

**NATIONAL CONSUMER DISPUTES REDRESSAL COMMISSION
NEW DELHI**

CONSUMER CASE NO. 1337 OF 2018

1. DEEPIKA CHAUDHARY CHANDRA & ANR.Complainant(s)
Versus
1. M/S. EMAAR MGF LAND LIMITEDOpp.Party(s)

BEFORE:

**HON'BLE MR. JUSTICE R.K. AGRAWAL,PRESIDENT
HON'BLE MR. BINOY KUMAR,MEMBER**

For the Complainant : For the Complainants : Mr. Varun Garg, Advocate
Mr. Rahul Malhotra, Advocate

For the Opp.Party : For the Opposite Party : Mr. Sunil Mund, Advocate

Dated : 02 Jun 2022

ORDER

1. The present Consumer Complaint has been filed under Section 21(a)(i), 22(1) of the Consumer Protection Act, 1986 (for short "the Act") against Opposite Party M/s. Emaar MGF Land Limited (hereinafter referred to as OP Developer) by Deepika Chaudhary Chandra and her husband Arun Kumar Chandra, Complainants / Allottees of Residential Apartment in a Group Housing Project, namely, "Palm Terrace Select" (for short "the Project"), to be developed and constructed by the OP Developer in Village Badshahpur, Sector 66, Gurugram, Haryana, seeking compensation towards delayed delivery of the possession of the allotted Apartment/Unit besides other reliefs.
2. According to the Complainant, the brief facts giving rise to filing of the present Complaint are that allured by the advertisement and the assurances given by the representative of the OP Developer that the construction of the Apartment would be completed and possession would be given within stipulated time, the Complainants jointly booked an Apartment in the Group Housing Project, namely, "Palm Terrace Select" (for short "the Project"), to be developed and constructed by the OP Developer in Village Badshahpur, Sector 66, Gurugram, Haryana, on 18.07.2010 by paying a booking amount of 10,00,000/-. The Complainants were allotted Unit No. PTS-10-0502 by the OP Developer vide allotment letter dated 16.08.2010. It is averred that two copies of Apartment Buyer's Agreement (hereinafter referred to as Agreement) were sent by the Developer for signature vide letter dated 17.09.2010 and thereafter one signed set was sent back to them vide letter dated 15.10.2010. However, no date of execution of the Agreement was mentioned on the Agreement. It was also averred that the Agreement contained various unilateral terms and conditions which were wholly one-sided, unfair and without giving any bargaining power to them. As per Agreement the total cost of the Apartment was 1,71,56,670/-. As per Clause 14 of the Agreement, the possession of the Apartment was to be delivered within a period of 36 months (plus grace period of 3 months) from the commencement of the construction. It was also averred that despite having received more than 50% of the sale consideration,

i.e., of 90,47,3674/-, from the date of booking, the OP Developer did not even started the construction. The construction could be started on 31.07.2012, therefore, as per terms of the Agreement the possession of the Apartment was to be delivered by 31.10.2015. The Complainants had deposited more than 95% of the total sale consideration, i.e., 1,68,74,791/- as per demands of the OP Developer on different dates upto the date of filing of the Complaint, i.e., May, 2018, despite that OP Developer failed to deliver the possession of the Apartment within stipulated period. It was also averred that the OP Developer has wrongly charged 7 lakh towards two car parking as the basement car parking spaces forms part and parcel of the common area, therefore, there is no ownership right which gets transferred to the Allottee. Alleging deficiency in service on the part of the OP Developer, the Complainant has filed the present Consumer Complaint seeking following reliefs:-

