

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

COMPLAINT NO: CC00600000054735

- 1) Vikram Kushalka
  - 2) Ankur Kushalka
  - 3) Pracheer Kushalka
- ...
- Complainants.

Versus

1. Maulik Sheth
  2. Lohitka Properties LLP
  3. Sheth Corp Pvt. Ltd.
  4. Emami Infrastructure Ltd.
- ... Respondents.
- MahaRERA Regn: P51800000735

**Coram:**

Hon'ble Shri Madhav

Kulkarni.

**Appearance:**

Complainant: Present a/w  
Adv. Nivedita

Respondent: Adv. Aditya

**Final Order**

29<sup>th</sup> August 2019

1. Three complainants who had booked two flats with the respondents/ promoter seek withdrawal from the project and refund of the amount paid with compensation as the respondents failed to deliver possession as per agreement.
2. The Complainants have alleged that they are members of joint family and collective allottees of flat Nos. 901-A and 902-A in the project "Rosa", Montana Phase-I at Kurla in Mumbai. Respondent Nos. 2 & 3 are the promoters and respondent No.1 is designated partner of respondent No. 2. Respondent No.4, a company along with respondent

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No.3 has invested in the project. One Mr. Girija Kumar is designated partner of respondent No. 2 and Director of Respondent No.4. Complainant No.1 acting on behalf of all complainant's. Booked flat Nos. 901 and 902 to accommodate entire family. The brochure did not mention 9<sup>th</sup> floor as refuge floor and complainants were shown 2<sup>nd</sup> floor as refuge floor. Respondents issued allotment letter dated 13.2.2016 in respect of Flat No. 901-A in the building Rosa and also in respect of Flat No. 902-A in the building Rosa. Respondent No.3 promised to execute agreement for sale at the earliest. Flat No. 901-A was agreed to be sold for Rs. 1,88,39,900/- and Flat No. 902-A was agreed to be sold for Rs. 2,14,11,900/-. In respect of Flat No. 901-A complainants were to pay Rs. 5,00,000/- at the time of booking and Rs. 32,30,300/- by 30.03.2016. In respect of F. No. 902A complainants were to pay Rs. 5,00,000/- at the time of booking and Rs. 37,39,556/- by 30.03.2017. Complainant No.1 availed loan of Rs. 1,13,00,000/- from Standard Chartered Bank which was disbursed in his account on 21.03.2016. Said amount was not paid to respondents on account of change in plans and delay in execution of agreement for sale. Complainant No. 1 had been paying EMI of Rs. 1,10,926/- till 10.09.2017. Ultimately, complainant repaid loan amount to the Bank on 20<sup>th</sup> May, 2017 and on 25.09.2017 causing loss to the complainants. Complainant No.2 availed loan from AXIS Bank on 19.12.2016. Complainant paid process fee and spent lot of time and

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energy to procure loan. The allotment letter does not give date of completion and date of possession.

3. Respondents have changed building plans. Two buildings Sierra and Blissberg are from the project, out of which Sierra is diagonally adjacent extended to have attached towers obstructing free view and privacy. Space and gardens represented in previous advertisement brochures have been reduced drastically. Changed plan has not been updated on the MahaRERA website. On 8.04.2017 one Anoop Kumar from respondent confirmed the grievances and shifted complainants to Flat Nos. 2201 and 2202. Complainant No.1 was following with respondents. It was informed that possession date will be given in the Agreement for Sale. Complainant has not heard anything further from respondents. Mr. Anoop Kumar called complainant No.1 suddenly and told that additional payment of Rs. 20,00,000/- was required for upgrading to new flats. Respondents raised further demand for Rs. 70,21,029/- in respect of Flat No. 901-A and Rs. 80,26,480/- in respect of Flat No. 902-A. The respondents have acted fraudulently. They have demanded 37% of the total consideration without signing the Agreement for Sale. They have threatened to forfeit booking amount of Rs. 10,00,000/-. The complainants therefore seek withdrawal from the project and refund of the amount paid with interest @ 20% p.a.

4. The complaint came up before Hon'ble Member on 14.09.2018 and it came to be adjourned to 10.09.2018, then came to be adjourned to 13.11.2018, then came to be transferred to Adjudicating Officer. The matter came up before me on 18.12.2018. It was adjourned to 22.01.2019 for recording plea of the respondent and written explanation by the respondent. Again it was adjourned to 1.02.2019. Respondents failed

*22.2.19*

to file written explanation. The matter was adjourned to 19.03.2019. On that day respondent was permitted to file written explanation on cost of Rs. 2000/-. The matter was adjourned to 23.04.2019. As the complainant was absent the matter was adjourned to 24.05.2019. Again the matter was adjourned to 24.06.2019. Arguments for both parties were heard on 24.06.2019. On that day costs were paid by respondents. As I am working at Mumbai and Pune Offices in alternative weeks and due to heavy pendency in this office, this matter is being decided now.

