

**BEFORE THE
TAMIL NADU REAL ESTATE REGULATORY AUTHORITY,
CHENNAI**

**Quorum : Hon'ble Mr. G. Saravanan, M.A.,B.L., Adjudicating Officer,
CCP Nos. 126 of 2019**

S. Vijayalakshmi ... **COMPLAINANT**

Vs.

M/s. Phoenix Hodu Developers Pvt Ltd.,
Rep. by Authorized Signatory G.C. Balaji ... **RESPONDENT**

Complainant : Represented by Mr. Ch. Paranjothi, Advocate

Respondent : Represented by Mr. T. Saikrishnan, Advocate

Heard on : 17.10.2019

Delivered on : 11.11.2019

ORDER

The above complaint by the complainant claiming the refund of the entire amount paid to the respondent towards the purchase and construction of booked apartment with interest, compensation and costs is filed under section 31 read with Section 71 of the Real Estate (Regulation and Development) Act, 2016 (hereinafter referred to as RERA Act).

2. **Averments of the complainant in brief as follows:**

(a) The complainant booked a row house with the respondent in their project namely "**The Commune IRIS**" at Old Mahabalipuram Road, Kalavakkam Village, Kanchipuram District and paid advance amount and further amounts.

(b) On 20.01.2016, the complainant entered into agreements of sale and construction separately with the respondent and also a tripartite agreement on 23.12.2016 with the respondent and the housing finance company. The total sale consideration of the house is Rs.55,42,238/-. The complainant paid in total Rs.44,04,224/- to the respondent.

(c) As per the construction agreement dated 20.01.2016 the respondent undertook to complete construction and hand over the house within 18

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months from the date of the agreement with 6 months grace period. The due date for delivery of the constructed house including the grace period ended by 19.01.2018. But the respondent has not handed over the house till date.

(d) The complainant availed house loan and put to heavy loss and hardship due to the delay in construction by the respondent. Hence the complainant withdraws from the project and seeks refund of the amount paid to the respondent with interest, compensation and costs.

3. **Averments of the respondent in brief as follows:**

(a) All the allegations, except admitted specifically, are denied. There was no delay or default on the part of the respondent. As per the registration certificate issued by TNRERA, the due date for delivery was 02.11.2017 and the same was extended upto 31.12.2019.

(b) The complainant was repeatedly asking for internal changes and modifications in their row house, which required further time. Agreements for sale and construction and tripartite agreement were entered between the parties. The complainant failed to pay the due amounts as per the agreed schedule and the same led to financial constraints to the respondent.

(c) The construction of the unit was completed long before and completion certificate was also obtained from the appropriate authority. As per the terms of the agreement, payment as per schedule is essence of the contract. Therefore, the respondent prays for the dismissal of the complaint with cost.

4. An attempt to settle the matter amicably has failed.

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5. Both the parties have filed their respective evidence on affidavit with documents.

6. On the basis of the rival contentions of the parties, the following points arise for determination:

- i. Whether the complainant is entitled for refund of the amount paid to the respondent towards the purchase of the row house with interest, compensation and cost on the ground of failure to complete the construction and hand over possession of the house as per the terms and conditions of the agreement?
- ii. What are the reliefs, the complainant is entitled for?

7. **Answer for Point No. (i)**

(a) The learned counsel for the complainant submitted that as per the construction agreement dated 20.01.2016, the respondent undertook to complete the construction and deliver the house within 18 months from the date of the agreement with six months grace period and the due date for delivery including the grace period expired by 19.01.2018 and the complainant paid Rs.44,04,224/- out of the total sale consideration of Rs.55,42,238/- and the respondent has not delivered the property till date and the complainant is entitled for refund of the money with interest, compensation and from the respondent.

(b) However the learned counsel for the respondent contended that the complainant defaulted in making payment in time and the project is completed and the house is ready for delivery and the completion

certificate was issued by the Tiruporur Town Panchayat on 13.07.2018 and there was no delay on the part of the respondent.

(c) As per clause 5(1) of the agreement entered between the complainant and the respondent on 20.01.2016, the possession of the constructed house was fixed for delivery on completion of 18 months from the date of the agreement with six months grace period. The due date for delivery including the grace period ended by 19.01.2018. Admittedly, the construction of house was not completed for delivery as on 19.01.2018.

