NATIONAL CONSUMER DISPUTES REDRESSAL COMMISSION
NEW DELHI

CONSUMER CASE NO. 3582 OF 2017

1. ANSHUL AGARWAL
2. MUKESH KUMAR GUPTA & PREM LATA GARG

. .....Complainant(s)

Versus

1. SHREENIWAS COTTON MILLS LIMITED
Having its registered office at: 7TH FLOOR, LODHA EXCELUS APOLLO MILLS COMPOUND NM JOSHI MARG, MAHALAKSHMI
MUMBAI-400011
MAHARAHSTRA .....Opp.Party(s)

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BEFORE:
HON'BLE MR. SUBHASH CHANDRA,PRESIDING MEMBER

FOR THE COMPLAINANT :	IN CC NOS. 3583 AND 3582 OF 2017 FOR THE COMPLAINANT MR VIMAL KIRTI SINGH, MR RAHUL SINGH, MR VARUN LAL, MR SANJAY GHOSH, MRS RUPALI GHOSH, MR NISHANT SHOKEEN, MR SIDHARTH SINGH, MS NANDITA SETH AND MR SUMITA SINGH, ADVOCATES IN CC NO. 323 OF 2018 FOR THE COMPLAINANT MR VIMAL KIRTI SINGH, MR RAHUL SINGH, MR VARUN LAL, MR SANJAY GHOSH, MRS RUPALI GHOSH, MR NISHANT SHOKEEN, MR SIDHARTH SINGH, MS NANDITA SETH AND MR SUMITA SINGH, MS AASHIMA THUKRAL,ADVOCATES
FOR THE OPP. PARTY :	MR RAHUL KRIPLANI MS SUPRAJA V AND MR ADITYA PRATAP SINGH CHAUHAN, ADVOCATES IN CC NO. 323 OF 2018 MR SIDDHARTH BHATNAGAR, SENIOR ADVOCATE WITH MR RAHUL KRIPLANI AND MS REA BHALLA, ADVOCATES

Dated : 06 September 2023

ORDER

1. This consumer complaint under section 21(1)(b)(i) of the Consumer Protection Act, 1986 (in short, the 'Act') alleges unfair trade practice and deficiency in service on part of the opposite party in completing the project as per the proposed plan and delay in handing over possession of a flat booked by the complainants within the promised time resulting in loss to the complainants who are therefore seeking refund of the amount deposited with compensation and other costs. This order will also dispose of two related consumer complaints CC No. 3582 of 2017 and CC 323 of 2018 filed by complainants who are family members of the complainants in the instant complaint pertaining to the same project and involve the same grievances and issues since they are based upon identical Agreements to Sell. For the purpose of convenience, the facts are taken from CC 3583 of 2017 which is taken as the lead case.

2. The facts, according to the complainants, are that they booked a 3 BHK residential flat in "World One", a project promoted as an iconic residential building comprising 117 floors and the tallest residential building in the world with several unique and premier features. The booking was done on 10.02.2014 for which Rs 18,00,000/- was paid on 26.02.2014 as booking amount. Flat No. 4001, East Wing, The World Towers, Upper Worli, Mumbai admeasuring 2044 sq.ft. carpet area was allotted on 30.09.2014 for a total sale consideration of Rs 14,41,90,530/-. Clause 1.3 defined the building to be 117 storied inclusive of several levels for parking. An Agreement to Sell (ATS) dated 23.12.2014 was registered with the Joint

Sub Registrar of Assurance and as per clause 11.1 and 11.2 the opposite party undertook to obtain the occupation certificate and offer possession for the purpose of fit outs by 31.12.2015, with a grace period of 1 year from the date of such an offer. The opposite party failed to hand over possession inspite of payments being made in time and despite follow-up by the complainants. On 20.05.2016 the opposite party intimated that possession would be offered by the first half of 2017 since it had commenced offering possession in the tower called "The World Crest". Subsequently, vide letter dated 18.08.2017 the receipt of Occupation Certificate was conveyed although the construction was at a standstill since completion of the 80th floor. On 14.04.2017 the complainants sent a legal notice to terminate the ATS and refund the money paid including registration fees. The complainant asserts that as per the Statement of Accounts issued by the opposite party, Rs 13,06,59,748/- or 87% of the sale consideration stood paid as on 10.06.2015, inclusive of stamp duty, registration fee and MVAT. The complainants state that the ATS dated 23.12.2014 had unfair terms and conditions and was biased against the complainant, especially clause 6.1 which entitled the opposite party to amend plans of the project without altering the carpet area. Alleging deficiency in service and unfair trade practice on part of the opposite party, the complainants are before this Commission with the prayer to:

(i) direct the opposite party to refund the total amount of Rs 13,06,59,748/- received from the complainants with interest @ 18% p.a. from the date of receipts;

(ii) direct the opposite party to compensate the complainant for Rs 87,12,879/- paid towards stamp duty, registration fee and MVAT;

(iii) direct payment of litigation expenses of Rs 5,00,000/-; and

(iv) pass any other deemed fit and proper.

3. Upon notice, the complaint was resisted by the opposite party by way of a written version. Averments of the complainant were denied while admitting the booking of the flat by them. Preliminary objections were taken that:

(i) the complaint was not maintainable as the flat was booked for a commercial purpose since three flats were booked in the World Tower Project by the complainant in the name of her husband and son in "World Crest" apart from the present flat in "World One" despite having flats in Mumbai and that she was therefore not a 'consumer' as per section 2(1)(d) of the Act and that the National Commission had held in various judgments that booking of more than one residential unit amounted to booking for investment/commercial purpose thereby making the complainant liable to not be a 'consumer';

(ii) the complainant was guilty of *suppressio veri* and *suggestio falsi* since the grace period after date for fit out possession of 31.12.2015 as per clause 11.2 and subsequent reasonable extension per clause 11.5 for factors beyond control of the opposite party had not been indicated which included *"... any notice, order, rule, notification of the Government and/or any other public or competent authority or of the court..."* under which the non-receipt of the No Objection Certificate (NOC) from the Civil Aviation Department for height clearance fell, apart from the fact that the complainant's apartment was on the 40th floor which was covered under the Occupation Certificate (OC) received on 29.07.2017 till the 43rd floor;

(iii) the complainants were not entitled for refund since as per clause 11.3 of the ATS the complainants were required to terminate the agreement within 90 days of the expiry of the grace period failing which it was deemed that they had accepted the revised date of possession;

(iv) there was no cause of action for the complaint as the delay was due to factors beyond the control of the opposite party as per clause 11.5 (viii) which included any notice, order, rule, notification of the Government and/or any other public or competent authority or of the court and delay in receipt of NOCs, Licenses, Occupation Certificate, Approvals; and as per clause 11.2 the date of receipt of Occupation Certificate is deemed to be the date of offer of possession.

4. On merits, opposite party contended that there was an insignificant delay in obtaining the Occupation Certificate for reasons not attributable to it and that a reasonable period of extension beyond the grace period was permissible as per clause 11.5. It is submitted that the Municipal Corporation of Greater Mumbai (MCGM) had approved 5 buildings in the World Tower Project with heights ranging from 176.101 meters and 436.211 meters above ground level (AGL) or 180.89 meters and 441 meters above mean sea level (AMSL) respectively, against the requirement of 496.55 meters AGL and 501.330 meters AMSL to utilize the permissible Floor Space Index (FSI). The Airport Authority of India (AAI) granted NOC dated 19.07.2010 for 176.101 AGL or 180.89 AMSL and that the opposite party's appeal to the Appellate Committee of AAI on 13.08.2010 was considered on 26.03.2015 which directed an aeronautical study to ascertain whether 454.29 meters AMSL was feasible. Height of 285.06 meters AMSL was cleared for one building and 179.24 meters AMSL for the balance 4 buildings. Opposite party filed Writ Petition No. 2274/2017 before the Delhi High Court which referred the issue to the International Civil Aviation Authority (ICAO) where it was currently pending. As regards refund of statutory fees and charges, it is contended that the complainant was obligated to pay the same and hence it could not be refunded. As the

process of handing over had commenced, the opposite party submitted that the complainant had no cause of action in the matter.

