

**NATIONAL CONSUMER DISPUTES REDRESSAL COMMISSION
NEW DELHI**

FIRST APPEAL NO. 432 OF 2024

(Against the Order dated 30/04/2024 in Complaint No. CC/324/2016 of the State
Commission Delhi)

1. EROS CITY DEVELOPERS PVT. LTD.

S-1, AMERICAN PLAZA, INTERNATIONAL TRADE
TOWER, NEHRU PLACE, NEW DELHI-110019

.....Appellant(s)

Versus

1. SMT. GINA SINGH CHOUDHARY W/O. MR. APUL
CHOUDHARY

R/O. HOUSE NO. 64, SECTOR-37, NOIDA-201301, UTTAR
PRADESH.

2. SHRI APUL CHOUDHARY S/O. MR. Y.K. CHOUDHARY
R/O. HOUSE NO. 64, SECTOR-37, NOIDA-201301, UTTAR
PRADESH.

.....Respondent(s)

BEFORE:

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

HON'BLE BHARATKUMAR PANDYA, MEMBER

FOR THE APPELLANT : MR. VIKAS MISHRA, ADVOCATE
: MR. VIRENDER KAUSHAL, AR

Dated : 09 July 2024

ORDER

Heard Mr. Vikas Mishra, Advocate, for the appellant.

2. Eros City Developers Private Limited has filed above appeal against the order of State Consumer Disputes Redressal Commission, Delhi, dated 30.04.2024 allowing CC/324/2016 with cost of Rs.50000/- and directing the appellant to refund the money deposited by the respondents with interest @6% per annum from the date of respective deposit till 30.04.2024, subject to refund till 30.06.2024, in case of default with interest @9% per annum from the date of respective deposit till the date of refund and pay Rs.100000/- as compensation for mental agony and harassment.

3. Smt. Gina Singh Choudhary and Apul Choudhary (the respondents) filed CC/324/2016, for directing the appellant to (i) refund Rs.1596322/- with interest @18% per annum from the date of respective deposit till the date of refund; (ii) pay Rs.1500000/- as exemplary damages; (iii) pay litigation costs; and (iv) any other relief, which is deemed fit and proper in the facts of the case.

4. The complainant stated that Eros City Developers Private Limited was a company, registered under the Companies Act, 1956 and engaged in the business of development and construction in real estate. The opposite party launched a project of commercial mall named

