NATIONAL CONSUMER DISPUTES REDRESSAL COMMISSION
NEW DELHI

CONSUMER CASE NO. 1731 OF 2018

1. SATBIR SINGH & ANR.
R/o H No-176, Ashok Vihar, Gali No-19,
GURUGRAM - 122017
HARYANA
2. RENU SHARMA
R/o H No-176, Ashok Vihar, Gali No-19,
GURUGRAM - 122017
HARYANA .....Complainant(s)

Versus

1. RAHEJA DEVELOPERS LIMITED & ANR.
(Through its Principal Officer) R/o W4D, 204/5, Keshav Kunj,
Cariappa Marg, Sainik Farms,
NEW DELHI - 110062
2. ICICI BANK LTD.
(Through Its Principal Officer-Gurgaon Branch) SCO - 18 & 19,
Honda Shopping Centre, Sector-14, Market Complex,
GURGAON - 122001
HARYANA .....Opp.Party(s)

BEFORE:
HON'BLE MR. JUSTICE A. P. SAHI,PRESIDENT

FOR THE COMPLAINANT : MR. S.M. CHUGH, ADVOCATE
MR. JAI SINGH, ADVOCATE

FOR THE OPP. PARTY : MR. SIDDHARTH BANTHIA, ADVOCATE &
MR. SARIM KHAN, ADVOCATE FOR OP-1
MR. PARTH KASUHIK, ADVOCATE FOR OP-2
MR. KEWAL VERMA, LEGAL MANAGER OF OP-2

Dated : 10 January 2024

ORDER
ORDER

1. The complainants have come up alleging deficiency in service on the part of the Opposite Parties by not delivering the possession of the plot booked by them being Plot No. E-85 in “Raheja Aranya City – Phase-2” situated in Gurugram, Haryana. The complainants state to have booked the said plot with a subvention arrangement of finances. The agreement to sale was executed on 25.03.2015 and simultaneously a memorandum of understanding was executed on the same date, with a specific provision of a buy back scheme available to the purchaser. The dispute in the present case is with regard to the invoking of clause-8 of the said memorandum of understanding by the complainants, which is extracted hereinunder:

"8. It is hereby agreed by the parties that the Purchaser/Investor ***within a time frame of 33 months to 36 months from the date of booking****, shall be* ***entitled to*** *call upon the Developer in writing,* ***to cancel the aforesaid booking at a guaranteed premium compensation of Rs.6350/- per square*** *yd. and in such a case the Developer/its nominee* ***shall cancel the said booking within 60 days of expiry of 36 months*** *from the date of booking. It is hereby clarified that the Developer shall over and above the guaranteed premium compensation amount* ***shall also be liable for refund of the entire amount paid by the Purchaser along with service tax so recovered from the Purchaser*** *till date by the Developer. The Purchaser will execute the necessary documents to surrender/cancel the allotted plot upon receipt of payment. The Purchaser shall execute such necessary deeds, documents in favour of Developer for surrender of the said plot by the Purchaser to Developer and the payment of guaranteed premium compensation shall be subject to applicable tax laws. In case of delay in making the payment by the Developer to the Purchaser beyond 60 days,* ***the Developer shall be liable to pay interest @ 18% per annum for the period of delay*** *on the total price payable to the Purchaser."*

2. The agreement to sale clearly recites that the scheme is of residential plots and it also recites the payment of guaranteed premium compensation if the purchaser chooses to cancel the booking of the plot. Clauses 'C' and 'D' of the agreement to sale are extracted hereunder:

"C. The Said Project, Inter-alia, comprises of ***residential plots*** *of various sizes as per the layout plans approved by the competent authority as per the rules and regulations:*

D. The Developer has offered a plot bearing No. [E85] in the Said Project for a Basic Sale Price of Rs.35275/- per sq. yd. on sale ***on guaranteed premium compensation with option to surrender/exit/cancel the booking/plot.****"*