5. Parties led their evidence and filed rejoinder, affidavit, and evidence as well as short synopsis of arguments. I have heard the learned counsel for both the parties at length and carefully considered the material on record.

6. Learned counsel for the complainants argued forcefully that the opposite party was guilty of unfair trade practice and deficiency in service *qua* the complainant. It was averred that the project had been pivoted on a unique selling proposition of "World One" being the world's tallest residential building for which reason the complainants booked a flat in the project and paid a premium for the same since its price was higher than the other towers in the World Tower project. This promise was belied since it was manifest that there was no NOC for the promised height of 117 floors from the AAI. In addition, the opposite party had failed to make an offer of possession in terms of the ATS which mandated possession for fit outs by 31.12.2015, extendable by a grace period of 1 year, on the basis of a partial OC which was to be followed by a complete OC within 1 year thereafter, also with a grace period of 1 year. It was averred that the grace period for the partial OC for fit outs expired on 31.12.2016 and that no offer of possession was made till filing of the complaint. It was also contended that the full or complete OC was not likely since the NOC of the AAI had not been received and that even the Appellate Authority of AAI had not cleared the case of the opposite party. Hence, the promise of an exclusive, iconic address of the world's tallest tower was unlikely to be delivered which constituted an unfair trade practice as well as a deficiency in service. The apartment was booked on 10.02.2014 and admittedly the deadline for possession for fit outs, even with grace period of 1 year till 31.12.2016, had not been met. The complainants' action in terminating the ATS and the claim for refund with compensation was, therefore, stated to be justified. It was also contended that the offer of possession for fit outs was not for the purpose of residing in the building since the offer of possession was only for the purpose of undertaking fit outs as per clause 20(t) of the ATS wherein the opposite party had categorically stated that possession for fit outs did not entitle allottees to reside in the flats. It was argued that for this reason opposite party had offered to compensate the flat buyers with Rs 2,50,000/- per month towards rental support even though this was not provided for in the ATS. It was argued that this constituted a clear admission on part of the opposite party of failure to successfully deliver on its commitments as per the ATS. Therefore, it was contended vehemently on behalf of the complainants that the entire purpose of booking a flat in the project had been frustrated and that despite taking a bank loan and servicing it through high interest rates, the money of the complainants remained with the opposite party even after 7 years of the promised date of being put in possession. Refund of the instalments paid with interest @ 18% which was equivalent to the rate charged on allottees for default in making timely payments, along with other refunds and costs was therefore prayed for.

7. Counsel for the complainants relied upon clauses 20 (t) and 20 (u) of the ATS to argue that as per the contractual agreement between the parties, the opposite party had undertaken to offer possession of the apartment for the purpose of fit-outs to be carried out by the allottee/complainant on the basis of a part OC. It was contended that this part OC only enabled the complainant to enter the apartment for the purpose of undertaking fit outs and not for occupation to reside. The permission to reside in the apartment was subject to the complete occupation certificate being received by the opposite party for which it had provided for another one year with a grace period of a year. It was contended that the opposite party was trying to obfuscate the issue and to project that there was only one OC that was required which covered both fit outs and occupation for the purpose of residing in the apartments. It was argued that legal possession of the apartment was not possible as per clause 20 (t) and (u) and that the opposite party was therefore liable for unfair trade practice and deficiency in service.

8. It was also urged by the counsel for the complainants that since the statutory requirement for clearance of height of the building from the AAI was lacking and was not even remotely likely to be obtained by the opposite party to meet the promise of a 117 floor building, the OC dated 29.07.2017 stated to have been obtained covering ground and 6 to 43 floors was not a valid document to offer possession since the project as conceptualized and marketed would not get executed in view of lack of NOC from the AAI pertaining to height of the building. Refund of the entire amount paid to date was therefore pressed for with interest @ 18% in view of the fact that (a) it was the rate for delayed payments by allottees and justified on the grounds of equity; (b) the complainants had been servicing a house building loan for the house since November 2014; and (c) the complainants had deposited large amounts for statutory dues and taxes on account of the flat.

9. In support of his arguments the learned counsel for the complainant relied upon various judgments. It was argued that in terms of the Hon'ble Supreme Court's judgment in ***Debashis Sinha Vs. R.N.R. Enterprise,*** Civil Appeal No. 3343 of 2020 decided on 09.02.2023, (2023) 3 SCC 195 the contention of the opposite party that there was no unfair trade practice on its part since the complainants were fully aware of the terms of the ATS at the time of its execution could not be sustained since it had been held that

> *More often than not, the jurisdiction of the consumer fora under the C.P. Act is invoked post-purchase. If complaints were to be spurned on the specious ground that the consumers knew what they were purchasing, the object and purpose of the enactment would be defeated. Any deficiency detected post-purchase opens up an avenue for the aggrieved consumer to seek relief before the consumer fora.*

It was therefore argued that the complainants could not be non-suited on this ground and that the complaint was maintainable.

10. The learned counsel for complainants argued that the complainants were 'consumers' under section 2(1)(d) of the Act since they availed services for a consideration from the opposite party. Reliance was placed on the Supreme Court's ruling in ***Samruddhi Coop. Housing Society Ltd. Vs. Mumbai Mahalaxmi construction (P) Ltd.,*** Civil Appeal No. 4000 of 2019 decided on 11.01.2022 to argue that failure to obtain an occupancy certificate or to abide by contractual obligations amounted to deficiency in service as was also held by the Apex Court in ***Wg Cdr Arifur Rahman Khan & Ors. Vs. DLF Southern Homes Pvt. Ltd.*** & Ors., (2020) 16 SCC 512 and ***Pioneer Urban Land Infrastructure Ltd. Vs. Govindan Raghavan***, (2019) 5 SCC 725. It was further argued on the that not providing a firm period for the completion of construction or handing over of possession is both a deficiency and an unfair trade practice on the basis of this Commission's order in ***Ansal Lotus Melange Projects Pvt. Ltd. & Anr. Vs. Dr. Yuti Mukesh Mishra*** in First Appeal No. 867 of 2013 dated 20.11.2018 which had held that:

> *Clearly, if the allottee is not satisfied with the changes made in the project and feels that he is adversely affected by these changes, he has the right to seek refund, even if he has given a consent in the allotment letter that opposite parties are entitled to make changes in the plan and to make construction accordingly because the consent was given without knowing full implications of the intended changes that would be made by the opposite parties as the changes were not disclosed to the complainant.*

In the instant case, it was argued that the opposite party had neither given any firm date of handing over of the flat nor had it obtained a completion certificate as on date nor was it in a position to be able to do so since the NOC of the AAI was lacking. Hence, both deficiency in service and unfair trade practice by the opposite party were alleged.

