

Deficiency in service and unfair trade practices by real estate developer: NATIONAL CONSUMER DISPUTES REDRESSAL COMMISSION NEW DELHI

SUNIL KUMAR TANEJA & ANR.

...Appellant

M/S. RPS INFRASTRUCTURE LIMITED

...Respondent

Case No: CONSUMER CASE NO. 2733 OF 2018

Date of Judgement: 01 January 2024

Judges:

SUBHASH CHANDRA
PRESIDING MEMBER

For Appellant: MR RAKESH MITTAL, MR AJAY HARSHANA, ADVOCATES

For Respondent: MR SHIVAM TANEJA, ADVOCATE

Facts:

Sunil Kumar Taneja and another (complainants) booked a 3 BHK flat with RPS Infrastructure Ltd (opposite party) in their RPS Auria project in Faridabad in April 2013 and paid Rs. 6 lakhs as booking amount. An allotment letter was issued in September 2013 for Unit No. T-02-0004 with super area of 1835 sqft approximately. As per the Apartment Buyer's Agreement signed on 7th September 2013, possession was to be given within 48 months by September 2017. Complainants paid Rs. 68.5

lakhs against total sale consideration of Rs. 72.66 lakhs mentioned in the agreement. However, opposite party constructed shops in front of complainants' unit blocking the view and reducing the lawn area promised, with no view of green belt or road left.

Complainants' Arguments:

The counsel for complainants argued that opposite party allotted the unit in April 2013 and buyer's agreement was executed in September 2013 as per which possession was to be given by September 2017. Complainant paid Rs. 68.51 lakhs against total sale consideration of Rs. 72.66 lakhs. Opposite party constructed shops in front of the flat blocking the green belt view and reducing the lawn area promised.

Complainants relied on various judgments of National Commission and Supreme Court regarding refund with interest for deficiency in service by builder and unfair trade practices:

Thangavel Palanivel case where compensation by builder cannot be restricted to amount in one-sided buyer's agreement. Emaar MGF Land case where non-delivery of possession after full payment is deficiency in service. Pioneer Urban Land case where one-sided terms of agreement cannot bind buyers. Puneet Malhotra case where steep increase in land values must be considered for compensation.

Opposite Party's Arguments:

The opposite party contended that there was no deficiency in service on their part. The allotment was as per the Agreement which provided for arbitration, so Commission has no jurisdiction. Complainants purchased flat for investment so are not 'consumers' under the Act. The project completion was delayed due to Covid lockdown and other force majeure circumstances. They completed construction in March 2022 and received Occupation Certificate in January 2023. Offer of possession was sent in March 2023 demanding remaining payment of Rs. 28.6 lakhs which complainants failed to pay leading to breach of agreement.

The opposite party argued that they had to develop the project internally while external development was responsibility of Town and Country Planning department and other government agencies. Complainants voluntarily applied and were allotted the unit per the

allotment letter and buyer's agreement. The layout plans were subject to change as per their internal development obligations. The project was delayed due to Covid lockdown, NGT and Supreme Court orders, default in payments by some buyers, arranging funds etc which were force majeure circumstances.

Commission's Reasoning and Conclusions:

The Commission observed that opposite party collected specific charges for preferential location but arbitrarily changed the layout without notice to complainants. Their contention about development obligations is against the complainants who paid additional charges per the original layout. The delay due to Covid lockdown does not justify delay since November 2019.

The Commission held that complainants are consumers under the Act since opposite party did not prove they booked the flat for commercial purpose. The reasons for delay cited by opposite party are general and not evidenced specifically for this project. As per earlier judgments, Covid lockdown after February 2020 cannot justify delay since November 2019 and default in payments by some buyers is not proved to have delayed this specific project.

The Commission concluded that opposite party arbitrarily altered layout after collecting charges, failed to justify delay in project and hence is guilty of deficiency in service and unfair trade practice under the Consumer Protection Act. The complaint was allowed and opposite party directed to refund paid amount of Rs. 68.51 lakhs with interest and pay litigation costs of Rs. 50,000 to complainants.

