

BEFORE ADJUDICATING OFFICER, RERA

BENGALURU, KARNATAKA

Complaint No. CMP/180817/0001152

Dated: 17th DECEMBER 2018

Complainant : Dr. NIRMAL TENGARAI SANKARANARAYANA
B2, 13-03, Elita Promenade Apartment,
J.P Nagar, 7th Phase, Puttenahalli
Bengaluru – 560078

AND

Opponent : Nitesh Hyde Park Phase II
Nitesh Housing Developers Pvt. Ltd., 7th
floor, 'Nitesh Timesquare', #8, Mahatma
Gandhi Road, Bengaluru - 560001

J U D G E M E N T

1. Dr. Nirmala Tengaraj Sankaranarayana, has filed this complaint under Section 31 of RERA Act against the project "Nitesh Hyde Park Phase II" developed by Nitesh Housing Developers Pvt. Ltd., bearing complaint no. CMP/180817/0001152. The brief facts of the complaint is as follows:

"I, Dr. Nirmala, have paid Rs. 1.33 crore to Nitesh during the period April 2014 to April 2015. 2. Nitesh Hyde Park - The project was supposed to be completed by 30th June 2015 as per construction agreement - Attachment - 1. 3. Nitesh requested for extension till 15th Feb 2016 which was communicated through a letter dated 30th July 2015 - Attachment - 2 4. Nitesh requested for extension till 30th August 2017 which was communicated through a letter dated 7th February 2017. There has been no response or communication from Nitesh after many follow ups. 7. As the builder did not comply with the terms of the agreement, I have suffered significant financial loss

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on the project. I wish to withdraw from the project claiming the refund of the principal amount including interest on the amount paid.

Relief Sought from RERA: Refund of money with interest"

2. On 6/9/2018, when the case was called, one Vinay, Chartered Accountant has filed his authority letter on behalf of complainant. Sri. Shivraj representing the developer was present. The developer has filed his objection statement stating that the developer had obtained partial OC with respect to block No. A,B and C. The construction work in block no. D,E and F is in progress. The complainant is the consumer with respect to block F. Therefore, the promise made by the developer in the agreement dated 11/4/2014 that he will deliver the possession on or before the end of 2015 has not been materialized. The developer has requested the complainant to deliver the possession on or before Aug 2016 and then extended to Aug 2017 but all those dates have been expired. Therefore the complainant wants to go away from the project.
3. As per Section 18 of the RERA Act, it is the wish of the consumer to be with the project or to go out of the project. The wordings used in Section 18 are as under:
- " 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 apartment, 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"*
4. By reading the above, it is clear that the Act does not make specific ground to go out of the project. However the parties have entered into agreement on 11/04/2014 with number of clauses, they are all binding upon each other.

5. The complaint has vehemently argued before me that he is entitled for the entire amount with loss sustained by him. I have already referred to S.18 where in it is said that if the consumer wanted to go out of the project then his amount shall be returned with interest including the compensation.
6. In the same manner the complainant has given a letter stating that he has incurred loss in the following manner. He has given the calculation memo as per Annexure 4 and said that the developer is liable to pay the interest of Rs. 36,83,123/- and delay charges at the rate of Rs.5/-per square feet comes to Rs. 3,74,330/- from July 2105 to October 2018. By this way the complainant has sought for refund of his total amount of Rs. 1,43,83,965/-. But his calculation is not in accordance with the law. As per Karnataka Apartment Ownership Act, 1972 the complainant is entitled for 9% of interest on the amount paid by him from time to time and at the rate of 10.25% from the date of May 2017 as per rule 16.
7. Now coming to the word compensation which has not been defined in this Act. In this regard I would like to take the following commentary:

1. *Adjudication of Compensation: The Act provides for compensation to the Allottee for false advertisement, structural defect failure to complete construction or deliver, defective title, and failure to discharge the other obligations under the Act, Rules or Regulations or Agreement. This section enables the authority, to appoint adjudicating officer for the purpose of adjudging the compensation.*

The word compensation is not defined under this Act, However, section 72 lays down the factors to be taken to account while adjudging the quantum of compensation namely, the amount of disproportionate gain or unfair advantage made, loss caused as a result of default and the repetitive nature of such default and other factors.

The Act unlike Consumer Protection Act and all other previous enactments strike a balance to protect the interests of both promoter and allottee. Subject to the Act and Rules and Regulation made there under the parties are free to enter into agreement and both the promoter and the allottee are bound by the same. The Promoter has a right to cancel the agreement as per the terms of the

agreement, for reasons to be reviewed by the authority. They may approach the adjudicating Authority for adjudging the compensation.

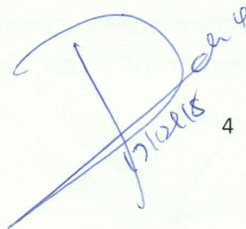
Further the authority has to keep in mind of S.72 also while awarding compensation as per S.71 of the Act.

Factors to be taken into account by the adjudicating officer:- While adjudging the quantum of compensation or interest, as the case may be, under section 71, the adjudicating officer shall have due regard to the following factors, namely:-

- a. The amount of disproportionate gain or unfair advantage, wherever quantifiable, made as a result of the default;
- b. The amount of loss caused as a result of the default;
- c. The repetitive nature of the default;
- d. Such other factors which the adjudicating officer considers necessary to the case in furtherance of justice.

8. In view of the above and in the absence of any other material from the developer I hold that the complainant is entitled for the amount. Of course the developer has said in the agreement to the effect that he will deduct 18% of the amount in case of termination the contract. But due to delay process adopted by the developer without the consent of the complainant he is not entitled for the said clause. Hence, the complaint is to be allowed.

9. From the above position of law it is clear that the Authority will have to take the notice of Section 72 along with Section 18. The Developer has given the completion date in the RERA as 31/12/2018. It means the amount given by the consumer has not been mis-utilised. It was the submission that the developer has played the fraud on the consumers by entering into agreement even though his title was under cloud. But it was the case of the developer that it was not having any effect on the consumer. The section 18 of the Act says that interest to be paid as prescribed which is as per rule 16.

A handwritten signature in blue ink, followed by the date '12/12/18' and the number '4'.

10. As per S.71(2) of the Act, the complaint shall be disposed off within 60 days from its date. IN this case the complaint was filed on 17/08/2018. As per SOP, the 60 days may be computed from the date of appearance of parties. In this case the parties have appeared on 06/09/2018. After hearing the parties the case was reserved for judgment and as such there is some delay in disposing of this complaint. Hence, I proceed to pass the following

ORDER

1. The complaint no. CMP/180817/0001152 has been allowed by directing the developer to return entire amount received from the complainant with ~~pay~~ simple interest @10.25% on the amount paid by the complainant towards purchase of flat from 1/5/2017 till realization. Further the developer is also directed to pay interest @9% p.a as per Karnataka Apartment Ownership Act, 1972 on the amount received on the respective dates till the end of April 2017.
2. If the developer has paid GST amount, then the developer shall enable the other party to claim that amount by providing necessary documents.
3. The complainant shall execute the cancellation document in favour of the developer after the entire amount is received.

Intimate the parties regarding this order.

(Typed as per dictation Corrected, Verified and pronounced on 17/12/2018)

(K.PALAKSHAPPA)
Adjudicating Officer