

THE MAHARASHTRA REAL ESTATE REGULATORY AUTHORITY
MUMBAI.

COMPLAINT NO: CC006000000171743.

Mr. Paresh Kanti Parihar,

Mrs. Vandana Paresh Parihar.

... Complainants.

Versus

M/s. Kiyana Ventures LLP.

... Respondents.

MahaRERA Regn: P51800000591.

(Kalpataru Radiance)

Coram: Shri B.D. Kapadnis,
Member-II.

Appearance:

Complainant: Adv. Mr. Vipul Joshi.

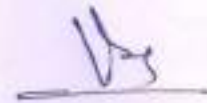
Respondents: Adv. Mr. Abir Patel.

FINAL ORDER

28th September, 2020

Complainants' claims.

The complainants have contended that they have booked flat no. 213 in the A wing of the respondents' registered project 'Kalpataru Radiance' situated at Village Pahadi, Goregon West. The complainants have paid the respondents Rs. 2,86,28,710/-. Despite the payment of such huge amount, the respondents have failed to handover the possession of the flat on agreed date 30.06.2016. Therefore, the complainants who want to continue in the project claim interest on their investment for delayed possession under section 18 of RERA. The complainants allege that the respondents did not attach the copy of IOD and commencement certificate with the agreement and thereby did not disclose the true facts to the complainants and thus they violated section 11(3) of RERA. The respondents have amended the building plan without their consent and thereby violated



section 14(2) of RERA. The respondents have not disclosed that they mortgaged the complainants' flat which created further charge on the property that too without their consent and thereby respondents contravened section 11(4)(h) of RERA. Respondents have not formed the society even after more than 51% of the flats of the project have been sold / booked and thereby they contravened section 11(4) (e) of the RERA.

Decision on application to put the complaint on Sine Die list.

2. The respondents have filed the application to put the complaint on Sine Die list by contending therein that -

a. The plot bearing no. R-8/ bearing CTS No. 260/5A of village Pahadi, Goregaon is the larger land comprising of various CTS nos.

b. MHADA entered into joint development agreement dated 10.04.2008 with M/s. Guru Ashish Construction Pvt. Ltd. (hereinafter referred to as "GACPL"). It is a sister concern of Housing and Area Development Limited (HDIL). MHADA gave development right of the land to GACPL on the consideration that GACPL shall handover 672 tenements for the tenants of MAHDA free of cost in rehab component and also handover certain tenements for MHADA to sell or allot in the open market

c. MHADA, by its letter dated 26.07.2011 and Deed of Confirmation and Modification dated 09.11.2011 permitted GACPL to create third party rights in respect of free sale component.

d. The respondents received the development rights from GACPL by virtue of development agreement dated 20.10.2011.

e. The respondents have been constructing four buildings namely A, B, C and D Wings on the said land under the said agreement.

f. Union Bank of India, one of the creditors of GACPL, initiated Corporate Insolvency Resolution Process under section 7 of Insolvency and



Bankruptcy Code and by the order dated 24.07.2017 the application was admitted by National Company Law Tribunal.

g. Thereafter, MHADA terminated the joint development agreement with GACPL by issuing notice dated 21.01.2018 contending that GACPL failed to comply with its obligation under the contract namely to construct the rehab component.

h. The respondents approached the Hon'ble High Court and filed a suit bearing no. 611 of 2019 (being suit no. (L) no. 176 of 2018) against MHADA for seeking directions of the Hon'ble High Court against the termination and issuance of the necessary directions to the MHADA for issue of completion/occupancy certificate. The Hon'ble High Court has passed an order dated 28.02.2018 and restrained MHADA from taking coercive steps pursuant to the termination notice.

i. In the aforesaid suit, the flat purchasers of the project 'Kalpataru Radiance-C' of the same lay-out filed interim application bearing nos. 1 and 2 of 2020 in February 2020 to seek the reliefs of issuance of occupation certificate by MHADA and various buildings in the lay-out by contending that more than 1,000 purchasers have purchased the flats from different developers and they should not be penalised for default of GACPL and HDIL towards MHADA. The matter has been seized with by the Hon'ble High Court but due to the spread of Covid-19 Pandemic and it is waiting for hearing before it.

j. Flat purchasers of the larger land filed complaints against GACPL before this Authority particularly Satish Shetty V/s. Guru Ashish Constructions Private Limited (Complaint no. CC006/1114). This Authority disposed of those complaints by permitting/ giving the liberty to the complainants to file fresh complaints after finalisation of the insolvency resolution process.



k. In view of fate of 672 tenants of MHADA and more than 1000 purchasers of the units in free sale component in the larger property is involved, the State Government has also constituted a single member committee comprising of Mr. Johnny Joseph in January 2020 to examine the resolution plan. The committee could not submit the report due to the present Covid-19 Pandemic and the extension is granted to it till September 2020 to submit the report.

