

JHUMA ENTERTAINMENT PVT. LTD. v. M/S. FANTASY BUILDWELL PVT. LTD.

JHUMA ENTERTAINMENT PVT. LTD.

...Appellant

M/S. FANTASY BUILDWELL PVT. LTD.

...Respondent

Case No: CONSUMER CASE NO. 1417 OF 2019

Date of Judgement: 11 December 2023

Judges:

SUBHASH CHANDRA
PRESIDING MEMBER

For Appellant: MS. SWATI SETIA , ADVOCATE

For Respondent: EX PARTE VIDE ORDER DATED 19.12.2019

Facts:

Wadhwa Rubber (Appellant) had filed an application under Section 9 of the Insolvency and Bankruptcy Code, 2016 against Bandex Packaging Pvt. Ltd. (Respondent) before the National Company Law Tribunal (NCLT). The NCLT dismissed the application on 08.01.2020. The Appellant applied for a certified copy of the dismissal order on 10.02.2021, after almost a year. The certified copy was prepared on 17.02.2021 and collected by the Appellant on 06.04.2021. The Appellant filed the appeal before the National Company Law Appellate Tribunal (NCLAT) on 04.08.2021.

NCLAT's Opinion:

The NCLAT noted that the appeal was filed beyond the limitation period of 30 days under Section 61 of the Code. It observed that the

Appellant was aware of the dismissal order but did not apply for a certified copy for over a year on the pretext that it had to be supplied free of cost. The NCLAT held that the delay in filing the appeal could not be condoned as no sufficient cause was shown. It stated that limitation runs from the date of preparation of the certified copy, i.e. 17.02.2021, and not from the date of its delivery. The NCLAT dismissed the appeal as barred by limitation.

Sections Referred:

Section 9 of the Insolvency and Bankruptcy Code, 2016 – Initiation of corporate insolvency resolution process by operational creditor

Section 61 of the Insolvency and Bankruptcy Code, 2016 – Appeals and Appellate Authority

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. M/s Jhuma Entertainment Pvt. Ltd., has filed the present complaint under section 21 (a)(1) of the Consumer Protection Act, 1986 stating that the opposite party M/s Fantasy Buildwell Pvt. Ltd., was a company incorporated and registered under the laws of India and engaged in the business of development and construction of group housing project. The opposite party launched a group housing project in the name of 'Project Paras Quartier' at Sector 2 Gurgaon – Faridabad Road, Gwal Pahari, Gurgaon, Haryana in the year 2013 and made wide publicity of its amenities and facilities. Lured by the promises of the opposite party, the complainant booked a flat on June 13.06.2013 and deposited the booking amount of Rs.40 lakh. At the time of the booking of the flat, the opposite party assured the complainant that the flat would be handed over within 42 months from the date of booking, i.e., by December 2016. The complainant filled

an application form for allotment of a residential independent floor in Tower PL- II of the aforesaid project 'Paras Quartier'. The opposite party allotted a flat bearing no.1102 in Tower PL II with a built up area of 5000 sqft. An Apartment Buyer Agreement was signed between the complainant and the opposite party on December 2013 after repeated requests. The Basic Sale Price of the aforesaid flat was Rs.4,72,00,000/- which was far in excess to the initial estimated cost informed at the time of booking of the apartment. The complainant deposited a sum of Rs.1,36,27,494/- with the opposite party. Rs.1,31,40,000/- was due as per the payment plan and another instalment of Rs.1,31,40,000/- was to be paid in three stages. The complainant states that he had paid Rs.4,87,494/- in excess of what was agreed to be paid under the payment plan and the next installment of Rs.47,80,000/- was to be paid on completion of the third floor roof slab. As the opposite party had not commenced the construction of the Tower PL- II, the balance due payment was not paid.

2. According to the complainant, the Apartment Buyer Agreement was not provided to the complainant immediately and only after persistent demands by the complainant, a copy of the agreement was given in December 2013. It was further stated that though the complainants has paid Rs.1,36,27,494/- towards the consideration of the said flat, the construction in Tower PL II has not even started and even after expiry of six years from the date of booking of the flat, there was absolutely no definite answer from the opposite party when the possession would be handed over to the complainant. Hence, the complainant was constrained to issue a legal notice dated 29.05.2019 to the opposite party calling upon to refund the amount of Rs.1,36,27,494/- deposited by the complainant along with interest @18% per annum from the date of deposit till the date of final payment and Rs.1,14,47,000/- towards compensation, damages and legal cost incurred. Despite service of notice, the opposite party failed to respond to the legal notice. Thereafter, the complainant filed the present consumer complaint before this Commission on 30.07.2019. The complainant has prayed

before this Commission to:

- a. Direct the opposite party to refund the entire amount of Rs.1,36,27,494/- deposited by the complainant along with interest @ 18% per annum from the date of deposit, i.e., 28.11.2013 till its complete realization;
- b. Direct the opposite party to pay a sum of Rs.1,14,47,000/- towards compensation for the loss of opportunity and for depriving the complainant of the benefit of his investment because of deficiency service of the opposite party on Rs.1,36,27,494/- calculated @ 14% per annum from the date of payment till the date of filing of the complaint;
- c. Direct the opposite party to pay lump sum damages of Rs.45 lakhs for mental agony and harassment suffered at the hands of the opposite party over the last six years due to the enormous delay in construction of the building, negligence and deficiency in service;
- d. Direct the opposite party to pay a sum of Rs.2,50,000/- as litigation cost to the complainant; and
- e. Pass any other orders or directions as deemed appropriate in the facts and circumstances of the case.

