

**NATIONAL CONSUMER DISPUTES REDRESSAL COMMISSION
NEW DELHI**

CONSUMER CASE NO. 3681 OF 2017

1. PRASHANT TELKAR AND VIJETA KALGHATGI & 51
ORS.

.....Complainant(s)

Versus

1. ND DEVELOPERS PVT. LTD. & 5 ORS.

Through :Mr MKK DURANI , MD, 398, 1st Floor, 7th
Cross, MICO Lay-out ,BTM 2nd Stage,
Bangalore-560076

2. GT VENKATASWAMY REDDY,
GUNJUR VILLAGE, VARTHUR HOBOLI,
BANGALORE EAST TALUK

3. GV NAGARAJA REDDY,
GUNJUR VILLAGE, VARTHUR HOBOLI,
BANGALORE EAST TALUK

4. GV SATISH REDDY,
GUNJUR VILLAGE, VARTHUR HOBOLI,
BANGALORE EAST TALUK

5. GV PALAKSHA,
GUNJUR VILLAGE, VARTHUR HOBOLI,
BANGALORE EAST TALUK

6. GV CHANDRA SHEKHAR
GUNJUR VILLAGE, VARTHUR HOBOLI,
BANGALORE EAST TALUK

.....Opp.Party(s)

BEFORE:

**HON'BLE MR. BINOY KUMAR,PRESIDING MEMBER
HON'BLE MR. JUSTICE SUDIP AHLUWALIA,MEMBER**

For the Complainant : Mr. Bishwajit Bhattacharya, Sr. Advocate
Ms. Narayani, Advocate
Mr. Chandrachur Bhattacharya, Advocate

For the Opp.Party : Mr. Karthik K.R., Advocate for OP-1
Mr. Kush Sharma, Advocate
Ms. Priya Choubey, Advocate for OP-4
NEMO for Others

Dated : 27 Dec 2022

ORDER

Binoy Kumar, Member

1. The present Joint Consumer Complaint (on behalf of 55 Buyers) is filed under Section 12 (1) (c) read with Section 13 (6) of the Consumer Protection Act 1986 (for short the 'Act') read with Order 1 Rule 8 of the Code of Civil Procedure, 1908 by the

Complainants/ Buyers against ND Developers Pvt. Ltd. & Others (hereinafter referred to as the Opposite Parties) seeking refund of entire amount collected from them towards consideration of the respective Units along with interest on the ground of delay in construction of the Project.

2. The facts leading upto the present Complaint are that the Complainants/ Buyers booked a Unit in the Project “**ND Laurel**” of the Opposite Parties situated at Gunjur Village, Varthur Hobli, Bangalore East Taluk, Karnataka. The Agreement between the Complainants/ buyers and the Opposite Party No.1 (ND Developers Pvt. Ltd./ Developer) had been entered and the Opposite Party No.1 to undertake the construction of the flats and handover the legal possession of the same to the Complainants. Other Opposite Parties are the landowners, who had offered the land to the Opposite Party No.1 for development and construction of the flats. All the Opposite Parties are parties to the Agreement executed with the Complainants and therefore the Opposite Parties, including the Developer and the landowners, are jointly liable for the numerous instances of unfair trade practices, restrictive trade practices and deficiency in services.
3. The Complainants stated that all the Buyers who are part to this Complaint are having common grievance i.e. failure of the Opposite Parties in handing over the peaceful legal possession of the flats within the time stipulated as per the Agreement executed with the Buyers and all of them want refund of the amount deposited with the Opposite Parties. All the Buyers have the ‘same interest’ in terms of the Judgment passed by the Hon’ble Supreme Court in *T.N. Housing Board v. T.N. Ganapathy, (1990) 1 SCC 608*.
4. As per Clause 9 of the Agreement to Sell dated 31.03.2011, the legal possession of the flats along with all promised facilities and amenities were supposed to be handed over by December, 2012 with an additional grace period of 4 months i.e. by March, 2013. The Opposite Parties failed to handover the legal possession of the flats and even those Complainants to whom incomplete possession of the flats have been offered. The Opposite Parties have failed to obtain the Occupancy Certificate despite already having collected 95% of the fund from the Buyers.
5. The Opposite Party No. 1/ ND Developers Pvt. Ltd. vide e-mail dated 20.10.2016 informed the Buyers that it will handover the possession of the flats to them by end of March, 2017 along with road work, STP, lift, corridor, staircase etc. but it failed. The Opposite parties vide e-mail dated 16.10.2017 informed the Buyers that the preliminary Occupancy Certificate will be available within 3 to 4 months but they failed to obtain the Occupancy Certificate till date. The Project is incomplete and poor quality of construction has been done. Further, the incomplete possession of flats was offered without the basic amenities like lift, stair case, etc.
6. Thus, aggrieved by the delay in possession of the respective Units, the Complainants/ Buyers have filed this Complaint with the following prayer to:
 - A. ***Direct opposite parties to refund to the complainants and all other flat buyers with same interest the amount which the complainants and other flat buyers with same interest have deposited with the opposite party no.1 (reflecting in Annexure-A) along with compensation in the form of simple interest @ 18% per annum from the date of deposit till date of actual refund.***
 - B. ***Direct opposite parties to pay to the complainants and other flat buyers with same interest a sum of Rs.10,00,000/- each on account of mental harassment and trauma.***

