

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

COMPLAINT NO. CC006000000078954

NAIM SHAIKH

..Complainant

Versus

Ekta Parksville Home Pvt Ltd

..Respondent

MahaRERA Regn. No. P99000000115

Coram:

Hon'ble Shri Madhav Kulkarni.
Adjudicating Officer, MahaRERA.

Appearance:

Complainant:Adv. Nilesh Gala

Respondents : Adv. Akshat Dedhia

**O R D E R
(Dated 24.02.2021)**

1. The complainant / allottee, who had booked a flat with the respondent / promoter seeks compensation from respondent.
2. As per online complaint, around September, 2010, complainant came across advertisement of the project of the respondent using latest technology from Singapore and promising possession within 2 years from January, 2011. On 8.12.2010. complainant submitted application form to book flat no. 1504 ,a 2 BHK classic flat on 15th floor in F wing in the project Linken park for consideration of Rs.25,10,667/-. On 16.02.2012, respondent wrote letter that development authority has been changed from CIDCO to Vasai Virar Municipal Corporation, due to which there were certain

amendments in the layout and area of the flat was increased by 40 sq. ft. Therefore, consideration was revised to Rs.26,84,457/-. Complainant was not informed about any delay in delivering possession due to change in DCR and due to fungible FSI. However, respondent demanded Rs.1,60,291/- in addition to Rs.3,76,600/- which were already paid. The complainant informed resp. that provisional booking amount was Rs.1,52,421/- and respondent told that Rs.13,649/- was the service tax.

3. Agreement for sale was executed on 31.12.2012 and total consideration was shown was Rs.28,90,107/-. The complainant paid Rs.6,06,922/-. As per clause no. 12.1 of the agreement, respondent was to handover possession by December, 2016 with an extension of 6 months, by obtaining OC. The complainant received letter dated 28.07.2014 from architect of resp. certifying the commencement of plaster work of wing F, G and H and also received letter dated 3.10.2014, about completion of brick work in those wings.
4. Around April, 2013, respondent wrongly charged interest on delayed payment though payment was made in time. By email dated 18.09.2014, complainant enquired about status of the flat. Vide email dated 29.09.2014, respondent gave tentative date of possession as March, 2015. Thereafter, it was informed that possession will be given in June, 2015. In reply to email dated 19.07.2015, it was informed that tentatively possession will be given by October, 2015. Complainant sought confirmation on 31.1.2016, 8.5.2016, 5.9.2016 whereupon it was informed that possession will be given February, 2017. Thereafter, no information was given by the respondent. On 6.9.2017, it was informed that OC will be obtained before December, 2020. Respondent relied on Bombay High Court Order dated 12.1.2011 on moratorium on sand excavation which was known to the respondent since beginning. The complainant has made a total payment

of Rs,31,30,716/- and is entitled to get back this amount with interest at the rate of 24% p.a. Respondent failed to give this amount though demanded by complainant. It has caused monetary loss and mental agony.

5. Complainant had filed complaint no. 22958 but sought withdrawal on 01.01.2019 as per settlement that was arrived at, but complainant was given liberty to file complaint again. By letter dated 02.05.2018 respondent acknowledged payment of entire consideration. The complainant also seeks compensation amount of Rs.5 lakhs and legal cost of Rs.1 lakh.
6. The Roznamas dated 15.07.2019, 18.12.2019, 16.06.2020 and 17.08.2020 have not been uploaded. The matter came up before me in virtual hearing on 24.09.2020 and arguments were heard on that day.
7. There is affidavit in reply uploaded by respondent on 23.09.2020. It is alleged that the order dated 31.12.2019 passed by Chairperson transferring the matter to Adjudicating Officer is challenged, as the AO has no jurisdiction in view of judgement of Appellate Tribunal in Sanvo Resort Vs. Renveer Sharma. No cause of action arose for filing of the present complaint. After the earlier complaint, complainant had abandoned the claim for refund and elected to take possession. The only object of RERA was completion of projects, so that flat purchasers are delivered their homes. Present project is part of larger layout still under construction. The refund will jeopardise rights of 20360 allottees. The subject flat was already completed and possession was offered on 20.05.2019. The complainant cannot be allowed to take a U turn. The OC was delayed due to non-performance by HDIL. The agreement was executed under the provisions of MOFA. Therefore, RERA does not apply to the same. Hon'ble Bombay High court has held in Neelkamal Realtors' case that RERA does not rewrite existing contracts. As on date complainant is in

arrears of Rs.3,13,087/- and has violated section 19(6) and section 19(10) by not taking possession within two months. The complaint therefore, deserves to be dismissed.

