

BEFORE THE
MAHARASHTRA REAL ESTATE REGULATORY AUTHORITY
MUMBAI

COMPLAINT NO. CC006000000078978

Vivek Sarin ... Complainant

Versus

Skystar Buildcon Pvt. Ltd ... Respondent
MahaRERA Regn: P51800001281

Coram: Shri. Gautam Chatterjee, Hon'ble Chairperson

Complainant was himself present.

Respondent represented by Mr. Bhounick Vaidya, Adv. (i/b. M/s. Kanga & Co.).

Order

January 31, 2020

1. The Complainant has stated that he has purchased an apartment bearing no: 1604- B in the Respondent's Project "Sunteck City Avenue 1" located at Goregaon, Mumbai for which they entered into an agreement for sale dated December 26, 2016, wherein the date of handing over possession was stipulated as 54 months from date of execution of the said agreement. The Complainant alleged that at the time of booking the date of possession promised was December, 2015 and accordingly, the Respondent has failed to deliver possession of the said apartment on time. Therefore, he prayed the Respondent be directed to pay him interest for the delayed possession or refund the amount paid with interest.
2. During the hearing, the learned counsel for the Respondent submitted that the Complainant's case is premature and is liable to be dismissed as the date of handing over possession of the said apartment admitted by the Complainant himself and as per the said agreement is 54 months from date of execution of the said agreement plus



9 months grace period from the date of the Agreement dated 26th December, 2016 duly registered.

3. The Complainant has made the following submissions via Rejoinder dated July 23, 2019 to the Complaint, which is taken on record and annexed as '**Annexure A**' to this Order.
4. The Respondent has made the following submissions via Reply which is taken on record and annexed as '**Annexure B**' to this Order.
5. In view of the above, it is clear that the complaint is premature and hence the prayers cannot be allowed, at this stage. The parties are advised to adhere to the terms and conditions set out in their agreement for sale.
6. Consequently, the matter is hereby disposed of.


(Gautam Chatterjee)
Chairperson, MahaRERA

ANNEXURE 'A'

Date: 23rd July, 2019

Place: Mumbai

To

The Chairperson,

Office of Maharashtra Real Estate Regulatory Authority,

3rd Floor, A-Wing, SRA Administrative Building,

Anant Kanekar Marg, Bandra East,

Mumbai,

Maharashtra 400051

SUBJECT: REJOINDER FOR OUR COMPLAINT NO CC006000000078978

Respected Sir,

This is with reference to our complaint no CC006000000078978 against SKYSTAR BUILDCON PVT. LTD. Regarding delay in possession of flat no. 1604, Building B, SUNTECK CITY AVENUE-I. Though the solicitor of SKYSTAR BUILDCON agreed in the last hearing to give a revised date of possession of the said unit, we have still not heard from them.

In any case, since in the last hearing, the solicitor of SKYSTAR BUILDCON refused any compensation for delay in possession, promised at the time of booking the unit (December 2015), we would now like to go for second option listed in our complaint:

Refund of entire amount paid (incl. taxes) with interest from date of payment and a **settlement fee** for addressing the mental agony and undue hardship (incl. the legal costs involved in arriving at a settlement) that we had to undergo during this time. We desire that this payment be made as compensation so that it rightfully does not attract taxes.

Our reasons for the appeal are listed below:

1. This unit was booked in June 2012 with a verbal promise of **Possession by December 2015**. However, no agreement was made for four years and finally when the agreement was made on 26th Dec, 2016, we had already made 80% payment against the value of the unit. We were surprised to see the possession date listed in this agreement as **54 Months** from the date of agreement. This certainly comes across as an unfair trade practice.
2. **Supreme Court Order dated 2nd April'2019 by Honourable Justice U U Lalit and Justice Indu Malhotra** on delay of possession of flats:
 - a. In *Fortune Infrastructure & Anr.v. Trevor D'Lima & Ors.*, this Court held that "a person cannot be made to wait indefinitely for possession of the flat allotted to him, and is entitled to seek refund of the amount paid by him, along with compensation." ¹(Annexure II, Page 14, Point 6.1)
 - b. The order further goes on to record in Point 8 as, "In *Bangalore Development Authority vs Syndicate Bank*, a Coordinate Bench of this Court held that **when possession of the allotted plot/flat/house is not delivered within the specified time, the allottee is entitled to a refund of the amount paid, with reasonable Interest thereon from the date of payment till the date of refund.**" ²(Annexure II, Page 20, Point 8)

3. **Terms of Agreement Being One-Sided, Unfair And Unreasonable:** We would like to quote the below Supreme Court Judgment dt. 2nd April, 2019 by Honourable Justice U U Lalit and Justice Indu Malhotra:

a. "In view of the above discussion, we have no hesitation in holding that the terms of the Apartment Buyer's Agreement dated 08.05.2012 were wholly one-sided and unfair to the Respondent-Flat Purchaser. The Appellant-Builder could not seek to bind the Respondent with such one-sided contractual terms." ⁱⁱⁱ(Annexure II, Page 19, Point 7)

b. Terms of agreement in which the Honourable judges found stark incongruities between the remedies available to both parties are ^{iv}(Annexure II, Page 16-Page 18):

