



HARYANA REAL ESTATE REGULATORY AUTHORITY
GURUGRAM

हरियाणा भू-संपदा विनियामक प्राधिकरण, गुरुग्राम

New PWD Rest House, Civil Lines, Gurugram, Haryana

नया पी डब्ल्यू डी. विश्राम गृह, सिविल लाईंस, गुरुग्राम, हरियाणा

**BEFORE S.C. GOYAL, ADJUDICATING OFFICER,
HARYANA REAL ESTATE REGULATORY AUTHORITY
GURUGRAM**

Complaint No. : 1595/2018
Date of Decision : 14.10.2019

Shri Rabinder Bahl
R/o 16E, Elvaston Place, South Kensington,
London through its Power of Attorney Holder
Shri Manish Sachdeva, S/o Dr. B D Sachdeva, R/o
21/2, Jasmine Street, Vatika City, Sohna Road,
Gurugram

Complainant

V/s

M/s Ramprastha Promoters & Developers Pvt Ltd.
C-10, C Block Market, Vasant Vihar,
New Delhi-110017

Respondent

Argued by:

For Complainant

Mr. Sushil Yadav, Adv

For Respondent

Mr. Dheeraj Kapoor, Adv

ORDER

This is a complaint under section 31 of the Real Estate(Regulation and Development) Act, 2016 (hereinafter referred to Act of 2016) read with rule 29 of the Haryana Real Estate(Regulation and Development) Rules, 2017(hereinafter referred as the Rules of 2017) filed by Shri Rabinder Bahl R/o 16E, Elvaston Place, South Kensington, London

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seeking refund of amount deposited with the respondent for booking of a flat in its project known as "Primera" in Sector 37-D, Gurugram measuring 1695 sq. ft. bearing No. 1701, 17th Floor in Tower A for a sum of Rs. 1,04,75104/-on account of violation of obligations of the promoter under section 11(4)(a) of Real Estate(Regulation and Development) Act, 2016. Before taking up the case of the complainant, the reproduction of the following details is must and which are as under:

Project related details		
I.	Name of the project	Ramaprastha Primera
II.	Location of the project	Sector-37-D,Gurgaon, Haryana
III.	Nature of the project	Residential (construction link plan)
Unit related details		
IV.	Unit No. / Plot No.	1701 17 th Floor,
V.	Tower No. / Block No.	Tower A
VI	Size of the unit (super area)	1695 sq.ft
VII	Size of the unit (carpet area)	-DO-
VIII	Ratio of carpet area and super area	-DO-
IX	Category of the unit/ plot	Residential
X	Date of booking	03.10.2012
XI	Date of execution of BBA (copy of BBA be enclosed as annexure 1)	03.10.2012
XII	Due date of possession as per BBA	03.08.2017
XIII	Delay in handing over possession till date	More than 1 year

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XIV	Penalty to be paid by the respondent in case of delay of handing over possession as per the said BBA	As per clause 17 of BBA
Payment details		
XV	Total sale consideration	Rs.1,04,75,104/-
XVI	Total amount paid by the complainant till date	Rs. 24,01,664/-.

2. It is the case of the complainant that relying upon advertisements in various newspapers as well as electronic media for the project of respondent known as Primera, Sector 37-D, Gurugram on 03.10.2012 he booked the above mentioned flat measuring 1695 sq ft for total sale consideration of Rs.1,04,75,104/- inclusive of BSP, car parking, IFMS, club membership, PLC etc. and paid a total sum of Rs. 24,01,664/- to the respondent vide various cheques. A Builder Buyer Agreement was executed between the parties. It is the case of the complainant that the project was to be completed by the respondent upto 03.04.2017 and hand over the possession of the allotted unit within a period of 54 months. Though, he paid a substantial amount to the respondent and the remaining amount was to be paid as per the instalments as the project was having a construction linked plan, but the respondent failed to perform its part of the contract and start construction at the spot. When despite a number of reminders, the respondent failed to perform its part of the contract and start construction at the spot, the complainant was left with no other alternative but to seek refund of the amount deposited besides interest and other charges.

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3. But the case of the respondent as set up in the reply dated 26.09.2019 is that though the complainant booked a flat in its project known by the name of "Primera" but he is an investor and Builder Buyer Agreement was not executed by him. It was also pleaded that the complainant booked a flat under the construction linked plan but failed to adhere to the schedule of payment and committed default in the same. So, being defaulter, he is not entitled for refund of the amount deposited with the respondent. It was further pleaded that though the complainant alongwith other allottees did not pay the amount due but the respondent had to continue with the construction of the project and which would be ready by March, 2020. It was denied that the complainant ever visited the site of the project. In fact, he is a non-resident Indian and invested in the project of the respondent just for the sake of monetary benefits and not for the purpose of residence.