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

POINTS	FINDINGS
1 Is the complainant allottee and respondent promoter?	Affirmative
2 If yes, has the respondent failed to deliver possession as per agreement, without there being circumstances beyond his control?	Affirmative
3 Is the complainant entitled to the reliefs claimed?	Affirmative
4 What Order?	As per Final Order.

REASONS

9. **Point Nos. 1 to 3** - At the outset, we will have to see what the law laid down by the Hon'ble Bombay High Court is, regarding the jurisdiction of the Adjudicating Officer appointed u/s 71 of Real Estate Regulations and Development Act. (Henceforth, RERA). Section 71 reads as follows:

1) For the purpose of adjudging compensation, u/s 12, 14, 18 and 19, the authority shall appoint in consultation with appropriate government, one or more judicial officer as deemed necessary who is or has been a District Judge, to be an Adjudicating Officer for holding an inquiry in the prescribed manner, after giving any person concerned a reasonable opportunity of being heard. Provided that any person whose complaint in respect of matter covered u/s 12, 14, 18 and 19 is pending before consumer disputes redressal forum or the consumer disputes redressal

commission or the national consumer redressal commission established u/s 9 of Consumer Protection Act on or before commencement of this Act, he may with the permission of such forum or commission as the case may be, withdraw the complaint, pending before it and file an application for adjudging compensation. Under sub section 1, Complaint shall be dealt with by Adjudicating Officer as expeditiously as possible and dispose of the same within a period of 60 days from the date of the application.

2) Provided that if any such application could not be disposed of within said period of 60 days, the AO shall record his reasons in writing for not disposing of the application within that period.

3) While holding an inquiry, AO shall have power to summon and enforce attendance of any person acquainted with the facts and circumstances of the case, to give evidence or to produce any document which in the opinion of Adjudicating Officer, may be useful for or relevant to the subject matter of inquiry and if in inquiry he is satisfied that person has failed to comply with provisions of any of the sections specified in sub-Section 1, he may direct to pay such compensation or interest as the case may be, as he deems fit in accordance with the provisions of any of those sections.

10. Section 72 reads that while adjudging the quantum of compensation, or interest as the case may be u/s 71, the AO shall have due regard to the following factors viz.

(a) The amount of disproportionate gain or unfair advantage wherever quantifiable, made as a result of the default;

(b) The amount of loss caused as result of the default;

(c) The repetitive nature of the default;

(d) Such other factors which the adjudicating officer considers necessary to the case in furtherance of justice.

11. Section 31 provides for filing of complaints with the authority or the adjudicating officer:

(1) Any aggrieved person may file a complaint with the authority or the AO as the case may be for any violation or contravention of the provisions of this Act or Rules and Regulations made thereunder against any promoter or an allottee or real estate agent as the case may be.

(2) The form, manner and fees for filing complaint, under sub-section 1 shall be such as may be prescribed

12. Section 12 provides for awarding compensation where any person makes an advance on the basis of information contained in advertisement etc. and sustains loss or damage by reason of incorrect/ false statement.

Under the proviso, if the person affected, intends to withdraw from the proposed project, he shall be returned his entire investment alongwith interest at such rate as may be prescribed and compensation, in the manner provided under the Act.

13. Section 14 provides for adherence to sanctioned plans and project specifications by the promoter and no alterations can be made without previous consent of that person except minor additions and alterations. Any other alterations and additions, are not permissible, without written consent of at least 2/3 rd of allottees other than promoter. Under Sub-section 3 in case of structural defects etc. ,if it is brought to the notice of promoter, within a period of 5 years, by the allottee, from the date of handing over possession, it shall be duty of promoter to rectify such defects without further charge within 30 days and in the event of promoters failure to rectify, such defects, within such time, aggrieved

allottee is entitled to receive appropriate compensation in the manner as provided under this Act.

