

**NATIONAL CONSUMER DISPUTES REDRESSAL COMMISSION
NEW DELHI**

FIRST APPEAL NO. 1072 OF 2019

(Against the Order dated 05/11/2018 in Complaint No. 492/2017 of the State Commission
Haryana)

1. M/S. EMAAR MGF LAND LTD.

Through its CEO, Sanjay Malhotra, 306-307-308, 3rd Floor,
Square One, C-2, District Center, Saket
NEW DELHI-110 001.

.....Appellant(s)

Versus

1. SURINDER KUMAR PUNCHHI & ANR.

S/o Late Shri Shiv Dass Punchhi, R/o House No.E-320, Shikhar
Apartments, GH-2, Sector-5, MDC,
PANCHKULA,
HARYANA

2. M/S CONSCIENT INFRASTRUCTURE PRIVATE
LIMITED

Through its Authorized signatory, Registered office at K-1,
Green Park,
NEW DELHI.

.....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 : MR. KARTIKEY SINGH, ADVOCATE WITH
MR. S. VINOD, ADVOCATE

Dated : 31 May 2024

ORDER

DR. SADHNA SHANKER, MEMBER

1. The present appeal has been filed under Section 19 of the Consumer Protection Act, 1986 (hereinafter referred to as 'the Act') by M/s Emaar MGF Land Ltd. (hereinafter referred to as the 'builder') assailing the Order dated 05.11.2018 passed by the State Consumer Disputes Redressal Commission, (hereinafter to be referred to as 'State Commission') in complaint no. 492 of 2017 whereby the complaint was allowed.

2. There is a delay of 185 days in filing the present appeal by the builder.

In the interest of justice and considering the reasons mentioned in the application for condonation of delay, the delay in filing the appeal is condoned.

3. The relevant facts of the case are that on 09.09.2008, one Shri Sumit Punchhi (hereinafter referred to as the 'original allottee') applied for booking an apartment

admeasuring 1920 square ft. bearing no. E-502 in "The Meadows", Sector 76, Gurugram, Haryana, for a total consideration of Rs. 65,15,280/-. Vide allotment letter dated 23.09.2008, the builder allotted the said apartment to the original allottee. The original allottee vide application dated 03.12.2009 requested the builder to change the unit from E-502, The Meadows to Q-401 and also for transfer of the amount of Rs. 5 lakh deposited from unit no. E 502 to unit no. Q-401, the new relocated unit. The original allottee also requested for change of the name from Sumit Punchhi to Shri Surinder Kumar Punchhi (here-in-after referred to as the 'complainant') and Smt. Geetika Punchhi. And at the request of the original allottee, the allotment was relocated from 'The Meadows' to 'The Enclave', Sector-66, Urban Estate, Gurgaon, Haryana unit bearing no. Q-401 which was allotted vide letter dated 07.12.2009. The Buyer's agreement was executed between the parties on 16.08.2010. The total consideration of the flat was Rs.60,69,885.29/- whereas the complainant has paid a sum of Rs.60,56,920/-. As per terms and conditions of the agreement, the possession of the flat was to be handed over to the complainant within 30 months (along with grace period) from the start of construction. As per the agreement, the complainant was entitled for compensation for delay @ Rs.5/- per sq. ft. per month of the super area. It is alleged that the construction was started by the builder on 21.08.2010 and consequently, possession of the unit was required to be offered to the complainant on or before 20.08.2012 but builder failed to deliver the possession within the stipulated period. The sale consideration of the unit was enhanced from Rs.60,60,885.29/- to Rs.66,40,129/-. Thus, there was deficiency in service on the part of the builder.

4. Alleging deficiency in service on the part of the builder, the complainant filed a complaint before the State Commission.

5. The builder contested the complaint by filing a written statement raising the preliminary objection that the complainant is not a 'consumer' within the meaning of the Act and that the complaint does not fall within the pecuniary jurisdiction of the State Commission. It is also stated that the complainant had not made the payment as per the schedule of payment and due to non-payment, the complainant is not entitled to receive any compensation and there is no deficiency on the part of the builder.

6. After appreciation of the facts of the case, the State Commission, vide its order dated 05.11.2018 allowed the complaint and the builder was directed to pay the interest at the rate of 9% on the amount paid by the complainant in different phases upto 14.03.2018. along with Rs.21,000/- as litigation charges.

