

NATIONAL CONSUMER DISPUTES REDRESSAL COMMISSION
NEW DELHI

CONSUMER CASE NO. 3333 OF 2017

1. RAJU CHOWDHARY & ANR.Complainant(s)

Versus

1. ATHENA INFRASTRUCTURE LTD. & ANR.

F-60, MALHOTRA BUILDING 2ND FLOOR,
CONNAUGHT PLACE

NEW DELHI-110001

2. INDIABULLS REAL ESTATE LTD.

INDIABULLS HOUSE 448-451, UDYOG VIHAR,
PHASE V,

GURGAON

HARYANA-110066

.....Opp.Party(s)

BEFORE:

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

For the Complainant : : Ms. Urvi Kuthiala, Advocate
: Mr. Shailesh Madiyal, Advocate
: Ms. Neha Jain, Advocate

For the Opp.Party : : Ms. Kanika, Agnihotri, Advocate
: Mr. Rohan Anand, Advocate

Dated : 25 Jan 2022

ORDER

1. Heard Ms. Urvi Kuthiala, Advocate, for the complainants and Ms. Kanika, Agnihotri, Advocate for the opposite parties.
2. The complainants have filed this complaint for directing the opposite parties (hereinafter referred to as the builder) jointly and severally (i) to refund Rs.17648722/- along with compoundable interest @18% with quarterly rest, from the date of respective deposits till the day of filing of the complaint, (ii) to pay pendente lite and future interest @18% compounded quarterly, till the date of actual payment, (iii) to pay Rs.25/- lacs as the compensation for escalation in market price, mental and physical harassment, (iv) to pay the cost of the litigation and (v) any other relief, which is deemed fit and proper in the facts and circumstances of the case.
3. The facts, as stated in the complaint and emerged from the documents attached with it, are that the builder was a company and engaged in business of development and construction of

residential and commercial buildings and selling its unit to the prospective buyers. In the year 2010, the builder launched a project of group housing in the name of “Indiabulls Enigma” at village Pawala Khusrupur, Sector-110, Gurgaon, Haryana. On coming to know about the project, the complainants visited the office/site of the builder and discussed about the project with the officials of the builder. They informed that the project consisted car parking space at stilt and basement level, club, convenient shopping, staircase, lifts, open spaces, passages, service of water supply, sewage disposal, irrigation etc. They assured that the construction would be completed and possession be delivered within three years. Believing upon their representation, the complainants booked a 4BHK flat on 14.08.2010 and gave a cheque of Rs.500000/-. The builder allotted Apartment No. 071, (tentative super area 3400 sq.ft. + two car parking spaces, basic sale price Rs.16579998/-), Block-A, in the project on 16.03.2012. Opposite Party-1 executed Flat Buyer’s Agreement on 09.04.2012, in favour of the complainants. Annexure-1 of the agreement, contained a “Construction Linked Payment Plan”. As per clause-21 of the agreement, the construction has to be completed within three years with grace period of six months from the date of execution of the Flat Buyer’s Agreement. The complainants took loan of Rs.1.25/- crore from Housing Development and Finance Corporation Ltd., for which a tripartite agreement dated 13.04.2012 was executed and the builder granted permission for mortgage of the flat on 12.04.2012. The complainants deposited Rs.500000/- on 14.08.2010, Rs.226208/- on 16.03.2012, Rs.1171767/- on 16.03.2012, Rs.171500/- on 17.03.2012, Rs.1568725/- on 16.04.2012, Rs.4900760/- on 20.04.2012, Rs.2174620/- on 07.05.2012, Rs.302362/- on 08.05.2012, Rs.871146/- on 12.07.2012, Rs.1180664/- on 13.07.2012, Rs.1448414/- on 08.09.2012, Rs.535196/- on 13.09.2012, Rs.1144800/- on 06.03.2013, Rs.564519/- on 06.03.2013, Rs.28111/- on 13.05.2014 and Rs.859921/- on 12.11.2014 (total Rs.17648722/-as against basic sale price of Rs.16579998/-). As per agreement, expected date of possession was June, 2015. Time to time, the complainants inquired about the possession of the flat and the builder gave some assurance for delivery of possession as early as possible. The complainants, vide email dated 08.05.2015, sought for information, regarding status of the construction. The builder, vide email dated 13.05.2015, supplied some photographs of the construction. On perusal of the photographs, it was revealed that there was no approach road from any side of the project. The complainants, vide email dated 14.05.2015, sought for information regarding approach road, electricity, water and other amenities. The builder however did not reply. The complainants, vide email dated 26.09.2017, sought for information, regarding date of the possession. The builder, vide email dated 27.09.2017, informed that they had applied for issue of “Occupation Certificate” and after receiving it, they would give exact date of possession. The complainants, vide email dated 29.09.2017, requested for return of the money deposited by them along with interest. When nothing was done, then the complaint was filed on 15.11.2017, complaining deficiency in service.

