NATIONAL CONSUMER DISPUTES REDRESSAL COMMISSION
NEW DELHI

FIRST APPEAL NO. 1620 OF 2016

(Against the Order dated 24/10/2016 in Complaint No. 582/2013 of the State Commission Delhi)

1. JAYPEE GREENS
A DIVISION OF JAIPRAKASH ASSOCIATES LTD.,
HAVING ITS OFFICE AT: SECTOR-128,
NOIDA-201301 .....Appellant(s)

Versus

1. YOGESH KUMAR GARG
BC-82 (WEST) SHALIMAR BAGH,
DELHI-110088 .....Respondent(s)

BEFORE:

HON'BLE MR. JUSTICE RAM SURAT RAM MAURYA,PRESIDING MEMBER
HON'BLE BHARATKUMAR PANDYA,MEMBER

FOR THE APPELLANT : MR. SUMEET SHARMA, ADVOCATE
MR. PARAS CHOUDHARY, ADVOCATE

FOR THE RESPONDENT : MR. SAURABH GUPTA, ADVOCATE
MS. ANANYA GUPTA, MS. POOJA BHARDWAJ, ADVOCATES
MR. UJJWAL, MR. ARPAN DOGRA, ADVOCATES

Dated : 01 November 2023

ORDER

1. Heard Mr. Sumeet Sharma, Advocate, for the appellant and Mr. Saurabh Gupta, Advocate, for the respondent.

2. Jaypee Greens (the opposite party) has filed above appeal against order of State Consumer Disputes Redressal Commission, Delhi, dated 24.10.2016, passed in CC/582/2016, allowing the complaint with cost of Rs.100000/- and directing the appellant to refund Rs.6807595/- with interest @18% per annum from date of respective deposit till the date of payment, within sixty days, with default clause and pay compensation of Rs.500000/- for mental agony and harassment to the complainant.

3. Yogesh Kumar Garg (the respondent) filed CC/582/2016, for declaring (i) letter dated 04.07.2013 of Jaypee Greens (the appellant), cancelling his allotment dated 05.10.2009 as revised on 03.11.2009 and demand of additional/excess consideration in the heads of ‘service tax’, ‘maintenance charges’, ‘social club membership’, ‘social club subscription fee’, ‘holding charges’, ‘interest’ and other demands as null and void; and directing Jaypee Greens (the appellant) to (ii) deliver possession of the flat allotted to him, complete in all respect as per specifications; (iii) pay delay compensation in the form of interest @18% per annum on his deposit of Rs.6807595/-, from April, 2010 till the date of possession; (iv) pay

Rs.500000/- as compensation for mental agony and harassment; (v) pay Rs.50000/- as litigation costs; and (vi) any other relief which is deemed fit and proper in the facts of the case.

