

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

**Quorum : Thiru. Sunil Kumar, I.P.S (Retd), M.A, LLB, Hon'ble Single Member
CCP No. 185 of 2021**

(i) C. Nirmala Rani
(ii) C. Lourdu Samy

..... **Complainants**

Vs.

M/s. Amar Prakash Developers Pvt Limited,
Rep. by its Authorized Signatory

..... **Respondent**

Complainants : Party – In - Person

Respondent : Rep. by M/s. D. Ravichander, Advocates

Heard on : 12.08.2022

Delivered on : 14.12.2022

ORDER

The above complaint by the complainants are for seeking refund with interest from the respondent towards purchase of the flat with interest, and costs and is filed under section 31 of the *Real Estate (Regulation and Development) Act, 2016* (hereinafter referred to as RERA Act).

2. Averments of the complainants, in brief, as follows:-

(a) The complainants have entered into an agreement with the respondent for the allotment of an apartment in the project namely, "**Temple Waves**", at Kundrathur Village, Pallavaram Taluk, Kancheepuram District and was allotted a flat bearing No. I-602, 6th Floor, Block No. 1 in Phase - 5. The total project cost was agreed for Rs.22,69,691/-. The agreement of project promotion and construction was entered on 20.08.2016. The sale deed was executed on 04.11.2016.

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(b) The complainants have paid a sum of Rs.10,79,705/-. The promised date of delivery was on or before December 2017 in the agreement of project promotion and construction. Subsequently, even the construction work of the flat had not started as on 31.10.2017 so the complainants gave a cancellation letter for the flat. Aggrieved the complainant wants to cancel the allotment and seeks refund of the amount paid by her to the tune of Rs.10,79,705/- with interest besides relief compensation and cost of litigation.

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

(a) The respondent questions the maintainability of the complaint stating that it is only the Authority which is vested with the powers to grant the reliefs sought by the complainants and not the Adjudicating Officer.

(b) The complainant and the respondent are in agreement with regard to the basic facts such as allotment of the flat to the complainants in the respondent's project, agreement of project promotion and construction as also the commitment of the handing over of the apartment on or before December 2017. The respondent further avers that there was a clear mention in the agreement of project promotion and construction that the date of delivery could get delayed due to non payment of stage wise instalment in time. The respondent submits that the complainants have failed to make the stage wise payment correctly which was covered in the agreement of project promotion and construction and this allows him extension of time to deliver whereby he could not be penalised for delayed delivery.

(c) The respondent avers that the delivery on or before December 2017 was subject to the complainants making the due payment as per the agreement payment schedule. The complainants was mandated under Clause 5 of the agreement to make payment within 7 days from the date of demand raised by the respondent failing which the respondent was entitled to leave at the

interest of 24% in the event of delay or default in making payments. He further avers that such delay entitles the respondent to extend the time for delivery of the concerned apartment. In this context, the respondent further avers that the ledger of payment of the complainants would show that the delays in making payment on each stage resulted in accrual of principle amount arrears and delayed interest charges still remaining due from the complainant to the tune of Rs.11,96,661/- and Rs.13,68,000/- which the complainants owes to the respondent.

(d) The respondent blames the complainant for not including the financial institution in the proceedings. Hence pleads for dismissing the compliant.

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

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 there was a delay in handing over of the apartment by the respondent to the complainants?

(ii) What are the reliefs made out?

7. Answer for Point No (i):-

(a) The facts of the CCP would indicate that the agreement of project promotion and construction was entered on 20.08.2016 (Ex.A3) and the sale deed was entered on 04.11.2016 (Ex.A4) respectively. The complainants have paid a total sum of Rs.10,79,705/- out of the total agreed amount of Rs.22,69,691/-. The committed date of delivery has been laid down in the construction agreement which stipulated the delivery of the flat on or before December 2017. The respondent had not been able to give any evidence to

show delivery of the apartment till date. Hence, delay in handing over of the apartment by the respondent to the complainants as claimed is made out.

(b) The respondent pleads that the complainants have failed to pay the stage wise payments and refers to Clause 5 of the agreement of project promotion and construction which makes it compulsory for the complainants to make payments on time within 7 working days from the date the respondent raised demand. Clause 6 of the same agreement of project promotion and construction makes a mention that the delivery of the completed apartment shall be subject to the complainants fulfilling and completing all their obligations as per the agreement. Citing this, the respondent argues that since the complainants have failed to make the stage wise payment correctly he is in his rights to extend the delivery date.

(c) A reading of the agreement of project promotion and construction (Ex.A3) would clearly show that as per Clause 17, the complainants was to get their apartment on or before December 2017, the one condition which allowed extension of time by the respondent was condition of force majeure as per the Clause 19 of the agreement of project promotion and construction which provides that the complainants would have no right to claim compensation if there is a delay due to force majeure. However, in this case no condition which could be termed force majeure is presented by the respondent. Hence the respondent cannot fall back on the plea of force majeure as a reason for the delay in delivery.

