

**IN THE DELHI STATE CONSUMER DISPUTES REDRESSAL
COMMISSION**

Date of Institution: 24.04.2017

Date of hearing: 26.05.2022

Date of Decision: 05.07.2022

COMPLAINT CASE NO.- 774/2017

IN THE MATTER OF

SHRI NEERAJ KAKKAR

S/o Late V.N. Kakkar

Aged 44 years,

R/o 6942 Roberts Park Dr. Mason

OH 45040, USA

(Through: Shlok Chandra, Advocate)

...Complainant

VERSUS

M/S PARSVANATH DEVELOPERS LTD.

6th floor, ARUNACHAL BUILDING,

19, BARAKHAMBA RD, New Delhi 110001

(Through: Mr. Rakesh Bhardwaj & T.P Chauhan, Advocate)

...Opposite party

CORAM:

**HON'BLE JUSTICE SANGITA DHINGRA SEHGAL
(PRESIDENT)**

HON'BLE SH. RAJAN SHARMA, MEMBER (JUDICIAL)

Present: None for the Parties.

**PER: HON'BLE JUSTICE SANGITA DHINGRA SEHGAL
(PRESIDENT)**

JUDGMENT

1. The present complaint has been filed by the Complainant before this commission alleging deficiency of service by the Opposite party and has prayed the following:

- a) *Direct the Opposite Party to return the principal amount paid by the Complainant to the Opposite Party along with 18% interest from the date of receipt of such amounts.*
- b) *Direct the Opposite Party to pay damages in a sum of Rs. 10 lakhs to the Complainant for the mental agony, undue hardship, and distress.*
- c) *Direct the Opposite Party to pay litigation costs to the Complainant for a sum of Rs. 5 lakhs; and*
- d) *Pass such other and further orders which this Hon'ble Commission may deem fit and proper in the circumstances of the case.*

2. Brief facts necessary for the adjudication of the present complaint are that Complainant booked a flat bearing no. T8-1203 with the opposite party in the project 'Parsvnath Privilege' being developed at Plot No. 11 in Sector Pi, Greater Noida, Uttar Pradesh. Complainant made an advance payment of Rs.10,00,000/- to the Opposite Party and subsequently, Opposite Party vide the

allotment letter dated 23.02.2007, issued the said flat to the Complainant. Thereafter, a Flat-Buyer Agreement was executed between the parties on 23.06.2007. As per Clause 10 (a) of the Flat Buyer Agreement dated 23.06.2007, the Opposite Party has to complete the construction of the said flat within 36 months from the date of commencement of construction of the particular block in which the flat is located. Thereafter, a letter dated 10.06.2010 was sent by the Opposite Party to the Complainant, informing about the delay and assured the complainant that the project would be completed by March, 2012. However, till date the construction of the said flat has not been completed by the Opposite Party.

3. The Complainant over the time had paid a sum of Rs. 36,98,996/- to the Opposite Party as and when demanded by it. The Complainant had followed up with the Opposite Party asking for possession of the said flat or in alternative refund of the amount alongwith interest but was of no avail. The Complainant also got served a legal notice dated 23.02.2017 to the Opposite Party regarding the refund of amount already paid by him along with interest but Opposite Party failed to respond to the said notice. Therefore, alleging deficiency in service on the part of the Opposite Party, the Complainant approached this Commission.
4. The Opposite Party has contested the present case and has raised preliminary objections as to the maintainability of the complaint case. The counsel of the Opposite Party submitted that the Complainant is not consumer under the Consumer Protection Act, 1986 as they invested the money to earn profit, which amounts to commercial purpose. He further submitted that the Complainant has no cause of action to file the present complaint.

5. The counsel for the Opposite Party further contended that the delay, if any, occurred on account of global recession and the liability of the Opposite Party on account of delay is duly provided as per Clause 10(c) of the Flat Buyer Agreement and therefore, this commission does not have the jurisdiction to adjudicate the present complaint. Pressing the aforesaid objections, the counsel appearing on behalf of the Opposite Party prayed that the complaint should be dismissed.
6. The Complainant has filed the Rejoinder rebutting the written statement filed by the Opposite Party. Both the parties have filed their Evidence by way of Affidavit in order to prove their averments on record.
7. We have perused the material available on record and heard the counsel for the Opposite Party.
8. The fact that the Complainant booked a flat with the Opposite Party is evident from the Flat Buyer Agreement dated 23.06.2007. Payment to the extent of Rs. 36,98,996/- has been made by the Complainant is also not disputed by the Opposite Party.

