

IN THE DELHI STATE CONSUMER DISPUTES
REDRESSAL COMMISSION

Date of Institution: 06.04.2018

Date of hearing: 03.04.2024

Date of Decision: 14.06.2024

COMPLAINT CASE NO.- 425/2018

IN THE MATTER OF

- 1. MS. PRATIMA SAINI,**
W/O MR. DAVENDER KUMAR BATRA.
- 2. MR. DAVENDER KUMAR BATRA,**
S/O LATE MR. B.D. BATRA.

BOTH RESIDENT OF:

3155/11 RAILWAY FLATS,
SHAKUBASTI, NEW DELHI.

**(Through: Mr. S.C. Rajpal &
Mr. Varun Rajpal, Advocates)**
...Complainants

VERSUS

**M/S OMAXE LIMITED,
THROUGH ITS CHAIRMAN/MANAGING DIRECTOR,
REGISTERED OFFICE
7, LOCAL SHOPPING CENTRE,
KALKAJI, NEW DEILHI-110019.**

(Through: Lex Panacea LLP)
...Opposite Party

CORAM:**HON'BLE JUSTICE SANGITA DHINGRA SEHGAL
(PRESIDENT)****HON'BLE MS. PINKI MEMBER (JUDICIAL)**

Present: Complainant in person.
Mr. Varun Rajpal (email id - rajpalassociates1@gmail.com), counsel for complainant.
Mr. Navdeep Dev Singh (email id - navdeepdev@gmail.com) and Mr. Lokendra Rana, counsels for OP.

**PER: HON'BLE JUSTICE SANGITA DHINGRA SEHGAL
(PRESIDENT)****JUDGMENT**

1. The present complaint has been filed by the Complainants before this commission alleging deficiency of service on the part of the Opposite Party and has prayed the following reliefs:
 - i. *To direct the opposite party to handover the physical possession of the aforesaid flat immediately after removing all the deficiencies / defaults thereof to the complainants without any further delay.*
 - ii. *To direct the opposite party to pay the House rent allowance amounting to Rs. 4,27,745/- upto March, 2018 alongwith future amount of HRA till the possession of the aforesaid flat to the complainants*
 - iii. *To direct the opposite party to pay the interest of Rs 26,30,110/- upto 3st March 2018 along with the future interest against the opposite parties.*
 - iv. *Direct the Opposite Party to pay the complainants Rs, 3,22,000/- in terms of clause 24(e) of the Buyer agreement compensation at the rate of Rs 5/- per Sq. feet per month for the entire delayed period of more than three years upto 31.03.2018 with regard to handing over of the possession of the flat which is still in continuation.*

- v. *Direct the Opposite Party to refund the excess amount of sale consideration amounting to RS. 390241/- received by it to the complainants.*
- vi. *Direct the Opposite Party to pay an amount of Rs. 5,00,000/- to the Complainants towards mental agony, hardships and tremendous harassment.*
- vii. *Direct the Opposite Party to pay an amount of Rs. 55,000/- towards litigation expenses.*
- viii. *To quash all the demands as raised on account the energy and maintenance charges etc in respect of the aforesaid flat till the physical possession thereof is handed over to the complainants*
- ix. *To pass such other order/ relief as this Hon'ble Court may deem fit and proper in the interest of justice.*

2. Brief facts necessary for the adjudication of the present complaint are that Mr. Santosh Kumar booked a flat bearing number RSB/First/27 in the project 'Royal Street' of the Opposite Party situated at Bahadurgarh, Haryana. Accordingly, an agreement dated 09.11.2012 was executed between the original allottee and the Opposite Party. As per clause 24(b) of the said agreement, the Opposite Party was to hand over possession of the said flat within 18/24 months from the date of signing the agreement on 09.11.2012. The original allottee timely paid all the due installments amounting to Rs. 39,60,002.04/- against the total sale consideration of Rs. 44,60,000/-, including Rs. 40,000/- as club cost and Rs. 20,000/- in respect of the said flat.
3. Thereafter, upon the assurance of the Opposite Party, the Complainants purchased the said flat from the original allottee, and the Opposite Party duly accepted the joint request form no. 30787 executed between the Opposite Party and the Complainants on 14.11.2014. The Opposite Party vide letter dated 04.04.2015, also raised a demand of Rs. 2,71,740.40/-, which was deposited by the

