

**NATIONAL CONSUMER DISPUTES REDRESSAL COMMISSION
NEW DELHI**

CONSUMER CASE NO. 787 OF 2017

1. MOHAN SHYAM DUBEY

.....Complainant(s)

Versus

1. M/S. EMAAR MGF LAND LTD.

ECE House, 28, Kasturba Gandhi Marg

NEW DELHI-110001

DELHI

.....Opp.Party(s)

BEFORE:

HON'BLE MR. JUSTICE A. P. SAHI, PRESIDENT

FOR THE COMPLAINANT : MR. AMIT SINGH CHAUHAN, ADVOCATE
MR. ZAFAR KHURSHID, ADVOCATE
MR. SYED HAMZA GHAYOUR, ADVOCATE

FOR THE OPP. PARTY : MR. ADITYA NARAIN, ADVOCATE
MR. MISHRA RAJ SHEKHAR, ADVOCATE

Dated : 04 April 2024

ORDER

JUSTICE A.P. SAHI, PRESIDENT

1. This is another builder buyer dispute, where the complainant has come up contending that he had booked an apartment for which he tendered an initial amount of Rs.7,50,000/- along with the application form. He was allotted flat no. GGN-03-0801 with super area 1650 sq. ft. in the project Gurgaon Greens launched by the opposite party in Sector 102, Dwarka Expressway, Gurgaon, Haryana. The contention is that the payment of Rs.40,56,443/- has been made till 01.07.2013. The provisional allotment letter has been filed on record and in clause 28 thereof it is recited that the building plan for the project have been approved by the Director Town Country Town Planning, Haryana and Director Town Planning, Gurgaon. Clause 30 and 31 of the allotment letter are relevant for the present controversy, which are extracted herein under:

“30. The Company shall make all efforts to handover possession of the Unit within a period of 36 (thirty six) months from the date of start of construction, subject to certain limitations as may be provided in the Agreement and timely compliance of the provisions of the Agreement by the Allottee. The Allottee agrees and understands that the Company shall be entitled to a grace period of 5 (five) months, for applying and obtaining the occupation certificate in respect of the Unit and/or the Project after the said period of 36 months.

31. Subject to the terms as stated in clause 30 herein above, in the event the Company fails to deliver the possession of the Unit to the Allottee within the stipulated time period and as per the terms and conditions of the Agreement, then

the Company shall pay, to the Allottee, compensation at the rate of Rs.7.50/- (Rupees Seven and Fifty Paise only) per sq. ft. of the super area of the Unit per month for the period of delay, subject to the Allottee having fulfilled his part of the obligations as per the terms of Allotment/ Agreement.

2. The schedule of payment indicates the payment to be made at item no. 1, 2 and 3 within 90 days of the booking and then with the hight of the construction as indicated in clause 30 of the booking agreement.

3. The complainant has also brought on record the letter of allotment and the receipt for the payments made. It discloses that M/s. Emaar MGF Land Limited is a joint venture between Emaar Properties PJSC, Dubai and MGF Developments Limited, India.

4. A builder buyer agreement was entered into on 27.05.2013 and a copy thereof has been brought on record. The said agreement mentions the booking application, indicating the area of the unit as 1650 sq. ft. for a total sale consideration of Rs.1,21,72,283/-, which includes the basic sale price as well as other amenities indicated in clause 1.2 of the agreement. The payment plan has been described in clause 1.2 (c) with other terms and conditions to be met by the allottee. Other terms and conditions and Representations and Warranties, rights and obligations of the allottee have also been detailed and as per clause 13 of the agreement, the company has reserved its right to terminate the agreement on delay of payments or to charge interest as well as other charges and also to forfeit the earnest money.

5. Clause 14 stipulates the period of possession as indicated in the booking application form referred to above and for ready reference the same is extracted herein under:

“14. POSSESSION

*a. Time of handing over the Possession Subject to terms of this clause and barring force majeure conditions, and subject to the Allottee having complied with all the terms and conditions of this Agreement, and not being in default under any of the provisions of this Agreement and compliance with all provisions, formalities, documentation etc., as prescribed by the Company, the Company proposes to **hand over the possession of the Unit within 36 (Thirty Six) months from** the date of start of construction., subject to timely compliance of the provisions of the Agreement by the Allottee. The Allottee agrees and understands that the Company shall be entitled to a **grace period of 5 (five) months.** for applying and obtaining the completion certificate/ occupation certificate in respect of the Unit and/or the Project.”*

6. Clause 16 indicates the obligation of the company to make compensatory payment in the event the possession of the unit is not handed over within the period stipulated including the extended period. The condition for payment of compensation on failure to take possession have also been indicated in clause 17. There are other clauses relating to defaults and consequences which for the present controversy are not very relevant. One of the clauses relevant to the controversy is the force majeure clause, which is clause 31 that is extracted herein under:

