

**BEFORE THE
TAMIL NADU REAL ESTATE REGULATORY AUTHORITY,
CHENNAI**
**Quorum : Hon'ble Mr. G. Saravanan, M.A.,B.L., Adjudicating Officer,
CCP Nos. 211 of 2019**

Bhuvanadevi Jayakumar

.....COMPLAINANT

Vs

Phoenix Serene Spaces Private Limited,
Rep. by its authorized signatory PVRK Chaithanya Raju
(Regn No.TN/01/Building/0163/2017)

.....RESPONDENT

Complainant : Rep.by M/s. Chennai law Associates,Advocates
Respondent : Rep.by Mr.T.Saikrishnan, Advocate

Heard on : 25.08.2020

Delivered on : 11.09.2020

ORDER

The above complaint by the complainant claiming refund of entire amount paid to the respondent towards purchase of the apartment booked by her with interest, compensation and costs is filed u/s 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) On 28.08.2015, the complainant booked row houses with the respondent in their project, namely, "**The Commune**" in 'The village' at Kalavakkam village at OMR, Chengelpet Taluk, Kancheepuram District and paid advance amount and further amounts subsequently and in total a sum of Rs.1,02,96,028/- out of the sale price of Rs.1,20,00,000/-

(b) Since the complainant was residing in UAE and was unable to travel, construction agreement with the respondent was signed and entered only on 04.07.2016. The respondent undertook to complete the construction of

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the row houses within 18 months from the date of the agreement. The promised time for completion was over by January 2018.

(c) Only on 18.02.2019, the respondent informed regarding the delivery of the row houses for the first time. But, on inspection of the constructed houses, the complainant found several structural defects. The complainant sent mail for which no reply was given by respondent. Subsequently, the respondent gave irresponsible replies as some works being out of scope. The complainant expressed dissatisfaction and withdrew from the project and demanded return of the amount.

(d) The respondent caused the delay in total reach of the contract. As per the provisions of the RERA Act, the complainant is entitled for refund of the amount paid with interest, compensation and cost. Hence the complaint.

3. Counter averments of the respondent, in brief, as follows:

a) The respondent denies all the averments as false. There was no delay or default. As per the registration certificate given by the TNRERA on the registration of the project, the validity of the project is up to 31-12-2019. The period for completion of the project is available till 31-12-2019. The complainants want to take wrongful advantage under the RERA Act. The complaint is not maintainable.

b) The reading of the complaint shows that the complainant had taken possession of the row houses and had also proceeded to install new tiles by spending amount Rs.2,00,000/-. Hence the complaint is liable to be dismissed as not maintainable. The respondent was making necessary modifications sought by the complainant at all material points of time. The allegations of defects were made for avoiding final payment due to the respondent. The absence of formal delivery and taking over possession upon final payment cannot be taken undue advantage by the complainant.

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c) The complainant was repeatedly seeking one or other modifications, changes in the construction and interior and was solely responsible for the delay of the tiling works. The complainant has taken constructive possession. It was the complainant who was postponing the taking of possession under one or other pretext and avoided to make final payment due to the respondent. The modifications sought by the complainant were not coming under the purview of the agreement and are highly impossible modifications.

d) The complainant had not paid any payment towards the stage.. 6,7and 8 even after emails were sent by the respondent after completion of the project. The complainant was in a mindset of moving into the project unit as per the agreement, but changed her mind due to instigation of the some default purchasers. The respondent completed the residential row houses well within the time as fixed in the agreement and the completion certificate was also issued by the authority. Therefore the complaint is liable to be dismissed with cost.

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

5. On the both sides, evidence on affidavit was filed and documents were marked.

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

(i) Whether the complainant is entitled to get back the amounts paid to the respondent with interest and compensation on the ground of failure on the part of the respondent to give possession of the row houses booked by her in accordance with the date and terms of agreements for sale and construction?

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(ii) Whether the complainant is entitled for all the reliefs as prayed for?

7. Answer for Point No. (i)

(a) The learned counsel for the complainant filed written argument notes and submitted that the complainant booked the residential row houses with the respondent for setting up her own residence after her return to India from UAE, where she was employed and made a total payment of Rs.1,02,96,028/- out of the sale price of Rs.1,20,00,000/-and the construction agreement and the agreement for sale were signed and entered on 04.07.2016, since she was unable to travel to India at the time of making booking advance in August 2015, and according to the terms of the agreements, the respondent undertook to deliver the constructed villas houses within a period of 18 months, i.e., by January 2018, but only on 18.02.2019, the respondent intimated regarding handing over of the completed houses for the first time and even in 2019, when the complainant inspected the houses on 05.04.2019, it was found that there were many structural defects and the construction was not according with the terms of the agreement and the respondent ignored the request of the complainant for rectification of the defects and thereafter the complainant withdrew from the project and complainant is entitled for all the reliefs.