3. The complainants invoking the aforesaid clause-8 within the period prescribed therein about which there is no dispute, sent a mail on 06.11.2017, requesting the Opposite Party No.1 to cancel the plot which was being surrendered and for completing the formalities. The said mail is extracted hereunder:

"satbir singh <satbirsingh0206@gmail.com>

To: Customercare <customercare@raheja.com>,

customercare@icicibank.com

Mon, Nov 6, 2017 at 9:22 AM

Dear Sir,

I have been allotted plot E-85 in Raheja Aranyna city Sohna sector 11 & 14 by the booking dated 31 December 2014 (copy attached) under by back scheme, as time period from the booking and as per MOU completing. I am surrendering/cancelling the said plots.

Please let me know what are other documents required to process for surrendering/cancelling the plots E-85.

Thanks

BRgds

Capt Satbir Singh

...”

4. In response to the said request, the Opposite Party No.1 intimated the complainants that they were not in a position to accept the said request of the complainants regarding the buy back proposal due to unfavourable market conditions and the application of RERA law. They also expressed their inability to continue to pay the EMIs under the subvention scheme and also requested the complainants to take over the loan and retain the unit allotted to them. The said reply dated 17.04.2018 is extracted hereunder:

“From: Kanika Kaushik <kanika.kaushik@raheja.com>

Sent: 17 April 2018 13:19

To: satbirsingh0206@gmail.com'<satbirsingh0206@gmail.com>

Cc: Customercare <customercare@raheja.com>

Subject: Aranya City/E85

Dear Mr. Singh,

Greetings from Raheja Developers Ltd.!!

This is with reference to your meeting held with Ms. Divya in our office today, it is most unfortunate that, despite our good intentions and endeavors, you had to undergo some discomfiture. We always aim for, highest level of customer satisfaction and optimum value generation depending upon the different market conditions.

We also accept that ***due to unfavorable market conditions, we are not in a position to honor the Buy Back Proposal and the same has become even more difficult after applicability of RERA.*** *As per Clause No. 4(4) of HRERA Act, promoter has to realize 70% of money received from customer in Escrow Account and that can only be used for construction activity. Infact, our utmost priority is also to complete the project with best in class construction with partnering leading international vendors.* ***It is also getting difficult us to reimburse future loan EMI's and we request you to please take over the loan and retain the unit allotted to you.***

Should you need any further clarification, you are requested to write to us at customercare@raheja.com <mailto:customercare@raheja.com> ... regarding your queries.

Warm Regards and Thanks,

Kanika Kaushik

Astt. Manager-Customer Relations

Raheja Developers Limited

AN ISO 9001:2000 Certified Company

406, Fourth Floor, Rectangle 1,

D-4, District Center, Saket

New Delhi-17

...”

5. This communication gave rise to the present complaint. The complainants have alleged that since there was no development of the project and the Bank (Opposite Party No.2) had made all the payments in one go to the Builder (Opposite Party No.1), which was contrary to the payment plan agreed upon between the complainants and the Builder, the complainants, having no hope in the project and availability of the plot, moved for cancellation and refund.

6. The present complaint is for refund of the amount of Rs.1,58,64,750/- in terms of clause-8 of the memorandum of understanding referred to above, which includes the guaranteed premium referred to above, and a further claim of 18% interest from the date of filing of the complaint till actual payment. However, ancillary reliefs of compensation due to mental agony and cost of litigation have also been prayed for.

7. It is urged that the Opposite Parties have indulged in unfair trade practice and this amounts to a clear deficiency in service also as per the agreements aforesaid, hence, the complaint deserves to be allowed.

8. The complaint has been resisted by the Builder on several grounds, mainly contending that the allegation of the plot not being developed has been set up in this complaint whereas this was not the reason for cancellation, which is evident from the mail of the complainants dated 06.11.2017 where no such allegations have been made. It is thus contended that there was no deficiency in service and the plot of land had been developed. It is the complainants who wanted to back out from the terms of the agreement and hence the claim petition is not maintainable.

