BEFORE THE MAHARASHTRA REAL ESTATE REGULATORY AUTHORITY

CORUM : Shri M.V. KULKARNI, ADJUDICATING OFFICER, PUNE

AT : PUNE

Complaint No. CC005000000011741

Mr. Rikhavdas Tejmal Shah (HUF)
and himself through its POA
387, Raviwar Peth, Office No.16
Nakoda Gold Pitch, Sonya Maruti Chowk,
Pune-411 002. .. Complainants

Versus

1. Mr. Bharat Mithalal Nagori,

2. Mr. Rahul Sureshchand Garg,

Address :- 19A/3A,
Near Shankar Maharaj Math,
Satara Road,Pune-411 043. .. Respondents

APPEARANCES :-

Complainant :- Adv. Sudip Mahesh Kenjalkar
Respondent :- ABH, Law LLP., Advocates & Solicitors
Adv. Mustafa

**FINAL ORDER**
(10.01.2019)

1. The Complainants, who had booked a Flat with the Respondents/Builders, seek compensation for the delay in delivery of possession of the flat by the Respondents and direction to revert to original plan.

2. The Complainant Rikhavchand Jain has alleged that he has purchased Flat No. 601 on 6th floor in B Wing in the project named "Ishanya" at Dhankawadi, Pune. The agreement was registered on 14th of Feb., 2014. The agreed price of the flat was Rs. 1,15,25,700/-. Possession was promised on or before January, 2016. Despite making payment of Rs. 1,06,14,503/-, Respondents have not delivered possession of the flat as per agreement. The quality of the construction is not up to the mark and the amenities which were promised are not there. The builders have without permission of the Complainants modified layout and plan, which is hampering rights of the Complainants and it causes great inconvenience and lot of problems. Internal road of the width of 18 mtrs. was agreed. However, it has been reduced to 12 mtrs. 'D' wing has been added illegally. The Complainants therefore, pray for compound interest for delay in possession on the total amount paid by Complainants till actual possession is delivered. They also pray for restoration of previous sanctioned plan and stay to the construction of 'D' wing, and 18 mtrs. road, as agreed.

3. As per Roznama, the matter came up before the Hon'ble Member of MahaRERA, Mumbai and on behalf of Complainants prayer was made to stop construction work at the site. Order calling upon Respondents why status-quo order should not be passed came to be passed. Matter was adjourned for 7th of June, 2018. On that date, on the request of the Respondents, matter came to be adjourned to 15th June, 2018. On 15th of June, 2018, arguments were heard and matter was closed for passing orders, with a direction to both parties to file written arguments within a week's period. On 23rd July, 2018 Respondents sought time to file reply and written submissions

and matter stood adjourned on 13th August, 2018. On that date matter stood adjourned on 28th August, 2018. On 28th of August, 2018 the matter came to be transferred to Hon'ble Member-2, MahaRERA, Mumbai. Vide Order, dated 30th August, 2018, Hon'ble Member did not allow the prayer to stop construction at the site however, a direction was given to protect the rights of the Complainants in the flat till final decision of the complaint. Vide Order, dated 27th Sept. 2018, Hon'ble Member-2, MahaRERA, Mumbai transferred this matter to Adjudicating Officer, Pune. The matter came up before me on 2nd Nov. 2018 when the arguments for Complainants were heard and the matter stood adjourned on 5th of Nov. 2018 for the arguments of the Respondents. Again on 5th of Nov. 2018 adjournment was prayed on behalf of Respondents. The matter stood adjourned on 6th of December, 2018. Again on 6th of December, 2018, the Respondents prayed for adjournment and matter came to be adjourned to 3rd of Jan. 2019 on costs of Rs. 2500/-. Ultimately, arguments for Respondents were heard on 3rd of Jan. 2019.

4. Mr. Bharat Nagori, claiming to be partner and authorized signatory of the Respondents filed their written explanation on 15th June, 2018. It is alleged that the agreement of the Complainant was validly terminated by Respondents by letter, dated December 30, 2015 for non-payment of instalments of sale consideration. The Complainant was delinquent in making payment of their instalments as per third schedule of the agreement. The Respondents demanded a sum of Rs. 72,91,542/- from Complainant. In view of termination of the agreement, the Complainants have no locus standii to demand possession and complain on account of delay in possession.