as “Eros Market Place” at Commercial Plot No.2, Shaktikhand II, Indirapuram, Ghaziabad, in the year 2004. One Yogendra Prasad Mehta booked a shop in the aforesaid project on 25.12.2004. Smt. Gina Singh Choudhary intended to open a “women’s clothes and fashion accessories shop” for earning livelihood by way of self-employment. Therefore, the complainants purchased the shop booked by Yogendra Prasad Mehta from him with the permission of the opposite party. The opposite party allotted Shop No.36, at First Floor, admeasuring 345 sq.ft approximately (super area) at the rate of Rs.4000/- per sq.ft. and executed an agreement dated 22.08.2005 in respect of above shop in favour of the complainants. The agreement contains a ‘payment plan’ under which Rs.120000/- had to be deposited at the time of booking, Rs.156000/- on or before 15.02.2005, Rs.138000/- on or before 15.04.2005 and balance amount was payable in 10 instalments linked with construction. As per demand, the complainants deposited Rs.1596322/- (including the amount deposited by Yogendra Prasad Mehta) till 2012, which included charges towards maintenance, electricity, security deposit, sinking funds, building insurance premium, which were payable on offer of possession. The opposite party offered possession, vide letter dated 23.02.2010, with demand of Rs.351844/-. The complainants visited the project and found that entire mall was in a very pathetic and dilapidated condition, the quality of construction was extremely sub-standard. Entire mall was in a run-down condition and the facade of the premises is all worn-off. In the brochure, the opposite party portrayed a world class retail, landmark involving a state of art architecture offering extraordinary experiences beyond ordinary shopping, with a host of services and facilities such as showroom, retail shops, ATM, Food Court, Restaurants with open terraces, kids Zone, Entertainment Zone, enticing walkways and cool water bodies with world class three screen multiplex. The complainants and many other buyers protested against the opposite party regarding the deficiencies and offering possession without completion of the construction as per specifications. The buyers held meetings with the opposite party for completion of the project and making the mall fully functional but the opposite party did not give any plausible or firm reply and gave only hollow assurances regarding completion of the project. As the assurances were not fulfilled, the complainant and other buyers gave several emails to the opposite party time to time but the opposite party never gave any firm assurance regarding completion of the project. Although the buyers held several meeting with the opposite party regarding delay but the opposite party refused to acknowledge minutes of the meeting. Due to pressure of the buyers, the opposite party obtained ‘Partial Completion Certificate’ on 05.04.2014 from Ghaziabad Development Authority (GDA). The opposite party was pressurizing the buyers and the complainants to take possession of the shops allotted to them and possession was offered to them, otherwise their allotment would be cancelled and 20% of BSP would be forfeited although the GDA, in reply obtained under Right to Information Act dated 03.11.2015, informed that there was no provision to handover possession prior to issue of ‘Partial Completion Certificate’. Even till date the project was not completed as per brochure. The opposite party is arbitrarily demanding exaggerated maintenance charges at the rate of Rs.15/- per sq.ft. per month from the complainants although they had not taken possession of the shop, which is in the line of fully functional “A Category Mall”. Although most of the lifts, elevators, escalators and other facilities are not in working condition. The washrooms are dirty and stinky with rusting and breakage in wall and floor tiles, the part of external plaster of the walls has worn out and fallen, the walkway is broken. Only about 2-3 guards were employed. There is lack of proper staff to maintain the mall. Entire area of the Mall is about 230000 sq.ft. Maintenance charges would be Rs.3450000/- per month. The opposite

party also promised to provide water connection to every shop, which has not been provided. There was no reference of 'Upper Ground Floor' in the layout plan/original maps submitted by the opposite party for obtaining 'Partial Completion Certificate'. 'Upper Ground Floor' can consist only one flight of stairs but in the mall, there are two flights of stairs. The opposite party sold structural 'First Floor' representing it to be 'Upper Ground Floor' and structural 'Second Floor' as 'First Floor'. The opposite party installed electricity meters for every shop without taking possession by the buyers and without consuming electricity by the buyers, the opposite party has fixed monthly electricity charges arbitrarily and raising bills in this respect from the complainants and other buyers. 'Lower Ground Floor' was designed for car parking and its area is included as common area but the opposite party has utilized large portion of it in multi-retail store as such common area has been reduced but its price has been charged from the buyers. The opposite party has constructed additional two shops in the open area/landing space between two corner shops, making it a running length of over 20 shops without any notice and consent of the buyers. The opposite party has caused inordinate delay in completing the project and avoiding to give any explanation of delaying the project. Till date, the project is not complete as per commitment in the brochure and none of amenities and facilities as mentioned in the brochure are provided. Due to unreasonable delay in handing over possession, the prices of property in other area have been increased many times and they have suffered with loss of opportunity. Circle rate for stamp duty and registration charges have been increased. The opposite party is charging interest @18% per annum compounded quarterly on delay payment of instalment but refused to give any compensation for delay in handing over possession. Clause 7(a) of the agreement provides for holding charges @Rs.5/- per sq.ft. per month but there is no mention for delay compensation in it. The opposite party is also liable to pay same interest in case of refund. The complainants were lured with rosy pictures in the brochure to book the shop and they were not shown the terms of the agreement at that time. Most of the clauses of the agreement are one sided and unreasonable. As there was clause for forfeiture of 20% of sale price in case of cancellation of the allotment, the complainants were forced to sign the agreement. Due to unreasonable delay in completing the construction of the project, the complainants have lost trust in the opposite party and cannot wait for possession endlessly. The complainants booked the shop for earning their livelihood but 10 years have expired and their purpose has been shattered. Cause of action arose on 03.11.2015, when the complainants came to know through RTI that the opposite party was granted 'Partial Completion Certificate' in April, 2014. Since development of the project is still going on, cause action is continuing in favour of the complainants. On these allegations, the complaint was filed on 01.04.2016.