7. Being aggrieved by the order of the State Commission, the builder has filed the present appeal before this Commission with the following prayer:

- a. *Set aside the impugned Order dated 05.11.2018 passed by the Hon'ble State Commission in C.C. No.492 of 2017; and*
- b. *to pass such other and further orders as may be deemed just and necessary in the facts and circumstances of the present case.*

8. Before us, the counsel further contended that the complainant did not meet the requirement of a 'Consumer' as defined under Section 2 (1)(d) of the Consumer Protection Act, 1986, as the unit in question was purchased for commercial or speculative purposes and

not for personal use. It is stated that the complainant has two other houses, one at Sector 7, Chandigarh and the other at MDC, Sector 6, Panchkula and he purchased the unit in question for speculative gains. It was also argued that the complainant concealed his intention to re-sell the unit, evidenced by the execution of a Conveyance Deed in their favour and subsequent sale of the property at a significantly higher price to subsequent buyers.

Further, the learned counsel for the builder argued that the complaint was time-barred as there was a lack of communication or action from the complainant regarding inspection of the plot, seeking waiver of delayed payment charges or taking possession of the unit. The period from the purported offer of possession i.e. in 2013 until the date of filing of the complaint in 2017 was not explained, therefore, the complaint is barred by limitation.

Further, the counsel representing the builder argued that the learned State Commission did not have pecuniary jurisdiction to deal with the complaint filed as the claimed amount in the complaint exceeded Rs.1 crore and the State Commission has returned a wrong finding that the interest claimed needs to be excluded from the prayers sought, to come within the pecuniary jurisdiction. To support this contention, he placed reliance on the decision of a larger bench of the National Commission in ***Ambrish Kumar Shukla Vs. Ferrous Infrastructure Pvt. Ltd., Consumer Case No.97 of 2016, decided on 07.10.2016.***

Lastly, it was argued by the learned counsel for the builder that the State Commission overlooked the fact that complainant in their purported complaint before the Hon'ble State Commission initially claimed compensation by way of interest @12% p.a. on the amounts paid by them for the period of delay, which was later restricted to 10% orally, without any application accompanied by an affidavit sworn by the complainant. This clearly evidences the fact that no loss actually accrued to the complainant and in fact only with a view to make wrongful gains, to the prejudice of the builder, chose to restricts its claims to 10% p.a. Additionally, in Paragraph 7 of synopsis of arguments filed by the complainant, he himself is relying upon the judgement passed by the Hon'ble Supreme Court of India in the case of ***Wg. Comdr. Arifur Rahman Khan Vs. DLF Southern Themes Pvt. Ltd., (2020) 16 SCC 512,*** wherein the Hon'ble Supreme Court of India has held that 6% interest per annum from the date of promised possession till date of offer of possession would be appropriate compensation for delayed possession. It is submitted that the State Commission erred in granting possession with interest @ 9% p.a., by not following the principles of interest Act and decision of the Supreme Court in ***GDA Vs Balbir Singh" [2004-5-SCC-65 and 2009-17SCC-199]***. It is submitted that the interest awarded by the State Commission is unjust, unreasonable. Also, it is categorically mentioned that the interest should not be given as a blanket and should be seen in the facts and circumstances of each case. In this regard, reliance has been placed on the following decision:

- a.
- b.
- c.

d. DLF Homes Developers Ltd. (Earlier Known as DLF Universal Ltd. and Anr. Vs. Capital Greens Flat Buyers Association [Civil Appeal Nos. 3864-3889/2020, decided on 14.12.2020

e. Sushma Buildtech Ltd. Vs. Jagsukhbir Khan, FA/468/2020, decided on 06.10.2020]

f. Shalabh Nigam Vs. Orris Infrastructure Pvt. Ltd. & Ors., CC/1702/2016, decided on 06.05.2019].

Therefore, the Impugned Order passed by the Hon'ble State Commission needs to be set aside.

