

<u>New PWD Rest House, Civil Lines, Gurugram, Haryana</u> नया पी.डब्ल्यू.डी. विश्राम गृह, सिविल लाईंस, गुरुग्राम, हरियाणा

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

Complaint No. : 5681/2019 Date of Decision : 07.04.2021

Sudhir Bhargava & Anurag Bhargava 7/203, Swarup Nagar, Kanpur, Uttar Pradesh

Complainants

V/s

- M/s ATS Real Estate Builders Pvt Limited 711/92, Deepali Nehru Place New Delhi-110019
- (ii) ICICI Bank Limited Land Mark, Race Course Circle, Vadodra

Respondents

Complaint under section 31 of the Real Estate (Regulation and Development) Act, 2016

Argued by:

For Complainants: For Respondent No.1 For Respondent No. II Sh. Nikhil Pillai, Advocate Shri M K Dang, Advocate None

<u>ORDER</u>

This complaint has been preferred by Shri Sudhir Bhargava & Anurag Bhargava, complainants 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) seeking refund of Rs.1,53,53,945/- deposited for booking a flat bearing 4122, 12th Floor, Tower No.4 in its project known as "ATS MARIGOLD" located in Sector 89A, Gurugram for a sum of Rs.1,60,68,750/- besides taxes etc. on account of violations of obligations of the respondent/promoter under section 11(4) of the Real Estate(Regulation & 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	"ATS MARIGOLD" Sector 89-A Gurugram
11.	Location of the project	-do-
III.	Nature of the project	Residential
Unit	t related details	
IV.	Unit No. / Plot No.	4122
V.	Tower No. / Block No.	Tower-4
VI	Size of the unit (super area)	Measuring 2150 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
Х	Date of booking(original)	23.07.2015
XI	Date of Allotment(original)	24.09.2015(A-2)
XII	Date of execution of BBA	25.09.2015(A-3)
XIII	Due date of possession as per BBA	March, 2019

XIV	Delay in handing over possession till date	
XV	Penalty to be paid by the respondent in case of delay of handing over possession as per the said BBA	
XVI	Tripartite Agreement for Rs.1,21,44,700/-	Oct. 2015(A-4) Availed loan of Rs.1,11,73,196/- upto July, 2016
Payn	nent details	
XVI	Total sale consideration	Rs.1,60, 68,750/
XVII	Total amount paid by the complainant upto 07.08.2018	s Rs.1,53,53,945/-

2.

A project known by the name of ATS MARIGOLD located in Sector 89A-, Gurugram was being developed by the respondent No.1. The complainant coming to know about the same decided to book a flat in it for a total sale consideration of Rs.1,60, 68,750/- on 21.07.2015. A letter of allotment dated 22.09.2015 A/2 was issued in favour of the complainants. It also led to execution of Builder Buyer Agreement(A-3) dated 25.09.2015 between the parties. It is the case of the complainants that they also raised a loan of Rs.1,21,44,700/- from ICICI Bank by executing Tripartite Agreement A/4 on 08.10.2015. A part of the loan amount was disbursed to the complainants. So, in this way, they started paying various amount to the respondent-builder and paid a total sum of Rs.1,53,53,945/- upto 07.08.2018. The due date for completion of project and offer of possession of the allotted unit was fixed as March 2019. However, neither the respondent-builder paid pre-EMIs as agreed upon under the scheme of Subvention till possession nor offered possession by the due date. Though a number of reminders were issued to complete the project and offer possession of the allotted unit to them but without any positive result as evident from the emails Annexure 6 and Annexure 7 respectively. When the 7 4 20-1

complainants failed to get any positive response from the respondent-builder, they withdrew from the project and sought refund of the amount deposited with it to the tune of Rs.1,53,53,745/- besides interest and compensation on 16.11.2019.

3. But the case of the respondent-builder as set up in the written reply is that though the complainants booked a unit in the above mentioned project with it and executed various documents but they were not regular in making payment and committed default in the same. A number of reminders Annexure R/5 to R/9 were issued to them to make payment so as construction of the project may be completed but without any positive result. No doubt, the booking of the unit was made under the 'Subvention scheme' but it was denied that the payments as agreed upon were not made . In f act, all the pre-EMIs with interest amount were remitted by respondent No.1 to respondent No. 2 in a period of 36 months as per TPA. Though there was some delay in completing the project but that was due to demonetisation and various orders passed by different statutory authorities. However, the construction of the project is complete and only finishing work is to be taken up. The possession of the allotted unit would be offered to the complainants very soon. It was denied that there was any intentional delay in completing the project and offer of possession of the allotted unit to the complainants ..