5. The appellant filed its written reply in the complaint, in which, booking of the shop in Shopping Mall "Eros Market Place", allotment of Shop No.36, at First Floor, admeasuring 345 sq.ft at the rate of Rs.4000/- per sq.ft., execution of the agreement dated 22.08.2005 in respect of above shop in favour of the complainants and deposits made by the complainants, have not been disputed. The opposite party stated that clause 47 of the agreement specifically mentioned that any advertisements, brochures, hand bills issued by the company do not form basis of this agreement and the company is bound by the terms and conditions mentioned in the agreement. The building plan for construction of the Shopping Mall "Eros Market Place" in an area of 12277 sq.mtrs. was approved on 27.07.2005 and its constructed could not be completed within a short span of time. Before booking the shop, the complainants made various queries in respect of the project, which were fully disclosed to them. After exploring

all the options, the complainants booked the shop. After reading and understanding the agreement, it was signed by the complainants as their free will. It has been denied that the opposite party forced the complainants to sign the agreement. It has been denied that the shop was booked for 'earning livelihood by way of self-employment. The opposite party did not commit, any date for handing over possession. The opposite party has not left any stone unturned to build the Shopping Mall, which provides for the best facilities to the shop owners and increase the footfall in the Shopping Mall, which is in interest of the buyers. The construction of the Shopping Mall completed and it was fully functional with three Screen Multiplex, Hypermarket, Restaurants, Family and Kids Entertainment Zone, Lounge, Bakery, McDonalds and Retail Showroom. Thereafter, the opposite party applied for issue of 'Completion Certificate' in the year 2008-2009, which was granted only on 05.04.2014, which is known to all the buyers of the shops. "Completion Certificate" pertaining to Multiplex was granted on 26.03.2016. The allegations of the complainants, contrary to it, are false. The opposite party offered possession of the shop to the complainants vide letter dated 23.02.2010 and in pursuance thereof, they took possession and the keys were handed over to them. After expiry of six years of taking possession, they are falsely alleging that they were forced to take paper possession. The protest by the buyers and meetings in its connection, have been denied. Email dated 18.07.2011 was addressed to Mr. Sameer Malhotra, which is not a communication to the employee of the opposite party. Although under Maintenance Agreement, Rs.15/- per sq.ft. per month has been mentioned but the opposite party is charging Rs.13.66 per sq.ft. per month as maintenance charges. It has been denied that the opposite party ever demanded exaggerated maintenance charges. The opposite party never demanded holding charges. The complainants are tarnishing good-will of the opposite party although the opposite party had never made false representations. It has been denied that at the time of booking the opposite party had promised to provide water connection in shop of the complainants. The water connection has been provided to those buyers, who had requested for it. There may be difference in terminology of 'Upper Ground Floor' 'First Floor' and 'Second Floor' but there is no difference in physical structure of the Mall. The complainants took possession after inspecting, verifying and satisfying in respect of quality of construction, carpet area, super area, its dimensions and gave an undertaking in respect of their satisfaction and not to raise any dispute in this respect. Electricity connections have been provided to each shop including the complainant's shop as such, they are liable to pay electricity charges. The opposite party was entitled to utilise full FAR and additional area has been constructed within sanctioned FAR. There is no unfair trade practice. The complainants booked the shop with speculation that its value would increase but its value has not increased as per their speculation, therefore now they are trying to wriggle out from the contract. The complainants made exorbitant and baseless claim. Preliminary issues that (i) the reliefs claimed in the complaint can only be granted in the suit for specific performance of the contract; (ii) the opposite party offered possession vide letter dated 23.02.2010 and complainants took possession and the keys were handed over to them in pursuance of it, they have no cause of action for the complaint; (iii) the complaint is time barred; and (iv) the complainants booked a shop in a Shopping Mall for commercial purpose and they are not 'consumers', the complaint on their behalf is not maintainable.