4. All other averments made in the complaint were denied in toto.

5. To decide the rival pleas, following issues arise for consideration:

I) Whether the respondent/developer violated the terms and conditions of the alleged Builder Buyer Agreement?

II) Whether there was any reasonable justification for delay to offer the possession of the allotted unit?

III) Whether the claimant is entitled for refund of paid amount?

6. I have heard the learned counsel for both the parties and also perused the case file.

7. It is not disputed that earlier, the complaint filed by the complainant was pending before the Authority and the same was received on transfer by this forum in view of orders dated 16.05.2019. It is also not disputed that

earlier, the complaint moved by the complainant through his attorney and

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the same was neither duly attested by the concerned Consul General of India nor stamped by the Collector of Stamps, Gurugram. So, that led to filing of an application by the respondent for rejection of the complaint. It was directed vide orders dated 03.04.2019 passed by the learned Authority that the grievances of the respondent raised in this regard would be taken into consideration while passing the final orders. It was also directed that the complaint filed by the complainant be got signed from him. That order was complied with on 03.04.2019 itself. So, in view of those facts, the learned authority passed an order dated 23.04.2019 with the following observations:

In view of the changed circumstances, the complaint should be decided on the material facts and it should not either be modified or allowed to strangled on account of some formalities as the complainant himself come in present and signed the application. There is nothing to re-numbered or re-filing of complaint by way of rejuvenation and the bench proceeds to decide the matter on merit on the basis of facts.

8. It is contended on behalf of the respondent by its counsel that though there are findings in this regard with regard to maintainability of complaint but the amended complaint was neither signed by the complainant nor his attorney. So, the same is not maintainable and is liable to be rejected. But the plea raised in this regard is devoid of merit. Once, it has been decided by the learned Authority that the complaint be decided on material facts and should neither be modified or allowed to strangled on account of some formalities, then, the plea now being raised by the respondent in this regard is not tenable. Thus, the complaint filed by the complainant seeking refund of the amount deposited with the respondent in its project known as 'Ramprastha Primera' situated in Sector 37-D, Gurugram is very much maintainable.

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9. It is the case of the complainant that he booked a flat with the respondent in its project known as 'Ramprastha Primera' for a sum of Rs.1,04,75,104/- and paid a sum of Rs.24,01,664/-. A reference in this regard has been made to documents R-1 and R-II. There is dispute about execution of apartment buyer agreement. It is contended by the learned counsel for the respondent that there is no Apartment Buyer Agreement executed between the parties. The complainant was asked to come present and execute that agreement but he failed to put in appearance and sign that document. So, unless there is due execution of that document, the same cannot be relied upon to decide the controversy between the parties. Secondly, it is pleaded that the complainant booked a flat under the construction linked plan in its project known as Primera. Since he failed to honour his commitment by executing the flat buyer agreement and pay the instalments due so, the respondent was within its right to forfeit the amount deposited by him with it and he cannot take benefit of terms and conditions mentioned in alleged BBA or to challenge the validity of the same. A reference in this regard has been made to the ratio of law laid down in cases of: **Bihar State Electricity Board, Patna and Ors Vs Green Rubber Industries and Ors, AIR 1990, SC699, Bharathi Knitting Co. Vs DHL Worldwide Express Courier Division of Airfreight Lt., AIR1996, SC,2508, Ginni Garments and Ors Vs Sethi Garments and Ors, MANU/PH/0330/2019, and G. J. Raja Versus Tejraj Surana, MANU/SC/1002/2019** and wherein it was held that terms of the contract have to be liberally considered and decided and consequently, the parties are bound by such contract and cannot wriggle out. Moreover, once the respondent has make out a case for forfeiting of the amount deposited with it by the complainant as per terms and conditions of booking contained in annexure R-1, then the burden shifts upon him to say otherwise. A reference

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in this regard has also been made to the ratio of law laid down in case of ***Pioneer Urban Land & Infrastructure Ltd Vs Govindan Raghvan in Civil Appeal No.12238 of 2018 decided on 02.04.2019 by the Apex Court of the land***

10. But on the other hand, it is contended on behalf of the complainant that he deposited a sum of Rs. 24,01,664/- with the respondent on different dates for booking of a residential flat in its project known as Primera in the year 2012 under the construction linked plan. But when the respondent failed to start construction of the project and offer possession within the stipulated time, then the complainant was not bound to proceed further and so he is entitled to withdraw from the project and seek refund of the amount deposited. Moreover, even after waiting for a number of years, the project is not complete and so, the complainant was left with no other alternative but to seek refund of the amount with the respondent. The complainant also send a number of mails w.e.f. 06.03.2014 to 05.03.2019 to the respondent seeking withdrawal from the project and refund of the amount deposited with it. A reference in this regard has been to a number of mails i.e. 24 in number exchanged between the parties and annexed with the case file by the complainant.

