

BEFORE ADJUDICATING OFFICER, RERA
BENGALURU, KARNATAKA

Complaint No. CMP/181128/0001687

Dated: 18th MARCH 2019

Complainant : PUSHKAR ARYA
No. 43, TNT Towers, Unit No. S-2,
Infantry Road
Bengaluru- 560001

AND
Opponent : Skylark Ithaca,
Skylark Mansions Pvt. Ltd.,
No. 37/21, Yellappa Chetty Layout,
Ulsoor road, Bengaluru, Karnataka,
560042

J U D G E M E N T

1. Mr. Pushkar Arya, has filed this complaint under Section 31 of RERA Act against the project "Skylark Ithaca" developed by Skylark Mansion Pvt. Ltd., bearing complaint no. CMP/181128/0001687. The brief facts of the complaint is as follows:

"1. The Complainant herein entered into an Agreement to Sell dated 24th March, 2017 for a sum of Rs. 18,81,688/- for purchase of Residential Flat bearing no. T-17-704 built on Eight Floor of Tower 17 of Respondent's project ?Skylark Ithaca? measuring 1610 sq feet along with 483.527 sqft of undivided share in the project being built by the Respondent. 2. The Complainant herein entered into

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a Construction Agreement dated 24th March, 2017. The total cost of construction was agreed Rs. 56,45,063/-. The booking date herein for the project was on 12th February, 2017 3. The Complainant has paid the following amounts towards the unit: Amount paid by Complainant Rs. Rs. 5,62,000 Amount released by the Banker to Respondent Rs. 64, 61,134 TOTAL Rs. 70,23,134 4. It is pertinent to note that, a. Complainant had entered into this project which the Respondent termed as Phase II under the Subvention Scheme, whereby Respondents agreed to pay the pre-emi cum interest over the same till the date of handing over the physical possession of the proposed residential flat at clause 5.10(b) and b. it was agreed that in case of cancellation, Respondents would repay the bank received towards loan as per clause 5.10(d). 5. Complainant also states that, the bank refused to disburse the loan amount due to the delay of construction and failure on part of the Respondents to execute the project in a timely manner. The complainant had already paid Rs. 562,000/- out of the amount payable by them, even though more than 10 pre-emi reimbursement were pending from the Respondents side. 6. The Respondents promised to adjust the amount payable by them for reimbursement of Pre-emi towards the dues owed by the Complainant. But the Respondents failed to act upon the same. 7. The Complainant submits that added to this, the Complainant booked the units under the representation that L&T would be the contractor for the project, but to the utmost shock of the Complainant, the project was given to NCCL rather than L&T.. The goodwill attached to L&T was one major deciding factor for the Complainant to chose the project.

Relief Sought from RERA : Exit Option, Amount
Repayment Cancel RERA Reg.

2. In pursuance of summon issued by this authority on 11/12/2018 the complainant was present through his advocate. Smt.LF, Advocate representing the developer filed vakalath and objections.

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3. I have heard the argument.
4. The points that arise for my consideration is whether the complainant is entitled for relief of exit option as prayed in the complaint?.
5. My answer is affirmative for the following

REASONS:

The complainant is the consumer who had entered into agreement with the developer on 10/11/2017 with respect to residential flat bearing no. T-15-905. According to the complainant has failed to deliver the possession as agreed in the agreement.

6. The developer has filed the objection statement stating that the complainant is not entitled for the relief since he is an investor. Another stand taken by the developer is that the complainant is not entitled for exit option since he is due payable to the developer.
7. I would like to say that the complainant cannot be called as investor because the Term "Investor" is not defined either in Agreement or nowhere defined under RERA. Any purchasers of the apartment is an allottee as per Sec.2(d) of RERA Act. Thus the connection of respondent that complainant is an Investor will not holds good to the facts of the case and it is neither sustainable on facts or in the Eyes of the Law. The concept of Investor is applicable under Consumer Protection Act and Not under RERA Act.

Done
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8. Under RERA Act any buyer is an allottee. Since the project is registered under RERA, only the provision of the RERA act will be applicable, the provision of other laws will be applicable in coordination and not is derogation to defend the main object of the Act. Thus the concept of the Investor is not applicable under RERA and as such more specifically to the complainant.
9. For the kind perusal and reference – Few NCDRC judgments have been mentioned which cases are clearly held by the Apex forum that what amount to investor and who is a Customer. An investor is defined as under:
*An investor is a person that allocates capital with the expectation of a future financial return. **A person who puts money into something in order to make a profit or get an advantage.** That is, someone who provides a business with capital and someone who buys a stock are both investor. An investor who owns a stock is a shareholder.*
10. From the above principle the developer has to prove something more than what he contended in his objection statement. Absolutely no evidence is placed by the developer as to the intention of the consumer regarding his investment. Hence, I hold that the developer has utterly failed to prove that the complainant is an investor and hence the same may be discarded.
11. The developer has field the additional objection by taking shelter under section 72 of the Act. It is his argument that the Adjudicating Officer is having the jurisdiction for the only with respect to section 12,14, 18 and 19 and he has no power beyond the scope of this section.

