

Delay in possession and right to refund with compensation: NATIONAL CONSUMER DISPUTES REDRESSAL COMMISSION NEW DELHI

AMIT GUPTA & ANR.

...Appellant

M/S. BPTP LIMITED & ANR.

...Respondent

Case No: CONSUMER CASE NO. 1514 OF 2019

Date of Judgement: 24.08.2022

Judges:

SUBHASH CHANDRA
PRESIDING MEMBER

For Appellant: DR PRABHAT KUMAR AND MR KARAN KANWAL
ADVOCATES

For Respondent: MR PRAGYAN PRADIP SHARMA, MS NIDHI TEWARI, ADVOCATES
ALONG WITH
MS VAISHALI MANGAL, AUTHORISED REPRESENTATIVE

Facts:

Complainants booked flats in 'Park Generations' project by opposite party (OP) in Gurgaon. Complainant in CC 1514/2019 booked Flat No. T-4, Tower 4 and made payments of Rs 62,16,653. Possession was to be given by 05.06.2016 as per agreement dated 06.12.2012. But possession offered only on 15.10.2019. Complainant in CC 335/2019 booked Flat No. 1903, Tower T-3 and made payments of Rs 64,92,098. Possession was to be given by 23.08.2015 as per agreement dated 23.02.2013. But

possession offered only on 17.10.2018. Complainant in CC 1515/2019 booked Flat No. 1903, Tower T-5 and made payments of Rs 65,65,887. Possession was to be given by 29.06.2016 as per agreement dated 29.12.2012. But possession offered only on 15.10.2019. There was delay of over 3 years in offering possession in CC 1514/2019, over 3 years in CC 335/2019 and over 2 years in CC 1515/2019. Complainants allege deficiency in service and unfair trade practice, and seek refund with interest, compensation and costs.

OP's Objections:

Dispute resolution through arbitration as per agreement. No cause of action. Complainants not 'consumers'. Pecuniary jurisdiction inflated. Barred by limitation. Complainants suppressed facts. Complicated questions of fact. Complainants agreed to terms in agreement. Delay due to force majeure events. Complainants were defaulters. Possession offer remedies delay.

Arguments by Complainant:

Unfair terms in one-sided agreement. Refund permissible under Consumer Protection Act. Compensation as per State Bank of India's maximum marginal cost of lending rate + 2% interest. Could not be compelled to accept delayed possession. Entitled to refund and compensation as per Supreme Court decisions. Onus on OP to prove complainants were not consumers. Total consideration determines pecuniary jurisdiction. Cause of action continuous as possession not given before complaint. Remedies under Consumer Protection Act in addition to agreement's arbitration clause.

Arguments by OP:

Delay due to NGT orders and ban on old vehicles, force majeure events. No evidence of same affecting project. Complainants must accept possession as occupation certificate received and possession offered. Agreement provided for compensation @ Rs 5/- per sqft per month. Earlier NCDRC orders directing allottees to take possession. Complainants not consumers as bought flat for commercial gain.

Sections/Analysis:

1. Complainants as 'consumers'

OP failed to prove complainants were not consumers. Onus was on OP as held in NCDRC judgment in Kavita Ahuja vs Shipra Estate. OP granted timely payment rebate to complainants. Did not declare complainants as defaulters. Could not take this plea as per Supreme Court decision in Imperia Structures Ltd vs Anil Patni.

2. Pecuniary jurisdiction

Based on total consideration and other amounts claimed as held in Ambrish Kumar Shukla vs Ferrous Infrastructure and Renu Singh vs Experion Developers. Validly invoked. Cause of action. Continuing as possession not offered before filing complaint, as per Supreme Court decision in Meerut Development Authority vs Mukesh Kumar Gupta.

4. Arbitration clause

Remedies under Consumer Protection Act additional, not derogatory to arbitration as held in Emaar MGF Land Ltd vs Aftab Singh. Complaint validly filed before Commission.