11. Counsel for the complainants relied upon the Supreme Court's judgment in ***Pioneer Urban Land & Infrastructure Ltd. Vs. Govindan Raghavan,*** Civil Appeal No. 12238 of 2018 decided on 02.04.2019, (2019) 5 SCC 725 to argue that delay in obtaining Occupancy Certificate almost 2 years after the date stipulated in the Apartment Buyer's Agreement as a consequence of which there was a failure to hand over possession within a reasonable period, amounted to deficiency in 'service' as defined under section 2(o) of the Act in terms of the judgment of the Supreme Court in ***Lucknow Development Authority Vs. M.K. Gupta***, (1994) 1 SCC 243. Hence, relying on its judgment in ***Fortune Infrastructure & Anr. Vs. Trevor D'Lima & Ors.*** (2018) 5 SCC 442 the Apex Court had held that

> *"a person cannot be made to wait indefinitely for possession of the flat allotted to him and is entitled to seek refund of the amount paid by him, along with compensation ... (and that) the flat purchaser was justified in terminating the Apartment Buyer's agreement by filing the Consumer Complaint, and cannot be compelled to accept the possession whenever it is offered by the Builder. The Respondent-Purchaser was legally entitled to seek refund of the money deposited by him along with appropriate compensation."*

12. It was further argued by the complainants that the ATS was a document that had been imposed upon the complainants and contained onerous and one-sided terms and as held in ***Govindan Raghavan*** (supra), such a contract was not binding on the complainants, since it had been held that

> *A term 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 incorporation of contractual terms of the Agreement (that) are ex-facie one-sided, unfair, and unreasonable constitute 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.*

13. Complainant also contended that the ATS was *ex facie* unfair and unreasonable since possession was to be initially given for fit outs and thereafter for occupation and since neither an NOC for clearance of the height of the building for 117 floors nor the possibility of it coming through in a defined time frame, the occupation certificate on which possession could be offered to him was a remote possibility. Hence, learned counsel for complainant argued that the complainant could not be expected to wait indefinitely for possession as held by the Hon'ble Supreme Court in ***Kolkata West International City Pvt. Ltd. Vs. Devashis Rudra,*** Civil Appeal No. 3182 of 2019 in SLP (C) No. 1795 of 2017 decided on 25.03.2019 wherein it was held that

> *A buyer can be expected to wait for possession for a reasonable period. A period of seven years is beyond what is reasonable.*

In the instant case, the booking was made in 2014 and possession was promised in 2015, with a year's grace. Therefore the lapse of 7 years since 2015/2016 to date was contended by the complainant to be inordinate.

14. In support of the averment regarding the offer of possession even if it were to be made to be valid, learned counsel for the complainant submitted that on account of non-availability of the occupation certificate, as held by this Commission in ***Amit Soni & Anr. Vs. M/s Umang Realtech Private Limited & Anr.,*** CC No. 2524 of 2017 dated 03.06.2019 where the

complainants did not wish to take possession since there was delay and no Occupancy Certificate was available, the offer would not be valid since it had been held that:

> *"Having regard to the fact that there is no committed date on behalf of the first Opposite Party with respect to the Occupation Certificate, we are of the considered view that the principle laid down by the Hon'ble Supreme Court in a catena of judgments that delivery of possession without the Occupancy Certificate does not construe legal possession, we hold that the act of the Opposite Parties in not adhering to the stipulated date of delivery of possession amounts to deficiency in service."*

15. Learned counsel for complainant argued that neither did the opposite party have an occupancy certificate from the concerned authority nor was it likely to receive one for the project in view of the AAI not having issued the NOC for the height to which the towers could be erected. Therefore, it was submitted that the complainants not wishing to take possession and seeking refund with compensation was completely justified. Relying on this Commission's order in ***M/s Barnala Builders & Property Consultants Vs. Krishan Gopal & Anr.,*** First Appeal No. 937 of 2018 dated 08.07.2020, it was also argued that in a case where the occupation certificate had been obtained after 2 years from the date of due possession, refund could not be denied if the allottee sought refund nor could he be compelled to take possession at that stage nor could deduction of 10% of the amount paid be imposed.

16. On the basis of ***Wg Cdr Arifur Rahman Khan & Ors. Vs. DLF Southern Homes Pvt. Ltd. & Ors***., Civil Appeal No. 6239 of 2019 decided on 24.08.2020, (2020) 16 SCC 512 it was argued that as held in ***Ghaziabad Development Authority Vs. Balbir Singh*** (2004) 5 SCC 65 that the word compensation had a very wide connotation and may constitute actual loss or expected loss and that it has to be based on a finding of loss or injury and must correlate to it and that no hard and fast rule can be laid down. The compensation sought in the instant case @ 18% p.a. was therefore justified on this ground.

17. Counsel for complainant also relied upon this Commission's judgment in ***Shalimar City Samajik Kalyan Samiti Vs. M.R. Proview Real Tech Pvt. Ltd.,*** Consumer Case No. 439 of 2018 dated 31.03.2022, (2022) SCC OnLine NCDRC 264 wherein it was held that in the absence of the builder not bringing on record any Occupation Certificate, it was not entitled to levy any maintenance charges from allottees till it was received. In the present case it was argued that since there was no such certificate available, the opposite party could not levy any charges on the complainants.

18. Complainant's counsel placed reliance upon this Commission's judgment in ***Reeta Srimal Vs. Parsvanath Developers Ltd. & Anr.*** in CC No. 3636 of 2017 dated 06.10.2022 (and ***Ram Shankar Mahalaha & Anr Vs. Parsvnath Developers Ltd.*** in CC No. 1589 of 2016 dated 06.10.2022) to argue that compensation for delay was accepted as justified and was acceptable since it was held as below:

> *7. The builders stated that they had offered fit out possession but in the absence of "Occupancy Certificate" no one can be forced to take possession of group housing project. As such offer of fit out possession is not a valid offer of possession. Supreme Court in* ***Wg Cdr Arifur Rahman Khan & Anr. Vs. DLF Southern Homes Pvt. Ltd.****, (2020) 16 SCC 512 and Civil Appeal No. 1232 of 2019* ***R.V. Prasannakumar Vs. Mantri Castles Pvt. Ltd.*** *(decided on 11.02.20190), held that delayed compensation is payable in the shape of interest @ 6% per annum on the deposit of home buyer from due date of possession till the offer of possession.*

19. Learned counsel for complainant contended that this Commission in ***Jagruk Nagrik & Anr. Vs. Shreeniwas Cotton Mills Ltd. & Anr.,*** CC No. 527 of 2019 dated 26.06.2023 had ordered full refund with compensation in a matter which pertained to the very same project involved in the present case, as below:

> *So far as representation made to complainant-2 for raising 117 floors of the building as well as the world's tallest building is concerned, it is fully proved from the brochure and other papers. The opposite party pleaded that Airport Authority of India has sanctioned construction for 284.29 mtrs. In 2013 and revised to 285.06, mtrs. In September 2015. The opposite party has not filed any evidence that the order of the Airport Authority of India granting sanction for construction upto 284.29 mts in the year 2013 had become a public news, at that time. Therefore, there was misrepresentation in respect of height of the building on the part of the opposite party. According to the complainants, tallest building in the world was only consideration for booking such an expensive flat in this project, therefore, the complainants are entitled to claim for refund of their money. Inasmuch as till today, the opposite parties could not obtain sanction of Airport Authority of India for raising the height of the building to beyond 285.06 mtrs. So far as default made by the complainant-2 in payment of installments after December 2016, is concerned, opposite party-1 did not exercise its right to cancel the allotment on this ground till filing of the complaint.*

20. Counsel for the complainant also argued that the opposite party had acted in violation of section 4 of the Maharashtra Ownership of Flats Act, 1963 (MOFA) since it raised demands exceeding 20% of the sale consideration even before the execution of the ATS on 03.06.2013.

