

ORDER SHEET


WEST BENGAL HOUSING INDUSTRY REGULATORY AUTHORITY

Complaint No. COM-000104 of 2019

Siddartha MukherjeeComplainant

AND

Aristo Infra Developers LLPRespondent

Sl. Number and date of order	Order and signature of Officer	Note of action Taken on order
7 ----- 17-02-2020 Dictated & corrected by me 	<p>Complainant is present filing hazira.</p> <p>Ld. Advocate of the Complainant is also present.</p> <p>Authorised Representative of the Respondent Shri Gourav Agarwal is present filing hazira.</p> <p>Ld. Advocate representing the Respondent Smt Swarnali Chanda is also present filing Vakalatnama.</p> <p>Hearing was completed on the last date and today was fixed for orders.</p> <p>This is the case filed by complainant under section 31 of West Bengal Housing Industry Regulatory Act,2017 (henceforth "the Act")</p> <p>1. The Case of the Complainant is that he booked a flat bearing number PH 1/B 702 at the 7th Floor with a super built-up area of approximately measuring about 915 square feet along with 2 (two) two-wheeler parking spaces at open ground (collectively "unit") comprised in the project named 'Signum Parkwoods Estate' of the Respondent Company at Block-B, Phase-I situated at 55,Khan Road,Bhadreswar,Hooghly-712139 on payment of total consideration money of Rs.22,21,165/- and accordingly an Agreement for Sale was executed between the parties on 27.04.2016. The promoter was required to handover possession of the said unit by 31.12.2018 including extended grace period of six months as available to the respondent promoter as per the covenants of agreement for Sale. According to the</p>	

Dictated
& corrected
by me



Complainant the project is incomplete and he has not received possession letter from the Respondent Company till the date of filing of the Complaint petition on 22.07.2019. By filing the Complaint petition, the Complainant prayed for the cancellation of the booking and refund of the amount which he has already paid to the builder and interest and Insurance premium that is –

- (i) Principal amount which have already been paid to the Builder ,
- (ii) Service Tax and GST which have been paid to the Builder,
- (iii) Interest which he has paid to the bank on borrowed capital and
- (iv) Insurance premium which he has already paid to the bank for borrowed capital.

2. This has been argued by the Complainant that under clause 11.3 of the Agreement for Sale, the Complainant is entitled to invoke his option to cancel booking of the unit and claim refund of entire sum paid by him till date together with interest @ 12% per annum from the date of payment to the date of refund as the Respondent failed to deliver the possession as per the Agreement within stipulated time period and thereby breached the binding clauses making complainant entitled for cancellation of booking.

3. The Respondent promoter admitted the facts of sale agreement and details of unit as stated in complaint petition, submitted, in Written Response on Affidavit on 01.02.2020, that the said Clause 11.3 starts with 'without prejudice to the provisions of clause 9.5' and the said clause 9.5 of the Agreement for Sale states that the Respondent shall not be held liable for any interest as claimed by the Complainant, inter alia, for delay on his part under clause 11.3 of the Agreement for Sale since the reason for delay in delivering possession of the unit was due to 'circumstances of Force Majeure'. The term 'Circumstances of Force Majeure' is defined under Clause 15.1 of the Agreement for Sale, which clearly includes 'delay in grant of electricity'. As per the Respondent since there was substantial delay on the part of the West Bengal State Electricity Distribution Company Limited ("WBSEDCL") in providing electricity connection to the project, which comes under Clause 9.5

Dictated
& corrected
by me



of the Agreement for Sale and reason for delay on the part of the Respondent in delivering possession of the unit, within the stipulated time was due to the such circumstances of Force Majeure, the Respondent refused to neither incur any liability, nor be held liable for claim of any amount by the Complainant and the Respondent inter alia claimed not be liable for any interest as claimed by the Complainant under clause 11.3 of the Agreement for Sale. In summary, respondent argued that clause 15.1 gives safeguard to the Promoter company as exception to clause 9.5 under Force Majeure circumstances against obligations of paying interest in terms of clause 11.3 of sale agreement. Respondent also argued that clause 11.2 provides for interest payment @18 % pa for default on the part of complainant in making timely payment as per schedule of payment and claimed that complainant defaulted in making payments, making him liable for interest penalty.

