

BEFORE ADJUDICATING OFFICER, RERA
BENGALURU, KARNATAKA

Presided by K.Palakshappa
Adjudicating Officer

Complaint No. CMP/180504/0000805

Dated: 12th June 2019

Complainant : C Mahesh Kumar
ETA Star The Gardens Apartment
G-402, Magadi Road
Bengaluru - 560023
Rep. by M.Mohan Kumar Advpcate

AND

Opponent : Mantri Webcity 3 C
Mantri Developers Private Limited,
#41, Vital Malya Road
Bengaluru - 560001
Rep. by V.R. Budihal Advocate.

J U D G E M E N T

1. C. Mahesh Kumar has filed this complaint under Section 31 of RERA Act against the project "Mantri Webcity 3C" developed by Mantri Developers private Limited bearing complaint no. CMP/180504/0000805. The brief facts of the complaint is as follows:

"ACCORDING TO MOU, MANTRI IS SUPPOSED TO REFUND ME THE PRE-EMI WHICH I PAY TO AXIS BANK, BUT STILL 15 PRE-EMIs ARE PENDING FROM MANTRI BUT AT ANY COST I HAVE TO PAY TO AXIS BANK. MANTRI IS NOT FOLLOWING THE TERMS OF MOU AND THEY VERY WELL KNOW THAT I AM A KIDNEY FAILURE PATIENT UDER DAILYSIS AND I AM FACING A LOT OF DIFFICULTIES FOR PAYING THE PRE-EMIs TO AXIS BANK AS I HAVE TO MANAGE MY

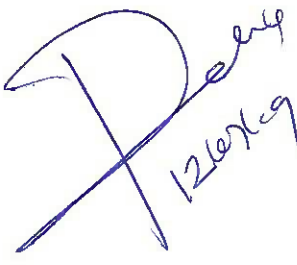
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DAILY SIS COST AND PRE-EMI. I HAVE MANY TIMES BEEN TO MANTRI HEAD OFFICE AND HAVE SENT MANY MAILS EVEN TO THE DIRECTOR OF MANTRI. AS USUAL THEY PROMISE THAT THEY WILL PAY ALL THE PENDING PRE-EMIs SOON BUT THEY DONT DO AS THE SAY. AND AT THE END OF THE CONTRACT THEY HAVE TO PAY AXIS A SUM OF RUPEES 42,00,000 (FORTY TWO LAKHS) LOAN WHICH IS TAKEN ON MY NAME + THEY HAVE TO PAY ME 14,00,000 (FOURTEEN LAKHS) AS PER THE DOUBLE THE MONEY SCHEME.

Relief Sought from RERA : I WANT JUSTICE"

2. After hearing the parties, the complaint was allowed by directing the developer to return Rs. 7,00,000/- along with interest @10.25% commencing from 4/5/2018 till the realization of full amount and also to clear bank loan along with EMI, if any.
3. Aggrieved by the same the complainant has filed appeal before the Karnataka Appellate Tribunal under Appeal No. 55/2018. The developer also has filed appeal against the same which was numbered as Appeal No. 96/2018. After hearing the parties the Appellate Tribunal has allowed both the appeals and remanded the matter back to this Authority for reconsideration of the complaint.
4. As directed by the Appellate Tribunal, the parties were present on 04/06/2019. Finally on 26/06/2019 I have heard the arguments and reserved for judgment.
5. The point for my consideration is
6. Whether the complainant is entitled for the relief as sought in his complaint?
7. My answer as affirmatively for the following

2



R E A S O N S

8. The learned counsel for the complainant submits that he is the consumer who has been allotted the flat for a particular sale consideration of Rs. 69,80,305/-. The complainant has agreed to purchase the same with an intention to enjoy the same. He has paid the amount as per the demand made by the developer. He has entered into Agreement of Sale, Construction Agreement and also Memorandum of Understanding. All these documents where his characteristic give an impression that the complainant is an allottee and he cannot be called by any other name. I would like to say that the learned counsel for complainant has vehemently contended that the above facts because the developer has called the Complainant as investor. Shri Bhoodihal Advocate submits that a consumer will take the flat/plot/building for consideration amount in case he is satisfied with the goods delivered by the developer. If he is not satisfied with the same, he can claim refund of the amount. But here in the present case, the complainant wants to sell his proposed unit to the developer means, he is not an allottee. Further, he also submits that the complainant has paid the amount and now, seeking 2X amount or under the scheme of buy back means his status would be a seller. He also submits that the person who sells the apartment for gain becomes promoter. A promoter cannot file a complaint against another promoter.
9. Shri Budihal Advocate also submits that a consumer can file a complaint against developer seeking for the relief. The word consumer is not defined in the present Act. Therefore, he submits that when a particular word is not defined in the Act, then we have to resort to some other Act to get the definition of the said word. In this regard he has taken the definition of consumer from Consumer Protection Act.

