

**NATIONAL CONSUMER DISPUTES REDRESSAL COMMISSION
NEW DELHI**

CONSUMER CASE NO. 1827 OF 2019

1. MONIKA BANSAL & ANR.Complainant(s)

Versus

1. TOTAL ENVIRONMENT BUILDING SYSTEMS
PRIVATE LIMITED

Through its Directors, Having its Registered Office at;
Imagine, No. 78,ITPL Main Road, EPIP Zone, Whitefield

BANGALORE-560066

.....Opp.Party(s)

BEFORE:

**HON'BLE MR. JUSTICE RAM SURAT RAM MAURYA,PRESIDING
MEMBER**

HON'BLE BHARATKUMAR PANDYA,MEMBER

FOR THE COMPLAINANT : MR. ADITYA PAROLIA, MS. PRIYA &
MS. ISHITA SINGH, ADVOCATES

FOR THE OPP. PARTY : MS. MANSVINI JAIN, ADVOCATE

Dated : 27 March 2024

ORDER

PER BHARATKUMAR PANDYA, MEMBER

1. The brief and undisputed facts of the case are that the complainant no.1, who travels all round India for the purpose of his profession including Bangalore, booked a unit in the project by the name of “Windmills of Your Mind” of OP Builder – Total Environment Building Systems Pvt. Ltd. at Bangalore as he wishes to settle there after his retirement. The total sale consideration of the unit is Rs.6,88,36,607/- and complainants booked the same by paying booking amount/registration amount of Rs.1 crore to the OP builder on 23.02.2015. After delay of almost one year and after collecting an amount of Rs.3,41,06,795/- (around 50% of total sale consideration) from them, OP Builder executed ‘Construction Agreement’ and ‘Agreement for sale’ both dated 25.01.2016 wherein OP Builder unilaterally decreased the area of the Unit from 7,292 sq. ft. to 5,924 sq. ft. Complainants were never informed regarding the decrease in area of the unit and they were made to pay the same amount of money for an area that was smaller than what they had been promised at the time of booking of the unit. Despite objections being raised by

the complainants, no satisfactory response was given by the OP builder. The complainants paid a total amount of Rs.6,86,19,422/- (90% of the total sale consideration) and despite that, OP failed to offer possession within the promised time period i.e. 30.07.2016 (excluding six months as grace period) as per agreement dated 25.01.2016. It is averred by the complainants that they had even made advance payment of one of the instalment on the assurance of the OP that interest on early payment of instalment @ 18% will be paid to them but later they backed out on their own words. OP sent a letter dated 12.12.2016 to the complainants assuring them of handing over possession of the unit by 07.10.2017 but they failed to do so. Thereafter, in February 2018, OP intimated that the Occupancy Certificate has been received, but no proof of the same was provided to them. OP again sent a letter dated 28.11.2018 assuring to complete the construction of the unit by February, 2019 but neither could the project be completed nor the possession handed over to the complainants. OP even assured the complainants that they will bear the entire incremental cost of GST and will also give them the furnishing of the unit for Rs.20 lakhs as compensation. But on those counts also OP backed out on their promises. Inordinate delay in handing over possession of the unit has frustrated the purpose of the complainants. Being aggrieved, complainants filed the present consumer complaint on 11.09.2019 before this Commission alleging deficient service from the builder and praying for the following reliefs:

Direct the OP builder to refund Rs.6,86,19,422/- paid by them along with 18% p.a. interest from the date of receipt of payments, to pay Rs.10 lakhs for mental agony, harassment and undue hardships and also to pay Rs.5 lakhs towards litigation costs.

2. The complaint was resisted by way of written statement on behalf of the opposite party. It is submitted by the OP Builder that Agreement for Sale of undivided interest in Clause 6.10 and the Construction Agreement in Clause 13.08 entered between them provide that in the event of any dispute arising out of the agreements, the same shall first be taken up by CREDAI (Confederation of Real Estate Developers Associations of India), Bangalore and if they are unable to resolve it, the same shall go for arbitration. Hence the complaint is not maintainable and is liable to be dismissed in *limine*. It is further contended by the opposite party that they have obtained Occupancy Certificate in February, 2019 and the unit purchased by the complainants is ready for occupation. Hence no question of refund now arises and complainants are at best only entitled to compensation at the agreed rate and not termination of the contract with refund. Opposite party is ready and willing to pay compensation for the period of delay beyond six months. Many reasons lead to the delay in completion of the project and the major cause was delayed payments of some instalments by the complainants, customisation of kitchen by

the complainants which took extra time and additional cost as also shortage of raw material and labour. However, extension of time was twice sought by the opposite party from the complainants and on receiving consent from the complainants, time for completion was extended till 28.02.2019. Opposite party further submitted that in view of the above, complainants are only entitled to liquidated damages as clearly set out in Clause 6.02 and 6.03 of the Construction Agreement and not for the refund of the total deposited amount.

