

ಕರ್ನಾಟಕ ರಿಯಲ್ ಎಸ್ಟೇಟ್ ನಿಯಂತ್ರಣ ಪ್ರಾಧಿಕಾರ, ಬೆಂಗಳೂರು  
**Karnataka Real Estate Regulatory Authority, Bengaluru**  
ನಂ: 1/14, ನೆಲಮಹಡಿ, ಸಿಲ್ವರ್ ಜ್ಯೂಬಿಲಿ ಬ್ಲಾಕ್, ಯುನಿಟಿ ಬಿಲ್ಡಿಂಗ್ ಹಿಂಭಾಗ, ಸಿ.ಎಸ್.ಐ.ಕಾಂಪೌಂಡ್,  
3ನೇ ಕ್ರಾಸ್, ಮಿಷನ್ ರಸ್ತೆ, ಬೆಂಗಳೂರು-560027.

**BEFORE ADJUDICATING OFFICER, RERA**

**BENGALURU, KARNATAKA**

**Presided by Sri K. Palakshappa**

**Adjudicating Officer**

**Date: 28<sup>th</sup> February 2020**

<b>Complaint No:</b>	<b>CMP/UR/190917/0004217</b>
Complainant :	Mrs. Usha Subbanna No.25, 8 <sup>th</sup> Cross, Kumara Park West Bengaluru-560020 Rep.by: Sri V.Akshay Kumar Jain, Advocate
Opponent :	M/s Nitesh Housing Developers Pvt. Ltd., Level 7, Nitesh Timesquare, No.8, M.G. Road Bengaluru -560001 The following address is as per the address given by the developer in his objection statement NHDPL Properties Private Limited at No.110, Level 1, Andrews Building, M.G. Road, Bengaluru-560001

**"J U D G E M E N T"**

1. Usha Subbanna, the complainant has filed this complaint bearing complaint no.CMP/UR/190917/0004217 under Section 31 of RERA Act against the project 'Nitesh Hyde Park Phase II' developed by "Nitesh Housing Developers Pvt. Ltd.," where in the complainant has prayed for refund of her investment along with interest for

*D. Devaraj*  
28/02/2020

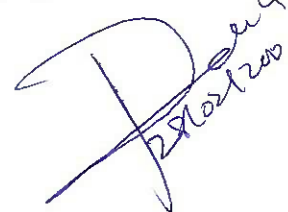
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failure to deliver apartment unit beyond due date. Her complaint reads as under

i. The complainant being desirous to purchase a residential unit in the project 'Nitesh One Hyde Park', and pursuant to an application made by the complainant dated 29.09.2013, the complainant by way of a letter dated 04.10.2013 was allotted a residential unit bearing apartment no. O P 0004, measuring 1306 sq. ft along with one cover car park. The total consideration for the allotted residential unit was Rs. 84,64,124/- The respondent had also included a slab wise payment schedule that was to be adhered by the complainant. A copy of the application dated 29.09.2013, allotment letter dated 04.10.2013 along with the slab wise payment schedule is produced herewith as Document No. 1, and Document No.2 respectively. ii. The Complainant paid the respondent a sum of Rs. 3,00,000/- towards the booking advance of the residential unit as stipulated under the payment schedule provided by the respondent. After the expiry of 20 days from the date of allotment, an additional sum of Rs. 13,92,825/- was made by the complainant in compliance with the payment schedule. The respondent by its letter dated 04.10.2013 acknowledged receipt of a sum of Rs. 16,92,825 / - paid by the complainant as booking advance towards apartment no. O P 0004. The respondent in the said letter dated 04.10.2013 requested the complainant to pay the balance sum of Rs. 14,38,901/- on or before 30.10.2013. A copy of the letter dated 04.10.2013 is produced herewith as Document No.3. iii. The sum of Rs. 14,38,901/- was requested to be paid by the complainant, as the respondent had informed that the project had progressed to the casting of the second floor. Therefore, the complainant in compliance with the payment schedule was to pay a sum of Rs. 14,38,901 /- towards the project. The complainant, in adherence with the payment schedule, on 30.10.2013 paid a sum of Rs. 13,92,825/- . The respondent, by its letter dated 30.10.2013, acknowledged receipt of the same. A copy of the letter dated 30.10.2013 is produced herewith as Document No. 4. iv. The respondent, subsequently, issued various demand notes dated 22.10.2013, 27.11.2013, 07.01.2014, 11.02.2014, 25.03.2014, 28.04.2014, 16.06.2014 and 25.08.2014 calling upon the complainant to make payments as stipulated under the payment schedule, as progress threshold as mentioned under the payment schedule were