(b) However the learned counsel for the respondent also filed written notes of arguments and contended that the construction agreement was entered on 04-07-2016 and the completion period is 18 months with additional 6 months for completion of the project and completion period was till July 2018 and by e-mail dated 18.02.2019, the respondent informed about the handing over of the property and the agreement was entered after of the RERA Act came into force and therefore governed by the

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provisions of the RERA Act under which registration certificate issued for the project with validity period up to 31-12-2019 and there is no delay and the complainant visited the houses on 05.04.2019 and expressed dissatisfaction on some works and all of sudden expressed her intention to withdraw from the project, and she took possession of the houses for carrying out modifications and laying tiles and interior works and the complainant cannot force the respondent to carry out the modification which does not come under the purview of the agreement and highly impossible and the competent authority has also issued completion certificate for completion of the project and the complaint is false and liable to be dismissed.

(c) Section 18 of the RERA Act gives an option to allottees to withdraw from the project and demand the amounts paid by them with interest including compensation, if a promoter fails or is unable to give possession of the flat on the dates specified in the agreement. It is not disputed that as per Ex.A2 Construction agreement dated 04.07.2016, the respondent undertook to complete the construction and deliver the row houses within 18 months from the date of the agreement with 6 months grace period. As per the terms of the agreement, due date for delivery is January 2018. From the evidence on record, it is seen that the complainant paid the booking advance on 28.8.2015 and subsequently made several payments up to 50% of the sale price even prior to the execution of the construction agreement on 04.07.2016. The payment schedule in Ex.A.2 agreement does not specify any date for completion of stage wise construction. However, the e-mail demand notices dated 22.08.2016, 12.09.2016 in Ex.A.6 series, by the respondent reveal that the last and final payment due and the readiness to handover the units is fixed on 25.06.2017. Even as per the respondent, the

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complainant was informed about the handing over of the property only by the e-mail dated 18.02.2019. Therefore, the contention of the learned counsel for complainant, the respondent failed and was unable to give possession of the row houses within stipulated time as per the terms of the agreement is acceptable.

(d) The learned counsel for the respondent contended that the complainant entered into agreement after the RERA Act came into force and is governed by the provisions of the RERA Act under which the registration certificate has been issued for the project, with the validity period up to 31.12.2019. As per the provisions of the RERA Act, the projects that were ongoing on the date of commencement of the RERA Act and for which the completion certificate was not issued, were required to be registered with the RERA authorities. The certificate of registration of the project is issued by the RERA authority on the basis of unilateral declaration made by the respondent. In the relevant form with affidavit, the respondent was required to submit the time period within which the project will be completed by them. In this regard, it is relevant to note that in Neelkamal Realtors Suburban Pvt Ltd and others vs. Union of India and others in Writ Petition No.2737/2017 and other WPs, the Hon'ble Bombay High court, by order dated 06.12.2017 held as follows:

256. The provisions of RERA, however, do not rewrite the clause of completion or handing over possession in agreement for sale. Section 4(2)(I)(c) enables the promoter to give fresh time line independent of the time period stipulated in the agreements for sale entered into between him and the allottees so that he is not visited with penal consequences laid down under RERA. In other words, by giving opportunity to the promoter to prescribe fresh time line under Section 4(2)(I)(c) he is not absolved of the liability under the agreement for sale.

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Therefore, it is obvious that the respondent cannot take shelter under the registration certificate issued by the RERA Authority from their obligations to complete the construction and make delivery of the flat, in accordance with the date and the terms of the agreement entered between them and the complainant. Hence, the above contention of the respondent is not sustainable.

(e) The learned counsel for the respondent further relied on Ex.P.5 occupation/completion certificate dated 13-07-2018 issued by the executive officer, Thiruporur Town Panchayat as the units referred in the certificate have been completed and ready for occupation. As per section 2(q) of the RERA Act, the certificate is to be issued by the competent authority certifying that the real estate project has been developed according to the sanctioned plan, layout and specifications. As per the rule 2(h)(iii) of the TNRERA Rules, completed project outside Chennai Metropolitan Area requires to be certified by the architect or structural engineer/licensed surveyor associated with project supported with photographs. The rule prescribes further procedure to make public the list of all such projects in the official website of the Director of Town and Country Planning. A perusal of the Ex.P.5, certificate reveals that the certificate is not issued based upon any such documents mentioned above in the rule or any inspection report of the officer concerned. Therefore, the respondent cannot even rely on the completion certificate which is not issued as contemplated under law.

(f) In Appeal No. 7 of 2019, Hon'ble Tamilnadu Real Estate Appellate Tribunal (TNREAT), by order dated 27-01-2019, held that mere issuance of a completion certificate by the competent authority is not sufficient and rule 2(h)(iii) contemplates completion of beams, structure and columns and

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the Act has very clearly stated under the sections 2,2(n),2(e),2(z)(n), categorically that the project should be completed and the ultimate product building should be in a livable nature, namely, the flat or villa or any other building should be in a usable nature. The respondent contended that the complainant cannot force the developer to carry out the modifications which do not come under purview of the agreement and are highly impossible. In Ex.p.7 legal notice dated 23.07.2019, the complainant detailed the works which needed rectification and the structural defects on the ceiling for which the respondent neither replied nor responded. It is not case of the respondent that they sent any reply to Ex.A.7 legal notice by the complainant. It is the obligation of respondent to provide the completed and constructed row houses in a usable nature for the complainant.

