

IN THE DELHI STATE CONSUMER DISPUTES
REDRESSAL COMMISSION

Date of Institution:05.09.2022

Date of hearing: 29.05.2024

Date of Decision: 05.07.2024

COMPLAINT CASE NO.- 146/2022

IN THE MATTER OF

1. MR. VIKAS JAIN

S/O MR. TARSEM CHAND JAIN.

2. MS. MONA GARG,

W/O MR. VIKAS JAIN.

BOTH RESIDENTS OF 10963, CAMINITO ALVAREZ,
SAN DIEGO, CALIFORNIA 92126, USA.

BOTH REPESENTED THROUGH SPECIAL POA HOLDER

MR. AKASH JAIN,

S/O MR. TARSEM CHAND JAIN,

R/O 901, MANTOVA TOWER,

MAHAGUN MODERNE, SECTOR – 78,

NOIDA UTTAR PRADESH – 201305.

(Through: Mr. Pawan Kumar Ray, Advocate)

...Complainants

VERSUS

ANSAL HOUSING LTD.,

(Formerly known as Ansal Housing & construction ltd.)

THROUGH ITS DIRECTOR/DIRECTORS,

HAVING REGISTERED OFFICE AT:

606, 6TH FLOOR, INDIRA PRAKASH 21,

BARAKHAMBA ROAD,

NEW DELHI – 110001.

(Through: Intellection Law Offices)

...Opposite Party

CORAM:**HON'BLE JUSTICE SANGITA DHINGRA SEHGAL (PRESIDENT)****HON'BLE MR. J.P. AGRAWAL, MEMBER (GENERAL)**

Present: Mr. Sreshth Nanda (email id – nandashreshth@gmail.com), counsel for complainant appeared on VC.

Mr. Shivkant Arora (Email id – shivkant@ilolegal.com, counsel for OP.

**PER: HON'BLE JUSTICE SANGITA DHINGRA SEHGAL
(PRESIDENT)****JUDGMENT**

1. The present complaint has been filed by the Complainants before this commission alleging deficiency of service on the part of Opposite Party and has prayed the following reliefs:
 - a) *Allow the present complaint; and*
 - b) *Pass an order directing the Opposite Party to refund the entire amount paid by the complainants i.e. Rs.96,46,580/- (Rupees Ninety-Six Lakhs Forty-Six Thousand Five Hundred Eighty Only) without any deduction along with interest @18% p.a. from the respective date of payment till realization; and*
 - c) *Pass an order directing the Opposite Party to pay a sum of Rs. 5,00,000/- (Rupees Five Lakhs only) on account of mental agony and harassment to the Complainants; and*
 - d) *Pass an order directing the Opposite Party to pay a sum of Rs. 1,00,000/- (Rupees One Lakhs only) to the Complainants towards cost of the present proceedings and litigation expenses; and*
 - e) *Pass such other order/orders as may be deemed fit and proper on the facts and in the circumstances of this case;*
2. Brief facts necessary for the adjudication of the present complaint are that the Complainants vide application form dated 25.10.2010, applied for the allotment of a residential unit in the project 'Estella,' to be constructed by the Opposite Party in Sector- 103, Gurgaon,

Haryana. Accordingly, after passage of 1.4 years, the Opposite Party vide allotment letter dated 22.06.2012 allotted unit bearing no. P-0301 in the aforesaid project to the Complainant. Thereafter, an Agreement Buyer Agreement was executed between the parties on 20.07.2012. As per clause 30 of the said agreement, the Opposite Party was to hand over the possession of the said unit within 36 months of execution of agreement or date of obtaining license. However, the Opposite Party neither hand over the possession of the said unit till date nor in position to deliver it for more years. More so, the various clauses of the said Apartment Buyer Agreement were unilateral, arbitrary and one sided but the Complainant had paid hefty amount of Rs. 29,92,295.50/- before the execution of the said agreement, therefore, the Complainants were left with no other way out to than to sign on the dotted sign of the Apartment Buyer Agreement. Further, the Complainants opted construction linked payment but the Complainants were receiving demand letters from the Opposite Party without know the stage of construction. Also, the Complainants made various inquiries regarding the stage of construction and the date of delivery of the possession of the said unit but the Opposite Party failed to give any satisfactory response to the Complainants.

The Complainants over the time had paid a sum of Rs. 96,46,580/- to the Opposite Party as and when demanded by it. The complainant also sent a legal notice dated 05.07.2022 to the Opposite Party asking refund of the amount alongwith interest but was of no avail.

