

**NATIONAL CONSUMER DISPUTES REDRESSAL COMMISSION
NEW DELHI**

CONSUMER CASE NO. 1376 OF 2017

1. GULSHAN KUMAR KAPOOR

S/o. Shri Kesar Dass, Through his attorney Shri Aryan Goyal,
R/o. House No. 309, Sector - 9,
CHANDIGARH

.....Complainant(s)

Versus

1. PARSVNATH DEVELOPERS LIMITED & 2 ORS.

Having its registered office at: 6th Floor, Arunchahal Building,
19, Barakhamba Road,
NEW DELHI - 110001

2. PRASVNATH DEVELOPERS LTD.

Through its Managing Director, SCO - 1, First Floor, Madhya
Marg, Sector - 26,

CHANDIGARH

3. PARSVNATH DEVELOPERS LTD.

Through its Managing Director, Parsvnath Royal, Sector - 20,
Behind Society No. GH - 105 to GH - 111,

PANCHKULA

HARYANA

.....Opp.Party(s)

BEFORE:

HON'BLE MR. SUBHASH CHANDRA, PRESIDING MEMBER

FOR THE COMPLAINANT : MS ANCHITA NAYYAR, PROXY COUNSEL
(WITH AUTHORITY LETTER)

FOR THE OPP. PARTY : MR PRABHAKAR TIWARI, ADVOCATE

Dated : 04 October 2023

ORDER

1. This consumer complaint under section 21 of the Consumer Protection Act, 1986 (in short, the 'Act') is filed against the opposite party alleging deficiency in not handing over possession of the flat booked by the complainant within the promised time and seeking refund of the amount deposited with interest as compensation and other costs.

2. The complainant states that he obtained a flat in "Parsvanath Royale", a project promoted and developed by the opposite party in Sector 20, Panchkula, Haryana on transfer from the original allottee, M/s Vardhaman Associates Pvt. Ltd., Ground Floor, Indra Prakash Building, 21, Barakhamba Road, New Delhi which had been allotted Flat no. T 7-1001, 10th Floor, Tower 7 admeasuring approx. 1740 sq ft. A sum of Rs 8,90,662.50 was paid by the original allottee and a Flat Buyer's Agreement (FBA) had been signed on 05.05.2011 for a sale consideration of Rs 59,37,750/- stipulating the basic rate of the flat @ Rs 3412.50 per sq ft plus other charges for EDC, infrastructure development, etc. Under clause 10(a) of the FBA, subject to *force majeure* events, the period of completion of the project was stated to be 36 months with another 6 months as grace period from the date of signing of the FBA, i.e.

05.11.2014 failing which compensation @ Rs 5/- per sq ft per month would be paid by the opposite party. A sum of Rs 47,44,142/- was paid as on 12.12.2013. However, possession had not been offered till date by the Opposite Party. In view of the fact that the project had not been completed on time, the complainant is before this Commission alleging deficiency in service with the prayer to direct the opposite party to:

- (a) refund the sum of Rs 47,44,142/- towards the amount paid by the complainants along with interest @18% p.a. from the date of payment till the;
- (b) pay compensation of Rs 10,00,000/- as damages and compensation;
- (c) pay Rs 1,00,000/- towards litigation expenses by the complainants;
- (d) any other orders as deemed fit.

3. The opposite party resisted the complaint and filed his written submissions to the complaint denying the averments of the complainant. Preliminary objections were taken that (i) the complainant was not a 'consumer' under the Act since he was a subsequent allottee who was a resident of the United States of America and had booked the flat for investment purposes; (ii) this Commission lacked jurisdiction as the matter was civil in nature; (iii) the complaint was filed without adducing any proof of deficiency in service; (iv) against the terms of the FBA which provided for compensation @ Rs 5/- per sq ft per of super area per month for delay and interest @ 12% only if the project was abandoned which was not the case and therefore relief sought was beyond the contract; (v) the complainant had not disclosed that he was a defaulter who had not paid the instalments due and (vi) there was no justifiable cause of action. On merits, it was stated that the complainant was not the original allottee but had been allotted the flat based on approval of Transfer Form dated 12.04.2011 when the rights of the allottee were assigned to the complainant and FBA dated 09.07.2011 was signed. The opposite party had waived interest on delayed payments by the original allottee and the complainant till 12.04.2011 vide latter dated 16.06.2011; however, default in payments continued leading to reminders dated 15.03.2012, 01.08.2012, 06.02.2013 and 01.10.2013. It was submitted that as per clause 10(a) of the FBA, the period of 36 months for construction was only a tentative indication and the opposite party could not be held to that timeline. The complainant was to make payments as per the Construction Linked Payment Plan of the project and the opposite party had regularly updated the complainant of the status of the project. Due to default in payments by the allottees on account of global recession, the opposite party contends that it had faced liquidity issues which was a *force majeure* event and hence the indicative date in clause 10(a) did not apply. On 14.07.2015, the opposite party had conveyed in writing to the complainant that the construction of Tower 7 was expected to be ready by December 2016. The complaint is stated to be misplaced and the complaint is prayed to be dismissed.

