

**NATIONAL CONSUMER DISPUTES REDRESSAL COMMISSION
NEW DELHI**

CONSUMER CASE NO. 1687 OF 2019

1. PODDAR INFRATECH PVT. LTD.

.....Complainant(s)

Versus

1. M/S. IMPERIA STRUCTURES LTD.

THROUGH ITS MANAGING DIRECTOR HAVING ITS
REGD OFFICE AT A-25, MOHAN CO-OPERATIVE
INDUSTRIAL ESTATE,NEW DELHI-110044

.....Opp.Party(s)

BEFORE:

HON'BLE MR. SUBHASH CHANDRA,PRESIDING MEMBER

FOR THE COMPLAINANT : MR. SUSHILA KAUSHIK AND MR.MANOJ
YADAV, ADVOCATES

FOR THE OPP. PARTY : MS. ANTARA MISHRA, ADVOCATE

Dated : 04 December 2023

ORDER

ORDER

This Complaint under Section 21 (a) (i) of the Consumer Protection Act, 1986 (for short "the Act") has been filed by the Complainant Company alleging deficiency in service and unfair trade practice in the delay of handing over of possession of a flat booked by the Complainant Company for the use of its Directors, as per the agreed date of handing over, in the project of the Opposite Party, the ESFERA, Sector 37-C, Gurgaon, Haryana.

2. The facts, in brief, are that the Complainant had booked two apartments in the abovementioned project of the Opposite Party and had been allotted Unit No.101, First Floor, Block-C, vide Application dated 22.09.2011, admeasuring 1650 sq.ft. for a sale consideration of ₹74,45,000/-. As per the Builder Buyer Agreement (BBA), dated 11.02.2013, the Opposite Party promised to hand over the possession within 42 months from the date of execution of the Agreement, i.e. by 11.08.2016 (Clause 10.1). The Complainant Company is engaged in the business of infrastructure development and had resolved by way of a Board Resolution to purchase the said flats of the use of its Directors based in Gurgaon. An amount of ₹73,35,800/- was paid by the Complainant to the Opposite Party, as per the demands raised from time to time. As per Clause 11.4 of the BBA, the Opposite Party had agreed to compensate the Complainant @ ₹5/- per sq. ft. for the period of delay which works out to approximately 1.4% p.a. rate of interest. The Complainant avers that the BBA was a onesided document drafted by the Opposite Party which includes onerous conditions imposed on the Complainant which Complainant had no option but to sign. The Opposite Party is alleged to have failed in its contractual obligation of handing over the possession within the stipulated period without providing any reason for delay despite repeated requests and reminders. Therefore, alleging deficiency in service, the Complainant is before this Commission in view of the inordinate delay in completing the project, which is found to be lying incomplete, with the following prayers:

“(a) Direct the O.P. to refund the entire amount collected from the complainant towards the consideration of the Flat along with interest @ 18% p.a. on the amount paid by them from the date of each deposit of the amount till it is actually returned to the complainant.

(b) Direct the O.P.s to pay a sum of ₹5,00,000/- (Rupees Five Lakhs only) to the complaint towards mental agony and harassment.

(c) Direct the O.P.s to pay a sum of ₹1,00,000/- to the complainant towards the cost of litigation.

(d) Any other order(s) as may be deemed fit and appropriate may also kindly be passed.”

3. Upon notice, the Complaint was resisted by way of a reply by the Opposite Party denying all the contentions of the Complainant. Preliminary objections taken by the Opposite Party were (i) the Complaint was misconceived and the jurisdiction of this Commission was invoked in respect of a purely commercial transaction; (ii) the Complainant was not a “Consumer” under the purview of Section 2 (1) (d) of the Act since the Complainant was a profit earning Company; (iii) the project consists of two phases of which Phase-I comprising Towers F, G and H had been completed and the Occupancy Certificate applied for on 20.06.2017 was received on 07.02.2018 and construction in Phase-II was underway; (iv) the BBA was signed on 11.02.2011 by the Complainant after conducting due diligence and it was, therefore, estopped from raising objections to it at this stage; (v) there was no delay attributable to the Opposite Party in completing the construction and handing over of the Unit booked and any delay was due to force majeure conditions such as delay in statutory clearances from the Authorities, lack of availability of raw material, labour strikes, ban on construction activities, delay in obtaining clearances for water supply due to restrictions by the High Court of Punjab & Haryana in Writ Petition No.20032 of 2008 and the order dated 13.09.2013 of the Town and Country Planning Department, Government of Haryana, which were all reasons that were not under the control of the Opposite Party. It was further contended that this Complaint was not maintainable before this Commission in view of the Sections 79 and 89 of the RERA Act, 2016 which is a specialized statute dealing with Real Estate allottees and purchasers.

4. On merits, it was contended that the delay, if any, was on account of force majeure reasons as per Clause 11.1, 11.2 and 41 of the Agreement and therefore, the Opposite Party was not liable for any delay. It was also contended that the purchase of the flats booked was for “commercial purposes” by the Complainant, which was engaged in the business of infrastructure development and related activities. It was denied that the Complainant was entitled to seek interest amounting to ₹65,34,349/- and it was stated that the Complainant had

failed to pay ₹4,47,793/- towards the sale consideration that was due on offer of possession. It was, therefore, contended that there was no deficiency in service on their part and that the Complainant was liable to be dismissed.