5. Force majeure defence

OP failed to prove how NGT orders and ban on vehicles specifically impacted the project with evidence. Burden on builder to show event was unforeseen as held in Manoj Kawatra vs Pioneer Urban. Should have mitigated impact by alternate arrangements as held in Anil Kumar Jain vs Nexgen Infracon.

6. Complainants right to refund

Builder cannot indefinitely delay possession – entitled to refund with compensation as held in Pioneer Urban vs Govindan Raghavan, Kolkata West International vs Devasis Rudra and other Supreme Court decisions. Complainant cannot be compelled to accept delayed possession – entitled to refund with compensation as held in Pioneer Urban vs Govindan Raghavan.

Distinguishable from Abhishek Khanna case as only 7 months delay there. Over 2 years delay in present case.

7. Interest Rate

9% simple interest as compensation as held in Experion Developers vs Sushma Shiroor.

Orders:

In CC 1514/2019:

***OP guilty of deficiency in service for delay in offering possession.
OP to refund Rs 62,16,653 with 9% simple interest from deposit dates
till 15.10.2019 within 8 weeks, else 12% interest till realization.
OP to pay litigation cost of Rs 50,000.***

In CC 335/2019:

***OP guilty of deficiency in service for delay in offering possession.
OP to refund Rs 64,92,098 with 9% simple interest from deposit dates
till 17.10.2018 within 8 weeks, else 12% interest till realization. OP
to pay litigation cost of Rs 50,000.***

In CC 1515/2019:

***OP guilty of deficiency in service for delay in offering possession.
OP to refund Rs 65,65,887 with 9% simple interest from deposit dates
till 15.10.2019 within 8 weeks, else 12% interest till realization. OP
to pay litigation cost of Rs 50,000.***

Key Cases Relied Upon:

Kavita Ahuja vs Shipra Estate (2016): Onus on builder to prove allottee not consumer.

Amrish Shukla vs Ferrous Infra (2017): Pecuniary jurisdiction.

Meerut Development Authority vs Mukesh Gupta (2012): Continuing cause of action.

Emaar MGF vs Aftab Singh (2019): CPA remedies additional to arbitration.

Manoj Kawatra vs Pioneer Urban (2021): Burden to prove unforeseeable event.

Anil Kumar Jain vs Nexgen Infracon (2019): Duty to mitigate force majeure events.

Pioneer Urban vs Govindan Raghavan (2019): Refund on delay in possession.

Kolkata West International vs Devasis Rudra (2019): Refund on delay in possession.

Experion Developers vs Sushma Shiroor (2022): 9% interest as compensation.

Full Text of Judgment:

1.This consumer complaint under section 21(a)(i) of the Consumer Protection Act, 1986 (inshort, the 'Act') read with section 12 alleges unfair trade practice under section 2(1)(r) and deficiency in service under section 2(1)(g) of the Act in delay in handing over possession of a flat booked by the complainants within the promised time in a project promoted and executed by the opposite party and seeking refund of the amount deposited with compensation and other costs. This order will also dispose of the complaints in CC Nos. 335 of 2019 and CC No. 1515of 2019 which relate to flats in different towers booked in the same project and which have similar facts. For the sake of convenience, the facts are taken from CC No. 1514 of 2019.

2.The facts, according to the complainants, are that they booked a residential flat in "ParkGenerations", a project promoted and executed by the opposite party in Sector 37-D, Gurgaon, Haryana. Complainants were allotted Flat No. T-4, Tower 4, 4th Floor admeasuring 1470 sq ft ata basic sale price of 3660 per sq ft amounting to Rs 53,80,200/- along with Development Charges, Preferential Location Charges, Club Membership Charges, Interest Free Maintenance Security Car Parking, Electricity connection charges, Firefighting charges and Power Back-upinstallation charges and other additional charges. A discount of Rs 1,72,166/- was provided making the amount Rs 52,08,034/-. A Flat Buyer's Agreement (for short, 'the Agreement') was signed on 06.12.2012 as per which (clause 3.1) possession was to be handed over in 36 months with a grace period of 6 months from the date of the Agreement, i.e., 05.06.2016. Payments were made commencing from 13.09.2011 amounting to Rs 64,15,108/- with a timely payment discount of Rs 2,03,188/- making the net payment of Rs 62,16,653/-. All payments were madeon time except one which was paid with 18% p.a. interest. The complainant avers that despitetimely payments the opposite party failed to offer possession of the flat to the complainants even after a lapse of 3 years 3 months and 10 days. The opposite party failed to respond tocommunications for refund of the

