

# MONIKA PATNI & ANR. V. EMAAR MGF LAND LTD. & ANR..

1. MONIKA PATNI & ANR.

.....Complainant(s)

Versus

1. EMAAR MGF LAND LTD. & ANR..

.....Opp.Party(s)

Case No: CONSUMER CASE NO. 410 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 OP in Sept 2011 and paid Rs. 1.01 Crores till Sept 2015. Possession was to be given by Oct 2015 but not offered. Complainants seek refund, compensation, costs etc. Complainants had taken a loan from Axis Bank by mortgaging the allotted unit. Bank filed recovery case before DRT over default in installments. OP settled dues with Bank, cancelled allotment of complainants and refunded balance amount in June 2018.*

**Court's Opinions:**

**Complainants are consumers as purpose was not commercial. Consumer forum's jurisdiction is not barred due to arbitration clause. Complainants defaulted in loan EMI payments to Axis Bank leading to recovery proceedings before DRT against them and OP. As per tripartite agreement, OP settled dues of Axis Bank, cancelled allotment and refunded remaining amount to complainants post settlement. Once complainants appeared before DRT and accepted refunded amount from OP, they cannot claim same amount again from OP.**

**Arguments:**

**Complainants:**

**Booked flat based on representations, paid installments diligently but faced delay in possession. Seek refund, compensation, costs, damages etc.**

**OP:**

**Complainants defaulted in payments leading to delay. Refund cannot be claimed once allotment cancelled and amount settled. Complaint not maintainable due to arbitration clause, remedy under RERA and as amount refunded falls outside pecuniary jurisdiction. Complainants concealed material facts relating to DRT recovery case and subsequent cancellation of their allotment.**

**Orders & Directions:**

**Complaint dismissed as complainants already received refund from OP pursuant to settlement reached in DRT recovery case filed by Axis Bank.**

**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)**

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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. Monika Patni and Manish Kumar Patni have filed above complaint for directing the opposite party to (i) refund entire amount deposited by them, including loan amount advanced by Axis Bank Limited and loss of Income Tax Rebate with interest @24% per annum, or in alternative (ii) provide alternate accommodation of identical size in same locality, complete in all respect, along with delayed compensation in the form of interest @24% per annum on the deposit of the complainants for the delayed period, (iii) refund the amount of parking charges and PLC charges, with interest @24% per annum, or in alternative (iv) refund @Rs.8000/-, per sq.ft. of the super area, as allotted to the complainants, (v) refund amount of interest realized by the opposite party with interest @24% per annum, (vi) pay compensation of Rs.25/- lacs, for mental agony and harassment; and (vii) any other relief which is deemed fit and proper in the facts and circumstances of the case.

3. The complainants stated that Ms. Monika Patni worked in the field of education and Manish Kumar Patni worked at senior positions in top corporates in financial services and the banks. 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, who were searching for their residence in the locality, booked an apartment on 11.09.2011 and deposited booking amount Rs.750000/-. The opposite party allotted

Apartment no.PGN-02-1103, size 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 space, on 18.10.2011 and executed Buyer's Agreement in their favour on 23.01.2012. Annexure-3 of the agreement provides "construction link payment plan". 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 3 months. Construction was started in August, 2012. The complainants diligently followed payment plan and deposited Rs.10174025/- till September, 2015. The complainants took loan of Rs.68/- lacs, sanctioned on 07.05.2014, from Axis Bank Limited, for payment of instalments. The opposite party vide letter dated 28.05.2015, sought for consent for revision of layout plan, which was objected by the complainants. Due date of possession including grace period expired in October, 2015 but the opposite party could not complete construction nor offered possession. Clause-12(a) of the agreement provides that the company shall pay compensation @Rs.7.5/- per sq.ft. per month on super area, for the period beyond 39 months. But the opposite party did not pay delayed compensation. The complainants gave notices dated 28.12.2016, 31.12.2016 and 04.01.2017, for refund of their amount along with interest but the opposite party did not respond. The opposite party committed unfair trade practice, inasmuch as layout plan was approved on 22.03.2012, while the opposite party started collection of money since 11.09.2011. The opposite party has collected PLC charges, on the ground that the apartment of the complainants was faced with green area of 8 acres across boundary but proposed green area was compromised and reduced to 15756 sq.mtrs. The opposite party has illegally realized car parking charge. 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 only 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 opposite party realized 90% of sale

consideration but failed to give possession on due date as such there was deficiency in service. The complainants have taken loan from the bank and were burdened to pay its EMI. The complaint was filed on 13.02.2018, alleging unfair trade practice and deficiency in service.