4. The complainant stated that Jaypee Greens (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 "Jaypee Greens", at Block-G, Surajpur-Kasna Road, Greater Noida, in the year, 2009 and made wide publicity of its amenities and facilities. The representatives/ officials of the OP contacted the complainant in July, 2009 and gave rosy pictures of the project. Believing upon the representations of the OP, the complainant booked Unit No.STR-7/1202 (super area 1461 sq.ft., basic sale price of Rs.7099470/-) and deposited Rs.700000/- on 20.07.2009. The OP, vide Provisional Allotment Letter dated 05.10.2009 allotted Unit No. STR-7/1202, area 1461 sq.ft., for consideration of Rs.7472515/-. Under 'payment plan' the complainant had to further pay Rs.6107595/- on or before 30.11.2009 and balance amount was payable on offer of possession. The OP, vide Provisional Allotment Letter dated 03.11.2009 revised consideration to Rs.7687515/-. Under 'payment plan' the complainant had to further pay Rs.6107595/- on or before 30.11.2009 and balance amount of Rs.879920/- was payable on offer of possession. The complainant further deposited Rs.6107595/- till 10.12.2009. It may be mentioned that as the opposite party delayed issue of permission letter dated 30.11.2009 to Housing Development Finance Corporation Limited for grant of loan to the complainant as such payment was delayed for 10 days. Allotment letter provides 15 months period, for handing over possession with grace period of 90 days. Due date of possession including grace period expired in 04.04.2011 but the construction was unreasonably delayed. The construction at the site was stopped from April, 2010. The complainant, therefore, vide email dated 12.06.2010, inquired about the date of possession but no reply was given. The OP, vide letter dated 02.01.2012 offered possession and raised demand of Rs.364920/- as balance consideration, Rs.9397/- as 'service tax', Rs.45688/- as interest, Rs.300000/- as car parking charges, Rs.1154984, as 'additional consideration', Rs.29741/- as 'service tax on it and Rs.127403/- as 'maintenance deposit', Rs.56210/- as 'service tax' on it and Rs.237145/- as social club membership.. Although possession was delayed but no delay compensation was credited rather various extra amount was demanded in different heads. Then the complainant visited the site and found that construction of the flat was still incomplete. The complainant raised protest in respect of extra demand, not paying delay compensation and incomplete construction vide letter dated 02.02.2012. The OP, vide email dated 29.07.2012, revised the demand to Rs.1851335/- but again no delay compensation has been credited. The complainant, vide email dated 01.08.2012, demanded delay compensation and raised protest for demand of Rs.1154984, as 'additional consideration', Rs.29741/- as 'service tax on it. The OP, vide email dated 06.09.2012, informed that that 'super area' has been increased to 1798.70 sq.ft., but they were charging for 1607.10 sq.ft. The OP issued notice dated 28.01.2013, for cancellation of the allotment of the complainant, if Rs.1716133/- was not paid within 30 days of the service of the notice. The complainant, vide letter dated 27.02.2013, demanded details of Rs.1716133/- and issued reminders dated 06.03.2013 and 13.03.2013 but no reply was given. The OP, vide email dated 04.07.2013, informed that provisional allotment of the complainant was cancelled and Rs.747251/- had been forfeited. The complainant, vide letter dated 08.07.2013, demanded Standard Terms and Conditions and visited the office of the OP on 15.07.2013 and demanded Standard Terms and Conditions

and gave an email dated 16.08.2013, in this respect but it was not supplied. Challenging extra demands and cancellation of allotment, this complaint was filed in October, 2013.

5. The opposite party filed its written reply, in which, booking of the flat, allotment of the flat, and deposits made by the complainant, have not been disputed. The OP denied that its officers/representatives approached the complainant for taking a flat in the project. The complainant booked the flat through real estate broker, namely M/s. Villa Investor Clinic. The complainant filed booking application in joint names of himself and his wife Smt. Alpana Garg. However, the complainant informed about sad demise of his wife, as such, revised Provisional Allotment Letter dated 03.11.2009 was issued, in the name of the complainant. The complainant, thereafter, requested to grant permission to mortgage the flat allotted to him, for taking loan and the OP issued letter dated 30.11.2009, in this respect. Housing Development Finance Corporation Limited granted loan to the complainant and disbursed Rs.3750000/- to the OP on 17.12.2009. The OP completed the construction and applied for issue of "occupation certificate", on 29.09.2011, which was issued on 16.12.2011. The OP, vide letter dated 02.01.2012, offered possession to the complainant. The complainant did not turn up for taking possession and depositing balance amount. The OP, vide emails dated 09.07.2012 and letters dated 29.07.2012 and 06.09.2012, issued reminder to the complainant for taking possession. By letter dated 29.07.2012, the OP reduced Rs.51135/- from the total demand, on account of delay compensation. Demand of 18% interest on the deposit as delay compensation is illegal. As per Terms and Conditions, on offer of possession, the complainant was required to take possession within 30 days after deposit of balance amount. After expiry of 30 days, the complainant was liable to pay 'holding charges' @Rs.5/- per sq.ft. per month on 'super area'. As the complainant did not deposit balance amount as per letter dated 02.01.2012 as revised on 29.07.2012, as such pre-cancellation notice dated 28.01.2013 was issued, giving 30 days time to deposit, balance amount. In spite of service of the notice, the complainant did not respondent, then cancellation letter dated 04.07.2013 was issued. The complainant was requested to return the original papers and take his money after forfeiture of Rs.747251. The OP refunded Rs.3750000/- to Housing Development Finance Corporation Limited on 11.02.2014, through cheque, which was en-cashed on 19.02.2014. The cancellation letter dated 04.07.2013 is in accordance with Standard Terms and Conditions and the complaint is liable to be dismissed. The period of 15 months as mentioned in the allotment letter was expected time. In the allotment letter and Standard Terms and Conditions, tentative 'super area' was mentioned. As per approved Building Plan, 'super area' is 1698.70 sq.ft., however, the OP is charging for 1607.10 sq.ft. only as such additional amount of Rs.1154948/- and Rs.29741/- as service tax on it, was demanded. In Annexure-IV of the allotment letter, Rs.7099465/-, as basic price, Rs.73050/-, as IDC charges, Rs.215000/-, as Social Club charges and service tax on it and Rs.30000/- as car parking charges have been mentioned. Payment of Rs.3750000/- was made to the OP on 14.12.2009 i.e. with delay of 17 days as such interest was taken on it. All the demands were in accordance with allotment letter and not excessive.