money deposited and the complainants are now before this Commission with the prayer to direct the opposite party to:

(i) refund Rs 62,16,652/- along with interest @ 18% per annum from the dates of payment till 30.06.2019 which amounts to Rs 64,51,335/-, i.e. a total of Rs 1,26,67,987/-;

(ii) pay interest @ 18% on Rs 1,26,67,987/- from 01.07.2019 till the actual date of payment;

(iii) pay Rs 5,00,000/- towards compensation for harassment and anguish caused;

(iv) pay Rs 2,00,000/- towards cost of litigation; and

(v) any other order deemed fit.

3. Upon notice, the complaint was resisted by the opposite party by way of a reply. Averments of the complainant were denied while admitting the booking of the flat by them. Preliminary objections were taken that (i) as per clause 33 of the Agreement the matter was to be settled through arbitration; (ii) the pecuniary jurisdiction of this Commission had been invoked by inflating the reliefs sought; (iii) complainants were not 'consumers' under section 2(1)(d) since refund has been sought after offer of possession was made on 15.10.2019 and since they were not able to trade the unit in the secondary real estate market; (iv) there was no cause of action and the complaint was barred by limitation as it was not filed within 2 years; (v) the complainants had not disclosed the full facts of being regularly updated about the construction status and subsequent offer of possession; (vi) the complaint raised complicated questions of facts which could not be adjudicated in summary proceedings; (viii) complainants were bound by the terms of the Agreement by which they had agreed liability of taxes and statutory dues; (vii) possession date indicated was subject to force majeure conditions in clause 10 including circumstances beyond the control of the opposite party and clause 3.3 providing for penalty for delay @ Rs 5/- per sq ft per month; (ix) complainants defaulted in payments and were issued a final notice and are required to make the final payment since an offer of possession had been made to them. On merits, force majeure is claimed on grounds of default in payments by the allottees and National Green Tribunal's orders prohibiting construction in the NCR region and

ban on vehicles more than 10 years old. Occupancy certificate was applied for Tower 4 on 24.07.2017 and received on 20.09.2019 and possession offered on 15.10.2019. Hence, it is contended that there was no deficiency in service or unfair trade practice and the complainant be dismissed.

4. Parties led their evidence and filed rejoinder, affidavit, and evidence as well as short synopsis of arguments. I have heard the learned counsel for the parties and carefully considered the material on record.

5. On behalf of the complainant it was argued that delay in handing over possession even after the stipulated period and grace period constituted deficiency in service and that the opposite parties were negligent in fulfilling their commitments. As no evidence has been adduced to prove that the complainants were beyond the pale of section 2(1)(d) the allegation that they were not 'consumers' was refuted. It was argued that the Agreement was one sided and unfair and hence refund was permissible under section 3.1. Reliance was placed on judgment of this Commission in Govindan Raghavan Vs. Pioneer Urban Land and Infrastructure Ltd., dated 23.10.2018 that the complainant could not be compelled to accept possession of the flat at a belated stage and are entitled to refund @ 10.7% p.a. based on the maximum marginal cost of lending rate of the State Bank of India of 8.7% plus 2% as compensation. Reliance was also placed on judgment of Hon'ble Supreme Court in Pioneer Urban Land and Infrastructure Ltd. Vs. Govindan Raghavan, in CA No. 12238 of 2018 decided 02.04.2019, (2019) 5 SCC 725 wherein it was held that a flat purchaser would be justified in terminating the Apartment Buyer's Agreement and cannot be compelled to accept possession when it is offered by the builder and was legally entitled to seek refund of the money deposited with appropriate compensation and that he could not be compelled to take possession even if it was offered after 2 years of expiry of the grace period. Counsel for the complainant also relied upon the judgment of the Hon'ble Supreme Court in Experion Developers Pvt. Ltd. Vs. Sushma Ashok Shiroor, Civil Appeal No. 6044 of 2019 decided on 07.04.2022 which held refund of