C. Award cost of the complainant to the complainants and other flat buyers with same interest.

D. Pass any such further order or orders which this Hon'ble Commission deems fit and proper in the facts and circumstances of the present case.

7. The Opposite Party No.1 filed its written version and resisted the Complaint by taking objections as under:

- a. The present Complaint is not maintainable as the same is barred by limitation. The Complaint is filed beyond 2 years from the date on which cause of action arose.
- b. The present Complaint is not maintainable as 18 Complainants among the total of 52 have taken possession of their Apartment allotted and the sale deeds with regard to the same have also been executed. Therefore, all the Complainants cannot have a similar prayer.
- c. The present Complaint filed on behalf of some of the allottees in the Project will not be maintainable as held by this Commission in *Ambrish Kumar Shukla & Ors. Vs. Ferrous Infrastructure Pvt. Ltd.* Only 52 Buyers have filed the present Complaint whereas there are more than 100 allottees in the Project.
- d. Pursuant to the executing the Joint Development Agreement between the Opposite Party No.1 and other Opposite Parties, one Mr. Krishna Reddy GT and Mr. Ganesh G.K. filed Suits for partition and despite these hurdles, the Opposite Party No.1 has delivered possession of the Apartments to most of the allottees, who are also the Complainants in the present Complaint.

8. A Rejoinder was filed by the Complainants in which they had stated that the Opposite Party No.1 has failed to deliver the legal possession of the Unit in a timely manner. Out of 55 Complainants, incomplete possession of the flats without Occupancy Certificate and without the promised facilities and amenities have been offered to 20 Complainants, out of which 15 Complainants have accepted the possession with the hope and under the promise made by the Opposite Parties that the Occupancy Certificate will be obtained soon. In spite of this fact, all the 55 Complainants are having the same interest since grievances are all common and the relief which the Complainants want is also common to all Complainants, which is refund of money with compensation. Out of 55 Complainants, 54 Complainants have availed loan to finance the present housing transaction.

9. We have heard the Learned Counsel of both the parties and have gone through material available on record.

10. The learned Counsel of the Complainants/ Buyers argued that the Complaint has been filed with the uniform prayer for refund. However, due to efflux of time some of the Complainants have taken physical possession. But the Opposite Parties have not obtained the Occupancy Certificate till date. The proposed date of possession was March, 2013. The Opposite Party Nos. 2 to 4 are also jointly and severally responsible. He further submitted that 24 Buyers/ Complainants out of 55 have been offered incomplete possession and have accepted the same. 31 Buyers have not taken possession.