3. In the rejoinder affidavit filed by the complainants, they have denied all the submissions and contentions made by the opposite party. It is submitted that the unit in question had been purchased by them as their retirement home and the only reason for seeking to rent out the same was to use the rental income to repay the loan they had taken to purchase the unit. It is further contended that even though opposite party obtained the Occupancy Certificate in February, 2019 itself, there is no explanation as to why they had not offered possession of the unit to them till the date of filing of the present complaint. As per the complainants, various reasons such as lack of raw material and labour do not constitute force majeure and cannot be used as a reason for delay in handing over possession of the unit.

4. Parties led their evidences by way of affidavit and filed their written statements and rejoinder. Parties also filed their synopsis of arguments. Counsels for the parties were heard at length.

5. We have considered the arguments of the counsel for the parties and examined the record. Complainants press for refund of deposited amounts with compensation and they do not press for possession of the flat as the same was not handed over till the filing of present complaint. However, as per OP builder OC was received on 24.01.2018 and the same was informed to the complainants on 02.02.2018. OP thereafter offered the possession of the unit to the complainants on 22.07.2020 i.e. after filing of the present case by the complainants, which was refused. Hence as per OP builder, complainants are not entitled for refund and are obligated to accept the possession of the unit, which has been customized as per their specifications. It was the complainant's insistence on customization that delayed the delivery of possession. Even though customization was started by the OP as early as in April, 2015 but due to repeated changes by the complainants led to delay in completion of the unit and delayed the handing over of the possession of unit. It were the complainants who had opted for a customized unit and payment was on a construction linked basis and it is unfair on the part of the complainants to held OP builder liable for delay in offering possession of the unit.

6. We have carefully considered the preliminary objections raised by the OP builder and find no merit therein. There is no bar to the allottee of a unit filing a complaint of deficient service from a builder before this Commission notwithstanding agreement for

particular mode of dispute resolution because the jurisdiction of this Commission is in addition to any other relief/proceedings to which the complainant may be entitled. It has been held by the Apex court in *Emaar MGF Land Ltd. Vs Aftab Singh 2018 SCC OnLine SC 2378* that existence of an arbitration clause in an agreement does not debar the complainant from approaching this Commission. Similarly, the fact that after taking over the possession, the allottee of a flat intends to rent out the unit does not make him any less a consumer within the meaning of section 2(1)(d) of the CP Act because an intention to rent out or actual renting out also cannot be termed to be any commercial activity. We therefore proceed to consider the complaint on merits.

7. The perusal of the documents reveal that the extended due date of possession was 31.01.2017 and that the offer of possession was first made by the OP builder as late as on 22.07.2020. Therefore, there is indeed delay of 3½ years in making offer of possession. We have also perused the email communications between the complainant and the OP builder relied upon by the OP to contend that the complainants have acquiesced in and even approved the handing over of the possession. However, it is an undisputed fact that an amount of Rs.6,86,19,422/- out of the total sale consideration of Rs.6,88,36,607/- was paid by the complainant by January, 2019, and on the date of actual extended due date of possession i.e. on 31.01.2017 a sum of Rs.5,39,65,000/- was already paid by the complainant and remaining Rs.1,46,54,423/- also stood paid before January, 2019. The OP builder has attempted to justify the delay in handing over possession by pointing out that it was the complainants who defaulted in timely payment of the instalments and that the complainants delayed communications of specifications and customisations desired by them and they kept on changing such specifications from time to time. As per the OP Builder, effectively, there is no delay in handing over the possession by the OP builders, even if there is any delay, the same has been overlooked by the complainants as is evident from email communications, and therefore, when the possession of the unit with customisation as required by the complainant has been offered on 22.07.2020, the allottee /complainant is obliged to accept the possession in view of *Ireo Grace Realtech Pvt. Ltd. Vs. Abhishek Khanna & Ors.* (2021) SCC Online SC 14. At the most the complainants may be entitled only for delay compensation after taking over of the possession which has already been duly and validly offered by the OP.