21. *Per contra,* learned counsel for the opposite party was vehement in arguing that the opposite party could not be held responsible for the delay as per clause 11.5 of the ATS since the NOC had been delayed by the AAI. It was argued that the

AAI had not provided the necessary clearance for a height of 496.55 mtrs. AGL and 501.339 mtrs. AMSL required for 117 floors planned in the project and that despite efforts before the Appellate Authority and the High Court this requirement could not fructify. As the consequential delay was on account of the delay by the AAI, the opposite party contends that it should not be held liable for the same. It is argued that the OC that was required for possession to be handed over for the purpose of fit outs had been obtained by the opposite party on 29.07.2017 and an offer of possession made on 25.12.2018. It was submitted that there was no further requirement of another OC and that therefore, the opposite party had offered possession to the complainants for the purpose of residing therein. In view of this, it was contended that the opposite party was not in default of any contractual obligations of delay in offering possession to the complainants. Delay, if any, was stated to have been marginal which deserved condonation.

22. Counsel for the opposite party argued at some length that the complainant had vacillated in his prayers before the Commission. It initially filed a consumer complaint dated 04.12.2017 seeking refund of the amount deposited with the opposite party in respect of the flat in question along with interest @ 18% and other costs and compensations. An Interlocutory Application (No. 1626/2019) was thereafter filed praying for possession. The primary prayer in the complaint was subsequently changed to that of seeking possession with refund as the alternate prayer in September 2020 and a complaint dated 15.10.2020. It was contended that the complainant was trying to alter his prayer in keeping with real estate trends and that he was a speculative investor who was trying to maximise his gains. He therefore contended that the complainant was not a 'consumer' under the ambit of the Act. It was also contended that the complainant should not be allowed to aprobate and reprobate at the same time.

23. It was also contended that the opposite party had kept the complainants informed of the delay in the project from time to time in a transparent manner. Reference was made to letter dated 09.02.2015 to convey that there had been a delay wherein it had been stated that:

> We have had the choice between expediting the delivery or ensuring that the final product, which you and your family will enjoy for decades, is delivered to the best possible standards. We have made an informed decision that a few months delay at this stage, while difficult to accept, is worth it. **We will be handing over your residences for interior fit outs to you in November/December 2015 and will be inviting you to become the first residents to start living at the World Towers from April 2016.**
>
> (Emphasis added)

On 23.12.2015 the opposite party intimated the complainants of the challenges in the project and it was conveyed that:

> Inspite of these challenges, the **possessions for fit-outs shall commence about six weeks later than scheduled, commencing from February 2016**….
>
> While we have taken all the mitigating actions possible to avoid this delay, we appreciate the inconvenience this causes you, pushing out the occupation of your new unit by a few additional months. Recognizing this, **we are offering you an offset of Rs 2.5 Lacs per month starting from the end of the grace period mentioned in your agreement and running until the actual date we offer fit-out possession of your unit**. This offset will be adjusted against your balance dues at possession.
>
> (Emphasis added)

Thereafter, on 08.06.2016 it was conveyed that:

> It gives me immense pleasure to inform you that **your residence at World Crest is ready for possession for fit-outs** and to congratulate you on being the proud owner of a World Residence in The World Towers, India's most iconic development. …
>
> **The occupation certificate for World Crest has been received**.
>
> (Emphasis added)

Various letters to the complainants to make the necessary deposits were also written including reminders, including intimating vide e-mail dated 31.03.2017 that:

> …Please note that we have waived off the interest that was accrued on both units, hence there are no interest charges showing in the statement. Also **as informed to you we have given you the offset extension till 31st January 2017**.
>
> (Emphasis added)

The opposite party therefore urged that the complainant was kept abreast of the delays and was also extended an offer of compensation by way of an offset by way of rental of Rs 2.50 lakhs per month in December 2015 which was extended till

January 2017 which was proof of its *bona fides.*

24. Counsel on behalf of the opposite party also contended that as per the ATS, complainant was required to terminate the agreement within 90 days of the expiry of the grace period failing which the complainant was deemed to have chosen to continue with the revised date. As there was no right of termination exercised, the complainant was deemed to have consented to the revised dates of possession. Hence, it was argued that there was no delay that the opposite party was liable for.

25. Counsel for the opposite party argued on the basis of the order of the Hon'ble High Court of Bombay in ***Sanjay Phulwaria & Ors. Vs. Mumbai Metropolitan Region Development Authority,*** WP No. 2639 of 2018 dated 16.10.2018, 2018 SCC OnLine Bom 3442: (2018) 6 AIR Bom R 578, that Regulation 6(8) of the Development Control Regulations of the Mumbai Metropolitan Region Development Authority (MMRDA) permitted the grant of part Occupancy Certificate and that therefore there was no requirement of a final/complete Occupancy Certificate. Consequently, it was argued that there was no requirement for another OC as per the ATS since in this case, the Hon'ble High Court had held that:

> *A part occupancy certificate of the building or part thereof before completion of the entire work, as per the development permission, can be granted subject to precautionary measures which may be provided by the authorities… Accordingly, acting on the possession certificate, possession of the tenements was also handed over to the flat purchasers since November, 2017. Considering the aforesaid clear provision as contained in the Development Control Regulations, we do not see any substance in the contention as urged on behalf of the petitioner that the MMRDA in any manner was prohibited from granting part occupancy certificate and the issuance of part occupancy certificate was illegal.*

26. The learned counsel for the opposite party also argued that a partial OC in respect of buildings was acceptable especially in residential buildings in Mumbai and that there was no irregularity in offering possession on this basis. Accordingly, it was argued that the offer of possession for fit outs was also for the purpose of residing and there was no requirement for another OC. It was further argued that in view of this position, the OC dated 29.07.2017 on the basis for which possession for fit outs was offered to the complainant was valid for them to also occupy and reside in the apartment booked.

27. Reliance was placed by the counsel for the opposite party on this Commission's judgment in ***Housing Development and Infrastructure Ltd. Vs. Maureen Pereira,*** First Appeal No. 271 of 2016 decided on 05.03.2019. It was argued that the National Commission had held that the requisite part-occupation certificate obtained by the builder would be sufficient compliance with the order of the State Commission that 'requisite' occupation certificate was essential for the builder to give possession and for the buyer to accept it. It was also contended that accordingly it was the accepted practice in Maharashtra to accept partial OCs which were tower specific.

28. Learned counsel for respondent placed reliance on this Commission's judgment (in ***Durgesh Singh Vs. Macrotech Developers,*** in CC No. 11 of 2019 dated 17.03.2023) involving a batch of consumer complaints which prayed for refund on the basis of delay in the offer of possession including some delay beyond the grace period after the possession for fit-outs permitting delay compensation from the committed date of possession for fit-outs till the actual date of offer for fit-outs, thereby recognizing the principle of partial occupancy certificate. Counsel for respondent also relied upon this Commission's order in ***Venkatraman Krishnamurthy & Anr. Vs. V. Lodha Crown Buildmart Pvt. Ltd.,*** Consumer Complaint No. 35 of 2018 dated 09.11.2022 wherein the validity of a part occupancy certificate was considered and it was ordered that possession be handed over and taken respectively by the builder and the allottee with delay compensation, thereby reiterating the principle of a partial OC. Respondent's counsel further relied upon another judgment of this Commission dismissing the appeal in ***Jignya Mittal Vs. Macrotech Developers Ltd.*** in CC No. 266 of 2020 dated 10.01.2022 which held, based upon a conjoint reading of the clauses in the Agreement to Sell containing provisions pertaining to handing over possession for fit outs and thereafter for occupation (with respective grace periods), that since the complainant took possession well before the stipulated period after availing the rental offset offered by the opposite party, there could be no delay attributable to the opposite party. It was argued that as per this judgment, the concept of a part OC for occupation had been upheld.