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

5. The respondent No.2 did not turn up despite due service and as such it was ordered to be proceeded against ex-parte.

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

7. Some of the admitted facts of the case are that on 22.07.2015, the complainants booked a unit detailed above in the project of the respondent known as ATS Marigold situated in sector 89-A, Gurugram for a sum of Rs. 1,60,68,750/-. A formal allotment letter of dated 24.09.2015 (A/2) was issued in this regard. In pursuant

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to that BBA (A/3) was executed between the parties on 25.09.2015, the due date for completion of the project and offer of possession as per that document was March, 2019. The unit of the claimants was booked under the subvention scheme. So, TPA (A-4) was executed between the parties to the dispute on 08.10.2015. Though a sum of Rs. 1,21,44,700/- was sanctioned but a part of the same to the tune of Rs.1,11,73,196/-Was disbursed and paid to the respondentiby respondent No. 2. It is not disputed that the claimants paid a total sum of Rs. 1.53,53,945/-. to the respondent-builder upto 07.08.2018. It is their case that neither the respondent-builder was regular in paying pre-EMIs of the loan sanctioned in their favour by respondent no. 2 nor the construction of the project was going on at a proper speed. So, the same led to issuance of e-mails annexure A-6 and A-7 (a number of e-mails) by the complainants to the respondent-builder. Neither the respondent-builder communicated to them about the status of the project nor reimbursed regularly the amount of pre-EMIs. So, keeping in view all these facts, they withdrew from the project and sought refund of the amount deposited with it. In this regard, besides referring to documents detailed above, a reference has been made documents A-5, A-6 and vide which the claimants requested a number of times to the respondent-builder to pay pre-EMIs and inform them about the status of the project but without any positive result. The complainants had already paid a major part of the sale consideration and the due date for completion of the project and offer of possession of the allotted unit has already expired. So, in such a situation, the claimants are entitled to seek refund of the amount deposited with the respondent-builder.

8. But on the other hand, it is contended on behalf of the respondent No.1 that though the complainants booked a unit in its project detailed above and paid different amounts but there was delay in making scheduled payments leading to issuance of reminders annexure R-5 to R-9 on 14.03.2018, 04.04.2018, 16.05.2018, 22.05.2018 and 07.08.2018 respectively. Secondly, Inumber of factors also were responsible for delay in completion of the project such as Central Government's notification with regard to demonetization, orders passed by the National Green Tribunal in the years

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2015-2016-2017-2018 non-payment of scheduled instalments by the allottees, inclement weather conditions in the area of Gurugram and out break of Covid-19. Despite all these impediments, the answering respondent has been able to complete the project and is at the finishing stage and its possession would be offered soon to the complainants including the other allottees. It was denied that the respondent did not pay pre-EMIs against the loan raised by the claimants from respondent no. 2. In fact, as per Clause- 27 of TPA(A-4) it was an obligation of the answering respondent to pay pre-EMIs interest amount during the Subvention period defined as 36 months on behalf of the complainants which was otherwise payable by them. That amount was paid by it to respondent no. 2 on behalf of the complainants for a period of 36 months. Moreover, if the plea of the complainants with regard to refund is allowed at this stage, then it may jeopardise the interest of other allottees who are waiting for their dream homes. Thus the complaint filed by the complainants seeking refund is not maintainable and they are trying to avoid payment of remaining amount to it. So, instead of allowing refund of the amount deposited with it, they be directed to pay the remaining amount and take possession of the allotted unit.

9. Admittedly, the claimants booked a unit with the respondent-builder in its project ATS Marigold, situated in Sector 89-A, Gurugram on 23.07.2015 for a total sale consideration of Rs.1,60,68,750/-. It led to issuance of a formal letter of allotment dated 24.09.2015 as Annexure/2. It was followed by BBA dated 25.09.2015 A/3 executed between the parties. The due date for completion of the project and offer of possession of the allotted unit was March, 2019 inclusive of grace period. It has the come onlrecord that the allotment of the unit was made to the complainants under the 'subvention until possession scheme' and which led to execution of a Tripartite Agreement -A/4 between the parties on 08.10.2018. In pursuant to execution of that document a sum of Rs.1,21,44,700/- was sanctioned in favour of the complainants by respondent no.2 and a sum of Rs.1,11,73,196/- was paid to respondent-builder by the financial institution on behalf of the complainants. A perusal of that subvention till possession scheme shows that it was 36 months. Though it is pleaded on behalf of the C 4/2021

