

Heading1
Heading2

Complaint Case No. CC/48/2017
(Date of Filing : 15 Feb 2017)

1. RAJENDER KUMAR & ANR
A-11/F-2, DILSHAD GARDEN, DELHI-95.Complainant(s)

Versus

1. EARTH INFRASTRUCTURES LTD.
26th, 1st FLOOR, PUSA ROAD, KAROL BAGH, NEW
DELHI-05.Opp.Party(s)

BEFORE:

HON'BLE MR. INDER JEET SINGH PRESIDENT
HON'BLE MS. RASHMI BANSAL MEMBER

PRESENT:**Dated : 03 Jun 2024****Final Order / Judgement**

Before the District Consumer Dispute Redressal Commission [Central District] - VIII, 5th
Floor Maharana Pratap ISBT Building, Kashmere Gate, Delhi

Complaint Case No.48/15.02.2017

1.Rajinder Kumar son of Shri Prem Chandra
2. Mrs Manju wife of Shri Rajinder Kumar
both resident of A-11/F-2 Dilshad Garden, Delhi-95 ...Complainants

Versus

M/s Earth Infrastructures Limited through its
Managing Director/joint Managing Director
26, Pusa Road, 1st floor, Karol Bagh , Metro Station,
New Delhi-110005 ...Opposite
Party

Date of filing: 15.02.2017

Date of Order: 03.06.2024

Coram:

Shri Inder Jeet Singh, President

Ms Rashmi Bansal, Member -Female

ORDER

Inder Jeet Singh , President

This case is scheduled today for Final Order.

1. (case of complainants) - The complaint u/s 12 of the Consumer Protection Act, 1986 has been filed by the complainants against OP-M/s Earth Infrastructures Pvt. Ltd. for refund of paid amount of Rs.11,70,00/- by alleging deficiency of services etc. In June 2011, there was an advertisement for sale of flats/studio apartment in residential township project namely 'Earth Studios' being developed by OP. The complainant no.1 made inquiry then the complainants started receiving messages and call from office or representatives of OP beside their personal visits at residence insisting to buy an apartment. The complainants booked a studio apartment/flat measuring 465 sq. yards in the Project of OP for total consideration amount of Rs.18,42,625/-. An application was furnished besides an advance amount of Rs.6,20,000/- against receipt to OP. The complainants were required to pay further amount of Rs.11,70,000/- at the time of signing of memorandum of understanding (MoU) and remaining balance amount of Rs.6,72,625/- to be payable at the time of possession, which will be on or before June 2013. It was also assured that on payment of Rs.11,70,000/- to the OP; then OP will pay assured monthly return of Rs.11,700/- to the complainant.

1.2. The complainants paid Rs.11,70,000/- to the OP as per demand and also executed MoU on 21.05.2012, however, possession was not handed over till June 2013. When complainants visited at the site of project, it shocked them to see that construction was not even started. Then on further visit at the office of OP, it was told that due to some delay, the unit will be handed over in July 2015 and they were also told that since assured monthly return is being paid, it will continue till possession is delivered. The complainants remained passive. However, the monthly assured return was also stopped by OP from October 2015 but in November 2015 the OP by way of letter asked the complainants for conversion of assured return plan into one time discount of 15% . The complainants refused to concede to their letter and requested to continue monthly assured return.

1.3. The OP failed to honour monthly assured return from October 2015 nor possession of unit was delivered, there is violation of MoU since OP failed to comply despite various communications. There is elapse of five years period but possession has not been delivered. There is just building structure but no further construction to deliver the flat to the complainants. OP has acted dishonestly and mala-fide. The request of complainants to refund the amount has also not been considered nor possession was delivered, therefore, the complainants sent legal notice dated 15.11.2016 under registered post to the OP to refund amount of Rs.11,70,000/- with

interest. It was also not complied with. The complainants suffered for unfair trade practice and deficiency of services on the part of OP. That is why the complaint for necessary directions to the OP to return paid amount of Rs. 11,70,000/-, compensation of Rs. 1,00,000/- and appropriate costs of litigation.

1.4. The complaint is accompanied with copies of - booking confirmation receipt and acknowledgment of receipt of booking amount, MoU 21.05.2012, letter dated 28.11.2015 of conversion plan to one time discount, reply to that letter and legal notice with postal record.

1.5 Initially the name of complainant no.1 was mentioned as Rajender Singh but his name is Rajender Kumar, it was rectified in the record of complaint with the leave of Commission. Accordingly it is mentioned in array of parties.

