

VIVEK AIREN & 2 ORS. Vs. M/S. SDS INFRATECH PVT. LTD.

VIVEK AIREN & 2 ORS. Vs. M/S. SDS INFRATECH PVT. LTD.

1. VIVEK AIREN & 2 ORS.
B-100, 2ND FLOOR, SEC-36.
NOIDA
U.P.
2. VIBHOR NEB.
2390, SEC-71, MOHALI.
CHANDIGARH.
3. AMIT AGGARWAL.
E-442, AASTHA KUNJ, SEC-18.
ROHINI
DELHI-110089.
4. AMIT AGGARWAL.
E-442, AASTHA KUNJ, SEC-18.
ROHINI
DELHI-110089

.....Complainant(s)

Versus

1. M/S. SDS INFRATECH PVT. LTD.

BHAGWATI BUSINESS CENTRE, S-561, SCHOOL BLOCK-
II, SHAKARPUR.

NEW DELHI-110092

.....Opp. Party(s)

Case No. : CONSUMER CASE NO. 2203 OF 2016

Date of Judgement : 06 December 2023

**Judges : JUSTICE RAM SURAT RAM MAURYA
HON'BLE BHARATKUMAR PANDYA**

For Complainant : MR. BIJOY KUMAR PRADHAN, ADVOCATE

**MS. PAVITHRA V., ADVOCATE
MR. MOHINDER SINGH, ADVOCATE**

For Opp. Party : MR. SHALABH SINGHAL, ADVOCATE

Facts:

- *Vivek Airen and others filed a complaint against SDS Infratech Pvt. Ltd. regarding deficiencies in services related to the 'NRI Residency' housing project.*
- *SDS launched the project in 2010 and issued allotment letters to buyers in 2011, committing delivery within 30 months.*
- *Buyers paid up to 80-100% of flat costs over time but faced long delays in possession. SDS also raised additional demands on buyers.*
- *Buyers alleged deficiency due to delays, unfair demands, lack of amenities, construction defects etc. and sought various reliefs from the Commission.*

Arguments:

Complainants:

- *Unreasonable delays in possession beyond committed timeline. No delay compensation paid.*
- *Unfair demands raised for car parking, maintenance charges, increased super area etc. without basis.*
- *Poor construction quality and defects.*

Opposite Party:

- *Delays were due to NGT order stopping construction,*

authorities delaying occupancy certificate etc. Force majeure conditions apply.

- *Buyers also delayed payments. As per terms, they aren't entitled to compensation.*
- *All demands as per allotment conditions. Increase in super area is justified.*
- *Majority of buyers have already taken possession, proving no construction defects.*

Court's Reasoning and Decision:

- *Rejected preliminary objections related to jurisdiction, arbitration clause etc.*
- *Accepted increase in super area based on occupation certificate showing increase.*
- *Rejected allegations of car parking and other additional demands based on allotment terms.*
- *Did not accept construction defect allegations due to lack of evidence.*
- *Considered NGT order as force majeure but more delays were within builder's control.*
- *Granted delay compensation at 6% interest on deposits for 13 months of delay.*
- *Directed settlement of accounts and execution of conveyance deed without further delay.*

Relevant Laws and Sections:

- *Consumer Protection Act 1986, Sections 12(1)(c), 13(6), 21.*
- *Rulings in Ambrish Kumar Shukla vs Ferrous Infrastructure, Emaar MGF Land Limited vs Aftab Singh etc.*



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Full text of Judgement :

1. Heard Mr. Bijoy Kumar Pradhan, Advocate, for the complainant and Mr. Shalabh Singhal, Advocate, for the opposite party.
2. Initially, Viven Airen, Vibhor Neb and Amit Aggarwal filed above complaint for directing the opposite party to (i) deliver possession of the flats, complete in all respect with all facilities, as allotted to them in the project "NRI Residency" within reasonable time preferably within 3 months; (ii) pay delay compensation in terms of the agreement/allotment letter; (iii) pay interest @18% per annum on the deposits of the home buyers from due date of possession till the delivery of possession; (iv) pay Rs.1000000/-, to each of them, as compensation for mental agony and harassment; (v) set aside unfair demand of Rs.1500000/- made by the opposite party; (vi) refund the amount charged in the garb of 10% increase in area; (vii) set aside illegal sale of mechanical car parking; (viii) pay litigation costs; and (ix) any other relief which is deemed fit and proper in the facts and circumstances of the case.
3. The complainants filed IA/12860/2016 under Section 12(1)(c)

of the Consumer Protection Act, 1986, for grant of leave to file the complaint in representative capacity on behalf of numerous home buyers of the project, having same interest. This IA was allowed vide order dated 25.10.2017. Thereafter, notices were published in newspapers as per Section 13(6) of the Consumer Protection Act, 1986 and various other home buyers were impleaded/deleted time to time.

