BEFORE ADJUDICATING OFFICER, RERA
BENGALURU, KARNATAKA
Presided by Sri K.PALAKSHAPPA
Adjudicating Officer
Dated: 15th September 2020

Complaint No.	**CMP/191205/0004891**
Complainants :	Chidambar Dixit # 24, B-2, Akkamahadevi Road, P.J. Extension, Davangere-577002 Rep. by Pramod Nair Advocate
Opponent :	Adarsh Developers Number 10, Vittal Mallya Road Bengaluru-560001. Rep. By Prakash Hegde, Advocate.

JUDGMENT

1. This complaint has been filed by complainant under Section 31 of RERA Act against the project "Adarsha Premia-Phase1" developed by Adarsh Developers. Their complaint reads as under:

> *As per Agreement to Sell dated 15.10.2015, the Apartment was to be handed over by October 2017, with a grace period of 3 months. This timeline was subsequently revised when Adarsh coerced the Complainant to execute a Supplementary Agreement dated 25.4.2017 which provided that the apartment would be handed over by December 2018. While more than 11 months have passed since this deadline, the Apartment has not been handed over, and the Complainant was informed that the apartment would only be ready by June 2020. The Complainant was therefore constrained to cancel the booking of the Apartment and seek a refund of the amounts paid on 6.7.2019. The request for cancellation was accepted by Adarsh on*

2.8.2019. However, the amounts have not been refunded along with interest and compensation, to date. (Further details are set out in the attached Complaint and Annexures)

Relief Sought from RERA : Refund of Rs. 1,61,05,837 along with interest from date of each payment and compensation

2. In pursuance of the summons issued by this authority Sri Pramod Nair Advocate has appeared on behalf of the complainant. Sri Prakash Hegde Advocate has appeared on behalf of the developer.

3. After filing the objections the matter was posted for arguments. The case was set down for arguments on 26/03/2020, but due to lock down the case was not called on that day. After lock down was lifted the hearing date was fixed on 17/07/2020. But due to clamping again the lock down the case was called on 30/07/2020 and the case was heard through virtual hearing by using Skype and reserved for judgment.

4. The point that arise for my consideration are:

   a) Whether the complainant proves that he is entitled for refund of his amount along with other reliefs as sought in his complaint?

   b) If so, what is the order?

5. My answer is affirmative in part for the following

REASONS

6. The Complainant has entered into an Agreement of Sell dated 15.10.2015 for the purchase of Flat bearing No. B-701, 7th floor, B-Block in ADARSH PREMIA at Kadirenahalli Village, Uttarahalli Hobli, Bangalore South Taluk.

7. Subsequently, a Supplementary Agreement dated 25.04.2017 was entered into pursuant to the necessary requirements made under the Real Estate (Regulation and Development) Act, 2016; wherein it was agreed that the construction would be completed and possession handed over on or before 31.12.2018.

8. However, notwithstanding such extension of time, the Respondent has failed to complete the construction of the Apartment and also failed to deliver the possession to the Complainant. The Complainant has made payment of all the instalments as per the payment schedule, whenever called upon to do so by the Respondent, without any demur or protest.

9. Per contra the developer has submitted his arguments by denying the case of the complainant.

   1. *It is his case that the agreement to sell relied upon by the complainant is pertaining to acquire an apartment in the **proposed pending development project** of the larger property; whereas the original documents thereof required to be handed over to the Apartment Owners Association of the said project.*

   i) *Date of intended Joint development agreement (JDA) is 24-10-2006 and modified JDA is 31-08-2009 and thereby, as per the development scheme thereof, it was intended to be developed with constructing the building complex therein consisting Basement, Ground floor and 25 upper floors, utilizing the available FAR and TDR and thus, possible delay in completing the such project was not unexpected and the said facts have been brought to the notice of the complainant also by specifying the information about the project.*

   ii) *That the date of **original agreement to sell dated 12-08-2014** has been entered into by and between the land owners of the larger property (fifteen in numbers) along with the builder (respondent) and the complainant. According to the said agreement to sell,*

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a) *Purpose of sale is right to construct the apartment only through developer*
b) *The development project thereof was* ***intended to be completed within 36 with 3 months grace period,*** *subject to the other terms of the agreement including* ***Force Majure***

10. That the development of project in question was initially intended to be completed within September 2017 and accordingly, the respondent became able to complete the construction thereof only to the extent of already approved plan, i.e., up to 15 upper floors only and the respondent became unable to obtain the approval for the modified plan for getting construct the additional upper floors, being capable of transferring the property of the entire project to the apartment owners thereof. The said delay was caused beyond the control of the respondent and thus, the respondent has sought for extension of intended competition period consulting with all the intending acquirer of the apartments, including the complainant and accordingly, the complainant was also entered into the supplementary agreement dated 27-04-2017. Execution of supplementary agreement is admitted by the complainant. The complainant is not claiming the relief from the date mentioned in the original agreement. According to complainant the developer has utterly failed to complete the project even from the date mentioned in the supplementary agreement.

