

**NATIONAL CONSUMER DISPUTES REDRESSAL COMMISSION
NEW DELHI**

FIRST APPEAL NO. 1117 OF 2023

(Against the Order dated 18/05/2023 in Complaint No. CC/144/2019 of the State
Commission Delhi)

1. TDI INFRASTRUCTURE LTD

D-92, GROUND FLOOR, LAJPAT NAGAR - 1, LAJPAT
NAGAR, SOUTH DELHI, NEW DELHI 110024

.....Appellant(s)

Versus

1. BIPIN GUPTA

2-A/304, RANG RASAYAN APARTMENTS, SECTOR -13,
ROHINI, DELHI - 110085

.....Respondent(s)

BEFORE:

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

HON'BLE BHARATKUMAR PANDYA, MEMBER

FOR THE APPELLANT : MR. SACHIN SHARMA, ADVOCATE

FOR THE RESPONDENT : MR. TARA CHAND GUPTA, ADVOCATE

Dated : 05 June 2024

ORDER

1. Heard Mr. Sachin Sharma, Advocate, for the appellant and Mr. Tara Chand Gupta, Advocate, for the respondent.
2. Above appeal has been filed against the order of State Consumer Disputes Redressal Commission, Delhi, dated 18.05.2023, allowing CC/144/2019, with cost of Rs.50000/- and directing the appellant to refund the entire amount of Rs.1734768/- paid by the respondent with an interest @6% per annum from the date of each deposit till 18.05.2023 in case the opposite party pays the entire amount on or before 18.07.2023 and if it fails to do so within that period, then the entire amount is to be refunded with an interest @9% per annum from the date of each deposit till realization and pay compensation of Rs.100000/- for mental agony and harassment.
3. Bipin Gupta (the respondent) filed CC/144/2019, for directing M/s TDI Infrastructure Ltd. (the appellant), to (i) handover possession of Apartment no. 504, having 150.9625 sq. mtr. area in Tower-D, Building D-1, TDI City, Kundli, Sonapat to the complainant; (ii) to pay Rs.2 lacs as compensation for harassment and torture; (iii) to pay Rs.25000/- as litigation expenses; and (iv) any other relief which is deemed fit and proper in the facts of the case.
4. The complainant stated that the opposite party launched a group housing project in the name of "TDI City" at Kundli, Sonapat in the year 2005 and made wide publicity of it. Believing upon the representation of the opposite party the complainant booked a flat with the opposite party in "TDI City" and had deposited the booking amount of Rs.400000/- on 20.07.2005. Subsequently, the opposite party allotted Apartment no.504, having 150.9625

sq. mtr. area in Tower-D. The opposite party executed Apartment Buyer's Agreement dated 20.07.2007, in which basic consideration of Rs.2356250/- was mentioned. Payment plan was "construction link payment plan". The complainant paid instalments as per demand of the opposite party from time to time. As per Clause 6.1 of the Agreement dated 20.07.2007, construction was to be completed within a period of three years from the date of execution of agreement, which period expired on 20.07.2010. Although the complainant has made payment of Rs.1734768/- to the opposite party but the project was still incomplete. The opposite party, vide letter dated 21.10.2010, asked the complainant to deposit entire balance amount by 20.11.2010 otherwise the opposite party would cancel the provisional allotment of the complainant without any further notice. The complainant raised a protest against the demand and had meeting with the official of the opposite party on in January, 2011, in which, the complainant was asked to payment and was assured possession within short time. The complainant sent a cheque No.968377 dated 20.01.2011 of Rs.757501/- in respect of the balance final payment in favour of the opposite party which has not been presented yet by the opposite party. The complainant wrote numerous letters and legal notices but in spite of service of the notices, the opposite party did not issue possession letter of the allotted apartment to him. The opposite party did not provide the correct statement of account of the complainant despite of repeated requests of the complainant. Then the complaint was filed before District Consumer Forum on 16.01.2013 (registered as CC/63/2013).

5. The appellant filed written version and contested the complaint admitting booking of a flat in "TDI City" vide advance registration form, issue of provisional allotment letter allotting Flat No. D-1-0504 and execution of Apartment Buyer's Agreement dated 20.07.2007, in which, payment plan was "construction link payment plan". The opposite party stated that they raised demand of the instalment payable on 'Casting 7th Floor Slab' vide letter dated 15.10.2009 and the instalment payable on 'Completion of Internal Plumbing' vide letter dated 04.06.2010 and Reminder dated 10.06.2010 but the complainant did not deposit it. As the complainant was a defaulter in making the payments as per payment schedule and thus, the opposite party had no option but to cancel the provisional allotment. The opposite party sent cancellation letter dated 21.10.2010, giving one month time to the complainant to make balance payment. In spite of service of the letter, the complainant did not deposit balance amount as such his allotment stands cancelled. The opposite party gave numerous reminders to the complainant for the due payment but the complainant always defaulted. It was further stated that in case of cancellation, the opposite party had the right to sell the flat to any other party and the complainant himself being a defaulter, has no right to claim any relief from the Forum. Value of the flat was more than Rs.20/- lacs and this Forum has no pecuniary jurisdiction to hear the complaint. The complainant booked the flat for commercial purpose and is not a 'consumer'.