11. The learned Counsel for the Opposite Party argued that the delay is due to some litigation with respect to the Project in the Court of the Principal Senior Civil Judge, Bangalore Rural District, Bangalore, Karnataka. The delay in the project is due to

unforeseeable facts and circumstances which were beyond the Control of the Opposite Party. He wanted the Complaint to be dismissed.

12. The objection of the Opposite Party that the present Complaint is not maintainable under Section 12 (1) (c) of the Act as held in the Order of this Commission in *Ambrish Kumar Shukla & Ors. V. Ferrous Infrastructure Pvt. Ltd.* in CC/97/2016 decided on 07.10.2016 is devoid of merit. The Complainant/ Buyers have common grievance i.e. delay in possession and seeking common relief i.e. refund. The relevant portion of the *Ambrish Kumar Shukla (Supra)* reads as under:

“Section 12(1) (c) of the Consumer Protection Act when read with Order I Rule 8 of the Code of the Civil Procedure will apply if (i) the consumers are numerous (ii) They have the same interest (iii) the necessary permission of the Consumer Forum is obtained and (iv) notice in terms of Sub-rule (2) of Rule 8 of Order I is given. It however, is not necessary that the cause of action available to all the consumers should also be the same. What is required is sameness of the interest and not the same cause of action.”

Further, the Application of Joint Complaint under Section 12 (1) (c) was allowed vide Order dated 27.03.2019 of this Commission.

13. The Objection that the delay was due to reasons beyond the control of the Opposite Party or due to Force Majeure circumstances is devoid of merit. In this regard, attention is drawn to Order of this Commission in *CC 379 of 2013 Sivarama Sarma Jonnalagadda & Anr vs. M/s Maruthi Corporation Limited & Anr* decided on 21.09.2021 wherein it was held that:

“We are of the view that that the Complainant cannot be made to wait indefinitely for the delivery of possession and the act of the Opposite Party in relying on force majeure clause while retaining the amounts deposited by the Complainant, is not on only an act of deficiency of service but also amounts to unfair trade practice.”

Any interested person/buyer book a flat/plot with the dream of getting it within agreed time or within a reasonable time.

14. The objection that the Complaint was bared by limitation is rejected. The Opposite Party has not obtained Occupancy Certificate till date which clearly means the flats are not fit for possession yet. It doesn't matter that some of the Complainant/ Buyers have taken paper possession. In this regard attention is drawn to the Order of the Hon'ble Supreme Court in *Wg. Cdr. Arifur Rahman Khan v. DLF Southern Homes Pvt. Ltd., (2020) 16 SCC 512 decided on 24.08.2020* which has categorically held and observed as under:

“36... The Developer in the present case has undertaken to provide a service in the nature of developing residential flats with certain amenities and remains amenable to the jurisdiction of the Consumer Fora. Consequently, we are unable to subscribe to the view of the NCDRC that flat purchasers who obtained possession or executed Deeds of Conveyance have lost their right to make claim for compensation for the delayed handing over of the flats.

The Cause of action is continuing.

15. The objection of the Opposite Party No.4 that the delay in construction is on account of the Opposite Party No.1 (Builder) as per the joint development agreement and that Opposite Party No.4 has no role in the matter and is not responsible jointly or severally is not convincing as in the Agreement to Sell all the Opposite Parties are being impleaded as Vendor and Opposite Party Nos.2 to 4 are represented through the General Power of Attorney Holder M/s ND Developers Pvt. Ltd. through its Managing Director M K K Durani. So we consider the Opposite Parties jointly and severally responsible. Reliance is placed on the Order of this Commission in ***Pooja Daryani & Anr. Vs. M/s Umang Realtech Pvt. Ltd. & Anr.*** decided on 6th August, 2019 in which it was held that the Opposite Party being the Confirming Party in a Collaboration Agreement entered among the Opposite Parties, even when being a landowner is jointly and severally liable for any compensation. Any other arrangement is only inter se between the Opposite Parties and shall not bind the Complainants.
16. We find that there is no doubt to the fact that there has been an unreasonable and continuous delay in completion of project. The Complainants cannot wait for an indefinite time as he had invested heavy amount with the intention to get the possession of their Unit on time. There are a number of Case Laws wherein the Hon'ble Supreme Court has decided favourably on the right of the buyers for getting refund of their money in case of undue and unreasonable delay by the Developer in giving possession in terms of the Agreement or delay compensation in the case buyer are seeking possession**.
17. Reliance is placed on the judgment of the Hon'ble Supreme Court in ***Kolkata West International City Pvt. Ltd. Vs. Devasis Rudra, II (2019) CPJ 29 SC***, decided on 25.03.2021 in which it was observed as hereunder :

