

ಕರ್ನಾಟಕ ರಿಯಲ್ ಎಸ್ಟೇಟ್ ನಿಯಂತ್ರಣ ಪ್ರಾಧಿಕಾರ,

Karnataka Real Estate Regulatory Authority,

1/14, 2nd Floor, Silver Jubilee Block, Unity Building Backside, CSI Compound,
3rd Cross, Mission Road, Bengaluru-560027

PROCEEDINGS OF THE FIRST ADDITIONAL BENCH
OF THE AUTHORITY

Dated: 11th MAY 2021

COMPLAINT NO. CMP/UR/200710/0006128

Members Present:-

1. M.R. Kamble, Chairman, K-RERA
2. Adoni Syed Saleem, Member-2, K-RERA

ZENITH RESIDENTS ASSOCIATION

.....Complainant

Karle Zenith Residence,
No. 236 (old Sy. No. 94/1, 94/3
and 94/10), 100 Feet Road,
Kempapura Main Road, Nagawara,
Bangalore Urban – 560045.

AND

KARLE HOMES PRIVATE LIMITED

.....Respondent

No. 151, Industrial Suburb,
Yeshwanthapur,
Bangalore Urban - 560022.

This complaint has been filed by the apartment owners of “Zenith Residences”.

After receiving the online complaint, notices were issued to both the sides. Mr. E. Suhail Ahmed and other advocates of M/s. Trial Base Advocates have filed vakalat on behalf of the complainant.

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Advocates from M/s. Dua Associates have filed Vakalat on behalf of the respondents. Mr. George Joseph, addressed arguments on behalf of the respondent.

The case was heard on 18/11/2020 and an interim order was passed on 13/11/2020 directing the respondent to allow the homebuyers unrestricted usage of the club house. Thereafter the case was heard on 23/03/2020, 31/03/2021, 15/04/2021 and on 20/04/2021 on which date the case was reserved for orders.

In their complaint it is stated that

- 1) The association has been formed under the provisions of the Karnataka Apartment Ownership Act, 1972 and a Deed of Declaration has been registered on 30/11/2018.
- 2) The approved plan has three basements, ground floor and 34 upper floors with a fully equipped club house and other common amenities and facilities. The prospectus / brochures of the respondent indicated that the residential project will have amenities and facilities including a club house of 37,500sqft. Many individuals purchased the apartments by entering into sale agreements. Separate construction agreements were also entered into between the homebuyers and the promoter.
- 3) When the Real Estate (Regulation and Development) Act, 2016 came into force the residential project of the respondent was an "ongoing" project. Therefore the respondent was duty bound to register the said project under the provisions of the Act. The respondent has failed to file applications seeking registration.
- 4) In the Agreement to Sell and the Construction Agreement clauses have been inserted unilaterally to show that the

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ownership of the club house, party halls and premium lounges in the real estate project remains with the respondent. The prospective buyers were not in a position to negotiate. As per the construction agreement, the cost of construction of the club house was to be borne by the apartment owners.

- 5) Thereafter the respondent has failed to transfer club house, party halls and premium lounges to the complainant association on the ground that the respondent has retained his ownership with him. The respondent has issued a notice calling upon the apartment owners to pay a sum of Rs.2,000/- as the subscription fee towards the club house which is in addition to Rs.3,50,000/- membership fee.
- 6) The club house has been constructed on schedule A property from which the undivided share has been carved out. As per the definition of "Common areas" under Section 2(9) of the Act, it is the entire land of the project and all community and commercial facilities situated in Real Estate project. The said common areas and facilities are to be transferred to the association of allottees.

In view of the above the complainant has asked that the developer should handover the physical possession of the club house, to the association of homebuyers and to get the project registered under the provisions of the Real Estate (Regulation and Development) Act, 2016 and further to refund the subscription fee along with 18% per annum. The respondent has requested this Authority to impose penalty on the respondent for having failed to form an association and to restrain the respondent builder from collecting any subscription fee.



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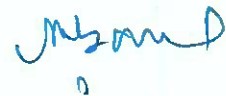
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Responding to the above complaint the following written objections are filed and arguments were also addressed on behalf of the respondents.

