HARYANA REAL ESTATE REGULATORY AUTHORITY
PANCHKULA , HARYANA

Complaint no. : RERA-PKL-210/2018
Date of Hearing : 15.01.2019
No. of Hearing : 4th

Rohit Chawla **...Complainant**

Versus

M/s BPTP Ltd. **...Respondent**

CORAM :

Sh. Rajan Gupta **Chairman**
Sh. Anil Kumar Panwar **Member**
Sh. Dilbag Singh Sihag **Member**

APPEARANCE :

Amit Kumar Shrivastav Counsel for Complainant
Shri Hemant Saini Counsel for Respondent

Order:

1. This matter has been adjourned on four occasions for amicable settlement but the parties have failed to arrive at a mutually agreeable settlement. On the last date of hearing, the Authority had heard and had passed a detailed order after going through the oral as well as written pleadings of both the parties.

The Authority had observed in its last order that it was prima facie of the opinion that the complainant had miserably failed to execute the Flat Buyer Agreement (FBA) and had defaulted in payment of due installments, as a result of which the respondent had cancelled the allotment of the unit after giving the complainant several opportunities to fulfil his part of obligations, accordingly the complainant now has no legal right to ask for possession of the unit after its cancellation by the respondent. The only question that remained to be decided was regarding the quantum/ percent of total sale consideration that the respondent could forfeit as earnest money.

2. The case of the complainant is that he booked a flat in June,2009 in the project named "Park Elite Floors" of the respondent in district Faridabad. He paid Rs.3,00,000/- as booking amount vide receipt dated 16.06.2009. The complainant was tentatively allotted flat no. V-42E-GF measuring 1418 sq. fts. vide Booking /Application Form dated 14.06.2009. The complainant had opted for construction linked

payment plan. He deposited another Rs. 2,97,768/- vide receipt dated 24.08.2009. Accordingly, the complainant has in total paid about Rs.5,97,768/- against the Basic Sale Price of Rs.25,56,002/-.The total sale consideration including EDC, IDC etc.was Rs. 31,16,936/-.

The complainant applied obtaining for home loan from IDBI Home Finance for payment of remaining consideration of the said flat. The IDBI sanctioned his loan of Rs.12,00,000/- vide sanction letter dated 22.10.2009. The complainant submitted the said sanction letter to the respondent and requested him to execute FBA and also to provide a copy of the approved layout plan. These documents were mandatorily required for release of loan.

The respondent continued raising demands for payment of installments, qua which the complainant vide email dated 06.04.2010 requested that he was unable to deposit the same as the loan was not disbursed by the bank on account of non-supply of relevant documents by the respondent. He further

stated that at that time there was no sign of construction of his villa at the site. The complaint alleges that the respondent instead of providing him necessary documents, vide emails dated 07.10.2010 advised him to approach some other banks for obtaining loan. The complainant replied to the email of the respondent that he was unable to change the bank at this stage as he had already paid Rs.10,000/- to the IDBI bank as processing fee. The respondent had accepted the sanction letter without any demur at that time. Complaint alleges that it was due to fault on the part of the respondent that he could not get his loan disbursed despite its section by the bank.

The complainant made repeated requests between 2009 to 2010 to the respondent to execute FBA which finally the respondent sent to the complainant in May,2010 but even then they, failed to provide relevant documents for disbursement of the loan. The complainant also states that the respondent informed him on 08.07.2010 that certain documents required for disbursement of loan will be given only after execution

of Builder Buyer Agreement and the Tripartite Agreement.

Complainant states that due to repeated harassment by the respondent he requested the respondent to refund the amount paid by him till date along with interest, but the respondent did not pay any heed to his request. Consequently, the complainant was constrained to file a consumer complaint no. 1370 of 2010 in District Consumer Disputes Redressal forum, New Delhi which was withdrawn due to certain technical reasons on 21.12.2017.

Now the complainant has filed the present complaint before this Authority seeking possession of the flat along with delay compensation and compensation on account of pain and harassment, in addition to the cost of litigation.