4. Parties led their evidence and filed their short synopsis of arguments. I have heard the learned counsel for both the sides and perused the evidence on record carefully.

5. The counsel for the complainant argued that the opposite party was to hand over the flat within 36 months with 6 months grace from the date of execution of the Agreement i.e. by 05.11.2014 as per clause 10(a) of the FBA signed on 05.05.2011 which it had failed to do

despite accepting a substantial amount of Rs 47,44,142/-; that the opposite party kept the complainants in the dark about the status of work progress and gave false assurances while collecting deposits as per the Construction Linked Payment Plan giving the impression that construction was as per schedule whereas there was no progress on site and resultantly the opposite party was guilty of deficient services and unfair trade practice. No occupation certificate or completion certificate had been produced by the opposite party till date and no offer of possession had been made. Therefore, deficiency in service was writ large and hence it is prayed that the deposited amount be refunded with interest and other damages and costs. The counsel for the complainant argued that the present case was squarely covered by judgments of this Commission in **Taranjit Kaur & Anr. Vs. Parsvnath Developers Ltd.** in Consumer Complaint No. 770 of 2017 dated 06.03.2020 and **Aashish Oberai Vs. EMAAR MGF Land Ltd.**, Consumer Case No. 70 of 2015 dated 14.09.2016, (2017) 1 CPJ 17 (NC) which had upheld the prayer for refund of the deposited amount with interest @ 10% p.a. and 9% respectively from the respective dates of deposit till the date of realization.

6. On behalf of the opposite party it was argued that the period of 42 months for construction mentioned in the FBA was indicative only. it was admitted that there had been a delay in the completion of the project although this was ascribed to *force majeure* events. It was also argued that the reasons for the delay were beyond the control of the opposite party as it was due to events which were beyond the control of the opposite party and could not be ascribed to it resulting in delay. The complainant was a consistent defaulter who was not entitled to relief. The project had also been registered under RERA and was likely to be executed within the stipulated time frame. It was admitted that neither had an occupancy certificate been obtained by it nor had an offer of possession been made to the complainant made as on date.

7. The preliminary issues raised by the opposite party have been considered. The opposite party's contention that the complainant was not a consumer under section 2(i)(d) of the Act since he resided in the USA and had booked the flat for commercial gains is not substantiated by any evidence. In order to prove that the complainant had booked the flat for a commercial purpose, the onus is on the opposite party to prove that the complainant was engaged in the purchase and sale of flats as held by this Commission in **Kavita Ahuja Vs. Shipra Estate Ltd. & Anr.**, in Consumer Complaint no. 145 of 2010 dated 28.05.2015, which it has failed to do. This contention of the opposite party therefore cannot be sustained. As for the assertion that complaint does not lie before this Commission, the Hon'ble Supreme Court has held in its judgment in **Emaar MGF Land Ltd. Vs. Aftab Singh**, (2019) 12 SCC 751 that the remedy under the Consumer Protection Act, 1986 is not restrained by the existence of an arbitration clause and that the remedy under the Act is in addition to other provisions under the law and reiterated this view in **M/s Imperia Structures Ltd. Vs. Anil Patni & Anr.**, (2020) 10 SCC 783 decided on 02.11.2010 that "*remedies under the Consumer Protection Act were in addition to the remedies available under special statutes (and) the provisions of this Act shall be in addition to and not in derogation of any other law for the time being in force*". Hence, this argument cannot be accepted. Since admittedly there is neither an occupancy certificate in place nor has an offer of possession been made, the contention of the opposite party that the complainant is not entitled to claim interest for the delay in possession also does not sustain in view of the Hon'ble Supreme Court's judgment in **Pioneer Urban land and Infrastructure Ltd. Vs. Govindan Raghavan**, (2019) 5 SCC 725 in Civil Appeal no. 12238 of