Complainants on 17.04.2015. However, the Opposite Party failed to offer possession of the said flat in time despite receiving Rs. 4,31,742.44/- towards the total sale consideration of Rs. 44,60,000/-. Furthermore, after an inordinate delay in handing over possession of the said flat, the Opposite Party vide letter dated 21.10.2016, offered possession along with an excess, illegal demand of Rs. 8,31,778.86/-. The Complainants also paid the aforesaid amount in order to take possession of the said flat but the Opposite Party failed to hand over possession even after receiving the said amount.

4. Therefore, the Complainants visited the site of the said project and were shocked to see the condition of the said flat, as its construction was defective and incomplete. Immediately, the Complainants brought the said deficiency to the notice of the Opposite Party and it assured the Complainants that they would rectify the condition of the said flat. However, the Opposite Party has failed to rectify the same to date, and the condition of the said flat remains uninhabitable. Moreover, when the Complainants came to know that they had deposited an extra amount in respect of the said flat, they requested a refund of the said excess amount, and the Opposite Party refunded an amount of Rs. 2,13,180/- to the Complainants on 25.07.2017. Therefore, the Opposite Party is also liable to refund the remaining amount of Rs. 3,90,241/- paid by the Complainants. The Opposite Party also failed to provide any compensation as per the agreement for the inordinate delay in handing over possession of the said flat. Additionally, due to the deficiency in service and unfair trade practices of the Opposite

Party, it is also liable to pay house rent allowance to the Complainants.

5. The Opposite Party has contested the present case and has raised preliminary objections as to the maintainability of the complaint case. The counsel of the Opposite Party submitted that the Complainants are not consumer under the Consumer Protection Act, 1986 as the Complainants invested the money to earn profit, which amounts to commercial purpose. He further submitted that the Complainants have no cause of action to file the present complaint. The counsel of the Opposite Party further submitted that this commission does not have the territorial jurisdiction to try and entertain the present complaint. He also submitted that the jurisdiction of this commission is barred as there is an arbitration clause in the allotment letter
6. The Opposite Party further submitted that as per clause 8 of the endorsement dated 14.11.2014 the Opposite Party was to complete the construction within 18/24 months from the days of endorsement. The Opposite Party also submitted the possession of the said flat was offered to the Complainant on 21.10.2016, which is within the prescribe period, therefore, there is no efficiency on the part of the Opposite Party. Pressing the aforesaid objections, the counsel appearing on behalf of the Opposite Party prayed that the complaint be dismissed
7. The Complainants have filed the Rejoinder rebutting the written statement filed by the Opposite Party. Both the parties have filed their Evidence by way of Affidavit in order to prove their averments on record.

8. We have perused the material available on record and heard the counsel for the parties.
9. During the course of proceeding, this commission vide order dated 11.02.2019 directed the Opposite Party to hand over the possession of the said flat to the Complainants. Accordingly, it is clear from the order dated 09.04.2021 that the possession of the said flat was handed over to the Complainants and registration regarding the same is also executed between them. However, the Complainants denied the fact of receiving any compensation of for handing over the possession of the said flat.
10. The *first* question for consideration before us is ***whether Complainants fall in the category of 'consumer' under the consumer protection act, 1986?***
11. The Opposite Party contended that the Complainants are not *Consumer* as defined under the Consumer Protection Act, 1986 as it invested the money to earn profit, which amounts to commercial purpose. To resolve this issue, we deem it appropriate to refer to ***Aashish Oberai Vs Emaar MGF Land Limited*** reported in ***I (2017) CPJ 17(NC)*** wherein it is held as under:

“6.A person **cannot be said to have purchased a house for a commercial purpose only by proving that he owns or had purchased more than one houses or plots.** In a given case, **separate houses may be purchased by a person for the individual use of his family members.** A person owning a house in a city A may also purchase a house in city B for the purpose of staying in that house during short visits to that city. A person may buy two or three houses if the requirement of his family cannot be met in one house. Therefore, it would not be correct to say that in every case where a person owns more than one house, the acquisition of the house is for a commercial purpose.”