29. The learned counsel for the opposite party argued on the basis of the Hon'ble Supreme Court's judgment in ***Supertech Ltd. Vs. Rajni Goyal,*** Civil Appeal Nos. 6649-50 of 2018 decided on 23.10.2018, 2018 SCC OnLine SC 2114 that a purchaser ought not to be allowed to reap benefits of its own delay in taking possession and that in the instant case, the complainant could not be permitted to seek compensation by way of interest on the amount deposited after not having taken over possession of the apartment offered to it.

30. Opposite party also submitted that it had offered compensation of Rs 2,50,000/- per month towards rent liable to be paid by the complainants from 30.11.2015 (to be adjusted against the final dues) in view of the delay. This was stated to be over and above the terms of the ATS between the parties.

31. The contentions of the rival parties have been considered carefully in the light of the material on the record and the arguments urged by the respective counsels. *The preliminary objections of the opposite party are considered at the outset.*

The averment that the complainants are not 'consumers' under the ambit of section 2(1)(d) of the Act needs to be examined in the light of the basis advanced for the averment. The only reason cited by the opposite party is that there are three apartments booked in the names of different members of the same family in the project and that they are residents of Mumbai and hence are speculative investors who have invested in the flat for a commercial purpose. The onus to prove that the complainants are engaged in the business of real estate i.e., the buying and selling of real estate or flats and plots for their livelihood squarely lies upon the opposite party as held by this Commission in its judgments in ***Kavita Ahuja Vs. Shipra Estates & Jai Krishna Estate Developers Pvt. Ltd. & Ors.,*** *I (2016) CPJ 31 (NC). This onus has not been discharged by the opposite party in the present case by way of any evidence on record. The Hon'ble Supreme Court has held in* ***Laxmi Engineering Works Vs P.S.G. Industrial Institute,*** *(1995) 3 SCC 583 held that 'commercial purpose' needed to be decided in the facts of each case and held that:*

> *"A person cannot be said to have purchased a house for a commercial purpose only by proving that he owns or had purchased more than one house or plots.* ***A person may buy two or more houses if the requirement of his family cannot be met in one house. Therefore, it would be incorrect to say that in every case where a person owns more than one house, the acquisition of the house is for a commercial purpose****."*
>
> *(Emphasis added)*

A bald averment that the booking of multiple units is intended for speculative purposes also cannot be appreciated in light of the fact that the complainants have taken a bank loan to pay the sale consideration and are in fact, servicing the same. The contention therefore cannot be considered.

32. *The preliminary objection of the opposite party that the complainants are not entitled to refund since they did not terminate the Agreement under clause 11.3 within 90 days of expiry of the grace period and therefore there is a deemed acceptance of the revised date needs to be considered in the context of the ATS itself. This is a document prepared by the opposite party which the complainants had no occasion to alter. The offer of possession also needs to be considered in light of the fact that the opposite party did not possess a valid NOC of the AAI with regard to the height of the tower for 496.55 mtrs. AGL and 501.339 mtrs. AMSL for 117 floors. Admittedly, the opposite party approached the AAI, the Appellate Authority of the AAI, the Hon'ble High Court of Delhi and also the ICAO for the necessary approvals to construct a 117 storied building. It did not, however, receive the necessary approvals except to be permitted to construct upto 176.101 mtrs. AGL or 180.89 mtrs. AMSL. In the absence of approval for the height required for 117 floors, the complainants were justified in not taking possession for fit outs. The opposite party were clearly deficient in service and guilty of unfair trade practice in not executing the project since they had promoted the project based on "World One" to be the world's tallest residential building. In view of the NOC of the relevant authority, the Airport Authority of India, not being available, the opposite party has been in default of its obligations under the ATS qua the complainants. Its arguments that the part OC is, in fact, the only relevant OC for possession, cannot be accepted or give it any modicum of support since the ATS mandates otherwise. The Hon'ble Supreme Court has held in* ***United India Insurance Co. Ltd. Vs, Harchand Rai Chandan Lal****, (2004) 8 SCC 644,* ***Suraj Mal Ram Niwas Oil Mills Pvt, Ltd. Vs. United India Insurance Co. Ltd.****., (2010) 10 SCC OnLine SC 628* ***and Canara Bank Vs. United India Insurance Co. Ltd. & Anr.****., (2020) 3 SCC 455 that a contract has to be interpreted strictly in the terms of the contract and that the legal obligations of the parties to the contract cannot be altered as it would amount to re-writing the contract. The contention of the opposite party does not merit consideration in view of the settled position of law in view of the above judgments and the fact that the opposite party's interpretation regarding the occupation certificate and offer of possession runs contrary to the provisions of the ATS which sets out the contractual obligations of the parties.*

33. *As regards the contention of the opposite party that the complainants do not have a cause of action, it is evident that the ATS had stipulated an offer of possession on 31.12.2015 or 31.12.2016 with grace period for fit outs and thereafter for occupation, with occupation certificate, on 29.07.2017. The offer of possession for fit out dated 25.12.2018 does not constitute a legal offer of possession for occupation as claimed by the opposite party as the OC is constrained by contractual clauses in the ATS, which is the opposite party's own document. As laid down by the Hon'ble Supreme Court in* ***M.K. Gupta*** *(supra), the absence of a valid offer of possession constitutes a continuing cause of action. The complaint is therefore maintainable.*

34. *The contention of the opposite party that the complainants are guilty of suppressio veri, suggestio falsi in (a) not disclosing in the complaint that an offer of possession had been made by the opposite party to it on 25.12.2018 for fit outs as per clauses 11.1 and 11.2 of the ATS or (b) that under clause 11.5 the opposite party was entitled to a further reasonable period of time in case of delay in handing over possession, (c) that an occupation certificate dated 29.07.2017 for floors up to the 43rd floor had been granted to the opposite party has also been considered. The provisions of clauses 11.1 and 11.2 of the ATS read as below:*

> *11. <u>FIT OUT AND POSSESSION</u>*
>
> *11.1* ***Subject to the Purchaser not being in breach of any of the terms*** *hereof and the Purchaser having paid all the dues and amounts hereunder including the Total Consideration,* ***the Company shall endeavour to provide the Unit to the Purchaser for fit outs on or before the dates as set out in Annexure "2" hereto****. The*

> ***Company shall endeavour to make all necessary submissions to obtain the occupation certificate in respect of the Unit*** *of the Building and make available the key common Areas and Amenities in respect of the Building* ***within a period of I (One) year from the date of Offer of Possession (for Fit Outs)*** *as set out in Annexure "2" hereto* ***and this shall be deemed to be the final possession of the Unit****.*
>
> *11.2 The Company shall without being liable to the Purchaser, be entitled to a grace period of 1 (One) year beyond the aforesaid dates mentioned in the Clause 11.1. The date on which the occupation certificate is issued (or deemed to be issued as per the relevant provisions of legislation) shall be deemed to be the "Date of Offer of Possession."*
>
> *(Emphasis added)*

35. *From the above, it is manifest that the opposite party is required to first offer possession on the basis of an OC for the purpose of fit outs with a grace period of 1 year. Thereafter, following the end of the grace period, opposite party was required to offer of possession for the purpose of occupation for residence, within one year from the end of the period of 1 year, with the provision of another year's grace period. There is thus a clear scheme of first offering possession for the purpose of fit outs and thereafter for occupation. This two-stage occupancy is envisaged in the ATS proposed by the opposite party itself. This provision is amplified further under clauses 20(t) and 20(u) of the ATS which state as under:*