11. Further it is the case of the respondent that the clauses contained in two agreements entered into between the parties, i.e., the Sale Agreement and Construction Agreement to be read. In this regard it is submitted on behalf of the developer that the complainant has given agreement to the land owner to purchase UDS and whereas agreement given to the promoter to construct the flat. In view of the same the promoter is only a contractor to

build the house in accordance with the plan. The landowner has received the amount who agreed to give the land is also necessary party. By highlighting this aspect the learned counsel for the developer submits that the present complaint is not maintainable and the same is liable for dismissal. But the same is not acceptable for the simple reason that there is no need to make the land owner as party since the developer as defined in the Act covers the plea taken by the developer. He is bound to answer to the claim of the complainant. There is a provision to file an affidavit in form B while filing the application for registration of project where he sworn to the fact that he will not discriminate between the allottees. When that being the case now the developer cannot contend that the complainant has not given authority to him regarding the land. I would say that there is no concept of construction of agreement itself. Under the above circumstances the developer cannot argue that the complainant has agreed to get construction of the flat from the developer and agreed to buy the land from the land-owner. I would say that the argument placed before me is fully against to the definition of "promoter" as defined in S.2(zk).

12. It is his further submission that the amount paid by the complainant is not a sale consideration since he has purchased UDS from the land owner and he has given some contract to the developer to build the flat. I have already said that the definition of the word PROMOTER as per S.2(zk) he cannot raise such kind of defence.

13. At the time of argument the learned counsel for the developer has raised some more technical points. According to him the Adjudicating Officer has not recorded plead guilty as said in rule 30(2)(d) and points for determination has not been framed and as such the present complaint is not maintainable. I would say that the Sri Prakash Hegde advocate has put in appearance on behalf

of the developer by filing his vakalath. Further he has filed his detailed objections denying his liability towards prayer made by the complainant. Accordingly the developer has placed his intention to contest the same.

14. It is his further argument that the complaint filed by the complainant is not in accordance with the form which is meant for the said purpose. He also submits that in order to know whether the complaint is filed covering the violation of S.12, 14,18 and 19 or not it should be in the same manner. In this regard it is submitted that the complaint is as per the rules laid down by Karnataka Real Estate Rules 2017 and contents of the complaint gives a definite picture about the violation of specific provision of law. Further he submitted that entire complaint when read together clearly reveals that the same has been filed for contravention of Section 12,14,18 and 19 of the Act. Further I say that the contention taken by the developer is not correct since the complainant has applied his complaint through online to take action against the erred developer for the appropriate relief. By reading the complaint it is understood that what kind of violation has been committed by the respondent. Therefore I would say that the developer tried to discard the case of the complainant by raising some technical grounds but his submission cannot be accepted in view of intention of this act. In this regard I would like to take the assistance of some observation made by **HARYANA REAL ESTATE APPELLATE TRIBUNAL** which reads as under:

> *As per preamble the enactment of the Act was required to establish the Real Estate Regulatory Authority for regulation and promotion of the real estate sector and to ensure sale of plot, apartment or building or the sale of the real estate project in an efficient and transparent manner and to protect the interest of the consumers in the real estate sector and to establish an adjudicating mechanism*

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for the speedy dispute redressal between the promoters/developers and the home buyers. The basic purpose for enactment of the Act was to provide the special platform to the consumers for redressal of their grievances against the defaults and malpractices of the promoters/builders. It was felt that several promoters had defaulted and the consumers who had spent their hard earned money had no specialized forum to approach to get the speedy remedy. Thus, in a way the Act is a beneficial legislation to the consumers but at the same time it also provides certain remedies to the promoters for the recovery of the dues and other matters.

15. In view of the above observation and also it is said that the civil procedure code and Indian Evidence Act are not strictly applicable and as such complaint filed by the complainant was without the assistance of legal expert and as such it cannot be dismissed on some technical defects and it so it will defeat the very purpose of the Act.

16. Further it is the case of the developer that the delay was caused is beyond his control and as such it is the main contention of the developer that the complainant is not entitled for relief.

17. In this regard it is the case of the developer that on account of the execution of supplementary agreement and getting permission from the other authority caused for the delay. Further it was also specifically described about the new set of rules came to be effected under the Karnataka Town and country Planning Act, which was main factor in causing delay beyond the control of the respondent and the same has been admitted by all the intending acquirer of the apartments, including the complainant.