This complaint is vexatious and mischievous attempt to extort moneys from the Respondents.

5. It is denied that 'D' Wing was not part of sanctioned plan/layout, because it is mentioned in the commencement certificate, dated 20th August, 2011. Though 'A' and 'B' Wing is one project, 'C' and 'D' Wing are separate projects separately registered with the RERA Authority. 'D' Wing is located on a separate plot. Purchasers of 'A' and 'B' Wing have nothing to do with 'D' Wing. None of their rights were affected due to 'D' Wing. The site plan annexed to the agreement gives only the site of 'A' Wing. Third party interest has been created in respect of 'D' Wing. Construction at the site is in front of 'C' Wing. The sanctioned plan requires a road of the width of 12 mtrs. No change in the width of the road has been effected. Even otherwise, the purchasers have conceded the rights of the Respondents to make required changes in the plans. The construction is of the highest quality. It is denied that amenities are not as per agreement. Delay in completing the project has occurred due to force majure circumstances. There were several stop work orders issued by Pune Municipal Corporation. There was delay in grant of requisite approvals by statutory authorities. Hence the date of possession mentioned in the agreement will not be applicable especially when the Complainants have delayed in making payments. Therefore, the complaint deserves to be dismissed.

6. In addition, there are consolidated written submissions by Respondents filed on 31.06.2018. Then written synopsis and

rejoinder filed by Complainants on 22.06.2018. Then sub rejoinder filed by Respondents on August 9, 2018.

7. On the basis of the 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) Have the Respondents validly Terminated the agreement with the Complainants ? .. .. .. | In the negative. |
| 2) Have the Respondents made incorrect/false Statement in respect of the flat/project Inducing the Complainants to make Payments ? .. .. .. | In the affirmative. |
| 3) Have the Respondents changed the sanctioned Plans and project specifications ? .. .. .. | In the affirmative. |
| 4) Have the Respondents failed to deliver possession of the flat to the Complainants as per terms of Agreement without there being reasons beyond their control ? .. | In the affirmative. |
| 5) Are the Complainants entitled to the reliefs claimed ? .. .. | In the affirmative. |
| 6) What order ? .. .. .. .. | As per final order. |

## REASONS

8. **POINT No.1** :- Shri Mustafa Saifuddin, learned counsel for Respondents has vehemently argued before me that as per agreement, dated 30th March, 2013, clause 15, the purchasers agreed that time for payment is the essence of the contract. In case purchasers failed to make payment of dues within a period of 15 days from the date of receipt of written intimation by promoter, the promoter shall have an option either to terminate the agreement or accept interest from the purchasers @ 18% p.a. for the unpaid/delayed payment. Further if the promoter exercises the option to terminate the agreement on this ground, he shall repay to the purchasers the amounts paid to them except a sum of Rs.2,00,000/- without interest. Shri Mustafa submitted that the Respondents have validly terminated the agreement with Complainants and therefore, the Complainants have no locus-standi to file this complaint. On the other hand, Shri Kenjalkar, learned counsel for Complainants has submitted that the Complainants have continued to pay the instalments and Respondents have accepted amounts. Letter, dated 27th March, 2018 shows that Respondents are ready to deliver possession to the Complainants, which means that the agreement has not been terminated.

9. Lot of case law has been cited on behalf of both the parties on this point. Shri Mustafa has cited following rulings to buttress his point that since Complainants failed to make payment as per schedule they cannot seek possession as per agreement.

(i) I.S.Sikandar (Dead) by L.Rs. v/s. K.Subramani and others(2013) 15 S.C.C - Page 27 - Para 32, 36, 37.

(ii) Her Highness Maharani Shantidevi P. Gaikwad v/s. Savjibhai Haribhai Patel & ors. Appeal (Civil) 3530 of 1998 S.C. – Para 50, 51, 52, 54, 56.

(iii) M/s. Shrushti Raj Enterprises (India) Ltd. v/s. Tilak Safalya Co-op. Housing Society Ltd. – 2018 SCC Online Bom. 1954 – Para 5 and 9.

(iv) Sardamani Kandappan v/s. S. Rajalakshmi & others (2011) 12 SCC – Pages 18 – Para 22, 23, 31.

(v) N.P. Thirugnanam (Dead) by L.Rs. v/s. Dr. R. Jagan Mohan Rao & others – (1995) 5 S.C.C. – Page 115 – Para 5.

