JAIPRAKASH ASSOCIATES LIMITED V. FATEH SINGH CHAUHAN

JAIPRAKASH ASSOCIATES LIMITED
JAYPEE GREENS, SECTOR 128 NOIDA
GAUTAM BUDDHA NAGAR
UTTAR PRADESH

……..Appellant(s)

Versus

1. FATEH SINGH CHAUHAN
R/O R-4/82, RAJNAGAR
GHAZIABAD
UTTAR PRADESH
2. SANTOSH CHAUHAN
R/O R-4/82, RAJNAGAR
GHAZIABAD
UTTAR PRADESH

……..Respondent(s)

Case No: FIRST APPEAL NO. 813 OF 2020

Date of Judgement: 03 Jan 2023

Judges:

HON’BLE MR. C. VISWANATH,PRESIDING MEMBER
HON’BLE MR. SUBHASH CHANDRA,MEMBER

For the Appellant : Mr. Sukumar Pattjoshi, Sr. Advocate
with Mr. Sumeet Sharma, Advocate
Mr. Paras Choudhari, Advocate
For the Respondent : Mr. Aditya Shankar Pandey, Advocate

Facts:

Appeal against order dated 02.08.2019 of Uttar Pradesh State Commission in Complaint No. 225/2016. Complainants booked a

residential apartment in project of opposite party (Jaiprakash Associates Ltd). Paid Rs. 41,75,728 over time but possession not offered even after 9 years. Complainants sought refund with interest and compensation for deficiency in service. Opposite party took defence of force majeure events like agitations, NGT orders etc causing delay. State Commission directed refund of paid amount within 2 months along with 10% interest or else 18% interest if delay beyond that; also awarded Rs 10,000 as litigation cost

Court's Opinions:

Respondent cannot be denied consumer status merely because property purchased as an investment. Opposite party has not provided evidence that complainants were property dealers or purchased it for resale. Hence contention regarding consumer status is rejected. Regarding force majeure defence, NGT order did not impose any stay on construction. No evidence to show delay was for reasons beyond control of opposite party. They cannot take shelter under force majeure clause to justify delay. Unreasonable delay of over 9 years in offering possession, even after receiving 90% of sale consideration. Complainants cannot be made to wait indefinitely for flats allotted to them. Entitled to seek refund of paid amount along with fair compensation. Contractual terms of agreement were one-sided, unfair and unreasonable. Complainants had no option but to sign the dotted lines of agreement framed by builder. Incorporation of such one-sided clauses itself constitutes an unfair trade practice. Opposite party cannot use them to avoid liability for deficiency in service. State Commission rightly held opposite party deficient; complainants entitled to refund with interest. However, in view of Supreme Court decision, interest should be 9% p.a. from each date of deposit

Arguments:

Appellant:

Complainants purchased property for investment, so don't qualify as consumers. Delay in construction was due to force

majeure events like NGT orders. Complainants also waived rights to claim interest/compensation as per agreement. Changing terms of agreement erroneous

Respondents:
No evidence property was purchased for resale so consumer status cannot be denied. Force majeure clause not applicable as no stay on construction by NGT. Appellant guilty of deficiency in service for inordinate delay. Entitled to refund of paid amount with fair compensation

Sections:
Appeal under Consumer Protection Act, 1986

Cases Referred/Cited:
Bharathi Knitting Co. Ltd vs. DHL Worldwide Express (1996). Sai Everest Developers v. Harbans Singh Kohli (2015), Fortune Infrastructure v. Trevor D'Lima (2018). Pioneer Urban Land v. Govindan Raghvan (2019). Experion Developers v. Sushma Shiroor (2022)

Laws Referred:
The Consumer Protection Act, 1986

Conclusion:
Appeal partly allowed. Appellant directed to refund paid amount with 9% interest from each date of deposit. 12% interest if amount not refunded within 2 months. Also to pay litigation cost of Rs 10,000 to complainants

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Full Text of Judgment:

1. The present Appeal is filed against the order dated 02.08.2019 passed by the U. P. State Consumer Disputes Redressal Commission, Lucknow (in short 'State Commission') in Consumer Complaint No. 225/2016.

