

**NATIONAL CONSUMER DISPUTES REDRESSAL COMMISSION
NEW DELHI**

FIRST APPEAL NO. 923 OF 2021

(Against the Order dated 29/10/2021 in Complaint No. 52/2020 of the State Commission
Chandigarh)

1. EMAAR INDIA LTD. & ANR.

THROUGH ITS AUTHORIZED REP. 306-307-308, 3 FLOOR,
SQUARE ONE , C2, DISTRICT CENTER SAKET
NEW DELHI 110017

2. EMAAR INDIA LTD

THROUGH ITS AUTHORIZED REP. OFFICE NO 40,
MOHALI HILLS SECTOR 105, SAS NAGAR

MOHALI

PUNJAB

.....Appellant(s)

Versus

1. GAURAV SINGH KHURANA & ANR.

S/O. SHRI KANWAL PREET SINGH, R/O. H NO 3005,
SECTOR 28D,

CHANDIGARH 160 002

2. NIMRAT KAUR KHURANA

D/O. SHRI JOGINDER SINGH, W/O. SHRI GAURAV SINGH
KHURANA, R/O A-49, FIRST FLOOR, NEW FRIENDS

COLONY, NEW DELHI-110065

.....Respondent(s)

BEFORE:

**HON'BLE MR. SUBHASH CHANDRA, PRESIDING MEMBER
HON'BLE DR. SADHNA SHANKER, MEMBER**

FOR THE APPELLANT : MR. ARJUN JAIN, ADVOCATE

FOR THE RESPONDENT : FOR THE RESPONDENT NO. 1 : MR. SUMIT SAHARAWAT,
ADVOCATE

FOR THE RESPONDENT NO. 2 : EX-PARTE

Dated : 05 April 2024

ORDER

DR. SADHNA SHANKER, MEMBER

1. The instant appeal has been filed under Section 51(1) of the Consumer Protection Act, 2019 (for short "the Act") in challenge to the Order dated 29.10.2021 of the State Consumer Disputes Redressal Commission, UT Chandigarh (hereinafter referred to as the "State Commission") in complaint No. 52 of 2020 whereby the complaint was allowed.

2. Heard the learned counsel for the appellant (hereinafter referred to as the 'builder company') and the learned counsel for the respondent No. 1 (hereinafter referred to as the 'complainant') and perused the record including the State Commission's impugned Order dated 29.10.2021 and the memorandum of appeal.

The respondent no. 2 was proceeded against *ex parte*.

3. Brief facts of the case are that the complainants booked a flat in the Project namely 'The Views' situated in Sector-105, SAS Nagar, Mohali, Punjab, with the builder company, for a total sale consideration of Rs.41,36,550/- and they were allotted flat No.H2-902 in Tower-H admeasuring 1350 sq. ft. vide allotment letter dated 29.01.2008. The builder-buyer's agreement was executed on 30.01.2008. The complainants paid a total amount of Rs.37,75,900/- as per the demand raised by the builder company. It is alleged that as per the agreement, the physical possession of the flat was to be handed over within 36 months from the date of agreement i.e. on or before 30.01.2011 but the builder company has failed to deliver the possession of the flat. As the builder company has failed to hand over physical possession of the flat within the stipulated period, the complainants sought refund of the deposited amount along with interest but their requests were disregarded.

4. Being aggrieved, the complainants filed a complaint before the State Commission, Maharashtra with the following prayer :-

- A. *Direct the Opposite Parties to refund the entire sale consideration amounting to Rs.37,75,900/- (Rupees Thirty Seven Lacs Seventy Five Thousand Nine Hundred Only) deposited by the Complainants till date;*
- B. *Grant interest @ 18% P.A. on the principal amount of Rs.37,75,900/- (Rupees Thirty Seven Lacs Seventy Five Thousand Nine Hundred Only) from the time of various deposits till the time of refund.*
- C. *Grant compensation to the tune of Rs.10,00,000/- for inconvenience and mental harassment and damages suffered due to deficiency of services on part of the Opposite Parties;*
- D. *Grant compensation to the tune of Rs.75,000/- towards the cost of litigation, documentation charges, representation(s) and numerous visits.*
- E. *Grant compensation calculate @ Rs. 5/- per square feet per month of the super area w.e.f. 01.02.2011 till the date of notice offering the possession.*
- F. *Any other relief to which the Complainants may be entitled to under the facts and circumstances of the matter be passed in favor of the Complainants and against the Opposite Parties;*
- G. *Cost of the complaint be awarded in favor of the complainants and against the Opposite Parties.*

