

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

COMPLAINT NO: CC006000000044422

Richard Jerm Dsilva

... Complainant.

Versus

Fareed merchant

... Respondents.

MahaRERA Regn: P51800011454

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

Appearance:

Complainant: Adv Doreen R DSilva

Respondents: Adv. Mr. Makarand Raut

FINAL ORDER

10th July, 2020

The complainant booked flat No. 202 in the respondents' registered project 'Thais Residency' situated in Andheri and the respondents agreed to deliver its possession within 30 months from the date of the agreement for sale dated 10/05/2012. The respondents failed to deliver possession of the said flat on agreed date therefore the complainant claims interest on his investment for every month of delay, under Section 18 of the RERA as he wants to continue in the project. He also claims Rs. 10,62,500/- paid towards the open space deficiency charges.

2. The respondents have filed their reply to contend that the project is developed on the land bearing City Survey No. 440/3/9 belonging to Mr. Thais D'Mello and Mrs. Norma D'Mello. The respondents completed the project in the month of October 2017 and applied for the occupancy certificate. They could not get the occupancy certificate in time because the land owners did not clear their title, ultimately on clearance of the title they



got the occupancy certificate on 11/06/2018. Therefore, the respondents contended that, the complaint has become infructuous. They further contend that the complainant has paid Rs. 10,62,500/- to MCGM as deficiency in open space premium as per clause 39 of the agreement for sale and therefore they are not liable to refund this amount.

3. After hearing both the parties this authority has passed the final order on 31/08/2018 and directed the respondents to pay interest on the complainant's investment for delayed possession however, the complainant's claim for refund of Rs. 10,62,500/- has been rejected.

4. The respondents have preferred an appeal before the Hon'ble Maharashtra Real Estate Appellate Tribunal bearing Appeal No. 006/10771. The Appellate Tribunal remanded the matter by setting aside the order passed by this authority as the respondents produced some additional documents and requested the Appellate Tribunal to consider them. Hence, in order to give parties the opportunity of rehearing the matter has been remanded.

5. After remand I have heard the Ld. Advocates for the parties. However, after remand of the case, the matter could not be taken because the advocates sought time to argue the matter and thereafter because of the shifting of the office from Bandra to Churchgate and thereafter due to the lockdown on account of spread of pandemic Covid-19 this matter remained to be decided. Now I am deciding it. I have heard the Ld. Advocates of the parties. The respondents' advocate Mr. Raut submits that a meeting was convened on 23rd December 2015 which was attended by the complainant and his wife. In the said meeting it was decided that the complainants shall pay their contribution of Rs. 10,62,500/- towards the deficiency in open space premium and it was also discussed in the meeting that the possession would be handed over within 8 months and the minutes to that effect recorded. Not only that, the complainant by his letter



dated 29/12/2015 also reiterated the fact that the previous possession date of 10/12/2014 has been superseded and the possession of the flat was to be handed over within 8 months from the said notice. Mr. Raut submits that since this material fact has been suppressed by the complainant while arguing the matter earlier and they have also obtained the order by playing fraud and this authority hence by relying upon the judgement of the Mahesh Jaylal Dadhia vs M/s. Thio Pharma 1999 (2) Maharashtra Law Journal 135, in this case the Hon'ble Bombay High Court has held that the parties must make true and full disclosure of all relevant facts for the decision and issues involved in the case, reliance has also been placed on SB Naidu vs Jagganath (1994) one Supreme Court Cases 1, in this case the Supreme Court has set-aside the order when it notice that the party obtaining the order played fraud on the court by suppressing the material fact, so on these basis Mr. Raut submits that the real date of possession has been suppressed by the complainant. According to him the 8 months' time has been granted by the complainants from giving possession from 23rd December 2015 which comes to August 2016 and hence the liability of the respondent to pay the interest is not from period of 30 months from agreement for sale as held by this authority previously. He has placed reliance on the minutes of the meeting as well as the letter alleged to have been issued by the complainant. However, the Ld. Advocate for the complainant submits that the letter on which the respondents have been relying upon is forged letter and that has never been issued by the complainant. The copy of the letter sent by the complainant regarding the payment of the deficient open space premium charges has also been placed on record which shows that the words regarding the extension of the time and supercede of the earlier date of possession are not mentioned. Therefore the Ld. Advocate for the complainant submits that the letter produced by the respondents is forged one and it cannot be relied upon. I