- “a) Direct Opposite Party to handover possession of Apartment duly completely in all respect i.e. in habitable condition and in conformity of the specification to the Complainants after taking the complete Completion Certificate and duly registering Apartment in the name of the Complainants as expeditiously as possible;
- b) Direct the Opposite Party to pay interest at the rate of 24% per annum on the amounts paid by the Complainants towards delayed possession, calculated from the date when the possession of the residential unit was to be handed over till the date when the actual physical possession handed over to the Complainants;
- c) Direct the Opposite Party to pay interest at the rate of 24% per annum on the installments/amounts paid by the Complainants from the date of the allotment of the Unit till the date of start of construction, calculated from the date of their respective deposit up till the 31.07.2012 i.e. the date of start of construction;
- d) Direct the Opposite Party to refund Car Parking Charges along with 18% interest therein collected by it from the Complainants;
- e) Direct the Opposite Party to pay sum of 20,00,000/- (Rupees Twenty Lakhs Only) towards compensation to the Complainants on the account of mental agony, trauma and harassment caused by Opposite Party;
- f) Direct Opposite Party to pay sum of 2,00,000/- (Rupee Two Lakhs Only) towards litigation cost to the Complainant;
- g) Pass/make such other appropriate order and/or directions as this Hon’ble Commission may deem fit and proper in the facts and circumstances of the present case;”

2. The Complaint was resisted by the Opposite Party Developer by filing its Written Statement in which the Opposite Party Developer averred that there is Arbitration Clause in the Agreement, therefore, the present Complaint is not maintainable before this Commission; the Complainants has owned their house in Gurgaon itself and have booked the Apartment in question for commercial/investment/speculative purpose, therefore, they do not fall within the definition of Consumer in terms of Section 2(1)(d)(ii) of the Act. It was also averred that this Commission has no pecuniary jurisdiction to entertain the Complaint as the compensation sought cannot go beyond 1 Crore. Relying upon Judgments passed by the Hon’ble Supreme Court, it was averred that terms & conditions of the Agreement is binding upon the Parties and thus in the case of delay in handing over physical possession of the

Apartment, the Complainants are entitled for delayed compensation @ 7.50/- per sq. ft. per month in terms of Clause 16(a) of the Agreement. It was further averred that as per Clause 1.3 of the Agreement, the covered car parking space cannot be treated as a part of the Common Area and facilities and the Complainant has been charged 7 lakh towards exclusive use of two car parking space by the Complainants. It was averred that there is no deficiency in service on their part and it was prayed that the Consumer Complaint be dismissed.

1. We have heard Mr. Varun Garg, learned Counsel for the Complainants, Mr. Sunil Mund, learned Counsel for the Opposite Party Developer and perused Complaints, Written Statements and given a thoughtful consideration to the various pleas raised by them.
1. The Hon'ble Supreme Court in *M/S Emaar MGF Land Limited vs. Aftab Singh – I (2019) CPJ 5 (SC)* , has laid down the law that an Arbitration clause in the Agreement does not bar the jurisdiction of the Consumer Fora to entertain the Complaint. Hence, the objection raised by the Opposite Party Developer that the clause of Arbitration bars this Commission from entertaining the Complaint is unsustainable.
1. The contention of the Opposite Party Developer that the Complainants have already owns a house in Gurugram and have booked the subject Apartment for commercial/investment/speculative purpose, is completely unsustainable in the light of the judgement of this Commission in *Kavita Ahuja vs. Shipra Estates I (2016) CPJ 31* , in which the principle laid down is that the onus of establishing that the Complainant was dealing in real estate i.e. in the purchase and sale of plots/ flats in his normal course of business to earn profits, shifts to the Opposite Party, which in the instant case they had failed to discharge by filing any documentary evidence to establish their case. Therefore we are of the considered view that the Complainants do fall under the definition of 'Consumer' as defined under Section 2 (1)(d) of the Act.
1. So far as the pecuniary jurisdiction is concerned, in terms of Section 21 of the Consumer Protection Act, this Commission possesses the requisite pecuniary jurisdiction where the value of the goods or services as the case may be and the compensation claimed exceeds 1 Crore. As held by a three Members Bench of this Commission in *CC No.97 of 2016 Ambrish Kumar Shukla & Ors. Vs. Ferrous Infrastructure Pvt. Ltd., decided on 07.10.2016* , the value of the services in such a case would mean the sale amount agreed to be paid by the Flat Buyer to the Developer, which has been held to lay down the law correctly on the issue relating to pecuniary jurisdiction and the sale consideration which was agreed between the Parties for buying the goods or hiring or availing the services is relevant for determination of pecuniary jurisdiction in cases of refund also by a larger Bench of 5 Members of this Commission in "*CC No. 1703 of 2018, Renu Singh vs. Experion Developers Private Limited*" and other connected matters *decided on 26.10.2021* . In the present case, even the agreed sale consideration is 1,71,56,670/-. Therefore, it would be difficult to say that this Commission does not possess the requisite pecuniary jurisdiction.
1. The plea of the learned Counsel for the Developer regarding binding nature of the Agreement/Contract whereby the Parties are bound by the terms and conditions of the

