Refund with interest allowed for delay in possession beyond contractual date: 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: 01 January 2024

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 of opposite party (OP) in Gurgaon and paid almost full amount. As per Flat Buyer's Agreement, possession was to be given in 36 months plus 6 months grace period. Complainants paid timely instalments and total payment after discounts was Rs 62 lakhs for one flat. OP failed to give possession

even after expiry of grace period. Several communications made by complainants for refund went unanswered. Complainants approached National Commission seeking refund of amount paid with interest, compensation and costs.

Arguments by Complainants:

Delay in possession despite timely payments constitutes deficiency in service by OP. Complainants are consumers under the Consumer Act. Onus of proving otherwise is on OP who has adduced no evidence. Agreement is one-sided, unfair, refund is permissible under the Act. Relying on judgments, complainant cannot be compelled to accept delayed possession and is entitled to refund with 10.7% interest (8.7% + 2% compensation). Relying on Pioneer Urban and other cases, flat buyer justified in seeking refund with interest if possession offered after long delay of 2 years from grace period. Change in floor plan is deficiency. Spiral staircase to terrace provided from within flat.

Arguments by OP:

Preliminary objections – Arbitration clause, inflated jurisdiction, not consumers, no cause of action, barred by limitation. Force majeure reasons for delay – NGT ban on construction in NCR and on 10 year old vehicles. Occupancy certificate received in Sept 2019 for the tower and possession offered in Oct 2019. No deficiency. Bound by Agreement terms including payment of penalty for delay. Complainants were defaulters and sent notice. Must make final payment since possession offered. Relying on Abhishek Khanna case, allottees must accept possession if offered after delay.

Court's Reasoning and Decision:

Onus of proving complainants not consumers is on OP who has adduced no evidence. Given rebate for timely payment, complainants not defaulters. Continuing cause of action since possession offered only after filing complaint. Arbitration clause no bar to approaching Consumer Commission. Lack of evidence by OP on impact of NGT orders on project. Force majeure not justified. Reliance on Abhishek Khanna misplaced as facts are different with much shorter delay. SC judgments allow refund with interest for indefinite delay in possession. Buyer cannot be compelled to accept delayed possession. Interest of 9% p.a.

compensatory as well as restitutionary. OP guilty of deficiency in service for delay beyond contractual date. Allowed refund of amount paid with 9% p.a. interest from deposit dates till offer of possession. 12% interest if not paid in 8 weeks. Also awarded litigation costs. Same relief granted in the other two complaints based on same project, reasons and delay.

Sections and Provisions:

Complaint under Section 21(a)(i) of Consumer Protection Act for unfair trade practice under Section 2(1)(r) and deficiency in service under Section 2(1)(g). Territorial jurisdiction under Ambrish Shukla order. Continuing cause of action under Meerut Development Authority case. Arbitration clause no bar under Emaar MGF and Imperia Structures cases. Consumer under Section 2(1)(d) and onus of proof under Kavita Ahuja order.

Cases relied upon:

By Complainants:

Govindan Raghavan v. Pioneer Urban Land and Infrastructure Ltd. (NCDRC 2018) – Refund with 10.7% interest for delay in possession.

Pioneer Urban Land and Infrastructure Ltd. v. Govindan Raghavan (SC 2019) – Flat buyer justified in seeking refund if possession delayed beyond grace period.

Experion Developers Pvt. Ltd v. Sushma Ashok Shiroor (SC 2022) – 9% interest fair compensation.

By Opposite Party:

Abhishek Khanna v. Ireo Grace Realtech Pvt. Ltd (SC 2021) – Allottee must accept possession if offered after delay.

Parklands Pride Buyers Assn v. BPTP Ltd (NCDRC 2022) – Directed allottee to take possession as per agreement.

Millennia Realtors Pvt. Ltd. v. Subroto Bandhu (NCDRC 2023) – Directed allottee to take possession.

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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 aflat booked by the complainants within the promised time in a project promoted and executedby 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 MaintenanceSecurity Car Parking, Electricity connection charges, Firefighting charges and Power Back-upinstallation charges and other additional charges. A discount of Rs 1,72,166/- was providedmaking the amount Rs 52,08,034/-. A Flat Buyer's Agreement (for short, 'the Agreement') wassigned on 06.12.2012 as per which (clause 3.1) possession was to be handed over in 36 monthswith 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 to communications 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 ofpayment till 30.06.2019 which amounts to Rs 64,51,335/-, i.e. a total of Rs1,26,67,987/-;
(ii) pay interest @ 18% on Rs 1,26,67,987/- from 01.07.2019 till the actual dateof 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 tobe settled through arbitration; (ii) the pecuniary jurisdiction of this Commission had been invoked by inflating the reliefs sought; (iii) complainants were not ‘consumers’ under section2(1)(d) since refund has been sought after offer of possession was made on 15.10.2019 andsince they were not able to trade the unit in the secondary real estate market; (iv) there was nocause 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) complainantswere 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 clause10 including circumstances beyond the control of the opposite party and clause 3.3 providingfor penalty for delay @ Rs 5/- per sq ft per month; (ix) complainants defaulted in payments andwere 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 inpayments 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 beenadduced 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 ofthis 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 ata 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 alsoplaced 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 725wherein 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 Real tech Pvt. Ltd. Vs. Abhishek Khanna & Ors., in Civil Appeal No. 5785 of 2019 decided on11.01.2021, 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 theban on construction on account of the order of the National Green Tribunal in the NationalCapital Region including the use of commercial diesel vehicles of ten years vintage. It wassubmitted 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 thecomplainants. Relying on Abhishek Khanna (supra) it was argued that the complainants wereobligated 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. MillenniaRealtors 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 by06.06.2016 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.,I (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 negatived by the fact that the opposite party extended arebate to the complainants for timely payments as reflected in the accounts brought on record bythe 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 SCC783 since the opposite party did not declare the complainants as ‘defaulters’, it is not open tothem to take this plea now.

9.The settled law on pecuniary jurisdiction as held by this Commission in Ambrish KumarShukla 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 viewedin 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 inthe 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) 12SCC 751 and in M/s Imperia Structures Ltd. Vs. Anil Patni & Anr., (2020) 10 SCC 783decided on 02.11.2010 that "remedies under the Consumer Protection Act were in addition tothe remedies available under special statutes (and) the provisions of this Act shall be in additionto 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.1442of 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 tofulfil their contractual obligation to the flat Buyers. It is not as if no construction took place inNoida and Greater Noida during the period that the interim order passed by the NGT remainedin force. There is no evidence brought on record that transportation vehicles eligible to ply werenot 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, merereliance 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 2019dated 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 cannotbe 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 of2019 decided on 25.03.2019 regarding the right of the consumer to seek refund in view of thein ordinate 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 personcannot be made to wait indefinitely for possession of the flat allotted to him and is entitled toseek 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/houseis 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 ofallottees 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 interesth as 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 inservice in not offering possession of the flat on 05.06.2016 and instead offering possession on15.10.2019. 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 failingwhich 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 aboveterms as below:
(i)CC No. 335 of 2019

Flat no 1903 in Tower T-3 of “Park Generations” was booked by Poonam Khandawe on13.09.2011. 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 CCNo. 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 failingwhich 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 theopposite 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.