5. Parties led their evidences by way of affidavits and filed rejoinder and short synopsis of arguments. I have heard the learned Counsel for the parties and perused the record carefully.

6. Learned Counsel for the Complainant has relied upon the judgment of this Commission in ***“Poddar Infratech Pvt. Ltd. vs. M/s Imperia Structures Ltd. Consumer Complaint No.258 of 2020, decided on 07.03.2023”*** which allowed the Complaint and directed the Opposite Party to refund the entire amount paid by the Complainant along with compensation @ 9% p.a. interest from the respective dates of deposits till realization within two months, failing which interest @ 12% p.a. was awarded along with litigation costs of ₹50,000/-. He also relied upon the judgments of this Commission in ***“Anil Patni And Anr. Vs. M/s Imperia Structures Ltd. (CC No.3011 of 2017); Gaurav Kumar Bali & Anr. vs. M/s Imperia Structures Ltd. (CC No.198 of 2018); Pankaj Gupta vs. M/s Imperia Atructutes Ltd. (CC No2720 of 2018) and Chetan Jindal & Anr. vs. M/s Imperia Structures Ltd. (CC No.408 of 2019),*** which pertain to the same Project and were similarly decided. Reliance was also placed upon a judgment of this Commission in ***“Springdale Core Consultants Pvt. Ltd. vs. Pioneer Urban Land And Infrastructure Ltd. (CC No.349 of 2017) decided on 16.03.2020”*** in which it was held that if a house or residential flat is booked or purchased by a Company for the residential use of its Directors or employees, the Company shall be a “consumer” within the meaning of Section 2(1)(d) of the Act, based upon the decision of the Hon’ble Supreme Court in ***“Lilavati Kirtilal Mehta Medical Trust vs. M/s Unique Shanti Developres & Ors. (Civil Appeal No.12322 of 2016).*** He further relied upon the judgments of this Commission in ***“Purusharath Builders Pvt. Ltd. vs. M/s Uppal Housing Ltd. & Anr. and Nava Bharat Press (Raipur) vs. M/s Sahara Prime City Ltd. & Others”***. It was argued that the cases relied upon by the Opposite Party are distinguishable and do not apply to the present case.

7. On its part, the Opposite Party contended that as per its Memorandum of Association, the Complainant Company was engaged in the business of infrastructure development and project management, commissioning of projects, construction of apartments, flats, commercial and residential complexes as well as letting out, sale, lease and purchase of land, houses, buildings, flats and apartments etc. and was, therefore, not a ‘consumer’ under the provisions of the Act. It was argued that the flats booked was to be construed as an asset of the Company and therefore, the Complaint was not maintainable. It was also argued that in the Board Resolution dated 21.06.2011, it is stated that the purchase of the flats was for the official residence of the Director/Officers of the Company in Gurgaon. It was, therefore, argued that the flat was being acquired to conduct work related functions and that in terms of the judgment in ***“Purusharath Builders Private Limited vs. M/s Uppal Housing Limited & Anr. (CC No.112/2012) and “Unisource Trading (India) Private Limited vs. Continental Airline Cargo & Anr. (CC No.210/2012),*** it was not for the purpose of earning of livelihood. Reliance was placed on ***“M/s Nav Bharat Press (Raipur) vs. M/s SPCL & Ors. (CC 193/2013)”*** wherein this Commission had imposed punitive costs and held the Complaint to be not maintainable having been filed by a partnership firm.

8. The preliminary objection of the Opposite Party that the Complainant is not a 'consumer', has been considered. In view of the judgment of this Commission in Springdale Core Consultants Pvt. Ltd. case (supra) and Lilavati Kirtilal Mehta Medical Trust (supra), the argument of the Opposite Party that the Complainant was not a consumer under the purview of Section 2(1)(d) of the Act, cannot be appreciated. In Springdale Core Consultants Pvt. Ltd. case (supra), it was held by this Commission as under:

“8. It would thus be seen that the legal status of the buyer be it a company, a partnership firm, a society, an Association of Persons or an individual is not relevant for deciding whether the buyer is a consumer within the meaning of Section 2(1)(d) of the Consumer Protection Act or not, the relevant factor being the purpose for which the residential plot / house is bought or booked by the buyer. If a house / residential plot is booked or purchased by a company for the personal residential use of the employees of the company, the purchase / booking is not linked to the regular profit generating business activities of the company, and therefore it cannot be said that the residential plot/house is bought or booked by the company for a commercial purpose. A company purchasing or booking a residential plot / house will be out of the purview of Section 2(1)(d) of the Consumer Protection Act only if there is a close and direct nexus between the purchase / booking of the house / residential plot and the regular business activities of the said company. The view taken by the Hon'ble Supreme Court in respect of the purchase of residential house by a Trust for its employees working in a Hospital being run by a Trust as a part of its commercial activities shall equally apply to the residential plot / house purchased / booked by a company for the residential use of its Directors, the determining factor being the purpose behind such purchase / booking and the legal status of the purchaser being immaterial. Though, a company is not obliged by law to provide residential accommodation to its Directors, the same being the legal position with respect to its employees, it would be wholly immaterial whether the residential plot / house is intended to be used for the residence of the employees or of the Directors of the company.