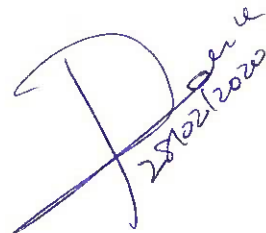


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completed. The complainant, with utmost faith in the respondents? progress report, duly made payments to the respondent as demanded in the various demand notes that were issued by the respondent. Copies of the demand notes dated 22.10.2013, 27.11.2013, 07.01.2014, 11.02.2014, 25.03.2014, 23.04.2014, 16.06.2014 and 25.08.2014 along with receipt of payment from the complainant is produced as Document No. 5 collectively. v. At this juncture, the complainant being desirous to purchase a larger residential unit than that which was allotted under the allotment letter dated 04.10.2013, the complainant by way of an application dated 24.11.2014, requested for a residential unit with large built per area to be allotted. The respondent by its letter dated 28.10.2014 allotted a residential unit bearing apartment no. O ? 0002 measuring 1945 sq. ft., in favour of the complainant. The differential amount of Rs. 36,92,999 was paid by the complainant towards allotment of the new and larger residential unit bearing apartment no O ? 0002. Receipt of the differential amount was acknowledged by the respondent by its letter dated 06.11.2014. A copy of the allotment letter dated 28.10.2014 and letter dated 06.11.2014 is produced herewith as Document No. 6 and Document No. 7 respectively. vi. Pursuant to the allotment letter dated 28.10.2014, the complainant and the respondent entered to a Construction Agreement dated 25.11.2014 and Agreement to Sell dated 25.11.2014. The complainant, was allotted a residential apartment unit bearing No. O - 0002 in the Ground Floor, of Block ?O? in Wing ?II? within the project ?Nitesh One Hyde Park? measuring 1945 sq. ft. of super built up area and proportionate share in common areas such as passages, lobbies, lifts, staircases and other areas of common use together with right to use one covered car parking space. The complainant was also entitled to 0.33% of undivided share, right, title interest and ownership in the larger part of the property, measuring up to 643.25 sq. ft. of share in the land (Schedule Property). A copy of the Construction Agreement dated 25.11.2014 and the Agreement to Sell dated 25.11.2014 is produced as Document No. 8 and Document No. 9 respectively. vii. As per the terms of the construction agreement entered into between the complainant and the respondent, the respondent was to deliver complete and peaceful possession of the completed apartment bearing No. O ? 0002 along with all enmities on or before 30.09.2015, with a grace period of six months. Accordingly, the extended date of delivery of

A handwritten signature in blue ink, followed by the date 28/02/2020.

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*complete and peaceful possession of the unit/apartment on or before March 2018.*

*Relief Sought from RERA : Refund of Rs. 1,18,69,452 along with 18% per annum*

2. In pursuance of the notice issued by this authority, the complainant has appeared through her advocate Shri. V.Akshay Kumar Jain. The developer has appeared through his representative.
3. Hence, I have heard the arguments.
4. The points that arise for consideration is as to:
  - a. Whether the complainant is entitled for refund of amount as prayed in the complaint?
  - b. If so, what is the order?
5. My answer is affirmative for the following

### REASONS

6. It is the case of the complainant that the developer has executed agreement of sale on 28/11/2014 in respect of flat bearing No. 0-0004 measuring 1306 square feet in the ground floor of block of Nitesh Hyde Park Project. It is her further case that on her request the developer has allotted a larger residential unit bearing No. 0-0002 measuring 1945 square feet in the ground floor of block-O in wing II of Nitesh Hyde park project. The developer has agreed to complete the project on or before 30/09/2015 with grace period of 6 months. It means the deadline for completion of the project was 31/03/2016. The complainant till date has paid Rs.1,18,69,452/- to the developer.