9. Learned counsel for the complainant has argued that the complainant is squarely covered under the definition of a 'consumer' and the ground raised by the builder that the complainant does not fall within the definition of consumers is misconceived and bad in law, primarily, in view of several decisions of this Hon'ble Commission stating that when a plea to the effect of buyer not being a consumer under the Consumer Protection Act is raised, the onus of proof to prove the same is upon the party taking such plea and must be substantiated by way of evidence. This Hon'ble Commission in ***Vipin Bihari and Ors. vs. Imperia Structures Ltd. (CC 692 of 2018)*** has reiterated the position of law laid down in the case of ***Everest Developers and Anr. Vs. Harbans Singh*** to the effect that "when the plea that a flat has been purchased for commercial purpose is raised by the Developer, the onus of proof shifts to the Developer to establish whether the Complainant has purchased the subject flat for trading/dealing in real estate". In the instant case there is no documentary evidence to establish that the developer has discharged this onus.

The learned counsel for the complainant further argued that on 16.08.2010, the builder executed the buyer's agreement with the complainant and in terms of which and as clearly reflected in Clause 14 thereof, the possession qua the unit in question was to be handed over within a period of 30 months (inclusive of grace period) from the date of commencement of construction i.e., 21.08.2010. Admittedly and owing to its own failures, the builder herein was unable to hand over the possession of the unit in question despite efflux of agreed date of delivery of possession as a result of which the complainant stopped making any further payments to the builder and filed a complaint in August, 2017. Furthermore, it is an undisputed position that the builder itself sent a letter dated 14.03.2018 offering possession of the unit and settlement of final dues. He further argued that this letter in itself is an admission of the fact that the builder did not have the requisite approvals prior to 14.03.2018 to handover possession to the complainant and thus, the cause of action was continuous in nature and in no manner can it can be said that the complaint is barred by limitation.

Furthermore, in so far as the contention raised by the builder that the complainant sold the property by way of resale to subsequent buyers is concerned, it would be relevant to point out that complaint was filed in August, 2017, the possession of the unit was offered on 14.03.2018 during the pendency of the complaint, thus, there was a considerable delay in handing over of the unit in contrast to the promised date of possession. Thus, even if subsequently, the unit was sold by the complainant, there is no dispute that the compensation for delayed possession will stand payable in accordance with law and the issue of the unit having been sold subsequent to the order of the state commission is only brought in just to misguide and deviate this Hon'ble Commission from the primary issue involved. Be that as it may, there is no bar to dispose of a property consequent to having taken over the possession of the same and the builder did not lead any evidence to the effect that the complainant is not

a 'consumer' before the Hon'ble State Commission. It is submitted that the failure of the builder to hand over possession within the contractually stipulated period amounts to deficiency in service within the meaning of Section 2(1)(g) of the Act. It is undisputed position that the builder failed to adhere to the contractual obligation to deliver timely possession of the flat in question. On that ground alone the instant case is squarely covered by the law laid down in the case of ***Wg. Comdr. Arifur Rahman Khan Vs. DLF Southern Themes Pvt. Ltd., (2020) 16 SCC 512***, wherein the Hon'ble Supreme Court has held that 6% interest per annum from the date of promised possession till the date of offer of possession would be appropriate compensation for delayed possession. There is deficiency in service on the part of the builder. Since deficiency in service is established on the part of the builder, the complainant is entitled for compensation for the delay in delivery of possession of flat. In support of his arguments, reliance is placed on the following decisions:

A. Jose Mariano Cordeiro vs. Kalash Real Estate Developers 01.02.2021

B. Wg. Cdr. Arifur Rehman Khan and Aleya Sultana & Ors. v. DLF Southern Homes Pvt. Ltd. Civil Appeal No. 6239 of 2019

C. Dushyant Sood vs. Vatika Limited (28.09.2021 NCDRC)

10. We have heard the learned counsel for the builder and the learned counsel for the complainant and perused the record including the order dated 05.11.2018 of the State Commission and the memorandum of appeal.

11. The question which falls for our consideration is whether there is any deficiency in service on the part of the builder.

12. As regards the contention of the builder that the complainant does not fall under the definition of consumer is concerned, the onus to prove that the complainant bought the flat for commercial purpose is on the builder and they have led no evidence on record in support of their contention. Reliance is placed on ***Kavita Ahuja Vs. Shipra Estate Ltd. and Jai Kishan Estate Developers Pvt. Ltd. I (2016)CPJ 31(NC)***. We are of the view that the complainant falls within the ambit of 'consumer' within the meaning of Section 2(1)(d) of the Act 1986.