8. Admittedly there was delay in making the offer of possession on 22.07.2020 whereas the assured date of possession, with grace period, was 31.01.2017. The reasons given by the OP builder do not appear valid. In any case, a 'grace period' of 6 months was provided to the builder. It is true that the first time that the complainants have objected to or showed their dissatisfaction about the extended time taken by the OP builder in handing over the possession was as late as on 07.04.2019. Even on 11.03.2019 and 26.03.2019 (page 32,33 of OP's reply), the complainant's communications to the OP reveal that the complainants are keen on taking over the possession. However, in our considered opinion,

the allottee of a unit, having already parted with substantial part of the consideration cannot be expected to start objecting to or communicating displeasure about the non-handing over of the possession after due date. The prime consideration for such an allottee is the safety of his investment which would obviously desist him from immediately wanting refund. Therefore, we are also of the considered opinion that it is not open to the defaulting builder in relying upon the acquiescence of the allottee to justify or to dilute the consequence of delay in handing over the possession. In the present case, when the delay was already subsisting, the complainants opted for specific customization with regard to wet kitchen as per mail dated 04.12.2018 which in our opinion cannot be a factor justifying the delay of more than 3 years. Therefore, it is very much evident that there has been deficiency in service on part of the opposite party in the form of delay in the offer of possession to the complainant. OP builder assured to bear the EMIs of the loan due to inordinate delay in construction of the unit, but the same was also not abided by them and possession was not offered till the date of filing of present complaint. As there is no dispute possible with regard to the fact that the offer of possession is delayed for more than 3½ years from the dates stipulated in the agreements, the reliance by the OP builder on *Ireo Grace Realtech Pvt. Ltd. Vs. Abhishek Khanna & Ors.* (2021) SCC Online SC 14 is misplaced.

9. OP builder stated in their revised synopsis that complainants had opted for customized unit and payment was on a construction-linked plan so they were required to do customization as per the specifications given by the complainant. As per OP builder, complainants agreed to extensions of time through their emails dated 12.07.2018 and 21.09.2018 and expressed their satisfaction with the progress of the project. But being satisfied with the progress of the project does not mean that it gives liberty to the OP builder to take as much time as they wish in completing the project. They are obliged to complete the project within reasonable time even after taking some more time than asked for by them. OP builder obtained Occupancy Certificate (OC) on 24.01.2018 (Page 18 of OP's affidavit of evidence) and they offered possession to the complainants vide email dated 22.07.2020 (page 4 of OP's additional documents) whereby they invited the complainants for final inspection and handover formalities of the Unit. We are of the opinion that the date of receipt of the OC by the builder is irrelevant for the allottee if the offer of possession is not made consequent to such receipt of OC.

10. In view of the aforesaid, we are of the considered view that as there is an unreasonable delay of more than 3 years in making offer of possession, resulting into deficient service, the complainants are entitled for refund of the amount deposited by them without any obligation of taking possession of the unit belatedly offered. As per recent judgments of Hon'ble Supreme Court as well as this Commission, the complainants are entitled for their entire money with interest in cases of unreasonable delay in handing over the possession. Reliance has been placed in the case of Hon'ble Supreme Court's

judgment in *Experion Developers Pvt. Ltd. Vs. Sushma Ashok Shiroor* (2022) 15 SCC 286 wherein it was held that the consumer has the right to choose to refund of his amount and the builder is liable to return the amount with interest from the date of deposit of the amount. Complainants have also relied on the judgment of Hon'ble Supreme Court in the case of Hon'ble Supreme Court in *Pioneer Urban Land & Infrastructure Ltd. Vs. Govindan Raghavan* (2019) 5 SCC 725 wherein it is observed that flat purchaser was entitled to the relief of refund of the entire amount deposited by him with interest, if the builder failed to fulfil his contractual obligation of obtaining the occupancy certificate and offering possession of the flat to the purchase within the time stipulated in the Agreement or a reasonable time thereafter. Supreme Court in *Bangalore Development Authority Vs. Syndicate Bank*, (2007) 6 SCC 711, *Fortune Infrastructure Vs. Trevor D' Lima*, (2018) 5 SCC 442, *Kolkata West International City Pvt. Ltd. Vs. Devasis Rudra*, 2019 SCC OnLine SC 438 and *NBCC (India) Ltd. Shri Ram Trivedi*, (2021) 5 SCC 273, has held that the buyer cannot be made to wait for indefinite period for possession. Due to unreasonable delay in handing over the possession, the allottees shall be entitled for refund of the amounts deposited along with compensatory and restitutionary interest of 9% p.a. from the date of respective deposits till date of actual payments: accordingly the following order is passed.

ORDER

In view of the above discussions, the complaint is partly allowed. The opposite party is directed to refund entire amount deposited by the complainants with interest @9% per annum from the date of respective deposit till the date of refund, within a period of two months from the date of this judgment.

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RAM SURAT RAM MAURYA
PRESIDING MEMBER

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BHARATKUMAR PANDYA
MEMBER