3. The matter was heard and admitted on 02.08.2019 and notice was issued to the opposite party, returnable on 19.12.2019 to file their written statement within a period 30 days from the date of receipt of the notice. On 19.12.2019, Registry reported that notice was served on the opposite party on 23.09.2019. However, none was present on behalf of the opposite party even in the second call and no reply was filed by the opposite party. As the period of 45 days had expired and no reply was filed, the opposite party was proceeded ex parte.

4. I have heard the learned counsel for the complainant and perused the material on record.

5. Learned counsel for the complainant has filed his evidence as well as the written synopsis. He has stated that the complainant has paid a substantial amount towards consideration in the project called 'Paras Quartier' at Sector - 2, Gurgaon, Faridabad Road, Gwal Pahari District, Gurgaon, Haryana which

was required for the use of its Director. The complainant paid Rs.40 lakh to the opposite party and accordingly the opposite party allotted flat no. 1102 on the 11 th.

Floor in Tower PL II admeasuring super area of 5000 sq ft, vide allotment letter dated 12.06.2013. The opposite party assured the complainant that the possession of the flat would be given with in three years from the date of booking, i.e., by May 2016. Learned counsel for the complainant submitted that the opposite party had issued a demand notice for a sum of Rs.50,84,996/- towards part consideration of the amount which the complainant paid on 13.08.2012 to the opposite party. Complainant submits that though the opposite party had assured that the possession of the flat would be given within 42 months from the date of booking, opposite party remained reluctant to furnish the copy of the Apartment Buyer Agreement executed between the parties and that the same was furnished only in December 2013 on repeated requests.

6. Learned counsel for the complainant alleged that a clause was inserted in the Apartment/Builder Buyer Agreement (Clause 3.1) to the effect that the opposite party was supposed to give/ offer possession of the aforesaid flat within 42 months (with additional grace period of six months) from the date of execution of the agreement. The complainant alleges that the Director of the Company had requested the opposite party on numerous occasions to handover the possession of the flat; however, the opposite party assured the complainant that possession of the flat would be handed over by May 2016. However, the opposite party failed to commence the construction of Tower PL-II of the project in which wherein the subject flat was allotted to the complainant.

7. Learned counsel for the complainant further alleged that as per the Apartment Buyer Agreement, the Basic Sale Price for the aforesaid flat was Rs.4,72,00,000/- which was in excess of the initial estimated cost informed by the opposite party at the time of booking of the apartment. As per the said agreement, the complainant deposited a sum of Rs.1,36,27,494/- with the opposite party.

8. Learned counsel for the complainant contended that even after expiry of more than 9 years from the date of booking, possession of the flat had not yet been handed over to the complainant, hence, it was constrained to issue a legal notice dated 29.05.2019. The opposite party did not respond to the legal notice. It was therefore, prayed that the complaint be allowed.

9. I have considered the arguments of the learned counsel for the complainant. The allegation of the complainant is that the opposite party has not even started the construction of the Tower till date, wherein the complainant had made booking of the flat in the year 2013 and out of the total consideration of Rs.4,72,00,000/- the complainant has paid an amount of Rs.1,36,27,494/- till 28.11.2013. In a catena of judgments, the Hon'ble Supreme Court and this Commission have held that a home buyer cannot be made to wait for an indefinite period for possession. In this regard the Hon'ble Supreme Court has laid down in Kolkata West International City Pvt. Ltd. Vs Devasis Rudra II (2019) CPJ 29 SC decided on 25.03.2021 as under:

"..... It would be manifestly unreasonable to construe the contract between the parties as requiring the buyer to wait indefinitely for possession. By 2016, nearly seven years had elapsed from the date of the agreement. Even according to the developer, the completion certificate was received on 29.03.2016. This was nearly seven years after the extended date for the handing over of possession prescribed by the agreement. A buyer can be expected to wait for possession for a reasonable period. A period of seven years is beyond what is reasonable. Hence, it would have been manifestly unfair to non-suit the buyer merely on the basis of the first prayer in the reliefs sought before the SCDRC. There was in any event a prayer for refund. In the circumstances, we are of the view that the orders passed by SCDRC and by the NCDRC for refund of moneys were justified."

In Fortune Infrastructure Vs Trevor D' Lima (2018) 5 SCC 442 also the Hon'ble Supreme Court laid down that:

'a buyer cannot be expected to wait indefinitely for possession

and in a case of an unreasonable delay in offering possession, the consumer cannot be compelled to accept possession at a belated stage and is entitled to seek refund of the amount paid with compensation'.

10. In view of the foregoing discussion, the complaint is partly allowed with cost of Rs.50,000/-. The opposite party is directed to refund the entire amount of Rs.1,36,27,494/- deposited by the complainant with interest @ 9% per annum from the date of respective deposit till the date of payment within two months from the date of pronouncement of the order failing which it shall carry interest at the rate of 12% per annum.

11. Pending IAs, if any, stand disposed of by this order.