(d) It is clear, that the total cost of the apartment as agreed was Rs.22,69,691/-. The complainants claims to have paid a sum of Rs.10,79,705/- however the ledger at Ex.B2 shows the payment of Rs.13,27,316/- hence the claim is restricted to the amount claimed to have been paid by the complainants as Rs.10,79,705/-. The respondent relies on the agreement of project promotion

and construction attempts to justify the delay on grounds of delayed stage-wise payments. At this stage, it is essential to read the Clause 9 of the agreement of project promotion and construction clearly which is as follows:-

“In case the allottees fails to pay the same so demanded within the period mentioned in the demand letter / Agreement annexure, the developer shall have the right to cancel the allotment, deduct the non-refundable amounts and refund the balance amount to the allottees without any interest only upon realization of money from re-sale / re-allotment of the said apartment to any other person”

(e) The above being so, even it is presumed that there was a delay in payment of dues, the respondent had all the provisions to cancel the allotment and deduct the amount due to him which have not been done by him. At this stage, he cannot resort to the use of favourable Clauses for claiming benefits, when he failed to enforce the provisions of the agreement of project promotion and construction at the appropriate stage. It is therefore a fact, that, while the respondent was committed to deliver the apartment in December 2017 he has failed to do so thereby making the delay in delivering the apartment a proven fact. Since, he has failed to utilize the available Clause 9 of the agreement of project promotion and construction, at this stage he cannot fall behind the plea of delayed payment and thus cannot be allowed to take the benefit of delayed delivery due to this claim.

(f) The non inclusion of the financier has no bearing on the validity of the agreement between the two parties, more so as the financier was not a party in the construction agreement or sale agreement and non-inclusion of the financier had no role for the delay in delivery of the flat and thus such a non inclusion will not come to the rescue of the respondent.

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(g) The respondent has submitted that the jurisdiction to decide the entitlement of the refund and compensation vests only with the Authority and not with the Adjudicating Officer. This claim of the respondent does not give him any relief either. It was in compliance of Hon'ble Supreme Court Judgement in *M/s. New Tech Promoters and Developers Pvt Ltd., Vs. State of UP & Ors. Etc.* claims, for refund, are now handled by the Authority and not the Adjudicating Officer as in the present CCP.

(h) Hence, the complaint lies within the scope of jurisdiction of RERA and as shown above the delay in delivery is clearly made out in handing over of the apartment to the complainants and thus the point is answered accordingly.

8. Answer for Point No (ii):-

(a) Therefore, the complainants are entitled for refund amount of Rs.10,79,705/- from the respondent.

(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 7.30% per annum which was the marginal cost of lending rate of interest of SBI at the time of filing the complaint plus 2% per annum, i.e., 9.30% p.a for the entire amount paid from the date of respective payment till repayment by the respondent.

(c) Considering the facts and circumstances of the case, a sum of Rs.25,000/- towards litigation expenses is fixed. The complainants are entitled for the reliefs as detailed above. Thus, the point is answered accordingly.

In the result, the respondent is directed as follows:-

- (i) The respondent shall the interest rate and cost as per the findings in answer for Point No. (ii) in Para No. 8 of this order within 30 days of issue of this order.

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- (ii) The complainants are at liberty to move the Adjudicating Officer for claiming the compensation portion of the complainants.
- (iii) The charge of the aforesaid amount as encumbrance, if any, shall be on the flat booked by the complainants till repayment of the claim as per this order. The office of this Forum is directed to intimate the encumbrance created by charge in the order to the Sub-Registrar concerned.
- (iv) On repayment of the claim as per the order, the complainants shall execute the cancellation of the construction agreement and sale deed, as the case may be, at the expense of the respondent.

Sd/- 14.12.2022
SUNIL KUMAR, I.P.S (Retd)
SINGLE MEMBER

LIST OF WITNESSES

CW-1 --- C. Lourdu samy
RW-1 ---- G. Dinesh Kumar

LIST OF DOCUMENTS FILED BY THE COMPLAINANTS

Ex.Nos	Date	Documents Name
Ex.A1	03.08.2016	Payment receipt
Ex.A2	15.10.2016 to 17.03.2021	Statement of account
Ex.A3	20.08.2016	Agreement of project promotion and construction
Ex.A4	04.11.2016	Sale deed

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LIST OF DOCUMENTS FILED BY THE RESPONDENT

Ex.Nos	Date	Documents Name
Ex.B1	28.02.2019	Completion certificate
Ex.B2	27.06.2022	Payment ledger statement
Ex.B3	20.08.2016	Agreement of project promotion and construction
Ex.B4	04.11.2016	Sale deed
Ex.B5	24.07.2016	Quotation

Sd/- 14.12.2022
SUNIL KUMAR, I.P.S (Retd)
SINGLE MEMBER
TNRERA, CHENNAI