4. The complainants stated that M/s. SDS Infratech Private Limited (the OP) was a company, registered under the Companies Act, 1956 and engaged in the business of development and construction of group housing project. The OP launched a group housing project in the name of "NRI Residency", at leasehold Plot No.GH-4-A, Sector-45, Noida, Gautam Budh Nagar, U.P. in the year, 2010 and made wide publicity of its amenities and facilities. Believing upon the representations of the OP, the complainants and numerous buyers booked one flat for each of them and deposited booking amount around September, 2010. The OP issued Deed of Allotments around February, 2011 allotting one unit to each of them in the project "NRI Residency". Annexure-II of the Deed of Allotment provides "construction link payment plan". Clause-10.1 of the Deed of Allotment provides that the developer shall endeavour to complete the construction within a period of 24 months from the date of allotment, with grace period of six months. As per demand of the opposite party, the complainants deposited the instalments and paid about 80% to 100% of the basic sale price, however, the construction was unreasonably delayed. The OP is now raising extra demands in various heads. Clause-6 of the Deed of Allotment provides that the allottee shall be entitled to use one designated open/covered car parking space at no extra cost. The OP built mechanical car parking encroaching upon common area and is selling it for Rs.2-3 lacs to the allottee. Clause-8.3 of the Deed of Allotment provides that in case of major alteration/ modification resulting in + 10% change in the cost of the flat, the developer shall intimate in writing to the buyers. The OP is raising extra demand in the head of 'increased super area' without any rhythm and reason and

without prior intimation to the home buyers, although the carpet area has not been increased. The OP constructed more numbers of flats than the flats, sanctioned in building plan as such there could be no increase in 'super area'. Some of the buyers have taken loan for payment of the instalment and increased price creates extra burden upon them. Clause-11.1 provides for delay compensation, in case, possession is not delivered within the period mentioned in clause 10.1. Due date of possession including grace period, expired in August, 2013. Although the possession was unreasonably delayed but the OP is not giving any delay compensation. Annexure-II of the Deed of Allotment shows that the OP has charged maintenance charges in total sale price @Rs.35/- per sq.ft. There is no justification for the OP to charge maintenance charges at highly excessive rate. The complainants raised their protest against illegal demands of the OP and demanded delay compensation in the form of interest @18% per annum, the rate for which the OP is charging interest on delayed payment of the instalments but they did not pay any heed. Then, this complaint was filed on 22.12.2016 alleging deficiency in service and unfair trade practice on the part of the OP.

5. The opposite party filed its written reply on 08.12.2017, in which, booking of the flats, allotment of the flats and deposits made by the complainants, have not been disputed. The OP stated that New Okhla Industrial Development Authority allotted the project land to the OP vide lease deed dated 12.03.2010, for development of the group housing project. The OP submitted building plan, which was approved on 14.07.2010 and the revised building plan was approved on 20.12.2011. The OP completed the construction and applied for issue of "occupation certificate" on 11.04.2014. National Green Tribunal, vide order dated 14.08.2013, stopped constructions within a radius of 10 KM from Okhla Bird Sanctuary. Although the builders challenged this order by moving recall application and also approaching Supreme Court but could not succeed. This order continued till notification of Echo-sensitive Zone by the Government dated 19.08.2015. Due to the

order of National Green Tribunal the construction was stopped from 14.08.2013 till 28.10.2013. The authorities did not process the application for issue of "occupation certificate" till 19.08.2015. "Occupation certificate" was issued on 31.05.2016. Thereafter, the OP started issuing offer of possession letter from June, 2016 to the allottees including the complainants. Building plan was sanctioned for 643 flats, while the OP constructed 642 flats. Out of total 624 allottees, 515 allottees have taken possession and got sub-lease deed executed in their favour. The OP denied that the complainants have paid 90% to 100% consideration. Complainant-1 paid about 70.5% consideration and did not make payment after December, 2011. Complainant-2 paid about 81% consideration and did not make payment after June, 2014. Complainant-3 paid about 89% consideration and did not make payment after November, 2014. The complainants delayed payment of the instalments throughout. The period mentioned in clause-10.1 of the Deed of Allotment is subject to timely payment of instalments and force majeure. As stated above, due to the order of National Green Tribunal the construction was stopped from 14.08.2013 till 28.10.2013 and withheld issuance of "occupancy certificate" till 31.05.2016, as such, the OP is entitled for extension of this period. Being defaulters, the complainants are not entitled for delay compensation. In any case, under clause-11.1, delay compensation is payable @Rs.5/- per sq.ft per month of the super area. Demand of 18% interest on the deposit is not in terms of the agreement. As per clause-6 of the Deed of Allotment, the OP is providing one designated open/covered car parking space without any extra cost to all the allottees. Mechanical car parking is optional and not compulsory. Under clause-2.4 of the Deed of Allotment, it has been mentioned that 'super area' was tentative. Clause-8.1 provides that building plan was provisional and tentative and is subject to change for which the allottees had given their consent. In revision of layout plan, common area increased as such 'super area' was proportionately increased. Although 'super area' is increased more than 10% but the cost