> ***20(t):*** *The purchaser acknowledge that as on the date of Offer of Possession (for fit outs), works in the Unit shall be complete and the Unit shall have regular water and electricity supply, as well as lift access. There may be certain works which may be ongoing in the Building/Property at such time but all due care shall be taken to ensure that the fit outs of the Unit are not affected in any manner by such works.* ***It is clarified that the Offer of Possession (for fit outs) entitles the Purchaser to carry on interior and other related works in the Unit but does not entitle the said unit to be occupied till such time that the Occupation Certificate is received in relation to the said Unit.***
>
> ***20(u): The purchaser shall not sell, lease, let, sub-let, transfer, assign or part with Purchaser's interest or benefit under this Agreement or part with the Possession of the Unit till such time that the occupation certificate of the Units is received****, all the payments payable by the Purchaser are paid in full and the Purchaser is not in breach of any of the terms and conditions of this Agreement. Any sale/transfer of the Unit after this time shall require written approval from the Ultimate Organization (and till such time that the Ultimate Organization is formed, of the Company) to ensure that the inherent nature of the society is not compromised by bringing in any member who does not subscribe to the guidelines and/or objectives of the Ultimate Organization. Any document for sale/transfer/lease etc. which is entered into without obtaining written approval of the Ultimate Organization (and till such time that the Ultimate Organization is formed, of the Company) shall not be valid and not binding on the Company.*
>
> *(Emphasis added)*

In view of the provisions of these clauses, it is clear that the occupancy certificate for fit outs was not intended for the purpose of occupation. It was merely for the purpose of undertaking fit outs of the flats as per the requirements of the allottees preparatory to occupation. The reliance of the opposite party to the judgment of the Bombay Hon'ble High Court in ***Sanjay Phulwaria*** *(supra) is of no avail since this judgment makes it clear that a provision under the Development Regulations of the MMRDA cannot put over 700 occupants to serious prejudice and is therefore, distinguishable from the instant case. An allottee cannot be faulted or non-suited for seeking legal possession which is based on a final or 'full' OC and not a part OC which permits only the undertaking of fit outs of expensive flats in a projected that has been projected to be a unique project. Such an argument would be patently unfair and unjust. The OC dated 29.07.2017 cannot, therefore, be construed and accepted as the final OC as the learned counsel for the opposite party would have us believe.*

36. It is manifest that the "World Tower" project was marketed as a *sui generis* project with unique and exclusive features that provided it with an attractive USP for the relevant clientele. However, by its own admission, the housing scheme only had approval of the MCGM whereas the AAI, the relevant competent authority for the NOC for the height, had cleared the project as on 19.07.2010 for 176.101 meters AGL or 180.89 meters AMSL which was revised on 26.03.2015 for 285.06 AMSL for one building and 179.24 meters AMSL for four buildings. Even though the allotted flat of the complainants was covered under the permitted height clearance, the opposite party did not clarify the issue and kept assuring the complainants that necessary approvals and OC will be available shortly based on which possession would be given. It further proceeded to argue for a revised system for OC and moved the High Court for the provisional OC to be the only OC required. In doing so, it has attempted to re-write the contract between the parties which has been held in a catena of judgments of the Hon'ble Supreme Court and this Commission to be violative of the Contract Act, 1872.

37. Reliance of the opposite party on clause 11.5 to claim that the delay was on account of reasons beyond its control and therefore covered under *force majeure* circumstances has been considered. Clause 11.5 reads as under:

> 11.5. Notwithstanding the provisions here of the Company shall without being liable to the Purchaser be entitled to reasonable extension of time for making available the Unit for fit out or completion of the set building beyond the

aforesaid dates mentioned in Clause 11 if the same is delayed for reasons beyond the control of the company including on account of:-

(i) Non availability of steel, cement, other building material, water or electric supply, or

(ii) Labour problems, shortage of water supply or electric power or by reason of any act of God, or

(iii) non delivery of possession is as a result of any notice, order, rule or notification of the Government and/or any other public or Competent authority or of the Court or on account of delay in issuance or non-issuance or receipt of NOCs, Licences, Occupation Certificate, Approvals etc, or non-availability of essential amenities, services and facilities such as lifts, electricity and water connections or sewage or drainage lines or for any other reason technical or otherwise or for any reason beyond the control of the Company, or

(iv) Economic Hardship

(v) Delay in receipt of documents and/or Approvals.

The opposite party's submission is that the delay was on account of the AAI's inability to provide the necessary clearance and not for reasons attributable to it cannot be accepted. It is evident that the project was launched on the basis of approvals based on a height clearance of 180.89 mtrs. AMSL that did not permit a 117 storied building as advertised. The AAI has rightly not accorded approval for a building that exceeds the requisite approval. Consequently, the occupancy certificate for residing in the building is also not available. The delay in offer of possession cannot be ascribed to any of the conditions in clause 11.5. The contention of the opposite party that the occupancy certificate is valid is not sustainable as it is clearly only for the purpose of fit outs and not for residing. The argument that the part OC be considered as the final OC is also not valid since the ATS mandates it differently in clauses 20(t) and (u). The opposite party is clearly in default in not making an offer of possession for residing in the apartment as it is required to do. The argument that the offer of possession for fit outs is equivalent to a final offer of possession is unacceptable and, seen conjointly with its offer for rental support @ Rs 2,50,000/- a month which is offered outside the terms of the ATS, is a clear admission of deficiency in service.

38. The contentions of the opposite party that there was no necessity for a final Occupancy Certificate have been considered in detail. His reliance on ***Sanjay Phulwaria*** (supra) cannot be appreciated in view of the fact that the facts of this case are distinguishable from the instant case. In ***Sanjay Phulwaria*** (supra), there was no promise of a building of a unique number of floors and the necessary approvals of AAI were in place which are lacking in the present case. This contention of the opposite party is contradicted in various communications of the opposite party to the complainant dated 04.12.2017 relied upon by the opposite party itself which state that the possession is being offered for the purpose of fit outs alone and not for occupation for residential purpose which will be provided subsequently. There is, significantly, no mention regarding the proposed date for the same. The communications of the opposite party are in line with the provisions of the ATS in sections 20(t) and 20(u) which are now sought to be distanced from by the opposite party.

39. *As is evident from the facts of this case, the opposite party has not been able to offer possession even after nearly 7 years of the promised date of handing over possession. In view of the fact that the opposite party has failed to discharge its contractual obligations of offering possession of the same based upon a valid occupation certificate and given the fact that in the absence of a NOC from the competent authority, the AAI, the construction of the tower to the promised 117 floors is not likely to be completed in the near future. The complainants cannot be prejudiced on the ground that the opposite party has failed to obtain the requisite height clearances. The projection of the project on the basis of approval of the MCGM without the approval/NOC of the AAI constitutes an unfair trade practice to 'promote' and market a project that was ab initio not cleared for the projected height. The offer of a part OC that is presented as the final OC by the opposite party is a clear case of both unfair trade practice under section 2(r) and deficiency in service under section 2(g) of the Act. The* Hon'ble Supreme Court has laid down 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 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 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.The Hon'ble Supreme Court also held *in* ***Kolkata West International City Pvt. Ltd.*** **(supra)** that

> "*It would be manifestly unreasonable to construe the contract between the parties as requiring the buyer to wait indefinitely for possession. By 2016, nearly seven years had elapsed from the date of the agreement. Even according to the developer, the completion certificate was received on 29 March 2016. This was nearly seven years after the extended date for handing over of possession prescribed by the agreement. A buyer can be expected to wait for possession for a reasonable period. A period of seven years is beyond what is reasonable. Hence, it would have been manifestly unreasonable to non-suit the buyer merely on the basis of the first prayer in the reliefs sought before the*

SCDRC. There was in any event a prayer for refund. In the circumstances, we are of the view that the orders passed by SCDRC and by the NCDRC for refund of moneys were justified."