1. The brochure which is referred to by the complainant nowhere specified that the club house was to be part of the common areas.
2. It was made clear both in the booking form and the allotment letters that the terms and conditions of the agreement to sell and construction agreement will prevail over what was stated in the brochures and letters of offer.
3. The prospective buyers were promised undivided share in land excluding the club house and premium lounge.
4. The project is also exempted from registration under Rule 4(1)(iv) of the Real Estate (Regulation and Development) Rules, 2017, hence requires no registration.

The construction of the entire project was completed in 2016. A completion certificate was issued on 20/10/2015. An application for the issue of Occupancy Certificate was filed before the BBMP on 22/08/2016 which was confirmed by the BBMP's letter dated 27/04/2017. In this letter the BBMP has clarified that work of the project is completed and the process of issuing Occupancy Certificate is in progress. Finally on 14/12/2017 the occupancy certificate was issued.

The RERA Act came into force on 01/05/2017 and completion of the project is recorded as 27/04/2017 i.e., prior to commencement of the RERA Act. Hence the project is not subject to registration.



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5. The undivided area which is transferred under the sale deed has been wrongly quoted by the complainant.
6. Before execution of the agreement to sell and construction agreement drafts were exchanged by the promoter with the homebuyers and sufficient opportunity was given to them.
7. The averments that the cost of construction of the club house and premium lounges were borne by the homebuyers is not correct. The homebuyers have no right title and interest over the club house.

In view of the above, the respondent has requested this Authority to dismiss the complaint by vacating the interim order dated 10/11/2020.

Heard both the sides and perused the records.

In order to decide the merits of the complaint, it is necessary to answer the following issues.

1. Whether the club house was part of the transaction of sale in favour of the homebuyers.
2. Whether the project "Zenith Residences" is required to be registered under the provisions of the Real Estate (Regulation and Development) Act, 2016.

Our answers to both the above issues are in the negative on the following reasons.

As per condition No.7 in the application for allotment of apartment, a club house membership charges of Rs.2,50,000/- has to be paid which "entitles the family members to use the club amenities"



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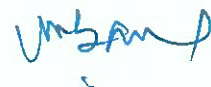
on free of charge basis except for some amenities which will be charged as applicable.

As per condition No.8, it is stated "the saleable areas mentioned in this application or in allotment letter are tentative in nature and or subject to change at the sole discretion of WFH and the cost of the apartment will vary accordingly".

As per condition No.10, it is stated that the terms and conditions in the agreement to sell and construction shall prevail between the parties.

At clause 7 of the agreement to sell, it is stated that the club house is only for use of owners / occupants and the seller may provide such facilities therein which they in their sole and absolute discretion consider necessary and viable. It is further clarified that "the ownership and possession of the club house and the buildings therefor and proportionate undivided share in the land in schedule A property and fixtures in club including moveable assets will remain absolutely and exclusively with the seller and / or their associate concerns, agents, nominees, assignees and / or transferees and they alone shall be entitled to "admit owners / tenants and member in possession as members. Members shall have no right, title or interest whatsoever in the land and in the club house buildings and or assets therein".

As per the deed of declaration dated 30/11/2018 which has been registered in the office of the sub-registrar, Gandhinagar, (Hebbal), Bangalore vide document No. 2387/18-19 at para 17 it is stated as under:-



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“That the Super Built Up Area (SBUA) of the apartments in the buildings and proportionate land share in the undivided form / Undivided Share (UDS) in the above property excluding SBUA and UDS of club house, premium lounge 1 and premium lounge 2 which belong to the grantor, will stand transferred to the prospective purchasers.....”

At para 27.4 of the same deed of declaration it is stated “the absolute ownership and exclusive possession of the club house and proportionate undivided right in the land in said property and fittings and fixtures therein including moveable, immoveable and intellectual assets will vest absolutely and exclusively with the grantor and / or their associate concerns, agents, nominees, assignees and / or transferees and they alone shall be entitled to.....”