Agreement, to compensate the Complainant for delay in terms of Clause 16(a) of the Agreement, we have gone through the Clause 13(a) and 16(a) of the Agreement, which read as under:-

2. "13(a) In case of delay in making payment by the Allotment (s) to the Developer as per the Schedule of Payment as stated in Annexure-2, the Developer shall have right to terminate the Agreement and forfeit the Earnest Money as detailed hereinabove. The Developers shall also be entitled to charge interest @24% p.a. till the date of payment..

16(a) Subject to Clause 31, in case within a period as set out in clause 14(a), the Developers is not able to hand over the possession to the Allottee(s), the Allottee(s) shall be entitled to the payment of compensation for delay at the rate of 7.50/- (Rupees seven and fifty paise only) per sq. ft. per month of the Super Area till the date of notice of possession under the provision of clause 15(a) provided the Allottee(s) has complied with all the terms and conditions of this Agreement. The Allottee(s) shall have no other claim against the Developer in respect of the said Unit and Parking Space under this Agreement during the said period of twelve (12) months"

1. A bare perusal of above Clauses makes it clear that as per Clause 16(a) of the Agreement, in case of delay the Opposite Party Developer is liable to pay 7.50/- per sq. ft. of the super built up area of the Apartment per month for the period of delay in offering of possession, whereas in terms of Clause 13(a) in case of late payment, the Complainants/Buyers are liable to pay interest @24% p.a. This shows that the terms of the Agreement are wholly one-sided and unfair. Therefore, the Complainants cannot be made bound to the terms of the Agreement, which are one-sided and unfair in the light of the recent Judgment of the Hon'ble Apex Court in *Pioneer Urban Land & Infrastructure Ltd. Vs. Govindan Raghavan, II (2019) CPJ 34 (SC)*, wherein the Apex Court has observed as follows:

"6.7. A terms of a contract will not be final and binding if it is shown that the flat purchasers had no option but to sign on the dotted line, on a contract framed by the builder. The contractual terms of the Agreement dated 08.05.2012 are ex-facie one sided, unfair and unreasonable. The incorporation of such one-sided clauses in an agreement constitutes an unfair trade practice as per Section 2(r) of the Consumer Protection Act, 1986 since it adopts unfair methods or practices for the purpose of selling the flats by the Builder.

7. In view of the above discussion, we have no hesitation in holding that the terms of the Apartment Buyer's Agreement dated 08.05.2012 were wholly one-sided and unfair to the Respondent-Flat Purchaser. The Appellant-Builder cannot seek to bind the Respondent with such one-sided contractual terms."

1. During the course of Proceedings, the OP Developer vide letter dated 28.08.2019 had offered the possession of the Apartment to the Complainants subject to payment of the outstanding dues, followed by reminder letter dated 03.10.2019 vide which the Complainants were called upon to clear the outstanding dues of 22,89,282/-. Vide Order dated 13.11.2019 on the Application moved by the Complainants seeking permission to deposit the amount with this Commission, following directions were passed:-

“The OP is directed to deliver possession of the allotted flat to the complainant complete in all respects within four weeks from today subject to the complainant paying the entire admitted amount including the VAT and Stamp Duty and depositing the disputed amount, if any, with this Commission during pendency of the complaint without prejudice to the rights and contentions of the parties in this complaint. The complainant shall comply with this order within four weeks from today.

The amount, if any, deposited with this Commission shall be kept in an automatically renewable FDR of a nationalized bank and the final order with respect to that amount and interest which accrues on it, shall be passed at the time of final disposal of the complaint. The IA stands disposed of.”