5. Respondents have alleged that the complaint is false and frivolous. On 13.02.2016 upon being satisfied with the details provided, complaints booked Flat No.901 and 902 in A Wing in Roza Bldg. for a consideration of Rs. 1,88,39,900/- and Rs. 2,14,11,900/- respectively. Complainants paid booking amount of Rs. 5,00,000/- in respect of each flat in Montane project. As per condition No.9 in the booking form, in the event of the booking is cancelled minimum 5% of sale price will be retained by Developer as cancellation charges. In case brokerage is paid minimum 7% were the cancellation charges. Respondent was in touch with the complainants and kept them updated. They were given clear instructions to pay Rs. 32,30,300/- in respect of Flat No. 901 and Rs. 37,39,556/- in respect of Flat No.02 before 30.03.2016. Complainants failed to arrange for the payment. Respondent time and again contacted complainants demanding instalments in vain. As per standard terms and conditions, bookings of complainants have been terminated due to delay in payment beyond 30 days. Respondents are entitled to forfeit earnest money as per settled law. Though loan amount was disbursed to complainants it was purposefully not paid to the respondents. It is denied that Mr. Anoop Kumar agreed to shift

*21-5-19*

complainants to Flat No. 2201 and 2202 on 22<sup>nd</sup> floor and email dated 8.4.2017. Respondent No. 3 is not involved in the project. Email from Mr. Malde does not assure anything to anyone. Completing paper work does not mean allotment of flat. Complainant himself wanted to change flat No. 901 and 02 to 2201 and 2202. Though there is no refuge area on 9<sup>th</sup> floor, complainant has cancelled booking by email dated 27.6.2017. The complaint therefore deserves to be dismissed.

6. Following points arise for my determination; I have noted my findings against them for the reasons stated below.

<b>Points</b>	<b>Findings</b>
1. Have the respondents changed the Plan?	Negative
2. Have the respondents failed to deliver possession as per agreement?	Affirmative
3. Are the complainants entitled to reliefs claimed?	Affirmative
4. What order?	As per final order

#### **Reasons.**

5. Point no. 1, 2

7. The complainants have claimed that they booked flat Nos. 901-A & 902-A on 30.03.2016 which were on 9<sup>th</sup> floor. The booking form for Flat No. 901-A is dated 13.02.2016 and in the name of complainant No. 3 & 2. Likewise, in respect of Flat No. 902-A is dated 13.02.2016 and is in the name of Complainant No.1. In both the forms Earnest money was shown as Rs. 5 lakhs and total amount payable Rs. 32,30,300/- and Rs. 37,39,556/- payable before 30.03.2016. Complainants claim that they have made payment of Rs. 5 lakhs in respect of each flat vide cheque

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dated 10.02.2016. Now, grievance of the complainants is that they were told that refuge area will be on 2<sup>nd</sup> floor. In fact, they have found refuge area on 9<sup>th</sup> floor. Respondents changed the plan and lessened amenities. Which amenities were lessened is not made clear. There is vague statement with the space and gardens represented in advertisement and brochures have been reduced drastically. This is not substantiated by placing the brochure on record and showing how they were reduced in the plan. Likewise, there is nothing on record and show that refuge area was shown on 2<sup>nd</sup> floor and it was changed to 9<sup>th</sup> floor. These are vague allegations made by complainants not substantiated by concrete evidence. I therefore answer point No.1 in the negative.

Point No. 2 u

8. There appears to be no dispute that complainants paid Rs. 5 lakhs in respect of each flat by issuing cheque dated 10.2.2016. It appears that further payments were required to be made by 30.03.2016 and the complainants have not made further payments. It is alleged that loan amount of Rs. 1,13,00,000/- was sanctioned<sup>ed</sup> and credited to the account of complainant No.1. As no agreement was executed complainant did not disburse said amount but paid EMIs. Actually complainant should not have got disbursed that amount. But may be by way of pre-caution he got that amount disbursed in his account. It is the contention of the complainants that respondents promised Flat No. 2201 and 2202 at the same price. However, later on the respondents demanded more amount. Respondents also neglected to execute agreement. It appears that dispute has arisen over the increased price in respect of flat Nos. 2201 and 2202. Anyway there is

20-8-19

nothing on record to show that respondents called upon complainants for execution of agreement. On the contrary the respondents want to forfeit the amounts paid by complainants under the pretext that being Earnest Money they are liable for forfeiture.

9. The complainants paid in all Rs. 10 lakhs on 13.02.2016. Allotment letters were issued on 13.02.2016. No date for possession was mentioned in the allotment letter. However, no <sup>as per promise</sup> ~~demands~~ have been executed by respondents nor <sup>demands</sup> ~~buildings~~ were made for execution of agreement. On the contrary respondents are bent upon forfeiting the amounts paid by complainants under one pretext or the other. Under Section 46 of the contract Act when no time for performance is specified engagement must be performed within a reasonable time. Almost 3 ½ years have gone by since complainants booked their flats and possession is nowhere in sight. I therefore hold that respondents have failed to deliver possession as per agreement without there being circumstances beyond their control. I therefore answer point No. 2 in the Affirmative.

10. <sup>Point No. 3</sup> Complainants have paid in all 10 lakhs to the respondents. It is claimed that loan amount of Rs. 1,13,00,000/-, was sought by complainants and was credited to their account and complainants paid EMIs. Complainants should not have hurried for the disbursal. If they have done it as pre-caution in my opinion a compensation of Rs. 50,000/- will be sufficient. Complainants will be entitled to claim interest on Rs. 10 lakhs as provided under Rule 18 of Maharashtra Rules. I therefore

20.3.19

answer point No.3 in the affirmative and proceed to pass following order.

### ORDER

- 1) Complainants are allowed to withdraw from the project.
- 2) Respondents to pay Rs. 10 lakhs to the complainant together with interest @ 10.75% p.a. from the date of payments till final realisation.
- 3) Respondents to pay Rs. 50,000/- towards compensation for seeking loan from Banks.
- 4) Respondents to pay Rs. 20,000/- as the costs of this complaint.
- 5) The respondents to pay the above amounts to the complainants within 30 days from the date of this order.

Mumbai.  
Kulkarni)  
Date: 29.08.2019  
Officer,  
MahaRERA

*Mh*  
29.8.2019  
(Madhav Kulkarni  
Adjudicating Officer