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 is a complaint under section 12 of the Consumer Protection Act, 1986 (in short, the 'Act') alleging deficiency in service in respect of non-delivery of a flat booked by the Complainant with the Opposite

Party in the project 'RPS AURIA', promoted and developed by it.

2.The facts, in brief, are that the Opposite Party promoted the project to the complainants claiming that the project was based on a finally approved plan by the concerned Government Department. Opposite Party claimed, inter alia that the proposed unit would consist of a personal lawn extending to a green belt and open space beyond the green belt. The complainants were induced to book a 3 BHK Flat in the project on 11.04.2013, for which they paid the booking amount of Rs.6,00,000/-. After 5 months, an Allotment Letter was issued on 11.04.2013 by which Unit No. T-02-0004, Ground Floor, Tower-02 in Project "RPS AURIA" situated at RPS City, Sector-88, Faridabad having super area of 1835.00 sq. ft. approximately was allotted to them. On 07.09.2013 a pre-signed Apartment Buyer's Agreement (in short 'the Agreement') was handed over to the complainant for signing. According to the said Agreement, possession of the flat was to be handed over to the complainants within 48 months from the date of execution of the said Agreement i.e. by 07.09.2017. According to complainants, the Agreement was completely one-sided and comprised clauses inimical to their interest which they had no option but to sign. The complainant has claimed that he paid Rs.68,51,325/- of the total sale consideration of Rs.72,66,600/- mentioned in the Agreement. However, the Opposite Party deviated from the plan approved and constructed shops in front of the Complainants' unit because of which, most of the windows, balconies and the remainder of the personal lawn were facing the rear of these shops. Consequently, the entire view of the green belt or of the road had been blocked and no space was left for the personal lawn promised.

3.The Opposite Party was placed ex-parte vide order dated 24.07.2023 as it continued to remain unrepresented despite notice. The reply and written submissions filed by the Opposite Party have, however, been considered as its final arguments. The contentions of the Opposite Party are that (i) there has been no deficiency in service on the part of the opposite party; (ii) the present complaint is without any cause of action; (iii) the allotment of unit in favor of complainants was as per the terms and conditions of the Agreement dated 07.09.2013 which

provided for arbitration as per clause no. 64 which states that "...the respective rights and obligations of the parties, shall be settled amicably by mutual discussion, failing which same shall be settled through Arbitration...." and therefore, the National Commission has no jurisdiction to entertain or adjudicate the matter; (iv) the complainants are not 'consumers' under the Act as they had purchased the flat for investment purposes. On merits it was submitted that the complainants had applied for a flat to the Opposite Party and subsequently obtained a loan from SBI by way of mortgage under a Tripartite Agreement between the complainants, the Opposite Party and SBI on 27.09.2013. As the building plan was approved on 18.05.2015 the Opposite Party had time to complete the construction by 17.05.2019. However, after November 2019 construction work was stopped on account of Covid-19. Thereafter, Opposite Party completed construction of Tower no. T-2 RPS AURIA in March 2022, in which the said unit 0004 is located and on 05.04.2022 it applied to the DG, Town and Country Planning (TCP) for Occupation Certificate (OC) which was issued on 25.01.2023. On receipt of the OC the Opposite Party issued an offer of possession to the complainants with a demand of Rs.28,64,552/- which was not paid. Therefore, there was a breach of the Agreement on part of complainants.

4. With the offer of possession the total sale price of the unit in question comes to Rs.1,00,83,503/- including interest for delay in payment of Rs.3,67,061/- and administrative charges of Rs.20,000/- along with applicable GST of Rs.1,20,351/- i.e. Rs.1,02,03,854/- besides applicable Stamp Duty @7%. As the complainants had so far deposited Rs.73,39,302/- against the total consideration of Rs.1,02,03,854/-, a sum of Rs.28,64,952/- was still to be paid by the complainants in terms of Allotment letter and the Agreement.