9. It is also submitted that the complainants had negotiated a plot of land which is immovable property and therefore a consumer complaint is not maintainable, for which reliance has been placed on two orders of this Commission, the first in the case of **Krishan Baldev Gupta Vs. Haryana State Industrial Development Corporation Ltd.,** decided on 20.05.1993 and reported in II (1993) CPJ 191 (NC). The second decision is in the case of **Shiela Constructions Pvt. Ltd. And Ors. Vs. Nainital Lake Development Authority And Ors.,** decided on 21.06.1996 in Original Petition No. 230 and 249 of 1993.

8. Learned counsel has then urged that the definition of the word ‘consumer’ read with the use of the phrase ‘housing construction’ in Section 2(o) of the Consumer Protection Act, 1986 (hereinafter referred to as the 1986 Act) does not allow this complaint to be maintainable, inasmuch as the alleged deficiency in service is regarding a plot of land which is not a residential project or a project of housing construction. Learned counsel has urged that the constructions would be raised after the plot is obtained and therefore any such alleged deficiency does not fall within the scope of the 1986 Act. It is also urged that the claim is neither of possession nor a refund arising out of any deficiency, rather the prayer is for payment of the guaranteed premium compensation which is to be returned under clause-8 referred to above, and therefore this is not a claim for services hired, rather it is a claim of

money arising out of a commercial venture. It is therefore submitted that the complaint deserves to be dismissed as falling outside the scope of the 1986 Act.

10. Learned counsel for the Bank has urged that the Bank has nothing to do with the dispute raised between the complainants and the Builder for delivery of a plot, inasmuch as under the subvention scheme the complainants had entered into an agreement of loan described as a facility agreement dated 01.03.2016 where the complainants had undertaken through a declaration to abide by the terms of the same. Learned counsel states that according to the terms and conditions of the said facility agreement, the Bank was required to disburse the entire amount to the Builder which was the loan amount disbursed in that regard. In return the EMIs had to be paid to the Bank and under the subvention agreement the Builder was to bear the EMIs till delivery of possession. Thus, the disbursement of the loan was made on the disbursal request form that was filled up by the complainants subject to the satisfaction of the loan by the payment of EMIs, the rate whereof was already indicated in the terms of the agreement. In essence, the contention of the learned counsel for the Bank is that the terms of payment by the complainants to the Builder under the payment plan was not a condition for disbursement insofar as the contract between the complainants and the Bank is concerned under the facility agreement. It is therefore submitted that the disbursement of the entire amount under the loan agreement to the Builder is not in violation of any terms between the complainants and the Bank.

11. At the outset, learned counsel for the complainants submits that the Bank is entitled to receive the entire amount in order to satisfy the loan and that the complainants do not dispute the receipt of the said amount by the Bank which is due under the terms and conditions of the loan. Learned counsel submits that the disbursement of the refund has to be made first to the Bank out of the amount claimed in this complaint and then the balance of the amount has to be paid to the complainants.

12. Having heard learned counsel for the parties, it should be clarified that so far as the Bank is concerned, it is entitled for the reimbursal of the loan amount which has to be satisfied as per the terms and conditions of the loan. The payment of the entire amount to the Builder by the Bank had not been objected to by the complainant when the said disbursement had been made. Thus, a plea through the complaint that the payment was made not in accordance with the payment plan agreed between the complainants and the Builder is not available, and even otherwise the Bank is not a party to the payment plan agreed between the complainants and the Builder, even though the loan may have been disbursed on such documents. The disbursement of the loan would be governed by the facility agreement and the subvention agreement between the parties, which indicates that the payment of the amount was to be made to the Builder and its realization was to be made through the instalments fixed thereunder. Thus, the contention with regard to the payment at one go by the Bank does not seem to violate any terms and conditions.

13. Coming to the dispute between the parties, the execution of the agreement to sale and the memorandum of understanding simultaneously on 25.03.2015 remains undisputed. The contention of the learned counsel for the Builder is that this complaint is not maintainable as it is in relation to an immovable property which is a plot and the judgments referred to above have been cited.