2.1 . (case of OP) - The OP opposed the complaint that it is liable to be dismissed, since the complainant is not a consumer as the booking was done for commercial purposes with assured return on the amount deposited, which the complainant has complied with till June 2015 in terms of clause 4.1 of MoU. However, the other component of clause 4.1. is that assured return was subject to timely payment of balance due amount, which the complainants failed to adhere and complied with. The complainants booked the unit not for their personal use but for speculative investment to capitalize the future profits. The complainant failed to perform their own obligations of timely and balance due amount on or before June 2013 or on the date of offer of possession of unit, whichever is earlier being clause no. 1.3 of MoU vis a vis they cannot take advantage of own their own negligence and faults. It does not depict the consumer dispute. Moreover, the complaint is without cause of action as well the complainant has concealed the material facts.

2.2. The complaint is based on fabricated averments, contrary to executed documents; the facts involves disputed questions, which can be decided by regular civil court, or otherwise there is an arbitration clause 5.1. of MoU, therefore, the Consumer For a lacks the jurisdiction to try the matter.

2.3. The complainant is raising hue and cry in the complainant out of nothing regarding the status of project, however, vague dispute is being raised, since reasons for delay in the project is neither in the control of either of the parties vis a vis OP never shield away from its obligations under MoU. As per clause 39 of MoU that in the condition of force majeure, the OP shall be entitled for extension of time for handing over the possession of apartment to allottees.

2.4. The written statement is accompanied with copies of - MoU and application form (dim impressions). [Although MoU has also been filed by the complainants].

3. (Replication of complainant) - The complainants filed their replication to the written statement of OP and they deny the allegations of written statement as informed, misconceived and misinterpretation. The complainants are consumers, MoU clearly mentions that agreement is for a residential unit. The case is fairly covered under the Consumer Protection Act for redressal and it does not need reference to Arbitration. There is criminal breach of trust, misappropriation and conspiracy of OP to swallow the hard earned money of complainants. The plea of force majeure is baseless and OP is taking shelter under this clause as an excuse. The OP

cannot take shelter for infinite time, since agreed time elapsed as well as more than five has gone. The OP has to refund the entire amount with interest at the rate of 18% .

4. (Evidence of parties) - At the stage of evidence, the complainant no.1 and no.2 filed their affidavits of evidence coupled with the documentary record of complaint. However, on the other side, the OP was given opportunity to lead evidence but despite opportunity and for want of leading evidence, OP's evidence was closed on 21.02.2019.

5. (Final hearing) - The complainant filed written arguments, which are basically replica of evidence of complainant. Further, Dr.V.P. Singh, Advocate for complainant made the final submissions orally. However, OP failed to file written arguments as well as to present oral submission despite opportunity.

6.1 (Findings) - The contentions advance on behalf of complainant are considered keeping in view the narration given in the evidence coupled with the documentary record.

The OP took certain objection on the point of jurisdiction of Consumer Fora and on other points of law. It is appropriate to decide them first.

6.2.1. The OP has reservation in the written statement that there are complicated question of facts and law involved to be dealt in regular trial before civil court, which cannot be decided in summary procedure by the Consumer Fora. It is equally opposed by the complainant that matter can be decided by the Consumer Fora.

6.2.2. The record is assessed. The OP's written statement on record or documents do not show mixed question of fact and law to be determined by the Civil Court exclusively or needs trial in regular civil court or as to how the dispute cannot be determined by the present DCDRC Central District. Therefore, this objection is decided against the OP that on the basis of material on record the matter can be determined by the present DCDRC on the basis of sufficient material on record. This contention is disposed off.

6.3.1. The other objection taken by OP is that the unit was booked for speculative purposes, therefore, the complainants are not consumers nor it is consumer dispute to be covered under the Consumer Protection Act, 1986. Whereas, the complainants has juxtaposition stand that MoU clearly mentions that it is residential unit and it was booked for that purposes.

6.3.2. Since as per MoU, it mentions that booking of the flat/unit is for residential purposes and none-else. The onus was no the OP to prove that it was other than residential purposes, but it failed. Thus OP could not prove its objection.

It is not out of context to mention that MoU (first page) is partly on non-judicial stamp paper it is bearing recital/particulars of the parties, the remaining terms and conditions are mentioned on MoU are on standard format, which are partly on page-1 of that format, other than recital since written on non-judicial stamp paper. In the format of recital, expression 'applicant/allottee' is printed but on non-judicial stamp paper, it is mentioned as 'investor' for complainants. However, it would not convert the purposes to commercial via a vis in the contents of MoU, there is expression of allottee or applicant or both in continuing till last page of signature.

6.4.1. The OP also claim that because of arbitration clause in the MoU, the matter is to be adjudicated by the Arbitrator, which is opposed by the complainants that it is a consumer dispute.