**WHETHER THE COMPLAINANT IS 'CONSUMER' UNDER
THE CONSUMER PROTECTION ACT, 1986?**

9. The Opposite Party contended that the Complainant is not 'Consumer' as defined under the Consumer Protection Act, 1986 as they invested the money to earn profit, which amounts to commercial purpose. To resolve this issue, we deem it appropriate to refer to *Aashish Oberai Vs Emaar MGF Land Limited* reported in *I (2017) CPJ 17(NC)* wherein it is held as under:

"6.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 houses or plots. In a given case, separate houses may be purchased by a person for the individual use of his family members. A person owning a house in a city A may also purchase a house in city B for the purpose of staying in that house during short visits to that city. A person may buy two or three houses if the requirement of his family cannot be met in one house. Therefore, it would not be correct to say that in every case where a person owns more than one house, the acquisition of the house is for a commercial purpose.”

10. It is imperative to refer to the dicta of the Hon’ble National Commission in **CC-1122/2018** titled **Narinder Kumar Bairwal and Ors. vs. Ramprastha Promoters and Developers Pvt. Ltd. and Ors.** decided on **01.11.2019**, wherein, the Hon’ble National Commission has held as under:

“19. The contention of the Learned Counsel that the said Flats were purchased for commercial purpose is not supported by any documentary evidence as the onus shifts to the Opposite Parties to establish that the Complainant have purchased the same to indulge in 'purchase and sale of flats' as was held by this Commission in Kavit Ahuja vs. Shipra Estates I (2016) CPJ 31. The Opposite Parties failed to discharge their onus and we hence hold that the Complainant are 'Consumers' as defined under Section 2(1)(d) of the Act.”

11. From the aforesaid dicta of the Hon’ble National Commission, it flows that it is for the Opposite Party to prove that the flat purchased was for commercial purpose, by way of some documentary proof and a mere bald statement is not sufficient to raise adverse inference against the Complainant.

12. In the present case, the Opposite Party has merely made a statement that the Complainant purchased the flat for commercial purpose and on perusal of the record before us, we fail to find any material which shows that the Complainant is engaged in the business of purchasing and selling houses and/or plots on a regular basis, solely with a view to make profit by sale of such flats. Mere allegation, that the purchase of the property is for commercial purpose, cannot be the ground to reject the present consumer complaint. Consequently, the objection raised on behalf of the Opposite Party is answered in the negative.

**WHETHER ANY CAUSE OF ACTION HAS ARISEN IN
FAVOUR OF COMPLAINANT TO APPROACH THIS
COMMISSION?**

13. The next question for adjudication before us is whether the Complainant has any cause of action to approach this Commission. The facts reveal that the Flat Buyer Agreement was executed between the parties on 23.06.2007, wherein the construction of the said flat was to be completed by the Opposite Party within 36 months from the date of commencement of construction of the particular block in which flat is located. However, the construction of the said flat in question is still incomplete.

14. We further deem it appropriate to refer to **Mehnga Singh Khara and Ors. Vs. Unitech Ltd.** as reported in **I (2020) CPJ 93 (NC)**, wherein the Hon'ble National Commission has held as under:

“It is a settled legal proposition that failure to give possession of flat is continuous wrong and constitutes a recurrent cause of action and as long as the possession

is not delivered to the buyers, they have every cause, grievance and right to approach the consumer courts.”

15. Applying the above settled law, it is clear that the Complainant is within their right to file the present complaint as the possession and completion of construction are still pending and has not seen the light of the day; giving the Complainant a recurrent cause of action to file the present complaint.

OPPOSITE PARTY- WHETHER DEFICIENT IN PROVIDING SERVICES?

16. Having discussed the preliminary objections raised on behalf of the Opposite Party, the next issue which arises is whether the Opposite Party is actually deficient in providing its services to the Complainant or not. The expression Deficiency of Service has been dealt with by the Hon'ble Apex Court in *Arifur Rahman Khan and Ors. vs. DLF Southern Homes Pvt. Ltd. and Ors.* reported at **2020 (3) RCR (Civil) 544**, wherein it has been discussed as follows:

“23.The expression deficiency of services is defined in Section 2 (1) (g) of the CP Act 1986 as:

(g) "deficiency" means any fault, imperfection, shortcoming or inadequacy in the quality, nature and manner of performance which is required to be maintained by or under any law for the time being in force or has been undertaken to be performed by a person in pursuance of a contract or otherwise in relation to any service.

