

**IN THE DELHI STATE CONSUMER DISPUTES REDRESSAL
COMMISSION**

Date of Institution: 15.06.2017

Date of hearing: 11.10.2022

Date of Decision: 16.01.2023

COMPLAINT CASE NO.- 1076/2017

IN THE MATTER OF

MR. SUSHIL RASTOGI,

S/O LATE MR. VIRENDRA KUMAR RASTOGI,

R/O A-86, SECTOR-15,

NOIDA-201301.

(Through: Mr. Arun Kaushik, Advocate)

...Complainant

VERSUS.

M/S REGAL EMPORIO INFRA TECH PVT. LTD.,

THROUGH ITS MANAGING DIRECTOR,

T-70, DDA FLATS, SECTOR-7,

JASOLA VIHAR, NEW DELHI-110025.

(Through: N.K. Bhardwaj & Associates)

...Opposite Party

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

Present: Mr. Arun Kaushik, Counsel for Complainant.
None for Opposite Party.

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

1. The present complaint has been filed by the Complainant before this Commission alleging deficiency of service on the part of the Opposite Party and has prayed the following reliefs:

- a. *“To handover the legal physical possession of the shop to the complainant as per allotment letter/buyer-purchaser agreement dated 15th May 2013 by executing the sale deed/conveyance deed duly registered with the competent authority.*
- b. *To pay a sum of Rs.5,00,000/- (Five Lacs) for mental agony physical harassment and litigation expenses caused by the opposite Party to the complainants in lieu of its arbitrary and adamant attitude.*
- c. *To refund the amount deposited by the complainant with interest or to pay interest @ 24% p.a. over the deposited amount i.e. Rupees 7,35,339/- (Rs. Seven Lac, Thirty five thousand, Three hundred thirty nine only.), paid by the complainant to the opposite party regarding the shop, till the delivery of the legal physical possession of the shop.*
- d. *To direct the opposite party to provide to the complainant, the completion certificate/occupancy certificate, building assessment (C&D), sanctioned plan, duly approved from the competent authority various permissions, approvals obtained/received by the opposite party for its project.*

e. Any other relief which the hon'ble court deem fit and proper as per facts and circumstances of the complainants and against the opposite party."

2. The brief facts for the adjudication of the present complaint are that in the year 2011, the Complainant booked a shop for his livelihood/self-employment with the Opposite Party in the project "Regal Emporio" situated at Plot no. C-2, Sector-4, Greater Noida, Uttar Pradesh, UP. Thereafter, the Opposite Party allotted a shop bearing no. NH-48 in Tower-I vide allotment letter dated 15.05.2013. The Opposite Party assured the Complainant that the possession of the said shop will be handed over to him within 3 years of the execution of the allotment letter. Thereafter, the Complainant received undated letter by the Opposite Party stating that the commercial project namely 'Regal Emporio' will develop with its new name i.e. 'Boulevard Walk'.
3. The Opposite Party issued demand letters to the Complainant as per Payment Plan without raising any construction. More so, the Opposite Party changed size, measurement number, basic sale price and tower of the Complainant's shop. The Complainant visited office of the Opposite Party numerous times to know about the construction of the said project but no satisfactory response was given by the Opposite Party. He further visited the project site and noticed that the construction work was still incomplete. Aggrieved by the delay in completing the project, the Complainant also sent legal notice dated 04.02.2017 requesting for possession of the shop but was of no avail. Also, till date no amount has been refunded by the Opposite Party. The Complainant over the time had paid a sum of Rs. 7,35,339/- to the Opposite Party as and when demanded by it.

4. The Opposite Party has contested the present case and contended that the Complainant is not consumer under the Consumer Protection Act, 1986 as the Complainant invested the money to earn profit, which amounts to commercial purpose. The counsel for the Opposite Party further submitted that the said project is registered under RERA and therefore, the present complaint cannot be adjudicated by this Commission. He also submitted that the delay in the completion of project was due to Force Majeure conditions i.e., litigations between the farmers and Greater Noida Industrial Authority, orders passed by Hon'ble NGT etc. Pressing the aforesaid contentions, the Counsel appeared on behalf of the Opposite Party submitted that the present complaint should liable to be dismissed.
5. The Complainant has 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.
6. We have perused the material available on record and heard the counsel for the parties.
7. The fact that the Complainant was allotted shop bearing no. 33 situated at 3rd floor, Plot C-2, Sector-4, Greater Noida with the Opposite Party is evident from the Lease Cum Allotment letter dated 15.05.2013 (*Annexure G with the present complaint*). Payment to the extent of Rs. 7,35,339/- by the Complainant to the Opposite Party is also evident from the Demand Letter Cum Service Invoice attached with the complaint (*Annexure J with the present complaint*).

8. The *first issue* which needs our adjudication is *whether the Complainant falls in the category of 'consumer' provided by the Consumer Protection Act, 1986*. The Opposite Party contended that the Complainant is not *Consumer* as defined under the Consumer Protection Act, 1986 as it invested the money to earn profit, which amounts to commercial purpose. 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 Kavita 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."

9. From the aforesaid dicta of the Hon'ble National Commission, it flows that it is for the Opposite Party to prove that the shop 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 Complainant.
10. In the present case, the Opposite Party has merely made a statement that the Complainant purchased the shop for commercial

purpose and on perusal of the record before us, we fail to find any material which shows that the Complainant is an investor solely with a view to make profit by sale of such shops. 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.