10. Shri Kenjalkar on the other hand has cited following case law-

(i) V. Valarmathi v/s. The Sub-Registrar – W.P. Nos. 13221 and 13222 of 2012 – High Court of Judicature at Madras. Relying on the Supreme Court decision in 2017(1) CTC 414 – Satya Pal Anand v/s. State of M.. and others, it is held that Inspector General of Registration has no power to cancel the registration of any document which has already been registered. Unilateral cancellation of settlement deeds is held to be null and void.

(ii) M. Rajesh @ Rajagopal and another v/s. The Inspector General of Registration & others – W.P. No. 156/2016 – Madras High Court.

(iii) Chetan Sharma & others v/s. Statee y Inspector of Police & another – Cri. O.P. No. 20640/2010 - Madras High Court.

(iv) G.D. Subramaniam v/s. The Sub Registrar – W.P. No. 8567/2008 – Madras High Court.

on the same point.

11. It must be remembered that the agreement in question is one in respect of purchase of a flat. The general characteristics of such a transaction can be enumerated as follows :-

On the basis of the advertisement by the builder and initial inspection, there is booking of the flat by purchaser by paying token amount. Then there is registration of agreement by paying the requisite instalment of the consideration. There is payment of further instalments of the consideration in proportion to the stage of construction that is completed. There is payment of final instalment on delivery of possession after completion of construction in all respects. Generally a purchaser avails home loan and the financer makes payment of instalments in proportion to the stage of construction that is completed on production of certificate from architect. The promoter or builder is entitled to claim instalment on completion of certain stage in the construction. The purchaser has to arrange for that money either by himself or through the financer. In case the purchaser is unable to arrange for the

money within the time specified in the agreement, the promoters are empowering themselves to charge interest from the buyer for the period of delay in paying the instalment. In few cases, the promoters or builders may waive the penalty. The question always is whether the construction was completed as per agreed time schedule and whether the builder has condoned the delay in payment of instalment. In number of cases, the builders are unable to complete the stage of the construction as per schedule. The purchasers are unable to pay instalment asked from builder. The builder then accepts the payment with or without penalty. The builders in such cases waive their right to terminate the agreement with the purchaser.

12. In the agreement at hand, dated 14.02.2014, as per clause 5(b), the Respondents undertook to deliver possession of the flat to the Complainant on or before January, 2016. As per third schedule, there are 31 stages for making payment. The last instalment of Rs. 2,30,514/- would have become payable on or before 15th January, 2016, had the Respondents completed the project in all respects on that date. One notice, dated 14th July, 2015 appears to be issued to the Complainant by Respondents. Amount of Rs. 10,22,961/- was said to be due. The Complainant was asked to pay the amount within 5 days, failing which, it was informed that the agreement stood terminated. It appears that the Complainant has made further payments which were duly accepted by the Respondents. Admittedly, till the end of the year 2018 the construction was not completed. One occupation certificate, dated 21st September, 2018 is now placed on record. Clearly the Respondents had defaulted in completing the construction as

per agreement. The Respondents had accepted the amounts even after 1st January, 2016. The Respondents themselves failed to deliver possession of flat by 1st January, 2016. The agreement had stood renovated. Consequently, unless specific breach of the new terms of the agreement are proved by the Respondents, they fail to prove that they validly terminated the agreement.

13. Complainants claim to have paid the price of Rs.1,06,14,503/-, which means more than 90% of the price. There is a registered agreement for sale, on which stamp duty has been paid as per provisions of the Stamp Act. By issuing a notice, the Respondents claim that they have terminated the agreement with the Complainants. They are totally silent about getting executed a registered cancellation deed from the Complainants and a specific offer to repay the amounts received from the Complainants. On the one hand the Respondents claim that they have terminated the agreement and on the other hand, they are not ready to refund the amounts received from the Complainants. They do not complete the construction on the date mentioned in the agreement and hand over possession to the Complainants and on the other hand, they are trying to dupe the Complainants of the monies paid by the Complainants. I am of the opinion that there is no valid termination of the agreement by Respondents. I therefore, answer Point No.1 in the negative.

