

**NATIONAL CONSUMER DISPUTES REDRESSAL COMMISSION
NEW DELHI**

CONSUMER CASE NO. 3885 OF 2017

1. DEEPAK GAUR & ANR.

.....Complainant(s)

Versus

1. SAIVEN DEVELOPERS AND CONSTRUCTIONS PVT.
LTD.

#1664,2nd Floor, 27th Main, 2nd Sector,HSR Layout,

Bangalore-560102

karnataka

2. SAIVEN DEVELOPERS PVT.LTD.

#1664, 2nd Floor, 27th Main, 2nd Sector, HSR Layout,

Bangalore-560102,

Karnataka

.....Opp.Party(s)

BEFORE:

HON'BLE MR. C. VISWANATH,PRESIDING MEMBER

HON'BLE MR. SUBHASH CHANDRA,MEMBER

For the Complainant : In person

For the Opp.Party : Mr. Vipul Ganda, advocate with
Ms. Snigdha Pal and Ms. Nirti Dua,
Advocates

Dated : 12 Jan 2023

ORDER

PER MR SUBHASH CHANDRA, MEMBER

1. This complaint under the Consumer Protection Act, 1986 (in short, the 'Act') has been filed alleging failure on the part of the opposite party to deliver possession of a house booked by the complainants in the project Saiven Caesars Palace located in village Kalahalli, Sarjapur Road, Bangalore and the subsequent termination of the allotment.

2. The brief facts, as stated by the complainant, are that a 4 BHK house (Unit No. 32) admeasuring 2616 sq ft with garden (765 sq ft) was booked on 06.11.2013 for a cost of Rs.1,00,00,000/- and as per Sale Agreement (hereafter, 'Agreement') dated 08.02.2014, a sum of Rs.96,00,000/- was paid towards the sale consideration including a loan component from the bank. It is stated that all payments were on time. Possession as per clause 13 of the Agreement was promised on/before 01.02.2016 with a grace period of 6 months with a delay penalty of Rs 5/- per sq ft per month till possession. As possession has not offered as promised, complainants asked for payment of penalty for delay on 25.11.2016. On 14.09.2017 opposite party offered possession. However, after an inspection of the house the complainant conveyed to the opposite party on 29.09.2017 that certain items were not completed and requested for the execution of the same. On 05.11.2017 there was an altercation between the parties on the site on issues relating to the project which were also conveyed to the opposite party by email the same day. On 08.11.2017 complaints were informed that the allotted unit had been locked and upon enquiry with the opposite party were informed that in view of the complaints having used derogatory language, there

was a breach of contract and the sale was being reconsidered. On 09.11.2017 the Agreement was terminated by the opposite party and communicated by an email.

3. The case of the complainants is that the termination is based on frivolous grounds and is reflective of an unfair trade practice since they had raised issues of delay compensation and issues relating to the club house and diversion of bore well water of the project to another construction site. A legal notice was sent on 14.11.2017 which was replied to by the opposite party's advocate on 15.12.2017 reiterating the same grounds for termination in addition to ascribing the delay to *force majeure* reasons such as the plaster and sand transport strike, excavation of underground rock, delay in payment of Rs.1,00,000/- as per demand notice dated 26.12.2016 and unwillingness by complainants to settle the issue. The complainants are before this Commission alleging deficiency in service in the delay in handing over possession and unfair trade practice in the unilateral cancellation of allotment with the prayer to direct the opposite party to:

- (i) refund the complete amount paid by the complainants for the unit with 18% p a compounding interest from the time of payment of each instalment
- (ii) pay the compensation of Rs.20,00,000/- as damages for harassment and mental agony cost due to the OP's hostile termination of the sale agreement
- (iii) pay the compensation of Rs.10,00,000/- as damages for defaming and insulting the complainants by the means of false, frivolous and baseless allegations
- (iv) pay the litigation charges of Rs.1,00,000/-
- (v) pay any other relief for which this honourable Commission may deem fit and proper in the interest of justice.

4. The complaint was resisted by the opposite party by a written version. While contending that the complaint was false and vexatious, deficiency in service and unfair trade practice is denied. It is contended that the complainants breached the Agreement in quarrelling with employees in the presence of potential customers and obstructing construction. It is submitted that such termination is neither deficiency in service nor an unfair trade practice under the Act. It is claimed that in view of the provision of arbitration in the Agreement, the complaint is not maintainable. On merits, it is submitted that the possession was promised on/before 01.02.2016 with a grace period of 6 months subject to *force majeure* conditions in clause 15 and that the shortage of plaster sand transporters since November 2014, encountering of 20,000 cubic feet of subterranean rock and incessant monsoons during rock excavation delayed the project. Delay in payment of the 7th instalment in full is also cited as a valid ground for termination. It is contended that possession had been offered vide emails dated 14.09.2017 and 20.09.2017 which was refused by the complainants vide their email dated 29.09.2017. It is the case of the complainant that clause 14 of the Agreement provides for a defect liability period of 12 months from the date of possession and that complainants disregarded the same in refusing to accept possession. Finally, it is contended that the complainants are in violation of clause 12 of the Agreement in that they obstructed/hindered the construction of the unit. The termination of allotment is therefore justified by the opposite party.

5. Parties led their evidences. We have heard the learned counsel for both parties and considered the evidence on record carefully.