6. State Commission, after hearing the parties, by the impugned order dated 24.10.2016, held that concept of 'super area' has been condemned by National Commission and Supreme Court, in catena of decisions. In the present case, super structure was already existing on the site, when the complainant had booked the flat. The complainant never consented for change/revise the building plan and increase of 'super area', additional demand for increase

of ‘super area’ was not justified. Due date of possession was April, 2011 and there was delay of 5 years, in handing over possession, as such, the complainant was entitled for refund. On these findings, the complaint was allowed and order as mentioned above was passed. Hence the OP has filed this appeal.

7. We have considered the arguments of the counsel for the parties and examined the record. The respondent filed the complaint for declaring letter dated 04.07.2013 of Jaypee Greens (the appellant), cancelling his allotment dated 05.10.2009 as revised on 03.11.2009 and demand of additional/excess consideration in the heads of ‘service tax’, ‘maintenance charges’, ‘social club membership’, ‘social club subscription fee’, ‘holding charges’, ‘interest’ and other demands as null and void; and directing Jaypee Greens (the appellant) to deliver possession of the flat allotted to him with other consequential reliefs. State Commission granted the relief for refund. The respondent has not filed any appeal, claiming for possession. Therefore, we have to examine the legality of the order of refund as passed by State Commission.

8. The respondent admits issue of revised provisional allotment letter dated 03.11.2009. In Annexure-IV of this allotment letter, Rs.7099465/-, as basic price, Rs.73050/-, as IDC charges, Rs.215000/-, as Social Club charges and service tax on it and Rs.30000/- as car parking charges, have been mentioned. Rs.700000/- was deposited by the respondent on 20.07.2009, Rs.6107595/- had to be deposited till 30.11.2009 and balance Rs.879920/- had to be paid on offer of possession. Out of Rs.6107595/-, Rs.3750000/- was paid by Housing Development Finance Corporation Limited to the appellant through cheque dated 10.12.2009, which was en-cashed on 14.12.2009. As such there was 14 days delay in payment of Rs.3750000/-. The respondent alleged that as the appellant has delayed issue of permission for grant of loan as such, payment of this amount was delayed and the respondent is not liable to pay interest on it. The respondent did not file any evidence to prove that when he had filed an application before the appellant for issue of permission for grant of loan after mortgaging the flat allotted to him or that the appellant has made any commitment in respect. As such demand of interest by the appellant for delayed payment of instalment cannot be said to be illegal. The demand of ‘service tax’ is statutory and ‘maintenance charges’, ‘social club membership’, ‘social club subscription fee’, ‘holding charges’ are per terms and conditions of allotment letter,

9. The respondent stated that due date of possession including grace period expired in 04.04.2011. The appellant has stated that it had completed the construction and applied for issue of “occupation certificate”, on 29.09.2011, which was issued on 16.12.2011 and vide letter dated 02.01.2012, offered possession to the respondent. The respondent raised first protest letter dated 02.02.2012, in which, he had stated that lobby was in bad condition and not painted; out of two lifts one lift was partially working and no delay compensation was paid. So far as furnishing is concerned, the builders used to do it after deposit of last instalment. The respondent had challenged demand of additional amount of Rs.1154948/- and Rs.29741/- as service tax on it and interest of Rs.45688/-. We have already held that demand of interest for 14 days delay in payment of Rs.3750000/- was in accordance with the terms and condition. So far as delay compensation is concerned, the appellant, vide letter dated 29.07.2012, reduced Rs.51135/- from the total demand, on account of delay compensation. The respondent claimed 18% interest on his deposit as delay compensation, which was not justified. The respondent had not deposited his money in any fixed deposit

scheme rather paid consideration, which was incurred in raising construction, and the respondent would get that construction with appreciated value.

