

Consumer case for delay in possession and refund of amounts paid for flat booking: NATIONAL CONSUMER DISPUTES REDRESSAL COMMISSION NEW DELHI

SEEMA GARG

...Appellant

M/S. G.S. PROMOTERS PVT. LTD. & 2 ORS.

...Respondent

Case No: CONSUMER CASE NO. 1963 OF 2018

Date of Judgement: 01 January 2024

Judges:

SUBHASH CHANDRA
PRESIDING MEMBER

For Appellant: MR. LALIT BESOYA AND MS. MEHAK KALRA, ADVOCATES

For Respondent: None

Facts:

Complainant Mrs. Seema Garg and Mrs. Anju Jain booked a flat with Opposite Party M/s G.S. Promoters Pvt. Ltd. in its project "Sikka Karmic Greens" in Noida. Flat No. 805 in Aspire Tower was allotted to Complainant. Flat Buyer Agreement executed between parties on 01.04.2013. Complainant paid initial installment of Rs. 3,88,650 on 15.05.2012 against total sale consideration of Rs. 45,77,000. By 05.05.2015, Complainant paid Rs. 44,17,164 including penal interest,

amounting to 95% of sale consideration. As per Agreement clause 26, Opposite Party was to complete construction within 36 months from excavation date plus 6 months grace period subject to force majeure. Opposite Party failed to offer possession by 15.05.2015 or extended date of 15.12.2015. On 21.07.2017, Opposite Party issued offer for possession for fit-outs demanding balance 5% payment within 15 days. Complainant found construction still underway without necessary approvals. Complainant did not take possession and sought refund with 24% interest vide letter dated 27.06.2018.

As Opposite Party failed to refund, Complaint filed before NCDRC seeking:

Refund of amount paid with 24% interest. Rs. 5,00,000 compensation for mental agony. Litigation costs. Any other relief deemed fit.

Opposite Party's Arguments:

Complainant not a "consumer" but an investor who booked flat through broker not made party. Claim unreasonable and exaggerated. Misjoinder of parties by including Directors. Complainant admitted default in payments so not entitled to relief. Agreed penalty for delay only Rs. 5 per sqft. No basis given for Rs. 1,40,00,000 valuation of suit. Project in Noida so District/State Consumer Forum have jurisdiction. Limitation period expired. No deficiency in service, only monetary claim requiring civil suit. Contents of Complaint incorrect, no formal cancellation request. Delay due to force majeure – agitation by farmers, NGT orders, disputes with contractors, shortage of materials, new laws etc. Interest of buyers wanting possession cannot be compromised for those seeking refund.

Complainant's Rejoinder:

Late payments made with interest @24% which Opposite Party accepted. Allotment not cancelled for delayed payments. No evidence to prove force majeure events specifically impacted the project. Buyers cannot be expected to wait indefinitely for possession. Offer of possession without occupancy certificate after over 19 months' delay from grace period expiry. Seeking refund and compensation justified due to breach of contract and deficiency in service.

Court's Observations and Decision:

Jurisdiction and Limitation:

No issue found with territorial jurisdiction or limitation period.

Merits:

Delay in offer of possession admitted by Opposite Party. Offer was for fit-outs only. Complainant paid interest @24% for late payments which Opposite Party accepted. Allotment not cancelled by OP for this reason. No evidence produced by Opposite Party on impact of force majeure events like NGT orders, demonetization etc on project. OP cannot deny refund citing delay when allotment not cancelled earlier on this ground.

Binding precedents entitle buyer to refund and compensation for indefinite delay in possession. Delay of over 19 months with no occupancy certificate breaches Agreement terms. Seeking refund and compensation justified due to deficiency in service by Opposite Party.

Compensation:

Interest rate of 9% p.a. held as fair compensation as per Supreme Court precedent.

Decision:

Complaint allowed. Opposite Party directed to refund Rs. 44,17,164 paid by Complainant with interest @ 9% p.a. from respective dates of payment within 2 months. On failure to refund, interest payable @ 12% p.a. Opposite Party to also pay litigation costs of Rs. 50,000 to Complainant.

Conclusion:

The National Consumer Disputes Redressal Commission upheld the Complaint filed for delay in offering possession of the booked flat beyond the contractually agreed period. It ruled deficiency in service was clearly established against the builder Opposite Party. The Complainant purchaser was held entitled to refund of paid amount with fair interest as compensation. This consumer case demonstrates the rights of flat buyers to seek refund plus interest where the builder inordinately delays offering possession without sufficient cause. It

reiterates the settled position in law allowing home buyers the remedy of cancellation and refund where possession is deferred indefinitely by the builder in breach of terms.

Case Laws Referred:

No case laws were referred in the order.

