



HARERA
GURUGRAM

HARYANA REAL ESTATE REGULATORY AUTHORITY
GURUGRAM

New PWD Rest House, Civil Lines, Gurugram, Haryana

नया पी.डब्ल्यू.डी. विश्राम

गृह. सिविल लाईंस, गुरुग्राम, हरियाणा

**BEFORE RAJENDER KUMAR, ADJUDICATING OFFICER,
HARYANA REAL ESTATE REGULATORY AUTHORITY
GURUGRAM**

Complaint No. : 901/2019
Date of Decision : 14.09.2021

M/s SRV Home Developers Pvt Ltd.
Through Mr Rajeev Singh, Director,
Apartment No.J-104, 10th Floor, Ridgewood Estate
DLF City, Phase-IV, Gurugram-122002

Complainant

V/s

M/s IREO Pvt Ltd.
C-4, Ist Floor, Malviya Nagar,
New Delhi-110017
Bay-1,IREO Campus Archiew Drive
IREO City, Golf Course Extn Road,
Gurugram

Respondent

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

Present:

For Complainant:
For Respondent:

Mr. KK Kohli, Advocate
Mr. M K Dang, Advocate

ORDER

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14-9-2021

This is a complaint filed by M/s SRV Home Developers Pvt Ltd. Through Mr Rajeev Singh, its Director,(hereinafter referred as buyer) under Section 31 of The Real Estate(Regulation and Development) Act, 2016 (in brief Act of 2016) read with Rule 29 of The Haryana Real Estate(Regulation and Development) Rules, 2017 (in brief 'Rules') against respondent (also called as developer) seeking directions to the latter to refund a sum of Rs.1,22,28,521/- alongwith interest 18% p.a. from the date(s) of payment till its realisation.

2. According to complainant, the respondent launched a project in the name and style of "The Grand Arch" in Sector-58, Gurugram. On representation of the respondent, it(complainant) applied for booking of an apartment on 20.12.2012 by paying initial amount of Rs.2,20,500/-. The respondent allotted a unit bearing No.GA-J-04-12, 4th floor, J-Tower measuring 1600 sq ft. for total sale consideration of Rs.2,24,48,168/-.

3. An Apartment Buyer's Agreement(ABA) was executed between them on 25.03.2013. By virtue of clause 13.3 of said Agreement, respondent assured that possession of booked unit will be handed over within a period of 18 months, with grace period of six months from the date of execution of ABA. It(complainant) has paid a total of Rs.1,22,28,521/- till now. Balance payments were to be made at the time of offer of possession.

4. On being failed to receive any information with regard to correct status and development of said project/unit, it filed complaint to police on 22.06.2015 vide No.SPIL, requesting the police authorities to take action against the respondent. A legal notice dated 21.04.2015 was also served upon it, demanding back payments made so far with interest @24% p.a. No response was received from respondent. It(complainant) filed a suit for permanent injunction and declaration, bearing Civil Suit No.90 of 2015 before the Court of Civil Judge, Gurugram, with request for cancellation of

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booked unit and refund of paid amount. On 22.12.2015. It received notice of possession stating that unit in question was ready for possession, subject to payment of outstanding dues. Thereafter the plaint of complainant was rejected by the Civil Court, Gurugram.

5. Despite offering possession, unit in question was nowhere near stage of occupancy. As the respondent did not comply with specifications, complainant refused to take its possession. Instead of completing the unit in question, to make it worthy of living, respondent cancelled the unit and forfeited the amount paid by it (complainant) causing wrongful loss, and thus respondent gained undue benefit. This attitude of respondent forced the complainant to move before this forum, seeking directions for refund of amount, alongwith interest and compensation etc.