5. The builder company contested the complaint by filing a written statement raising the preliminary objections, firstly, that the complainants are not consumers as they have their own house in New Delhi and they had purchased the flat only to earn quick profit and they have no intention to reside in the flat in question and secondly, the complaint is barred by limitation. The other preliminary objection is that pursuant to the enactment of Real Estate

(Regulation and Development) Act, 2016, (hereinafter referred to as the 'RERA'), the proceedings before the State Commission are not maintainable by virtue of section 79 read with Section 71 of RERA and hence, the complaint is not maintainable and is liable to be dismissed. It is further stated that it is well settled principle of law that in case of sale of immovable property, time is never regarded as essence of the contract and there was no definite commitment to hand over possession within 03 years as time was not the essence of agreement. Further, the builder company stated that the presence of an arbitration clause in the agreement rendered the consumer complaint non-maintainable. The builder company further stated that if a refund was sought, forfeiture of earnest money would apply as per the agreement's terms and conditions. Additionally, they claimed that the Commission lacked pecuniary jurisdiction to entertain the complaints.

6. The State Commission, vide its Order dated 29.10.2021 partly allowed the complaint and directed the builder company to refund the amount of Rs.37,75,900/- to the complainants, along with interest @11 % p.a. from the respective dates of deposit onwards, without deducting any TDS along with compensation of Rs. 50,000/- towards mental agony and harassment as also cost of litigation.

7. Aggrieved by this Order dated 29.10.2021 of the State Commission, the builder company has filed the instant appeal before this Commission.

8. Learned counsel for the builder company has submitted that the complainants have other properties and has been residing in posh locality of New Friends Colony, New Delhi, therefore, they are not consumers within the meaning of section 2(1)(d) of the Act. He further argued that the State Commission did not have pecuniary jurisdiction and has gone beyond the powers conferred upon it because the prayer made by the complainants was valued at Rs. 1.28 crores. In support of this contention, he placed reliance on the decision rendered in the case of **Ambrish Kumar Shukla vs. Ferrous Infrastructure Pvt. Ltd. in C.C. No. 97 of 2016**. He further contended that the complainants had earlier sought refund in 2009 due to personal financial pressure and the opting out of the allotment would amount to surrender of allotment, entailing forfeiture of earnest money. He further submits that the complainant made the last payment on 13.05.2019 till which date, there was no issue regarding delay in handing over possession. He further argued that the rate of interest at the rate of 11% is highly excessive and 6% is just, reasonable and commensurate with the loss and injury suffered by the complainants.

9. The learned counsel for the complainant has vehemently argued that the complainants are not the investors of real estate by purchasing and selling the property to make commercial gain and the complainants are in need of a suitable residential accommodation and they fall within the definition of 'consumer' within the meaning of Section 2(1)(d) of the Act. He has further argued that the complainants are not the permanent resident of New Delhi or Gurugram, Haryana and the complainants were residing in rented accommodation taken by complainants' parents. He further argued that the RERA Act came into force in the year 2017 while the transaction of this case had taken place in the year 2008, therefore, the RERA Act is not applicable to the present case.

10. The question which falls for our consideration is whether there is deficiency in service on the part of the builder company.
11. In so far as the point of arbitration clause is concerned, it has been rightly dealt with in detail by the State Commission that an arbitration clause in the agreement between the buyer and the builder cannot circumscribe the jurisdiction of a consumer fora notwithstanding the amendments made to section 8 of the Arbitration Act.
12. As regards the point of registration of the project under the RERA Act, we are in agreement with the learned counsel for the complainant that the RERA Act was formulated and legislated in the year 2017 whereas the transaction of this case had taken place in the year 2008, which is much prior to the enforcement of the provisions of the said RERA Act, and the possession of the flat was to be handed over on or before 30.01.2011, therefore, the RERA Act is not applicable to the present case.
13. As regards the point that the complainants are not “consumers”, learned counsel for the builder company has not been able produce any documentary evidence that the complainants have their own property in New Delhi or Gurugram, hence, it cannot be said that the complainants are not consumers. Merely saying that the complainants possess property in New Delhi or Gurugram is not sufficient to hold that the complainants are not consumers within the meaning of Section 2(1)(d) of the Act.
14. As regards the point of pecuniary jurisdiction is concerned, the complaint was filed on 26.02.2020 when the Consumer Protection Act, 1986 was in force. As per section 17 of the Act, the State Commission shall have jurisdiction to entertain complaints where the value of the goods or services and compensation, if any, claimed exceeds rupees twenty lakh but does not exceed one crore. In the present case, the complainants sought refund of Rs.37,75,900/- along with interest @ 18% p.a. on the principal amount of Rs.37,75,900/- , compensation to the tune of Rs.10,00,000/- for inconvenience and mental harassment and damages suffered, Rs.75,000/- towards the cost of litigation, documentation charges, representation(s) and numerous visits and compensation calculable @ Rs. 5/- per square feet per month of the super area, which comes out to be more than one crore which certainly exceeds the pecuniary jurisdiction of the State Commission as per the ratio in *Amrish Kumar Shukla (supra)*. However, it is seen that the State Commission rejected the objection of pecuniary jurisdiction and decided the case on merits. This is a complaint of the year 2008 and it has been heard on merits by the State Commission. Although, the appellant raised this issue of pecuniary jurisdiction before the State Commission, which rejected it, at this stage, the argument of the petitioner is a technical issue which in the interest of justice is being rejected; reliance has been placed on the decision of NCDRC in *M/S Omaxe Ltd. Vs. Hira Lal Mittal RP/3061/2017 (NCDRC)*.
15. It is noticed that there has been an unreasonable delay in construction of the subject Project. The flat was allotted to the complainants on 29.01.2008 and an agreement was executed between the parties on 30.01.2008. The complainants paid Rs.37,75,900/- against the unit. It is admitted by the builder company that it had not delivered the possession of the said flat within the stipulated period which constitutes deficiency in service. Therefore, the complainants are entitled to refund of the entire deposited amount with reasonable interest. Reliance is placed on the Judgment of the Hon’ble Supreme Court in *Pioneer Urban Land and Infrastructure Ltd. Vs. Govindan*