14. Under Section 18 (1), if the promoter fails, to complete or is unable to give possession of an apartment, plot or building,

- (a) In accordance with terms of agreement for sale or as the case may be duly completed by the date specified there in or

- (b) due to dis-continuance of his business as a developer, on account of suspension, or revocation of registration, under this Act, or for any other reason, he shall be liable on demand, to the allottee in case the allottee wishes to withdraw from the project, without prejudice to any other remedy available, to refund the amount received by him in respect of the apartment, etc. with interest at such rate as may be prescribed in this behalf including compensation in the manner provided under this Act. Under the proviso, if allottee does not intend to withdraw, he shall be paid, interest for every month of delay, at such rate as may be prescribed. Under sub-section 2 promoter shall compensate allottee in case of any loss caused due to defective title to the land. Under Sub- section 3 if the promoter fails to discharge any other obligations imposed on him under this Act or the rules or regulations made thereunder or in accordance with the terms and conditions of the agreement for sale, he shall be liable to pay such compensation to the allottees, in the manner as provided under this Act.

15. Section 19, provides for rights and duties of the allottee and under Sub-section 4 he shall be entitled to claim refund, with interest and compensation, if promoter fails to comply or is unable to give possession of apartment etc. in accordance with the terms of agreement for sale or

due to discontinuance of his business as a developer on account of suspension or revocation of registration under the provisions of this Act.

16. Hon'ble Appellate Tribunal, has taken a view in the matter of Pankaj Agarwal that adjudicating officer has no jurisdiction to grant refund of the amount with interest and has power only to grant compensation and that jurisdiction vests only with the authority.

17. However, observations of Hon'ble Bombay High Court will have to be seen. In the case of Lavasa Corporation Ltd., Vs. Jitendra Tulsiani, in 2nd appeal, 9717 of 2018 with Civil Application No. 683 of 2018, in para 76 Hon'ble High Court has observed as follows :

Moreover, if the Appellant is permitted to raise such defence, it would be as good as allowing Adjudicating Authority established under RERA, to go behind the registration certificate for holding that said registration under RERA, is not applicable to the project of the appellant. Can the Adjudicating Authority, do so? The answer has to be in the negative, if the scheme of RERA, is considered. It is pertinent to note that under RERA, there are two different authorities established; one is real estate regulatory authority defined u/s 2 (1) and established u/s 20 of the RERA. It is conferred with the jurisdiction to entertain the application, for registration of the projects. As can be seen from, provisions Section 3 and 4 of "RERA, application for registration of real estate project is to be made to real estate regulatory authority established under chapter 5 which deals with establishment and incorporation of the authority.....

As per para 77- "as against it, the adjudicating authority under the RERA is defined, in Section 2(a) as Adjudicating Officer appointed under sub-section 1 of Section 71. This Adjudicating Authority as can be seen from

Section 71(1) of the Act is established for the purpose of adjudging compensation under Section 12, 14, 18 and 19 of the said Act.

Section 31 provides that the complaints are to be filed by aggrieved persons under RERA with the AA for any violation or contravention of the provisions of this Act.

As per para 78- therefore, the authority which grants registration under RERA is different than the authority which is established to adjudicate the grievances of the aggrieved persons under the said Act. One authority cannot encroach on the jurisdiction exercised or to be exercised by another authority. Here in the case, the registration certificate to the appellant is granted by the Regulatory Authority, established u/s 20 of the said Act and now the appellant is calling upon the AA established u/s 71 of the RERA to go behind registration certificate and to hold that provisions of RERA are not applicable to the appellant.

Hon'ble High Court framed point no. 2 as- whether Appellate Tribunal has committed an error in holding that AA under RERA has jurisdiction to entertain the complaints filed by respondent u/s 18 of the RERA?

Point no. 3 was framed as- whether Adjudicating Authority under RERA can go behind registration certificate of the appellant so as to hold that it has no jurisdiction, though the project is registered under the said Act? Hon'ble High Court answered point no. 2 and 3 in the negative. In para 62, reference is made to Judgement of Hon'ble Apex Court in the case of TELCO Vs. State (2000)5 SCC 346 about the interpretation of enactment viz. that which will achieve the object of the Act.

