

ATLANTA SYSTEMS PVT. LTD. V. NEGOLICE INDIA LTD. & ANR.

1. ATLANTA SYSTEMS PVT. LTD.

Through Mr. Sandeep Narula, Regd. Office M-135, Second Floor,
Opp. Super Bazaar, Cannaught Place
New Delhi – 110 001

.....Complainant(s)

Versus

1. NEGOLICE INDIA LTD. & ANR.

Through Mr. Mahesh Bhagchandha, e-13/29 Harsha Bhawan,
Cannaught Circus
New Delhi – 110 001

2. Delhi Development Authority

Through Vice Chairman, Vikas Sadan, INA,
New Delhi

.....Opp.Party(s)

Case No: CONSUMER CASE NO. 183 OF 2010

Date of Judgement: 17 Jan 2023

Judges:

HON'BLE MR. C. VISWANATH, PRESIDING MEMBER

HON'BLE MR. SUBHASH CHANDRA, MEMBER

For the Complainant : Mr Devendra Singh, Advocate with
Mr Anant Kr Vatsya, Advocate

For the Opp.Party : For Opposite Party no.1 Mr Parveen Kr
Aggarwal, Advocate

For Opposite Party no.2 Mr Ishaan Sharma and Mr Pawan Kumar,
Advocates

Facts

Complainant, a private limited company, had booked a residential flat with OP1 (builder) in October 2006 and paid Rs. 10.44 lakhs. Provisional allotment letter was issued allotting Flat No. E-802. Complainant paid further installments. Builder sent Apartment Buyer Agreement (ABA) in March 2007 which complainant signed and returned but did not receive counter-signed copy. Despite follow-ups, counter-signed ABA was not provided. Meanwhile, builder issued demand notices for payments and finally cancelled allotment in January 2008 for default in payments. Complainant claims cancellation was illegal since he asked for counter-signed ABA repeatedly but builder failed to provide the same. As per RTI replies, the builder had obtained necessary approvals for the project only in 2007-08 even though provisional allotment stated construction will commence in 2 months.

Arguments by Complainant

It is a consumer under the Consumer Protection Act having booked the flat for residential use by its executives. Complaint is within limitation. In absence of executed ABA, terms of allotment and payment schedule were not explicitly made known. Non-execution of ABA amounts to deficiency in service. Cancellation of allotment on ground of default in payments is illegal since 'bhoomi puja' event was never conveyed by builder.

Arguments by Builder

Complainant is not a consumer as flat was booked for commercial use. Complaint barred by limitation. Payments were not linked to execution of ABA or start of construction. There was default in making stage-wise payments as per application. Cancellation was as per terms of application. Complainant was provided with ABA duly signed by builder which he failed to execute and return. So builder is not at fault.

Court's Observations and Conclusions

Complainant is a consumer under the Act. Complaint is not barred by limitation as there was continuing cause of action. Non-execution of ABA by builder amounts to unfair trade practice. Builder cannot rely on clauses of application form when ABA was not duly executed. Payment schedule included stage linked to "Bhoomi Pujan" event which builder never conveyed. Hence, builder wrongly cancelled allotment.

Order

Complaint allowed. Builder directed to restore allotment of flat on original terms and conditions and handover possession with 6% interest for delay.

Relevant Legal Provisions

Section 2(1)(d) of Consumer Protection Act, 1986 – definition of consumer

Section 2(1)(r) of Consumer Protection Act, 1986 – definition of unfair trade practice

Section 24A of Consumer Protection Act, 1986 – limitation period

Cases Referred

Karnataka Power Corporation v Ashok Iron Works Pvt. Ltd. (on interpretation of consumer)

National Insurance Co. Ltd. v Hindustan Safety Glass Works Ltd. (on limitation)

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Court

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Full Text of Judgment:

1. This complaint under section 12(i)(a) read with section 21(a)(i) of the Consumer Protection Act, 1986 seeks possession of an apartment booked by the complainant with the opposite

party no. 1 in his project with compensation on grounds of deficiency in service and unfair trade practice.