*D. J. J. J.*  
*28/03/2016*



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7. In this regard it is the stand of the developer that the complainant cannot terminate the agreement. In case, complainant WANTS to terminate the agreement then 18% of the amount will be deducted and rest of the amount will be returned within 180 days. Of course, the developer has also given some excuses stating that due to bad situation in the market he could not able to complete the project and also he submitted that there was an injunction from the City Civil Court by virtue of the Arbitration petition filed by the land lord.

8. Further, the developer has taken some contentions with regard to the delay caused wherein he submits as under:

*a) The principal contractor of the project/Ramky infrastructure ltd., did not perform as per the expectation and were very slow in their construction work. When respondent asked to increase the manpower to speed up the pace, they were not able to do so and due to which the respondent had to terminate their services as per the contract they had with them but the contractor filed O.S.5044/2015 and obtained injunction against the respondents.*

*b) It is further submitted that there were numerous occasions of transporters strike who used to transport river sand and other building materials to the respondent project site.*

*c) It is submitted that with regard to power connectivity to the project site, the Bescom had to cut the road. The respondent applied for road cutting permission to the BBMP. After considerable time the BBMP accorded*

*[Handwritten Signature]*  
28/02/2020

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*permission for road cutting and thereafter the Bescom provided the connectivity.*

*d) During the excavation work, the contractors encountered rocks at the work site. Due to that there was inordinate delay in the resumption of construction work.*

*It is submitted that as per construction agreement, the complainant is not entitled to claim delay compensation due to delay arising out of force majeure circumstances. As stated above, the delay caused was due to above referred bonafide reasons and due to litigations over the schedule property and hence the complainant is not entitled to any delay compensation (clause 6.2 of the construction agreement)*

*The interest claimed by the complainant is exorbitant and same is not permitted under law. Hence that cannot be granted to the complainant.*

*It is submitted that the respondent never agreed for the liability of Pre Emi payment towards the loan raised by the complainant.*

*It is further submitted that the calculation of interest and compensation made by the complainant is wrong and illegal and not be tenable under law. Hence it cannot be granted.*

*It is submitted that the financial constrains caused due to bad market conditions which has been affecting the Real estate industry, also prevented the respondent to complete the project within the time frame.*

*Denu*  
*28/02/2020*

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*It is submitted that the respondent company has paid Rs.13,85,097/- (Thirteen lakhs eighty five thousand and ninety seven only) out of the amount paid by the complainant towards GST/VAT/service tax. Hence the respondent company need not refund the portion of amount to the complaint.*

I find no good reasons in the above contention taken by the developer since the developer has to compensate the consumer or refund the amount whenever he failed to complete the project within the due date as said in the agreement of sale. The reasons given by him are not covered by the term Force majeure. When that being the case I would say that whatever the objections taken by the developer is only his defence, but Sec.18 does not recognise those reasons.

9. The learned counsel for the complainant submitted that because of the delay made by the developer he is entitled for seeking refund of the amount paid as per Section 18 of the Act. In support of his contention, the counsel for the complainant has given some of the decisions:

- *The ruling in the case of DLF Homes Panchkula Pvt. Ltd. V. D.S. Dhanda and others (first appeal no. 853 of 2016) by the National Consumer Disputes Redressal Commission squarely applies to the present case. All the purported "delay" events are business risks that the respondent ought to have taken into consideration at the time of signing the Agreement particularly since it was aware of a number of the purported "delay" events when entering into the agreements.*