10. The appellant has stated that as per approved Building Plan, 'super area' is 1698.70 sq.ft., however, the OP is charging for 1607.10 sq.ft. only as such additional amount of Rs.1154948/- and Rs.29741/- as service tax on it, was demanded. In booking application filed by the respondent, it has been mentioned "as per tentative location plan". In clause-5 of Undertaking attacked with booking application, "tentative plans" has been mentioned. The plans attached with booking application mentioned that the plans are indicative and subject to change; area increased of 5% to7% is expected. Clause-3.6 of Standard Terms and Condition mentioned that in the event of enhancement of area the allottee shall make prompt payment of additional charge. State Commission has proceeded upon premises that super structure was already existing on the site, when the complainant had booked the flat. There was no such allegation in the complaint. Even if super structure was existing on the date of booking but in all the papers relating to booking, it was mentioned that area/plans are tentative and these recitals cannot be ignored. In provisional allotment letter approximate 'super area' of 1461 sq.ft. was mentioned. The appellant is charging for 1607.10 sq.ft., which amounts to 10% increase. In similar agreement, Supreme Court upheld increase of 10% 'super area' in **DLF Home Developers Ltd. Vs. Capital Greens Flat Buyers Association, (2021) 5 SCC 537**.

11. In view of aforesaid discussion, we do not find that demand of the appellant in the letter dated 02.01.2012 was legal. In spite of payment of delay compensation of Rs.51135/- vide letter dated 29.07.2012, there was no justification for the respondent for not depositing the demanded amount in spite of reminders dated 09.07.2012, 29.07.2012 and 06.09.2012, and pre-cancellation notice dated 28.01.2013 and cancellation letter dated 04.07.2013 does not suffer from any illegality. After offer of possession, if the respondent denied to take possession then he had committed breach of the agreement and his earnest money is liable to be forfeited. Supreme Court in **Ireo Grace Realtech Private Limited Vs. Abhishek Khanna, (2021) 3 SCC 241**, held that if after obtaining "occupation certificate", possession is offered then the home buyer is obligated to take possession under the agreement.

12. In booking application Rs.700000/- has been mentioned as earnest money. Supreme Court in **Fateh Chand Vs. Balkishan Das, AIR 1963 SC 1405, Maula Bux Vs. Union of India, (1969) 2 SCC 554** and **Kailash Nath Associate Vs. Delhi Development Authority, (2015) 4 SCC 136**, held that forfeiture of earnest money for breach of contract must be reasonable and if forfeiture is in the nature of penalty, then provisions of Section 74 of Contract Act, 1872 are attracted and the party so forfeiting must prove actual damage. After cancellation of allotment, the flat will remain with the opposite party as such there is hardly any actual damage. This Commission in CC/438/2019 Ramesh Malhotra Vs. EMAAR MGF Land Ltd. (decided on 29.06.2020), CC/3328/2017 Mrs. Prerana Banerjee Vs. Puri Construction Ltd. (decided on 07.02.2022 and Mr. Saurav Sanyal Vs. M/s. Ireao Grace Pvt. Ltd. (decided on 13.04.2022) held that 10% of basic sale price is reasonable amount to be forfeited as "earnest money".

13. State Commission has awarded 18% interest but Supreme Court in **Experion Developers (private Limited Vs. Sushma Ashok Shiroor, 2022 SCC OnLine SC 416**, held that in case of refund, 9% interest is just compensation, which amounts to restitutory and

compensatory both. In view of aforesaid discussion, This Commission, vide order dated 18.05.2017, directed Housing Development Finance Corporation Limited to refund Rs.3750000/- to the complainant.

O R D E R

In view of the aforesaid discussions, the appeal is partly allowed. The appellant is directed to refund entire amount deposited by the complainant with interest @9% per annum from the date of respective deposit till the date of refund, after forfeiting Rs.700000/- on the date of cancellation of allotment. If any excess amount has been paid to the complainant, in compliance of decree of State Commission, then it would be open to the appellant to realize it from the complainant, after supplying its calculation sheet and if necessary to execute this decree.

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RAM SURAT RAM MAURYA
PRESIDING MEMBER

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BHARATKUMAR PANDYA
MEMBER