2. Briefly put, the facts, as stated by the complainant are that it had booked a flat in opposite party no. 1's project Victoria Garden, Model Town, Delhi in October 2006 for the use of its visiting executives by depositing Rs 10,43,654/-. Vide provisional allotment dated 06.11.2006 flat no. E 802 was allotted to him under a Construction Linked Payment Plan with an assurance to complete construction within 36 months with grace period of 6 months. The complainant states that while he paid another installment in December 2006, the Apartment Buyers Agreement (in short, 'Agreement') was not executed while other demands for payments kept on being raised. The Agreement received from opposite party no 1 vide letter dated 09.03.2007 was signed and sent on 24.03.2007. However, a signed copy was not received back by the complainant for which several follow up efforts were made to no avail. On 27.09.2007 a final notice was received for payment of dues with interest within 10 days. Despite the complainant asking for the signed copy of the Agreement in November 2007, opposite party cancelled the allotment vide letter dated 14.01.2008 on the ground of default in payment and sent a cheque for Rs 6,41,010/- as refund after forfeiting the earnest money. On the complainant taking up the matter with opposite party no. 1, this cancellation was agreed to be revoked; however, no letter was issued.

Complainant returned the cheque for refund which was resent by the opposite party on 18.03.2008. As several efforts to resolve the issue did not fructify, the complainant issued a legal notice on 13.08.2008 to the opposite party no. 1. In response it was conveyed on 15.09.2008 that the allotment stood cancelled. The cheque for refund was again enclosed and it was admitted that the Agreement had not been furnished to the complainant.

3. The complainant states on the basis of information obtained through the Right to Information Act (RTI) that the opposite party had applied for clearances pertaining to fire, water and

sewage clearances that were essential for a building plan sanction only in May 2007, that environment clearance was given in May 2007 and sanctioned plans were obtained only in February 2008. However, as per information on the website of Delhi Pollution Control Committee, the Consent to Establish was not available with the opposite party on 11.12.2008. Despite such a situation, the opposite party had stated while issuing provisional allotment that construction would commence in two months which was a mis-representation. The land area available was also wrongly shown as 8 acres when only 4.5 acres was available. It was assured that 7 towers of 11 floors each would be constructed; however, the complainant states that 20 floors are being constructed per tower. It is also contended that while Rs 5,590/- per sft has been charged from him by opposite party no.1, allotments to others is at Rs 3,500/- per sft. Alleging deficiency in service and unfair trade practice, the complainant is before us with the prayer to:

- (a) set aside the communication dated 14.12.2008, 18.03.2008 and 15.09.2008 and hold the opposite party no.1 guilty of deficiency of service/unfair trade practice
- (b) direct the opposite party no. 1 to furnish to the complainant a complete and duly signed set of original documentation pertaining to the allotment of flat no. E 802 in the project Victoria Garden situated adjoining Model Town, Delhi including the standard application form and apartment buyers agreement
- (c) direct the opposite party no.1 to give due possession of the apartment no. E 802 in the project Victoria Garden on the same terms and conditions as promised when the letter of allotment was issued on 06.11.2006 and collect payment of pending installments
- (d) direct the opposite party no. 1 to pay an amount of Rs 10,00,000/- to the complainants for mental agony and harassment suffered by the complainants
- (e) restrain the opposite party no. 1 from transferring,

reselling, registering, parting with possession or creating any charge in respect of the said flat no. E 802 in the project Victoria Garden situated adjoining Model Town, Delhi
(f) Pass such other orders as may be deemed fit, proper and necessary.