18. Then there is landmark judgement of Division Bench of Hon'ble Bombay High Court in the case of Neelkamal Realtors Vs. Union of India, Writ Petition no.2737 of 2017 dated 06.12.2017. The validity of almost whole of

the RERA was scrutinised by the Hon'ble Bench. Except the provision u/s 46 (1)(b), all other provisions have been upheld.

The discussion on jurisdiction of Adjudicating Officer by Hon'ble Justice N.H.Patil, starts from paragraph 124. It reads – the entire scheme of RERA is required to be kept in mind. It is already submitted during the course of hearing that in many cases, helpless allottees had approached the consumer forum, High Court, Apex Court. In a given fact situation of the case, the courts have been passing orders by moulding reliefs by granting interest, compensation to the allottees and issuing the directions for the timely completion of the project, transit accommodation during completion of project, so on and so forth. Under the RERA, now this function is assigned to the Authority, Tribunal. An Appeal lies to the High Court. Under one umbrella, under one regulation and under one law, all the issues are tried to be resolved. Provisions of Section 71 refer to power to adjudicate. District Judge is conferred with power to adjudicate compensation u/s 12, 14, 18 and 19. A promoter could very well put up his case before the adjudicator who deals with the issues in the light of the fact situation of each case. Therefore, there should not be any apprehension that mechanically compensation would be awarded against a promoter on failure to complete the development work.

The proviso to section 71(1) provides that any person whose complaint in respect of matters covered under sections 12,14,18 and 19, is pending before consumer disputes redressal forum, or consumer disputes redressal commission or the national consumer redressal commission, established under Section 9 of Consumer Protection Act, on or before commencement of this Act , he may with the permission of such forum or

commission as the case may be withdraw the complaint pending before it and file an application before the AO under this Act.

Para 125 reads that- the proviso to Section 71(1) as quoted above, is a clear indicator that even pending complaint, before consumer forum could be transferred to adjudicator under RERA. A submission was advanced that allottee is free to approach whatever forum in respect of defaults committed if any, in compliance with agreement for sale entered into between the promoter and allottee prior to registration of RERA. In view of scheme of RERA we find that this contention of Petitioners cannot be upheld. It would be unreasonable to expect allottee to resort the proceedings in different forums prior to registration of project in respect of the agreement executed prior to the registration under RERA and post registration. Under the scheme of RERA, the adjudicatory mechanism is prescribed under one umbrella. We do not notice any illegality in the same.

Section 71(1) is framed in the larger interest of consumers. The adjudicator who would be a judicial member of the rank of district judge would be dealing with all issues and the pleas raised by promoter, allottee and other stake holders before adjudicating claim for compensation. The orders are subject to judicial review by higher forum. Therefore, promoter should have no apprehension that they would be remediless or there is no scope under scheme of RERA for consideration of their claim.

Para 126 reads - another plea, raised is, as to why a promoter shall pay interest for the past contractual rights, in case of failure, to complete the project after registration under RERA, till possession is handed over. Under the scheme of RERA, it is clear by now that a promoter has to self-assess and declare time period during which he would complete the project. But

in case, in spite of making genuine efforts, a promoter fails to complete the project, which the concerned authority, adjudicator, forums, tribunal would certainly look in to genuine cases and mould their reliefs accordingly. We do not find that on that count provisions of Section 18(1)(a) are to be declared as contrary and violative of Article 14, 19(g) The payment of interest u/s 18 is compensatory in nature.

The provisions of Section 18 must be read with Sections 71 and 72. The adjudicator would consider each case on its merits and unless such cases emerge and decisions are taken by authority, it would not be appropriate at this stage to hypothetically consider a situation and decide constitutional validity of statutory provisions.

Para 127 reads - it was submitted on behalf of Union of India that MOFA provides for interest to be paid in certain cases (Section 8) and constitutional courts too had granted interest to flat purchaser in case of defaults by the promoter. The requirement to pay interest u/s 18 is not penal since payment of interest is compensatory in nature due to delay suffered by the flat purchaser.....