11. The counsel for the Opposite Party further ***contended that the project in question is registered under RERA and therefore, this Commission cannot adjudicate the present complaint.*** The law is no more res integra on this issue and is well settled by the dicta in ***Ireo Grace Realtech Pvt. Ltd. Vs. Abhishek Khanna & Ors.*** reported in (2021) 3 SCC 241, wherein the Apex Court has held as under:

"42. In a recent judgment delivered by this Court in Imperia Structures Ltd. Vs. Anil Patni, it was held that remedies under the Consumer Protection Act were in addition to the remedies available under special statutes. The absence of a bar under Section 79 of the RERA Act to the initiation of proceedings before a fora which is not a civil court, read with Section 88 of the RERA Act makes the position clear. Section 18 of the RERA Act specifies that the remedies are "without prejudice to any other remedy available". We place reliance on this judgment, wherein it has been held that: (SCC p.811, paras 31-32).

"31. Proviso to Section 71(1) of the RERA Act entitles a complainant who had initiated proceedings under the CP

Act before the RERA Act came into force, to withdraw the proceedings under the CP Act with the permission of the Forum or Commission and file RCA No.3/2020 Smt. Manju Gupta & Anr. Vs. M/s Parsvnath Developers Ltd. Page No.10 of 14 an appropriate application before the adjudicating officer under the RERA Act. The proviso thus gives a right or an option to the complainant concerned but does not statutorily force him to withdraw such complaint nor do the provisions of the RERA Act create any mechanism for transfer of such pending proceedings to authorities under the RERA Act. As against that the mandate in Section 12(4) of the CP Act to the contrary is quite significant.

32. Again, insofar as cases where such proceedings under the CP Act are initiated after the provisions of the RERA Act came into force, there is nothing in the RERA Act which bars such initiation. The absence of bar under Section 79 to the initiation of proceedings before a fora which cannot be called a civil court and express saving under Section 88 of the RERA Act, make the position quite clear. Further, Section 18 itself specifies that the remedy under the said section is "without prejudice to any other remedy available". Thus, the parliamentary intent is clear that a choice or discretion is given to the allottee whether he wishes to initiate appropriate proceedings under the CP Act or file an application under the RERA Act".

12. It is clear from the above dicta that the remedies available under the Consumer Protection Act, 1986 are in addition to the remedies provided under the special statutes and if the proceedings under the Consumer Protection Act are initiated after RERA Act came into force, there is nothing in the RERA Act which bars such initiation. Relying on the above settled law, the contention of the Opposite Party that this Commission cannot adjudicate the present complaint complainant on the ground that the project is registered under RERA is devoid of any merit and dismissed.
13. The *last issue* which is to be adjudicated is *whether the Opposite Party is actually deficient in providing its services to the Complainant*. 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.

14. At this stage, we deem it appropriate to refer to clause 5.5 of the Lease Cum Allotment Agreement dated 15.05.2013 entered into by both the contesting parties. It reflects that the Opposite Party was bound to complete the construction of the said shop within 3 years and six months for the Retail Space from the date of execution of the said Agreement. However, till date the construction of the said shop has not been completed by the Opposite Party.
15. Relying on the above settled law, we hold that the Opposite Party is deficient in providing its services to the Complainant as the Opposite Party had given false assurance to the complainant with respect to the time for completing the construction of the said shop and kept the hard-earned money of the complainant for about 9 years.
16. The Opposite Party further submitted that the delay in the completion of the project was due to Force Majeure conditions i.e., litigations between the farmers and Greater Noida Industrial

Authority, orders passed by Hon'ble NGT etc. however, on perusal of record we do not find any evidence which shows us that any force majeure condition caused delay in the said project. We are of the considered view that neither any new legislation was enacted nor any existing rule, regulation or order was amended stopping, suspending or delaying the construction of the said project. It is the sole responsibility of the Opposite Party to complete the construction of the said project within time. The Complainant cannot be tormented due to the faults of the Opposite Party. Therefore, this contention of the Opposite Party is devoid of any merit and is dismissed.

17. Keeping in view the facts of the present case and the extensive law as discussed above, we direct the Opposite Party to refund the entire amount paid by the Complainant i.e., **Rs. 7,35,339/-** along with interest as per the following arrangement:

- A. An interest @ **6% p.a.** calculated from the date on which each installment/payment was received by the Opposite Party till **16.01.2023** (being the date of the present judgment);
- B. The rate of interest payable as per the aforesaid clause (A) is subject to the condition that the Opposite Party pays the entire amount on or before **16.03.2023**;
- C. Being guided by the principles as discussed above, in case the Opposite Party fails to refund the amount as per the aforesaid clause (A) on or before **16.03.2023**, the entire amount is to be refunded along with an interest @ **9% p.a.** calculated from the date on which each

installment/payment was received by the Opposite Party till the actual realization of the amount.

18. 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 Complainant; and
 - B.** The litigation cost to the extent of Rs. 50,000/-.
19. Applications pending, if any, stand disposed of in terms of the aforesaid judgment.
20. A copy of this judgment be provided to all the parties free of cost as mandated by the Consumer Protection Act, 1986. The judgment be uploaded forthwith on the website of the commission for the perusal of the parties.
21. File be consigned to record room along with a copy of this Judgment.

(JUSTICE SANGITA DHINGRA SEHGAL)
PRESIDENT

(PINKI)
MEMBER (JUDICIAL)

Pronounced On:
16.01.2023