



HARERA
GURUGRAM

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. : 5031/2019/154/2018
Date of Decision: 10.02.2020

**Ms. Shivani Dewan, Resident of 15,
Club Lane, Karnal - 132001, Haryana.**

Complainant

V/s

**M/s S.S Group Pvt. Ltd. 77, SS House,
Sector-44, Gurugram, Haryana.**

Respondent

Argued by:

For Complainant

Ms. Priyanka Agarwal, AR

For Respondent

Mr. C.K. Sharma Advocate

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 Smt. Shivani Dewan seeking refund of Rs. 36,21,040/-/- deposited with the respondent for booking of a residential unit No.23A, located on 23rd floor, Tower No.2 in the project known as "The Leaf", situated in Sector-84-

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85 Gurugram 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 | The Leaf, Sector 84-85, Gurugram |
| II. | Location of the project | Sector 84-85, Gurugram |
| III. | Nature of the project | Residential |

| Unit related details | | |
|----------------------|--|-----------------------------|
| IV. | Unit No. / Plot No. | 23A, 23rd floor, Tower No.2 |
| V. | Tower No. / Block No. | Tower 2 |
| VI. | Size of the unit (super area) | 1690 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 | 23.07.2012 |
| XI. | Date of Allotment | |
| XII. | Date of execution of FBA (copy of FBA be enclosed as annexure-1) | 17.10.2013 |
| XIII. | Due date of possession as per FBA | 17.01.2017 |
| XIV. | Delay in handing over possession till date | More than three years |

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| | | |
|------------------------|--|---|
| XV | Penalty to be paid by the respondent in case of delay of handing over possession as per the said FBA | As per clause 8.3(a) of Flat Buyer Agreement Annexure P/2 |
| Payment details | | |
| XVI | Total sale consideration | Rs.92,31,240/- |
| XVII | Total amount paid by the complainant till September, 2014 | Rs. 36,21,040/- |

2. It is the case of the complainant that being a lecturer, she was to shift to Delhi/Gurugram for the welfare of the family. So, allured by the advertisements of the respondent and believing its version in good faith, she booked a flat in its project "The Leaf" having approximately 1690 sq. feet on 23.7.2012 by depositing a sum of Rs.7,50,000/-. An acknowledgement in this regard was issued by the respondent. A further payment of Rs.19,65,780/- was also made and that amount was also paid by the complainant on 15.07.2013 vide Annexure E1. A Flat Buyer Agreement Annexure P/2 was executed between the parties on 17.10.2013 and as per clause 3.8 (b), the target date of offer of possession was mentioned as 51 months. It is also the case of the complainant that though she continued to make payment of the amount due to the respondent and paid a total sum of Rs.36,21,040/- upto July 2014 but the latter failed to complete the project and offer her possession of the allotted unit. A reminder Annexure P/3 with regard to payment of remaining amount was made by the respondent but it failed to offer possession of the allotted unit so as to take 2-3 years more. It is further the case of the complainant that since respondent failed to complete the construction of the allotted unit within the prescribed period and offer its possession, so, she was left with no other alternative but to file a complaint seeking refund of the amount deposited with it.

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within the parameters of form CAO as provided under rule 29 of the Rules, 2017.

5. After both the parties put in appearance, they filed their amended pleadings reiterating their earlier pleas.

6. Since, it was not evident from the pleadings of the parties as to what was the pace and stage of construction of the project in which the complainant was allotted a unit by the respondent, so vide orders dated 25.11.2019, passed by this forum, a local commission was appointed to visit the project site of the respondent and to report on the following points:-

i) What is the status of the project known by the name "The leaf" (Group Housing Complex of SS Group) situated in Sectors 85-85, Gurugram.

ii) To report about the status of completion of Tower-2 in the above named project and its completion.

iii) Whether the project named above would be complete by 31.12.2019 as mentioned in Registration Certificate dated 01.05.2019.

7. In pursuance to the directions passed by this forum, Mr. Sumeet Kumar, Engineer Executive, consisting of a team of Harera visited the project site and gave report dated 10.12.2019 with the following conclusions being reproduced as under:-

a) The physical progress of over all project is approximately 65-70%

b) The physical progress of complainant Tower T2 is approximately 45-50%.

c) The physical progress of complainant unit is approximately 60-65%

No objections to that report were filed by either of the parties.

