



HARYANA REAL ESTATE REGULATORY AUTHORITY PANCHKULA

Website: www.haryanarera.gov.in

COMPLAINT NO. 1167 OF 2019

Monika Mittal

....COMPLAINANT(S)

VERSUS

M/s Samar Estates Pvt. Ltd.

....RESPONDENT(S)

CORAM:

Dr. Geeta Rathee Singh
Nadim Akhtar
Dilbag Singh Sihag

Member
Member
Member

Date of Hearing: 21.09.2022

Hearing:

2nd (re-opened)

Present: -

Mr. Vishal Madaan, Id. Counsel for the complainant
Mr. Sumit Passi, Id. Counsel for the respondent

ORDER (DILBAG SINGH SIHAG-MEMBER)

Present case was disposed of vide order dated 28.06.2019 passed by Sh. Anil Kumar Panwar, the then Id. Adjudicating Officer, Haryana Real Estate Regulatory Authority, Panchkula vide which relief of refund was declined to the complainant and directing him to pay all outstanding dues. Respondent was directed to deliver possession of the flat to the complainant by 30.09.2019 after completing the construction. It was further observed that outstanding amount has not been paid by the complainant, therefore respondent would be at liberty to cancel allotment and forfeit a part of already paid amount. Complainant has filed appeal before Hon'ble Appellate Tribunal and matter has been remanded back for rehearing the case on merits. The case has been today listed for rehearing.

2. Following are brief facts of the case:
 - i. Complainant was allotted a flat bearing no. E-901 by the respondent in his project "Ess Vee Apartments, Sector-20, Panchkula". It has been averred that she has already paid a sum of Rs. 25,74,708/- to the respondent against the basic sale price of Rs. 71,50,000/-. Flat buyer agreement (FBA) between the parties was executed on 10.01.2013. As per clause 32 of FBA, the respondent was obliged to



offer possession of the flat within 36 months from the date of commencement of construction. Complainant's grievance is that neither construction has been completed nor possession has been offered even after lapse of over 8 years from the date of booking.

ii. Complainant further alleged that delay in offering of possession of flat caused great harassment to her and since project has neither been completed nor is likely to be completed because of mismanagement and severe defaults on the part of the respondent, her money should be refunded along with interest. She has also demanded compensation for the mental torture and harassment suffered at the hands of the respondent who has already caused delay of more than 8 years.

iii. Respondent does not dispute the payment of alleged money to him. His plea is that the delay in completion of the project is not intentional and it has been caused due to non-payment of the due amounts by the complainant, which were demanded vide letters dated 14.05.2017, 31.05.2016, 12.06.2015, 12.01.2015, 24.10.2014, 09.07.2014, 21.04.2014, 02.03.2014, 05.12.2013, 10.01.2013, 01.02.2012. Respondent further averred that inspite of the fact that no payment has been made after 07.01.2013 by the complainant, he had completed the final roof slab of Tower E and construction up to plaster work of the booked apartment. Claiming that he has paid all enhanced EDC and IDC which was due to the State Government, respondent has

further asserted that he has full intention of completing the project and handing over possession of completed apartments to the allottees. He, however, seeks time up to 30th of September 2019 for completing the project and handing over the possession.

3. Learned counsel for the complainant submitted that respondent is not in position to complete the project and hand over possession of booked flat to the complainant. Further, Authority has also disposed of bunch of complaint cases allowing relief of refund along with interest provided under Rule 15 of HRERA Rules 2017.

4. Considering above facts and pleadings made by learned counsel for complainant, Authority observed that this is a stuck project. Construction activities at the site have not taken place for more than 5-6 years. Project is badly delayed. Initially project was registered vide Registration No. HRERA-PKL-PKL-54 of 2018 dated 05.10.2018 but on account of the repeated defaults made by the respondent company, said registration was cancelled and certificate of registration was withdrawn. On the basis of these findings, Authority has already allowed refund in bunch of complaints with lead complaint No.865 of 2019 titled as Mamta Gupta versus Samar Estates Pvt Ltd. vide order dated 09.10.2019. Detailed speaking orders had been passed in the said lead complaint No.865 of 2019 dated 09.10.2019, operative part of the same is reproduced below for reference:

9. Authority has gone through the proceedings of the matter over the course of last one year. It has gone through all the facts and documents placed before it. It has also gone through the documents submitted by the respondents while getting the project registered before this Authority. Keeping in view the facts and circumstances of the matter, it observes and orders as follows: -

i) Project of the respondents was registered in this Authority vide registration certificate dated 05.10.2018. Entire project is comprised of 24 towers with 925 apartments, out of which 464 apartments have been allotted/sold. Respondents had assured the Authority, while getting the project registered, that Phase-I of the project will be completed by December, 2018 and Phase-II by March, 2019. The fact however is that for the last more than one year not even a brick has been laid in the project. No efforts whatsoever have been made by the respondents for completing the project and handing over the apartments to the complainants. No investment at all has been made in the project. Promoter does not appear to be having any Plan of Action for doing so. Accordingly, it is concluded that the respondent has severally defaulted in fulfilling its obligations. Respondent has been making only false assurances without arranging funds for investment. Respondents have thus violated even the conditions of registration. Accordingly, a Show Cause Notice deserves to be issued to the respondents for cancellation of the registration granted to the project.