3. The Opposite Party has contested the present case and raised preliminary objections as to the maintainability of the complaint case. The counsel of the Opposite Party submitted that the

Complainants are not consumer under the Consumer Protection Act, 2019 as the Complainants invested the money to earn profit, which amounts to commercial purpose. More so, the Complainants are admittedly residing in USA, therefore, the Complainants never intend to own unit in question for their bona fide residence in Gurugram. He further submitted that the complainant has no cause of action to file the present complaint.

4. He further submitted that the delay in handing over the possession of said unit was due to force majeure circumstances, which were beyond the control of the Opposite Party due to demonetization, Hon'ble Punjab & Haryana High Court, wherein ground water extraction in reign of Haryana was banned and Hon'ble National Green tribunal also directed to stop construction in Delhi NCR to prevent emission etc. He also submitted that there is no delay in the possession of the said unit, therefore, there is no deficiency in service on the part of the Opposite Party.
5. The Complainants have filed the Rejoinder rebutting the written statement filed by the Opposite Party. Both the parties have filed their Evidence by way of Affidavit in order to prove their averments on record.
6. We have perused the material available before us and heard the counsel for both the parties.
7. The fact that the Complainants had booked a unit with the Opposite Party is evident from the Apartment Buyer Agreement dated 20.07.2013. Payment to the extent of Rs. 96,46,580/- by the Complainants to the Opposite Party is not disputed by the it.
8. The first issue to be adjudicated is whether the Complainants have cause of action to approach this commission. It is imperative to refer

to Section 69 of the Consumer Protection Act, 2019 wherein it is provided as under: -

*“(1) The District Commission, the State Commission or the National Commission shall not admit a complaint unless it is filed within **two years from the date on which the cause of action has arisen.***

(2) Notwithstanding anything contained in sub-section (1), a complaint may be entertained after the period specified in sub-section (1), if the complainant satisfies the District Commission, the State Commission or the National Commission, as the case may be, that he had sufficient cause for not filing the complaint within such period:

Provided that no such complaint shall be entertained unless the District Commission or the State Commission or the National Commission, as the case may be, records its reasons for condoning such delay.”

9. Analysis of Section 69 of the Consumer Protection Act, 2019 leads us to the conclusion that this commission is empowered to admit a complaint if it is filed within a period of 2 years from the date on which cause of action has arisen. In the present case neither possession of the said unit in question in all respects with agreed facilities has been delivered, nor the amount deposited by the Complainants have been refunded till date. We further deem it appropriate to refer to **Mehnga Singh Khera and Ors. Vs. Unitech Ltd.** as reported in **I (2020) CPJ 93 (NC)**, wherein the Hon’ble National Commission has held as under:

“It is a settled legal proposition that failure to give possession of flat is continuous wrong and constitutes a recurrent cause of action and as long as the possession is not delivered to the buyers, they have every cause, grievance and right to approach the consumer courts.”

10. Applying the above settled law, it is clear that failure to deliver possession being a continuous wrong it constitutes a recurrent cause of action and, therefore, so long as the possession is not delivered to the Complainants. The Complainants are within their right to file the present complaint before this commission.

11. **The second question for consideration before us is whether Complainants fall in the category of 'consumer' under the consumer protection act, 2019?**

12. The Opposite Party contended that the Complainants are not *Consumer* as defined under the Consumer Protection Act, 2019 as they invested the money to earn profit, which amounts to commercial purpose. To resolve this issue, we deem it appropriate to refer to *Aashish Oberai Vs Emaar MGF Land Limited* reported in *I (2017) CPJ 17(NC)* wherein it is held as under:

“6.A person **cannot be said to have purchased a house for a commercial purpose only by proving that he owns or had purchased more than one houses or plots.** In a given case, **separate houses may be purchased by a person for the individual use of his family members.** A person owning a house in a city A may also purchase a house in city B for the purpose of staying in that house during short visits to that city. A person may buy two or three houses if the requirement of his family cannot be met in one house. Therefore, it would not be correct to say that in every case where a person owns more than one house, the acquisition of the house is for a commercial purpose.”

13. It is imperative to refer to the dicta of the Hon'ble National Commission in *CC-1122/2018* titled *Narinder Kumar Bairwal and Ors. vs. Ramprastha Promoters and Developers Pvt. Ltd. and Ors.* decided on *01.11.2019*, wherein, the Hon'ble National Commission has held as under:

*“19. The contention of the Learned Counsel that the said Flats were purchased for commercial purpose is not supported by any documentary evidence as the onus shifts to the Opposite Parties to establish that the Complainant have purchased the same to indulge in 'purchase and sale of flats' as was held by this Commission in *Kavit Ahuja vs. Shipra Estates I (2016) CPJ 31*. The Opposite Parties failed to discharge their onus and we hence hold that the Complainant are 'Consumers' as defined under Section 2(1)(d) of the Act.”*