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Court

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Full Text of Judgment:

1. This Complaint under Section 21(a)(i) of the Consumer Protection Act, 1986 (for short "the Act") alleges deficiency in service on the part of the Opposite Party in failing to deliver possession of the flat booked by the Complainant within the time agreed and seeks refund of the deposited amount with interest by way of compensation.

2. In brief, the relevant facts are that the Complainant booked a flat with the Opposite Party in its project "Sikka Karmic Greens" Plot No.GH-01/C, Sector 78, NOIDA, Distt. Gautam Budh Nagar, Uttar Pradesh. Flat No.805 in Aspire Tower was allotted to her and a Flat Allotment Agreement (in short "the Agreement") was executed on 01.04.2013. The first installment of ₹3,88,650/- was paid on 15.05.2012 against the sale consideration of ₹45,77,000/-. By 05.05.2015, ₹44,17,164/-, including penal interest, amounting to 95% of the sale consideration had been paid. As per Clause 26 of the Agreement, the Opposite Party promised to complete the construction of the flat within 36 months from the date of excavation with a grace period of 6 months subject to force majeure conditions. No offer of possession was made either by 15.05.2015 or by 15.12.2015 as per the Agreement. However, on 21.07.2017 the Opposite Party made an offer of possession for fit out raising a demand for payment of balance 5% of the sale consideration within 15 days failing which holding charges, maintenance charges and applicable interest was to be levied. The Complainant found that the construction was still under way and also learnt that the necessary permissions were not in place but had been applied for. She, therefore, did not take the possession and sought

refund with interest @ 24% p.a., which was the rate of interest charged by the Opposite Party for delay in payments, vide letter dated 27.06.2018. As the same was not complied with by the Opposite Party, the Complainant is before this Commission with the following prayers:

(i) To refund the cost of the flat as was paid by the Complainant with the interest of 24% on the amount paid as same rate had been charged by the Opposite Parties from Complainant till date.

(ii) Opposite Parties to pay the compensation for mental agony caused to Complainant by way of delay in possession/mis-information/deceit the Complainant i.e. ₹5,00,000/-.

(iii) Opposite Parties to pay the cost of suit.

(iv) Any other order which this Hon'ble Commission may deem fit just and proper may kindly be passed in favour of the Complainant.

3. The Complaint was resisted by way of reply by the Opposite Party denying the allegations and taking the preliminary objection that the Complaint was not maintainable since the Complainant was not a 'consumer' under Section 2(d) of the Act but was an investor who lived abroad and had booked a flat through a broker who had not been made a party. The claim was stated to be unreasonable and exaggerated and it was submitted that there was misjoinder of necessary parties since the Directors and Officers of the Company had been impleaded as parties. It was stated that the Complainant had admitted default in making payments and was therefore not entitled to any relief. It was stated that it was admitted by the Complainant that the agreed penalty for delay in handing over of possession was ₹5/- per sq.ft., and hence the Complainant's case is not valid. It was submitted that the Complainant had not provided any basis for valuing the Complaint at ₹1,40,00,000/- and that the same was arbitrary and was liable to be rejected under Section 26 of the Act as frivolous and vexatious. It is also contended that as the project was located in NOIDA, the preliminary jurisdiction lies with the concerned District/State authorities and jurisdiction did not lie with this Commission. Objection was also taken on the grounds of limitation since the last instalment was stated to have been paid in May 2015 while the Complaint was filed in August 2018 and no application for condonation of delay had been filed. It was contended that there was no deficiency in service on the part of the

Opposite Party and that the nature of the complaint was for recovery/refund which was required to be done in a Civil Suit and not under these proceedings. It was, however, admitted that flat No.805, Floor No.8 in Aspire Tower had been booked in its project "Sikka Karmic Greens" by the Complainant and an Allotment Agreement dated 01.04.2023 executed between the parties. The period for construction/completion of 36 months with 6 months of grace period subject to timely payments and force majeure circumstances was not disputed. However, agitation by farmers, orders of the National Green Tribunal, dispute with contractors, unavailability of sand due to orders of the NGT and shortage of cement and steel for various periods, slow down in real estate sector, demonetization, compliances of new laws such as RERA had delayed the project which was covered under force majeure circumstances and therefore the Opposite Party was entitled to a reasonable extension of time. Reliance was placed on the observations of the Hon'ble Supreme Court in Chitra Sharma vs. Union of India, Civil Appeal No.744 of 2017 to argue that the interest of home buyers who prefer possession should not be compromised by the interest of those home buyers who sought refund of their money. On merits, the Opposite Party argued that the contents of the Complaint were incorrect, highly exaggerated and that there was no formal request for cancellation of the Flat Buyer Agreement. It was therefore prayed that the Complaint be dismissed with costs.