18. In accordance with the said supplementary agreement the project was intended to be completed within the end of **December, 2018** and however, due to the newly enforced RERA Act, the respondent was constrained to getting register the pending project before the RERA, fact of which also brought to the notice of all the intending acquirer of the apartments that the said date of complaining the project, i.e, December, 2018, is subjected to the time to be taken for securing permissions to be taken in accordance with newly enacted RERA.

19. If caused further, the delay compensation shall be paid to the intending acquirer of the apartments at the rate of Rs.2/- per sq. feet per month of such delayed period.

20. Under the aforesaid facts, having no other better alternative, the Respondent has got registered said pending project before the Hon'ble Authority as an ongoing project, being completed by the month **June, 2020** as per the RERA Registration certificate issued by the Hon'ble Authority for the reasons caused to the non-completion of the project, as well as, the fact of registering the project before the RERA has been also communicated to the complainant also.

21. In this connection I would say that the developer has taken so many reasons to bail out from the present situation. I would say that this authority has decided in so many cases holding that the due date mentioned in the agreement of sale is the only criteria to determine the due date. Whatever the reasons given by the developer under the umbrella of delay in sanctioning by competent authority all are not sustainable and therefore a right will accrue to the complainant when the developer has failed to complete the project on or before December 2018. A right is accrued to the complainant either to continue with the project or to seek refund of the amount by choosing to exit from the project.

Here the complainant has sought for refund of the amount paid by him. I would say that even at the time of argument also it is not the case of the developer that he has received the occupancy certificate. As on today the one and half year is over from the due date even then the developer is not able to complete his project and thereby he must refund the amount which was paid by the complainant towards the purchase of the flat in question.

22. It is the say of the Complainant that he has tried to get in touch with the respondent on several occasions to determine the date of completion and delivery of possession of the Apartment to him. The Complainant had issued a letter in November 2019, asking for assurance on the date of handing over of possession of the Apartment to him. The Respondent's representatives, though contacted the Complainant, did not give him any assurance or undertaking and continued with vague and evasive replies and further urged him not to worry.

23. The Complainant has waited long enough and is not in a position to tolerate any further delay on the Respondent's part as he has suffered financial hardship on account of repaying the home loan without any hope of the project being completed anytime in the foreseeable future, making it a dead/bad investment for him. In support of the same he has given some citations which reads as under:

> *The Complainant has a statutory right under Section 18 the RERA Act to withdraw from the project and seek a full refund with interest at the prescribed rate and compensation, without prejudice to any other remedy that may be available. It is therefore submitted that the terms of the Agreement of Sale and the Supplemental Agreement are grossly one-sided and unfair and therefore not enforceable.*

The Supreme Court in Pioneer Urban Land & Infrastructure v Govindan Raghavan 2019 (5) SCC 725 held:

" A term of a contract will not be final and binding if it is shown that the flat purchasers had no option but to sign on the dotted line, on a contract framed by the builder. The contractual terms of the agreement dated 8-5-2012 are ex facie one-sided, unfair and unreasonable. The incorporation of such one-sided clauses in an agreement constitutes an unfair trade practice as per Section 2(r) of the Consumer Protection Act, 1986 since it adopts unfair methods or practices for the purpose of selling the flats by the builder." (emphasis supplied)

Further, the Supreme Court in

Kolkata West International City Pvt. Ltd.

v.

Devasis Rudra

(2019) SCC Online SCC 438

Considered a similar clause as per which the builder was only required to pay a nominal compensation, while the homebuyer was required to pay an exorbitantly high penalty. The Supreme Court held:

"In Buyer's Agreement's clause, any delay beyond 30 June 2009 would result in developer being required to pay interest at prevailing savings bank interest of State Bank of India. Where buyer was in default, agreement stipulated that, interest at rate of 18 per cent from date of default until date of payment would be charged for a period of two months, failing which allotment would be cancelled by deducting 5% of entire value of property. Agreement was evidently one sided. For a default

on part of buyer, interest at rate of 18% was liable to be charged. However, a default on part of developer in handing over possession would make him liable to pay interest only at savings bank rate prescribed by SBI. There was merit in submission which had been urged by buyer that, agreement was one sided. Clause would not preclude right and remedy available to buyer to claim reasonable interest or, as case might be, compensation. .... It would be manifestly unreasonable to construe contract between parties as requiring buyer to wait indefinitely for possession." (emphasis supplied)

Furthermore, Section 18 of the RERA Act provides that the promoter "shall be ***liable on demand to the allottees****, in case the allottee wishes to withdraw from the project,* ***without prejudice to any other remedy available, to return the amount received by him*** *in respect of that Flat, plot, building, as the case may be,* ***with interest*** *at such rate as may be prescribed in this behalf* ***including compensation*** *in the manner as provided under this Act." Section 19 of the RERA Act similarly provides that "the allottee is entitled to claim refund of amount paid with interest. ..if the promoter fails to or is unable to give possession of the Flat .. in accordance with the agreement for sale.."*