19. Hon'ble Justice Ketkar in para 264 has observed as- so far as challenge to Section 59, 60, 61, 63, 64 are concerned, these provisions fall in chapter VIII entitling offences, penalties, and adjudication..... Payment of interest and compensation, u/s 12, 14, 18 and 19 needs to be adjudicated by AO as per Section 71. The amount of interest and compensation is payable by the promoter to the allottee or by allottee to the promoter u/s 19 (7). As against this under Section 76 the sums realised by way of penalties imposed by appellate tribunal or the authority in the union territories, are to be credited to the consolidated fund..... Section 76 does not include determination of AO u/s 71 of RERA. This is also a pointer to indicate that the interest and

compensation determined by AO u/s 12, 14, 18 and 19 is not by way of penalty but is essentially compensatory in nature.

20. In my humble opinion the scope of compensation can not be restricted, if provision of Sec.72 of RERA is considered. There is no special provision empowering the authority to award refund but there are general powers u/s.37 &38. The word compensation is not defined in RERA. In general terms it would mean making good loss suffered due to financial stress, physical stress or mental stress. Wording used in sec.12 is returning investment. Wording used in sec. 18 is amount received ...including compensation. When the authority transfers a complaint to A.O. for determination of compensation considering the prayer clause ,the A.O. must determine compensation and can not simply dismiss the complaint.
21. In my humble opinion as laid down by Hon'ble Bombay High Court in the Lavasa case and Neelkamal case, the main functions of the authority are to register real estate project and to extend the registration or otherwise, encourage timely completion of real estate projects and to inflict penalty in case of default in compliance of the provisions of this enactment. The AO on the other hand is to lessen the burden of the authority in awarding compensation in case of default under the provisions of the enactment. Therefore, Section 31 permits aggrieved person, by violation or contravention of provisions of this Act or Rules and Regulations made thereunder, to file a complaint with the authority or the AO. The complaint for compensation u/s 12, 14, 18 and 19 can be directly filed with the AO in case of violation or contravention of the provisions of the Act, rules and regulations. Section 72 clause b mandates the amount of loss caused as a result of the default, as a factor to be considered while adjudging quantum of compensation or interest by AO. Sub-clause c mandates considering the

repetitive nature of the default. In my humble opinion the amount that the allottee pays to the promoter is the loss suffered in the event of default by promoter which can be awarded by the AO with interest. Awarding interest is also provided under Section 71 sub-section 3. The default of the promoter will be repeated everyday till the allottee receives either possession and amenities as per promise or gets back the amounts paid by him. The only question appears to be one of nomenclature and there is no legal bar to award compensation by AO u/s 72 sub-section a to d.

22. Complainant has alleged that agreement for sale was executed on 31.12.2012 and flat no. 1504 in F wing in Linken park, Vasai was agreed to be sold for Rs.28,90,017/-. These facts are not denied by the respondent. Copy of agreement for sale is also placed on record. Copy of Order in complaint no. 22958 dated 1.1.2019 is placed on record as Exhibit B. It reads that complainant has withdrawn this complaint vide application dated 2.5.2018 stating that both the parties have amicably resolved and settled the issue, with liberty to approach MahaRERA again if any of the terms is violated by respondent in future. Copy of complaint no. 22958 is also placed on record. There were the same averments and same reliefs were claimed. Copy of booking application with receipt for Rs.3,76,600/- is placed on record. There is copy of letter dated 02.05.2018 issued by respondent. Accordingly Demand Draft for Rs.1,00,809/- was received by the respondent towards full and final settlement of consideration. Possession of flat was promised to be given by 31.12.2018. If the respondent fails to give possession on that day, respondent was to pay interest as prescribed in Rule 18 until possession is given. It appears that in view of this settlement, earlier complaint was disposed of. One thing is certain that complainant is an allottee. I therefore, answer point no. 1 in the affirmative.