4. Both the parties are in consensus on the point that the total amount paid by the Complainant till date as part of the Consideration money of the said unit is Rs.19,99,052/- and that possession could not be delivered within due date of possession, thereby entitlement of complainant to invoke option for cancellation in terms of clause 11.3. Parties did not argue on this admitted position.

5. Now, the issues before this Authority to be decided are as follows:-

- (i) Whether the Complainant can cancel the Agreement for Sale dated 27.04.2016 at his option due to default on the part of the Respondent in the matter of delivery of possession within due date of possession ?
- (ii) Whether exceptions of clause 15.1 regarding Force Majeure entitles respondent not to pay interest on refund on cancellation in terms of 11.3?
- (iii) Whether the Complainant is liable to pay interest as per rates stated in Clause 11.2 of the Agreement for Sale?

6. Parties were heard on various dates, giving opportunity to makes their submissions and counter submissions on issues of facts and law. In this respect the provisions of the clause 11.3, which is important to determine the

issues in this complaint case are examined and for the sake of convenience reproduced as follows:-

Clause 11.3 of the Agreement for Sale

“Breach of Developer’s Covenants: Without prejudice to the provisions of Clause 9.5 above, in the event the Developer fails and /or neglects to perform any of the Developer’s covenants, this Agreement shall at the option of the Buyer, stand cancelled and /or rescinded, upon which the Developer shall refund to the Buyer all payments received till that date, with interest @ 12% (twelve percent) per annum, from the date of payment to the date of refund. If the Buyer opts not to cancel the Agreement, then also the Developer shall pay to the Buyer interest @ 12% (twelve percent) per annum, for the entire period of delay.”

It is fairly clear from plain reading of the clause that complainant is at liberty to opt out of the project in cancellation of booking or remain with project and claim interest for delay in delivery of possession beyond due date of possession.

7. Examined the evidences, document and submission of the parties on the record.

In respect of issue no. (i) the evidences produced proves that the Respondent breached covenants of Clause 9.5 and clause 9.6 of the Agreement for sale as the Developer failed to deliver the possession even within the extended period of delivery of possession as agreed upon between the parties that is within 31.12.2018. Therefore as per Clause 11.3 of the Agreement the buyer at his option can cancel and/or rescind the Agreement and the Respondent is liable to pay interest as provided under clause 11.3 of the Agreement for sale.

On issue (ii) the Respondent took the plea of ‘Force Majeure’ in this respect as Clause 11.3 starts with the phrase, - “Without prejudice to the provisions of clause 9.5”. The said Clause 9.5 states that the Respondent shall not be held liable for claim of any amount by the Complainant, if the Respondent is

Dictated
& corrected
by me



Dictated
& corrected
by me



unable to deliver possession of the unit within the stipulated time due to circumstances of Force Majeure. The term 'Circumstances of Force Majeure' is defined under clause 15.1 of the Agreement for sale, which clearly includes 'delay in grant of electricity'. But the Respondent failed to produce any evidence to prove that he has informed the Complainant about delay in possession for not getting electricity and cause of the delay at any stage within due date of possession. To take the plea of Force Majeure, it is necessary to prove that the Respondent has sufficiently informed the Complainant about the cause of delay and justified reasons for the delay and there is no malice on the part of the Respondent. The Respondent failed miserably to prove that he has sufficiently informed the Complainant about the delay in possession due to electricity and the reasons for the delay, therefore the plea of Force Majeure on the ground of delay in grant of electricity, can't permit respondent to seek waiver or non-applicability of interest on refund in the event of cancellation.

However, it is a fact that getting electricity supply got delayed considerably, though for reasons which are partly not attributed to respondent company alone and such delay in getting clearances happened due to procedural delays in delay in decision making for applying for electricity and providing lands for such purposes, that could be provided to WBSEDCL last year only, after due date of possession. This is for this consideration that the grounds for delay as claimed by respondent are partly true. But, such grounds, though admitted facts, can't absolve responsibility of respondent .

