

MANISH KUMAR PATNI & ANR. V. EMAAR MGF LAND LIMITED

1. MANISH KUMAR PATNI & ANR.

S/O DR.M.K.PATNI R/O A-153, BELVEDERE PARK, DLF
PHASE-3,
GURGAON
HARYANA

2. MRS. MONIKA PATNI

W/O SHRI MANISH KUMAR PATNI R/O A-153, BELVEDERE
PARK, DLF PHASE-3,
GURGAON
HARYANA

.....Complainant(s)

Versus

1. EMAAR MGF LAND LIMITED

THROUGH ITS DIRECTORS, REGD. OFFICE AT: 306-308,
SQUARE ONE, C-2, DISTRICT CENTRE, SAKET, SOUTH
DELHI,
NEW DELHI-110017

.....Opp.Party(s)

Case No: CONSUMER CASE NO. 1613 OF 2018

Date of Judgement: 12 Jan 2023

Judges:

HON'BLE MR. JUSTICE RAM SURAT RAM MAURYA, PRESIDING MEMBER
HON'BLE DR. INDER JIT SINGH, MEMBER

For the Complainant : Mr. Aditya Parolia, Advocate

Mr. Nithin Chandran, Advocate

Ms. Ishita Singh, Advocate

For the Opp.Party : Mr. Aditya Narain, Advocate

Mr. Mishra Raj Shekhar, Advocate

Facts:

Complainants booked an apartment in Palm Garden project of opposite party (Emaar MGF) in Oct 2011 and paid Rs. 1.01 Crores till Sept 2015. Possession was to be given by Aug 2018 as per the construction linked plan but was offered only in Nov 2019. Complainants allege unfair trade practice, deficiency in service and seek refund with interest, compensation and costs.

Court's Opinions:

Mere owning multiple flats doesn't make a person a non-consumer if purpose is not commercial. Complainants are consumers. Arbitration clause doesn't exclude consumer forum's jurisdiction. Complainants have right to choose their remedy. Considering delay of 4 years after promised possession date despite receiving almost entire sale value, complainants are justified in seeking refund with interest. Indefinite delays in possession are unreasonable as held by Supreme Court.

Arguments by Parties:

Complainants:

Booked flat based on OP's representations regarding project facilities and timelines. Paid installments diligently but possession delayed by over 4 years. Seek refund, interest, compensation and costs.

OP:

Complainants defaulted in installments so construction was delayed. Interest already charged for late payments. Complainants own multiple properties so they are not consumers. Dispute should go to Arbitrator/RERA instead of consumer forum.

Orders & Directions:

Complaint allowed partly. OP directed to refund entire amount paid by complainants with interest @9% p.a. within 2 months. OP can first satisfy loan dues of Tata Capital from

the refund amount.

Sections & Cases Referred/Cited:

Definition of 'Consumer' under Consumer Protection Act, 1986; Lilavati Kirtilal Mehta Medical Trust Vs. Unique Shanti Developers (2020); Emaar MGF Vs Aftab Singh (2019); Pioneer Urban Land & Infrastructure Ltd. Vs Govindan Raghavan (2019)

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Court

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Full Text of Judgment:

1. Heard Mr. Aditya Parolia, Advocate, for the complainants and Mr. Aditya Narain, Advocate, for the opposite party.
2. Manish Kumar Patni and Mrs. Monika Patni have filed above complaint for directing the opposite party to
(i) refund Rs.10148140/- with interest @24% per annum, (ii) pay compensation of Rs.10/- lacs, for mental agony and harassment, (iii) pay Rs.one lac, as litigation cost; and (iv) any other relief which is deemed fit and proper in the facts and circumstances of the case.
3. The complainants stated that Manish Kumar Patni worked at senior positions in top corporates in financial services and the banks and Ms. Monika Patni worked in the field of education. After leaving their previous carriers, the complainants were engaged in their self-employment. Emaar MGF Land Limited (the opposite party) was a company, registered under the Companies Act, 1956 and engaged in the business of development and construction of group housing project and selling its unit to the prospective buyers. The opposite party launched a group housing project in the name of "Palm Garden" at village Kherki Daula, Sector-83, Gurgaon, in the year 2011 and made wide publicity of its facilities and amenities. Believing upon the representations and promises of the opposite party, the complainants booked an apartment in the project "Palm Garden" and deposited booking amount of Rs.750000/- on 18.10.2011. The opposite party issued

Provisional Allotment Letter dated 18.10.2011, allotting Unit No.PGN-02-1102, super area 1900 sq.ft. basic price Rs.9025000/-, (exclusive of Taxes, External Development Charges and Infrastructure Development Charges) + Rs.829350/- as Preferential Location Charges + Rs.300000/- as Car Parking and executed Buyer's Agreement in their favour on 23.01.2012. Annexure-3 of the agreement provides "construction link payment plan". Construction was started in August, 2012. The complainants diligently followed payment plan and deposited Rs.10148140/- till September, 2015. Buyer's Agreement is one sided and arbitrary as in case of delay in payment of instalment, the opposite party was charging interest @24% per annum, while in case of delay in possession, compensation @Rs.7.5/- per sq.ft. per month on super area was payable. The opposite party sought revision of map in May, 2015 although by that time construction would have been completed. The complainants raised an objection for revision of map. The opposite party realized 90% of sale consideration but failed to give possession on due date as such there was deficiency in service. The opposite party promised for impeccable amenities of power back up, security, club, 8 acres landscapes green area, 1.5 acre mini golf course, 24 mtrs. wide road connectivity to exit/entry, Bowling Alley, Formal concept Gardens, ratio of 84% super area to apartment area etc. But none of the above amenities were completed. The complainants have taken loan from the bank and were burdened to pay its EMI. The complaint was filed on 17.07.2018, alleging unfair trade practice and deficiency in service.