(g) The learned counsel for the respondent further contended that the complainant took possession of the house from the respondent to carry out modifications such as tiles laying and interior works. But the learned counsel for the complainant pointed out that no such possession was taken by the complainant and also relied on emails exchanged between the complainant and respondent. Even according to the own version of the respondent in their counter, the complainant did not to come forward to take possession on making final payment due to them, inspite of repeated e-mails sent by them. The e-mail correspondent between the complainant and the respondent in Ex.B3 as well as A6 series reveal that complainant had not approved the tiles provided by the respondent and they selected tiles from the shop and arranged to send the tiles to the respondent for the purpose of laying in the houses. In the e-mail dated 24-08-2017, the respondent acknowledged the receipt of tiles from the local vendor of the choice of the complainant. Therefore, the contention of the respondent

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that the complainant took possession or constructive possession is not sustainable.

(h) It is relevant to note that Hon'ble Supreme Court in Pioneer Urban Land & Infrastructure Ltd., Vs. Govindan Raghavan and Ors., reported in Manu/SC/0463/2019 held that the builder could not seek to bind the buyer with one sided contractual terms and once the builder failed to fulfill his contractual obligation of obtaining the Occupancy Certificate and offering possession of the flat to the respondent-purchaser within the time stipulated in the agreement, or within a reasonable time thereafter, the respondent flat purchaser could not be compelled to take possession of the flat even though it was offered almost two years after the grace period under the agreement expired. As per the Construction agreement, the respondent promised to deliver the row houses with 18months with 6 months grace period from the date of the agreement. Admittedly the possession of the row houses were not offered within the time stipulated in the agreement. In the above circumstances it is held that the complainant is entitled for refund of the amount paid to the respondent towards the purchase of the apartment with interest and compensation. Thus the, point is answered accordingly.

8. Answer for Point No. (ii)

a) It is not in dispute the complainants made a total payment of Rs.1,02,96,028 /-. The complainants are entitled for refund of the said amount.

b) As per Rule 18 of TNRERA Rules, rate of interest shall be at the highest marginal cost of lending rate of SBI plus 2%. Hence, the complainant is entitled for the interest at the rate of 8.05% per annum which is currently the highest marginal cost of lending rate of interest of SBI plus 2% per

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annum i.e., 10.05% per annum for the amounts paid from the date of respective payment till repayment by the respondent.

c) The complainants claimed 9% of the amount paid towards compensation for mental agony and hardship. In A.No.76/2019, Hon'ble TNREAT by order dated 26.08.2020 held that awarding of compensation must be "Fair and Just" and compensation awarding 9% of amount paid was not sustainable. In the circumstances of case, the compensation for mental agony, inconvenience and hardship is fixed at Rs.1,00,000/-.

d) The complainant claimed Rs.3,59,860/- towards expenses on registration of documents and installation of tiles. Admittedly tiles were purchased by the complainant. The claims were not disputed by the respondent. Hence, the complainant is entitled for a sum or Rs.3,59,860/- towards expenses for registration of documents and cost of tiles for use in the row houses incurred by her. Towards litigation expenses, Rs.25,000/- is fixed. The complainants are 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 amounts at the interest rate, compensation and litigation cost as per the findings in answer for Point No.(ii), Para No.8 of this order within 30 days of issue of this order.
2. The charge of the aforesaid amount as encumbrance shall be on the flats booked by the complainant till repayment of the claim as per this order.
3. On repayment of the claim as per the order, the complainant shall execute the cancellation of the construction agreement and sale deed, as the case may be, at the expense of the respondent.

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G. SARAVANAN
ADJUDICATING OFFICER

CCP.NO. 211 of 2019**LIST OF WITNESSES**

CW-1 --- BhuvanadeviJeyakumar
RW-1 --- Kondepu Raja Sekhar

LIST OF DOCUMENTS FILED BY THE COMPLAINANT

Ex.Nos	Date	Documents Name
Ex.A1	----	Receipts(16 Nos.)
Ex.A2	04.07.2016	Construction Agreement
Ex.A3	04.07.2016	Agreement to sell
Ex.A4	----	Receipts(12 Nos.)
Ex.A5	----	Payment schedule
Ex.A6	----	E-mail communication
Ex.A7	23.07.2019	Legal notice

LIST OF DOCUMENTS FILED BY THE RESPONDENT

Ex.Nos	Date	Documents Name
Ex.B1	02.01.2019	Board Resolution
Ex.B2	20.03.2019	Letter of Authorization
Ex.B3	----	E-Mail Communication
Ex.B4	02.11.2017	Registration Certificate
Ex.B5	13.07.2018	Occupation/Completion Certificate
Ex.B6	----	Photos

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G. SARAVANAN
 ADJUDICATING OFFICER
 TNRERA, CHENNAI

11.9.2020
 ADMINISTRATIVE OFFICER
 TN REAL ESTATE REGULATORY AUTHORITY