4. The complaint was resisted by opposite party by way of a written statement. The opposite party contended that the complaint was false and frivolous and made for undue gains. Preliminary objections were taken that the complainant was not a 'consumer' under section 2(i)(d) of the Act with no locus standi to file a consumer complaint. The complaint was also objected to on grounds of limitation as the order of cancellation was dated 14.01.2008 while the application was filed on 28.09.2010, i.e. beyond two years as mandated under section 24 A of the Act. Reliance is placed on judgments of the Hon'ble Supreme Court in State Bank of India Vs. B.S. Agriculture Industries, (2009) 5 SCC 121, Union of India & Anr. Vs. British India Corporation Ltd. & Ors., (2003) 9 SCC 50, Haryana Urban Development Authority Vs. B.K. Sood (2006) 1 SCC 164 and Gannmani Anasuya & Ors. Vs. Parvatini Amarenfra Chowdhary & Ors. (2007) 10 SCC 296 to argue that a complaint barred by limitation deserves dismissal at the threshold. It is also contended that the complainant failed to disclose his failure to pay the demands due from him which resulted in cancellation of allotment. It is stated that there has been misjoinder of parties in arraying Delhi Development Authority (DDA) as opposite party no. 2 and the complaint is not filed by an authorized person for which reasons the complaint needs to be dismissed.

5. On merits, it is stated that the flat was booked for commercial purposes as it was to be used for visiting employees. It is denied that change in land use in respect of the land purchased from M/s National Textile Corporation had been obtained. It is also denied that prior sanction of building plans was a pre-condition for the booking of the flats and receiving of deposits for the same under the law. It

is denied that there was any commitment that construction would commence within 2 months. The time frame for construction is contended to have been only indicative and the construction linked payment plan stated to be different to the schedule of payment of 10% of basic sale price at the time of booking, 10% of base price with 50% PLC and 50% car parking within 45 days of booking and another 10% of basic price, 25% of PLC and 25% car parking charges within 90 days, with no connection with start of construction. While admitting the booking with initial deposit, it is contended that payments made by the complainant were adjusted to the non-construction related stages of payment and therefore there was default as far as construction related payment was concerned. It is contended that failure to make payments cannot be justified on the ground that the Agreement copy had not been provided.

6. The cancellation of allotment is justified on the strength of clause 14 of the Agreement, especially since a provisional allotment letter had been issued. It is contended that there was no stipulation that payment by complainant would be made only after the signed Agreement was available and that the complainant had ulterior motives. As the complainant had undertaken in the application form itself that it would have no claims for non- allotment or withdrawal of allotment, the contention of the complainant was baseless. It is contended that there was no requirement under law to obtain clearances and permissions before booking flats and that it had been held by the Hon'ble Delhi High Court that prior consent from DPCC for air and water pollution control was not applicable for residential complexes. It is denied that the opposite party no. 1 had misrepresented to the complainant regarding extent of land. As regards the number of floors per tower, it is submitted that in view of additional FAR being allowed under the Master Plan for Delhi 2021, revised plans were submitted to opposite party no. 2 and necessary fees paid since modification of plans at the discretion of the Company/opposite party 1 was permitted as per clause 2 of the application form for allotment of the flat. The allegation of

differential pricing has been denied on the justification that prices were a result of market fluctuations.

7. It is contended by opposite party 1 that the sale consideration of the flat in October 2006 was Rs 1,04,36,534/- excluding PLC, parking charges, IFMS, CMRC and other miscellaneous charges. The amount paid by the complainant is Rs 23,64,711/- and the pecuniary jurisdiction of this Commission is not met. It is prayed that the complaint be dismissed with exemplary costs.

8. We have heard the learned counsel for the parties and carefully considered the record. Both the learned counsel also filed their short synopsis of arguments.