1. In compliance of the Order dated 13.11.2019, the Complainants have deposited following amount :-

With the Opposite Party Developer
(Admitted Amount)

Lien Marked Fixed Deposit for HVAT Liability 1,50,891/-
Registration Charges & Pasting Charges E-Challan 50,003/-
E-Stamp Paper 9,50,820/-
Cheque for water connection charges
5,006/-
Total 11,56,720/-

With this Commission
(Disputed Amount)

Basic, Covered Car Park, PLC 9,45,158/-
Delayed Payment Charges 1,17,328/-
Advanced Monthly Maintenance Charges 1,19,440/-

Total 11,81,926/-

1. Precisely, in the present case, the controversy revolves around two issues firstly, payment of disputed amount and secondly, delayed compensation.

1. So far as the payment of disputed amount is concerned, Car Parking charges are to be paid by the Complainants in view of the Judgment passed by the Hon'ble Supreme Court in “ ***Wing Commander Arifur Rahman Khan and Aleya Sultana and Others vs DLF Southern Homes Pvt Ltd and Others [Civil Appeal No 6239/2019 decided on 24 August 2020]* ”. Balance of Basic Sale Price and PLC are also payable by the Complainants as per terms of the Agreement. The Complainants are duty bound to make the payments as per demand of the OP Developer and in case of delay in making the payment, the Complainants are liable to pay Delay Payment Charges as per terms of the Agreement. As far as Advance Maintenance Charges are concerned, it will also be paid by the Complainants to the OP**

Developer but the Advance Maintenance Charges will be applicable only with effect from the date of actual possession of the Apartment to the Complainants.

2. Consequently, the Registry is directed to release the disputed amount deposited by the Complainants in compliance of the Order dated 13.11.2019, alongwith accrued interest, if any, in favour of the OP Developer within two weeks from today.
3. Now coming to the issue of delayed compensation, it is not in dispute that the Complainants booked the Apartment with the OP Developer on 18.07.2010. As per Clause 14 of the Agreement the OP Developer was obligated to deliver the possession of the Apartment by 31.10.2015 but despite having received a huge sum of 1,68,74,791/-, i.e., almost 95% of the total sale consideration, the OP Developer failed to deliver the possession of the Apartment within stipulated period and the possession was actually handed over only in the year 2020, i.e., with a delay of approximately five years and the Conveyance Deed has also not been executed till 13.07.2021 despite having received the stamp duty and other charges from the Complainants far back in the year 2020, which in our considered view is a clear case of deficiency in service on the part of the OP Developer.
4. We find it a fit case to place reliance on the Judgment dated 11.01.2021 passed by the Hon'ble Supreme Court in "***Ireo Grace Realtech Pvt. Ltd. vs. Abhishek Khanna & Ors.***" [Civil Appeal No. 5785 / 2019 & other connected Appeals], in which the Hon'ble Apex Court has observed as hereunder :
 1. ***The Developer is however obligated to pay Delay Compensation for the period of delay which has occurred from 27.11.2018 till the date of offer of possession was made to the allottees....***

1. Respectfully following the principle laid down by the Hon'ble Supreme Court in "***Ireo Grace Realtech Pvt. Ltd. vs. Abhishek Khanna & Ors.***" (*supra*) , we are of the considered view that the Complainants are entitled for Compensation for delay in delivery of the possession of the Apartment. Keeping in view the peculiar facts and circumstances of the case, we are of the view that the compensation in the form of simple interest @ 8% p.a. alongwith cost of 25,000/- would meet the ends of justice.
1. Consequently, the Opposite Party Developer is directed to pay interest on the amount deposited @8% w.e.f. 31.10.2015, i.e., the expected date of delivery of the possession, till the actual date of handing over of the possession of the Apartment to the Complainants, within four weeks from today. The OP Developer shall also pay cost of 25,000/- to the Complainants.
1. The Consumer Complaint stands partly allowed in above terms. The pending application, if any, also stands disposed off.

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R.K. AGRAWAL
PRESIDENT
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BINOY KUMAR

MEMBER