4. The opposite party filed its written reply on 24.09.2018. The opposite party did not dispute, booking of the apartment, allotment of apartment and deposits made by the complainants. However, the opposite party stated that the complainants were defaulters and made payments of instalment with delay. The opposite party issued payment reminders dated 19.12.2011, 05.01.2012, 28.06.2012, 18.07.2012, 21.01.2013, 06.02.2013, 28.02.2013, 20.03.2013, 28.03.2013, 02.01.2014, 01.08.2014, 19.08.2014, 21.10.2015, 06.11.2015, 12.12.2016, 02.04.2017,

03.10.2017 etc. Some of the instalments were not deposited even on issue of reminders, then final notices dated 14.02.2012, 14.08.2012, 09.04.2013 etc. were issued to the complainants. Clause-10(a) of the agreement was subject to timely payment of the instalments and force majeure reasons. As the complainants committed default in payment of the instalments, time schedule for construction was also delayed. Total payment made by the complainants includes Rs.654973/- as interest for delayed payment. Allegation that the PLC has been collected and thereafter green area in front of the apartment was reduced, was incorrect. The opposite party never promised for provide 24 mtrs wide road and entry/exit. Preliminary objections that the complainants were not a consumer inasmuch as they owned a residential house i.e. house No.153 Belvedere Park DLF, Phase-3, DLF cyber city Gurgaon and they booked two flats i.e. other Flat No.PGN-02-1102, Tower-2 in project Palm Garden. According to own allegations, both the complainants were working as consultants in real estate business since 2003-2004. Therefore, it is apparent that they booked these apartments only for the purpose of getting better return and not for their residence. The complainants took loan from Tata Capital Housing Finance, mortgaging the property in dispute on 20.06.2013. Preliminary issues that the complainants owned a house and booked two apartments as such they are not consumers. The agreement contains an arbitration clause, therefore, the complainants be relegated to go before an Arbitrator. After enactment of Real Estate Regulatory and Development Act, 2016, the RERA Authority has been constituted under the said Act, as such, the complainants be relegated to submit their claim before the RERA Authority. The complaint is liable to be dismissed.

5. The complainants filed Rejoinder Reply, Affidavit of Evidence and Affidavit of Admission/Denial of documents of Manish Kumar Patni and Ms. Monika Patni (the complainants). The opposite party filed Affidavit of Evidence of Shipra Saboo. In the Affidavit of Evidence of Shipra Saboo, the opposite party stated that the construction was completed and

the application for issue of "occupation certificate" was filed on 11.02.2019, which was issued on 17.09.2019. The opposite party issued letter of offer of possession to the complainants on 19.11.2019. Both the parties have filed their written submissions.

6. After hearing arguments and reserving the complaint for judgment, the opposite party filed an Interim Application on 25.11.2022, stating that the complainants had taken loan of Rs.75/- lacs from Tata Capital Housing Finance Ltd., mortgaging Unit No.PGN-02-1102. The complainants committed default in payment of loan. Tata Capital Housing Finance Ltd. has filed an application under Section 14 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest, Act, 2002, before District Magistrate Gurugram, for taking over possession of Unit No.PGN-02-1103, which was allowed on 17.12.2021 (corrected on 08.02.2022). Tata Capital Housing Finance Ltd. sent to statement of account of the loan to the complainants on 04.11.2022.

7. We have considered the arguments of the parties and examined the record. The opposite party raised preliminary issue that the complainants are not consumer. For excluding a buyer from the definition of 'consumer' as defined under Consumer Protection Act, 1986, it is required to be proved that goods was bought or service was availed for 'commercial purpose'. Number of flats/houses owned or booked by the buyer is not decisive as held by Supreme Court in Lilavati KirtilaL Mehta Medical Trust Vs. Unique Shanti Developers, (2020) 2 SCC 265. In the present case the opposite party has not adduced any evidence that the apartments were booked for commercial purpose. In Emaar MGF Land Limited Vs. Aftab Singh, (2019) I CPJ 5 (SC), Supreme Court held that arbitration clause does not exclude the jurisdiction of consumer fora. RERA authority has concurrent jurisdiction and the complainants have right to elect remedy of their choice.

8. Clause-10(a) of the agreement provides 36 months period from the date of start of construction, for handing over

possession with grace period of three months. As per statement of account maintained by the opposite party, the construction was started on 09.08.2012 as such 36 months period expired on 09.08.2015 and three months grace period expired on 09.11.2015. The complainants deposited total Rs.10148140/- till September, 2015. The complainants committed delay in paying some instalments, for which the opposite party has already charged interest. The possession was offered on 20.11.2019 i.e. after about 4 years of due date of possession, which was unreasonable delay. The complainants are justified to seek refund of their money along with interest. The opposite party has not pleaded force majeure reason. Supreme Court in Pioneer Urban Lan & Infrastructure Ltd. Vs. Govindan Raghavan (2019) 5 SCC 725, held that a home buyer cannot be made to wait for possession for indefinite period.

ORDER

In view of the aforesaid discussions, the complaint is partly allowed. The opposite party is directed to refund entire amount deposited by the complainants including loan amount advanced by Tata Capital Housing Finance Ltd. with interest @9% per annum from the date of respective deposit till the date of payment, within a period of two month from the date of this judgment. It shall be open to the opposite party to satisfy the dues of Tata Capital Housing Finance Ltd. first and return balance amount to the complainants.