"thus it is submitted that in view of the same, the definition of the same

"consumer" and the purport of the same under the Consumer Protection Act, 1986 shall have to be resorted to, to define the scope of the RERA Act, 2016 and more so, because both the Act i.e., RERA Act, 2016 and Consumer

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Protection Act, 1986 are beneficial piece of Legislations. The definition of Consumer under the Consumer Protection Act, 1986 is as follows;

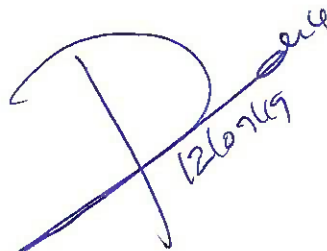
Consumer means any person who-

1. Buys any goods for consideration which has been paid or promised or partly paid and partly promised or under any system of deferred payment and includes any user of such goods other than the person who buys such goods for consideration paid or promised or partly paid or partly promised or under any system of deferred payment when such use is made with the approval of such person, but does not include a person who obtains such goods for resale or for any commercial purpose.
2. Hires or avails of any service for a consideration which has been paid or promised or partly paid and partly promised or under any system of deferred payment and any beneficiary of such services other than the person who 'hires or avails of any service for a consideration which has been paid or promised or partly paid and partly promised or under any system of deferred payment, when such service are availed of with the approval of the first mentioned person but does not include a person who avails such services for any commercial purposes.

Explanation: for the purposes of this clause, 'commercial purposes' does not include use by a person of goods brought and used by him and services availed by him exclusively for the purpose of earning his livelihood by means of self employment."

10. Further he submits that;

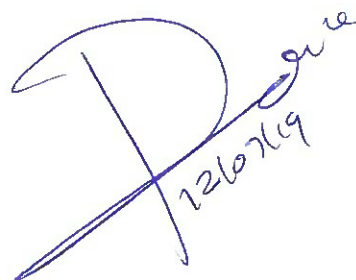
Admittedly, complainant always intended to sell the apartment herein for a valuable consideration with double the benefit on own contribution, and the same takes the complainant out of the purview of the RERA Act. To cut the mountain into a mole, it is submitted that the contract between the parties being a buy back contract or a return of the apartment contract, complainant would neither be a

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'consumer' nor an 'allottee' in as much as, it would be a preposterous interpretation to give to the term 'consumer' and 'allottee' when the investment, runs in lakhs of rupees, which cannot be held to be for the livelihood of complainant, in view of the definition of consumer, under the provisions of the consumer Protection Act, 1986 and the allottee under the provisions of the Real Estate (Regulation and Development) Act, 2016. In the above circumstances, it is submitted that the complainant is not an allottee and cannot invoke the provisions of the Act, and on this ground alone, the instant complaint deserves to be dismissed.

It is further submitted that complainant cannot take refuge under the definition "allottee" under section 2(d) of the Act, in as much as no right, much less any title, has been transferred by the respondent herein to complainant, or was intended to be transferred to complainant, in as much as, it was never the intention of complainant to become the owner of the apartment and hence, complainant cannot at all be considered to be "allottee" under the provisions of the Act, and under the circumstances the complaint is not sustainable at law.

The abovementioned contention of the Respondent stands heightened by the fact that the complainant has not claimed any right under the terms of any other contract, viz., Agreement of Sale of undivided interest or Agreement for construction, etc., but has only maintained his claim under the pre-EMI/buy back scheme. Thus, the pre-EMI/buy back scheme being an absolute contract between the parties, the rights qua the liabilities flow from the said scheme and hence, the said pre EMI/buy back Scheme denudes the complainant of any right to approach the adjudicatory mechanism provided under the RERA Act, 2016 for the reasons mentioned supra, and for the said reason, the instant complaint itself is not maintainable.

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Hence, it is submitted that the complainant is not an allottee as contemplated under the RERA Act, 2016; and further, complainant is not an end user or the consumer. Therefore the RERA Act, 2016 is not applicable to him, and for the said reasons, the instant complaint is not maintainable and deserves to be dismissed in limine.

11. In view of the above stand taken by the developer he submits that the complaint is to be dismissed.
12. Per contra the learned counsel for complainant submits that his client never becomes promoter because as per the definition of the word promoter, he also submits that if really the complainant is a promoter, then the respondent would have mentioned in the name of the complainant as co-promoter in form B. If not, means the complainant shall not be called as promoter. Further he has drawn my attention to a document called as Memorandum of Understanding. The learned counsel for complainant has read the terms and condition and submits that the complainant has been allotted a flat bearing No. H-902.
13. Further in conditions 15- 18, wherein it is written as under;
 1. *The investment amount (own contribution amount) not to exceed 10% of the total unit value. The disbursement claim by MDPL from PNBHFL/INDIABULLS/Axis will not exceed 60% of the total unit value.*
 2. *The pre Emi calculations will be based on loan tenure of 20 years and at floating rate of interest.*
 3. *The first month payout will be on a pro-rata basis.*
 4. *Mantri Developers will assure return of 100% on the own contribution made by the unit purchaser at the end of June 2018, i.e., 36 months from the date of booking.*
14. By reading above terms and condition, it is clear that it is one kind of scheme offered by the developer, for which the complainant has agreed to. It is the duty of the developer to comply with the terms. He cannot take U turn by ignoring terms and conditions of Memorandum of Understanding. There is a provision for EMI means

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it is a clear case of a contract for purchase of a flat. In view of the same, even though Agreement of Sale, Construction of Agreement have been executed in order to specify the nature of transaction MOU has been executed. Merely because the complainant has demanded for refund of amount with benefit as agreed by the developer cannot deny the same by taking some stand which is contrary to his own document.