6.4.2. Firstly, as per section 3 of the Act, 1986, the provisions of this Act 1986 are in addition to, and not in derogation, of other law in in force. There is similar provision in sec. 100 of the Consumer Protection Act, 2019. Thus, despite arbitration clause no.5 in the MoU, the jurisdiction of Consumer For a is not barred. Secondly, in precedent Skypak Courier Ltd Vs. Tata Chemicals 2000 5 SCC 294, it was held "that even if there exists an arbitration clause in an agreement and complaint is made by consumer in relation to a certain deficiency of services, then the existence of an arbitration clause will not bar to entertain the complaint under the Consumer Protection Act since the remedy provided under the Act is in addition to the provisions of any other law for the time being in force"

Accordingly, this point is determined against the OP and the consumer's complaint cannot be dismissed on this ground. This District Consumer Dispute Redressal Commission is competent and has jurisdiction to adjudicate this consumer's complaint despite arbitration clause in MoU.

6.5. In view of above, it is also held that complainants are consumers and dispute involved is consumer dispute. This objection of OP is also disposed off.

7.1. By taking into stock of all materials of evidence, which has been proved by the complainant. There is no contrary evidence to rebut the facts proved by the complainant, since no evidence has been led on behalf of OP nor there is any admission by complainants in their replication to the allegations in written statement of OP. The OP has also referred 'force majeure clause' in the written statement but no fact is mentioned in the written statement nor any evidence led to establish as to what were those circumstances constituting force majeure. The OP cannot be treated protected just by writing expression 'force majeure', when those facts are not existing and proved.

7.2. The OP's case is that there was assured return understanding and the complainants were to pay balance due amount on or before June 2013 or on the date of offer of possession of unit, whichever is 'earlier' being clause no. 1.3 of MoU. But word 'later' is manually written in that clause, which reads "that balance due amount on or before June 2013 or on the date of offer of possession of unit, whichever is later" in clause no. 1.3 of MoU, which is also in the copy of MoU on page 16 filed by OP as Annexure-A . The OP failed to rebut this evidence.

7.3. To say, the complainants had booked a studio flat/apartment/unit in the project of OP, for that purposes booking amount of Rs. 6,20,000/- was deposited. Then subsequently MoU was entered between the a parties and further payment was also deposited. The complainants paid Rs.11,70,000/- to the OP. The complainants were assured that studio flat in the project will be delivered by June 2013 or in extended period of July 2015, but OP failed. Moreover, the complainants were also not given their assured monthly return from October 2015 onwards in violation of MoU. Therefore, the complainants are consumers as they were promised to deliver possession of the studio apartment/flat against consideration agreed. However, despite receiving the agreed payments but neither the apartment was constructed to be delivered nor it was delivered to them, it is unfair trade practice as well as deficiency in services. Therefore, it is held

that complainants have proved complaint against OP. Hence the complainants are held entitled for return of paid amount of Rs. 11,70,000/-in their favour and against the OP.

7.4. The complainants claim interest of 18 % pa as stated in the legal notice and replication. It was not mentioned in the complaint but reiterated during arguments that legal notice is part of record and evidence. There is no agreed rate of interest as the documents proved does not contain any such clause vis a vis the complainants were being paid Rs.11,700/-per month as assured return till October 2015; which comes to 12%pa; however, it was for limited period. Therefore, after considering all aspects, interest at the rate of 9% pa from the date of complaint till realization of amount will meet both ends.

7.5 The complainants also seek compensation of Rs. 1,00,000/- on account of harassment and agony besides cost of litigation. The complainants have not established their financial status, income or sources of income for the purposes of evaluating the compensation amount. However, the circumstances are speaking that they faced delay and difficulty, inconvenience and other harassment besides non-payment of assured returns; therefore, compensation of Rs. 30,000/- is allowed in their favour and against the OP. Cost is also quantified as Rs. 10,000/-in their favour and against OP.

8. Thus, the complaint is allowed in favour of complainants and against the OP to return/ pay amount of Rs. 11,70,000/- along-with simple interest @ 9%pa from the date of complaint till realization of amount; apart from to pay compensation of Rs.30,000/- & costs of Rs.10,000/- to complainants. This amount will be payable within 45 days from the date of this order, failing to pay the amount in that time, then the interest rate will be 12% per annum on amount of Rs. 11,70,000/- from the date of complaint till realisation of amount. The OP may also deposit the amount in the Registry of this Commission in the form of valid instrument in the names of complainants by informing them.

9. Announced on this 3rd day of June 2024 [ज्येष्ठ 13, साका 1946]. Copy of this Order be sent/provided forthwith to the parties free of cost as per rules for compliances, besides to upload on the website of this Commission.

[ijs64]

**[HON'BLE MR. INDER JEET SINGH]
PRESIDENT**

**[HON'BLE MS. RASHMI BANSAL]
MEMBER**