3. The respondent has denied all the allegations and has raised several preliminary objections, as follows:

i. The present complaint is not maintainable as the floor of the complainants is less than 500 sq. mts thus registration is not required as per section 3(2) (a) of

RERA Act, 2016. Even as per Guidelines for Registration of Independent floors for the Residential Plots of Licenced Colonies issued by financial Commissioner & Principal Secretary to Govt. Haryana Town & Country Planning Department dated 27.03.2007, registration of independent floors can be allowed in case of residential plots of sizes 180 sq yards or above and each such dwelling unit shall be designated as 'Independent Floor' which shall be recognized as a distinct, identifiable property with a separate identification number.

ii. The complainant himself is a defaulter who did not pay due installments in time despite reminders on 23.07.2010, 23.10.2010, 24.12.2010, therefore his booking of apartment has to be treated as having been automatically cancelled on the account of non-payment of outstanding instalments.

iii. That the complainant is guilty of concealing from the Authority the goodwill gestures made by the

respondent like grant of 'Timely Payment discount" of Rs.15,672/-.

iv. Respondent further states that the complainant is guilty of "Forum Shopping" as he had filed a consumer complaint before, District Consumer Disputes Redressal forum, New Delhi which he had to withdraw later on for want of cause of action and now again he has come before this Authority to try his luck here.

v. The respondent states that they had intimated the complainant for clearance of dues and to collect relevant documents to facilitate timely execution of the FBA, vide letter dated 10.05.2010. The complainant neither cleared his dues nor came forward to collect the documents for execution of FBA. Thereafter the respondent sent two sets of the documents for execution of Agreement to the complainant in May,2010 but the complainant failed to sign and execute the Agreement despite reminders dated 08.07.2010, 10.09.2010 and 20.10.2010.

vi. The respondent vide email dated 15.11.2010 sent a scanned copy of map for V block to the complainant

and also shared contact numbers of the concerned persons at site for obtaining any further information.

vii. The respondent states that they also advised the complainant to approach PNB, HDFC, LIC for availing housing loan, since the necessary documents were already provided to HDFC,PNB and LIC-H for disbursing loan for the project and the documents could not be provided on individual basis.

viii. The respondent further states he sent reminders dated 08.07.2010, 04.09.2010, 10.09.2010 and the Final reminder dated 20.10.2010 to the complainant to execute the Floor Buyer Agreement failing which his application for allotment shall be cancelled.

ix. The respondent issued final letter on 24.12.2010 to the complainant to clear his outstanding dues failing which the booking would be automatically treated as cancelled, but the complainant did not turn up to clear the dues and to execute the agreement due to which, the respondent cancelled the allotment of the unit.

x. Learned counsel for the respondent further argued that clause 11of the allotment letter stipulates for

forfeiture of earnest money at the rate of 25% of the sale price. He argued that when an agreement is made between the parties without any fraud, misrepresentation or duress, and actually the agreement has been made voluntarily, willingly and with full understanding of its contents, the same is enforceable as such and is fully binding on both the parties. Since none of the clause of the agreement was oppressive or unreasonable, the complainant cannot ask for refund of his earnest money. The right of the respondent to deduct earnest money to the extent of 25% as per provisions of letter of allotment cannot be denied. In support of his contention he cited judgement titled **Ganga Dhar vs Shankar Lal AIR 1958, SC 770** (V45 C103), wherein the appeal in the suit for redemption was preferred on the grounds that the terms of mortgage deed provided that (1) the mortgage shall not be redeemed for eighty five years and (2) that it could be redeemed only after that period and within 6 months thereafter, failing which the mortgagor would cease to have any claim on the mortgaged property

and mortgage deed would be deemed to be a deed of sale in favour of the mortgagee. Hence the appellant challenged the mortgage agreement /deed on the ground that term of 85 years amounted to clog on redemption and therefore the agreement was unconscionable and oppressive. The Apex Court held that that "the term providing for a period of eighty five years was not a clog on the equity of redemption and the mere length of the period could not by itself lead to an inference that the bargain was in any way oppressive or unreasonable". Hon'ble Supreme Court further held that "the mortgagee had not taken any unfair advantage of his position as the lender, nor that the mortgagor was under any financial embarrassment. Hence the Apex Court dismissed the appeal on the ground that the bargain had been freely made, there was nothing else to which attention was directed as showing that the bargain was hard. We, therefore, think that the bargain was a reasonable one and the eighty-five years term of the mortgage should

be enforced. We then come to the conclusion that the suit was premature and must fail".