- i. Clause 6.4 (ii) of the Agreement entitles the Appellant – Builder to charge Interest @18% p.a. on account of any delay in payment of instalments from the Respondent – Flat Purchaser
- ii. Clause 6.4 (iii) of the Agreement entitles the Builder to cancel the allotment and terminate the Agreement, if any installment remains in arrears for more than 30 days.
- iii. On the other hand, as per Clause 11.5 of the Agreement, if the Builder fails to deliver possession of the apartment within the stipulated period, the Flat Purchaser has to wait for a period of 12 months after the end of the grace period, before serving a Termination Notice of 90 days on the Builder, and even thereafter, the Builder gets 90 days to refund only the actual installment paid by the Flat Purchaser, after adjusting the taxes paid, interest and penalty on delayed payments. In case of any

delay thereafter, the Builder of liable to pay Interest @9% pa only.

- iv. Another instance is Clause 23.4 of the Agreement which entitles the Builder to serve a Termination Notice upon the Flat Purchaser for breach of any contractual obligation. If the Flat Purchaser fails to rectify the default within 30 days of the Termination Notice, then the Agreement automatically stands cancelled, and the Builder has the right to forfeit the entire amount of Earnest Money towards liquidated damages. On the other hand, as Clause 11.5 (v) of the Agreement, if the Flat Purchaser fails to exercise his right of termination within the time limit provided in Clause 11.5, then he shall not be entitled to terminate the Agreement thereafter, and shall be bound by the provisions of the Agreement.
- v. As per the judgment, Point 6.6 states that, "Section 2 (r) of the Consumer Protection Act, 1986 defines 'unfair trade practices in the following words: 'Unfair trade practice' means a trade practice which, for the purpose of promoting the sale, use or supply of any goods or for the provision of any service, adopts any unfair method or **unfair or deceptive practice**...and includes any of the practices enumerated therein."
- vi. In our case, some of the stark incongruities between the remedies available to the developer and us are as under:
 - 1. Clause 13 ^v(Annexure lil, Page 23): "Without prejudice to other rights of the Promoter hereunder or in law otherwise, the Unit Holder/s agree to pay to the

Promoter, interest at the rate of **18% p.a. compounded on monthly basis** on all the amounts which become due and payable by the Unit Holder/s to the Promoter."

Whereas Clause 17 ^{vi}(Annexure II, Page 26) states that, "If the Promoter for any reason other than those stated in Clause hereinabove, is unable to give possession of the said premises on the expiry of the grace period from the delivery date as specified herein above, the Promoter shall be liable to pay to the Unit Holder/s **simple interest at 9% p.a.**"

2. Clause 14 (a): "If the Unit Holder/s fail to pay any installment of the Purchase Price or amounts/deposits under Clause 7 above or any other amounts/charges payable to the Promoter in terms of this Agreement within a period of 60 days from the date on which such amounts become due, the Promoter..shall be entitled to **Terminate this Agreement forthwith by addressing written notice to the Unit Holder/s.**" Also clause 14 (b) states, " Upon termination of this Agreement by the Promoter in accordance with Clause 14 (a) above, the Promoter shall be entitled **to forfeit 10% of the Purchase Price (being earnest money deposit paid by the Unit Holder..**" ^{vii}(Annexure III, Page 23).

There is however, no provision made for the buyer to terminate the Agreement on account of the builder

revising the original Agreement terms conveyed verbally.

3. Clause 14 (b) ^{viii}(Annexure III, Page 24) states, "Further, in the event of the consideration agreed to be received on such resale of the said Premises..is less than the Purchase Price, the Promoter shall have the right to recover the differential amount from the Unit Holder/s, or adjust the same against the amounts refundable to the Unit Holder/s as above. Whereas Clause 14 (c) ^{ix}(Annexure III, Page 24) states, "However, in the event of the consideration agreed to be received by the Promoter on resale of the said Premises..is more than the Purchase Price, the Unit Holder/s shall not be entitled to stake any claim in respect of such excess consideration received by the Promoter." Such an Agreement is totally one-sided and unfair to the Buyer.

4. Clause 24 ⁱ(Annexure III, Page 28) – **Holding Charges**

This clause states, "The Promoter at its sole discretion shall decide to condone any delay in taking possession of the said Premises in a manner stated herein, provided that the Unit Holder/s shall bear and pay to the Promoter **holding charges at the rate of Rs20/sq ft.**" This is another example of the agreement being one-sided and unfair to the Buyer.