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

9. Some of the admitted facts of the case are that the complainant booked a flat bearing No.23A, located in Tower-2 on 23rd floor in the project of the respondent known as "The Left" situated in sectors 84-85, Gurugram on 23.07.2012 by paying a sum of Rs.7,50,000/- against the total sale consideration of Rs.92,31,240/-. A Flat Buyer Agreement Annexure P/2 dated 17.10.2017 was subsequently executed between the parties. A perusal of that document shows that the project of the respondent was to be completed by 17.01.2018 i.e the target date of specified period of 51 months. Though, the complainant continued to pay different amounts approximately of a sum of Rs. 36,21,240/- by 21.07.2014 but failed to make payment of the remaining amount. It is the case of the complainant that since there was no progress of construction at the site of the project, so she did not deposit the remaining amount with the respondent. Admittedly, she had already deposited 40% of the total sale consideration of Rs.92,31,240/-towards allotment of the flat with the respondent by July 2014 and did not deposit any amount after that. So, now the question for consideration arises as to whether in such a situation, the complainant is entitled for withdraw from the project and seek refund of the amount deposited with the respondent. It is contended on behalf of the complainant that since the respondent failed to complete the project within the stipulated period, so, she was left with no other alternative but to withdraw from the project and is entitled to seek refund. Reliance in this regard has been placed on the ratio of law laid down in case of Vijay Kumar and another versus M/s S.S.Group Private Limited and others -, Consumer case No.706/15 decided on 20.11.2018 and wherein the Hon'ble National Consumer Disputes Redressal Commission, New Delhi allowed the complaint and ordered refund of the

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amount deposited with the respondent in the project in which the complainant was allotted a residential unit. Thus, it has been argued that the complainant is entitled to seek refund of the amount deposited with the respondent.

10. But, on the other hand, it is contended on behalf of the respondent that though earlier the complainant filed a complaint against the respondent for refund of the amount deposited with it but that was declined by the learned Authority vide its order dated 12.09.2018. Though, that order was set aside in appeal but with a direction to the allottee to amend the complaint. So, the order passed in this regard should be taken into consideration by this forum. Secondly, the complainant is a defaulter and failed to make any payment towards the allotted unit after July 2014. It was obligatory for her to adhere to the schedule of payment as mentioned in letter of allotment Annexure R/2 and payment plan. Then, out of her free will and consent, she executed a Flat Buyer Agreement Annexure P/2 on 17.10.2013. Since she failed to adhere to the schedule of payment and committed default in the same, so, she was sent a number of communications through e-mail starting from 20.08.2015 to 27.02.2018 (14 in number). Even prior to that vide letter dated 06.12.2013, the complainant was sent a notice for cancellation of the unit due to non-payment of the amount due. She admittedly received that letter and replied vide two letters dated 13.12.2013 and 18.12.2013 admitting the delay due to financial hardships and assured to pay the future instalments in a time bound manner. So, all this shows that against a total sum of Rs.92,31,240/- the complainant paid only a sum of Rs.36,21,040/- upto July 2014. So, now she cannot ask for refund of the amount deposited with the respondent being a defaulter and is liable to pay remaining amount as the project is going to be completed very soon. Moreover, in a situation like this where the project of the respondent

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is going to be completed very soon, even otherwise evident from report of the local commission dated 10.12.2019, refund cannot be allowed.

11. The complainant was allotted a residential unit by the respondent on 23.07.2012 detailed above for a total sum of Rs.92,31,240/-. She initially deposited a sum of Rs.7,50,000/- and later on a sum of Rs.19,65,780/-. So that led to execution of a Flat Buyer Agreement Annexure P/2 between the parties on 17.10.2013. It is provided in that document that the date of possession of the allotted unit would be 36 months + 90 days of grace period i.e. 17.01.2017. A period of more than three years admittedly expired and the project of the respondent is still incomplete as is evident from the report of the local commission dated 10.12.2019. It is mentioned in the conclusion arrived at by the local commissioner that though the physical progress of the tower of the respondent (T-2) is approximately 45-50 per cent but the physical progress of her unit is approximately 60-65 per cent. Even the validity of the project in which the allotted unit of the complainant is situated expired on 31.12.2019. It is not proved that the same has been extended beyond that period. Now, in such a situation, the question for consideration arises as to when both the parties failed to comply with contractual obligations then whether they can take the benefit of the same. It is evident from perusal of the Flat Buyer Agreement dated 17.10.2013 Annexure P/2 that the complainant was required to make payment towards the allotment of the residential unit as per terms and conditions embodied in allotment letter dated 10.09.2012, Annexure R/2. Though she made payment of a total sum of Rs.36,21,040/- by July 2014 i.e. 40% of the total amount of Rs.92,31,240/- but did not pay the remaining amount due to financial constraints as is evident from Annexures R/3 (consisting of page No. 42 to 55), Annexure R-4 (consisting of page 59 to 63), Annexure R-8 (consisting of page 68, 69, 71, 72, 74, 75, 78 to 93) and Annexure R-9 on the file. A perusal