“31. *FORCE MAJEURE*

*The handover of the Unit shall be subject to force majeure clause which, inter alia, includes delay on account of non-availability of steel and/or cement and/or other Building materials, water supply or electric power or slow down strike or due to a dispute with the construction agency employed by the Company, civil commotion or by reasons of war, enemy action, earthquake or any act of God. If there is any delay in the delivery of possession of the Unit or the **Company is unable to deliver possession** of the Unit due to a force majeure event or due to any notice, order, rule or notification of the Central or State Government and/or any other public or competent authority or for any other reason beyond the control of the **Company**, **shall be entitled to a reasonable extension of the time for delivery of possession of the Unit.** The Allottee understands and acknowledges that if due to any force majeure conditions, the whole or part of the Project is abandoned or abnormally delayed, the Allottee shall not be entitled to prefer any claim whatsoever **except that the Company shall on demand refund the Allottees' money without any interest.**”*

7. Learned counsel for the complainant contends that as per the aforesaid terms and conditions, the expected date of delivery after 36 months would be 27.05.2016 and with the extended period the date of delivery would be October, 2016. This period however has been disputed as the learned counsel for the opposite party stated that the date of construction has to be counted from July, 2013. Nonetheless, be that as it may, it is undisputed that neither the project was completed nor the offer of possession was made. Instead according to the complainant, the opposite party started making demands for further payments vide letters dated 16.12.2016, 17.02.2017 and 01.03.2017, that were unjustified and therefore the complainant did not make any payments.

8. The present complaint was filed on 21.03.2017 seeking a relief of possession of the unit after completing the project and in the first alternative to refund the entire amount of Rs.40,56,443/- together with interest, damages and reliefs relating thereto.

9. The complaint was entertained and the opposite party was called upon to answer the same, who has filed the written version disputing the claim contending that the complainant had failed to honour the payment schedule and did not make any payments after November, 2013. It is urged that all demands which were made from 2016 onwards were refused and instead of complying with the said demands the present complaint has been filed.

10. It is also contended by the opposite party that between December, 2016 and May, 2017 the super structure up to the 9th floor had been constructed and efforts were made seeking occupancy certificate and completing other formalities, whereupon the letter of offer of possession was tendered to the complainant, which is dated 07.07.2022.

11. The complainant declined the offer of possession, which was also indicated during the pendency of this complaint and which has been argued by the learned counsel for the complainant that there is no occasion for taking possession after 5 years of filing of the complaint in 2022 and the complaint therefore is being pressed for refund coupled with

interest and compensation to be awarded to the complainant as there is a clear deficiency on the part of the opposite party.

12. Learned counsel for the opposite party has urged that this is a matter of contract and therefore according to the terms of the agreement if the complainant has defaulted in making payments liability cannot be shifted on the opposite party and even otherwise since possession is being offered, in the event of any delay, compensation is payable to the complainant. The submission of the learned counsel for the opposite party is that there is no question of refund and keeping in view the preliminary relief claimed in the complaint for possession, the opposite party has offered possession of the premises which is in a complete status to be occupied by the complainant. It is urged that if the complainant is resiling back from his relief of taking possession of the premises then in that event he cannot claim refund or any penalty thereon.

13. Learned counsel for the complainant has relied on the following judgments to substantiate his submission and more particularly in the case of *Pulkit Agarwal & Ors. Vs. Emaar MGF Land Ltd.*, MANU/CF/0323/2021 and *Reena Kapur & Ors. Vs. Emaar MGF Land Ltd.*, MANU/CF/0323/2021 to urge that with regard to the same builder this Commission has allowed the complaints for refund, which are almost identical to the present complaint and hence the same reliefs be granted. The judgments relied on by the complainant are as follows:

1. *Experion Develoeprs Pvt. Ltd. Vs. Sushma Ashok Shiroor*, 2022 SCC OnLine SC 416.
2. *Ireo Grace Realtech Pvt. Ltd. Vs. Abhishek Khanna & Ors.* (2021) 3 SCC 241.
3. *Pioneer Urban Ladn & Infrastructure Ltd. Vs. Govindan raghavan* (2019) 5 SCC 725.
4. *Pulkit Agarwal & Ors. Vs. Emaar MGF Land Ltd.*, MANU/CF/0323/2021.
5. *Reena Kapur & Ors. Vs. Emaar MGF Land Ltd.*, MANU/CF/0323/2021.
6. *Ambrish Kumar Shukla & Ors. v. Ferrous Infrastructure Pvt. Ltd. I* (2017) CPJ 1 (NC).

