BEFORE ADJUDICATING OFFICER RERA

BENGALURU, KARNATAKA

Complaint No. CMP/1806622/0000944

Date: 31st OCTOBER 2018

Complainant : SHIDDALINGAYYA VEERAPURMATH
Shivaraj N Arali, Advocate,
No. 431, 1st Floor, Panchi Vihar,
Talacauvery Layout, Amrutha halli,
Vijayapura – 560092

AND

Opponent : Vasathi Housing Limited
No. 85/2, D Block, Sahakar Nagar,
Bengaluru - 560092.

J U D G E M E N T

This Complaint has been filed by the consumer against the developer under section 31 of RERA Act claiming the payment of full amount with interest. His complaint reads as:

The Respondent sold the flat W3-A-802, deliberately suppressing and withholding material information of pendency of OS No. 25522/2014 against them, pending before 28th Additional City Civil Court, Bengaluru whereby, the very title to the property is under cloud, thereby fraudulently induced the complainant to buy the same and collected from him about 95 % of the sale consideration. Had this fact been informed, the complainant would not have purchased the flat. Secondly, the respondent fraudulently represented and promised to the complainant that, he would complete the

project with Occupancy Certificate ready for registration and possession by December-2016, with 6 months grace period i. e tll June-2017, whereas, did not complete as promised, even now. Had the respondent not promised as such, the complainant would not have purchased the flat. Thirdly, the respondent fraudulently mis-represented and promised to the complainant that, the project would be consisting of certain world class amenities and specifications as mentioned in its sale brochure, the internet advertisements, various discussions held with the complainant at the time of booking Dt. 29-12-2015, so also, in the agreement for sale Dt. 10-05-2016, whereas, did not intend to provide the same, nor forthcoming fro the project even to this date.

I have booked my flat with Shivaraj N Arali, on 29-12-2015, we both, have almost same grievance. I have authorized him to act for me, instructed to filed this case, as I am in Japan on work, authorized him to represent my cause. I have even filed authorization authorizing him to represent me.

Relief Sought from RERA : Refund of Rs. 7272725/- with 24% interest and comp

After registration of the case notice has been issued the parties. In pursuance of the same Complainant was present through his authorised person where as the Respondent – Developer has appeared through his counsel. The developer and Complainant tried to resolve the issue out of court but failed in the attempt and hence finally argument was placed on both sides. At the time of argument the authorised person of the complainant submits that the documents produced in complaint No. 931 and the arguments placed in the said case may be adopted.

The Complainant has filed this Complaint seeking the relief of refund of total amount paid to the developer with interest at the rate of 24% per annum. The Respondent has strongly opposed the case of the Complainant and submitted that the Complaint is not entitled for relief as sought in the Complaint.

Surprisingly the Respondent–Developer has claimed a counter claim with a prayer to this Authority to direct the Complainant to pay remaining amount of Rs. 13,03,343/-

The Complainant has submitted his argument stating that no reasonable grounds are there to continue with the project because the title of the Developer over the land itself is in dispute. In this regard he has drawn my attention to suit filed by one Ramachandra Shetty in O.S.No. 25522/14 which was filed for the relief of specific performance. In fact the pendency of suit is not in dispute but according to the Respondent it is nothing to do with the claim of the Complainant. During the course of argument the Complainant has drawn my attention stating that the Developer has received the amount from the Complainant by suppressing the fact of dispute since there was cloud on the title of the Developer which clearly attracts Section 18(2) of RERA Act. In spite of pendency of the suit regarding the title the Developer has entered into agreement of sale where in the complainant has paid nearly more than 95% of the total consideration amount. This is nothing but an unfair practise. In case the Complainant takes the Sale Deed by continuing with the project it would be considered as fraudulent Sale Deed.

Further it is his contention that the Complainant is having sufficient valid and legally enforced reasons for opting the Cancellation of agreement. But the same was strongly opposed by the other side. The original suit filed by Ramachandra Shetty is not pertaining to the whole land covered in the project but it was restricted only to 3.12 acres which is nothing to do with the case of the Complainant.

Project was ought to be completed in the month of June 2017 but on account of induction of RERA and on account of provision available in RERA the completion date was shown as 31/12/2018. The counsel for the Developer submitted that the Developer will be able to give possession of the flat with OC before the time line as mentioned in the RERA. He further submits that he is ready to pay the delay compensation at the rate of Rs. 6/- per sq.ft, from July 2017. In case of cancellation from the Complainant as per clause 12.1 of agreement for sale an amount of Rs.100/- per sq.ft, will be forfeited by the Developer.