6. Brief facts of complainant's case in tabular form, are as under:

Project related details		
I.	Name of the project	"The Grand Arch"
II.	Location of the project	Sector 58, Gurugram
III.	Nature of the project	RESIDENTIAL
Unit related details		
IV.	Unit No. / Plot No.	No.GA-J-04-12, J-Tower
V.	Tower No. / Block No.	J-Towers
VI	Size of the unit (super area)	Measuring 1600 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

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X	Date of booking(original)	20.12.2012
XI	Date of Allotment(original)	20.12.2012
XII	Date of execution of ABA/BBA (copy of BBA/SBA enclosed)	25.03.2013
XIII	Due date of possession as per BBA/SBA	Within 18 months from the date of ABA/BBA
XIV	Delay in handing over possession till date	More than 5 years
XV	Penalty to be paid by the respondent in case of delay of handing over possession as per the said ABA	

Payment details

XVI	Total sale consideration	Rs. 2,24,48,168/-
XVII	Total amount paid by the complainants	Rs.1,22,28,521/-

7. The respondent contested the claim of the complainant. It raised preliminary objection regarding jurisdiction of Authority/Adjudicating Officer to try and entertain present complaint. It is alleged that unit in question was allotted, prior to the enactment of The Act of 2016, hence provisions of this Act cannot be applied retrospectively. Moreover, this complaint is barred by res-judicata in a suit filed by present complainant. Civil Judge(Junior Division), Gurugram, vide order dated 06.02.2016 held that dispute between parties is subject matter of arbitration, as per terms of allotment, the Court rejected the plaint filed by present complainant.

8. It is further the case of respondent that complainant made part-payment of Rs.1,25,93,691/- out of total sale consideration of Rs.2,59,86,720/-. There was delay of six months in offering possession and

the complainant could claim only delayed compensation, as per terms of allotment. The allotted unit was cancelled only on failure of complainant to make timely payments and for not taking possession. Earnest money alongwith delayed payment interest, brokerage and service tax has been forfeited and that too, as per terms and conditions of booking application. After termination of allotted unit, in exercise of its right under clause 21.2 of Agreement, the unit in question has been sold by respondent to third party, even before filing of present complaint. As such, the complainant is not entitled to any relief and its complaint is liable to be dismissed, with heavy costs.

9. I have heard learned counsels for both of parties and have gone through the record.

10. As mentioned above, according to respondent, unit in question was allotted prior to enactment of The Act of 2016 and hence provisions of this Act cannot be applied retrospectively. It is not disputed that it was an 'on-going' project. No completion certificate had been received by the respondent, when said Act came into force. The respondent was obliged to apply for registration within three months, when the Act came into force. By applying for registration during said period, respondent agreed to abide by provisions of the Act. I do not find much substance in aforesaid preliminary objection raised by the respondent.

11. It is not denied that plaint in a civil suit filed by the complainant, was rejected by Civil Judge, Gurugram observing that it was a matter for arbitrations. Even as per respondent, when complainant failed to take possession of unit in question, the same cancelled allotment of unit. Even respondent did not adhere to the arbitration clause. In that event, provision of arbitration had no meaning for present complainant. In this way, none of

parties intended to follow arbitration clause, in their agreement. Moreover, Act of 2016 is special Act, dealing with such matters between the developer and buyer. Provisions of this Act have overriding effect even upon covenants agreed by the parties. I find no legal hurdle in entertaining this complaint. As civil suit stated above, was not decided on merits, complaint is not hit by ~~re-judicata.~~ *res-judicata.*

12. Learned counsel for respondent submitted that there was no considerable delay in handing over possession. Even as per complainant, respondent offered possession by serving notice on 22.12.2015. According to clause 13.3 of ABA, the respondent proposed to offer possession of apartment in question to the complainant within a period of 18 months from the date of execution of said agreement, with additional grace period of 180 days. In this way, the date of possession comes to 25.04.2015. There was delay of about 8 months *only.*

13. On the other hand, as per learned counsel for complainant, respondent was not entitled for grace period, as no force majeure circumstances are shown by it. Same was bound to hand over possession till 25.10.2014, which it failed to hand over. Moreover, agreement (ABA) was one sided and oppressive to his client. It provides for forfeiture of earnest money i.e. 20% of sale consideration but as per law, respondent at the most could deduct only 10% of amount, as earnest money.