(d) Ex.B-7, occupation/completion certificate dated 13.07.2018 is issued as the units mentioned therein were completed in construction and ready for occupation. However, in Ex.A-10, email dated 01.10.2018 to the complainant, the respondent stated that there has been a delay in completion of her unit and promised to make ready the apartment by Tamil New Year. By email dated 13.10.2018, the complainant expressed readiness for registration at any time and also the delay by the respondent at various stages on various reasons. Only by Ex.A-16 email dated 13.02.2019, the respondent informed the complainant that the unit is ready for handing over. But again the respondent sent Ex-A-19 email dated 03.07.2019 as the works has been completed. Therefore, it is clear that even according to the own version of the respondent, the house was not made ready for delivery as per the terms and conditions of the agreement or as on the date of Ex-B7 occupation/completion certificate.

(e) Further, it is contended by the learned counsel for the respondent that as per the certificate of registration granted by the TNRERA the time for completion of construction stands extended and it supersedes the bilateral

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agreement between the parties. The time limit in the certificate has nothing to do with the promised date of delivery of possession of the house to the allottee as per the bilateral agreement. The certificate has been issued by the TNRERA on the basis of unilateral declaration made by the respondent. The extension of time limit for completion of the entire project by TNRERA under section 5 of RERA Act will not absolve the liability of the builder under the agreement.

(f) Regarding the contention of the respondent that repeated modifications in the constructions was taking time, as pointed out by the learned counsel for the complainant, the relevant email seeking modification was dated 27.11.2015 i.e., well before the agreement of construction was entered and the other email dated 02.01.2017 is much prior to the due date for delivery of the row house fixed under the agreement. The sketch of the plan of the house produced by the respondent in Ex.B-4, itself is dated 27.08.2015 i.e, prior to date of agreement. Admittedly, the email dated 02.01.2017 is with regard to putting grills over the windows, which would not take much time. Therefore, the contention for delay on the ground of modification sought by the complainant is not sustainable.

(g) The learned counsel for respondent submitted that the complainant defaulted in payment even though the house was ready for delivery. In Ex.A-18, email dated 25.02.2019, the complainant specifically stated that the villa is incomplete, no roads, electricity and other pending works not completed and the demand notice was made without completion of the house and she is also ready to settle the payment but not without

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completion. When it is a row house for which access by road is vital for peaceful possession and enjoyment, the complainant, having paid Rs.44,04,224/- out of the sale consideration, cannot be expected to pay further with incomplete construction of the house.

(h) Perusal of Ex.B5, payment statement shows that demand notes were raised for payment according to stage-wise construction irrespective of the delay in progress of construction of the project. Where promises are reciprocal, each party has the option to perform his part of contract but cannot insist on the other party performing his part without himself performing what he has agreed to do.

(i) The learned counsel for the respondent submitted that the agreements between the parties entered on 20.01.2016 and RERA Act especially Section 18 was brought into force from 01.05.2017 only and the RERA Act can have only prospective application and the RERA Act creates new rights and remedies for the parties. The learned counsel also relied on the decision of Hon'ble Supreme Court in G.J. Raja vs. Tejraj Surana reported in 2019 AIR(SC) 3817 and also contended that the said decision was not brought to notice of the Hon'ble Bombay High Court in the Neelkamal Realtors Suburban Pvt Ltd., and Ors case.

(j) The RERA Act does not contemplate rewriting of contract between the flat/unit buyer and the promoter. Under Section 18, the delay in handing over the possession is taken into consideration from the date fixed in the agreement of construction or sale entered between the home buyer and the promoter. Therefore, section 18 cannot be said to have retrospective effect. In the *Neelkamal Realtors Suburban Pvt Ltd., and Ors Vs. Union*

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of India and Ors., reported in MANU/MH/3135/2017, the Hon'ble Bombay High Court considering the RERA Act and some of the sections including Section 18 held that the said provisions of the RERA Act are not retrospective in nature and observed as follows:

We have already discussed that above stated provisions of the RERA are not retrospective in nature. They may to some extent be having a retroactive or quasi retroactive effect but then on that ground the validity of the provisions of RERA cannot be challenged. The Parliament is competent enough to legislate law having retrospective or retroactive effect. A law can be even framed to affect subsisting/existing contractual rights between the parties in the larger public interest.