6. The complainants filed Rejoinder, Affidavit of Evidence of Apul Choudhary and documentary evidence. The opposite party filed Affidavit of Evidence of Ashok Kumar Singh and documentary evidence. Both the parties filed their written arguments. State

Commission, by impugned order dated 30.04.2024, held that not handing over possession and execution of conveyance deed by the opposite party is a continuous wrong as such the complaint is not time barred. The complainants have stated that the shop in dispute was booked for earning livelihood by way of self-employment of Smt. Gina Singh Choudhary as such the complainants are 'consumers' and the complaint is maintainable. State Commission has territorial jurisdiction to try the complaint. As the opposite party failed to offer possession, within reasonable period, it is deficiency in service. From reply obtained under RTI dated 21.11.2022, it is proved that the opposite party applied for issue of 'Completion Certificate' on 14.11.2013 and 'Partial Completion Certificate' was issued on 05.04.2014, offer of possession, vide letter dated 23.02.2010 was not valid. It is proved from the photographs filed by the complainants that the construction of the Shopping Mall was not complete even in the year 2016. The complainants cannot be made to wait for possession for unlimited period. On these findings the complaint was allowed and the order as stated above has been passed. Hence this appeal has been filed.

7. We have considered the arguments of the counsel for appellant and examined the record. The counsel for the appellant submitted that the complainants booked a shop in a Shopping Mall for commercial purpose. The complainants, in their email dated 28.09.2013, stated that investment in "Eros Market Place" is at a high risk of sinking. In monetary terms it has a lot of opportunity cost in realizing returns from investment. There is no possibility and certainty to realize returns through this investment. From this email it is fully proved that the complainants were investors with speculation in the commercial property. The complainants are not 'consumers' and the complaint on their behalf is not maintainable.

8. The word "consumer" has been defined under Section 2 (1) (d) and word "service" has been defined under Section 2 (1) (o) of the Consumer Protection Act, 1986, (hereinafter referred to as the Act) which are quoted below:-

Section-2 (1) (d).- "consumer" mean 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 and partly promised, or under any system of deferred payment, when such use is made with 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 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 such services for any commercial purpose;

Explanation.- For the purpose 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 livelihood by means of self-employment.

Section 2(1) (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;”

9. The term “housing construction” has been added by Act No.50 of 1993, under Section-2(1) (o) of the Act. Earlier the Explanation was added by Act No. 50 of 1993 w.e.f. 18.06.1993 under Section-2(1) (d) (i) of the Act. By Act No. 62 of 2002, w.e.f. 15.03.2003, Section-2(1) (d) (ii) was also amended and the term “but does not include a person who avails such services for any commercial purpose” has been added in it and the Explanation was placed in last. Supreme Court in **Lilavati Kirtilal Mehta Medical Trust Vs. Unique Shanti Developers (2020) 2 SCC 265**, held that though a strait jacket formula cannot be adopted in every case, the following broad principles can be culled out for determining whether an activity or transaction is “for a commercial purpose”:-

19.1. The question of whether a transaction is for a commercial purpose would depend upon the facts and circumstances of each case. However, ordinarily, “commercial purpose” is understood to include manufacturing/industrial activity or business-to-business transactions between commercial entities.

19.2. The purchase of the good or service should have a close and direct nexus with a profit-generating activity.

19.3. The identity of the person making the purchase or the value of the transaction is not conclusive to the question of whether it is for a commercial purpose. It has to be seen whether the dominant intention or dominant purpose for the transaction was to facilitate some kind of profit generation for the purchaser and/or their beneficiary.