13. It is seen from the facts of the case and the evidences available on record that the buyer's agreement was executed on 16.08.2010 and as per clause 14 of the agreement, the period for delivery of the flat was to be handed over to the complainant within 30 months (alongwith grace period) from the start of construction i.e. 21.08.2010. The basic price of the unit was about Rs.60,69,885.29/- and this amount has already been paid. During the pendency of the complaint, the price of the unit was increased unilaterally, still the complainant has paid the total amount of Rs.63,17,521/-.

14. As regards the pecuniary jurisdiction is concerned, from a perusal of record, it is seen that the basic sale price of the flat is Rs.60,69,885.29/-, interest claimed at the rate of 12% per annum from the promised date till 31.07.2017 is Rs.35,81,232.00/- i.e. from 01.09.2012 to 31.07.2017, Rs.3,00,000.00/- as compensation and Rs.45,000.00/- as litigation, documentation and other charges which totals Rs.99,96,117.27/-. It is clear that at the time of

filing, the complaint was within the pecuniary jurisdiction of the State Commission as per the ratio of ***Ambarish Kumar Shukla & Anr; 21 others Vs Ferrous Infrastructure Consumer Case No.97 of 2016, decided on 07.10.2016, and Parikshit Prashar Vs Universal Buildwell Pvt Ltd & Anr; others***).

15. We are of the view that the State Commission has rightly held that the total amount claimed does not exceeds Rs.1 crore and the complaint is within the pecuniary jurisdiction of the State Commission.

16. With regard to the next contention of the complaint being time barred, it was held by Hon'ble Supreme Court in ***Meerut Development Authority Vs Mukesh Kumar Gupta (IV (2012) CAJ 12*** "the failure to deliver possession of the flat constitutes a recurrent continuing cause of action". Therefore, we find no merit with regard to this point.

17. It is seen that during the pendency of the complaint and while writing a letter dated 14.03.2018 the possession of the dwelling unit has been offered to the complainant after receiving the occupancy certificate on 25.01.2018. Therefore, the delay in offer constitutes a deficiency in service on the part of the builder as they failed to deliver the possession of the said flat within the stipulated time.

18. With regard to the interest awarded by the Ld. State Commission i.e.@9% per annum is concerned, recently the Hon'ble Supreme Court in the case of ***DLF Home Developers Ltd. v. Capital Greens Flat Buyers Assn., (2021) 5 SCC 537 decided on 14.12.2020***, has held as under:-

"It is true that in the present case, the contractual rate of Rs 10 per square foot per month is double the rate fixed in the agreements in the above case. On the other hand, the Court must be conscious of the fact that the situation in the real estate market in Delhi is very distinct from that in Bengaluru both in terms of rentals and land values. This has not been disputed. The flat buyers had to suffer on account of a substantial delay on the part of the appellants. In such a situation, they cannot be constrained to the compensation of Rs 10 per square foot provided by the agreements for flat purchase. However, having regard to all the facts and circumstances, we are of the view that the compensation on account of delay should be brought down from 7% to 6%. Moreover, the amount, if any, which has been paid in terms of the contractual rate shall be adjusted while computing the balance due and payable in terms of the judgment. (In the earlier decision noted above, compensation at 6% was ordered to be paid in addition to the contractual rate since the amenities agreed to be provided by the developer had not been set up).

19. Having considered the facts that the complainant had paid an amount of Rs.63,17,521/- and the said amount is blocked for a long period and there is delay of more than 05 years in handing over the physical possession of the unit to the complainant and in view of the law laid down by the Hon'ble Supreme Court and this Commission, we are of the view that the rate of interest at the rate of 6% per annum is just and equitable, commensurate with the loss and injury suffered.

20. As such we modify the award made by the State Commission to the extent that the builder company shall pay compensation in the form of interest at the rate of 6% per annum on the deposited amount of Rs.63,17,521/- from the promised date of handing over physical possession i.e. 21.02.2013 till the date of offer of possession i.e. 14.03.2018 along with Rs.21,000/- as cost of litigation. The order be complied with within eight weeks from today, failing which, it shall carry interest at the rate of 9% per annum.

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

.....
**SUBHASH CHANDRA
PRESIDING MEMBER**

.....
**DR. SADHNA SHANKER
MEMBER**