*[Handwritten signature]*  
27/02/2020

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- *The rulings in the case of DFL Homes Panchkula Privet Limited v. D. S Dhanda and others (First Appeal No. 853 of 2016 (Paras 48, 49 and 57) by the National Commission Disputes Redressal Commission squarely applies to the present case. All the purported delay events are business risk that the respondent ought to have taken into consideration at the time of signed the agreement particularly since it was aware of a number of the purported delay events when entering in to the agreements.*
- *In the case of Avinash Saraf, Neha Dugar Saraf V. Runwal Homes Privet Limited, the Hon'ble Maharashtra Real Estate Regulatory Authority at Mumbai in Complaint No. CC06000000000032 by way of its final order dated 13.10.2017 directed the respondent therein to pay the consideration amount along with the stamp duty and registration charges along with interest. The authority also granted a compensation at 9% from the respective date of payment along with Rs. 20,000/- towards the cost of the complainants. The respondent was also directed to bear the expenses of executing the cancelation of sale agreement. A copy of judgment is produced here with for the kind perusal of this Hon'ble Authority.*
- *In the case of Joan Disouza v. Deepak Kamik and others, the Hon'ble Maharashtra Real Estate Regulatory Authority at Mumbai in Complaint No. CC06000000000181 by way of its final order dated 04.10.2017 directed the refund of the entire consideration paid by the complainant along with compensation of Rs. 1,00,000/- . The respondent was once again directed to bear the cost of re-conveyance of the plots. A copy of the judgment is produced here with for the kind perusal of this Hon'ble Authority.*

*Deepak Kamik*  
28/02/2018



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10. I would say that the reasons given by the developer are not acceptable and he has not any ground to forfeit the amount paid by the complainant on the ground of cancellation made by the complainant. The developer can forfeit the amount to some extent as a penalty only in case the cancellation has been made by the complainant without any default on the part of the developer, but here the developer who was expected to complete the project in the month of March 2016 till today he is not able to get the occupancy certificate means his project is not yet completed. When that being the case the stand taken by the developer as stated above falls on the ground. As per the judgement of the Apex court in Pioneer case it reads as under:

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

Civil Appeal No. 12238/2018,

Pioneer Urban Land & Infrastructure Ltd.

V/s

Govindan Raghavan

*which reads as under:*

*Para 6.1:In the present case admittedly, the appellant builder obtained the occupancy certificate almost two years after the date stipulated in the apartment buyer's agreement. As a consequence, there was failure to handover possession of the flat to the respondent flat purchaser within a reasonable period. The occupancy certificate was obtained after a delay of more than 2 years on 28/08/2018 during the pendency of the proceedings before the National Commission. In LDA v. M.K.Gupta, this*

*D. S. S. S.*  
*28/08/2020*

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*court held that when a person hires the services of a builder, or a contractor, for the construction of a house or a flat, and the same is for consideration, it is a "service" as defined by Section 2(1)(o) of the Consumer Protection Act, 1986. The inordinate delay in handing over possession of the flat clearly amounts to deficiency of service.*

In view of the above discussion made by the Hon'ble Apex court the developer has no defense as against the case made out against the complainant. The reasons given by the developer will not absolve him from the liability. He is bound to return the amount as per Sec 18 of the Act. However, the amount paid towards the tax may not be included in the total amount payable to the complainant. Further, I would say that the developer is liable to return the tax amount and he may collect the same from the concerned department since he is going to sell the same unit to some other person.

11. Before passing the final order I would like to say that as per section 71(2) of RERA the complaint shall be disposed off by the Authority within 60 days from the date of receipt of the complaint. The said 60 days be computed from the date of appearance of the parties. In this case the parties have appeared on 21/11/2019 and case is being disposed off on today with some delay. With this observation, I proceed to pass the following

*[Handwritten signature]*  
28/11/2019

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**ORDER**

- a. The Complaint filed by the complainant bearing No. CMP/UR/190917/0004217 is hereby allowed
- b. The developer is hereby directed to return a sum of Rs.1,04,84,355/-
- c. The developer is also directed to pay interest on respective amount paid on the respective dates till 30.04.2017
- d. The developer is also directed to pay interest @ 2% above the MCLR of SBI commencing from 01.05.2017 till realization of the entire amount.
- e. The developer is directed to return Rs.13,85,097/- to the complainant which was paid by the developer to the GST with a direction to collect the same from the concerned department.
- f. The developer is directed to execute cancellation agreement of sale, after whole amount is recovered.
- g. The developer is hereby directed to pay Rs.5,000/- as cost of the petition.

Intimate the parties regarding the order.

(Typed as per dictated, corrected, verified and pronounced on 28/02/2020).

K. PALAKSHAPPA  
Adjudicating Officer

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