4. Both the opposite parties filed its written reply on 25.01.2018, separately, in which, material facts have not been denied. It has been stated that opposite party-2 was neither necessary nor proper party and there was misjoinder of the parties. The agreement contained an arbitration clause as such the complaint is not maintainable. The complainants are not the consumers. The complainants committed various defaults in timely payment of the instalments as such they cannot complain for delay in construction. Time was not the essence of contract as the agreement dated 09.04.2012, stipulates for compensation to the buyers, in case of delay in construction as such on the ground of delay in offer of possession, the complainants cannot ask for refund of the money. The compoundable interest @18% with quarterly rest has not been provided under the agreement, in case of refund of the money. The builder is carrying out the construction at full swing and

endeavours to offer possession at the earliest. Various technical pleas have been raised. It has been stated that the complaint was liable to be dismissed. The builder through IA/9733/2019, filed "Occupation Certificate", applied on 21.11.2017 and issued on 06.04.2018.

5. The complainants filed two rejoinder replies on 16.11.2018, in which, the facts stated in the complaints were reiterated. The complainants filed documentary evidence and Affidavit of Evidence. Along with rejoinder reply, the complainants filed Final Statement of Account, as supplied along with possession letter dated 03.07.2018, in which, total deposit of Rs.18088354/- was acknowledged and Rs.1569354/- was shown as due. The complainants also filed his reply letter dated 24.07.2018, stating that they had already cancelled the agreement and sought for refund of money deposited by them. Both the parties filed their written synopsis.

6. I have considered the arguments of the counsel for the parties and examined the record. The facts, as stated in the complaint, have not been disputed. As per Final Statement of Account, as supplied along with letter dated 03.07.2018, total deposit of Rs.18088354/- was acknowledged by the builder. The complainants stated that they had made this payment till 12.11.2014 as against basic sale price of Rs.16579998/-. As per Clause- 21 of Flat Buyer's Agreement dated 09.04.2012, the construction has to be completed within three years, with grace period of six months from the date of the agreement. As such expected date of possession was November, 2015. The builder obtained "Occupation Certificate", 06.04.2018 and offer possession on 03.07.2018 although up to 12.11.2014, more than the basic sale price had been realized. There was more than two years eight months delay in offer of possession. The builder has not given any reason for delay in completion of the construction except that the complainants have committed defaults in timely payment of the instalments but no evidence in this respect has been produced. The payment plan was "Construction Linked Payment Plan" as such the builder has to prove that in spite of demand letter, the complainants have not deposited instalment in time but no such plea was raised nor any paper has been filed. Letter Pad of Indiabulls had been used in Allotment letter till Final Statement of Account as such it cannot be said that Indiabulls is neither a necessary nor proper party.

7. The builder has argued that the time was not the essence of contract as clause-22 of the agreement dated 09.04.2012, stipulates for compensation to the buyers, in case of delay in construction as such on the ground of delay in offer of possession, the complainants cannot ask for refund of the money. Supreme Court in **Fortune Infrastructure Vs. Trevor D' Limba, (2018) 5 SCC 442, Pioneer Urban Land & Infrastructure Ltd. Vs. Govind Raghavan, (2019) 5 SCC 725, Kolkata West International City Pvt. Ltd. Vs. Devasis Rudra, 2019 (6) SCALE 462 and Wg.Cdr. Arifur Rahman Khan Vs. DLF Southern Homes Pvt. Ltd., (2020) 16 SCC 512**, held that the buyer cannot be made to wait for possession for unlimited period. In case of inordinate delay in offer of possession, the buyer was entitled for refund of money. So far as judgement in **Ireo Grace Realtech Vs. Abhishek Khanna, (2021) 3 SCC 241**, is concerned, Supreme Court found that due date of possession would be 27.11.2018, while possession was offered on 28.06.2019 as such there was delay of about 7 months in offer of possession. As such, proposition of law, of this case is not applicable.

ORDER

In view of aforesaid discussions the complaint is allowed with costs of Rs. one lac. The opposite party is directed to return entire money deposited by the complainants along with interest @9% per annum from the date of each deposit till actual payment. The order shall be complied with

within a period of two months from the date of the judgment. Failing which, the builder will be liable to pay interest @10% per annum.

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RAM SURAT RAM MAURYA
PRESIDING MEMBER