6. Learned counsel for the complainant submitted as per the complaint to argue that the cancellation of the allotment was an unfair trade practice and reflective of deficiency in service in delay in handing over possession. It is argued that the complainants had been regular in making all payments and that the opposite party had acted unilaterally and arbitrarily in terminating the Agreement based on false and baseless allegations. It is argued that the complainants had paid almost the entire amount of the sale consideration and were put to financial hardship on account of monthly EMIs to the bank. It is also argued that there is no misjoinder of parties and that both the opposite parties are the same entity. It is argued that relief as prayed for be allowed.

7. *Per contra*, the counsel for opposite party no. 2 argued that there was no deficiency in service and that possession was offered on 14.09.2017 and 20.09.2017 after Occupancy Certificate had been obtained on 22.06.2017 from the concerned village Panchayat, which was declined by the complainants on 29.09.2017 citing incomplete works. Delay in offer of possession is defended on the ground that it was on account of grounds that are covered under the *force majeure* clause of the Agreement. It is argued that there was breach of contract by the complainants in obstructing work at site and default of clause 3 in making timely payment by the complainant. It is submitted that the complainants had disregarded clause 14 providing for a defect liability period in refusing to accept possession with *mala fide* intentions. Reliance is placed on this Commission's order in ***Sudha & Ors. Vs. Jaiprakash Associates Ltd.*** 2021 SCC OnLine NCDRC 166 which held that based on the Hon'ble Supreme Court's order in the Abhishek Khanna case, allottees cannot refuse possession even if there is delay, if offer of possession is made on the basis of an occupation certificate. It is contended that there was no deviation from the project plan as all club facilities were provided for. It is finally argued that as laid down by the Hon'ble Supreme Court in ***DLF Home Developers Ltd. & Anr. Vs. Capital Greens Flat Buyers Association & Ors.***, (2021) 5 SCC 537, compensation for delay in possession should not be excessive and ordered payment of 6% interest. On behalf of the learned counsel for the opposite party no. 1, it is argued that there was no privity of contract between his client and the complainants as it is a distinct entity from opposite party no. 2. He has relied upon this Commission's order in ***Himkash Sales Depot, Nurpur & Ors. Vis. Branch Manager & Ors.***, LAWS (NCD)-2012-10-97.

8. From the foregoing it is apparent that the Agreement was terminated by the opposite party no. 2 on two grounds, i.e. default in payment of demand raised and obstruction in construction. From the record it is evident that the default in payment was of Rs 1,00,000/- and the complainants had paid Rs.96,00,000/- against the agreed sale consideration of Rs.1,00,00,000/- which, in the circumstances of the case, is a relatively minor lapse, considering there is provision of interest penalty for delayed payments. The other violation of the Agreement, of causing hindrances to the execution of the project and causing potential loss of income by way of sale of property by damaging the reputation of the opposite party, has however, been considered more seriously by the opposite party no. 2 and the allotment cancelled by it. Be that as it may be, the complainants are before us seeking refund of the money deposited against the sale consideration along with compensation.

9. We have considered the rival contentions of both parties. On the preliminary objections taken that the complainants should have availed recourse under arbitration, in the light of the Hon'ble Supreme Court's judgment in ***M/s Emaar MGF Land Limited Vs. Aftab Singh*** - I (2019) CPJ 5 (SC) that an arbitration clause does not bar the jurisdiction of the consumer *fora* to entertain such complaints, it is held that there is no bar on this complaint.

10. On merits, while the opposite party contended that the complainants defaulted on payment, it is apparent that it was only a part amount. No justification for not accepting this payment with penal interest is provided by the opposite party. Admittedly there was delay in making the offer of possession in September 2017 whereas the assured date of possession, with grace period, expired in August, 2016. The reasons for seeking application of *force majeure* conditions do not appear valid since it was for the opposite party to have considered various exigencies before committing to the period of construction as it was his responsibility to factor in the risks as the builder. In any case, he had provided for a 'grace period' of 6 months. He has also not offered any compensation for the delay as provided for in clause 13 of the Agreement as per his submissions and arguments. The clauses of the contract need to be applied on the principle of equity and failure to do so by the opposite party amounts to an unfair trade practice. In ***IREO Grace Realtech Pvt. Ltd. Vs. Abhishek Khanna*** in Civil Appeal No. 5785 of 2019 decided on 11.01.2021 which is relied upon by the opposite party, there were different categories of allottees and the project was only part completed. Prospective allottees were distinct in seeking refund and possession. Therefore, the reliance of the opposite party on ***Abhishek Khanna*** (supra) does not appear valid as that case is distinguishable from the instant case as the facts of both are different.

11. In view of the foregoing, it is evident that there has been deficiency in service on part of the opposite party in the delay in the offer of possession to the complainant. The complaint is, therefore, partly allowed and disposed of with the directions that the opposite party no 2 refund the amount of Rs.96,00,000/- deposited by the complainant with interest at 9% from the respective dates of deposit. Opposite party shall also pay the

complainant litigation cost of Rs.25,000/-. This order shall be complied with within 8 weeks, failing which the rate of interest will be 12%. It is made clear that the responsibility of settling the loan amount, if any, shall be that of the complainants.

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C. VISWANATH
PRESIDING MEMBER
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SUBHASH CHANDRA
MEMBER