14. The judgments that have been cited at the bar by the learned counsel for the Builder spell out the facts which led to the observations made therein. In the case of **Krishan Baldev Gupta (Supra)** the complaint was with regard to enhanced demand raised for the price of the land on account of the increase in the price of the plots due to enhancement of the compensation in the land acquisition proceedings. The demand was therefore on account of the statutory adjudication with regard to the price of land, and under the terms of allotment it was agreed that the allottee will have to pay to the Haryana State Industrial Development Corporation any additional amount which the Corporation will have to bear on account of the increase in the cost as a result of any award by the Court of law under the Land Acquisition Act. Thus, in that case there was a clear agreement with regard to the rates of the property, the enhancement whereof on account of land acquisition orders/award was to be paid as cost of the land. That was therefore neither a deficiency nor an unfair trade practice.

15. The present case is not of that nature and is rather a service promised under the agreement for a developed piece of land.

16. The other reason given in the judgment referred to above was with regard to levy of extension fee. Since the constructions had not been completed in time, there was a clause under the agreement to grant extension and levy extension fee. This was also a charge relating to the property and was not regarding rendering of any such services as involved herein, and therefore the Commission came to the conclusion that on such issues a consumer dispute could not be entertained as it did not amount to any sale or hiring of services for consideration. As indicated above, the present case is of hiring of services relating to delivery of a developed piece of land and therefore the aforesaid decision cannot in any way apply on the facts of the present case.

17. The second case of **Shiela Constructions Pvt. Ltd. (Supra)** relied on by the learned Counsel for the Builder was by a construction company where certain plots were acquired by the construction company and during the development of the said project, there was a complaint giving rise to a dispute relating to non-completion of a link road with a gap of about 100 meters. The matter had also been agitated before the High Court and during the pendency of the complaint, the link road was also completed. It is in that context that an observation was made that the plots had been purchased in an auction and there was no hiring of service in relation to the said acquisition of the plot of land which was only an outright sale of immovable property. Thus the Commission came to the conclusion that a consumer complaint for the said relief would not be maintainable and more so declined to entertain it after it was found that the dispute of the link road came to an end as it had already been completed.

18. The ratio of the aforesaid judgments on the facts of the present case would therefore not be applicable as they are distinguishable on facts and even on the principles of law, inasmuch as the instant case is of hiring of service and sale of goods, namely, a developed plot of land, that was offered under the terms and conditions of the agreement and the memorandum of understanding dated 25.03.2015 with a buy back service stipulation. The aforesaid two cases relied on by the learned counsel for the Builder are therefore clearly distinguishable and the said principles are not applicable on the facts of the present case as referred to above.

19. The plot for which the present complaint has been filed is a residential plot and is not a commercial space. The same was sought by the complainant not for resale or commercial purpose. The refund claimed in the present case is with regard to the buy-back service offered in respect of an allotment of a plot. The maintainability of such a nature of complaint for the allotment of a plot was considered by the Apex Court in the case of **"Chandigarh Housing Board Vs. Avtar Singh & Ors. (2010) 10 SCC 194** paragraph 30 to 36 is extracted herein under:

> **"30.** The definitions of the terms "consumer", "deficiency" and "service" contained in Sections 2(1)(*d*), (*g*) and (*o*), which have a bearing on the decision of these appeals read as under:
>
> "2. *Definitions*.—(1) In this Act, unless the context otherwise requires,—
>
> ***
>
> (*d*) 'consumer' means any person who,—
>
> (*i*) buys any goods for a consideration which has been paid or promised or partly paid and partly promised, or under any system of deferred payment and includes any user of such goods other than the person who buys such goods for consideration paid or promised or partly paid or partly promised, or under any system of deferred payment, **when such use is made with the approval of such person**, but does not include a person who obtains such goods for resale or for any commercial purpose; or
>
> (*ii*) **hires or avails of any services for a consideration which has been paid or promised or partly paid and partly promised, or under any system of deferred payment and includes any beneficiary of such services** other than the person who hires or avails of the services for consideration paid or promised, or partly paid and partly promised, or under any system of deferred payment, when such services are availed of with the approval of the first mentioned person but does not include a person who avails of such services for any commercial purpose;
>
> *Explanation*.—For the purposes of this clause, 'commercial purpose' does not include use by a person of goods bought and used by him and services availed by him exclusively for the purposes of earning his livelihood by means of self-employment;
>
> ***
>
> (*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**;