11. It is not disputed that on 03.10.2012, the complainant booked a flat in the project of the respondent known by the name of "Primera" for a sum of Rs. 1,04,75,104/- and was issued allotment letter annexure R-2. He paid different amounts with the respondent since 03.10.2012 and totalling to the tune of Rs.24,01,664/-. Though a Builder Buyer Agreement was to be executed between the parties but there was delay in the execution of the same. A perusal of that document shows signatures of complainant but not of the respondent. However, a perusal of paper book at page 38 of annexure R-1 shows the booking of flat by the complainant with the respondent for a

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sum of Rs.1,04,75,104/- under the construction linked plan. Its acceptance through Sanchit Aggarwal, Assistant Manager of the respondent and duly accepted by the complainant shows that the booking of the latter for residential unit by the respondent was accepted. Later on, on 22.03.2015 as well as on 22.03.2017 demand letters-cum-invoices for Rs.19,49,499/- and Rs.60,12,113/- were issued by the respondent and ^{the same} to be paid by the complainant within 15 days from the issuance of those letters. Moreover, if the complainant was not paying any other amount except already paid to the respondent for the residential unit allotted to him under the construction linked plan, then, the latter was fully competent to cancel the same and refund the remaining amount after deducting certain percentage of that amount. But that was not done despite sending emails and confirming the same vide communications dated 16.09.2014 and 19.12.2014 send by the respondent to the complainant, ^{through e-mails} There is also another letter annexure R-2 at page 48 dated 01.08.2013 confirming the booking of the flat by the complainant with the respondent for a sum of Rs.1,04,75,104/- on 18.07.2013 and receiving a sum of Rs.24,01,664/-. So, now, the issue for consideration arises as to whether there is delay in payment of remaining instalments by the complainant on the basis of acceptance of his offer and secondly, whether the respondent can forfeit the deposited amount and refuse to refund the same despite withdrawal from the project? the answer to these issues is in the negative. A similar question arose for consideration before the hon'ble Apex Court of the land in case Central Inland Water Transport Corporation Limited and Ors Vs Brojo Nath Ganguly and Ors. and others (1986) 3SCC 156 and wherein it was observed that under:

"..... Our judges are bound by their oath to 'uphold the Constitution and the laws'. The Constitution was enacted to secure to all the citizens of this country social and economic justice. Article 14 of the Constitution guarantees to all persons equality before the law and equal protection of the laws. This principle

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is that the courts will not enforce and will, when called upon to do so, strike down an unfair and unreasonable contract, or an unfair and unreasonable clause in a contract, entered into between parties, who are not equal in bargaining power. It is difficult to give an exhaustive list of all bargains of this type. No court can, visualize the different situations which can arise in the affairs of men. One can only attempt to give some illustrations. For instance, the above principle will apply where the inequality of bargaining power is the result of the great disparity in the economic strength of the contracting parties. It will apply where the inequality is the result of circumstances, whether of the creation of the parties or not. It will apply to situations in which he can obtain goods or services or means of livelihood only upon the terms imposed by the stronger party or go without them. It will also apply where a man has no choice, or rather no meaningful choice, but to give his assent to a contract or to sign on the dotted line in a prescribed or standard form, or to accept a set of rules as part of the contract, however, unfair, unreasonable and unconscionable a clause in that contract or form or rules may be. This principle, however, will not apply where the bargaining power of the contracting parties is equal or almost equal. This principle may not apply where both parties are businessmen and the contract is a commercial transaction

.....These cases can neither be enumerated nor fully illustrated. This court must judge each case on its own facts and circumstances".

