Buyer entitled to a refund upon delay

CONSUMER PROTECTION

JEHANGIR B GAI

Nishant Saini had booked a flat with S.S Group in a luxury residential project called The Coralwood & Almeria at Village Sihi in Gurgaon. The cost of the flat, which had a super built-up area of 2,000 sq. ft., was ₹1,26,72,000, which included preferential location charges, external development charges, and infrastructure development charges. Once Saini had paid the booking amount of ₹13,09,684, he was issued an allotment letter on May 17, 2012. Later, an agreement was executed on June 5, 2012, for the sale of the flat. The agreement provided that possession would be given within 36 months, with a grace period of 90 days.

Saini availed of a housing loan from Indiabulls, and a total amount of ₹1,11,32,379 was paid to the builder. Since the project was delayed, possession was not given by September 5, 2015, even after the grace period of 90 days had expired. On visiting the site, Saini found that construction work had stopped and the project was unlikely to be completed even in the near future. He also found that the rear courtyard area had been considerably reduced. So, he demanded a refund of the amount paid along with 18 per cent interest.

Since the builder failed to refund the amount, Saini approached the National Commission with a complaint against the developer and its director. Saini pointed out that the builder had executed an unfair and one-sided agreement by which the developer was enjoying the use of his money while he had to live in rental accommodation and pay ₹28,000 per month, besides bearing the housing loan EMI of ₹75,006. The builder challenged the maintainability of the complaint, by terming Saini an investor and not a consumer. The builder also claimed that the agreement provided for any dispute to be referred to arbitration, so the matter could not be decided by the consumer commission. On merits, the builder claimed that the project was delayed due to environmental clearance, but the flat was now ready and possession could be given. Since Saini was insisting on a refund, the builder argued that the agreement provided that the money could be refunded only if another buyer could be found for the flat.

The Commission scrutinised the agreement and held that the conditions for refund were indeed one-sided in favour of the builder. The Commission pointed out that the builder was aware that environmental clearance was required and should have taken suitable steps to get the approval. So, it would be wrong to penalise the flat purchaser for the delay.

The purchaser can't be made to wait endlessly just because the builder fails to fulfil his contractual obligation to obtain the Occupancy Certificate on time

The Commission relied on a Supreme Court judgement and observed that the purchaser cannot be made to wait endlessly merely because the builder fails to fulfil his contractual obligation to obtain the Occupancy Certificate within the stipulated period. It held that if the purchaser was unwilling to wait and insisted on a refund due to delay in possession, the builder was legally obliged to refund the entire amount along with interest.

Accordingly, by an order dated March 18, 2021, delivered by Justice R K Agrawal presiding on the Bench along with S M Kantikar, the National Commission ordered the builder to refund the entire amount of ₹1,11,32,379 along with 9 per cent interest from the date of payment of each instalment till the date of refund. In addition, ₹25,000 was awarded as cost. A period of eight weeks was given for compliance, after which the interest was to be hiked to 11 per cent for the period of delay.

The writer is a consumer activist

Fractional ownership is for deep-pocketed investors

Most retail investors will be better off opting for a REIT

SANJAY KUMAR SINGH

Investors who have bet their money on residential real estate are a disappointed lot today. The rental yield of 2-3 per cent fails to combat inflation and capital appreciation has been poor over the past six-seven years. Meanwhile, large private-equity players have been acquiring the commercial real estate portfolios of Indian developers, a pointer to their bullishness on this asset class. If you, too, have wanted exposure to a grade A commercial property, you can do so now by investing through a fractional ownership platform.

How does it work?

The platform offering fractional ownership does the due diligence and selects a property. A special purpose vehicle (SPV) is created that owns it. Investors become shareholders in the SPV. Each investor is part owner of a specific property. Rental income is distributed annually. At the end of four-six years, the property is sold and the capital gain is distributed.

The platform charges an annual management fee of around 1 per cent. When the property is sold, it charges a performance fee. This could be around 10 per cent on the portion of the internal rate of return (IRR) that is in excess of a hurdle rate of, say, 8 per cent.

Access to grade A property

Through this vehicle, an investor can get access to a grade A office building, which has traditionally been the preserve of high-net-worth individuals. It also comes with the promise of high return. "You can expect a rental yield of 8-9 per cent. Along with capital appreciation, the IRR can be 15-18 per cent over the investment period," says Shiv Parekh, chief executive officer and founder, hBits, a real estate fractional ownership platform.

The property is built, so investors circumvent the risk of delay in approval or construction. "We vet the property and ensure that all the statutory clearances and the occupancy certificate are in place," says Riaz Maniyar, co-founder, Yieldasset Real Estate Tech. The building is leased, so investors don't bear vacancy risk at entry.

These platforms get the property title verified by lawyers. They also maintain an escrow account, and appoint a trustee who ensures that investors' funds are not misused.

FRACTIONAL OWNERSHIP VERSUS REIT

Criterion	Fractional ownership	REIT
■ Ownership	Investor gets part ownership of a single asset	Gets to buy units of a fund that holds multiple properties
■ Degree of choice	Investor gets to select the property he wishes to own	No choice; fund manager picks the properties
■ Likelihood of alpha generation	Higher	Lower
■ Concentration risk	Higher	Lower
■ Liquidity	Likely to be lower as investor holds unlisted shares in an SPV	Likely to be higher as units of REITs are listed

Beware of concentration risk

Here, investors take exposure to a single property, and not a diversified basket of properties, as happens in a real estate investment trust (REIT). "If the investor makes the wrong choice, his investment could underperform a REIT," says Vishal Dhawan, chief financial planner, Plan Ahead Wealth Advisors.

The timing of exit can be an issue. "Not all the owners may want to sell at the same time," says Anuj Puri, chairman, Anarock Property Consultants.

If an existing tenant vacates and a new one is not found on time, the rental income could take a hit. The anticipated capital appreciation of 7-8 per cent annually may also not materialise. "If supply exceeds demand in that micro-market, capital appreciation could be lower than expected," says Dhawan. The platforms do try to ameliorate this risk by purchasing buildings in established commercial hubs with high demand and few vacant land parcels.

Who should go for it?

Investors who can shell out the minimum ₹25 lakh may take the fractional ownership route. It is suited for experienced investors who want a say in the choice of the property their money gets invested in.

Retail investors, who have less money to invest, say, ₹50-70,000, should opt for REITs. They will get exposure to a diversified basket of commercial assets, chosen by the fund manager, and usually spread across cities.

REIT, being a listed entity, is more tightly regulated. "It is a tested investment option across developed nations. In India, too, it has received a favourable response from investors since its launch," says Puri.

Since the units of REITs are listed, liquidity is likely to be better. In fractional ownership, investors hold unlisted shares that may not be easy to dispose of if they wish to exit prematurely. "Check whether you may have to sell at a high discount if you wish to exit prematurely," says Dhawan.

Finally, understand the taxation of the two vehicles. "If the investor has made the investment through a company, then the company will be liable to tax on rental income. When the investor receives dividend income, it will be taxable in his hands," says Suresh Surana, founder, RSM India. REITs enjoy more favourable tax treatment. "REITs are accorded pass-through status. The income distributed by the REIT is considered as rental income in the unit holder's hands and subject to tax as income from house property," says Surana.