deposit as a valid compensation in opposition to the opposite party's reliance on the judgment in Ireo Grace Realtech Pvt. Ltd. Vs. Abhishek Khanna & Ors., in Civil Appeal No. 5785 of 2019 decided on 11.01.2021, the ratio of which was argued to be distinguishable on the grounds that the delay was only 7 months, and the facts of the case were different including changes to the building plan. It was also argued that the floor plan had been altered from the original design and a spiral staircase to the terrace had been provided from within the flat.

6. Learned counsel for the opposite party argued, in addition to the reasons set out in his reply, that the delay in the completion of the project was not due to reasons attributable to the opposite party, but on account of

force majeure factors which were beyond his control and therefore he was not liable for deficiency in service. The force majeure reasons stated to be the ban on construction on account of the order of the National Green Tribunal in the National Capital Region including the use of commercial diesel vehicles of ten years vintage. It was submitted that an occupation certificate dated 20.09.2019 was now available from the competent authority in respect of Tower 4 and that an offer of possession had been made to the complainants. Relying on Abhishek Khanna (supra) it was argued that the complainants were obligated to accept possession in view of the fact that the occupation certificate was available, and an offer of possession had been made on 15.10.2019. It was also stated that the Agreement provided for compensation @ Rs 5/- per sq ft per month and therefore the demand for refund with compensation should not be allowed. According to the opposite party, the offer of possession demonstrates that the deficiency in delay in delivery of possession stands remedied. Reliance was placed by the learned counsel for opposite party on this Commission's orders in Parklands Pride Buyers Association Vs. BPTP Ltd. & Anr., CC No. 2035 of 2018 dated 14.02.2022 and RA No. 35 of 2022 dated 04.08.2022, Subroto Bandhu & Anr. Vs. Millennia Realtors Pvt. Ltd. & 2 Ors., in CC No. 3141 of 2017 dated 25.01.2023 wherein complainants were directed to take possession in accordance with the terms of the Agreement. It was reiterated that the

complainants were not 'consumers' who had invested in the flat to earn commercial benefit and were unable to trade the flat in the secondary market and had defaulted in making payments to whom a final demand letter had been issued.

7. From the foregoing, it is evident that the complainants had admittedly booked a flat in opposite party's project, "Park Generations", and despite an Agreement between the parties, the opposite party failed to comply with its contractual obligation to offer possession of the flat by 06.06.2016 despite receiving nearly 100% of the sale consideration. The complainants have alleged deficiency in service on part of the opposite party for this reason along with adoption of unfair trade practice by it in demanding and receiving instalments towards the sale consideration without achieving the construction milestones.

8. The preliminary objections of the opposite party have been considered. The contention that the complainants are not consumers under section 2(1)(d) is a bald assertion that is not supported by any evidence by the opposite party. In the light of this Commission's order in Kavita Ahuja Vs. Shipra Estate & Jai Krishna Estate Developers Pvt. Ltd. & Ors., (2016)CPJ 31 (NC) that the onus to prove that the complainants were engaged in the business of real estate and buying and selling of property lay upon the opposite party which had not been discharged, this contention does not sustain. As regards the contention that the complainants are 'defaulters' in payments, the argument is negated by the fact that the opposite party extended rebate to the complainants for timely payments as reflected in the accounts brought on record by the complainant, a fact not controverted by the opposite party. NO action appears to have been taken by the opposite party to declare the complainants as 'defaulters' and as held by the Hon'ble Supreme Court in

M/s Imperia Structures Ltd. Vs. Anil Patni & Anr., (2020) 10 SCC 783 since the opposite party did not declare the complainants as 'defaulters', it is not open to them to take this plea now.