9. Learned counsel for the complainant argued that it was a juristic person as held by the Hon'ble Supreme Court in Karnataka Power Corporation Vs. Ashok Iron Work Pvt. Ltd. (2009) 3 SCC 240 and as the flat was booked for the residence of his employees and not for commercial purposes, he was entitled to be a 'consumer' under the Act. It is argued that the complaint filed on 28.09.2010 is not barred by limitation since the opposite party no.1 did not raise this issue while accepting the deposit of Rs.1 crore vide this Commission's order dated 07.02.2014 and filed IA no.1572 of 2014 dated 07.03.2024 as an after-thought. The acknowledgement by the opposite party no.1 that cancellation letter was in view of alleged violation of clause 3 of the Agreement vide his letter dated 15.06.2009 implies that it was a continuing cause of action. It is argued that in the absence of a concluded agreement, applicability of clause 3 is irrelevant. Reliance is placed on National Insurance Co. Ltd., vs Hindustan safety Glass Works Ltd., – (2007) 5 SCC 776, wherein the Hon'ble Supreme Court held that:

“where a supplier is responsible for causing a delay in the settlement of the consumer's claim, the consumer shall be entitled under law to file a complaint in the Consumer Court even after the expiry of the period of two years”.

The Opposite party has contended that there was no continuing

course of action as per agreements in written statement or that IA no. 1572 of 2014 was an after-thought. The opposite party has relied upon clause 15 of the Agreement to invoke arbitration in the present case even while not completing the process of exchanging signed copies of the document. He alleged deficiency in service in that he had not been provided with a signed copy of the Agreement which would have defined the rights and obligations of both the parties, including the payment schedule.

10. The only remaining issue according to the complainant was the delivery of the signed Agreement along with possession of the flat along with compensation for delay, damages and refund of excess payment with interest to the complainant since the total basic cost of the flat was Rs 1,14,91,342/- and an excess amount of Rs 8,73,369/- stood deposited as on 21.02.2014. It is argued that even though the project was launched in 2004-05, and delivery was promised in 36 months, the building plan sanction had been obtained only on 01.02.2008 and a fresh revised plan was obtained on 19.10.2009. The construction was completed in 2016. Therefore, the opposite party 1 had misled the complainant.

11. The complainant argued that non execution of the Agreement was an unfair trade practice and the payments were obtained by misleading the complainant into believing that the work will commence in December 2006 since all approvals were in place and accordingly a construction schedule of 36 months with a grace period of 6 months was indicated. During the course of arguments, it was stated that the opposite party had accepted Rs 1,00,00,000/- as per order of the Commission dated 07.02.2014 while disposing IA 630/2014 and therefore the sale consideration had been paid. It is argued that the complainant had been making repeated efforts with the opposite party to resolve the issue and that the opposite party had also replied to his communications, including the legal notice on 15.09.2008. It is, therefore, argued, that the period of limitation should not be considered from 14.01.2008, the date of unilateral cancellation by the opposite party no 1.

Consequently, it was argued that the flat be handed over as per the original rate charged with delay compensation and the excess amount be refunded with compensation for harassment.

12. On behalf of opposite party no.1 it was argued that the sale consideration of the flat in question was Rs 1,16,40,592/- plus taxes, sale deed, registration charges, etc. The complainant was required to pay this amount as per the construction linked payment plan in addition to the three stage payment of (a) 10% of basic sale price at the time of booking, (b) 10% of base price with 50% PLC and 50% car parking within 45 days of booking and another 10% of basic price, and (c) 25% of PLC and 25% car parking charges within 90 days. This was not connected with the construction linked plan. As against this, the complainant had paid only Rs 23,64,711/- and despite notices remained in default of payments. As neither the first installment due on 24.11.2006 nor the second installment due on 08.01.2007 was paid by the complainant, a reminder was sent on 21.05.2007 followed by a final notice dated 27.09.2007. It was only thereafter that the allotment was cancelled on 14.01.2008 on ground of default. It is stated that this was as per clause 14 of the Application Form which specifically provided for cancellation in case of default in payment beyond 60 days of the due date for payment. It is argued that the complainant had provided the Agreement to the complainant on 09.03.2007 which he had signed and returned on 24.03.2007. It is argued that the complaint was barred by limitation under section 24A of the Act as it was filed beyond the stipulated period as the cause of action was the cancellation dated 14.01.2008. The complainant had filed an IA No. 11846 of 2018 for condonation of delay on 26.06.2018 and 31.07.2018 which is yet to be decided. All averments of the complainant with regard to deficiency in service and unfair trade practice are denied by him. It is also argued that the complainant is not accompanied by any resolution of the Board of Directors authorizing any one to file the complaint as required under law. It is submitted that the completion certificate of the project was applied for on

18.02.2015 and a partial completion certificate covering towers A,B,C,D,E,G and community facilities was made available by the opposite party no. 2 the same day.