12. It is imperative to refer to the dicta of the Hon'ble National Commission in *CC-1122/2018* titled *Narinder Kumar Bairwal and Ors. vs. Ramprastha Promoters and Developers Pvt. Ltd. and Ors.* decided on *01.11.2019*, wherein, the Hon'ble National Commission has held as under:

“19. The contention of the Learned Counsel that the said Flats were purchased for commercial purpose is not supported by any documentary evidence as the onus shifts to the Opposite Parties to establish that the Complainant have purchased the same to indulge in 'purchase and sale of flats' as was held by this Commission in Kavit Ahuja vs. Shipra Estates I (2016) CPJ 31. The Opposite Parties failed to discharge their onus and we hence hold that the Complainant are 'Consumers' as defined under Section 2(1)(d) of the Act.”

13. From the aforesaid dicta of the Hon'ble National Commission, it flows that it is for the Opposite Party to prove that the flat purchased was for commercial purpose, by way of some documentary proof and a mere bald statement is not sufficient to raise adverse inference against the Complainants.

14. In the present case, the Opposite Party has merely made a statement that the Complainants purchased the flat for commercial purpose and on perusal of the record before us, we fail to find any material which shows that the Complainants are engaged in the business of purchasing and selling houses and/or plots on a regular basis, solely with a view to make profit by sale of such flats. Mere allegation, that the purchase of the property is for commercial purpose, cannot be the ground to reject the present consumer

complaint. Consequently, the objection raised on behalf of the Opposite Party is answered in the negative.

15. *The next question for adjudication before us is whether the Complainants have any cause of action to approach this commission.?*

16. To deal with this issue, it is imperative to refer to *Section 24A of the Consumer Protection Act, 1986*, which provides as under:

24A. Limitation period.—

(1) The District Forum, the State Commission or the National Commission shall not admit a complaint unless it is filed within two years from the date on which the cause of action has arisen.

(2) Notwithstanding anything contained in sub-section (1), a complaint may be entertained after the period specified in sub-section (1), if the Complainant satisfies the District Forum, the State Commission or the National Commission, as the case may be, that he had sufficient cause for not filing the complaint within such period: Provided that no such complaint shall be entertained unless the National Commission, the State Commission or the District Forum, as the case may be, records its reasons for condoning such delay.”

17. Perusing the above statutory provision of law, it is clear that the complaint shall be filed before the State Commission within two years from the date on which the cause of action has arisen.

18. Returning to the facts of the present case, it is evident from the record that the Opposite Party failed to hand over the possession of the said flat within prescribed time and it was during the course of

the proceeding when the flat was handed over to the Complainants; giving the Complainants a recurrent cause of action to file the present complaint.

19. **The third question for consideration is whether this commission has territorial jurisdiction to adjudicate the present complaint.?**

20. We deem it appropriate to refer to Section 17(2) of the Consumer Protection Act, 1986 which provides as under:

“(2) A complaint shall be instituted in a State Commission within the limits of whose jurisdiction-

(a) the opposite party or each of the opposite parties, where there are more than one, at the time of the institution of the complaint, actually and voluntarily resides or carries on business or has a branch office or personally works for gain; or

(b) any of the opposite parties, where there are more than one, at the time of the institution of the complaint, actually and voluntarily resides, or carries on business or has a branch office or personally works for gain, provided that in such case either the permission of the State Commission is given or the opposite parties who do not reside or carry on business or have a branch office or personally works for gain, as the case may be, acquiesce in such institution; or

(c) the cause of action, wholly or in part, arises.”