14. **Point Nos.2 and 3** :- Two specific allegations have been made by Complainants that 'D' Wing is being illegally added in the project and the width of internal road is being reduced

from 18 mtrs. to 12 mtrs. The Complainants have placed on record comparison between the project prospectus and sanctioned plan. Shri Mustafa submitted that 'D' Wing is on separate plot and separate project. No evidence is however, adduced in that respect. In the site plan annexed to the agreement, it is shown as open area, but there is no mention whether it is on the same plot or different plot. The width of the road is shown as 18 mtrs. No doubt, there is clause 11(g), which provides that, "promoter shall be entitled to revise the building plans of the said complex to be constructed by them on the said land without being required to take consent of the purchasers, provided however that such changes shall not materially affect the location of the unit agreed to be sold thereby". As per site plan, 'D' building is not in front of 'A' building. Consequently, the Complainants losing frontage and direct access to Satara Road is out of question. However, the Respondents have reduced the width of road from 18 meters to 12 meters and this will definitely cause inconvenience to the Complainants. This act is done by the Respondents unilaterally and is also affecting interest of the Complainants adversely. I therefore, answer Point Nos. 2 and 3 in the affirmative.

15. **Point No. 4** :- As per clause 5(b) of the agreement, the Respondents had agreed to deliver possession of the flat to the Complainants on or before June 2015. The occupancy certificate is however, obtained on 21st of September, 2018. Whether obtaining of occupancy certificate was informed to the Complainants is not known. Ordinarily it was required to be informed by 30th Sept. 2018. The only defence put up by the Respondents was that since Complainants did not make

per agreement. The Respondents had accepted the amounts even after 1st January, 2016. The Respondents themselves failed to deliver possession of flat by 1st January, 2016. The agreement had stood renovated. Consequently, unless specific breach of the new terms of the agreement are proved by the Respondents, they fail to prove that they validly terminated the agreement.

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timely payments, the possession has been delayed. Feeble attempt was also made to defend delay on the ground of delay in getting statutory permissions. No evidence is adduced in that behalf. There is no cogent evidence adduced by the Respondents to show how the Complainants delayed payment of instalments and what was it's effect. In fact, the Respondents have delayed delivery of possession by more than 3 years and there is no justifiable reason coming forth from the Respondents. I therefore, hold that the Respondents failed to deliver possession as per terms of the agreement without there being reasons beyond their control. I therefore, answer Point No. 4 in the affirmative.

16. **Point No. 5** :- The prayer of the Complainants is to direct the Respondents is to pay compound interest for delayed possession and for stay for construction of 'D' Wing and restoration of 18 mtrs. road. As discussed above, the Respondents were required to inform the Complainants about obtaining occupation certificate and ask the Complainants to take possession. Therefore, the Complainants will be entitled to recover interest under Section 18(1) (proviso) and under Rule 18 of the Maharashtra Real Estate (Regulation & Development) (Registration of Real Estate Projects, Registration of Real Estate Agents, Rate of Interest & Disclosure of Website) Rules, 2017 on the actual amounts paid by them to Respondents towards price of the flat from 1st July, 2015 to 30th of Sept. 2018 at State Bank of India's Highest Marginal Cost Lending Rate + 2% i.e. 8.70% + 2% = 10.70% and subject to Complainants paying final instalment for further delay in delivering possession by Respondents, the Respondents shall pay interest as above, till actual delivery of

possession by them. So far as the prayer of stay to the construction of 'D' Wing and increasing the width of the road, the Adjudicating Officer has no power to grant such reliefs. I therefore, answer Point No.5 in the affirmative and proceed to pass following order.

## ORDER

(i) The Respondents shall pay interest to the Complainants @ State Bank of India's highest Marginal Cost Lending Rate + 2% i.e. 8.70% + 2% = 10.70% p.a. on the amounts paid by the Complainants towards cost of the flat from 1st of July, 2015 till 30th Sept. 2018 and on further delay in delivering possession of the flat to the Complainants, the Respondents shall pay the interest at the above rate till actual delivery of possession of the flat by them subject to payment of final instalment by the Complainants.

(ii) The Respondents to pay Rs. 20,000/- to the Complainants as cost of this complaint.

(iii) The Respondents to pay the outstanding amount as above, within 30 days from the date of this order.

Pune
Date :-10.01.2019

10.1.2019
( M.V. Kulkarni )
Adjudicating Officer,
MahaRERA, Pune