2018 decided on 02.04.2019 that an allottee as a consumer is entitled to seek refund of the money paid by him to the opposite party/builder in case of inordinate delay on the part of the opposite party to hand over possession. The Hon'ble Supreme Court has also held in **Kolkata West International City Pvt. Ltd. Vs. Devasis Rudra, Civil Appeal No. 3182 of 2019** decided on 25.03.2019 that "It would be manifestly unreasonable to construe the contract between the parties as requiring the buyer to wait indefinitely for possession". In the present case, the delay is of nearly 8 years since January 2015 when possession was to be handed over. The Hon'ble Supreme Court in **Pioneer Urban Land and Infrastructure Ltd. Vs. Geetu Gidwani Verma & Anr.**, Civil Appeal No. 12238 of 2018 with No. 1677 of 2019 dated 02.04.2019 has also laid down that a buyer cannot be compelled to take possession of a flat when there is delay in delivery of possession by the builder and the buyer is entitled to refund along with compensation/interest for such delay. As for the applicability of the *force majeure* condition, it is apparent that the ground of lack of payments by allottees due to global recession cannot be sustained in view of no evidence on the basis of a bald statement.

8. From the material on record and the arguments advanced by both the learned counsel for the parties, it is apparent that the complainant is liable to claim relief with effect from the FBA dated 09.07.2011 signed after the transfer of the flat in question from the original allottee was approved by the opposite party. As per this FBA, the date of possession after 36 months and after including the 6 months of grace period, would be January 2015. It is manifest from the record and admission of the opposite party that it has failed to deliver possession to the complainant by the promised date. The payment plan was construction linked and the complainant continued to demand and receive instalments despite the construction milestones not being achieved as is evident from the delay admitted. This is certainly a deficiency in service as well as an unfair trade practice on its part. The argument that the complainant was a consistent defaulter does not sustain in the light of the fact that the opposite party had itself waived the interest due till 12.04.2011 and that it did not choose to terminate the contract for this breach of contractual condition. It therefore cannot take this plea to deny the complainant his right to seek refund of the money deposited. The Hon'ble Apex Court has laid down in **Govindan Raghavan (supra)** that an allottee as a consumer is entitled to seek refund of the money paid by him to the opposite party/builder in case of inordinate delay on the part of the opposite party to hand over possession and in **Kolkata West International City Pvt. Ltd. (supra)** that delay of nearly 8 years is certainly not reasonable. The argument of the opposite party that in view of the clause for the payment of compensation @ Rs 5/- per sq ft of super area per month the complainant is not entitled to interest on the deposited amount cannot be accepted since such a clause would apply in a case where the construction of the flat is delayed and the buyer accepts possession for which the respective parties will pay holding charges and compensation for the delay in possession. It does not apply to a situation where the buyer has no option but to seek refund due to the project remaining incomplete and where the builder itself seeks to recover interest for default at an exorbitant rate which constitutes an unfair trade practice, as held by this Commission in **Swarn Talwer & Ors. Vs. Unitech Limited**, Consumer Complaint No. 349 of 2014 dated 14.08.2015. The payment of interest as compensation has been held by the Hon'ble Supreme Court in **Experion Developers Pvt. Ltd. Vs. Sushma Ashok Shiroor**, CA No. 6044 of 2019 decided on 07.04.2022 to be both restitutionary and compensatory and to be payable from the dates of deposit. A rate of interest of 9% simple interest per annum is considered to be suitable.

9. For the aforementioned reasons, I do not find any merit in the arguments of the opposite party. In view of the facts and circumstances of this case, the complaint is found to have merits and is liable to succeed. It is accordingly allowed with the following directions:

- (i) opposite party is directed to refund the entire amount of Rs 47,44,142/- deposited with it by the complainant to the complainant with interest @ 9% p.a. from the respective dates of deposit till the date of realization;
- (ii) this order shall be complied within 8 weeks of this order failing which the rate of interest shall be 12% per annum.
- (iii) opposite party shall also pay Rs 50,000/- to the complainant as cost of litigation.

All pending IAs stand disposed of with this order.

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SUBHASH CHANDRA
PRESIDING MEMBER