21. Analysis of Section 17 of the Consumer Protection Act, 1986 leads us to the conclusion that clause 17(2) of the Act provides the extent of territorial jurisdiction, wherein it has been provided that the state commission shall have the jurisdiction to entertain cases where opposite party at the time of the institution of the complaint, actually and voluntarily resides or carries on business or has a

branch office or personally works for gain or the cause of action arose.

22. Having discussed the statutory position, the facts of the present case reflect the registered office of the Opposite Party no.2 is at 7, Local Shopping Centre, Kalkaji, New Delhi. Since the registered office falls within the territory of Delhi, this commission has the territorial jurisdiction to adjudicate the case. To strength the aforesaid findings, we tend to rely on ***Rohit Srivastava v. Paramount Villas Pvt. Ltd.*** reported at ***2017 SCC OnLine NCDRC 1198***, wherein it has been held as under:

“It is not in dispute that the Registered Office of Opposite Party No. 1 Company is situated in Delhi, i.e., within the territorial jurisdiction of the State Commission at Delhi and therefore, in the light of clear provision contained in Section 17(2)(a), which stipulates that a Complaint can be instituted in a State Commission, within the limits of whose jurisdiction, the Opposite Party actually carries on business. In view of the said provision, we have no hesitation in coming to the conclusion that since the Registered Office of the first Opposite Party is situated in Delhi, the State Commission did have the territorial jurisdiction to entertain the Complaint.”

23. Relying on the above settled law, we are of the view that this commission has the territorial jurisdiction to adjudicate the present complaint.
24. **The next question for consideration before us is whether the existence of arbitration clause in the agreement barred the jurisdiction of this commission?**
25. The next preliminary objection raised by the Opposite Party is that since there exists an arbitration clause in the said Agreement, the

parties should be referred to arbitration and this commission is barred from exercising its jurisdiction. To deal with this issue, we deem it appropriate to refer to *Emaar MGF Land Limited vs. Aftab Singh reported at I (2019) CPJ 5 (SC)*, wherein the Apex court has held as under: -

“55. We may, however, hasten to add that in the event a person entitled to seek an additional special remedy provided under the statutes does not opt for the additional/special remedy and he is a party to an arbitration agreement, there is no inhibition in disputes being proceeded in arbitration. It is only the case where specific/special remedies are provided for and which are opted by an aggrieved person that judicial authority can refuse to relegate the parties to the arbitration.”

26. The Hon’ble Apex Court has put to rest the controversy relating to the existence of arbitration clauses in the allotment letter/apartment buyer agreement etc. as is evident from the aforesaid para of Emaar MGF Land Limited (supra). In the present case also, the Complainant has opted for the special remedies provided under the Consumer protection Act, 1986 therefore, this commission can refuse to relegate the present case to the arbitration. Hence, this commission is authorized to adjudicate the case and the existence of an arbitration clause in the agreement does not affect the jurisdiction of this commission
27. Having discussed the preliminary objections raised on behalf of the Opposite Party, *the next issue which arises is whether the Opposite Party is actually deficient in providing its services to the Complainants*. The expression Deficiency of Service has been

dealt with by the Hon'ble Apex Court in *Arifur Rahman Khan and Ors. vs. DLF Southern Homes Pvt. Ltd. and Ors.* reported at 2020 (3) RCR (Civil) 544, wherein it has been discussed as follows:

“23.The expression deficiency of services is defined in Section 2 (1) (g) of the CP Act 1986 as:

(g) "deficiency" means any fault, imperfection, shortcoming or inadequacy in the quality, nature and manner of performance which is required to be maintained by or under any law for the time being in force or has been undertaken to be performed by a person in pursuance of a contract or otherwise in relation to any service.

