

**BEFORE ODISHA REAL ESTATE REGULATORY AUTHORITY
BHUBANESWAR**

Complaint Case No.224/2018

Mr. Sankar Sebak Dey,
C/O INDFAB Projects (P) Ltd.,
At: FCI Road, Kulad,
PO: Nalco Nagar, Angul,
Dist: Angul-759145

....Complainant

Versus

1. M/s. Hi-tech Edifice(P) Ltd.,
Represented by its Managing Director
Plot No.103, Sahid Nagar,
Bhubaneswar -751007

2. Sri Tirupati Choudhury
S/o. Late Kunja Bihari Choudhury,
Managing Director,
Hi-Tech Edifice(P) Ltd.,
Plot No.111, Sahid Nagar,
Bhubaneswar.

....Respondents

Adv.for Complainant : Mr.S.Mohanty & Associates

Adv. For Respondent : Mr.K C Prusty & Associates.

ORDER Dated 2.5.2019

01. This is a case for refund of money with interest and compensation.

02. Briefly stated the Complainant's case is that on 22.10.2011, he entered into an Agreement for Sale with the Respondents for purchase of one "Flat No.4/B-3-07 in the 4th floor having an area of 665 sq.ft. in the project namely "Hi-tech Paradise" at Mouza-Nailo developed by the Respondents. The consideration money was fixed at Rs.9,97,500/- and the Respondents had undertaken to complete the unit in all respect and deliver possession within 30 months from the date of agreement upon receipt of apartment cost in time. As on the date of filing of the case, the Complainant had paid Rs.3,97,125/-. The stipulated date for completion and delivery of the project including the grace period was 21.10.2014, but the Respondents failed to deliver possession. On 26.10.2015 the Complainant sent a legal notice to the Respondents and after not getting suitable response from the Respondent she filed C.C. No.347/15 before the District Consumer Dispute Redressal Forum, Puri which he withdrew on 14.8.2018. Complainant has further stated that in a press

meeting dtd. 24.5.2016 the Chairman and M.D. of Respondent company promised to deliver the house within 09 months without claiming further money but did not deliver. Rather they transferred the project with its majority rights to a 3rd party without consent of 2/3rd allottees. Moreover the Respondents have violated the provisions of Section-13 of the Act by receiving booking amount of Rs.1,58,000/-. On these grounds the Complainant has filed this case praying for refund of money with interest and compensation.


03. The Respondents filed written statement challenging the case as not maintainable for mis-joinder and non-joinder of party stating that though Mr.Tirupati Choudhury, the then M.D. has resigned from the Respondent Company, and the Complainant knowing this fact has impleaded him as Respondent No.2, but has not impleaded the present Director Mr. P.K. Mohanty. Moreover earlier complaint case No.347/15 filed by the Complainant was dismissed as withdrawn by the District Consumer Disputes Redressal Forum, Puri vide order dtd. 14.8.2018 and no liberty was given by the Consumer Forum to file the present case. Moreover as per clause-38 of the agreement the dispute should have been referred to an arbitrator. Hence this Authority has no jurisdiction to entertain the complaint for the same cause of action. Moreover the last payment was made by the Complainant on 23.12.2011 and this case has been filed on 9.10.2018. So it is barred by limitation.

4. The Respondents have not disputed the fact of execution of the agreement and the fact of payment of Rs.3,97,125/- by the Complainant, but have specifically pleaded that non-delivery of possession of the flat was due to non-payment of dues by the Complainant as per Agreement. They have also stated that they have not committed any offence U/s 13 or 15 of RERA Act. Respondents have also stated that the Complainant is not entitled for refund of Rs.3,97,125/- as the same has already been spent in the construction of the flat and as per Agreement, they are entitled to deduct 10% of the deposit and no interest or compensation is payable in case of refund. The Respondents have also prayed to direct the Complainant to pay the balance cost of the flat to them to complete the construction. On these grounds, the Respondents have prayed for dismissal of the case.