The Hon'ble Supreme Court in
Bangalore Development Authority
v.
Syndicate Bank,
(2007) 6 SCC 711 held "...if the buyer, instead of rescinding the contract on the ground of non-performance, accepts the belated performance in terms of the contract, there is no question of any

breach or payment of damages under the general law governing contracts. However, if some statute steps in and creates any statutory obligations on the part of the development authority in the contractual field, the matter will be governed by the provisions of that statute... (emphasis supplied)
Therefore, irrespective of the nominal compensation provided to the Complainant under the Agreement of Sale, the Complainant has a statutory right under Sections 18 and 19 of the RERA Act to seek a full refund, along with interest and compensation. Shockingly, even after accepting the Complainant's request for cancellation, the Respondent has failed to refund the money and make any payment of interest or compensation to the Complainant for over 1 year.

The Supreme Court in Alok Shanker Pandey
v.
Union of India & Ors. II

(2007) CPJ 3 (SC) held: "7. It may be mentioned that there is misconception about interest. Interest is not a penalty or punishment at all, but it is the normal accretion on capital. For example if A had to pay B a certain amount, say 10 years ago, but he offers that amount to him today, then he has pocketed the interest on the principal amount. Had A paid that amount to B 10 years ago, B would have invested that amount somewhere and earned interest thereon, but instead of that A has kept that amount with himself and earned interest on it for this period. Hence equity demands that A should not only pay back the principal amount but also the interest thereon to B."
The above decision was relied on in a recent decision of the National Consumer Disputes Redressal Commission

recently held in Vivek Kishorchandra Mehta & Anr. vs Puranik

> *Builders Pvt. Ltd. in October 2018: "...it is clear that if money has remained for some time with the opposite parties, they are liable to pay some interest on that amount.." (emphasis supplied)*
>
> *Further, as has been held by the Supreme Court in several decisions including Pioneer Urban Land & Infrastructure v. Govindan Raghavan 2019 (5) SCC 725 and Bangalore Development Authority v. Syndicate Bank, (2007) 6 SCC 711, the interest is payable to the Complainant from the date of payment of each instalment.*
>
> *I would say that though the above judgments are not directly applicable to the present issue but the principle is that whenever there is delay in completing the project then the buyer shall take some relief. Now as per S.18 of the Act, when there is a violation of any provisions of law then there are only two options. One is that grant of delay compensation in case the buyer wants to continue with the project and for refund of the amount in case the buyer wants to go out of the project and therefore the question of dismissal of complaint does not arise.*

24. The learned counsel for the developer has submitted that the complainant is not entitled for any special relief since he has not made any allegation as mentioned in S.72 of the Act. He submits that the authority has to look into the other aspects while determining the quantum of delay compensation by going to S.72 of the Act. The Adjudicating Officer has to take into consideration as to management of the money collected from the allottees. If there is no proof of disproportionate gain or unfair

advantage made by the developer from the amount collected from the allottees or of the invested money in any of other project then the question of grant of compensation under the colour of unfair trade practice does not arise. I would say that the complainant never alleged against the developer on any count as mentioned in S.72 of the Act. When that being the case as rightly argued by Sri Hegde the complainant is not entitled for the prayer of any kind of damages.

25. In view of the same coupled with my discussion I say that the whatever the defence taken by the developer will not prevent the complainant seeking the relief as claimed by him and as such I have no any hesitation to say that the present complaint is deserves to be allowed in part.

26. As per Section 71(2) of the Act the complaint shall be disposed of within 60 days. This complaint was filed on 24/12/2019 where the parties have appeared 19/02/2020. The case was posted to 17/03/2020 for filing objections. In the meanwhile on account of natural calamity COVID-19 the whole nation was put under lock down completely from 24/03/2020 till 17/05/2010. In view of the office order the case was called through Skype and finally heard the parties and as such this judgment could not be passed within the due time and as such it is with some delay. With this observation, I proceed to pass the following.

ORDER

a) The complaint filed in CMP/191205/0004891is hereby allowed.

b) The developer is hereby directed to refund Rs. 60,00,000/- to the complainant.

c) The developer is directed to pay simple interest @ 9% on the respective amount paid on the respective date till 30/04/2017 and @ 2% above the MCLR of SBI commencing from May 2017 till the realization of entire amount.

d) The developer is also liable to discharge the bank loan with its interest, EMI if any, EMI if paid by the complainant on behalf of the developer with any other statutory charges.

e) The developer is also directed to pay Rs. 5,000/- as cost of this case.

f) Intimate the parties regarding the Order.

(Typed as per Dictated, Verified, Corrected and Pronounced on 15/09/2020).

(K.PALAKSHAPPA)
Adjudicating Officer.