Considering the above incongruities in our agreement, you will please appreciate that this Agreement is totally one-sided and unfair to the flat purchaser. **Hence, as per the Supreme Court judgment by Honourable Justice U U Lalit and Justice Indu Malhotra, the Builder cannot seek to bind us with such one-sided contractual terms.**^{xj} (Annexure II, Page 19, Point 7)

Therefore keeping in mind the SC Judgment enclosed with this letter, we will appreciate if the Promoter, SKYSTAR BUILDCON is advised to refund to us the entire amount paid to them (incl. duties and taxes) by us, alongwith interest of 18% p.a. compounded monthly (being charged by them to us for delayed payment).

Yours sincerely,

Vivek Sarin

ⁱ Annexure II, Page 14, Point 6.1

ⁱⁱ Annexure II, Page 20, Point 8

ⁱⁱⁱ Annexure II, Page 19, Point 7

^{iv} Annexure II, Page 16- Page 18

^v Annexure III, Page 23, Clause 13

^{vi} Annexure III, Page 26, Clause 17

^{vii} Annexure III, Page 23, Clause 14(a), Clause 14(b)

^{viii} Annexure III, Page 24, Clause 14(b)

^{ix} Annexure III, Page 24, Clause 14(c)

^x Annexure III, Page 28, Clause 24

^{xj} Annexure II, Page 19, Point 7

Annexure B

..

...

- a. *The Complainant has come to this Hon'ble Authority with unclean hands. It has not set out the true and correct facts in the matter. The Complainant has not only suppressed relevant material facts and documents, but has also attempted to prejudice this Hon'ble Authority by misrepresenting and distorting the true and correct facts.*
- b. *The Complainant, is stating that the Respondent promised the date of possession in December, 2015 whereas it entered into an Agreement for Sale dated 26th December, 2016 ("the Agreement") and made further payments in accordance with the terms of the Agreement. However the fact is that, the Complainant himself in the Agreement duly executed and registered, agreed to a possession date of 54 months plus 9 months grace period i.e. upto 31st March, 2022.*
- c. *The Complainant is unsure about the reliefs sought by him in the Complaint filed as the reliefs sought in the online complaint before this Hon'ble Authority and the reliefs sought under the Rejoinder dated 23rd July, 2019 to the Complaint are not the same. The Complainant under the Complaint has sought for the possession of the said Flat whereas in the rejoinder to the Complaint the Complainant has sought for refund of the amount paid with interest. However, the Complainant has failed to establish any case against the Respondent or otherwise for any of the aforesaid reliefs.*
- d. *The Complainant is relying upon the judgement of Pioneer Urban Land & Infrastructure Ltd. vs. Govindan Raghavan and Ors in Civil Appeal No. 12238 of 2018, wherein the promoter had failed to obtain the occupation certificate within the time limit agreed in the Agreement for Sale. However, in the present case, there is no default of the time limit agreed between the parties in the Agreement and therefore, the present case is distinguished and not applicable.*
- e. *The Complainant has not established any violation by the Respondent under the provisions of the Real Estate (Regulation and Development) Act, 2016.*

The Complainant has suppressed the following relevant material facts:

- f. *The Respondent had registered the Project known as 'SUNTECK CITY AVENUE - 1' ("the Project") under section 3 (1) of the Real Estate (Regulation and Development) Act, 2016 ("the Act") with the Maharashtra Real Estate Regulatory Authority on 27th*

July, 2017, bearing Project Registration Number P51800001281 and had accordingly obtained the registration certificate from this Hon'ble Authority.

- g. The Complainant has executed and registered the said Agreement on 26th December, 2016. Therefore, without prejudice, even if the promise (assuming so made, but not admitted) to the Complainant to hand over possession by December, 2015, the Complainant has thereafter himself agreed to a new date of March, 2022 i.e. 54 months plus 9 months grace period from the date of the Agreement dated 26th December, 2016 duly registered.
- h. The Agreement executed and registered between the Complainant and the Respondent is the only repository of the terms and conditions governing the transaction and that by and under Clause 52 of the Agreement, any previous writings, commitments, etc. stand superseded by the terms of the Agreement which has been knowingly and voluntarily made by the Complainant. I state that the Complainant has in the Rejoinder, placed reliance on the judgement of Pioneer Urban Land & Infrastructure Ltd. vs. Govindan Raghavan and Ors. However, the judgement is not applicable in the present case and is distinguished due to the fact that the definite time period provided in the Agreement has not expired. Furthermore, the terms of the Agreement are fair and in accordance with the prevailing business practices and cannot be said to be unfair by any means.
- i. Therefore, the Complainant has failed to make out a case for any violation by the Respondent under the provisions of the Act and is therefore not eligible for any interest or compensation.
- j. In the event the Complainant wishes to withdraw from the Project, such withdrawal shall be in terms of the Agreement executed and registered between the parties and the Respondent shall accordingly be entitled to take such action/steps in accordance with such terms of the Agreement.

...