05. Parties were heard. Perused the materials on record. At the outset, let us examine the question of maintainability of the case, on the ground of non-joinder and mis-joinder of parties. It is seen that Mr. Tirupati Choudhury who had signed the Agreement for Sale has been

impleaded as Respondent No.2 and the Respondent Company has been impleaded as Respondent No.1. The present Director Shri P.K.Mohanty who has signed on the written statement as Director of Respondent Company was not a signatory to the Agreement. In such fact & circumstance, the case is not bad for non-joinder or mis-joinder of party.

6. The next contention of the Respondents is that vide order dtd.14.8.2018 no leave or liberty was granted by the District Consumer Redressal Forum, Puri to the Complainant to file the present case, hence this case is not maintainable. On the other hand the Ld. counsel for complainant submitted that his prayer for withdrawal was allowed by the consumer Forum & thereafter he has filed the case. The copy of Order dtd.14.8.018 of the District Consumer Redressal Forum, Puri in C.C. No.347/15 shows that the petition of the Complainant for withdrawal of that case was allowed by the District Consumer Redressal Forum, Puri. Although the said order does not have any mention about granting of any "leave" or "liberty" to the Complainant to file the present case, the said fact doesn't affect the maintainability of this case as because the Real Estate (Regulation & Development) Act, 2016 nowhere mandates to obtain any leave or liberty from the Consumer Forum to file a case before the Authority. So such contention is not acceptable.



07. Then let us take up the other contention regarding Arbitration. Clause-38 of the agreement provides for referring all disputes and differences between the parties to an Arbitrator to be appointed by the builder. One of the key objectives of enacting the R.E.(R&D) Act,2016 was to create a specialised body to provide for speedy dispute redressal. It is a settled position of law that a specific law regarding any specific subject matter has an overriding effect over any general law. In other words, the provision of a general statute must yield to those of a special one. The Arbitration Act so far as it relates to disputes between two parties to a contract is a general law and the said Act., was not enacted for the special purpose relating to disputes between real estate promoters and allottees whereas the R.E.(R&D) Act, 2016 is enacted exclusively for the adjudication and resolution of disputes involving real estate promoters and allottees. That apart the R.E.(R&D) Act,2016 was enacted subsequent to enactment of the Arbitration and Conciliation Act,1996. It is well settled that " the later law overrides the previous law".

Considering the facts and circumstances of the case, the statutory provisions and well-settled legal position as narrated above,

we are of the view that irrespective of the fact that there is an Arbitration Clause in the Agreement for sale, the present case is maintainable in this forum.

08. The Ld. Counsel for the Respondents further contended that the last payment was made by the Complainant on **23.12.2011** whereas the present case was filed in July, 2018, and as such it is barred by limitation. On the contrary the Ld. Counsel for the Complainant countered it stating that the date of last payment i.e. 23.12.2011, cannot be the starting point of limitation as no cause of action arose on that date. In his legal notice dtd.26.10.2015 the Complainant had asked the Respondents for refund of money with interest and compensation. It is pertinent to note that in the year,2015, the Complainant had filed C.C. No.347/15 before Consumer Forum, Puri and after withdrawing the said case on 14.8.2018, filed the present case on 9.10.2018. Considering these facts and circumstances of the case, it is held that the case is not barred by limitation.

09. As per agreement, the construction of the unit should have been completed by April, 2014 and including the grace period of six months it should have been completed by October,2014. The copy of money receipts filed by the Complainant shows that by 23.12.2011, the Complainant had paid Rs.3,97,125/- which is around **40%** of the total consideration. So commensurate with such payment, the construction should have been completed up to **40%** by that date. The Respondents have also admitted the fact of payment made by Complainant. In his legal notice dtd.26.10.2015, the Complainant had informed the Respondents that he had gone to the construction site in July,2013 and found nobody there and the construction work was already stopped. From the materials available on record, it emerges that the construction of the flat was not completed within the stipulated time as per the agreement nor did it progress commensurate with payment.