Law Associate shall send a copy of this order to the Project Section with the direction of the Authority to issue a Show Cause Notice to the respondents for cancellation of the registration certificate.

ii) Respondent has severely mis-managed the project. If assurances made by him at Sr. No. (ix) of Para-4 of the order dated 30.04.2019 are taken into account, against the projected cost of Rs. 340 crores, the respondent claims to have already invested Rs. 208 crores against which about 94 crores only could be collected from the allottees. Respondents appear to have commenced construction of much larger number of apartments than booked/sold whereas they should have constructed the project in phases

in tandem with the sale of apartments. Respondent has also clearly has mis-managed his finances. Apparently, respondent also raised loans from banks and financial institutions and non-repayments of which may have resulted into a piling up of huge interest liability.

Real Estate (Regulation and Development) Act 2016 provides for payment of interest @ prescribes in case, apartments are not delivered in time. Apparently, with delay of 4 to 10 years, interest liability of the respondents towards allottees will also be huge.

It is a well-known fact that property market is down at present and sale of apartments projects like this is not likely to easy. Furthermore, the allottees who have lost faith in the promoter and have been waiting for possession of their apartments from the last more than 4-10 years are unlikely to pay more money to the promoter.

In these circumstances, promoter is unlikely be able to arrange funds for completion of the apartments of complainants as well as rest of the project. As noted by the Authority earlier also, this has become a stuck project which the promoter is unlikely to be able to complete.

(iii). In accordance with the provisions of Section-8 of the RERA Act, efforts have been made to constitute associations of the allottees so that they may take over the project and complete it at their level at least to the extent of the towers in which their apartments are located. Allottees have repeatedly expressed their inability to join together and to constitute an association for this purpose. Accordingly, option of handing over the project to the association of the project is not available.

(iv) As per the conditions of the license, in case a promoter defaults in completion of the project, the Town and Country Planning Department of the State Government can take over the said project for completion. A letter had been written to the Town and Country Planning Department in this regard, to which they have submitted their reply dated 11.09.2019, the operative part of which is as under: -

“Since, the applicant company has not submitted the bank guarantee of Rs. 98.65 lacs on

account of IDW conveyed vide this office memo dated 04.06.2019 (CP/2014). Hence the request of the applicant for approval of service plan estimates and renewal of license cannot be processed due to non-deposition of bank guarantee and the same will be examined after deposition of Bank Guarantee on account of IDW. Therefore, the Department cannot take any action to take over the Project at this stage.”

In simple words, the department is only concerned with recovery of Rs.98.65 lacs on account of internal development works and they would not bother themselves to the problems of the allottees. For all practical purposes, the department has flatly denied the responsibility for completion of the project.

(v) It is but natural that the promoter of the project would have incurred multiples liabilities during the last 10 years including liability of repayment of loans along with interest to the financial institutions; liability towards the operational creditors; and liabilities towards State Government agencies. Most importantly, they have liabilities towards the allottees comprised of principal money received and interest liability incurred on account of delay caused in completing the project.

It is evident that the promoter does not have any liquidity to discharge any of the obligations besides funds needed for completion of the project.

For these reasons also, it is for unlikely that the respondent-promoter would be able to complete the project.

(vi) In the above circumstances, provisions of Section 18 of the RERA Act, provides for grant of relief of refund of the money paid by the allottees along with interest @ prescribed. Authority accordingly orders that the respondents shall refund the money paid by the complainants along with interest @ prescribed in Rule-15 of the HRERA Rules, 2017. All the complainants shall file their claims before the respondents and the respondents shall be liable to pay the amount as calculated in accordance with this order.

(vii) This Authority realises the fact that since respondents have not been able to arrange the money for completion even first phase of the project, now, they may not be able to arrange money for giving refund to the allottees. Accordingly, the Authority orders that allottees may use the provisions of any law of the land for enforcing their rights for getting the money refunded including considering class action against the respondents by invoking provisions of Insolvency and Bankruptcy Code, 2016 (IBC, 2016).

So that the respondents do not alienate their properties to the prejudice of the complainants and other similarly placed allottees, the Authority considers it just and fair to prohibit the respondents from alienating any of their properties including the properties of the project without permission of this Authority.

This Authority can grant the permission to sell the properties of the project, if justified, with a stipulation that proceeds of the sale shall be put into an escrow account which shall be devoted first for refunding money to the complainants and rest for investment in the project.

(viii) While disposing of a bunch of cases in lead case No.383/2018 titled Gurbaksh Singh versus ABW Infrastructure Pvt Ltd., Authority had inter alia ordered as follows: -

“13. We are of the considered view that the right granted to an allottee by the amendment ordinance of 2018 is a value-able right and that right can be pressed before the appropriate forum/authority for satisfaction of their claims against the promoters/debtors.