Hence by a bare reading of the allotment letter, agreement to sell and deed of declaration, it is clear that the ownership of the club house has remained with the promoter respondent. What has been assured is only the restricted right of enjoyment of the club house on certain conditions. That is on payment of the stipulated fees. However, as per provisions of Karnataka Apartment Ownership Act, 1972, and the provisions of Real Estate (Regulation and Development) Act, 2016, the common areas have to be transferred to the Allottee Association. The club house is situated on the first floor of car parking which is a common area. The promoter has created a permanent interest on the common area by way of deed of Declaration registered with Sub-Registrar, Gandhinagar (Hebbal), Bangalore. This needs to be dealt with by competent court.

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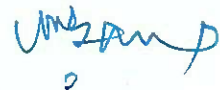
The plan of the project has been approved by the BBMP vide its order No. Addl.dir/JD North/0107/2011-12 on 25/07/2012. In pursuance of the same a commencement certificate has been given by the BBMP on 02/02/2013. After completing the project and after obtaining a certificate of completion from the Chartered Engineers the respondent filed an application seeking occupancy certificate on 14/02/2017. The BBMP inspected the building on 22/04/2017 and issued an endorsement on 27/04/2017 stating that the building is completed and the process of issuing occupancy certificate is in progress. Finally on 14/12/2017 the occupancy certificate was issued by the Plan Sanctioning Authority i.e., BBMP.

The respondent has taken up a plea that the project is eligible for exemption from registration in view of Rule 4 of Real Estate (Regulation and Development) Rules, 2017.

Though Section 3 and 4 of the Real Estate (Regulation and Development) Act, 2016 have prescribed the criteria for the registration of the projects, certain exceptions have also been provided in the Rules.

Rule 4(1) of the Real Estate (Regulation and Development) Rules, 2017 reads as under:-

“Additional disclosure by promoter of ongoing projects:- (1) Upon the notification for commencement of sub-section (1) of Section 3, promoters of all ongoing projects which have not received completion certificate shall, within the time specified in the said sub-section, make an application to the Regulatory Authority in the form and manner as specified in Rule 3.



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Explanation:- For the purpose of this rule "ongoing project" means a project where development is going on and for which completion certificate has not been issued but excludes such projects which fulfill an of the following criteria on the date of notification of these rule, namely:-

- (i) In respect of layouts where the streets and civic amenities sites and other services have been handed over to the Local Authority and Planning Authority for maintenance;
- (ii) In respect of apartments where common areas and facilities have been handed over to the registered Association consisting of majority of allottees;
- (iii) Where all development works have been completed as per the Act and certified by the competent agency and sale / lease deeds of sixty percent of the apartments / houses / plots have been registered and executed;
- (iv) Where all development works have been completed as per the Act and certified by the competent agency and application has been filed with the competent Authority for issue of completion certificate / occupation certificate; and
- (v) Where partial occupancy certificate is obtained to the extent of the portion for which the partial occupancy certificate is obtained."

Section 3 prescribing registration of project has come into force on 01/05/2017. Further it is stipulated that a period of three months has been given for registration of the ongoing projects. Hence all ongoing projects were expected to be registered within 31/07/2017. The Real Estate (Regulation and Development) Rules, 2017 were implemented



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vide notification dated 10/07/2017. As could be seen the project was completed on well before 01/05/2017 and an application seeking for issue of occupancy certificate was also submitted within the due date.

Hence in view of the above discussion we are of the considered view that the complaint lacks merit and the project is not required to be registered. Hence the following order.

ORDER

In exercise of the powers conferred under Section 31 of the Real Estate (Regulation and Development) Act, 2016, the complaint filed by the Zenith Residents Association is hereby rejected.

And further in exercise of the powers conferred under Section 3, 4 of the Act read with Rule 4(1)(iv) of the Real Estate (Regulation and Development) Rules, 2017, it is hereby ordered that the project "Zenith Residences" is exempted from registration under the provisions of the Act.


(Adoni Syed Saleem)

Member-2
KRERA


(M.R. Kamble)

Chairman
KRERA