5. The complainants have approached this Commission with the prayer to:

- a. direct the opposite party to refund a sum of Rs.1,59,68,231/- to the complainants along with future penal interest @18% per annum;
- b. award compensation of Rs. 10 lakhs to the complainants;
- c. award damages and cost escalation of the said flat to the complainants;

d. award cost of litigation to the complainants; and
e. pass any other order as the Hon'ble Court may deem fit and proper in the interest of justice.

6. The Complainant filed a rejoinder and both the parties filed their affidavits in evidence as well as their short synopses of arguments. I have heard the learned counsel for complainant and carefully considered the material available on record.

7. Learned Counsel for the complainants argued that the opposite party allotted Unit No. T-02-0004, Ground Floor, Tower-02 in RPS AURIA on 11.04.2013. An Apartment Buyer's Agreement was executed on 07.09.2013 which was a prepared document of the Opposite party as per which the possession was to be handed over within 48 months from the date of execution of the said agreement, i.e., by 07.09.2017. It was submitted that the complainant paid or Rs.68,51,325/- against the total sale consideration of Rs.72,66,600/-. It was submitted that the Opposite Party constructed shops in front of the complainants' flat on account of which the lawn area was reduced and most of the windows and balconies were facing the rear of the shops thus blocking the view of the green belt or the road with no space left for the individual lawn.

8. The complainants relied on the judgment of this Commission in Thangavel Palanivel & Anr. Vs. M/S DLF Southern Homes Pvt., Ltd., in Consumer Complaint No. 304 of 2015 decided on 29.08.2016 wherein it was held that "Therefore, I have no hesitation in reiterating that the compensation which the builder has to pay to the buyers in such cases cannot be restricted to the compensation stipulated in the wholly one side Buyer's Agreement and has to be based upon the loss suffered by the consumer on account of deficiency in the services rendered to him." The complainants also relied upon this Commission's judgment in Emaar MGF Land Limited & Anr. Vs. Amit Puri First Appeal No. 250 of 2014 decided on 30.03.2015 in which it was held that: "We are in complete agreement with the State Commission that non-delivery of legal physical possession of the fully developed allotted plot to the complainants, after receipt of full consideration thereof, tantamounts to deficiency in rendering service as also unfair trade practice on the part of the appellants and therefore, the complainants was entirely justified in

praying for refund of the amount deposited with interest for with holding the money for over seven years." Reliance was also placed by the complainants upon the Hon'ble Supreme Court's judgment in Pioneer Urban Land & Infrastructure Ltd. vs. Govindan Raghavan Civil Appeal No. 12238 of 2018 decided on 02.04.2019 that "...the terms of the Apartment Buyer's Agreement dated 08.05.2012 were wholly one-sided and unfair to the respondent flat purchaser. The appellant builder could not seek to bind the respondent with such one-sided contractual terms." Lastly, complainants placed reliance upon this Commission's judgment in Shri Puneet Malhotra vs. M/s Parsvnath Developers Ltd., Consumer Complaint No. 232 of 2014 decided on 29.01.2015 in which it was held that: "...The opposite party has already taken almost entire sale consideration from the complainants, However, despite making almost entire payment, the complainants have not been able to get the shelters they had sought to acquire and considering the steep increase in the value of land and cost of construction in last 7-8 years. It is not possible for them to acquire another similar accommodation even after adding the amount of interest @18% per annum to the amount they had deposited with the opposite party. Therefore, the facts of these cases are really gross and justify grant of interest @18% per annum, inclusive of appreciation in the value of land and increase in the cost of construction in last about 7-8 years."