14. From the aforesaid dicta of the Hon'ble National Commission, it clear that the purchase of more than one house or plot by the buyer cannot be termed as commercial purpose. In a present case, separate residential unit has been purchased by the buyer for the individual use of his family members, therefore, we find no merit in the contention of the Opposite Party that the Complainants, who are residing at USA, are not a consumer under the consumer protection act, 2019.
15. Further, it is for the Opposite Party to prove that said unit purchased was for commercial purpose, by way of some documentary proof and a mere bald statement is not sufficient to raise adverse inference against the Complainants. In the present case, the Opposite Party has merely made a statement that the Complainants purchased the said apartment for commercial purpose but fail to provide any material which shows us that the Complainants are engaged in the business of purchasing and selling houses and/or plots on a regular basis, solely with view to make profit by sale of such units. Mere allegation, that the purchase of the property is for commercial purpose, cannot be the ground to reject the present consumer

complaint. Consequently, the objection raised on behalf of the Opposite Party is answered in the negative.

16. The Opposite Party further contented *that the delay in handing over the possession of said unit was due to force majeure circumstances*, which were beyond the control of the Opposite Party as per clause 31 and 32 of the said agreement.
17. To deal with this issue, we deem it appropriate to *Consumer Case no. 1624 of 2018* tilted as *Sachin Goel & Anr. V. M/S. Ansal Housing & Construction Limited* decided on 13.07.2022, wherein similar case Hon'ble NCDRC held:

“12. Admitted facts of the case are that complainants were to get possession of the apartment within 48 months with 6 months grace period. It is submitted that extraction of ground water was banned in Gurgaon by Punjab and Haryana High Court, therefore, construction was delayed. This cannot be a ground for Force Majeure because the opposite party could have used tankers and other sources to get water for the construction purpose and, therefore, this plea of Force Majeure is not a valid plea.

13. *As regards ban on the mining of sand in Haryana and Rajasthan is concerned, it is not such an act which was beyond the control of the opposite party or would have made it impossible for the opposite party to complete the construction because dust could have been obtained from other sources. It is also submitted that delay had occurred due to ban on the use of dust in 2015-2016 by the National Green Tribunal. It is expected from the opposite party that while making the promise*

regarding the date of possession, it should assess the anticipated date of possession after taking construction or the likely impediment in the construction. The opposite party certainly would have considered all these factors and that is why it gave time of 6 months of Force Majeure. It is also clear that no specific period during which the use of dust etc was banned by the National Green Tribunal has been mentioned by the opposite party. It is apparent that promised date of possession was 02.04.2017 and the present complaint was filed in the year 2018 and continued till 2022 and till date, there is no evidence that construction had been completed and the occupancy certificate has been obtained. Therefore, the ground that they could not complete the construction due to these reasons are meritless and baseless and has been taken with the intention to gain some advantage. It is a proved fact that opposite party had failed to give offer of possession of the subject apartment till date i.e. even after the expiry of five years.”

18. We also deem it appropriate to refer **Consumer Case No. 235 Of 2018** titled **Narinder Sachdeva & Anr. V. M/S. Ansal Housing & Construction Limited** decided on 06.01.2022, wherein NCDRC held:

14. Learned Counsel appearing for the Opposite Party vehemently argued that the Clause specifies that the delivery of possession is subject to force majeure conditions and that there were several reasons and circumstances beyond the control of the Opposite Party such as interim orders of the Hon'ble Punjab and Haryana High Court, whereby ground water extraction was banned in Gurgaon; orders passed by the National Green Tribunal (NGT), whereby mining of sand in Haryana and Rajasthan was banned; reservation agitation in Haryana;

orders of NGT to stop construction to prevent emission of dust in the month of April, 2015 and again in November, 2016, demonetization etc.

15. All the aforementioned reasons do not fall within the ambit of reasons beyond their control as it can be seen from the record that the Flat Buyer's Agreement was entered into way back in July, 2013 and the orders of NGT to prevent emission of dust in April, 2015 and in November, 2016 cannot be construed to be any substantial reason and definitely not a force majeure condition. Even demonetization and reservation agitation cannot be construed as force majeure. With respect to other reasons there is no documentary evidence on record that they have led to the delay in the delivery of possession.