Done
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12. Further it is the case of the developer that the prayer made by the complainant is in the nature of enforcement of agreement specifically in terms of the construction. Therefore it is the case of the developer that the complainant shall approach the Civil Court but I am not going to accept his argument because section 18 of the RERA Act empowered the complainant to approach this Authority.
13. As per Section 18 in case of delay in delivering the possession the complainant is entitled for the compensation. Further section 17 prescribes regarding execution deed of conveyance. Section 19 determines the rights and Liabilities of developer as well as consumer.
14. Further as per 79 of the Act, the Civil Court has no jurisdiction over the issues hence, the submission made by the developer regarding jurisdiction has no force. The parties shall not approach the civil court. In order to comply with the terms of the agreement the developer has to pay the EMI as agreed in the agreement. As per S.19(3) the allottee is entitled to claim the possession. As per S.18 it is wish of the complainant either to continue with the project or to go away from the project. From the above discussion the dispute raised by the complainant is within the jurisdiction of the Adjudication Officer.
15. For these objections filed on behalf of the developer, the complainant filed his reply where in he has given one more important reason for withdrawal from the project.

the complainant submits that the respondent have also breached their obligation under Section 12 by falsely advertising that they have hired the construction service of L&T as a stand, alone contractor for the project, but to the

utmost shock of the complainant, the project was given to NCCL rather than L&T. The goodwill attached to L&T was one major deciding factor for the complainant to choose the project. Respondent by this act has ensured that, they have committed an error of deceptive marketing.

The complainant submits that since the inception of the project, the respondent have been deceiving prospective customers and have consistently failed in executing their duties. The complainant has been facing constant financial hardship due to the negligence and failure of the respondent in dispersing their duties and responsibilities."

16. The intention behind it is very clear that the developer may not complete the project because of the above said reasons. Further the complainant also submitted photos showing the progress of Tower 12. By looking into photos, it appears that the completion of the project may not be within the nearing date.
17. Complainant had earlier filed a complaint bearing complaint no. 544/2018 before this authority seeking for re-imbursement of Pre- Emi, the same was allowed on 23/04/2018 directing the respondent developer to comply the same. In this regard the complainant submits that on 31/10/2018 the respondent developer filed a memo stating that he is not in the position to clear due till June 2019. It means the execution of the award is not possible. Hence, the complainant has filed this complaint for different relief.

18. The learned counsel for the complainant has given some citation in support of his argument. The reasons given by the complainant for going away from the project are sufficient to hold that he is going away only because of the fault on the part of the developer. In addition to it is clear that the agreement shall have all the clauses to give all kinds of relief to both parties. The agreement should have been executed with the minds of both parties and in the same spirit it shall have the choices either to continue with the project or to go away from the project. Otherwise the agreement amounts to one sided agreement which is not executable. Hence, as rightly pointed out by the complainant he is entitled for the relief of exit from the project.

19. AS per S.71(2) RERA, the complaint shall be closed within 60 days from the date of filing. As per the SOP the 60 days be computed from the date of appearance of parties. In this case the complaint was presented on 28/11/2018. The parties have appeared on 11/12/2018. Hence, the complaint could not be disposed of within time. With this observation I proceed to pass the order.


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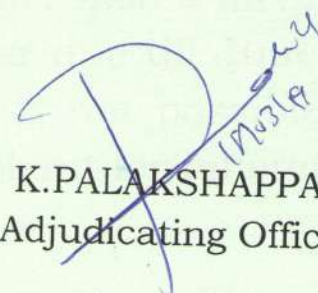
ORDER

The complaint no. CMP/181128/0001687 is allowed.

- a. The developer is directed to return full amount of Rs.6,17,002/- to the complainant along with interest @ 9% P.A. for the respective amount paid on respective date prior to April 2017 and interest @ 10.75% P.A. from 01/05/2017 till the realisation of full amount.
- b. The developer is also to discharge loan amount of Rs. 46,27,508/- along with all the EMI and interest, if any.
- c. The developer shall deduct the GST amount out of the amount payable to complainant and hand over the necessary documents to the complainant in case he has paid GST to the Government to enable the complainant to claim that amount.
- d. The complainant is hereby directed to execute the cancellation deed in favour of the Developer after the entire amount has been realized.
- e. Rs. 5,000/- to be paid as cost of the petition by the developer.

Intimate the parties regarding this order.

(Typed as per dictation Corrected, Verified and pronounced on 18/03/2019)


K.PALAKSHAPPA
Adjudicating Officer