9. Counsel for the opposite party stated in his written arguments that the opposite party had promoted and developed RPS AURIA, a residential group housing colony. Complainant's and other allottees applied in this project for allotment of a unit to them. A unit was allotted to the complainant by the opposite party on 11.04.2013 for a total consideration of Rs.72,66,600/-. Thereafter, a Buyer's Agreement was executed on 07.09.2013. The opposite party applied for approval of the DG, TCP's approvals and obtained an approved/ revised building plan on 18.05.2015. Thereafter, the opposite party started construction of the said project. Complainants' opted for a Construction Linked Payment Plan and accordingly, instalments became due and there was breach on the part of the buyer's agreement. Subsequent to the said allotment, the complainants obtained a loan from the State Bank of India (SBI), and secured the said unit by way of mortgage of all rights, title and

benefits through a Tripartite Agreement executed between the complainant as borrower, the opposite parties as builder and State Bank of India on 27.09.2013. The project was to be completed within 48 months from the date of execution of the Buyer's Agreement or from the date of getting various sanctions from the concerned authorities subject to force majeure circumstances. The development and construction work was stopped by the orders of the National Green Tribunal (NGT) and Hon'ble Supreme Court on account of lock down due to COVID 19 and the opposite party suo motu extended the period of completion of the construction unit by 9 months upto 14.06.2022. The opposite party had to arrange huge funds in addition to the amounts received from the allottees to meet the cost of construction of the said Tower no. T – 2 and construction of the same was completed in March 2022 and OC received on 25.01.2023. Opposite party offered possession on 27.03.2023 along with demand for Rs.28,64,552/-. The same was not paid by the complainant in terms of the allotment and the Buyers Agreement.

10. From the foregoing, it is evident that there is no dispute with regard to the fact that the complainants had booked unit no. T 02 – 0004 in the project RPS AURIA, developed, promoted and executed by the opposite party. There is also no dispute with regard to the fact that against the sale consideration of Rs.72,66,600/- the complainants had deposited Rs.68,51,325/- of the amount due. It is admitted that the amount paid included, in addition to the basic sale price, charges towards Ground Floor Personal Lawn usage for Rs.30,00,000/- including Preferential Location Charges (PLC) of Rs.2,75,250/-.

11. The contention of the complainants that the construction of shops right in front of the plot allotted to them has deprived them of the view and locational premium for which the PLC was paid has been countered by the opposite party on the grounds that the internal development of the said Residential Group Housing Colony Project – RPS AURIA was to be done by the opposite party. It was contended that the statutory obligation to develop the external and peripheral services of the Project – RPS AURIA, i.e., External/ Sector/ Main Roads, Water supply Line, Sewer Line, Electricity etc., was cast upon the DG, TCP,

Haryana Urban Development Authority (HUDA) and other competent authorities of State/ Central Government/Agencies. According to the opposite party in order to discharge these obligations, the opposite party and the DG, TCP/ HUDA etc., entered into agreements through licences qua the development of the said Residential Group Housing Colony Project – RPS AURIA. It is submitted that after acquiring the complete details about the said Residential Group Housing Colony Project – RPS AURIA and after having been fully satisfied with the terms and conditions of the licence, the provisions of the applicable laws and duties/ obligations of the opposite party and the authorities, the complainants voluntarily applied for allotment of the residential unit and unit no. 0004 was allotted in his favour vide allotment letter dated 11.09.2013. The complainants were allotted the said unit upon agreed terms and conditions and the Buyer's Agreement.

12. This contention cannot be justified or accepted especially since the opposite party had specifically promised exclusive views for which it charged a premium from the complainants. The contention of the opposite party that the lay out plan was subject to change and that it had obligation to develop the internal development and external development was to be developed by DG, TCP and other competent authorities also cannot be sustained since this right cannot be to the detriment of the complainant who had paid the PLC as per the originally approved layout plan. In any case, the completion of Tower T 2 in which the allotted unit was situated was delayed by the opposite party. No reasons for the same has been provided except generalised reasons and attribution of the delay to Government and to agencies. The reasons that delay in November 2019 was due to Covid 19 cannot be justified as the lock down due to the pandemic commenced only in March 2020.