13. On behalf of opposite party no. 2 it was argued that there was no privity of contract between it and the complainant as a service provider as it is a statutory authority which accords only administrative approvals. It was stated that the building plan sanction was applied for on 14.11.2005 by the opposite party no. 1 which was accorded on 01.02.2008; however, a revised plan was submitted on 20.11.2008 which was not considered whereafter another plan was submitted on 19.01.2009 with the requisite fee of Rs 1,53,198/- which was also rejected as it was not in conformity of the Master Plan. On 18.02.2015 a partial completion certificate was issued for 338 units except 132 EWS units as per Master Plan for Delhi, 2021. The revised building plan for Tower 11 was approved by opposite party no. 2 on 13.01.2021.

14. The preliminary objections on the issues of (i) jurisdiction of this Commission in view of provision of arbitration, (ii) status of the complainant as a 'consumer' and non availability of authorization from the Board to file this complaint, (iii) applicability of section 24A of the Act pertaining to limitation, have been considered. There is no bar on this Commission to examine the complaint despite the provision of arbitration in terms of the Hon'ble Supreme Court having held in M/s Emaar MGF Land Limited Vs. Aftab Singh – I (2019) CPJ 5 (SC) that an arbitration clause does not bar the jurisdiction of the consumer fora to entertain such complaints. There is no restriction on the complainant to file this complaint since as a legal entity it is not barred under the Act as per section 2(i)(m) which includes a 'firm', whether registered or not. As regards the objection that the flat was booked for 'commercial purposes', the judgment of the Hon'ble Supreme Court in Laxmi Engineering Works Vs. P S G Industrial Institute – (1995) 3 SCC 583 has laid down that "a commercial purpose is a question of fact that needs to be decided in the facts of each case and it is not the value of

goods that matters but the purpose for which the goods bought are put to. The same would be applicable to for hiring or availing services". The argument of the opposite party no.1 that the flat was not for the personal use of a 'consumer' has not been categorically proved by any evidence on record. His argument cannot be accepted for this reason. The contention that the complaint is barred by limitation commencing from 14.01.2008 does not sustain since there was a continuing cause of action as is evident from the fact that there was communication on the issue of cancellation till as late as 15.09.2008.

15. It is the contention of the complainant that the payment of Rs.1,00,000/- to the opposite party constitutes payment towards the sale consideration. This amount was directed by this Commission vide its order dated 07.02.2014 while disposing of IA No 630 of 2014. This IA had prayed for restraining OP no.1 from transferring, re-selling, registering, parting with possession or creating any third party rights or charge in respect of flat no. E – 802, 8th Floor, Tower E and direct the opposite parties to maintain the specification of the flat as per the terms and conditions of original Buyer Agreement and brochure for allotment of flats of this project. The order of the Commission reads as under:

"Having heard the learned counsels for the parties and perused the documents on record, but without expressing any opinion on the merits of the rival contentions at this stage, it is directed that the developer shall maintain status quo as it exists today in respect of nature, title and possession of apartment number E 801, Type C-1, Tower No. 3 on the 8th floor subject to the complainant paying to the developer an additional amount of Rs 1 crore within two weeks from today."