9. The settled law on pecuniary jurisdiction as held by this Commission in Amrish Kumar Shukla and 21 Ors., vs Ferrous Infrastructure Pvt.

Ltd., I 2017 CPJ 1 (NC) and

Renu Singhvs Experion Developers Pvt. Ltd., CC no.1703 of 2018 is that total consideration paid by the complainant and other damages claimed will determine pecuniary jurisdiction. In view of this position of law the contention of the opposite party regarding pecuniary jurisdiction does not sustain.

10. Opposite party's contention regarding there not being any cause of action has been viewed in light of the Hon'ble Supreme Court's judgment in Meerut Development Authority Vs. Mukesh Kumar Gupta, IV (2012) CPJ 12 on 09.05.2012, wherein it was laid down that not offering possession of a plot or flat booked for a consideration constitutes a continuing cause of action. Admittedly, in the instant case possession was offered only on 15.10.2019 which was after the institution of the complaint. Hence, this contention of the opposite party cannot be sustained.

11. The opposite party's contention that in view of the provision of a clause for arbitration in the Agreement, this complaint does not lie before this Commission stands negated in light of the Hon'ble Supreme Court's judgment in Emaar MGF Land Ltd. Vs. Aftab Singh, (2019) 12 SCC 751 and in M/s Imperia Structures Ltd. Vs. Anil Patni & Anr., (2020) 10 SCC 783 decided on 02.11.2010 that

"remedies under the Consumer Protection Act were in addition to the remedies available under special statutes (and) the provisions of this Act shall be in addition to and not in derogation of any other law for the time being in force". This contention therefore, cannot be considered.

12. The averment of the opposite party that the delay was due to force majeure circumstances and factors beyond its control needs consideration in view of the fact that the opposite party has failed to bring on record any evidence to establish how the ban impacted the project specifically. These issues have 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 NGT's orders adversely causing delay in

completion of the project and impacting the date of handing over of flats, such reliance on force majeure conditions was not justifiable. In the present case, opposite party has failed to substantiate his contention with any specific evidence on record as to how these factors cited as force majeure events impacted the instant project and whether any steps to mitigate or overcome them were taken. As per this Commission's orders in Manoj Kawatra and Others Vs Pioneer Urban Land and Infrastructure Ltd., in CC no.1442 of 2018 decided on 01.11.2021, a developer cannot take shelter under the force majeure clause unless it is able to show that the event was unforeseen and unexpected and in Anil Kumar Jain (supra) it was held that if the NGT had restrained builders from extracting underground water in Noida/Greater Noida, they were expected to arrange water from alternative sources so as to fulfil their contractual obligation to the flat Buyers. It is not as if no construction took place in Noida and Greater Noida during the period that the interim order passed by the NGT remained in force. There is no evidence brought on record that transportation vehicles eligible to ply were not available in the market. Therefore, it cannot be accepted that the Opposite Party could not arrange adequate transportation of building materials required for timely completion of the project, hence, these constitute a force majeure event. In the absence of such evidence, mere reliance on a bald assertion is not sustainable and cannot be accepted.

13. The Hon'ble Supreme Court has laid down in Pioneer Urban Land and Infrastructure Ltd. Vs. Geetu Gidwani Verma & Anr., Civil Appeal No. 12238 of 2018 with No. 1677 of 2019 dated 02.04.2019 in Pioneer Urban Land and Infrastructure Ltd., vs Govindan Raghavan in Civil Appeal no. 12238 of 2018 decided on 02.04.2019, (2019) 5 SCC 725 that a buyer cannot be compelled to take possession of a flat when there is delay in delivery of possession by the builder and the buyer is obliged to refund along with compensation or interest for such delay and in Kolkata West International City Pvt. Ltd. Vs. Devasis Rudra, Civil Appeal No. 3182 of 2019 decided on 25.03.2019 regarding the right of the consumer to seek refund in view of the inordinate delay on the part of the opposite party. Hon'ble Supreme Court in Fortune