L. The resolution plan submitted by the resolution professional is reserved for the orders.

3. Heard Mr. Abir Patel for the respondents and complainants. Mr. Patel highlights the points raised by the respondents in the application.

4. Mr. Abir submits that the Hon'ble Chairperson of this Authority has disposed of the complaints relating to the larger layout since NCLT has taken the cognizance of the matter. I find that, the Hon'ble Chairperson has specifically referred to section 14(1)(1) of the IBC which relates to the staying suits/ proceeding pending in any court or tribunal during moratorium period. Therefore, these orders will not come to the help of the respondents because the moratorium period of six months imposed by NCLT has already lapsed.

5. Mr. Abir submits that the matter is before Hon'ble High Court in the various suits relating to termination notice issued by MHADA and hence this complaint be put on hold till the decision of those suits. He brings to my notice the case of Chhavi Mehrotra Vs. Director General of Health Services, 1995 Supp (3) SCC 434, in this case, same petitioner filed the writ petitions before the Hon'ble Supreme Court and Hon'ble High Court for similar reliefs and therefore, the Hon'ble Supreme Court has held that the High Court ought not entertain the writ petition filed by such petitioner when Supreme Court is seized with the same matter. Mr. Abir relies on



Kannuru Basava Punnarao v/s. Puttagunta Nageswara Rao, 1993 (3) A.P.L.J. 295, in this case, Andhra Pradesh High Court was dealing with the application for transfer of proceeding under section 24 of code of civil procedure and held that when the suits for similar reliefs were filed against the same defendant in more than one court, , in order to avoid conflicting decisions the matters were brought in one court. Mr. Abir then relies on the Indian Overseas Bank Madras vs Chemical Construction Company (1979) 4 SCC 358, in this case the Hon'ble Supreme Court has held that the scope of section 25 of code of civil procedure is wider than section 24, these provisions relates to the transfer of the case. Mr. Abir then relies upon the Chitivalasa Jute Mills v/s. Jaypee Rewa Cement (transfer petition no. 16 of 2002) , it again relates to transfer of a case, Reliance is also placed on Sukanya Holdings (P) Ltd. V/s. Jayesh H. Pandya (2003) 5 S.C.C. 531, in this case the Hon'ble Supreme Court has held in the context of section 8 that the Arbitration and Conciliation Act 1996 that the entire agreement should be covered and not only a part of it for the purpose of section 8 of Arbitration and Conciliation Act 1996. In Indian overseas bank Madras Vs. Chemical construction co. (1979) 4 SCC 358 regarding transfer of a case the Supreme Court observes that the scope of section 25 relating to power of High Court is wider than the power of a district judge u/s. 24 of Code Civil Procedure. After giving thought to the ratios laid down in the above-mentioned cases, I find that they are not applicable to the facts of the case on hand and they do not help Mr. Abir to convince me that once the matter is moved before the Hon'ble High Court, this Authority should not exercise it jurisdiction for following reasons---

A. The cases on which Mr. Abir has placed reliance are not applicable to the facts of the case.



B. Plaintiffs of the civil suits filed before the Hon'ble High Court have mainly prayed for the reliefs against MHADA challenging the termination of the development agreement and issuance of various permissions particularly occupation/completion certificate of the sale component.

C. The reliefs claimed by the complainants in this complaint are totally different than the reliefs claimed by the plaintiffs of those suits.

D. Complainants or the allottees of other wings are not the parties in those suits.

E. Complainants allege that the respondents have violated or contravened various provisions of RERA and the Authority can entertain the complaints under section 31 of the RERA against the promoter when there are allegations regarding the contravention or violation of the provisions of RERA or the rules or regulations framed thereunder.

F. Authority is empowered to grant the reliefs claimed by complainant's u/s 34 to 38 of RERA.

G. The Authority has exclusive jurisdiction to deal with these matters and jurisdiction of civil court is expressly barred by section 79 of RERA.