16. On merits, the key issue in the case is whether the opposite party no. 1 was justified in cancelling the provisional allotment on the ground of default in payment. While there is a provision in the application form with regard to such a condition, as claimed by the opposite party no.1, the complainant's case that in the absence of there being a

duly signed and executed Agreement between the parties, the terms and conditions between the two parties had not been explicitly made known also merits consideration. It is curious that the Agreement forwarded by the opposite party on 09.03.2007 in two sets for the signature of the complainant, was not executed by him. It is not disputed by the opposite party that the complainant failed to execute this document. It is also evident that the project was delayed beyond the committed date of completion. In fact, the date of completion as per the allotment was 06.05.2010 inclusive of the grace period reckoned from the date of allotment (06.11.2006). As per the written submissions of opposite party no 2, the building plan was sanctioned only on 19.01.2009.

17. The Agreement is a document that was prepared by the opposite party no. 1 and has not been objected to by the complainant. Therefore, its execution by the opposite party would have ensured that the arrangement for the construction of the flat would have been more transparent and legally binding for both parties. As per the application form for the allotment signed by the complainant, which is relied upon by the opposite party no 1, clause 11 reads as under:

The Applicant/s agrees that out of the amount/s paid/payable by him/her towards the Consideration and other charges, the Company shall deal with 15% (Fifteen Percent) of the total Consideration as Earnest Money to ensure fulfillment of all the terms and conditions by the Applicant/s as contained herein and in the Apartment Buyers Agreement etc of the Company. Timely payment of the Consideration and other charges as per the Company's Payment Plan is the essence of the Allotment if accepted by the Company. The Applicant/s has agreed to pay Earnest Money to ensure fulfillment of the Terms and Conditions as contained in the Application Form under standard Apartment Buyers Agreement of the Company. The Applicant/s hereby authorizes the Company to forfeit the Earnest Money paid in case of default by him.

The non-execution of the standard Apartment Buyer Agreement of the Company within a period of 30 days of dispatch by the

Company shall be treated as an event of default.

(Emphasis added)

18. It is not the case of the opposite party that it had not received the signed copy from the complainant. It has also not contended or produced any evidence to the effect that a signed copy was returned to the complainant. The opposite party no 1 is therefore liable for unfair trade practice in not ensuring the formal execution by returning a signed copy of the Apartment Buyer Agreement after having received Rs 23,64,711/- from the complainant. The admitted delay in the completion of the project renders the opposite party liable for deficiency in services.

19. As regards the issue of default in payments, which is the reason for the cancellation of the allotment, the relevant extract in the application form regarding 'Payment Plan' reads as under:

PLAN C: CONSTRUCTION LINKED PAYMENT PLAN

At the time of booking	10%
Within 45 days of Booking	10%+50%PLC+%50% Car Parking
Within 90 days of Booking.....	10%+25%PLC+%25% Car Parking
On Bhoomi Puja	5%+25%PLC+%25% Car Parking
On start of Foundation	.5%

From the above, it is amply evident that there was a stage of payment that was linked to 'Bhoomi Puja'. The complainant has argued that the date for this event was never conveyed. The opposite party not brought on record any document to prove that date for this was conveyed to the complainant. It has not denied that there was such a stage for payment. It has, however, cancelled the allotment of the complainant on the ground of default in payment of installments as per the terms and conditions in the application form. The opposite party cannot be selective in relying upon the conditionalities included in the application form with regard to payments while

not complying with the obligations placed on it. Such an approach proves that the application form is a one-sided document and has unfair trade practice writ large.

20. The deposit of Rs 1,00,00,000/- by the complainant was made as per an order of this Commission directing this deposit in order to restrain the opposite party from selling it or creating third party rights on it as the construction of the flat is reported to be complete. The flat is, therefore, available for allotment. In view of the opposite party being guilty of unfair trade practice and deficiency in service, this complaint is found to have merit and accordingly succeeds. The opposite party is directed to restore the allotment of flat E 802, Victoria Garden, Model Town, Delhi to the complainant on the same terms and conditions as per the original allotment dated 06.11.2006. The opposite party shall hand over possession of the flat after completing the necessary formalities within 8 weeks along interest at 6% on the deposit made (excluding the Rs.1,00,00,000/-) from the due date of possession till the date of offer of possession.

21. The complaint is disposed of with these directions.