to take the possession of the flat provided he makes the payment as agreed by the parties.

Mumbai.

Date: 22.04.2019.


22-4-19
(B. D. Kapadnis)
Member & Adjudicating Officer,
MahaRERA, Mumbai.