10. The Respondents have taken a plea that non-completion of construction was due to non-payment of dues by the Complainant. The Agreement dtd.22.10.2011 shows that the payment was construction linked. No document has been filed by the Respondents to show that at any point of time they had asked the Complainant to make any payment informing him about the stage of completion of any mile stone of work. The Respondent had stated that the complainant was asked to make payment of Rs.30,000/- on 3.11.2015 but it is much after expiry of the stipulated period of completion as per agreement, so the same is no-way

helpful to the Respondents. For these reasons, the plea regarding cause of delay taken by the Respondents are not acceptable and they cannot escape from their liability for not completing the construction of the unit within time as per Agreement.

11. Section-18 of Real Estate(Regulation & Development) Act, 2016 provide that if the construction is not completed within the due date, the allottee has right to withdraw from the project and claim for return of his payment along with interest and compensation. In his legal notice dtd.26.10.2015 the complainant requested the Respondents to return the total money with interest so also the expenditure incurred by him towards house rent. The Respondents have taken a plea that they are not liable to pay any interest, rather 10% of the payment was to be deducted in case of refund as stipulated in clause-22 of the agreement. In view of the express provisions of Section 18 of the Act, when the Respondents have failed to complete the construction and handover possession within stipulated time as per Agreement, they are liable to refund the money with interest at the rate as provided in Rule-16 of Odisha Real Estate (Regulation & Development) Rules, 2017.

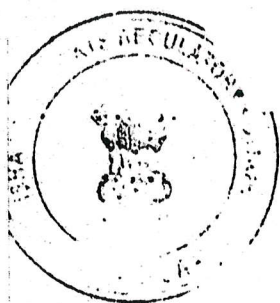
So far prayer for compensation, the same is within the jurisdiction of Adjudicating Officer as provided under Section-71 of the Act. This Authority cannot decide the question of compensation. The Complainant, if so likes, may file a separate petition for compensation before the Adjudicating Officer.

12. Complainant has alleged that the Respondents company had committed an offence punishable Under Section 15 of the Act as they have transferred majority rights of the project to a 3rd party namely Prafulla Kumar Mohanty without obtaining written consent of 2/3rd allottees. No document has been filed by the Complainant to substantiate such allegation. The other allegation is that the Respondents had taken more than 10% of the total consideration amount before entering into an Agreement for Sale in violation of Section 13 of R.E. (R&D) Act,2016. The Agreement was executed on 22.10.2011 and by then the R.E (R&D) Act,2016 had not come into force. So Section 13 of the Act being a penal provision is not applicable in the case. As such we do not find any material to hold the Respondents guilty for violation of Section 13 or 15 of the RERA Act.

Hence Ordered.

ORDER

1. The Respondents are directed to refund the payment of Rs.3,97,125/- made by the Complainant along with interest @ 10.5% per annum compounded quarterly w.e.f. the respective dates of receipt of the amount by them (i.e. on Rs.1,58,000/- w.e.f. 12.10.2011, On Rs.50,000/- w.e.f. 30.11.2011, on Rs.39,500/- w.e.f. 29.11.2011 and on Rs.1,49,625/- w.e.f. 23.12.2011) till the date of refund.
2. Refund should be made within 45 days from the date of this order failing which the Complainant may take steps for realisation of the dues according to law.



Sd/-
(Niranjan Sahu)

Sd/-
(B.C.Mohapatra)

Sd/-
(A.K.Mohapatra)

List of documents relied upon the Complainant.

1. Copy of agreement dtd.22.10.2011.
2. Copy of Money receipt dtd. 12.10.2011, 29.11.11, 30.11.2011, &23.12.11
3. Copy of legal notice dtd.26.10.15.
4. Copy of order dtd.14.8.2018 of Consumer Forum in C.C. No.347/15.
5. FIR dtd.23.5.2016

List of documents relied upon the Respondents.

NIL

Sd/-
(Niranjan Sahu)

Sd/-
Member-I
(B.C.Mohapatra)

Sd/-
Chairperson
(A.K.Mohapatra)

True Copy

Sd/-
Registrar 28/5/19

Memo No. 6434(3)/ORERA Date 29/05/2019

Certified copy of order forwarded to the Complainant/ Respondent for information.

Sd/-
Registrar 28/5/19