***

(*o*) 'service' means **service of any description** which is made available to potential users **and includes, but not limited to the provision of facilities in connection with** banking, financing, insurance, transport, processing, supply of electrical or other energy, board or lodging or both, **housing construction**, entertainment, amusement or the purveying of news or other information, but does not include the rendering of any service free of charge or under a contract of personal service;"

31. The first part of the definition of "consumer" refers to the buyer of goods and user thereof by a person other than buyer but does not include a person who obtains such goods for resale or for any commercial purpose. The second part of the definition refers to a person who hires or avails of any services for a consideration which has been paid or promised or partly paid and partly promised, or under any system of deferred payment and includes the beneficiary of such services other than the person who hires or avails of the services but does not include a person who avails such services for commercial purpose.

32. The term "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 by a person in pursuance of a contract or otherwise in relation to any service.

33. The term "service" means service of any description which is made available to potential users and includes the provision of facilities in relation to banking, financing, insurance, transport, processing, supply of electrical and other energy, boarding or lodging, housing construction, entertainment, amusement, etc. However, the services rendered free of charge or under a contract of personal service are excluded from the definition of the term "service".

34. The question whether the Consumer Fora **can entertain a complaint in the matter of allotment of plot** or construction of a flat by a statutory authority was considered by a two-Judge Bench of this Court in *LDA* v. *M.K. Gupta* [(1994) 1 SCC 243] in the backdrop of challenge to the orders passed by the National Commission which had awarded damages to the respondents on account of delayed delivery of possession of the houses. The Bench observed that the nature of "complaint" which can be filed under Section 2(1)(*c*) of the Act **is for unfair trade practice or restrictive trade practice adopted by any trader or for the defects suffered for the goods bought or agreed to be bought and for deficiency in service hired or availed of or agreed to be hired or availed of, by a complainant i.e. a consumer** or any voluntary consumer association registered under the Companies Act, 1956 or under any law for the time being in force or the Central Government or any State Government.

35. The Bench then noted that the definition of "consumer" is in two parts and proceeded to observe : (*M.K. Gupta case* [(1994) 1 SCC 243] , SCC pp. 253-54,

para 3)

> "*3*. … The first deals with goods and the other with services. Both parts first declare the meaning of goods and services by use of wide expressions. Their ambit is further enlarged by use of inclusive clause. For instance, it is not only purchaser of goods or hirer of services but even those who use the goods or who are beneficiaries of services with approval of the person who purchased the goods or who hired services are included in it. The legislature has taken precaution not only to define 'complaint', 'complainant', 'consumer' but even to mention in detail what would amount to unfair trade practice by giving an elaborate definition in clause (*r*) and even to define 'defect' and 'deficiency' by clauses (*f*) and (*g*) for which a consumer can approach the Commission. **The Act thus aims to protect the economic interest of a consumer as understood in commercial sense as a purchaser of goods and in the larger sense of user of services.** The common characteristics of goods and services are that they are supplied at a price to cover the costs and generate profit or income for the seller of goods or provider of services. But the defect in one and deficiency in other may have to be removed and compensated differently. The former is, normally, capable of being replaced and repaired whereas the other may be required to be compensated by award of the just equivalent of the value or damages for loss."