claimants that there was delay in making payments of pre-EMIs to respondent No.2 by respondent No.1 but that fact is belied and is against the record. There is some delay in making payment towards that account but document Annexure A/8 consisting of 24 pages proves otherwise. The complaint seeking refund of the amount deposited with the respondent-builder was filed by the complainants on 16.11.2019 and the due date for completion of the project and handing over possession of the allotted unit has already expired in March, 2019. It is pleaded on behalf of respondent No.1 that since, there was delay in making payment by the complainants as well as other allottees as evident from Annexure R/5 to R/9, so the construction of the project could not pick up. Secondly, the respondent also referred to documents Annexure R/1 to R/4 i.e. copies of orders dated 07.04.2019 passed by the National Green Tribunal, study of RBI and other studies/inspection reports, press releases, Environment Pollution (Prevention and Control) Authority for stoppage of construction activities in 2018 and report regarding weather conditions. But whether these factors are sufficient for delay in completion of the project and offer of possession of the allotted unit to the complainants. The answer is in the negative. Though photographs annexed with R/10 at page 88 to 89 shows stage and extent of construction but it cannot be said that the project is near completion and its possession is likely to be handed over to the allottees including complainants soon. In cases of Pioneer Urban Land & Infrastructure Ltd vs Govindan Raghvan(2019) 5, SCC, 725 Civil Appeal No.12238 of 2018 decided on 02.04.2019 and followed by Ireo Grace Real Tech Pvt Ltd. Vs Abhishek Khanna & Others, Civil Appeal No. 5785 of 2019 decided on 11.01.2021, it was held by the Hon'ble Apex Court of the land that a person cannot be asked to wait indefinitely for possession of the allotted unit and is entitled to seek refund of the amount paid by him alongwith compensation. Moreover, when the due date has already expired, then the allottees cannot be made to wait to seek refund of the amount deposited with the respondent-builder and offer of possession. Then, Section 18 of Real Estate(Regulation and Development) Act, 2016 provides for refund and the same runs as under:

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18. Return of amount and compensation-

(1) If the promoter fails to complete or is unable to give possession of an apartment, plot or building –

- (a) In accordance with the terms of the agreement for sale or, as the case may be, duly completed by the date specified therein; or
- (b) he shall be liable on demand to the allottee, 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.

It was also observed in the second case detailed above that when the project is not complete and occupation certificate has not been obtained, then the allottee cannot be made to wait indefinitely for possession of the apartment allotted to them nor they can be bound to take the possession of the apartment in another project. So, in such a situation, the allottees are entitled to seen refund of the entire amount deposited with the respondent. Lastly, in case of DLF Universal Ltd & Anr Vs Capital Greens Flat Buyers Association etc. Civil Appeal No. 3864-3889 of 2020 decided on 14.12.2020, it was observed by the Hon'ble Apex Court of the land that delay in approval of building plans and issuance of stop work orders as a result of fatal accidents during the course of construction being force majeure conditions cannot be taken into consideration in achieving timely completion of contractual obligations. Even, there was also an exit offer given to the flat buyers on two occasions by the builder and which also resulted in delay in completing the project. So all these circumstances were not considered sufficient for invoking force majeure conditions and resulted in payment of delayed possession charges to the allottees by the builder.

10. Thus, the plea of the respondent with regard to delay in completion of the project and offer of possession to the complainants including other allottees as a ground to displace their cause for refund is not tenable. Even, it is not disputed

that upto now neither any occupation certificate of the project in which the complainants were allotted a unit has been received nor any offer of possession of the allotted unit has been made to them So, their plea of seeking refund of the deposited amount in view of ratio of law laid down in cases of **Ireo Grace Real Tech Pvt Ltd**. Vs **Abhishek Khanna & Others,** and **Pioneer Urban Land & Infrastructure Ltd** vs **Govindan Raghvan** is very much maintainable.

11. Thus, in view of my discussion above and taking into consideration all the material facts brought on record by both the parties, it is evident that the respondent-builder violated the terms and conditions and other commitments agreed upon between the parties and there is no reasonable justification for delay in offer possession of the allotted unit to the complainants. So, the respondent-builder is guilty of violating the terms and conditions of BBA. Thus, accordingly, the complainants are held entitled to seek refund of the deposited amount with the respondent-builder to the tune of Rs.1,53,53,945/-. The following directions are hereby ordered to be issued against the respondent-builder:

- The respondent-builder is directed to refund a sum of Rs.1,53,53,945/besides interest @ 9.30% p.a. from the date of receipt of each payment upto the date of actual payment to the complainants;
- The amount of pre-EMIs paid by the respondent-builder in the account of complainants, if any, would be deducted while calculating the total amount due towards them;
- (iii) The loan amount received by the complainants against the allotted unit and paid to the respondent-builder would be a charge payable to respondent No.2 and the same would be paid prior to paying the deposited amount to them.

(iv) There would be charge on the allotted unit No.4122, Tower-4, measuring 2150 sq ft. situated in the project known as 'ATS Marigold' Sector 89-A, Gurugram till the whole amount detailed above is paid by the respondent-builder to respondent No.2 as well as to the complainants;

- The respondent-builder is further debarred from creating third party rights with regard to unit in question without paying the amount detailed above;
- (vi) The above mentioned directions be complied with by the respondentbuilder within a period of 90 days and failing which legal consequences would follow.
- 12. File be consigned to the Registry.

07.04.2021

Adjudicating Officer, J Haryana Real Estate Regulatory Authority: Gurugram 7-4-2021

Judgement uploaded on 16.04.2021