23. As per clause no. 12 (1) of the agreement dated 31.12.2012, date for possession was December, 2016 with a grace period of 6 months that is June, 2017. Under the settlement, date for possession was agreed at 31.12.2018. In view of settlement, complainant withdrew his complaint but he was given liberty to file fresh complaint if terms of settlement were violated by respondent. As per agreement dated 31.12.2012 date for delivery of possession was December, 2016 plus 6 months which means June, 2017 as per clause no. 12.1. There is no dispute that possession was not delivered by Respondent by June, 2017 and therefore, previous complaint came to be filed. Under the same clause, in the agreement under the certain usual circumstances, time for delivery of possession was to be extended. The no., of earlier complaint is 22958 of 2018 and its copy has been uploaded. By Interim order dated 31.12.2019 Hon'ble Chairperson transferred the present matter to AO, Mumbai for adjudication of interest and compensation. Copy of order dated 01.01.2019 in CC 22958 passed by Hon'ble Chairperson is uploaded by the respondent. Accordingly complaint was disposed of as withdrawn with liberty to file fresh complaint in terms of settlement. This order is also uploaded by complainant.

24. The order dated 01.01.2019 makes reference to the withdrawal application filed by complainant. On 02.05.2018 whereby the settlement was arrived at. The said letter dated 02.05.2018 is issued by Respondent to the complainant. Complainant is relying on this letter to prove fresh cause of action.

25. There is no dispute that initially date for possession was agreed at 30.06.2017. On failure of the respondent to deliver possession accordingly, complainant approached the authority but the matter was settled. The settlement is as per letter of the respondent dated 02.05.2018.

As per letter respondent had received the last instalment from the price on the same date. The letter further reads that the settlement was subject to possession of the flat on or before 31.12.2018. If the respondent was unable to do so, the respondent undertook to pay interest as per Rule 18 of Maharashtra Rules, until possession of the said flat. It is true that as per settlement dated 02.05.2018, time for delivery of possession was extended upto 31.12.2018 that is another 1 and half years. Thus the respondent was getting about 8 years for delivery of possession since booking and 6 years since execution of agreement. The condition as to date for delivery of possession was modified upto 31.12.2018. On that condition the complainant made total payment of Rs.27,16,107/- and including stamp duty etc. paid Rs.31,30,716/-. It is because the respondent did not abide by the term, that the complainant has filed this complaint.

26. Then the respondent has uploaded occupation certificate dated 15.05.2019. The respondent has alleged that subject flat is completed and possession was offered to the complainant on 20.05.2019. It is the contention of the respondent that the date for possession is extended by 24 months, due to mitigating circumstances, mainly that HDIL failed to fulfil promises of providing infrastructure. These factors were there when the matter was settled earlier. Complainant had consented to extend the period for delivery of the possession. The period stood extended till 31.12.2018 without attracting penalty. The period thereafter, was to be extended subject to payment of interest. Respondent could have defended the delay after 31.12.2018 on payment of interest. As stated earlier respondent got a period of more than 8 years since booking by complainant and 6 years since execution of agreement. There is no evidence that the respondent paid interest to the complainant from 01.01.2019. Consequently, there is breach of term committed by

respondent after 31.12.2018. There is no justification for this breach. I therefore, answer point no. 2 in the affirmative.

27. In view of the discussion above, complainant is entitled to recover Rs.31,30,716/- from the respondent and Rs.50,000/- towards mental agony suffered and Rs.20,000/- towards the costs of this complaint. I therefore, answer point no. 3 in the affirmative and proceed to pass following order:

ORDER

- 1) Respondent is directed to complainant, Rs.31,30,716/- together with interest at the rate of 10.40% p.a. from the date of payments till final realisation u/s 71(3) and 72(b) and (c) of RERA.
- 2) Respondent to pay Rs.50,000/- to complainant towards mental agony suffered u/s 72(d) of the RERA.
- 3) Respondent to pay to the complainant Rs.20,000/- as costs of this complaint.
- 4) Respondent to pay above amounts within 30 days from the date of this order.

Mumbai
Date : 24.02.2021

Madhav
Vitthal
Kulkarni
(Madhav Kulkarni)
Adjudicating Officer
MahaRERA

Digitally signed by
Madhav Vitthal Kulkarni
Date: 2021.02.25
20:27:42 +05'30'