H. Section 14(1)(1) of the IBC relates to the staying the suits/ proceedings pending in any court or tribunal during moratorium period. The orders asking complainants to file fresh complaints after close of NCLT proceeding will not come to the help of the respondents because the moratorium period imposed by NCLT has already lapsed.

Therefore, I find that the complaint is maintainable before this Authority and it is not necessary to keep the matter on sine die list. Hence the application is rejected.

Reply of respondents.

6. The respondents have pleaded not guilty. The respondents contend that they constructed four buildings namely wing nos. A, B, C & D. They



have specified June 2023 as the proposed date of completion of 'A wing' while registering the project. The permissions have been issued in the name of GACPL and GACPL has not been made party to the proceedings. GACPL has disputes with MHADA and that is why the occupation certificate is withheld by MHADA. The subject matter is already seized with Hon'ble Bombay High Court for deciding it in comprehensive manner. Therefore, there is no propriety in proceeding with this matter before this Authority. The respondents contend that though the date of possession is mentioned as December 2016 in the agreement for sale, it is subject to the grace period of 6 to 9 months on account of various mitigating circumstances specified therein. They contend that they have already completed the building but because of the dispute of MHADA and GACPL the completion / occupation certificate has not been granted by MHADA. The respondents contend that the complainants have consented for amending the plans as mentioned in the clause 7.2 and 7.3 of the agreement. They further contend that after the registration of the project if the plans are amended without the consent of allottees then it would be violation of section 14(2) and they have not amended the plans after registration of the project. On the point of the mortgage of the complainants' flat, the respondents contend that they have already taken the NOC letter from ICICI Bank in January 2015, whereby the bank released its charge on the flat. Therefore, the contention about mortgage is absolutely false. Hence, the respondents request to dismiss the complaint.

Maintainability of complaint.

7. Now I shall turn to the case on hand. I have already assigned reasons while rejecting respondents' application to hold that the complaint is maintainable before the Authority.



Claim u/s.18 of RERA.

8. The complainants contend that the respondents agreed to handover the possession of their flat on or before 31.12.2016. They have paid Rs. 3,08,08,731/- out of total consideration of Rs. 3,24,66,038/- which is its 95%. I do not find any substance in submission of the respondents' advocate that the date specified by the respondents for completion of the project at the time of its registration has not been crossed and therefore section 18 of RERA is not attracted because in the case of M/s. Neel Kamal Realtors Suburban Pvt, Ltd. V/s. Union of India it is mentioned by Hon'ble High Court that the court cannot re-write the agreements. Therefore, the date of possession specified by the parties in the agreement is a material date for computing the delay and not the date of completion unilaterally changed by the promoter while registering the project.

9. The respondents themselves have admitted that the agreed date of possession was 31.12.2016. It is also necessary to take the judicial note of the fact that after 31.12.2016 the plans have been changed by the promoter. Therefore, there is reason to believe that the project is delayed only because the respondents have changed the plan. The architect' report of 15.02.2020 clearly shows that the application for occupation certificate was not made till that date. This shows that the building was incomplete. Even if it is taken for granted that the respondents could not obtain the occupation certificate / completion certificate from MHADA because of the dispute between MHADA and GACPL, a period of 6 months can be granted as per section 8 (b) of the MOFA for such reason. The agreement has been executed during MOFA regime and its section 8 (b) provides that, if the promoter is prevented by the causes beyond his control from completing the project in time then the period of possession can be extended by three months first, if the reasons still persist, then it can again be extended by



next three months. Therefore, extension beyond 6 months cannot be given and hence, I find that, in any circumstance the respondents were liable to handover the possession of the flat on or before 30.06.2017. Admittedly, the respondents have failed to handover the possession of the flat till date. The allottee cannot enter into the flat without occupation certificate because it is not permissible under section 3(2) (i) of MOFA and it is an offence under Maharashtra Municipal Corporation Act also. Therefore, it is the statutory duty of the promoter under section 11(4)(b) of RERA to obtain the occupation certificate and he shall handover the possession of the flat to the allottee as per section 19(3) of RERA. The respondents have failed to discharge their statutory duty. As per the section 34 (f) of RERA, it is the duty of this Authority to get the provisions of the RERA and Rules and Regulations framed thereunder complied with. Therefore, I find that since the respondents have failed to handover the possession of the flat to the complainants even after six months from the agreed date, I find that, the respondents have made themselves liable to pay interest on the complainants' investment for the delayed possession under section 18 of RERA. The respondents have relied upon the case of M/s. Neel Kamal Realtors Suburban Pvt, Ltd. V/s. Union of India wherein in para 126 of the Judgement Hon'ble High Court has observed that, in case, in spite of making genuine efforts, a promoter fails to complete the project, then the concerned authority, adjudicators, forum and tribunals would certainly look into the genuine cases and mould the reliefs accordingly. The complainants' entitlement is to the simple interest at the prescribed rate from 01.07.2017 till getting the possession of the flat. The prescribed rate of interest is 2% above SBI's highest MCLR which is currently 7% p.a. The relief can be moulded to this extent only.