has not been increased more than 10% as such previous consent of the allottees was not required. 'Interest Free Maintenance Security' is payable under clause 14.6 and as per Annexure-II, it is payable at the time of 'offer of possession'. Maintenance charges are payable @Rs.0.25 per sq.ft. to the maintenance agency as per clause-14.5. Demand of 'Interest Free Maintenance Security' was in terms of the Deed of Allotment. Electricity connection and meter installation charges, security deposit, energizing charges, water and sewer connection charges are payable under clause-19.3 of the Deed of Allotment. The OP is not raising any extra demand and all the demands are as per agreement. It has been denied that terms of deed of allotment were one side and arbitrary. One freak accident of collapse of a small portion of the basement roof, which otherwise was under demolition due to technical reason, had occurred. At the time of issue of "occupation certificate" the statutory authority has tested the quality of the construction and did not find any deficiency. Preliminary issues that (i) total value of one flat is below Rs.one crore and the complaint does not fall within pecuniary jurisdiction of this Commission; (ii) the complainant are not consumers rather investors; (iii) there is no sameness of interest of the complainants; and (iv) The deed of allotment contains an arbitration clause, are raised. The complaint is liable to be dismissed.

6. The complainants filed Rejoinder Reply, Affidavits of Evidence of various complainants and documentary evidence. The opposite party filed Affidavit of Evidence of Punit Gupta and documentary evidence. Both the parties have filed written synopsis.

7. We have considered the arguments of the parties and examined the record. Preliminary issues raised by the OP have no merit. Section 21 of the Consumer Protection Act, 1986 provides that where value of the goods/service together with compensation claimed exceeds Rs.one crore, the complaint can be filed before this Commission. Full Bench of this Commission in Ambrish Kumar Shukla Vs. Ferrous Infrastructure Pvt. Ltd.,

I (2017) CPJ 1, held that for the purposes of pecuniary jurisdiction, value of services of all the complainants have to be added in the case of joint complaint. In the present case, value of the goods together with compensation claimed by the complainants exceeds Rs. one crore. Supreme Court in Emaar MGF Land Limited Vs. Aftab Singh, (2019) 12 SCC 751, held that consumer forum exercises jurisdiction in addition and not in derogation of any other enactment as such provisions of Arbitration and Conciliation Act, 1996 do not bar the jurisdiction of this Commission. The opposite party has not adduced any evidence to prove that the complainants are doing business of purchase and sale of the flat as such they cannot be held as the investors.

8. Under clause-2.4 of the Deed of Allotment, it has been mentioned that 'super area' was tentative. Clause-8.1 provides that building plan was provisional, tentative and subject to change for which the allottees had given their consent. The opposite party stated that in revision of layout plan, common area had increased as such 'super area' was proportionately increased. Although 'super area' is increased more than 10% but the cost has not been increased more than 10% as such previous consent of the allottees was not required. "Occupation certificate" dated 31.05.2016, shows that sanctioned area was 7252.27 sq. meters while actual building occupied area was 9156.71 sq. meters as such there is about 26% increase in constructed area. "Occupation certificate" dated 31.05.2016, further shows that total 643 units were sanctioned and total 642 units were constructed as such number of flats have not been increased. If number of flat has not been increased then increase in 'super area' is proved. In similar set of agreement, Supreme Court in DLF Home Developers Pvt. Ltd. Vs. Capital Greens Flat Buyers Association, (2021) 5 SCC 537, upheld increase of 10% of the super area and demand in this respect. Supreme Court in Experion Developers Pvt. Ltd. Vs. Himanshu Dewan, 2023 SCC OnLine SC 1029 has not accepted the arguments of the counsel for home buyer that judgment of this Commission in Pawan Gupta Vs. Experion

Developers Pvt. Ltd. 2020 SCC OnLine NCDRC 788 will operate as res-judicata. It has been held that in subsequent case, the builder has proved increase in super area by adducing evidence.

9. The OP stated that as per clause-6 of the Deed of Allotment, they are providing one designated open/covered car parking space without any extra cost to every allottee. Mechanical car parking is optional and not compulsory. A perusal of letter of offer of possession and final statement of account of the complainants does not indicate that any amount was demanded from them in the head of 'car parking'. So far as construction of 'mechanical car parking' is concerned, the OP has stated that it has not affected car parking place as allotted to the complainants. The complainants have not adduced any contrary evidence.