40. It is evident that there is no offer of possession by the opposite record on record even as on date. The argument that the occupation certificate dated 29.07.2017 is the basis for the final offer of possession is a fallacious argument that cannot be accepted in view of the contractual position in the ATS. The argument that the 'part' OC is the 'final' OC cannot also be accepted since it does not convey either occupation/residing rights nor legal title to the apartment as per clause 20 (t) and clause 20(u).

41. In the present case, the complainant booked the flat in 2014 and was promised possession on 31.12.2015. Reckoned from this date the delay is delay is of nearly 6 years. In the facts and circumstances of the case, considering that the likelihood of legal offer of possession is remote in view of the absence of the requisite NOC for the proposed height of the building, seeking refund with compensation for delay is not unjustified.

42. It is manifest that despite the ATS being a registered document, the opposite party has failed to adhere to the commitments made thereunder. Rather, there have been wilful defaults that the opposite party has not disclosed to the complainants. It has instead chosen to convey a rosy picture to the complainants and not inform them of the true state of the lack of statutory approvals and objections of agencies such as the Airport Authority of India with regard to the height of construction permitted. Opposite Party has consistently mentioned in its own communications to the complainants that it would be offering possession for fit outs and has subsequently, in a *volte face,* argued that the part occupation certificate dated 29.07.2017 received from the Municipal Corporation of Greater Mumbai (MCGM) was the required occupancy certificate for residing in the project on the basis of *the judgment of the Hon'ble High Court in* ***Sanjay Phulwaria*** *(supra) which as analysed above is not applicable since that* project had all requisite approvals and there was no delay on account of any NOC from a statutory department while the present case suffers from such deficiencies. No document has been brought on record to explain why the construction of the building was stalled at the 80th floor or why the occupation certificate was available for up to 43 floors only. In the absence of a clear picture being presented before the complainants, the inability to decide between seeking possession or refund can be condoned. In view of there not being any approval regarding the number of floors to be constructed because of the AAI's NOC not being available and the offer of possession on the basis of a part occupation certificate which as per the ATS gives no legal right to the complainants, it cannot be disputed that the complainants were not within their rights to seek refund of their money with interest by way of compensation along with other reliefs.

43. *For the reasons stated above, the contentions of the opposite party cannot be appreciated. There is no protection to him under either clauses 6.1, 11.1, 11.2 or 11.5 or 20(t) and 20(u) of the ATS which is admittedly a document prepared by it. The reliance on Clause 11.3 requiring the termination of the agreement within 90 days of the end of the grace period for possession is also no avail to the opposite party in view of the fact that the opposite party itself kept altering the date of possession for fit-outs. The moot question in this case is the No Objection Certificate from the Airport Authority of India relating to the height the building can be constructed up to. Admittedly, the opposite party requires an NOC for 501.330 meters AMSL for constructing 117 floors. However, the NOC available is for 285.06 meters AMSL, as revised from 180.89 meters AMSL on appeal before the Appellate Authority of AAI on 26.03.2015. As a consequence, there is no clarity on the number of floors the project will eventually have as, admittedly, the issue of height clearance related NOC is before the ICAO. As construction cannot proceed in the absence of the NOC, the issue of Occupation Certificate cannot be resolved in the foreseeable future. The apartment in question was booked in 2013 and only a part occupation certificate for fit outs is being offered as late as after 7 years in 2016. In view of the Hon'ble Supreme Court laying down in* ***Samruddhi Co-operative Housing Society Ltd.*** *(supra) that:*

> *"In the present case, the respondent was responsible for transferring the title to the flats to the society along with occupancy certificate.* ***The failure of the respondent to obtain the occupation certificate is a deficiency in service for which the respondent is liable. Thus, the members of the appellant society are well within their rights as 'consumers' to pray for compensation as a recompense for the consequent liability*** *(such as payment of higher taxes and water charges by the owners) arising from the lack of an occupancy certificate."*

As allottees in a premier, iconic project the complainants cannot be compelled to accept possession and are entitled to seek refund of the money deposited. As held by the Hon'ble Supreme Court in ***Kolkata West International City Pvt. Ltd.*** *(supra), the period of delay is inordinate and an allottee cannot be made to wait indefinitely for possession. As also held by the Hon'ble Supreme Court in* ***Govindan Raghavan*** *(supra) and* ***Trevor D'Lima*** *(supra) the termination of the contract and seeking of refund of money deposited with compensation in cases where there was inordinate delay in offering possession was justified. In the instant case, both unfair trade practice and deficiency in service are established on part of the opposite party. The contention of the opposite party that the occupation certificate for fit outs is the final OC and therefore is the final offer of possession cannot be accepted as a fair assertion. Not only is this contention entirely contrary to the terms and conditions of the ATS which is the opposite party's own document and contrary to its own communications to the complainant but is also a completely misleading argument to cover up the reasons for default and delay and is evidence of unfair trade practice and deficiency in service. It is also evident that the claim of protection under the force majeure conditions under Clause 11.5 is unsustainable since this was not a sudden or unforeseen event but was in the knowledge of*

the opposite party since inception of the project since the NOC for height clearance was not available ab initio to execute a 117 storied building. Unfair trade practice and deficiency in service are writ large on the opposite party. The complaint is, therefore, found to have merits and is liable to succeed.

44. *The Hon'ble Supreme Court has in various judgments held that complainants are entitled to compensation that is just and fair. The Hon'ble Supreme Court has held in* ***Experion Developers Pvt. Ltd. Vs. Sushma Ashok Shiroor****, C.A. No. 6044 of 2019 decided on 07.04.2022 that the compensation by way of interest has to be both compensatory as well as restitutionary. The principle of compensation is well established in matters relating to deficiency in service and unfair trade practice under the Act. It cannot, however, be one for profit but must adequately compensate the complainant. Quantification of compensation for pecuniary loss and consequential harassment is done by way of a suitable rate of interest on the amount paid, whether in lumpsum or through instalments. Interest @ 9% was held as justified in* ***Wg Cdr Arifur Rehman*** *(supra) and in* ***Balbir Singh*** *(supra) it was held that:*

> *"8. However, the power and duty to award compensation does not mean that irrespective of the facts of the case compensation can be awarded in all matters at a uniform rate of 18% per annum. As seen above,* ***what is being awarded is compensation i.e. a recompense for the loss or injury. It therefore necessarily has to be based on a finding of loss or injury and has to correlate with the amount of loss or injury****. Thus, the Forum or the Commission must determine that there has been deficiency in service and/or malfeasance in public office which has resulted in loss or injury. No hard and fast rule can be laid down …"*
>
> *(Emphasis added)*

Payment of compensation under multiple heads has been deprecated by the Hon'ble Supreme Court in various judgments, notably ***DLF Home Panchkula Pvt. Ltd. Vs. DS Dhanda & Ors,*** *Civil Appeal No. 4910-491 of 2019 decided on 10.05.2019****.*** *However, the Apex Court laid down that compensation be commensurate with facts of each case. In this view of the matter, the compensation and claim for damages need to be viewed differently and the contention of the complainants considered appropriately.*

45. *It is also evident that the complainants have obtained bank loans and in order to service the commitments have switched the loan to other banks. Compensation at a rate of interest that indemnifies the complainant against the loss due to interest paid cannot be considered excessive or for profit.*

46. The complainant has also submitted that he had obtained loan for the apartment in question and had been paying interest on it at very high rates and that in order to mitigate the hard-ship on account of servicing of this loan he had from time to time switched the loan from one bank to another as follows:

	4001	
Date	**Rate of Interest**	**Bank from which loan taken**
November 2014	12.25%	DHFL
January 2016	9.50%	Aditya Birla Housing Finance
July 2016	9.30%	Axis Bank

The rate of interest paid justifies a commensurate rate of interest as compensation**.**

Accordingly, compensation @ 12% p.a. from the date of deposit till the date of order is felt to be reasonable. Any compensation lesser than this amount would not be restitutionary.