6. The complainant filed Rejoinder, his Evidence by way of Affidavit to prove his case while opposite party filed the affidavit of evidence of Mr. Paras Arora, its Authorized Signatory. District Forum, vide order dated 07.06.2018, held that it had no pecuniary jurisdiction to hear the complaint and returned the complaint for presentation before appropriate forum. Thereafter, CC/144/2019 was filed on 08.02.2019 before State Commission. State Commission, in the impugned order found that the opposite party has not adduced any evidence to prove that the flat was purchased for commercial purpose. The opposite party admitted allotment of Flat no.D1-0504, execution of Apartment Buyer's

Agreement dated 20.07.2007 and deposits made by the complainant. As per agreement, possession had to be handed over by 20.07.2010 but possession was not offered by that time. As the opposite party had delayed possession, it had no right to cancel the allotment. On these findings, State Commission allowed the complaint and order as stated above has been passed. Hence this appeal has been filed by the opposite party.

7. We have considered the arguments of the counsel for the parties and examined the record. As per Apartment Buyer's Agreement dated 20.07.2007, Payment plan was "construction link payment plan", in which, apart from basic consideration of Rs.2356250/-, EDC, IDC, E & FFC, PB, CP i.e. total Rs.3106875/- was payable in instalments. Clause-3 of the agreement provides that the allottee shall make all the payment as per Schedule and clause-5 provides that timely payment of the instalment was essence of the contract. According to the complainant, he had paid total Rs.1734768/-. The opposite party raised demands of the instalment payable on 'Casting 7th Floor Slab' vide letter dated 15.10.2009 and the instalment payable on 'Completion of Internal Plumbing' vide letter dated 04.06.2010 and Reminder dated 10.06.2010 but the complainant did not deposit it. As the complainant was a defaulter in making the payments as per payment schedule and thus, the opposite party had no option but to cancel the provisional allotment. The opposite party sent cancellation letter dated 21.10.2010, giving one month time to the complainant to make balance payment, in terms of Clause-9. In spite of service of the letter, the complainant did not deposit balance amount as such his allotment stands cancelled after expiry of one month. After cancellation of the allotment, the complainant gave cheque No.968377 dated 20.01.2011 of Rs.757501/- (not Rs.856153/- as demanded in the letter dated 04.06.2010) but the opposite party did not en-cashed it. The complainant alleged that the construction was delayed as such allotment was not liable to be cancel but no evidence has been filed to prove that the demands were raised before the stage of construction. The opposite party completed the construction and obtained "occupation certificate", on 25.05.2012. Therefore, cancellation of the allotment does not suffer from any illegality.

8. However, the opposite party had not refunded the balance amount after forfeiting 'earnest money' as per clause-9 of the agreement as such cancellation of the allotment was not complete and the complaint filed on 17.01.2013 was not time barred. As the complainant was defaulter, his 'earnest money' was liable to be forfeited. Supreme Court in **Fateh Chand Vs. Balkishan Das, AIR 1963 SC 1405, Maula Bux Vs. Union of India, (1969) 2 SCC 554** and **Kailash Nath Associate Vs. Delhi Development Authority, (2015) 4 SCC 136**, held that forfeiture of earnest money for breach of contract must be reasonable and if forfeiture is in the nature of penalty, then provisions of Section 74 of Contract Act, 1872 are attracted and the party so forfeiting must prove actual damage. After cancellation of allotment, the flat will remain with the opposite party as such there is hardly any actual damage. This Commission in CC/438/2019 Ramesh Malhotra Vs. EMAAR MGF Land Ltd. (decided on 29.06.2020), CC/3328/2017 Mrs. Prerana Banerjee Vs. Puri Construction Ltd. (decided on 07.02.2022 and Mr. Saurav Sanyal Vs. M/s. Ireao Grace Pvt. Ltd. (decided on 13.04.2022) held that 10% of basic sale price is reasonable amount to be forfeited as "earnest money".

ORDER

In view of aforesaid discussions, the the appeal is partly allowed. The order of State Commission dated 18.05.2023 is set aside. The appellants are directed to refund entire amount

deposited by the respondent with interest @9% per annum from the date of respective deposit till the date of refund, after forfeiting 10% of basic sale price, within a period of two months from the date of this judgment.

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RAM SURAT RAM MAURYA
PRESIDING MEMBER

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BHARATKUMAR PANDYA
MEMBER