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of letter dated 06.12.2013 sent by the respondent to the complainant shows that the latter was directed to remit the remaining amount. It was replied vide letters dated 13.12.2013 and 18.12.2013 by the complainant expressing inability to pay the remaining amount due to unwillingness of the financial institutions to finance the allotted unit. So, a request was made to waive off interest with a promise to pay the remaining instalments with late charges and not to unilaterally cancel the unit. Whether in the face of financial constraints as expressed by the complainant and despite a number of reminders sent to her, the respondent was required to complete the project; the answer is in negative. Even some other allottees just like the complainant failed to make payment of the amount due as and when demanded. So that was the reason, the project in which the complainant was allotted a unit could not be completed. Then, it has come in the version of the respondent that delay in completion of the project is due to various factors such as shortage of labour, non-availability of construction material, demonetisation, committing default in making payments by the various allottees including the complainant and various other factors. Now, the complainant withdrew from the project as the same has not been completed within the stipulated period and is seeking refund of the amount deposited by relying upon the ratio of law laid down in case of Vijay Kumar and another (Supra). There is no dispute about the ratio of law laid down in this case but that was dealt with by the National Consumer Disputes Redressal Commission, New Delhi under the Consumer Protection Act, 1986 and not the Real Estate (Regulation & Development) Act, 2016. Secondly, it is to be seen as to whether the parties to the dispute adhered to Flat Buyer Agreement P/2. The total sale price of the allotted unit to be paid by the complainant to the respondent was Rs.92,31,240/- and the same was to be paid at different stages from the date of booking i.e. 23.07.2012 upto the

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stipulated period as embodied in Flat Buyer Agreement P-2 i.e. 36 months from the date of signing of that document with a grace of period 90 days. A perusal of statement of account filed shows that upto April 2015, the complainant deposited a sum of Rs.36,21,040/-. There was delay of different duration of period in deposit of various amounts upto April, 2015. After that, the complainant did not make any payment and the due amount upto 12.11.2019 was Rs.56,57,190/-. So, it is a case where the complainant failed to fulfil her contractual obligations as contained in Flat Buyer Agreement and the respondent failing to complete the construction within the stipulated period as provided in Clause 8.1(a) of that document and which is being reproduced as under:

Subject to term of this clause and subject to the Flat Buyer Agreement having complied [with all the terms and conditions of this Agreement and not being in default under any of the provisions of this Agreement and complied [with all provisions, formalities, documentation etc. as prescribed by the developer, the developer proposes to hand over the possession of the flat within a period of 36 months from the date of signing of this agreement, the flat buyer agrees and understands that the developer shall be entitled to a grace period of 90 after the expire of 36 months for applying and obtaining the occupation certificate in respect of the group housing complex.

It is evident that the due date of possession as per that agreement comes to 15.10.2016 with a grace period of 90 days. Admittedly, neither the respondent has offered possession of the allotted unit to the complainant nor applied for occupation certificate. Even as per the report of local commission dated 10.12.2019, the physical progress of the complainant's Tower-2 is approximately 45 to 50% though her unit is approximately 60-65% complete. Though, in such a situation, the complainant would have been entitled for delayed possession charges but since she wants to wriggle out from the project and is insisting to get money back, so keeping in view

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the status of the project as evident from report of local commission dated 10.12.2019 and delay in completing the same for more than three years and which may take long time, she is allowed to withdraw from the project but have to forgo 10% of the total sale consideration. Besides, the complainant would also liable to pay service tax and other taxes deposited with the Government by the respondent. A similar situation arose in case of Major General Bhaskar Kalita and Anr. Vs M/s Selene Constructions Ltd. bearing complaint No.2253 of 2018 decided on 26.07.2019 by the learned Authority, Gurugram and wherein despite an offer of possession after a period of 9 ½ months from the due date of the completion of the project, the refund of the deposited amount was allowed to the complainants. The order passed in regard was challenged by the complainants before the Hon'ble Haryana Real Estate Appellate Tribunal vide Appeal No.347 of 2019 and who vide orders dated 23.12.2019 affirmed the same by observing that there is no illegality and infirmity in the impugned order handed down by the learned Authority.

12. So, taking into consideration all the material facts adduced by both the parties and the observations made above, the following directions to the respondent are hereby issued.

- i) the respondent is directed to refund the amount deposited by the complainant after deducting 10% of the total sale consideration;
- ii) the respondent would be at liberty to charge service tax and other taxes received from the complainant and deposited with the concerned authorities;

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iii) the order passed in this regard should be complied with within a period of 90 days from this order.

13. The complaint stands disposed of. File be consigned to the Registry

10.02.2020

(S.C. Goyal)
Adjudicating Officer,
Haryana Real Estate Regulatory Authority
Gurugram

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Judgement uploaded on 02.07.2020