The acquisition of a residential plot or house by a company, for being used as a residence of its directors or employees does not have a close and direct nexus with the regular business activities of the company, is not essential for the business activities of the company, does not aid, assist or promote its business and does not generate any business revenue or profit for the corporate. It is only a perquisite provided by the company to its Directors or employees, and may or may not form an integral part of their terms of employment or appointment, as the case may be.”

9. Another argument of the Opposite Party that in view of the enactment of the RERA Act, 2016 this Complaint does not lie before this Commission can also not be appreciated in light of the fact that it has been held by the Hon'ble Supreme Court in Anil Patni (supra) that

“remedies under the Consumer Protection Act were in addition to the remedies available under Special Statute” and hence, the provisions of the Consumer Protection Act are in addition to and not in derogation of the provisions of any other law for the time being in force.

10. As regards the applicability of force majeure conditions, the contention of the Opposite Party cannot be sustained in view of the fact that only a bald contention has been made without any specific details regarding the applicability of the events pertaining to raw material shortage, labours strike, shortage of water etc. impacting this particular project. In **“Manoj Kawatra and Others vs. Pioneer Urban Land and Infrastructure Ltd. in Consumer complaint No.1442 of 2018 decided on 01.11.2021”** this Commission has held that a Developer cannot take shelter under the force majeure clause unless it is able to show that the event was unforeseen and unexpected. It has also to be established based on evidence that the project in question was adversely impacted. In the absence of such evidence, mere reliance on such an assertion is not sustainable and cannot be accepted.

11. Admittedly, the project was to be completed by 11.08.2016. The Opposite Party has stated that the Occupancy Certificate with regard to Phase-I was applied for on 20.06.2017 and received on 07.02.2018, i.e. after the promised date of possession. No offer of possession with regard to the Unit in question in Tower-C has been made to date. No Completion Certificate in respect of Tower-C has also been brought on record. In a catena of judgments, the Hon’ble Supreme Court and this Commission have held that an inordinate delay in offering the possession to allottees after receiving the deposits in a timely fashion would construe “deficiency in service” on the part of the Opposite Party/Builder. The Hon’ble Supreme Court in **“Kolkata West International City Pvt. Ltd. vs. Devasis Rudra – II (2019) CPJ 29 SC”** has laid down that *“it would be manifestly unreasonable to construe the contract between the parties as requiring the buyer to wait indefinitely for possession. A buyer can be expected to wait for possession for a reasonable period. A period of seven years is beyond what is reasonable.”* The Hon’ble Supreme Court in **“Pioneer Urban Land And Infrastructure Ltd. Vs. Govindan Raghavan (2019) 5 SCC 725”** has held that an allottee/consumer was entitled to seek refund of the amount deposited by him with the Opposite Party since the Builder had failed to fulfill his contractual obligations of obtaining the Occupancy Certificate and offering possession of the flat to the purchaser within the time stipulated in the Agreement or within a reasonable time thereafter and that the purchaser could not be compelled to take possession of the flat even if it was offered after the grace period under the Agreement expired.

12. The Complainant is, therefore, entitled to seek refund of the money deposited by him with the Opposite Party, with interest as compensation since the Opposite Party has clearly failed to complete the project within the stipulated period or a reasonable period thereafter in making an offer of possession to the Complainant.

13. As regards the rate of interest as compensation, the Hon’ble Supreme Court in the case of **“Experion Developers Pvt. Ltd. vs. Sushma Ashok Shiroor, Civil Appeal No.6044 of 2019”** decided on 07.04.2022 has held that compensation by way of interest has to be both compensatory as well as restitutionary and held that interest @ 9% would be fair and just. It would be appropriate to follow this principle in the instant case.

14. In view of the foregoing, it is evident that the Complainant is a “consumer” under the Act who had booked the apartment in question for the use of its Directors/employees as per a Board Resolution and had paid 95% of the sale consideration to the Opposite Party. The Opposite Party has failed to adhere to its contractual obligation of handing over possession within the promised period of 42 months or after a reasonable period following the expiry of this time line even after receipt of ₹73,35,800/- towards the sale consideration. The deficiency in service is, therefore, established. The reasons advanced by the Opposite Party to claim shelter under the force majeure conditions and to justify that the delay was not attributable to it have been examined above and held to be not justifiable.

15. In view of the foregoing, the Complaint is liable to succeed and is accordingly allowed with the following directions:

(i) The Opposite Party shall refund the entire amount of ₹73,35,800/- along with interest @ 9% p.a. from the respective dates of deposits till the date of payment within two months, failing which the applicable rate of interest shall be 12% p.a. till realization. There shall be no order as to costs.

16. All pending applications, if any, stand disposed of along with this order which disposes of this Complaint.

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SUBHASH CHANDRA
PRESIDING MEMBER