have given thought to the contends of both the parties, the crux of the matter is the real date of possession and therefore I shall deal with this particular issue to find it out whether the original period of 30 months for giving possession of the flat has been extended by the respondent for which the complainant has given his consent or not.

6. Mr. Raut relies upon the minutes of the meeting held on 23rd December 2015, it clearly mentions Mr. and Mrs. Richard DSilva for flat No. 202 were present. The minutes further shows that they committed to pay their dues Rs. 10,62,500/- towards the deficiency in open space premium and it is also admitted fact that the complainant has paid the said premium. The real controversial part is contained in Paragraph 11 thereof, which reads " Director Mr. Fareed Merchant brought to their notice that after all payments are made to the MCGM acquiring completion certificate procedure may take two months approximately, thereafter MCPL may try its best to complete the building in following next 6 months being the monsoon being the contingent factor". All members supported the statement and time frame unanimously. The Copy shows that it has been received by the complainant on 26/12/2015 itself. Thereafter, Mr. Raut brings to my notice the letter dated 29/12/2015 allegedly same by the complainant sent by the complainant to the respondents, it refers to the payment of Rs. 10,62,500/-. The relevant portion of the second part reads " as committed we expect you to complete the project up to the 7th floor and full building as per development agreement within a revised possession period of maximum 8 months from the date thereof and shall supersede the previous possession date of 10/12/2014 also handover the possession of our flat 202 in a peaceful manner". By bringing these two documents to my notice Mr. Raut submits that, earlier date of possession namely 10/12/2014 has been superseded. On the contrary, eight month from the date of meeting i.e. 23/12/2015 has been extended by the



complainants and therefore he submits that this material fact was not disclosed or was concealed by the complainants for obtaining the order and hence he request that their matter be thrown at the threshold.

7. In the reply Ld. Advocate of the complainant submits that, complainant has also produced the letter of the complainant dated 29/12/2015 which does not contain the contents regarding the extension of the period of possession and it does not contain that earlier date of possession has been superseded. Complainant further brings to my notice that the letter produced by the respondent is forge and it does not bear the signature of the complainant. On the contrary the letter on which the complainant has been relying upon is signed by the complainant and his wife not only that the but the letter shows it has been received by the respondents on 31/12/2015 and the signature of the person receiving it on behalf of the respondents is also appearing on the said letter. Therefore, complainant contends that the letter regarding the extension of the time produced by the respondent is forge document and it is not admissibly an evidence, this authority should not rely upon it.

8. In order to appreciate the facts stated above it is necessary to consider them in their perspective by keeping oneself in the shoes of the parties. After this I find that following points are not in dispute:

- a) The agreement for sale has been executed on 10/05/2012 in which it is specifically mentioned that the possession of the flat would be given within 30 months from the date of the said agreement, it means that the possession of the flat was agreed to be given on or before 05/11/2014.
- b) The title to the land was defective and therefore the respondents were not able to get the occupation certificate, this issue between the respondents and the land owners was pending and ultimately on 18/04/2018, the Collector granted non-agricultural permission which was required for the issuance of the occupancy certificate.



- c) On 11/06/2018, the respondents obtained occupancy certificate, the facts mentioned above clearly shows that the occupancy certificate could not be obtained till 11/06/2018 because there were the issues regarding the title of the land between the respondents and the land owners. The complainant being the purchaser of the flat in any way was not concerned with this dispute.

The project is delayed for the reasons mentioned above.