13. As per annexure I of the Agreement, the following charges were payable for Development Charges and Preferential Location Charges: Development Charges (DC) and Preferential local charges (PLC)

S no.	Particulars	Amount in Rs.	Additional charges Due
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1.	DC	8,62,450/-	50% DC within 105 days of booking and 50% DC on the start of excavation
2.	PLC	2,75,250/-	50% PLC on completion of foundation and 50% PLC on completion of First Floor Roof Slab Casting
3.	Ground Floor personal lawn usage charges	3,00,000/-	10% due with each demand of second floor slab casting of completion of flooring and 20% due with offer of possession demand
4.	Club Membership	1,50,000/-	
5.	One Covered Car Parking allocation charges	3,00,000/-	
6.	Power Back up installation charges – 2 KVA	60,000/-	
7.	External Electrification charges (EEC) and Fire Fighting Charges (FFC)	2,66,075/-	
8.	Interest free maintenance Security	91,750/-	100% due on offer of possession
		11,67,825/-	

14. The argument of the opposite party that the plans were subsequently altered as it was responsible for the internal development of the project is clearly an unfair trade practice under section 2 (1) (r) of the Act, since it was admittedly without notice to the complainants and after collection of specific charges for PLC and additional charges. The opposite party has now attempted to resile from this

position. The complainants have also contended that the project was delayed by the opposite party. Against the promised date of completion/ handing over of possession on 07.09.2017, the project was completed by 05.04.2022 and OC applied for on 25.01.2023.

15. Per contra, the opposite party contends that the complainants are not justified in their claims. This fact of delay is not controverted by the opposite party. However, the delay is justified on the ground that there were

force majeure circumstances, that Building Plan was approved on 18.05.2015, the construction work was stopped by order of NGT and Hon'ble Supreme Court, on account of lock downs and COVID 19 and the construction was banned by various competent authorities, delays in payment of instalments by some of the allottees, slow-down in the real estate market, arranging of funds to meet out the cost of construction etc.

16. Considering the preliminary issue of whether the complainants are 'consumers' under section 2 (1) (d) of the Act, the opposite party has merely made an assertion which has not been substantiated by any evidence. This Commission in Kavita Ahuja Vs. Shipra Estate Ltd. & Jai Krishna Estate Developers Pvt. Ltd. in CC 137 of 2010 dated 12.02.2015, has held that the onus to prove that the complainant/ allottee has booked a flat for commercial purpose has to be discharged by the opposite party by providing that the complainants were engaged in the business of real estate through buying and selling of flats. This has not been done in this case. Hence, the argument of the opposite party does not sustain.

17. The defence on account of force majeure by the opposite party is on grounds that the argument raised by the opposite party that lock down on account of Covid 19 pandemic and delay in payments of instalments, led to the delay and therefore, constituted force majeure circumstances have been considered. Covid 19 pandemic related to lock down applied from 20.02.2020 whereas the defence taken is from November 2019. This ground cannot, therefore be considered. Similarly, with regard to the issue of delay in payments, no evidence has been brought on record to prove how the defaults by the complainants

delayed the project. The issues raised are general and it has not been evidenced how these reasons impacted in execution of this particular project. These have been extensively considered in this Commission's orders in

AnilKumar 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 evidence to substantiate the claim that the orders of the NGT adversely caused delay in completion of the project specifically and impacted the date of handing over of flats, such reliance on force majeure conditions was not justifiable.

18.From the foregoing discussion, it is manifest that the opposite party arbitrarily altered the layout of the project after collecting PLC and additional charges from the complainants. It has not justified this through any evidence. No authorisation of the complainants permitting him to do so have also been brought on record. The reasons for the delay which are sought to be justified on grounds of force majeure cannot be accepted as discussed above. Opposite party is therefore, liable for deficiency in service and unfair trade practice under section 2 (1) (g) and 2(1) (r) respectively of the Act. The arguments of the opposite party do not sustain in the view of the discussion above. Deficiency in service and unfair trade practice under the Act is therefore, clearly evident in this case.

19.For the aforesaid reasons, the complaint is liable to succeed. The complaint is therefore, allowed partly and the opposite party is directed to:

i.Repay the entire amount of Rs. 68,51,325/- with 9% interest from the respective dates of deposit within eight weeks, of this order failing which the applicable rate of interest will be 12%; and

ii.Pay the complainant litigation cost of Rs.50,000/-.

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