Amending the plans.

10. The complainants have referred to the Architect's Report which clearly shows that the construction of 'building A' is completed except the club house, in accordance with the approved plan dated 29.07.2017. Therefore, the complainants contend that the plan has been approved on 29.07.2017, it means that the plan has been changed after their agreement for sale dated 29.12.2014 and their consent has not been obtained. The respondents have relied upon the contents of the agreement to show that at the time of the agreement itself, the complainants have given their consent for the necessary changes in the plans. Therefore, they deny this allegation. However, I find that blanket consent is not valid in law. If any change is to be made in sanctioned plan, layout plan, specifications relating to an apartment, then prior consent of its allottee is necessary and if it affects building or common areas of the project, previous consent of two-thirds of the allottees is necessary. This mandate of section 14(2) of RERA overrides any contrary law, contract or agreement. After giving thought to the facts of the case, I have ascertained from the complainants that no prejudice is caused to them directly because the area of the flat, its amenities have not been affected. Therefore, I warn the respondents in this regard, that henceforth they shall not change the sanctioned plan or layout, without the prior consent of the allottees as required by section 14(2) RERA.

Violation of section 11(3).

11. The complainants complain that the respondents did not attach a copy of IOD or completion certificate with the agreement leading to non-disclosure of the true facts to the complainants. Hon'ble Bombay High Court in the case of M/s. Neelkamal Realtors cited supra has held that the provisions of the RERA are prospective except section 12, 14, 18 and 19



which are retroactive. Since the agreement has been executed in the year 2014, I find that there is no violation of section 11(3) regarding non-attaching the copy of IOD or completion certificate to agreement as alleged. Moreover, this provision relates to the stage of booking and not to the stage of agreement and the commencement certificate/IOD are put in public domain while registering the project with this Authority, be that, as it may.

Contravention of section 11(4)(h) of RERA.

12. The respondents contend that they have taken loan and mortgaged property before the booking of the flat by complainants and thereafter they obtained NOC from the financier when they sold the booked flat to the complainants. Therefore, I do not find any force in the allegation of the complainants regarding mortgaging their flat without their knowledge or consent or its concealment in this regard. I do not hold them guilty of contravening section 11(4)(h) of the RERA.

Formation of society.

13. Respondents contend that they took steps for formation of society of allottees by sending them a letter dated 21.07.2018 but allottees did not respond them. It is not disputed that even after booking of more than 50% of the flats / units in the buildings, the respondents have not formed the society/association of allottees. The respondents are required to form the society of the allottees or their association as required under the section 11(4)(e) of the RERA and it is the duty of allottees also to participate towards formation of their association/society u/s 19(9) of RERA. Therefore, I proceed to pass the following order.

ORDER

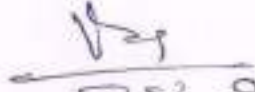
- A. The respondents shall pay simple interest at the rate of 9% p.a. on the amount of consideration paid by the complainants prior to 01.07.2017, from 01.07.2017 and on the subsequent payments from



their dates of payment till handing over the possession of the flat, car parking space with all the agreed amenities and with occupation / completion certificate as the case may be.

- B. The respondents shall also pay the complainants Rs. 20,000/- towards the cost of the complaint.
- C. The parties are at liberty to adjust their respective current claims and pay the balance, if any, to whom it is due.
- D. The respondents shall form society/association of the allottees within two months from this order and allottees shall extend their co-operation.
- E. The respondents shall not alter/ amend / revise the building/layout plans without following the provisions of section 14(2) of RERA henceforth.

Date: 28.09.2020.


28.9.2020
(B. D. Kapadnis)
Member-II,
MahaRERA, Mumbai.