However at the time of argument, the counsel for the complainant has submitted his argument on various other aspects, he has drawn my attention to say that the developer ought to have fixed the price of the flat towards the carpet area but as per the agreement he is calculating the price on the super built up area.

As per the agreement the developer was expected to give the possession by the end of 2016, but the respondent submitted that there is an additional 6 months grace period. The same was opposed by saying that 6 months grace period should be given only in case of all the amenities are given.

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*"

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 10/5/2016 with number of clauses, they are all binding upon each other. In the said agreement the consumer has agreed to pay electricity and water charges separately.

The question of considering the carpet area comes into picture only after the induction of this Act. Here the parties have entered into agreement in the year 2016 and at that time this Act was not introduced. Hence, the submission made by the complainant that the super built up area is not correct but it is to be calculated only to the carpet area holds no water. Moreover it is the terms of the parties for which they have agreed to act upon it.

According to the agreement if the purchaser cancels the agreement without any default on the part of developer then only the developer is entitled to recover the amount of Rs. 100 per sq.ft. But the complainant submits that he is going out of the project on account of the fault on the part of the developer. In this regard he has drawn my attention to the proceeding of the civil dispute under O.S no. 25522/14 was filed on 27/03/2014 but the agreement was executed by the developer was on 10/05/2016. It means the consumer wanted to say that the developer has entered into agreement with the consumer even though he was involved in the dispute where his title is questioned. In view of the words used in S.18 and the delay caused in completion of the project, the developer has lost his right of forfeiture.

The complainant has vehemently argued before me that he is entitled for the entire amount with loss sustained by him. I have already refereed 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. But the word compensation 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.*

From the above principle as well the conditions imposed in the agreement regarding forfeiture clause I would say that the developer cannot exercise his right of forfeiture and he has to return the amount to the consumer. Hence, the complaint is to be allowed.

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 is going to complete the project by the end of this year. Further it is his case that the flat is ready for occupation. The developer has submitted in his objection statement to the effect that the complainant can occupy the same by tendering the rest of the sale consideration. 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.

The complainant has given the following decisions in support of his claim.

Delhi High Court

Capital Hotel And Developers Ltd, vs Delhi Development Authority on 22 September, 2004

This decision has been given to say that the developer was under an obligation to disclose the pendency of the suit. In

fact according to the developer he has disclosed but not mentioned in the agreement at the behest of complainant.

NATIONAL CONSUMER DISPUTES REDRESSAL COMMISSION, NEW DELHI

CONSUMER CASE NO. 503 OF 2015

1. BHUPESH GUPTA & AN.R

38, CHETAN ENCLAVE, PHASE II, JAIPUR ROAD,

ALWAR RAJASTHAN

Versus

1. M/S. UNITECH LTD.

THROUGH ITS MDs) THE REAL ESTATE MARKETING

DIVISION, 6, COMMUNITY CENTRE,

SAKET, NEW DELHI – 110017

CC No. 511/2015 & CC No. 1046/2015

I would like to say the above decision is not helpful to him because the rate of interest has been prescribed.

In view of the same I would say that the complainant is entitled for refund of his amount along with applicable interest from the date of this complaint.

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 22/06/2018. As per SOP, 60 days shall be computed from the date of appearance of the parties. In this case the parties were present on 24/07/2018. Further parties tried to resolve the issue as per S.32(g) of the Act, but could not reach. After filing objections and hearing the parties, the case is reserved for orders. Hence, there is a little delay in closing the complaint. With this observation I proceed to pass the order.

ORDER

a) The Complaint No. **CMP/1806622/0000944** is allowed.

b) The developer is hereby directed to return the whole amount received from the complainant without deducting together with interest at 10.25% on the principal sum commencing from 01/05/2017 till the realisation of entire amount.

c) In case the developer has paid the GST, then the developer has to give necessary documents to the complainant to enable him to claim the same from the concerned department.

d) The complainant shall execute the cancellation deed in favour of the developer after realisation of entire amount.

e) Intimate the parties regarding this order.

(Typed as per dictation Corrected, Verified and pronounced on 31/10/2018)

(K. PALAKSHAPPA)

Adjudicating Officer