Therefore, the decision relied by the learned counsel for the respondent on the principles of applicability of provision prospective in nature is not relevant to the case. Hence the contentions of the learned counsel are not acceptable.

(k) In the above circumstances, it is held that the complainant is entitled for refund of the entire amount paid to the respondent with interest, compensation and cost. Thus the point is answered accordingly.

8. Answer for Point No. (ii)

(a) In view of the answer for Point No.(i), the complainant is entitled for refund of entire amount with interest, compensation and cost from the respondent. It is not in dispute that the complainant paid a sum of Rs.44,04,224/- to the respondent for the purchase of the row house. Therefore, the complainant is entitled for refund of Rs.44,04,224/- from the respondent with interest, compensation and costs.

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(b) As per Rule 18 of the TNRERA Rules, the rate of interest payable shall be the current highest marginal cost of lending rate of interest of State Bank of India (SBI) plus 2% per annum. Hence, the complainant is entitled for the interest at the rate of 8.15% per annum which is currently the highest marginal cost of lending rate of interest of SBI plus 2% per annum i.e., 10.15% p.a for the entire amount paid from the date of respective payment till repayment by the respondent.

(c) So far as the compensation towards mental agony and hardship, the complainant has claimed Rs.1,00,000/-. Since the claim is found reasonable, a sum of Rs.1,00,000/- is fixed towards compensation for mental agony and hardship caused to the complainant. Towards litigation, a sum of Rs.25,000/- is fixed. The complainant is entitled for reliefs as detailed above. Thus, the point is answered accordingly.

In the result, the respondent is directed as follows:

- (1) The respondent shall pay the complainant the amounts at the interest rate, compensation and costs as per the findings in the answer for Point No.(ii), Para 8 of this order within 30 days from the date of issue of this order.
- (2) The charge of the aforesaid amount shall be on the row house booked by the complainant till the repayment.

Sd/-11.11.2019

G. SARAVANAN
ADJUDICATING OFFICER
TNRERA, CHENNAI

LIST OF WITNESSES

CW-1 --- S. Vijayalakshmi
RW-1 --- G.C. Balaji,

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LIST OF DOCUMENTS FILED BY THE COMPLAINANT

Ex.Nos	Date	Documents Name
Ex.A1	20.01.2016	Sale agreement
Ex.A2	20.01.2016	Construction Agreement
Ex.A3	23.12.2016	Tripartite Agreement
Ex.A4	28.08.2015	Receipt
Ex.A5	04.01.2017	Receipt
Ex.A6	25.01.2017	Receipt
Ex.A7	29.01.2017	Receipt
Ex.A8	03.02.2017	Receipt
Ex.A9	20.09.2017	Final Payment letter by respondent
Ex.A10	01.10.2018	E Mail Communication
Ex.A11	13.10.2018	E Mail Communication
Ex.A12	20.10.2018	E Mail Communication
Ex.A13	17.11.2018	E Mail Communication
Ex.A14	25.01.2019	E Mail Communication
Ex.A15	13.02.2019	E Mail Communication
Ex.A16	25.02.2019	E Mail Communication
Ex.A17	03.07.2019	E Mail Communication

LIST OF DOCUMENTS FILED BY THE RESPONDENTS

Ex.B1	---	Board Resolution
Ex.B2	20.03.2019	Letter of Authorization
Ex.B3	24.11.2015	Mail Correspondence between the complainant and the respondent
Ex.B4	---	Sketch of the plan
Ex.B5	---	Payment statements made by the complainant to the respondent
Ex.B6	02.11.2017	Registration Certificate by the TNRERA
Ex.B7	13.07.2018	Occupation/Completion Certificate

Sd/-11.11.2019

G. SARAVANAN
ADJUDICATING OFFICER
TNRERA, CHENNAI

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ADMINISTRATIVE OFFICER
TN REAL ESTATE REGULATORY AUTHORITY