Raghavan LNIND 2019 SC 311 and in the case of ***Ireo Grace Realtech Pvt. Ltd. Vs. Abhishek Khanna & Anr. in Civil Appeal No. 5785 of 2019*** .

16. On the issue of what would constitute a reasonable rate of interest in the present times; reliance is placed on the Order of Hon'ble Supreme Court in the case of ***Ireo Grace Realtech Pvt. Ltd. Vs. Abhishek Khanna & Anr. in Civil Appeal No. 5785 of 2019***, decided on 11.01.2021, has held as under:-

"52. We are cognizant of the prevailing market conditions as a result of Covid-19 Pandemic, which have greatly impacted the construction industry. In these circumstances, it is necessary to balance the competing interest of both parties. We think it would be in the interests of justice and fair play that the amount deposited by the Apartment Buyers is refunded with Interest @ 9% S.I. per annum from 27.11.2018 till the date of payment of the entire amount."

The Hon'ble Supreme Court has taken similar view in ***M/s Nexgen Infracon Pvt. Ltd. Vs Manish Kumar Sinha in Civil Appeal No. 62 of 2021*** decided on 11.01.2021, wherein it was held as under:

".... This takes us to the next question whether the rate of interest awarded by the Commission be maintained or whether such rate is required to be scaled down. In keeping with the directions issued by this Court in the case of Prateek Infra projects, we scale down the interest from 12% & 14% as ordered by the Commission to 9% per annum. We also modify the direction restraining the appellant from deduction the tax at source.

It is, therefore, directed that the amounts deposited by the respondents in respect of the apartment in question shall be refunded to them along with interest @9% per annum from the dates of respective deposits."

17. There are a numbers of orders and judgments of this Commission and Hon'ble Supreme Court where an interest rate of 9% has been awarded along with the refund of entire amount deposited by buyer/purchasers.

18. The Hon'ble Supreme Court in the case of ***DLF Homes Panchkula Pvt. Ltd. vs. D.S. Dhanda***, in CA Nos. 4910-4941 of 2019 decided on 10.05.2019 has held that multiple compensations for singular deficiency is not justifiable. Therefore, the award of compensation of Rs.50,000/- for mental agony and harassment as well as cost of litigation granted by the State Commission is found to be not tenable.

19. In view of the above settled legal proposition, we are of the view that the compensation has to be just and equitable, commensurate with the loss and injury suffered. We feel that in particular facts and circumstances of the case, the compensation in the form of simple interest at the rate of 9% per annum for delay in delivery of possession would be just and equitable and commensurate with the loss and injury suffered by the complainant. Also, it would be apt that the compensation should be calculated from the date of respective deposit till realization, without deducting any TDS.

20. As such we modify the award made by the State Commission to the extent that the builder company shall refund the amount of Rs. 37,75,900/- with compensation in the form

of simple interest at the rate of 9% per annum from the respective dates of deposit till realization. Direction no. (ii) is set aside. The order be complied with within four weeks from today, failing which, it shall carry interest at the rate of 12% per annum.

21. The appeal stands disposed of in above terms. All pending applications, if any, stand disposed of.

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**SUBHASH CHANDRA
PRESIDING MEMBER**

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**DR. SADHNA SHANKER
MEMBER**