“.....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 the 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 unfair 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.

In the circumstances, we are of the view that the orders passed by the SCDRC and by the NCDRC for refund of moneys were justified. Having regard to all the facts and circumstances of the case, we modify the order of the NCDRC by directing that the appellant shall pay interest at the rate of 9% per annum to the respondent instead and in place of 12% as directed by the NCDRC. Save and except for the above modification, we affirm the directions of the NCDRC.”

18. In another Landmark judgement of Hon'ble Supreme Court, titled ***Pioneer Urban Land & Infrastructure Ltd. Vs. Govindan Raghvan, II (2019) CPJ 34 (SC)***, decided on 02.04.2019, it was held as under:

“We see no illegality in the Impugned Order dated 23.10.2018 passed by the National Commission. The Appellant – Builder failed to fulfil his contractual obligation of obtaining the Occupancy Certificate and offering possession of the flat to the Respondent – Purchaser within the time stipulated in the Agreement, or within a reasonable time thereafter. The Respondent – Flat Purchaser could not be compelled to take possession of the flat, even though it was offered almost 2 years after the grace period under the Agreement expired. During this period, the Respondent – Flat Purchaser had to service a loan that he had obtained for purchasing the flat, by paying Interest @10% to the Bank. In the meanwhile, the Respondent – Flat Purchaser also located an alternate property in Gurugram. In these circumstances, the 22 Respondent – Flat Purchaser was entitled to be granted the relief prayed for i.e. refund of the entire amount deposited by him with Interest”.

19. In a recent Order of the Hon’ble Supreme Court in the case of *Experion Developers Pvt. Ltd. Vs. Sushma Ashok Shiroor*, in Civil Appeal No.6044 of 2019 decided on 7.4.2022, it was held as under :-

“We are of the opinion that for the interest payable on the amount deposited to be restitutionary and also compensatory, interest has to be paid from the date of the deposit of the amounts. The Commission in the Order impugned has granted interest from the date of last deposit. We find that this does not amount to restitution. Following the decision in DLF Homes Panchkula Pvt. Ltd. Vs. DS Dhanda and in modification of the direction issued by the Commission, we direct that the interest on the refund shall be payable from the dates of deposit. Therefore, the Appeal filed by purchaser deserves to be partly allowed. The interest shall be payable from the dates of such deposits.

At the same time, we are of the opinion that the interest of 9% granted by the Commission is fair and just and we find no reason to interfere in the appeal filed by the consumer for enhancement of interest.”

20. In other Order of the Hon’ble Supreme Court in *Supertech Ltd. Vs. Rajni Goyal (2019) 17 SCC 681* decided on 23.10.2018, wherein, it has been held as under :-

“However, the Commission held that since there was a delay in handing over possession of the flat to the Respondent purchaser, the Appellant builder was liable to pay interest to the Respondent purchaser by way of compensation. The scheduled date for handing over possession was 31.10.2013. The Appellant builder had issued the pre-possession letter on 31.10.2015. As per the Respondent purchaser, the Appellant builder did not have the occupancy certificate on that date. The Commission directed the Appellant builder to pay compensation in the form of simple interest @ 8% p.a. from 1.11.2013 till the date on which possession was actually offered to the Respondent purchaser.