4. The opposite party has filed its written reply on 02.07.2018, in which, the facts of booking the apartment on 11.09.2011, allotment of Unit No.PGN-02-1103, Tower-2, super area 1900 sq.ft. to the complainants, execution of Apartment Buyers' Agreement in their favour on 23.01.2012 of the aforesaid apartment and deposits made by them, have not been disputed. The opposite party stated that the complainants were a rank defaulter in payment of instalment and it is incorrect to say that they had followed the payment plan diligently. Sometime the builder had to issue reminders and sometimes pre-cancellation notices then the instalments were deposited. An amount of Rs.1009503/- was charged as interest on the defaulted amount. The complainants are still liable to pay Rs.616059/- along with Rs.965137/- towards interest for delayed payment. As the complainants did not make timely payment of the instalment, as such, they cannot have any grievance for delay in construction and offer of possession. It has been denied that the complainants have paid more than 90% of the consideration. It has been denied that the terms of buyers agreement were one sided. The entire terms and conditions were set forth in the application form and were disclosed to the complainants at the time of booking of the flat. The opposite party was owner of the project land and applied for sanction of its layout plan, as such, the opposite party invited applications for booking of the apartment in that project and there was no unfair trade practice in this respect. Clause 10 (a) of Buyers' Agreement was subject to timely payment of instalment and force majeure reasons. The allegation that the PLC has been collected and thereafter

green area in front of the apartment was reduced, was incorrect. 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 Axis Bank Ltd. on 21.04.2014 mortgaging the property in dispute. The complainants committed default in payment of instalments of the bank. Therefore, Axis Bank Ltd. filed an application registered as (OA No.1228/2017) under Section 19 of Recovery of Debts due to Bank and Financial Institutions Act, 1993 before the Debt Recovery Tribunal, Delhi, for recovery of its dues, in which, notices have been issued by the order dated 11.12.2017 to the complainants and the opposite party. The complainants put appearance before Debt Recovery Tribunal on 22.02.2018. As the property in dispute i.e. Unit No.PGN-02-1103 was mortgaged and Axis Bank Limited had charged over it, therefore, the opposite party entered into a settlement with Axis Bank Ltd. on 15.06.2018 and satisfied all the dues of Axis Bank Ltd. OA No.1228/2017 has been decided in terms of settlement by order dated 15.06.2018. The opposite party has cancelled the allotment of the complainants, by letter dated 15.06.2018 and the balance amount of Rs.2990995/- has been refunded to the complainants by Demand Draft Nos.870710 and 870711 dated 14.06.2018. After cancellation of allotment as well as accepting the balance amount, the contract between the complainants and opposite party has come to an end. Therefore, the complaint is liable to be dismissed. After refund of the amount to Axis Bank Ltd. only amount of Rs.2990995/- belonging to the complainants remained with the opposite party and the claim was not falling within the pecuniary jurisdiction of this Commission. The contract

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 complainants have concealed the material fact relating to proceeding of Debt Recovery Tribunal, Delhi and cancellation of their allotment. Therefore, the complaint is liable to be dismissed for concealment of material fact.

5. The complainants filed Rejoinder Reply on 28.12.2018, Affidavits of Evidence and Affidavits of Admission/Denial of documents of Ms. Monika Patni and Manish Kumar Patni. The opposite party filed Affidavit of Evidence Shipra Saboo. Both the parties have filed their written submissions.

6. 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) 1 CPJ 5 (SC), Supreme Court held that arbitration clause does not exclude the jurisdiction of consumer fora. Remedy before RERA authority is alternate remedy and does not exclude jurisdiction of this Commission.

7. The complainants have made various allegations against Axis Bank Ltd. in the complaint but Axis Bank Limited has been deleted by order dated 26.02.2018. The complainants took loan from Axis Bank Ltd. on 21.04.2014 mortgaging the property in dispute. The complainants committed default in payment of instalments of Axis bank Limited. Therefore, Axis Bank Ltd.

filed an application registered as (OA No.1228/2017) under Section 19 of Recovery of Debts due to Bank and Financial Institutions Act, 1993 before the Debt Recovery Tribunal, Delhi, for recovery of its dues, in which, notices have been issued by the order dated 11.12.2017 to the complainants and the opposite party. This complaint was filed on 13.02.2018. The complainants put appearance before Debt Recovery Tribunal, Delhi on 22.02.2018. As the property in dispute i.e. Unit No.PGN-02-1103 was mortgaged and Axis Bank Limited had charged over it, therefore, the opposite party entered into a settlement with Axis Bank Ltd. on 15.06.2018 and satisfied all the dues of Axis Bank Ltd. OA No.1228/2017 has been decided in terms of settlement by order dated 15.06.2018. The opposite party has cancelled the allotment of the complainants, by letter dated 15.06.2018 and refunded balance amount of Rs.2990995/- to the complainants by Demand Draft Nos.870710 and 870711 dated 14.06.2018, in terms of tripartite agreement. After cancellation of allotment as well as accepting the amount, the contract between the complainants and opposite party has come to an end. These facts have been concealed by the complainant. In view of the fact that the complainants had appeared before Debt Recovery Tribunal and accepted balance amount of cancellation of their allotment, they are not entitled to claim same money again from the opposite party as it was paid to Axis Bank Limited in accordance with tripartite agreement between the parties.

#### ORDER

In view of the aforesaid discussions, the complaint is dismissed.