4. Parties led their evidences. Complainant filed rejoinder and short synopsis of arguments. Opposite Party did not file its the short synopsis of arguments despite being given a last opportunity vide order dated 27.03.2023.

5. I have heard the learned Counsel for the Complainant. Despite notice and several opportunities, the Opposite Party continued to remain unrepresented and was therefore declared ex parte. However, its reply has been taken as the final arguments.

6. It is manifest from the record and the submissions of both the parties that there was a delay in making an offer of possession by the Opposite Party with regard to the flat booked by the Complainant. The

offer of possession dated 21.07.2017 was for the purpose of fit-outs and no Occupancy Certificate or Completion Certificate has been brought on record by the Opposite Party to date. Even the offer of possession for fit-out on 21.07.2017 was nearly 19 months after the expiry of the grace period as per the Agreement.

7. On its part, the Complainant countered the explanation that the Opposite Party provided for this delay attributing it to the default in payment by the Complainant and the applicability of force majeure circumstances. The Complainant stated that it paid the sale consideration along with interest @ 24% for delayed payments which has not been controverted by the Opposite Party.

8. I find merit in the Complainant's contention in view of the fact that the payments towards sale consideration were accepted by the Opposite Party along with interest, and hence, it is now not valid for it to state that there was a default since the payment of the interest by the Complainant regularizes the said default. In any case, the Opposite Party did not cancel the allotment on this ground. It has also not brought on record any notice for cancellation on this ground. As held by this Commission in *Ankur Goswami vs Supertech Ltd.*, Anr. 2017 SCC Online NCDRC 1240 having not cancelled the allotment on account of delay in making the payments, the Opposite Party cannot now deny refund of amounts paid to it by the Complainant on account of this delay.

9. The other defence taken by it is that of applicability of force majeure circumstances. The contention of the Opposite Party is that the delay in completion of the construction was on account of extraneous factors that qualify for force majeure have also been considered. In real estate projects where the opposite party/builder collects deposits against a time committed project, the management of risks is his liability. The contention of the opposite party on force majeure grounds of demonetisation and restrictions on account of orders of the National Green Tribunal (NGT) cannot be considered as being valid in the present case. There has been no documentary evidence adduced by the opposite party to substantiate its claim for relief on the basis of these reasons. These issues have also been extensively considered

in this Commission's orders in

Anil Kumar Jain & Anr. Vs. M/s Nexgen Infracon Private Limited in Consumer Complaint No. 1605 of 2018 dated 23.12.2019 wherein it was held that in the absence of any proof to substantiate the claims of demonetisation and NGT adversely causing delay incompletion of the project and impacting the date of handing over of flats, such reliance on force majeure conditions was not justifiable. In the instant case no proof has been adduced before us to the effect that there was any specific order of the NGT against the opposite party, such as a ban on construction or any related activity or how it impacted this particular project. We are, therefore, of the view that the contention of the opposite party is without merit and cannot be sustained.

10. The Hon'ble Supreme Court has held in a catena of cases, notably in Pioneer Urban Land & Infrastructure Ltd. Vs Govindan Raghavan, (2019) 5 SCC 725 and Fortune Infrastructure Vs. Trevor D'Lima (2018) 5 SCC 442, that an allottee cannot be expected to wait indefinitely or for an inordinate period of time for possession of the flat booked by him and is entitled to seek refund in case of inordinate delay in making the offer of possession by the Opposite Party. In the instant case, the offer of possession has been made after nearly 19 months and is not accompanied by any Occupancy Certificate or Completion Certificate. The Complainant cannot, therefore, be faulted in seeking to cancel the allotment and to seek refund with compensation for the delay. The delay is also not disputed by the Opposite Party but is sought to be justified on the grounds that cannot be sustained.

11. In view of the foregoing discussion, the Complaint is liable to succeed since breach of contract is evident and deficiency in service on the part of the Opposite Party stands established.

12. As regards the rate of interest as compensation, the Hon'ble Supreme Court in the case of Experion Developers Pvt. Ltd. vs. Sushma Ashok Shiroor, Civil Appeal No.6044 of 2019 decided on 07.04.2022 has held that compensation by way of interest has to be both compensatory as well as restitutionary and held that interest @ 9% would be fair and just. It would be appropriate to follow this principle in the instant

case.

13. The Complaint is therefore allowed with the direction to the Opposite Party to refund the entire deposited amount of ₹44,17,164/- with interest @ 9% p.a. from the respective dates of deposits within two months of this order, failing which the applicable rate of interest shall be 12% p.a. till realization. In addition, the Opposite Party shall also pay litigation costs of ₹50,000/- to the Opposite Party.

14. Pending IAs, if any, stand disposed of with this order.