Similarly issue was involved in **Pomal Kanji Govindji & Ors. vs Vrajlal Karsandas Purohit & Ors. decided on 4 November, 1988 (1989 AIR 436).** The mortgagee and the tenants inducted by the mortgagee filed appeals and special leave petition against the decision of the High Court of Gujarat, upholding the right of the mortgagors to redeem the properties before the period stipulated in the deeds. The mortgagor had challenged the mortgage deed on the ground that the term of 99 years for redemption of mortgage was harsh and oppressive condition. Apex court upheld the principle laid down by Viscount Haldane L.C. in G. and C. Kreglinger v. New Patagonia Meat and Cold Storage Company Ltd., [1914] Appeal Cases 25 that "the reason justifying the Court's power to relieve a mortgagor from the effects of his bargain is its want of conscience. The Court's jurisdiction to relieve a mortgagor from his bargain depends on whether it was obtained by taking advantage of any

difficulty or embarrassment that he might have been in when he borrowed the moneys on the mortgage. Length of the term, was not by itself oppressive and could not operate as a clog on the equity of redemption."

4. The Authority has considered the written and oral pleadings of both the parties in detail. It observes and orders as follows:-

i. First of all the respondent has challenged the jurisdiction of this Authority for the reasons that the agreement between the parties was executed prior to coming into force of RERA Act. This objection is not sustainable in view of the detailed orders passed by this Authority in ***complaint case No.144- Sanju Jain Vs. TDI Infrastructure Ltd***. The logic and reasoning in that complaint are fully applicable on the facts of this case as well.

ii. The second challenge to the jurisdiction has been made on the ground that the floor area on which the floor to the complainant allotted measures less than

500 sq. mts. and this project was not required to be registered, therefore, the jurisdiction of this Authority does not extends to this case. This objection also is not sustainable for the same reasoning as given in complaint case No.144 - Sanju Jain vs TDI Infrastructure Ltd. Furthermore, the issue that the plot/floor is less than 500 sq. mts. is totally devoid of merits because this plot/floor is a part of larger colony being developed by the respondent. The said plot/floor is not an independent project being developed by the respondent. Numerous such plots along with other buildings are being developed by the respondents as a part of the project. Since jurisdiction of the Authority extends to whole of the project, it cannot be said that it does not extend to individual plot because these plots happen to be less than 500sq.mts.Such an interpretation of the law will lead to absurd results.

iii. Now, the important question that arises at this stage is whether it was the complainant who defaulted in payment of the due instalments consequent upon

which the respondents cancelled the allotment, or whether due to non-supply of the requisite documents by respondents to the complainants, that resulted in non-availment of sanctioned bank loan, which resulted in default in payment by the complainant, which eventually led to cancellation of the apartment.

It is abundantly clear from the documents placed on file that the complaint repeatedly asked the respondents to supply him documents for signing flat buyer agreement and also the construction plans etc. of the colony for submission to the IDBI Bank to get the sanctioned loan disbursed, but the respondents kept asking him to approach HDFC, PNB bank etc. to whom they had supplied the documents. The respondents have admitted that they could not have supplied the documents on individual basis. In the opinion of this Authority it does not appear impossible to supply documents on individual basis to facilitate availing of loan by the allottees such as complainant.

It is due to the non-cooperative behaviour of the respondent that the complainant eventually could not

get his loan disbursed which lead to seeking refund of the money paid by the complainant. He even approached District Consumer Disputes Redressal Forum before whom the matter remained pending for nearly 7 years. All these circumstances point out to the fact that the complainant was serious about buying the apartment for which he had deposited the initial sum of Rs.5.97 lakh with the respondents and had also got his loan sanctioned from IDBI Bank, but due to non-supply of documents by the respondent the complainant could not avail of loan. Accordingly the respondents have contributed towards default by the complainant in making payment of due intalments.

iv. From the point of view of respondents it can be argued that respondents had supplied requisite documents to the complainant for executing the FBA. They had also provided requisite documents to three banks for facilitating availment of loan by the prospective allottees. The complainant in 2010 could have signed the agreement and the documents so supplied and also presented the documents to any of these 3 banks

or even to IDBI Bank for availing of the loan, which he did not do. To this extent the complainant has contributed towards non fructification of the deal.