19.4. If it is found that the dominant purpose behind purchasing the good or service was for the personal use and consumption of the purchaser and/or their beneficiary, or is otherwise not linked to any commercial activity, the question of whether such a purchase was for the purpose of “generating livelihood by means of self-employment” need not be looked into.”

In **Sunil Kohli v. Purearth Infrastructure Ltd., (2020) 12 SCC 235**, held that affidavit of evidence as quoted above clearly points out that the complainants wanted to dispose of the property in Denmark and wanted to come down to Delhi to start a business. It is for this purpose that the premises in question were booked. The evidence also discloses that Complainant 1 was not employed any more in Denmark and as a matter of fact, he was serving Red Cross, a charitable organisation. In the circumstances, it cannot be ruled that the case of the complainants would not come within the definition of “consumer” as defined under the provisions of the Act.

10. The term ‘investment’ means putting money into an asset that can grow in value or produce income or both. If the investment is for growth in value then it cannot be a ‘commercial purpose’. If investment was for generating income then it is a ‘commercial purpose’. Then role of Explanation to Section 2(1)(d) comes into play. In the present case,

the complainants stated that Smt. Gina Singh Choudhary intended to open a “women’s clothes and fashion accessories shop” for earning livelihood by way of self-employment. Therefore, the complainants booked the shop in dispute. The complainants also filed Affidavit of Evidence in this respect. If a person is unemployed then except his assertion in this respect, he could not adduce any other evidence. If the opposite party challenges this assertion, then the burden of proof lies upon it to adduce evidence and prove that the complainant was earning livelihood from any other source. The opposite party could not adduce any evidence to prove that Smt. Gina Singh Choudhary was earning her livelihood from any other source. Supreme Court in SLP (C) No.15290 of 2021 Shriram Chits (India) Private Limited Vs. Raghachand Associates (decided on 10.05.2024) held that as the service provider has raised the plea that the complainant is not a ‘consumer’, the burden of proof lies upon him.

The case laws relied upon by the counsel for the appellant in M/s. Richa & Company Vs. DLF Universal Limited, 2012 SCC OnLine NCDRC 671 and Pradeep Singh Pahal Vs. M/s. TDI Infrastructure Pvt. Ltd., 2015 SCC OnLine NCDRC 2295, being contrary to the dictum of Supreme Court are no more good law.

11. Next argument of the counsel for the appellant is that the complainants in paragraph-10 of the complaint admitted that possession was offered on 23.02.2010. They further admit taking of possession but state that it was a ‘paper possession. The appellant vide letter dated 27.10.2012, called upon the complainants to get the conveyance deed executed in respect of the shop in dispute. In paragraph-29 of the complaint, the complainants have stated that cause of action arose on 03.11.2015, when the complainants came to know through RTI that the opposite party was granted ‘Partial Completion Certificate’ in April, 2014. Since development of the project is still going on, cause action is continuing in favour of the complainants. The counsel for the appellant submitted that the complainants admit that possession was offered on 23.02.2010 and they also deposited consideration as such action arose on 23.02.2010. The complaint was filed on 01.04.2016. Section 24-A of the Consumer Protection Act, 1986 provides two years limitation. The complaint was time barred and ought to have been dismissed as time barred.

Although the complainant admitted that possession was offered on 23.02.2010 but stated that it was a ‘paper possession as on that day the building was not complete and “Completion Certificate’ was not obtained. State Commission found that from the photographs, it was proved that the building was not complete. ‘Partial Completion Certificate’ was issued on 05.04.2014, as such offer of possession, vide letter dated 23.02.2010 was not valid in the eye of law and contrary to Section 15-A(2) of U.P. Urban Planning and Development Act, 1973. The complaint is not time barred. Supreme Court in **Lata Construction Vs. Dr. Ramesh Chandra Ramaniklal Shah, (2000) 1 SCC 586, Meerut Development Authority Vs. Mukesh K. Gupta, IV (2012) CPJ 12 (SC) and Samruddi Cooperative Housing Society Limited Vs. Mumbai Mahalaxmi Construction Pvt. Ltd., AIR 2022 SC 428**, held the builder is contractually and legally bound to handover possession of the unit complete in all respect as per specification and execute conveyance deed. So long as these obligations are not fulfilled, it is continuing wrong and gave continuous cause of action.