47. For the aforesaid reasons, in the facts and circumstances of this case, we find merit in the complaint and the same is accordingly allowed. The opposite party is found liable for unfair trade practice under section 2(1)(r) of the Act in promoting a project without the requisite statutory approvals and of deficiency in service under section 2(11) in not offering possession of the flat on 30.11.2015 and instead offering part possession on 15.10.2019. Accordingly, this complaint is allowed in part and disposed of with the following directions:

(i) opposite party shall repay the complainant the sum of Rs 13,06,59,748/- with compensation in the form of simple interest @ 12% p.a. from the respective dates of deposit till the date of this order;

(ii) opposite party shall pay this amount within 8 weeks of this order failing which the applicable rate of interest will be 15% p.a. till realization;

(iii) opposite party shall also pay the complainant litigation cost of Rs 50,000/-.

48. (a) <u>CC No. 3582 of 2017</u>

(i) Flat no. 1301 in East Wing (3 BHK), 13th Floor, "The World Crest", Upper Worli, Mumbai admeasuring 2065 sq ft including two car parking was booked by Mr. Anshul Agarwal on 05.12.2012 for a total consideration of Rs.9,51,16,644/-. Allotment letter was issued on 18.01.2013 and as per ATS dated 02.08.2013 delivery was promised on 30.11.2014. Rs.9,84,99,012/- (excluding interest and service tax) was paid to the opposite party. Possession for fit outs was offered by opposite party on 08.06.2016 based on Part Occupation Certificate dated 30.05.2016. This building was required to have 53 floors as per the ATS. However, based on the NOC issued by the Mumbai Fire Brigade, as enhanced by the Appellant Authority of MFB the height permitted is 213.35 meters AMSL, i.e. for 61 floors.

(ii) The opposite party has failed to comply with contractual obligations in respect of both the number of floors promised to be constructed as well as in handing over valid legal possession as per the ATS registered between the parties which contained the same terms and conditions as in the ATS registered in CC 3582/2017. For the reasons stated in order relating to CC No. 3583 of 2017, opposite party is guilty of deficiency in service in not complying with contractual obligations to hand over possession on the stipulated date of delivery. The

(iii) Opposite party is accordingly ordered to refund Rs 9,84,99,012/- with 12% simple interest compensation from the respective dates of deposit till the date of this order within 8 weeks to the complainant, failing which, with interest @ 15% till realization along with litigation costs of Rs 50,000/-.

The complainant has also submitted that he had obtained loan for the apartment in question and had been paying interest on it at very high rates and that in order to mitigate the hard-ship on account of servicing of this loan he had from time to time switched the loan from one bank to another as follows:

	1301	
Date	**Rate of Interest**	**Bank from which loan taken**
September 2013	12.25%	DHFL
October 2014	10.35%	Axis Bank
September 2022	7.80%	Standard Chartered Bank

The rate of interest paid justifies a commensurate rate of interest as compensation**.**

(b) <u>CC No. 323 of 2018</u>

(i) Flat no. E 1103 admeasuring 2002 sq ft in East Wing (3 BHK), 11th Floor, "The World Crest", Upper Worli, Mumbai including two car parking was booked by Mr. Mukesh Kumar Gupta on 05.12.2012 for a sale consideration of Rs.9,42,85,620/-. Allotment letter was issued on 18.01.2013. and as per ATS dated 03.06.2013 delivery for fit outs was promised on 30.11.2014. Rs.9,27,76,111/- was paid by the complainant to the opposite party. Based on a Part Occupation Certificate obtained by opposite party on 30.05.2016 possession for fit outs was offered on 08.06.2016. This building was required to have 53 floors as per the ATS. However, based on the NOC issued by the Airport Authority of India, as enhanced by the Appellate Authority of AAI, the height permitted is 179.24 meters AMSL, i.e. for 61 floors. In the written arguments filed by the complainant on 07.08.2023, the complainant has sought refund of the amount of Rs.10,27,76,111/- (including Rs 1,00,00,000/- deposited as per direction of this Commission) with interest of 18% per annum which was paid as part of the total consideration from the date of respective deposits.

(ii) The complainant had prayed for direction to refund the amount of Rs.9,27,76,111/- with compensation as interest @ 18% p.a. or alternatively, to direct handing over of legal possession of the apartment. As per this Commission's orders dated 11.02.2019 and 13.02.2019 in IA 886/2019, Rs 1,00,00,000/- was paid to the opposite party and possession taken over for fit out on 05.03.2019. This amount was over and above the sale consideration agreed upon between the parties as per the ATS. It therefore reflects the earnestness of the complainant to occupy the apartment. However, complainant alleges there was a shortfall of 586 sq ft in the carpet area handed over. It was argued during oral submissions that there was a delay of 9 years in view of failure on part of opposite party to obtain Full Occupation Certificate since 30.05.2016 and this possession was not legally valid as the complainant was not entitled to reside in the flat as per Clause 6.4 read with Clause 20(t) and 20(u) of the ATS and did not constitute legal possession entitling him to reside in the flat. Consequently, alleging that contractual obligations have not been complied with by the opposite party, the complainant has argued for refund of the money deposited towards the sale consideration with compensation @ 18% interest based on reciprocity with the 18% penal interest charged by opposite party for default under Clause 19 and to return possession of the flat as it conveyed no legal rights. Opposite party has claimed that complainants did not terminate the ATS under section 11.3 and therefore are not entitled to refund and that there was no shortfall in carpet area as the area of balconies which as per MOFA was part of the carpet area required to be included. It

was argued that the complainant has altered his prayer based upon the shift in real estate prices and that he is a speculative investor and not a 'consumer' under the Act.

(iii) It is manifest that the opposite party has failed to comply with contractual obligations in respect of both the number of floors promised to be constructed as well as in handing over valid legal possession as per the ATS registered between the parties which contained the same terms and conditions as in the ATS registered in CC 3582/2017.. The possession handed over is therefore *non est.* For the reasons stated in order relating to CC No. 3583 of 2017, opposite party is guilty of deficiency in service in not complying with contractual obligations to hand over possession on the stipulated date of delivery. In any case, there was a prayer for refund.

(iv) Opposite party is accordingly ordered to refund Rs.10,27,76,111/- (inclusive of Rs 1,00,00,000/- paid at the time of taking possession) with 12% simple interest compensation from the respective dates of deposit till the date of this order within 8 weeks failing which with interest @ 15% till realization along with litigation costs of Rs 50,000/-.

The complainant has also submitted that he had obtained loan for the apartment in question and had been paying interest on it at very high rates and that in order to mitigate the hard-ship on account of servicing of this loan he had from time to time switched the loan from one bank to another as follows:

	1103	
Date	**Rate of Interest**	**Bank from which loan taken**
March 2013	10.75%	PNB Housing Finance
July 2016	9.35%	ICICI Bank
March 2019	8.75%	Federal Bank

The rate of interest paid justifies a commensurate rate of interest as compensation.

49. CC 3582/2017 and CC 323/2018 are also disposed of in terms of the directions in the lead case of CC 3583/2017 as per the foregoing paragraphs. Pending IAs, if any, also stand disposed of with this order.

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SUBHASH CHANDRA
PRESIDING MEMBER