24. A failure of the developer to comply with the contractual obligation to provide the flat to a flat purchaser within a contractually stipulated period amounts to a deficiency. There is a fault, shortcoming or inadequacy in the nature and manner of performance which has been undertaken to be performed in pursuance of the contract in relation to the service. The expression 'service' in Section 2(1) (o) means a service of any description which is made available to potential users including the provision of facilities in connection with (among other things) housing construction. Under Section 14(1)(e), the jurisdiction of the consumer forum extends to directing the Opposite Party inter alia to remove the deficiency in the service in question. Intrinsic to the jurisdiction which has been conferred to direct the removal of a deficiency in service is the provision of compensation as a measure of restitution to a flat buyer for the delay which has been occasioned by the developer beyond the period within which possession was to be handed over to the purchaser. Flat purchasers suffer agony and harassment, as a result of the default of the developer. Flat purchasers make legitimate assessments in

regard to the future course of their lives based on the flat which has been purchased being available for use and occupation. These legitimate expectations are belied when the developer as in the present case is guilty of a delay of years in the fulfilment of a contractual obligation.”

28. At this stage, we deem it appropriate to refer to Clause 8 of the endorsement dated 14.11.2014 issued by the Opposite Party in favour of the Complainants.

That I/we hereby clearly agree and understand that the development/ construction period of the said Unit as stated in the Allotment Letter/ Agreement shall be reckoned with effect from the date of endorsement of allotment right in my/ our favour and I/ we shall not claim for compensation for any delay in offer of possession of the said Unit by the Company.

29. It is reflected that the Opposite Party was bound to complete the construction of the said flat within 18/24 months from the date of endorsement dated 14.11.2014. However, it is evident from the record that the Opposite Party offered possession of the said flat through a letter dated 21.10.2016 for fit-out purposes. Moreover, the Opposite Party itself admitted in the aforementioned letter that it would offer temporary possession of the said flat after receiving the outstanding amount due from the Complainants. Therefore, it is clear that the flat was not complete as of 21.10.2016. Furthermore, the record shows that the Opposite Party, despite receiving the due amount, failed to hand over possession of the flat until the filing of the present complaint.
30. Furthermore, the Complainants submitted that the Opposite Party, along with the offer of possession, sent a statement of account in

which the Complainants were asked to pay an amount of Rs. 8,31,778.86 by 04.11.2016. However, all demands raised by the Opposite Party are as per the agreed terms. Moreover, the Complainants failed to provide any evidence that the said amount was paid under threat or any other circumstance. The Complainants also failed to show any letter or document sent by them indicating that they raised any objection to this amount. Also, the Complainants cannot claim rent house allowance as it has not been established that the Opposite Party's delay in handing over the flat caused the Complainants to incur rent expenses.

31. Additionally, it is clear that there was an inordinate delay on the part of the Opposite Party in handing over possession of the said flat. Therefore, the Opposite Party cannot claim the maintenance charges of Rs. 36,000/- which were charged to the Complainants during the period prior to handing over possession of the said flat.
32. Relying on the above facts and as per the clause 24 (e) of the agreement dated 09.11.2012, *we direct the Opposite party to pay the penalty for delayed possession @ Rs. 5 per Sq. ft per month from the date 15.11.2016 till date of registration of the said flat in favour of the Complainants.*
33. In addition to the aforesaid and taking into consideration the facts of the present case, the Opposite Party is directed to pay a sum of
 - A. **Rs. 1,00,000/-** as cost for mental agony and harassment to the Complainants; and
 - B. The litigation cost to the extent of **Rs. 50,000/-**.
34. Applications pending, if any, stand disposed of in terms of the aforesaid judgment.

35. The judgment be uploaded forthwith on the website of the commission for the perusal of the parties as well as forwarded to the corresponding E-mail addresses available on the record i.e. rajpalassociates1@gmail.com (Complainants) and navdeepdev@gmail.com (Opposite Party).
36. File be consigned to record room along with a copy of this Judgment.

**(JUSTICE SANGITA DHINGRA SEHGAL)
PRESIDENT**

**(PINKI)
MEMBER (JUDICIAL)**

Pronounced On:
14.06.2024