2. Brief facts of the case are that the Complainant/Respondent applied for the allotment in the Project namely Kassia at Jaypee Greens Sports City, Gautam Budh Nagar, having Unit Reference No. KS2-35-102, on 29.01.2011. After making an application, an agreement was made with the Opposite Party on 29.01.2011. In pursuance of the Agreement, the Complainant deposited a Cheque of Rs.3,00,000/- in favour of the Opposite Party on 29.01.2011. The Opposite Party issued receipt dated 01.02.2011 and acknowledgement dated 24.02.2011 for the amount paid by the Complainant. After receiving the aforesaid amount of Rs. 3 ,00,000/-, the Opposite Party issued Provisional Allotment letter, dated 20.09.2011, in favour of the Complainant and sent a demand notice of Rs. 38,56,852/-, on 20.09.2011. The Complainant accordingly paid the amount, vide Cheque No. 465222 on 19.10.2011. The Opposite Party thereafter demanded Car Parking Charges and Service Tax from the Complainant, vide letter dated 10.12.2012, and the Complainant, pursuant to it paid Rs. 3,863/-. The Opposite Party also demanded Rs. 15,013/- towards Service Tax differential amount, which was also deposited by the Complainant through Cheque dated 19.06.2013. Despite a total payment of Rs. 41,75,728/-, the Opposite Party had not started the construction work. The Complainant, therefore, demanded refund from the Opposite Party along with interest, but the Opposite Party failed to refund the Complainant. Aggrieved by the deficiency in service and unfair trade practice on the part of the Opposite Parties, the Complainants filed Consumer Complaint before the State Commission with the following prayer: –

"(i) To direct the Opposite Party to make the payment of (Rs.3,00,000) Rs. 38,56,862/-, Rs. 3,863/- and Rs. 15,013/-, Total – Rs.41,75,728/- and interest of five years from January 2011 to 2016 Rs. 2505,436/- along with 18% interest annually on aforesaid total amount (Rs 66,81,164/-) from the date of filing of complaint case to the date of actual payment to the complainant.

(ii) To direct the Opposite Party to make the payment of Rs.15,00,000/- towards physical and mental agony because till date no work has been initiated on project and neither refund the deposited amount.
(iii) To direct the respondent to pay Rs. 30,000/- for cost of the case.
(iv) Any other relief which this Hon'ble Court deems fit and proper in the interest of justice."

3. The Opposite Party resisted the Complaint by filing reply whereby it was averred that the Complainant had wrongly filed the Complaint. It was stated that the Complainant had invested money in real estate market for obtaining profits and therefore, under Section 2(1) (d) of the Consumer Protection Act, the Complainant was not a consumer. The delay in construction was due to force majeure events and there was no deficiency in service on part of the Opposite Party. The project was delayed due to agitations by the farmers. In such situation, the Opposite Party was neither in a condition to develop the land nor in a condition to sell the land. Besides this, as per order dated 29.08.2014, the Opposite Party was directed to pay 64.7% additional incentive to the farmers due to which the farmers stopped the construction work. The Opposite Party filed a complaint with the District Administration but no action was initiated in this regard. There was, thus, delay in the construction work. Also, the National Green Tribunal, vide its order dated 11.01.2013, restrained all builders of Noida & Greater Noida, including the Opposite Party from extracting any quantity of underground water for the purpose of construction or otherwise, hampering the pace of development of the said project. At the time of booking of the apartment, it was agreed between the parties through Clause 7.1 of the Standard Terms and Conditions that in case of force majeure events the Opposite Party would be entitled to extension of time without incurring any liability. It was also submitted that in case the Complainant was not interested in taking possession of the said apartment, he

could surrender the provisional allotment of the apartment and seek refund of payment made by him as per Clause 7.2 of the Standard Terms and Conditions agreed between the Parties. Clause 7.1 and 7.2 of the Standard Terms and Conditions agreed between the Parties are as follows:

"7.1 The Company/JSIL shall make best efforts to deliver possession of the Said Premises to the Applicant within the period more specifically described in the Provisional Allotment Letter with a further grace period of 90 (ninety) days. If the completion of the Said Premises is delayed by reason of non-availability or scarcity of steel and / or cement and / or other building materials and / or water supply and / or electric power and / or slow down, strike and / or due to a dispute with the construction agency employed by the Company, lock out or civil commotion or any militant action or by reason of war, or enemy action, or earthquake or any act of God or if non-delivery of possession is as a result of any law or as a result of any restrictions imposed by a Governmental Authority or delay in the sanction of building / zoning plans / grant of completion/ occupation certificate by any Governmental Authority or for any reason beyond the control of the Company (hereinafter referred to as "Force Majeure Events" and each individual event referred to as a "Force Majeure Event"), the Company shall be entitled to a reasonable extension of time for delivery of possession of the Said Premises.

7.2. Nothing contained herein shall be construed to give rise to any right to a claim by way of compensation / damages / loss of profit or consequential losses against the Company/JSIL on account of delay in handing over possession for any of the aforesaid conditions beyond the control of the Company/JSIL. lf, however, the Company/JSIL fails to deliver possession of the Said Premises within the stipulated period as mentioned herein above, and within the further grace period of 90 (ninety) days thereafter, the Applicant shall be entitled to a discount in Consideration for delay thereafter @

Rs.5/= per sq. ft. (Rs.54/- per sq. mtr.) per month for the Super Area of the Said Premises ("Rebate"). The time consumed by the occurrences of Force Majeure Events shall be excluded white computing the time delay for the delivery of possession of the Said Premises."

It was therefore stated that there was no deficiency in service or any unfair trade practice by the Opposite Party.
4. The State Commission after hearing the Counsel for both the Parties and perusing the record, vide order dated 02.08.2019, partly allowed the Complaint in the following terms:

"…the complaint is partly acknowledged and the Opposite Party is directed to deposit the amount of the complainant i.e. Rs.41,75,728/- within two months from the date of deposit to the date of payment at the rate of 10% per annum. If the Opposite Party does not return the deposited amount along with interest at the said rate for this time, then the Opposite Party will return all the amount with interest at the rate of 18% from the date of deposit to the date of payment. The Opposite Party will pay Rs.10,000/- as litigation charges to the complainant."

5. Aggrieved by the order of the State Commission, the Appellants/Opposite Parties preferred the instant Appeal with the following prayer:-

"A. Pass an order setting aside the order dated 02.08.2019passed by the Hon'ble State Consumer Disputes Redressal Commission, Lucknow in the matter "Fateh Singh Chauhan &Anr. Vs. M/s Jaiprakash Associate Ltd." Complaint No.225 of 2016;
B. Pass any other order(s) or direction(s) as this Hon'ble Commission may deem fit in the facts and circumstances of the instant case."

6. Heard the Learned Counsel for the Parties and carefully perused the record. Learned Counsel for the Appellant stated

that the delay in handing over the possession of the unit was due to force majeure conditions beyond the control of the Appellant. Restrictions were imposed by orders of the NGT. The State Commission also did not consider that the Respondent had no right to seek interest or compensation, as exercise of such right was waived by the Respondent, vide Clause 9.1.5(a) of the Standard Terms and Conditions, and the Respondent was therefore estopped from claiming the same. While passing the impugned order, the State Commission erred in changing the terms of a commercial contract between the parties without finding the validity of any of the clauses/provisions of the Standard Terms & Conditions. The Hon'ble Supreme Court in Bharathi Knitting Co. Ltd vs. DHL Worldwide Express, 1996 (4) SCC 704 held that the Consumer Forums are required to comply with the provisions of the contract executed by and between the parties. The compensation granted by the State Commission against the Agreement between the parties was, therefore, erroneous.

7. It was admitted that the Respondent entered into an agreement with the Appellant for purchase of a flat bearing Unit no. KS2-35-102 in Kassia at Jaypee Greens Sports City, Gautam Budh Nagar (U.P.), vide Provisional Allotment Letter dated 20.09.2011 for a total consideration of Rs. 43,36,130/-, excluding other taxes and charges applicable. The time period for delivery of possession as provided was 24 months with a further grace period of 90 days, however it has been more than nine years and the construction work was still in progress. The Respondent had already paid substantial amount of Rs. 41,75,728/- towards the purchase of the property.