14. Learned counsel for the opposite party has urged that the order passed by this Commission in the case of *Pulkit Agarwal (Supra)* was on a concession made by the answering opposite party and therefore there is no ratio that can be culled out so as to apply it on the facts of the present case, where the answering opposite party has not given any consent for refund. The submission is that the other decision also in the case of *Reena Kapur (Supra)* had turned on its own facts and therefore does not come to the aid of the complainant.

15. Having heard learned counsel for the parties, the facts as emerge from the pleadings are that the expected delivery of possession was in 2016.

16. As a matter of fact and as also pointed out by the learned counsel for the opposite party, that there was some interse dispute between M/s. Emaar Properties PJSC, Dubai and M/s. MGF Developments Limited, India which took time to sort out the differences and it is only in 2016 that the same came to be resolved. Nonetheless, the project according to the opposite party was undertaken immediately and constructions were speeded up with super structure having been constructed by May, 2017. The building was completed and then the occupancy certificate was applied for, which was awaited and was ultimately received by the answering opposite party, whereupon the letter of offer of possession is stated to have been dispatched to the complainant dated 07.07.2022.

17. The complainant has completely declined to accept the offer of possession, which has been argued even today by the learned counsel for the complainant and therefore it is evident that the offer of possession itself has been made in 2022. Consequently, the delay in offer of possession stands admitted by the opposite party for which several reasons are being attributed including the differences between the partners of the project from 2013 to 2016 and thereafter due to certain force majeure conditions, which have been pleaded in the written version including the non-availability of the occupancy certificate. This defence on the part of the opposite party is no longer available in view of the pronouncement of the Apex Court in the case of "Ireo Grace Realtech Pvt. Ltd. Vs. Abhishek Khanna & Ors. (2021) 3 SCC 241", Wing Commander Arifur Rahman Khan and Ors. Vs. DLF Southern Homes Private Limited & Ors., (2020) 16 SCC 512" and Experion Develoeprs Pvt. Ltd. Vs. Sushma Ashok Shiroor, 2022 SCC OnLine SC 416, holding that if any such delay is caused for non-delivery of possession to the buyer, cannot be to his disadvantage. The buyer cannot be compelled to wait endlessly for the delivery of possession nor can he be compelled to make payments when the project itself does not take off timely.

18. In the present case, it is evident from the payment schedule and the statement of accounts that the last payment made by the complainant is admitted to the opposite party on 01.07.2013. It is thus evident that after having collected the same there own statement of accounts records that there were no dues, which is reflected at item no. 22 of the statement of account filed as annexure A to the reply. Thus, there was no default of payment by the complainant keeping in view the expected date of possession.

19. It is the own case of the opposite party that construction commenced with the project further from December, 2016 to May, 2017 and thereafter. It is undisputed that the occupancy certificate was received by them and it is thereafter the opposite party sent the letter of offer of possession on 07.07.2022. The delay therefore is not only after 2016 but it has continued till 2022. This lapse is enough time to frustrate the aspirations of the flat buyers and therefore the learned counsel for the complainant has rightly prayed for this relief of refund, which the complainant is entitled in the background above. There is not only a deficiency but a huge deficiency in the services offered by the opposite party by not adhering to the timeline and consequently the claim of refund as prayed by the complainant is justified. There is a clear deficiency in service on the part of the opposite party by not ensuring delivery of possession of the flat within the tenure as promised.

20. Coming to the orders passed by this Commission in the case of *Pulkit Agarwal (Supra)* and *Reena Kapur (Supra)*, learned counsel for the opposite party is correct in his submission that the case of *Pulkit Agarwal (Supra)* was disposed off after the answering opposite party

conceded for refund. However, the merits of the case had been discussed and it was found that there was delay and the complainant could not be expected to make any further payments. Paragraph 8 of the order in the case of Pulkit Agarwal (*Supra*) therefore indicates a ratio that supports the claim of the complainant in the present case, even if the matter was disposed of on the concession, which was offered at the stage of the order being pronounced on merits.

21. The second case which is of *Reena Kapur (Supra)* has been disposed of on merits and relates to the same project recording a clear finding that the opposite party has miserably failed to live up to their promises contained in the builder buyer agreement and then relying on the judgment of the Apex Court has proceeded to hold that the complainant was entitled for refund of the amount with reasonable interest on the amount till the date of refund.

22. In the background above there is no gain saying that the complainant is entitled for full refund together with interest thereon, accordingly the complaint is allowed. Let the entire sum of Rs.40,53,443/- be refunded to the complainant with interest @ 9% per annum thereon with effect from the date of deposit as per statement of the amount. The said payment shall be made within a period of three months from today. In the event of any lapse or default in payment the rate of interest shall enhance to 12% per annum. The complainant is also entitled for litigation expenses of Rs.50,000/-.

.....J
A. P. SAHI
PRESIDENT