10. 'Interest Free Maintenance Security' is payable under clause 14.6 and as per Annexure-II, it is payable at the time of 'offer of possession'. Maintenance charges are payable @Rs.0.25 per sq.ft. to the maintenance agency as per clause-14.5. Demand of 'Interest Free Maintenance Security' is in terms of the Deed of Allotment. Electricity connection and meter installation charges, security deposit, energizing charges, water and sewer connection charges are payable under clause-19.3 of the Deed of Allotment and all the demands are as per agreement. Cooking Gas supply through pipeline is additional benefit to the home buyers. There is no reason for them to deny its charges.

11. So far as allegations relating to construction defects are concerned, the defects as mentioned in the emails are of finishing nature. Issue of "occupation certificate" is prima facie proof that the construction is complete. It is normal practice amongst the builder to complete finishing works after deposit of last instalment i.e. instalment of offer of possession. The complainants have not deposited last instalment. The complainants did not make any effort to obtain spot inspection report to prove any construction defects.

According to the OP, out of total 624 allottees, 515 allottees have taken possession and got sub-lease deed executed. As such allegations of construction defects are not proved.

12. Clause-10.1 of the Deed of Allotment provides that the developer shall endeavour to complete the construction within a period of 24 months from the date of allotment, with grace period of six months. Clause-11.1 provides for delay compensation @Rs.5/- per sq.ft. per month of the super area, in case, possession is not delivered within the period mentioned in clause 10.1. Due date of possession including grace period, expired in August, 2013, in those case, in which deed of allotments were issued in February, 2011. This period will vary in case, deed of allotment was issued subsequently. The OP stated that they completed the construction and applied for issue of "occupation certificate" on 11.04.2014. National Green Tribunal, vide order dated 14.08.2013, stopped constructions within a radius of 10 KM from Okhla Bird Sanctuary. Although the builders challenged this order by moving recall application and also approaching Supreme Court but could not succeed. This order continued till notification of Echo-sensitive Zone by the Government on 19.08.2015. Due to the order of National Green Tribunal the construction was stopped from 14.08.2013 till 28.10.2013. The authorities did not process the application for issue of "occupation certificate". "Occupation certificate" was issued on 31.05.2016. Thereafter, the OP started issuing offer of possession letter from June, 2016 to the allottees including the complainants.

13. Thus there was six months delay in completing the construction to those allottees, in whose favour deed of allotment was issued in February, 2011 and thereafter issuance of "occupation certificate" was delayed for two years one month. The OP took plea that the complainants had delayed payment of the instalments throughout. As such delay of six months has occurred in completing the construction due to delayed payment of instalments. Statutory authority delayed issuance of "occupation certificate" due to restraint order of

National Green Tribunal. The period mentioned in clause-10.1 of the Deed of Allotment is subject to timely payment of instalments and force majeure. Therefore the complainants are not entitled for delay compensation.

14. Supreme Court in Dhanrajmal Govindram Vs. Shyamji Kalidas, AIR 1961 SC 1285, held that an analysis of the rulings on the subject shows that where reference is made to "force majeure" the intension is to save the performing party from the consequences of anything over which he had no control. According to the OP, the construction was stopped from 14.08.2013 till 28.10.2013 due to restraint of National Green Tribunal. In this case, Echo-sensitive Zone was notified by the Government on 19.08.2015. Thereafter, there was no force majeure for issue of "occupation certificate". Subsequent time taken in issue of "occupation certificate" was within expectation of an experienced builder. Possession was offered in June, 2016. The OP has delayed construction for a period of five months and offer of possession for a period of eight months. Total delay is of 13 months. As the OP has charged penal interest on delayed payment of instalment as such the OP cannot deny delay compensation. Although in deed of allotments, delay compensation was payable @Rs.5/- per sq.ft. per month of the super area but Supreme Court in Wg.Cdr. Arifur Rahman Khan Vs. DLF Southern Homes Pvt. Ltd., (2020) 16 SCC 512 and DLF Home Developers Pvt. Ltd. Vs. Capital Greens Flat Buyers Association, (2021) 5 SCC 537, held that 6% interest on the deposit of home buyers for the delayed period is appropriate delayed compensation.

ORDER

In view of aforesaid discussions, the complaint is partly allowed. The opposite party is directed to pay delay compensation to the complainants in the form of interest @6% per annum on their deposit for a period of 13 months. The OP will charge interest on its dues @9% per annum from July, 2016. The OP shall issue fresh statement of account to the

complainants within a period of one month from the date of this judgment duly crediting delay compensation. If after adjusting delay compensation, any amount is payable by the complainants, it will be paid within one month of issue of statement of account. If any amount is payable by the OP, it will be paid along with statement of account. After settlement of the account, the OP will arrange for execution of sub-lease deed without any further delay and handover possession to the complainants. This judgment will not be applicable to those home buyers, who have settled their dispute and taken possession.

-END-