19. Above dicta reflects that the ban on groundwater extraction, sand mining, and the orders of the NGT, do not fall within the scope of circumstances beyond their control. Additionally, factors like demonetization and reservation agitation cannot be considered force majeure events. Furthermore, there is a lack of concrete documentary evidence to support the claim that these reasons have genuinely caused delays in delivering possession. Therefore, it can be concluded that the contentions made by the Opposite Party in relation to force majeure hold no substantive basis. Also, in the present case the Apartment Buyer Agreement was executed way back year 2012. Therefore, the contention taken by the Opposite Party is devoid of any merits.
20. Having discussed the preliminary objections raised on behalf of the Opposite Party, the next issue which arises is ***whether the Opposite Party is actually deficient in providing its services to the Complainants.*** The expression Deficiency of Service has been dealt with by the Hon'ble Apex Court in ***Arifur Rahman Khan and Ors.***

vs. DLF Southern Homes Pvt. Ltd. and Ors. reported at 2020 (3) RCR (Civil) 544, wherein it has been discussed as follows:

“23.The expression deficiency of services is defined in Section 2 (1) (g) of the CP Act 1986 as:

(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.

24. A failure of the developer to comply with the contractual obligation to provide the flat to a flat purchaser within a contractually stipulated period amounts to a deficiency. There is a fault, shortcoming or inadequacy in the nature and manner of performance which has been undertaken to be performed in pursuance of the contract in relation to the service. The expression 'service' in Section 2(1) (o) means a service of any description which is made available to potential users including the provision of facilities in connection with (among other things) housing construction. Under Section 14(1)(e), the jurisdiction of the consumer forum extends to directing the opposite party inter alia to remove the deficiency in the service in question. Intrinsic to the jurisdiction which has been conferred to direct the removal of a deficiency in service is the provision of compensation as a measure of restitution to a flat buyer for the delay which has been occasioned by the developer beyond the period within which possession was to be handed over to the purchaser. Flat purchasers suffer agony and harassment, as a result of the default of the developer. Flat purchasers make legitimate assessments in regard to the future course of their lives based on the flat which has been purchased being available for use and occupation. These legitimate expectations are belied when the developer as in the present case is guilty of a delay of years in the fulfilment of a contractual obligation.

21. At this stage, we deem it appropriate to refer to clause 30 of the Apartment Buyer agreement dated 20.07.2012 entered into by both

the contesting parties. It reflects that the Opposite Party was bound to hand over possession of the said unit within 36 months from the date of the said agreement. However, the Opposite Party miserably failed to hand over the possession of the said unit with stipulated period. Therefore, it is clear that the Opposite Party failed its contractual obligation. Also, it is evident from the receipt attached with the complaint that the Complainants had timely paid an amount of Rs. 96,46,580/- towards the basic sale consideration of Rs. 92,82,530.91/-.

22. We also deem it appropriate to refer to *Aashish Oberai vs. Emaar MGF Land Limited* reported in I (2017) CPJ 17 (NC), wherein the Hon'ble National Commission has held as under:

"I am in agreement with the learned senior counsel for the Complainant that considering the default on the part of the Opposite Party in performing its contractual obligation, the Complainant cannot be compelled to accept the offer of possession at this belated stage and therefore, is entitled to refund the entire amount paid by him along with reasonable compensation, in the form of interest."

23. Relying on the above settled law, we hold that the Opposite Party is deficient in providing its services to the Complainants as the Opposite Party had given false assurance to the Complainants with respect to the time for handing over the possession of the said unit and kept the hard-earned money of the Complainants. Therefore, now the Complainants are not bound to take the possession of the said unit after the stipulated period.

24. Keeping in view the facts of the present case and the extensive law as discussed above, we direct the Opposite Party to refund the entire amount paid by the Complainants i.e., **Rs. 96,46,580** /- along with simple interest as per the following arrangement:
- A.** An interest @ **6% p.a.** calculated from the date on which each installment/payment was received by the Opposite Party till **05.07.2024** (being the date of the present judgment);
 - B.** The rate of interest payable as per the aforesaid clause (A) is subject to the condition that the Opposite Party pays the entire amount on or before **05.09.2024**;
 - C.** Being guided by the principles as discussed above, in case the Opposite Party fails to refund the amount as per the aforesaid clause (A) on or before **05.09.2024**, the entire amount is to be refunded along with an interest @ **9% p.a.** calculated from the date on which each installment/payment was received by the Opposite Party till the actual realization of the amount.
25. In addition to the aforesaid and taking into consideration the facts of the present case, the Opposite Party is directed to pay a sum of:
- A.** Rs. 4,00,000/- as cost for mental agony and harassment to the Complainants; and
 - B.** The litigation cost to the extent of Rs. 50,000/-.
26. Applications pending, if any, stand disposed of in terms of the aforesaid judgment.
27. The judgment be uploaded forthwith on the website of the commission for the perusal of the parties.

28. File be consigned to record room along with a copy of this Judgment.

**(JUSTICE SANGITA DHINGRA SEHGAL)
PRESIDENT**

**(J.P. AGRAWAL)
MEMBER (GENERAL)**

Pronounced On: **05.07.2024**

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