The Appellant builder inter alia submitted that possession of the flat was offered to the Respondent purchaser in December, 2015 after obtaining the completion certificate for the building. Even though the agreement provided for delivery of possession by 31.10.2013, the delay occurred

because of various legal impediments in timely completion of the project because of various orders passed by the National Green Tribunal. The delay ought to be computed from six months after 31.10.2013 i.e. from 1.5.2014 by taking into consideration, the 6 months grace period provided in the agreement. Furthermore, the period of interest should close on April, 2016 when the full occupancy certificate was obtained as per the admission of the Respondent purchaser herself in para 4 (j) of the Consumer Complaint, wherein she has admitted that the Appellant builder had obtained the completion certificate as late as April, 2016 with respect to delay in handing over possession. The Respondent purchaser ought not to be allowed to reap the benefits of her own delay in taking possession. In the light of the aforesaid discussion, the period of compensation of interest must be computed from 1.5.2014 till 30.4.2016 at the rate awarded by the Commission. The Order of the Commission is modified only to the extent mentioned hereinabove. The Appeals are disposed of accordingly.”

21. We have gone through the Agreement of one of the Complainants/ Buyers, Mr. Dhiroj Kumar Behera and Mrs. Sabita Sahu, who has accepted possession in 2016. We notice that as per Clause 9 of the Agreement, the possession of the flat was to be given by December, 2012, with an additional grace period of 4 months. Thus, the possession was to be given on or before April, 2013. These Buyers have taken possession on 31/01/2016. However, even after lapse of more than 6 years from the date of paper possession by these buyers, the Opposite Parties/ Builder has not obtained the Occupancy Certificate till date. For the others who have not taken such paper possession in the absence of Occupation Certificate the delay is around 9 years. Thus there is continuous delay of more than 9 years for obtaining Occupancy Certificate. The Builder/ Developer cannot force a buyer to take possession without Occupancy Certificate. In this regard attention is drawn to the order of Hon'ble Supreme Court in ***Samruddhi Co-Operative Housing Society Ltd. Vs. Mumbai Mahalaxmi Construction Pvt. Ltd. in Civil Appeal 4000 of 2019***, decided on 11th of January, 2022, wherein, it was held as under:-

“In the present case, the respondent was responsible for transferring the title to the flats to the society along with the 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”.

22. Though the Complaint has been filed under Section 12 (1) (c) of the Act and the prayer at the time of filing the Complaint in the year 2017 has been for refund on account of delay in giving possession and receipt of Occupancy Certificate, from the record, it is seen that some of the Complainants have taken paper possession in 2016 itself. Therefore, this Complaint will be limited to the Complainants only and alternate relief will need to be given accordingly.

23. In view of the discussion above, we partly allow the Complaint with directions as under:-

Part-1

Where the Complainants/ Buyers are seeking Refund and have not taken possession:

- a. The Opposite Parties are directed to refund the entire amount deposited by the respective Complainants/ Buyers along with delay compensation @ 9% per annum on the deposited amount from the respective dates of deposits till realization, within a period of two months of this Order.
- b. Any delay beyond two months, will attract an interest rate of 12% per annum for the same period.

Part-2

Where the Complainants/ Buyers have taken paper possession:-

- a. the Opposite Parties are directed to complete the construction of the flats allotted to the Complainants in all respects, duly obtaining the requisite Occupancy Certificate at their own cost and responsibility and offer and give possession of the respective Units to the Complainants within 06 months of this Order alongwith delay compensation @ 8% per annum from the proposed date of possession as per the respective Agreements which will include the grace period, till the offer of possession or obtaining Occupancy Certificate whichever is later.
- b. Any delay beyond two months, will attract an interest rate of 12% per annum for the same period.

24. Pending applications, if any, stand disposed of.

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BINOY KUMAR
PRESIDING MEMBER
.....J
SUDIP AHLUWALIA
MEMBER