v. Another angle to look at the situation is that when respondents cancelled the allotment in 2010, they should have simultaneously settled the accounts at that stage and conveyed forfeiture or otherwise of the earnest money. They have not done so even till now. After coming into force of the RERA Act, the rights of the respective parties have to be determined in accordance with the new law. With regard to jurisdiction a law has already been laid by this Authority that where there are subsisting obligations between both the parties, this Authority will have jurisdiction to adjudicate upon the disputed issues.

vi. Shri Hemant Saini, learned counsel for the respondent states that clause 11 of the allotment letter stipulates that in the event of default by the complainant, earnest money to the extent of 25% of the basic sale price shall be forfeited. The 25% of the money works out to Rs.7,79,234/-. Therefore respondent have forfeited

the entire amount of Rs.5,97,768/- deposited by the complainant.

vii. Shri Hemant Saini has argued that in the cited cases namely Ganga Dhar versus Shankar Lal AIR 1958, SC 770 and Pomal Kanji Govindji & Ors. versus Vrajlal Karsandas Purohit & Ors. decided on 4th November,1988 (1989 AIR 436) that a mortgage deed of 85 years duration where-after in the event of the default on the part of mortgager the mortgage deed shall be deemed to be a sale deed which was not oppressive or unconscionable. Shri Saini has used these arguments to suggest that provision relating to forfeiture of 25% of the basic sale price as an earnest money is not oppressive, unreasonable or unconscionable. His argument is that when an agreement has been made voluntarily with free will without any duress or misrepresentation, the same shall be enforceable as such.

viii. The cited two cases are distinguishable from the facts of the present matter. In the cited cases the agreement was made between the two parties and the terms and

conditions thereof were drawn with mutual consent. It was a stand alone agreement between two competent parties. In the present case however the agreement is a standard form agreement. A lengthy document is presented by the developers to the allottees without giving them any option to suggest any amendment. Such agreements are usually executed after the allottee has parted with a considerable amount of money. In such circumstances the allottee are virtually left with no other option but to sign the agreement. Hon'ble Apex court in large number of cases have struck down several provisions of such agreements as being unreasonable oppressive and unconscionable. Hon'ble Supreme Court has laid down a law in civil Appeal no. 35562 of 2015 preferred against decision of National Consumer Disputes Redressal Commissions in case titled Ashish Oberoi vs Emaar MGF land Limited that for delayed payment of instalments, the interest penalty at the rate of 18% or 24% is unreasonable or unconscionable. In such circumstances interest penalty at the rate of 9% has

been held to be reasonable in cases in which the Hon'ble Apex Court has struck down several provisions of the agreement executed between the developers and the allottees as being unconscionable.

ix. This Authority, therefore, will decide on case to case basis whether a particular provision in an agreement could be called oppressive, unconscionable or not. For the foregoing reasons it is observed that the cited judgements of the Hon'ble Apex Court are not applicable on the agreements made by the promoters with their allottees in standard formats. It is to be decided on a case to case basis whether a particular provision shall be deemed unconscionable and oppressive or not.

x. The Real Estate (Regulation and Development) Act which came into force on Ist July,2017 stipulates that the promoters and allottees shall be put on a similar pedestal while dealing with each other. The Act prohibits deposit of more than 10% of money without executing a builder-buyer agreement. This provision pre-supposes that the earnest money of only 10%

should be charged by the promoters. It also hints at a philosophy that in the event of default not more than 10% of money should be deducted as earnest money.

xi. The facts of this case however dictate that on account of contributory defaults by both the parties, their relationship as a promoter and an allottee came to an end in the year 2010 itself after the cancellation of the allotment by the promoter. A relationship which came to an end in 2010 cannot be revived after a period of 9 years. For this reason the prayer of the complainant for getting him the possession of the apartment cannot be accepted.

xii. In the explained circumstances, the Authority observes that both parties have contributed to the breach of conditions of the allotment resulting into frustration of the deal between them. The Authority therefore decides that the respondent shall refund the entire amount of money received by them from the complainant within a period of 60 days and he will not forfeit any amount out of the earnest money deposited by the complainant. The complainant however shall

not be entitled to the interest on the earnest money paid by him because of his contributory fault in not making payment of the apartments as per demand raised by the respondent.

Disposed of accordingly. The file be consigned to the record room and the orders be uploaded on the website of the Authority.

Dilbag Singh Sihag
Member

Anil Kumar Panwar
Member

Rajan Gupta
Chairman