24. A failure of the developer to comply with the contractual obligation to provide the flat to a flat purchaser within a contractually stipulated period amounts to a deficiency. There is a fault, shortcoming or inadequacy in the nature and manner of performance which has been undertaken to be performed in pursuance of the contract in relation to the service. The expression 'service' in Section 2(1) (o) means a service of any

description which is made available to potential users including the provision of facilities in connection with (among other things) housing construction. Under Section 14(1)(e), the jurisdiction of the consumer forum extends to directing the opposite party inter alia to remove the deficiency in the service in question. Intrinsic to the jurisdiction which has been conferred to direct the removal of a deficiency in service is the provision of compensation as a measure of restitution to a flat buyer for the delay which has been occasioned by the developer beyond the period within which possession was to be handed over to the purchaser. Flat purchasers suffer agony and harassment, as a result of the default of the developer. Flat purchasers make legitimate assessments in regard to the future course of their lives based on the flat which has been purchased being available for use and occupation. These legitimate expectations are belied when the developer as in the present case is guilty of a delay of years in the fulfilment of a contractual obligation.

17. At this stage, we deem it appropriate to refer to clause 10 (a) of the Flat Buyer agreement dated 23.06.2007 entered into by both the contesting parties. It reflects that the Opposite Party was bound to complete the construction of the said flat within 36 months from the date of commencement of construction of the particular block in which flat is located. However, till date the construction of the said flat has not been completed by the Opposite Party.
18. Relying on the above settled law, we hold that the Opposite Party is deficient in providing its services to the Complainant as the Opposite Party had given false assurance to the Complainant with respect to the time for completing the construction of the said flat and kept the hard-earned money of the Complainant. Moreover, the Opposite Party failed to reimburse the amount to the Complainant as provided in the agreement dated 23.06.2007.

19. Further, the Opposite Party submitted that the clause 10(c) of the Flat Buyer Agreement duly protects the rights of the Complainant in case of delay in project. We deem it appropriate to refer to **Clause 10(c)** of the Flat Buyer Agreement, which states as under:-

“In case of delay in construction of the flat beyond the period as stipulated subject to force majeure and other circumstances as aforesaid under clause 10(a), the Developer shall pay to the buyer compensation @53.82/- per sq. meter or @Rs. 5/- per sq. ft. of the super area of the flat per month for the period of delay.”

20. To resolve this issue, we deem it appropriate to refer to the case of **Mehnga Singh Khera and Ors. Vs. Unitech Ltd.** as reported in **I (2020) CPJ 93 (NC)**, wherein the Hon’ble NCDRC has held as under:

“Payment of a nominal compensation such as Rs. 5/- per square feet of the super area has become the order of the day in contracts designed by big builders and a person seeking to buy an apartment is left with no option but to sign on the dotted lines, since the rejection of such a term by him would mean cancellation of the allotment. No reasonable person would volunteer to accept compensation constituting about 2-3% of his investment in case of delay on the part of the builder, when he is made to pay compound interest @18% p.a. for delay on his part in making payment. It can hardly be disputed that a term of this nature is wholly one sided, unfair and unreasonable.”

21. Relying on the above settled law, we are of the considered view that clause 10(c) of the Flat buyer Agreement dated 23.06.2007 with respect to the payment of compensation by the Opposite Party in case of delay in completing the construction of said flat unit is wholly one sided and unfair to the Complainant.
22. Keeping in view the facts of the present case and the extensive law as discussed above, we direct the Opposite Party to refund the entire amount paid by the Complainant i.e., **Rs. 36,98,996/-** along with interest as per the following arrangement:
- A. An interest @ **6% p.a.** calculated from the date on which each installment/payment was received by the Opposite Party till **05.07.2022** (being the date of the present judgment);
 - B. The rate of interest payable as per the aforesaid clause (A) is subject to the condition that the Opposite Party pays the entire amount on or before **05.07.2022**;
 - C. Being guided by the principles as discussed above, in case the Opposite Party fails to refund the amount as per the aforesaid clause (A) on or before **05.09.2022**, the entire amount is to be refunded along with an interest @ **9% p.a.** calculated from the date on which each installment/payment was received by the Opposite Party till the actual realization of the amount.
23. In addition to the aforesaid and taking into consideration the facts of the present case, the Opposite Party is directed to pay a sum of
- A. Rs. 2,00,000/- as cost for mental agony and harassment to the complainants; and
 - B. The litigation cost to the extent of Rs. 50,000/-.

24. The opposite party is also directed not to deduct any TDS on the amount being paid/refunded. Our view is fortified by the dicta of *Bombay High Court* in the case of *Sainath Rajkumar Sarode & Ors. Vs. State of Maharashtra & Ors. reported in [2021] 283 TAXMAN 494 (Bom)*.
25. Applications pending, if any, stand disposed of in terms of the aforesaid judgment.
26. A copy of this judgment be provided to all the parties free of cost as mandated by the Consumer Protection Act, 1986. The judgment be uploaded forthwith on the website of the commission for the perusal of the parties.
27. File be consigned to record room along with a copy of this Judgment.

(JUSTICE SANGITA DHINGRA SEHGAL)
PRESIDENT

(RAJAN SHARMA)
MEMBER (JUDICIAL)

Pronounced On:
05.07.2022