9. Clause 39 of the agreement for sale provides that if any permission is required to be obtain or any compliance is to be effected under the Central or State Government Legislature or under any order, notification whatsoever the same shall be complied with the purchaser and the open space premium was to be paid to the Municipal Corporation and therefore the meeting was convened on 29/12/2015 whereby the complainant agreed to share the amount of Rs. 10,62,500/- and he paid the same in the year 2015 itself.
10. The full commencement certificate up to 7th floor was issued by MCGM on 12/02/2016.
11. The minutes of the meeting dated 23/12/2015 have been forwarded to the complainant on 24/12/2015. The Complainant has produced the letter dated 29/12/2015 which shows that it has been received by the respondent on 31/12/2015 wherein there is the mention of the payment of deficiency of open space premium that's all.
12. The respondent relies upon the letter which shows that the period of eight months from the date of the execution of the letter has been extended and the previous date of possession has been superseded but these contents are absent in the letter sent by the complainant to the respondents of which the receipt has been given. There is no subsequence correspondence showing that the respondents communicated the



complainant that by his letter he agreed to extend the period of eight months.

13. There is no unequivocal consent given by the complainant for extension of time. Even if one takes into consideration the minutes of the meeting one finds that the respondents represented that within the period of eight months the building would be constructed and that is why allottees supported. It does not mean that the persons who attended the meeting gave the consent for the extension. When one imagines oneself as allottee and stands in his shoe then in this present scenario it will become clear that when the meeting was convened by that time the original period of giving possession had expired long-back and the building was not completed. The respondents gave them further assurance of completion of the project within next eight months and there was not anything in the hands of the allottees but to hope that it would be constructed within the period of next eight months and therefore I find that if the contents are read as they are they do not indicate that the complainant fully supported or gave consent for the extension, it was simply who expect the possession and nothing was left with the complainant.

14. When the building is not constructed and completed then there remains nothing in the hands of the allottees but to wait for completion of the project and for getting the possession. When the promoter goes on promising them there remains nothing in their hand but to wait and wait for the possession. Only because the allottees who were present in the meeting they did not oppose because the respondent represented that within the period of next eight months he would construct the project and shall handover the possession so they had nothing in their hands but to say yes. This particular helpless situation cannot be interpreted in the manner the respondents want to interpret. It cannot be said that the allottees gave their consent for the extended date hence I do not agree with Mr. Raut



when he submits that the period of possession has been extended by eight months after the meeting was convened. Therefore, I do not agree with him and I do not accept his submissions that the extended date of possession was August 2016. To conclude I hold that the agreed date of possession as per the agreement for sale stands the field and it is 05/11/2014. Admittedly, the respondents have not handed over the possession on this date and therefore this case squarely falls under Section 18 which enables the complainant to seek interest on his investment.

15. The payment mentioned in the earlier order has not been disputed. The complainant has not challenged the order and the findings of the court regarding the reimbursement of Rs. 10,62,500/- paid towards the open space premium. After reconsideration of the facts I find that there are no merits in the contentions of the respondents. The earlier order holds good hence I proceed to pass the same order but with .. that the respondents shall pay Rs. 30,000/- in addition to the earlier cost of the complaint. Hence the following is the order:


ORDER

1. The respondents shall pay the complainant simple interest at the rate of 10.5% on TDS amount of Rs. 29,000/- on consideration of Rs. 70,38,500/- from 09/11/2014 and on the amount mentioned in the paragraph 8 of the earlier order from the dates of their payment till handing over the possession of the flat for every month of delay under Section 18 of the RERA.
2. The parties are allowed to adjust the amount payable by them and shall pay the balance, if any.
3. The complainant's claim for Rs. 10,62,500/- for reimbursement of the premium of open space is hereby rejected.
4. The respondent shall pay Rs. 30,000/- towards the cost of this complaint in addition to the earlier cost of Rs. 20,000/-



This order is being digitally signed by the undersigned with his digital signature and it will be uploaded by Legal Assistant with her digital signature.

Date: 10.07.2020.


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