This Authority is of considered view that there were shortcomings in proper planning, due diligence and required steps for obtaining electricity supply by applying on time within a reasonable time from commencement of the project, despite knowing fully well that 31st December 2018 is due date of possession as per agreement between the parties. Moreover, no evidence or written submission could be filed that claims that Force Majeure Circumstances were known to the complainant and duly availed by respondent by any communication to that effect and extending the date of possession. Therefore, this Authority is not inclined to accept the arguments of respondent that complainant is not entitled to claim interest as per clause

Dictated
& corrected
by me



11.3 of the agreement and finds that respondent is liable to pay interest on invoking this clause by complainant.

In respect of issue no. (iii), it can be said that the plea of the Respondent that the Complainant shall be liable to pay interest as per Clause 11.2 of the Agreement for Sale is also not tenable as the Respondent failed to submit any document or letter or demand notice by which he has informed the Complainant that there was delay on the part of the Complainant and that he condoned the delay in payments made by the Complainant. Rather, respondent acknowledged the receipts of deposits that also stated no interest demand due to any delay payments. In absence of any such documents and supporting evidence to prove claims of respondent, Respondent is not entitled to claim interest @ 18% p.a. for any payment amount dues and outstanding from the Complainant as per Clause 11.2 of the Agreement. As such no delay in amount by complainant could be established. Respondent did not press on this claim, thus this issue is settled.

In respect of the relief claimed by the Complainant regarding refund of Service Tax and GST which have been paid to the Respondent, this Authority is of the considerate view that Statutory tax already paid to the Statutory Authority is not possible to refund. So, this relief claimed by the Complainant is not allowed.

The relief claimed by the Complainant regarding refund of interest which he has paid to the borrowed capital is also not allowed as this Authority is of the view that there is no covenant between the parties in this regard in the Agreement for Sale and in absence of any statutory provisions to allow interest compensation on borrowed capital, Respondent is not under obligation to pay such compensation.

8. Therefore this Authority is satisfied to the effect that the Respondent has made default and/or neglected to perform its obligations as per the Agreement and thus the Complainant is entitled to cancel and/or rescind the Agreement for Sale and entitled to get refund of total amount paid alongwith interest as per Clause 11.3 of the Agreement. It is hereby,

Ordered ,

Dictated
& corrected
by me



(a) that the Respondent shall refund principal amount of Rs.19,99,052/- alongwith interest @ 12% per annum from the date of deposit to the date of cancellation of the Agreement for sale within 45 days from date of receipt of this order. It is further decided that the date of exercise of option for cancellation is the date of filing this complaint petition as agreed by the parties during the course of hearing and this Authority decides that 30th June 2019 shall be the actual deemed date of cancellation of booking for the purposes of clause 11.3. The Month of July 2019 onwards till date of final orders is not considered for the purposes of clause 11.3 of the agreement, with the consent of the parties. This is considered in terms of provisions of clause 11.3 and in consideration of some relief to the respondent company in the facts and circumstances of case, with the consent of complainant.

(b) that the Agreement for Sale executed between the parties as on 27.04.2016 is hereby deemed cancelled on the prayer of the Complainant with retrospective effect from 30.06.2019;

On the oral prayers of parties, this Authority also considered the issues consequential to cancellation of booking and refund orders, as raised by the parties and clarified that

(c) that the Complainant shall supply the copy of the demand raised by the bank to the Respondent for closure of the home loan account taken by him for payment of the consideration money; and

(d) that the entire refund shall be made by the Respondent by bank transfer to the bank account of the Complainant within 45 days from the date of supply of the copy of the demand raised by the bank to him and complainant is entitled to seek interest @ SBI PLR plus 2 % p.a on any amount remaining outstanding beyond such 45 days.

(e) that the Complainant shall be duty bound to supply the 'No Dues Certificate' issued from the bank to the Respondent immediately after

completion of the payment; and

- (f) That the Complainant shall remove all charges, mortgage or interest on the property.

There are no other orders as to costs.

Complaint petition is thus disposed of.

Communicate this order to both the parties.

Dictated
& corrected
by me




(ONKAR SINGH MEENA)

Designated Authority,
Housing Industry Regulatory Authority,
West Bengal.