15. I would like to say that the argument submitted on behalf of the complainant has to be accepted without giving room to place some other argument to defeat the very purpose of this contract. The developer who has called the public at large by inviting to purchase the flats has given some kind of concession or benefit or attractive/colorful schemes and the present scheme is one among the same. The consumer who has accepted the scheme either with an intention to take the possession of the flat or to get the refund with some benefit is a natural phenomena. I find no good reason to say that the consumer becomes a seller just because he chosen to get back his amount with attached scheme. The scheme has been introduced by the developer to attract more number of consumers. When a particular scheme is attached with some kind of benefit will not change the status of complainant. In other words I would say that, what kind of scheme has been released by the developer, he is bound to follow it otherwise he will be violating Sec. 12 of the Act. Therefore, I say that the developer is not only bound by Agreement of Sale, Construction Agreement but also bound by Sec. 12 of the RERA Act. He cannot blow hot and cold by twisting the purpose of the scheme. I would say that the developer has taken the benefit of the amount paid by the complainant. He has developed the project with the money of the consumers including complainant. Sec. 18 of the Act gives liberty to consumer to go ahead with the project by taking delay compensation in case of delay or refund of the amount in case he wants to go away from the project. This right has to be exercised as per the Agreement of Sale. It means Agreement of Sale is the basic important document for the purpose of this Act. The condition No. 7 and 8 of Agreement of Sale as under_

The purchaser herein been interested in getting an apartment constructed in the apartment building proposed

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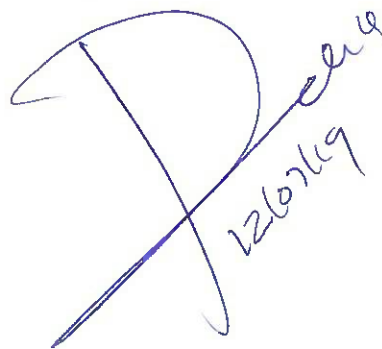
on the schedule –A property, has joined the scheme formulated by the Developer and has approached the developer and expressed his/her/their/its desire to purchase the proportionate undivided right, title and interest within the plinth area of a particular building/tower on which the apartment is constructed for which forms a part of the schedule –A property which is more fully described in Annexure A1(hereinafter referred to “Annexure A Property”) and the Owner and the Developer has agreed to convey the property described Annexure A1, subjected to the terms and conditions hereinafter appearing, which the purchaser has accepted and therefore this Agreement; and

The purchaser also simultaneously entered in to a separate Agreement for Construction with the Developer, where under he/she/they/it has/have agreed to get constructed, as per the Scheme a residential apartment described in Annexure B1 to the said Agreement, and both Agreement for Sale of undivided interest and agreement for construction shall be co-terminus and together constitute one contract, whether or not a sale deed in pursuance hereof is executed.

16. In view of the above position of the complainant and also above discussion made by me, it is clear that the argument on behalf of developer has no force.
17. Further the contention taken by the developer that there is no provision in the agreement to go out of the project. For this the complainant submits that if there is no provision to go out of the project means the agreement is nothing but one sided agreement. When an agreement is executed having a door to enter there shall be another door to go out of the project in case the consumer wants to go. As per S. 18 of RERA, the developer has to give compensation in case the developer has failed to deliver the possession. Further the developer shall return the amount in case the consumer wants to go out of the project. Under this back

ground the agreement shall have the provision for the same if not it will be called as one Sided Agreement. It is the choice of the consumer either to continue with the project or to go out of the project. It cannot be curtailed by the developer by imposing the condition which is contrary to natural justice. Hence, I hold that the present complaint has to be allowed.

18. 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. This complaint was filed on 05/11/2018. After hearing parties I have passed the judgment on 05/07/2018. But the same was challenged by both the parties in Appeal No. 55/2018 and 96/2018. The same was allowed on 26/04/2019 with a direction to dispose of the case afresh. Further the appellate court also directed the parties to appear before AO on 28/05/2019 and to dispose the case within 60 days. Hence, there is no delay in completing the complaint. Hence, I proceed to pass the following



ORDER

The Complaint filed by the complainant bearing No. CMP/180504/0000805 is allowed by directing the developer to pay Rs. 6,93,000/-with interest at @ 10.75% p.a. from today till the recovery of entire amount.

The developer shall pay the 2X amount of Rs. 6,93,000/- to the complainant.

The developer is also directed to discharge the loan, its interest, Pre EMI if any and other incidental charges.

Further the developer shall also pay Rs. 5000/- as cost of the petition.

Intimate the parties regarding the order.

(Typed as per dictated, corrected, verified and pronounced on 12/07/2019).

K. PALAKSHAPPA
Adjudicating Officer



12/07/19