However, we are of the further view that the rights guaranteed by the RERA Act, 2016 for protection of allottees are very wide in nature and must be interpreted accordingly. As already stated in the arguments listed in Para 10 above that the allottees of a project, after having paid the EDC and substantial amount of money to the developer should be treated as deemed owners of the proportionate piece of the land and assets of the

project, and their rights cannot be alienated by way of an agreement made between the promoter and the lending financial institution. Rights of the allottees must be treated superior to the rights of the lending financial institutions. Financial institutions, in so far as the assets of the related real estate project are concerned, are free to satisfy the claims from the remainders of the assets of the project after satisfaction of the claim of the allottees, and in addition they are free to set their claim satisfied from other assets of the promoters. They can press their claim even against the sureties and guarantees offered by the promoters.

14. Aforesaid conclusion that the rights of the allottees should be treated superior to those of other financial creditors are also supported by the principles of natural justice and the express provisions of RERA Act, 2016. In support of these arguments it is observed as follows: -

(i) Financial institutions are expert agencies which carry out due diligence about the promoter as well as his project before taking decision to lend money. They have expert manpower and machinery to adjudge the viability of the project and creditworthiness of the promoters. They have capability to understand risk factors involved. Accordingly, at the stage of lending, either they are fully aware of the facts that full or a portion of the project has been allotted to the allottees, thus creating third party rights or they are fully aware that the allotments will be made by the promoters in future, thereby creating third party interests in the assets hypothecated or kept with them as security. It is to be presumed that lenders have factored-in these facts at the time of lending.

Lending institutions are also supposed to monitor progress of the project in order to ensure that money lent by them is safe and is invested properly in the project. If the money lent by them is diverted or siphoned away, they must also share burden for the same for

the purpose of protecting the rights of ordinary citizens. If the lenders fail to monitor the Project closely and if their loan is not repaid in time, they themselves also must share the blame. Allottee, however, must not suffer on behalf of the promoter or the financial institution.

(ii) On the other hand, an allottee typically is a middle-class person who harbours the dream of owning a house for his family. Savings of two or three generations usually have to be mobilized to own a house. He invests money on the basis of assurances held out to him by the promoters and the State Government agencies. He cannot access or understand the account of the project nor does he have any power to monitor progress of the project on day-to-day basis.

Principles of natural justice, therefore, dictate that the rights of the allottees should be treated superior and higher to those of the financial institutions.

(iii) It is relevant to quote here the provisions of Section 79 and Section 89 of the Real Estate (Regulation & Development) Act, 2016.

Section 79: Bar of Jurisdiction- *No civil court shall have jurisdiction to entertain any suit or proceeding in respect of any matter which the Authority or the adjudicating officer or the Appellate Tribunal is empowered by or under this Act to determine and no injunction shall be granted by any court or other authority in respect of any action taken or to be taken in pursuance of any power conferred by or under this Act.*

Section 89: Act to have over-riding effect- *The provisions of this Act shall have effect, notwithstanding anything inconsistent*

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therewith contained in any other law for the time being in force.”

It is observed that Section 89 explicitly mandates that provisions of RERA Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force. Further, Section 18 guarantees that in the event of a project not being completed he shall have a right to seek refund of his money along with interest without prejudice to any other remedy available. Similarly Sub Section 3 and Sub Section 4 of Section 19 assure the allottee that he will be given refund of the money deposited by him in the event of default in completion of the project by the promoters.

This Authority is, therefore, of the considered opinion that since these rights of the allottees have been held superior to any other law for the time being in force, the rights of the allottee, therefore, shall be treated superior to that of the rights of other creditors including the financial institutions.

(i) Allottees of the project in question shall be treated as deemed owners of the project. The promoters of the project and the lending financial institutions cannot alienate the ownership rights of the allottees at their own level without their consent. Therefore, the claim of the allottees against the assets of the project shall be treated superior to any other right of any other person or entity including the financial institutions and/or other creditors.

(ii) If claims of the allottees are not satisfied fully from the assets of the project in question, they shall be treated creditors of the promoters at par with other creditors for satisfaction of their claims from the assets of

the promoters other than the assets of the project in question.

(iii) ***

(iv) ***

(v) Complainants and other similarly placed allottees may present these orders before any authority dealing with liquidation of assets of the Project, or the respondents and seek satisfaction of their claims on priority. It is, however made clear that the claims of the allottees shall be restricted to the refund of the money paid by them to the respondents along with interest as provided for in rule 15 of the HRERA Rules, 2017.

Authority considers it just and fair to grant the similar rights to the complainants of this project as well.

5. Facts and circumstances of the captioned complaint are exactly similar to the matters already disposed of vide order dated 09.10.2019. So, Authority is tentatively of the view to allow refund in favour of complainant along with interest provided under Rule 15 of HRERA Rules 2017 in terms of above said order. However, learned counsel for respondent sought adjournment to argue his case since he has been recently engaged in this matter.



6. On request of respondent's counsel, case is adjourned to
09.11.2022.



.....
DR. GEETA RATHEE SINGH
(MEMBER)



.....
NADIM AKHTAR
(MEMBER)



.....
DILBAG SINGH SIHAG
(MEMBER)