Infrastructure & Anr. Vs. Trevor D'Lima & Ors., (2018) 5 SCC 442 laid down that a person cannot be made to wait indefinitely for possession of the flat allotted to him and is entitled to seek refund of the amount paid with compensation and in Bangalore Development Authority vs. Syndicate Bank, (2007) 6 SCC 711 held that when possession of the allotted plot/flat/house is not delivered within the specified time, the allottee is entitled to a refund of the amount paid, with reasonable interest thereon from the date of payment till the date of refund, which was reiterated in Pioneer Urban Land & Infrastructure Ltd. Vs. Govindan Raghavan, (supra). Finally, the reliance of the opposite party on Abhishek Khanna (Supra) is not of any avail to it since the facts are distinguishable. In Abhishek Khanna (Supra) there were two categories of allottees and there was a delay of only 7 months. The facts of the case on hand are clearly different.

14. In Experion Developers Pvt. Ltd. Vs. Sushma Ashok Shiroor, C.A. No. 6044 of 2019 decided on 07.04.2022 the Hon'ble Supreme Court has held the compensation by way of interest has to be both compensatory as well as restitutionary and held that interest @ 9% would be fair and just. Compensation on the same lines will be appropriate in this matter also.

15. For the aforesaid reasons, in the facts and circumstances of this case, we find merit in the complaint and the same is liable to succeed. The opposite party is found guilty of deficiency in service in not offering possession of the flat on 05.06.2016 and instead offering possession on 15.10.2019. Accordingly, this complaint is allowed in part and disposed of with the following directions:

(i) opposite party no. 1 shall repay the complainant the sum of Rs 62,16,653/- paid to it with compensation in the form of simple interest @ 9% p.a. from the respective dates of deposit till 15.10.2019;

(ii) opposite party shall pay this amount within 8 weeks of this order failing which the applicable rate of interest will be 12% p.a. till realization;

(iii) opposite party shall also pay the complainant litigation cost of Rs 50,000/-.

16. Consumer complaint nos. 335 of 2019 and 1515 of 2019 are also

disposed of in the above terms as below:

(i)CC No. 335 of 2019

Flat no 1903 in Tower T-3 of "Park Generations" was booked by Poonam Khandawe on 13.09.2011. Delivery was promised on 23.08.2015 as per Agreement dated 23.02.2013. Rs.64,92,098/- was deposited by way of various instalments with the opposite party. However, possession was offered on 17.10.2018 after Occupation Certificate was obtained by opposite party on 09.10.2018. For the reasons stated in order relating to CC No. 1514 of 2019, opposite party is guilty of deficiency in service in not complying with contractual obligations to hand over possession on the stipulated date of delivery. Opposite party is accordingly ordered to refund Rs 64,92,098/- with 9% simple interest compensation from the respective dates of deposit till 17.10.2018 within 8 weeks failing which with interest @ 12% till realization along with litigation costs of Rs 50,000/-.

(ii)CC No. 1515 of 2019

Flat no 1903 in Tower T-5 of "Park Generations" were booked by Prabhat Kumar and Anjali Rani on 18.12.2012. Delivery was promised on 29.06.2016 as per Agreement dated 29.12.2012. Rs.65,65,887/- was deposited by way of various instalments with the opposite party. However, possession was offered on 15.10.2019 after Occupation Certificate was obtained by opposite party on 20.09.2019. For the reasons stated in order relating to CC No. 1514 of 2019, opposite party is guilty of deficiency in service in not complying with contractual obligations to hand over possession on the stipulated date of delivery. Opposite party is accordingly ordered to refund Rs 65,65,887/- with 9% simple interest compensation from the respective dates of deposit till 15.10.2019 within 8 weeks failing which with interest @ 12% till realization along with litigation costs of Rs50,000/-.

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