14. It is contended by learned counsel for respondent that as per clause 6 of ABA, 20% of sale consideration was to be treated as 'earnest money' and complainant agreed for said term by signing the ABA. The same was not illegal. Ld counsel relied upon cases titled as (i) **Kavita Sikka Vs Oasis Landmark LLP 2018(1) C.P.R. 335** where it was held by the National Consumer Disputes Redressal Commission that in case where records and

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pleadings of the complainant clearly indicated that she was fully aware of the fact that as per certain clause 2.5 of the agreement, 20% of the cost of property plus applicable taxes shall be treated as earnest money. Further, as per another clause, the opposite party would be entitled to forfeit the earnest money on cancellation of booking and cannot now plead ignorance of this fact. The complainant was held to have failed to establish deficiency in service on the part of the opposite parties. (ii) **Hanuman Cotton Mills Vs Tata Air Craft Ltd. 1970 AIR(SC) 1986** where the Apex court upheld forfeiture of earnest money upon default in terms of the contract, Appeal in this regard was dismissed with costs.(iii) **Santa Banta Com. Ltd Vs Shreyans Motors Pvt. & Ors 2015(2) CPJ 153** where National Consumer Disputes Redressal Commission upheld the right of respondent to forfeit booking amount of Rs.5,35,000/- stating that the respondents were well within their right not to refund booking amount as there was default on the part of the appellants.

15. Learned counsel referred some more judgments on this point but for the sake of brevity, same are not reproduced here.

16. A perusal of ABA makes it clear that same is one-sided, tilted towards the developer and oppressive to the buyer. It gives very limited right, almost negligible to the buyer to withdraw from the project, while the builder/developer has reserved its right to cancel the allotment and forfeit earnest money, which is 20% of total sale consideration, even on slight negligence/fault of buyer, to pay even single instalment, as demanded by the developer. It is settled now that, earnest money, which is liable to be forfeited should not be more than 10% of sale consideration.

17. Exercising powers conferred under section 85 of the Act of 2016 and other powers in that behalf, Haryana Real Estate Regulatory Authority,

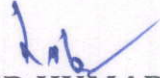
Gurugram issued Notification dated 05.12.2018 bearing No.11/RERA GGM Regulations 2018. Noticing that several frauds were carried, without any fear as there was no law regarding earnest money and again considering the judgement of National Consumer Disputes Redressal Commission, this authority was of the view that forfeiture of amount of earnest money shall not exceed more than 10% of total sale consideration amount of real estate i.e. apartment/plot/building as the case may be. It is directed that in all cases where the cancellation of flat/unit/building is made by the builder in unilateral manner or the buyer intends to withdraw from the project and the agreement containing any clause contrary to the aforesaid regulations shall be void and not binding on the buyer.

18. I find weight in the contention of learned counsel complainant stating in the absence of force majeure circumstances, respondent was not entitled to grace period of 180 days. Excluding this period, due date of possession comes as 25.09.2014. Admittedly, the respondent had served notice of offer of possession on 22.12.2015. According to complainant, despite said notice, unit allotted to it (complainant) was not ready for possession being incomplete. Said notice was an eye-wash to bluff the complainant. Although in its reply, respondent denied said allegation, same (respondent) failed to show any evidence to prove that unit in question was ready to be occupied by that date. It is not plea of respondent even that same has received occupation certificate even till today., what to say of completion certificate.

19. Considering facts mentioned above, it is well established that respondent failed to complete the unit, as per agreement between the parties. In such circumstances, complainant was well within its right to claim refund of the amount. Complaint, in hands is thus allowed. The respondent is directed to refund amount of Rs.1,22,28,521/- alongwith

interest @ 9.30% p.a. from the date of each payment till realisation of whole amount. Respondent is also burdened with costs of litigation Rs.1,00,000/- to be paid to the complainant.

20. File be consigned to the Registry.


(RAJENDER KUMAR)
Adjudicating Officer,
Haryana Real Estate Regulatory Authority
Gurugram
14.09.2021

Judgement uploaded on 09.10.2021.