36. The Court repelled the argument that the Act is confined to movable goods only and observed that the Consumer Fora have jurisdiction to deal with complaints of deficiency of service in relation to immovable properties. The Court referred to the definition of the term "service" as amended in 1993 to cover "housing construction" and observed : (*M.K. Gupta case* [(1994) 1 SCC 243] , SCC p. 255, para 4)

> "*4*. … It is in three parts. The main part is followed by inclusive clause and ends by exclusionary clause. The main clause itself is very wide. It applies to any service made available to potential users. **The words 'any' and 'potential' are significant. Both are of wide amplitude.** The word 'any' dictionarily means 'one or some or all'. In *Black's Law Dictionary* it is explained thus, 'word "any" has a diversity of meaning and **may be employed to indicate "all" or "every" as well as "some"** or "one" and its meaning in a given statute depends upon the context and the subject-matter of the statute'. The use of the word 'any' in the context it has been used in clause (*o*) indicates that it has been used in wider sense extending from one to all. **The other word 'potential' is again very wide.** In *Oxford Dictionary* it is defined as 'capable of coming into being, possibility'. In *Black's Law Dictionary* it is defined as 'existing in possibility but not in act. Naturally and probably expected to come into existence at some future time, though not now existing; for example, the future product of grain or trees already planted, or the successive future instalments or payments on a contract or engagement already made'. *In other words service which is not only extended to actual users but those who are capable of using it are*

covered in the definition. The clause is thus very wide and extends to any or all actual or potential users. But the legislature did not stop there. It expanded the meaning of the word further in modern sense by extending it to even such facilities as are available to a consumer in connection with banking, financing, etc. Each of these are wide-ranging activities in day to day life. They are discharged both by statutory and private bodies. In absence of any indication, express or implied there is no reason to hold that authorities created by the statute are beyond purview of the Act. When banks advance loan or accept deposit or provide facility of locker they undoubtedly render service. A State Bank or nationalised bank renders as much service as private bank. No distinction can be drawn in private and public transport or insurance companies. Even the supply of electricity or gas which throughout the country is being made, mainly, by statutory authorities is included in it. The legislative intention is thus clear to protect a consumer against services rendered even by statutory bodies. **The test, therefore, is** not if a person against whom complaint is made is a statutory body but **whether the nature of the duty and function performed by it is service or even facility**."

20. The principles deducible from the ratio of the above quoted judgement of the Apex Court and highlighted therein, therefore, hold that a consumer complaint for a plot of land for housing construction facility would be maintainable that would include the performance of a promised service of buy back facility, as on the facts of the present case, and would be a deficiency as well as an unfair trade practice.

21. The services as promised included the service of the buy-back proposal which memorandum was executed simultaneously. The clause has been invoked well within the period of three years as indicated in the said agreement which is undisputed. The complainant had availed a loan facility and the guaranteed premium which was offered under the buy-back clause was part of the consideration that was to be refunded. The refund, therefore, was not sought as a bargain for investment. The complainant was under an obligation to discharge the liability of the loan to the Bank and therefore, he rightly exercised his option to surrender the allotment and requested for cancellation. There is no material on record to indicate that the complainant was an investor in Real Estate or even otherwise a speculator as the opposite party has not been able to demonstrate that the complainant was indulging in profit making. In fact, the complainant was not asking anything beyond the services promised under the agreement, and therefore seeking refund of the guaranteed premium which was denied by the opposite party is a clear deficiency in service. The response given by the opposite party on 17.4.2018 quoted hereinabove clearly establishes that the complainant was not honouring the buy-back proposal because of unfavourable market conditions. This denial was therefore clearly contrary to what had been represented, and unfavourable market conditions cannot act as an impediment to the claim made by the complainant as there is no such pre-condition or restriction limiting the liability of refund. By denying the same, it is a clear case of unfair trade practice and hence, the complainant is entitled to the relief claimed for.

22. The present Complaint is accordingly allowed. The OP-1 shall refund the entire amount of Rs.1,58,64,750/- together with 18% interest as per the terms of the agreement to the complainant w.e.f. date of refusal by the OP i.e. 17.4.2018 till the date of actual payment.

.....J

A. P. SAHI

PRESIDENT