

INFORMATION MEMORANDUM:

MahaRERA Tribunal holds that forfeiture of booking amount is unfair due to one-sided, inequitable clauses contained in the forms, which the buyers are forced to sign by Promoters.

Rekha Navani vs. M/s. Omkar Ventures Pvt. Ltd

Decided on 29th June 2020

On cancellation of booking, Consumers to be refunded the booking amount if the booking was made on a happening of event which the consumer could not procure due to reasons beyond her control.

Facts of the case:

Allottee booked a flat on 30.11.2017 in a project "Lawns and Beyond" Phase 2 at Andheri, Mumbai. At the time of booking Allottee paid Rs.1 Lac towards EOI and Rs.6.95 Lacs towards application fees. Channel partner of Promoter promised that in case Allottee is found ineligible for housing loan, the amount paid will be refunded.

On 05.12.2017, Allotment letter was executed between parties and demand notice was issued to Allottee to pay the next instalment. Since Allottee could not procure loan from bank, she requested for refund from Promoter. Promoter refunded only Rs.1 Lac against EOI and forfeited Rs.6.95 Lacs towards booking amount. Allottee pursued the matter again

with Promoter. As Promoter did not oblige, Allottee filed a complaint with RERA Authority seeking refund of entire amount with interest in terms of section 19 (4) of RERA Act. Promoter relied on clause contained in Allotment letter stating that they are entitled to forfeit 10% of consideration price of flat. However, they have forfeited only 5% of the total consideration.

Order passed by MahaRERA Authority:

The MahaRERA Authority observed that section 18 of RERA Act cannot come to rescue of Allottee since there is no executed Agreement for sale. Authority disposed the matter directing refund subject to the terms and conditions of Allotment letter.

Aggrieved by the said order of the Authority, the Allottee filed appeal before the Maharashtra RERA Appellate Tribunal.

Issue before Appellate Tribunal:

Whether Allottee is entitled for entire refund of the amount paid by her with interest?

Allottees' contentions:

1. At the time of booking of flat through channel partner of Promoter, they promised to refund the entire down payment in case loan eligibility of Allottee is not met. Later vide email dated 13.02.2019, channel partner confirmed the aforesaid promise.
2. After filling the booking form, said form containing various terms and conditions was never supplied to Allottee.
3. Form provided for forfeiture of application fee and not Rs.6.95 Lacs which was payment of part consideration of flat.
4. As per allotment letter, Application form stands superseded by the Allotment letter. Thus Promoter is obligated to refund the amount paid by Allottee.

Promoter's contentions:

The Promoter opposed the Allottees' appeal stating:

1. Section 18 of the Act is only admissible when there is failure on the part of Promoter to handover possession as per terms of agreement for sale. There is no failure on part of Promoter. Therefore, Allottee is not entitled to claim refund of amount.
2. As per clause contained in application form, Promoter is entitled to forfeit application fees in the event of withdrawal/ cancellation of booking or non-payment of balance application fees.
3. As per allotment letter, the application form stands superseded. Promoter is entitled to recover/forfeit 10% of total consideration of flat if the purchasers cancel booking. However, the Promoter has forfeited only 5% of the total consideration.
4. The email of channel partner is not binding on promoter since it was sent to Allottee and not to booking holder.

Key Principles:

1. Allottee entitled to refund of booking amount if the Allottee was unaware of the interpretations and implications of one-sided and inequitable terms of booking form.
2. Any representation made by the channel partner appointed by the Promoter on behalf of the Promoter. The Promoter is liable for any consequences of representation.

Verdict of Appellate Tribunal:

The Appellate Tribunal partly allowed the appeal holding that the forfeiture of amount paid by Allottee is erroneous and contrary to the provisions of the Act. It observed that:

- (i) The booking form and allotment letter were not in conformity with the provisions of RERA Act. They were also ambiguous, one-sided and inequitable. The RERA Act is a welfare legislation enacted primarily to safeguard the interests of Allottees and thus Promoter cannot be allowed to act contrary to spirit of Act.

- (ii) Court will not enforce unreasonable, unfair contract or clause. It placed reliance on the principle laid down in the case of *Central Inland Water vs. Brojo Nath Ganguly & Anr*¹, and *Pioneer Urban Land and Infrastructure vs. Govindan Raghavan*.

- (iii) The channel partner was appointed by Promoter. It cannot brush aside its liability arising out of the promise made by channel partner on behalf of Promoter.

- (iv) No significant variation in sale price of the flat was mentioned by Promoter. Thus no loss has occurred to Promoter on account of cancellation of flat to warrant forfeiture of the amount paid by the Allottee. Therefore, Allottee is entitled to refund of forfeited amount of Rs.6.95 Lacs without interest.

Acelegal Analysis:

This decision of Appellate Tribunal is in line with the Pioneer Urban Land case. The decision will have an impact on many such disputes between the builders and buyers of flat. The buyers always had concerns over

¹ 1986 AIR SCR (2) 278

disadvantages they face due to one sided clauses in flat buyer's agreement.

However, the said decision is also fraught with danger of overreach by RERA authority. Citing this as a precedence the authorities may end up rewriting the contract between the parties thus violating the sanctity of a written contract between parties. It's a trite law that courts cannot rewrite contract between parties.

Therefore, the authorities must cautiously use the said decision as a precedence.

The authorities will also have to balance the needs of industry in refund cases. If buyers move out of a project without anything more at an advanced stage of project, the promoter will suffer. Hence, even on this count the authorities will have to balance the needs of parties.

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