8. As regards the objection raised by the Appellant that the Respondent had booked the Unit for investment purpose, attention is drawn to the order of this Commission in the case of Sai Everest Developers v. Harbans Singh Kohli, 2015 SCC OnLine NCDRC 1895, decided on 21.07.2015, wherein it was held that:

"the Opposite Party should establish by way of documentary evidence that the Complainants were dealing in real estate or

in the purchase and sale of the subject property for the purpose of making profits."

In the instant case, no such evidence filed by the Appellant to establish that the said flat was purchased for the purpose of resale. This contention is therefore rejected.

9. Regarding delay in handing over possession, the Appellant tried to justify on the ground of force majeure. The Appellant placed reliance on the order of NGT restricting extraction of underground water constituting a force majeure condition. It is seen from the evidence adduced by the Appellant that there was no stay on construction by the NGT. In the absence of any material on record to substantiate the plea of the Appellant that the delay was for reasons beyond their control, we hold that the Appellant cannot take shelter under the Force Majeure clause. For the latches of the Appellant, the Respondent cannot be made to suffer.

10. There was unreasonable delay by the Appellant in completion of the flat. In Fortune Infrastructure & Anr. v. Trevor D'Lima & Ors., Civil Appeal No. 3533-3534 of 2017, decided on 12.3.2018, Hon'ble Supreme Court held that "a person cannot be made to wait indefinitely for possession of the flat allotted to him/her, and is entitled to seek refund of the amount paid by him, along with compensation". In the present case, even after payment of more than 90% of the consideration of the Apartment, the Appellant failed to fulfill its contractual obligation of delivering possession of the Unit of the Respondent within the time stipulated in the Agreement, or even within a reasonable time thereafter. The possession of the flat has still not been offered to the Respondent. It has already been 9 years from the date of promise of the possession. The Respondent is, therefore, entitled to refund along with compensation. While relying on the Terms and Conditions of the Agreement between the parties, the Appellant had stated that the right of the consumer had been waived through the Agreement to approach the courts for relief and is only bound by the agreement which prima facie

seems to be one sided. In this regard, the order of the Hon'ble Supreme Court in Pioneer Urban Land & Infrastructure Ltd. Vs. Govindan Raghvan, ll (2019) CPJ 34 (SC), decided on 02.04.2019, are very much applicable in the present case. The order of the Apex Court reads as follows:

"6.7. A term of a contract will not be final and binding if it is shown that the flat purchasers had no option to sign on the dotted line, on a contract framed by the builder. The contractual terms of the Agreement of 08.05.2012 are ex-facie one sided, unfair and unreasonable. The incorporation of such one-

sided clauses in an Agreement constitutes an unfair trade practice as per Section 2(r) of the Consumer Protection Act, 1986 since it adopts unfair methods or practices for the purpose of selling flats by the Builder.

7. In view of above discussion, we have no hesitation in holding 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 cannot seek to bind the Respondent with such one-sided contractual terms."

The Appellant was clearly deficient in its services and is bound to refund the amount deposited by the Respondent. The State Commission had rightly allowed the Complaint. The Hon'ble Supreme Court in a recent decision titled Experion Developers Pvt. Ltd. Vs. Sushma Ashok Shiroor, in Civil Appeal No.6044 of 2019, decided on 07.04.2022, observed that interest payable on the amount deposited should be restitutionary and also compensatory and it has to be paid from the date of the deposit of the amounts. It was also held in the aforesaid matter that the interest at the rate of 9% is fair and just.

10. The Order of the State Commission is modified. The Appellant/Opposite Party shall refund the entire amount deposited by the Respondent/Complainant along with interest @ 9% p.a. from date of each deposit till realisation within a period of two months from this Order, failing which it will attract an interest of 12% p.a. The Opposite Party is also

directed to pay Rs.10,000/- as litigation cost to the Complainant.