12. Relying upon Section 15-A(1) of U.P. Urban Planning and Development Act, 1973, the counsel for the appellant submitted that as the appellant had applied for issue of 'Completion Certificate' in the year 2008-2009 and offer of possession to the complainants vide letter dated 23.02.2010 was in accordance with law as it would be deemed to be issued. The complainants were contractually bound to take possession. In fact they took possession as admitted in the complaint as 'paper possession'.

By producing reply of statutory authority under RTI dated 21.11.2022, the complainants proved that the opposite party had applied for issue of 'Completion Certificate' on 14.11.2013, which is a more authentic evidence. The 'Note Sheet' dated 18.05.2011, shows that the application for 'Completion Certificate' was not as per sanctioned plan. Certain unauthorised constructions were raised by the appellant as the statutory authority had called for a report for considering compounding of unauthorized construction. The appellant has produced the order of Statutory Authority dated 05.04.2014, compounding unauthorized construction and thereafter, they applied for modification in sanctioned layout plan. As the application for issue of 'Completion Certificate' of the year 2008-2009 was not in accordance of sanctioned layout plan, no presumption of issuance of 'Completion Certificate' can be raised under Section 15-A(1) of U.P. Urban Planning and Development Act, 1973.

13. The counsel for the appellant submitted that as 'Partial Completion Certificate' was issued on 05.04.2014, the defect in offer of possession, vide letter dated 23.02.2010, stood rectified. But Supreme Court in **Utpal Trehan Vs. DLF Home Developers Limited, (2022) 10 SCC 409**, held that if offer was possession was illegal then it is invalid and the builder is liable to issue fresh offer of possession.

By producing several lease deeds of other buyers, the appellant tried to argue that the project was complete and other buyers have taken possession. Admittedly these lease deeds were prior of issue of 'Partial Completion Certificate' dated 05.04.2014 and contrary to Section 15-A (2). Illegal acts of several person cannot be legalized only for the reasons that various persons have committed illegality.

14. The appellant allotted Shop No.36, at First Floor, admeasuring 345 sq.ft at the rate of Rs.4000/- per sq.ft., executed the agreement dated 22.08.2005 in respect of above shop in favour of the complainants and admits deposits made by the complainants. The deposit made by the respondents is more than agreed consideration. Demand of refund by the complainants in year 2016 as the appellant has failed to offer possession for such a long period was proper. Supreme Court in **Pioneer Urban Land & Infrastructure Ltd. Givindan Raghavan, (2019) 5 SCC 725**, held that even if no time for delivery of possession was fixed in the agreement, a reasonable period of three years can be inferred for possession. 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, Pioneer Urban Land & Infrastructure Ltd. Givindan Raghavan, (2019) 5 SCC 725** and **NBCC (India) Ltd. Shri Ram Trivedi, (2021) 5 SCC 273**, has held that the buyer cannot made to wait for indefinite period for possession.

15. By the impugned order State Commission has granted interest @6% per annum, if the refund is made till 30.06.2024. The interest as granted by State Commission is contrary to the

three members Bench of Supreme Court in **Experion Developers Private Limited Vs. Sushma Ashok Shiroor, 2022 SCC OnLine SC 416**, in which, it has been held that in case of refund 9% interest would be just and fair compensation. After 30.06.2024, the interest of 9% has become applicable. Therefore, we do not propose to extend the period for compliance of impugned order of State Commission while dismissing the appeal.

O R D E R

In view of the aforesaid the appeal has no merit and is dismissed.

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RAM SURAT RAM MAURYA
PRESIDING MEMBER

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BHARATKUMAR PANDYA
MEMBER