Further, It was also observed in case **Pioneer Urban Land & Infrastructure Ltd Vs Govindan Raghvan (supra)** that the terms 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 lines on a contract framed by the builder. The contractual terms of document dated 02.07.2013 are ex- facie one-sided, unfair and unreasonable. The incorporation of such one-sided clause as mentioned above 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/plots by the builder. So, in such a situation, the respondent/promoter can not seek to bind the complainant with such one-sided contractual terms of the so called agreement. Lastly, in case

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Neelkamal Realors Suburban Pvt Ltd. Vs Union of India & Ors. (CWP-2737/2017) the Hon'ble Bombay High Court observed as under:

“ Agreements entered into with individual purchasers are invariably one sided standard-format agreements prepared by the builders/developers and which are overwhelmingly in their favour with unjust clauses on delayed delivery, time for conveyance to the society, obligations to obtain occupation/completion certificate etc. Individual purchasers had no scope or power to negotiate and had to accept these one-sided agreements.”

Even, in case of **Fortune Infrastructure & Anr Vs Trevor D'Lima & Ors(2018) 5 SCC 442**, it was held by the hon'ble apex court of the land that a person cannot be made to wait indefinitely for possession of the plot allotted to him and is entitled to seek refund of the amount paid by him alongwith compensation.

12. Though, it is pleaded on behalf of the respondent that the complainant is an investor being NRI and does not come within the definition of Consumer as defined under the Consumer Protection Act, 1986 by relying upon the ratio of law laid down in case of **Manohar Damecha Vs Lavasa Corporation Ltd.** Manu/CF/0357/2016 wherein it was held that when a non-resident Indian purchases a property like the complainant then the complaint filed by him before the consumer forum is not maintainable. But again the plea taken in this regard is devoid of merit. The complainant is an allottee of the flat in question and deposited substantial amount with the respondent. He even withdrew from the project of the respondent in the year 2014 by writing an email on 10.09.2014 and confirmed by the respondent ^{for} by taking up follow up action vide its email dated 16.09.2014. The complainant did not deposit the remaining amount due under the construction linked plan as the respondent failed to start construction and complete the project. It is not proved that the respondent was not in a position to complete the project due to non deposit of various instalments due by the complainant and other

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allottees. So, in such a situation, the complainant is entitled to seek refund of the amount deposited with the respondent and complaint filed in this regard is maintainable. So, findings on Issue No. I & II are hereby ordered to be returned accordingly.

13. It is evident from a perusal of the factual as well as legal issues mentioned above that though the complainant booked a residential unit in the project of the respondent under construction linked plan and deposited a total sum of Rs.24,01,664/- on different dates. ^{he} But, did not deposit the remaining amount due as he withdrew from the project in the year 2014 and the latter having failed to complete the project and to offer possession of the allotted unit to him. Moreover, acceptance of a total sum of Rs.24,01,664/- since the year 2012 and issuance of allotment letter annexure R-1 shows that the respondent allotted a residential unit to the complainant in its project, namely, "Primera" for a total sale consideration of Rs.1,04,75,104/-. Though the Builder Buyer Agreement was not signed by the allottee but it was then the duty of the respondent to cancel the allotment of the residential unit and to pay back the remaining amount after deducting certain amount. The total sale consideration of the allotted unit to the complainant was Rs.1,04,75,104/- and he admittedly ~~the~~ deposited a sum of Rs.24,01,664/- with the respondent before he opted for withdrawal from the project on 10.09.2014. A follow up action was also taken by the respondent by writing an email dated 16.09.2014 to the complainant. Despite exchange of emails, nothing concrete came out since 16.09.2014 to upto date and the last email having been sent by the complainant to the respondent on 05.03.2019. The respondent rather waited for the complainant to come and knock at the doors of this forum for refund of the amount deposited with it. So, in view of law laid down in case of **Fortune**

Infrastructure & Anr Vs Trevor D'Lima & Ors(2018) 5 SCC 442, the complainant

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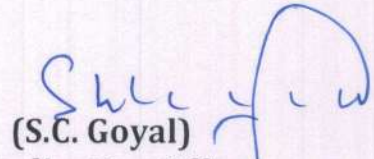
being a allottee cannot be made to wait indefinitely for possession of the allotted unit and is certainly entitled to seek refund of the amount deposited with the respondent.

14. Thus, in view of my discussion above, it is held that the complainant is entitled to seek refund from the respondent of the amount of Rs.24,01,664/- besides interest @ 10.25%p.a. from the date of different payments till the date of actual payment.

15. This order be complied with by the respondent within a period of 90 days from the date of this order and failing which legal consequences would follow.

16. File be consigned to the Registry.

14.10.2019


(S.C. Goyal)
Adjudicating Officer,
Haryana Real Estate Regulatory Authority
Gurugram 14/x/2019

Judgement uploaded on 27.05.2020