

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

Date of Institution: 19.07.2023

Date of hearing: 23.04.2024

Date of Decision: 25.06.2024

FIRST APPEAL NO.- 326/2023

IN THE MATTER OF

M/S. TDI INFRASTRUCTURE LTD.

REGISTERED OFFICE AT:

MAHINDRA TOWER, 2A

BHIKAJI CAMA PLACE, 2ND FLOOR

NEW DELHI – 110006.

(Through: SKV ASSOCIATES)

...Appellant

VERSUS

1. MR. RAM ADHAR

S/O SH. PANCHOO

2. ASHA GAUTAM

W/O RAM ADHAR

BOTH RESIDENTS OF :

D-598, DDA FLATS,

BINDAPUR, NEW DELHI - 110059

(Through: Mr. Ashish Varma, Advocate)

... Respondents

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

Present: Mr. Nishit Yogi, Mr. Nikhil Thakur, proxy counsel for Mr. Vaibhav Agnihotri, Counsel for the Appellant.
Mr. Ashish Varma (email id – varma.ashish73@yahoo.com), Counsel for the respondents.

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

1. The facts of the case as per the District Commission record are:

“2. Briefly stated the facts of the case are that the opposite party is a company 35 incorporated under Companies, Act, 1956, engaged in the business of construction and development of residential and commercial buildings.

3. The complainants applied for a flat based on advertisement of the project of the OP at TDI City, Kundli, Sonapat, Haryana vide application dated 24.10.2010 for residence in August 2019.

4. It is also alleged that till 2015, the complainants have paid an amount of Rs. 26,47,852/- (Rupees Twenty Six Lakh Forty Seven Thousand Eight Hundred Fifty Two) to the OP and 10% was payable on possession and remains unpaid as possession has not been handed over by OP. It is alleged the complainant are consumer of the OP.

5. It is further alleged that the complainants 1 and 2 entered into an agreement dated 15.03.2011 with the OP at New Delhi for allotment of a 3 bedroom floor/apartment having an approximate super area of 108.14 sq metres (1164 sq ft approx.) in the scheme called Tuscan Floors, Near TDI Mall in Tuscan City, Kundli, District Sonapat, Haryana.

6. It is further alleged that in para H of the said agreement dated 15.03.2011 it was stated that the application of the complainants was accepted by the OP and an independent apartment / independent floor tentatively numbered as T-45 having a tentative super area of approximately 108.14 sq mts or 1164 sq ft, comprising of 3 bedrooms and 2 toilets, a drawing/dining room, a kitchen. balconies located on the first floor of the building in the project called Tuscan floors was allotted provisionally to the complainants.

7. It is also alleged the OP agreed to hand over possession of the said independent/ floor apartment as per para 30 of the said agreement dated 15.11.2011 to the complainants not beyond 30 months from the date of execution of the agreement dated 15.03 11.2011, failing which penalty @ Rs 5 per sq ft of the total super area was payable per month.

8. It is also alleged that in para 2 of the agreement dated 15.03.2011 it was stated that the basic sale price of the floor/apartment shall be Rs.25,50,000/- (Rupees twenty five lakh and fifty thousand only) and after inclusion of External Development Charges (EDC) and Infrastructure Development Charge (IDC) the total basic price aggregated to Rs.28,36,926/-(Twenty eight lacs thirty six thousand nine hundred twenty six only). It is also stated that para 5 and para 11 provided for interest 21% to be paid by the complainants in case of default and @24% in payment of installments beyond 90 days from the date of installment Para 7 provided for 9% interest payable by the OP on the total sale consideration, in case it was unable to hand over the floor/ apartment.

9. It is also alleged that Annexure-II of the agreement provided for payment plan. Complainants paid Rs.13,06,926/- (Rupees Thirteen Lakh Six Thousand Nine Hundred Twenty Six) to the OP and the remaining amount was paid through loan availed from the Syndicate Bank, Old Rajinder Nagar Branch, New Delhi, A Letter dated 06.07.2011 was written by the OP to the AG M Syndicate

Bank acknowledging receipt of Rs 13,06,926/- (Rupees Thirteen Lakh Six Thousand Nine Hundred Twenty Six) from the complainants. It was alleged that complainants were the consumers of OP.

10. It was further alleged that Syndicate Bank sanctioned Rs.17,00,000/- (Rupees Seventeen lacs only) towards loan to the complainants for the said flat pursuant to a tripartite agreement dated 05.07.2011 executed between the complainants, opp party and Syndicate Bank.

11. It is also alleged that in terms of agreement dated 15.03.2011, the possession of the said unit became due on 15.09.2013. The complainant no 1 wrote letters dated 13.07.2015, 11.09.2015, 17.09.2015, 16.07.2016, 04.10.2016, 04.01.2017, 18.09.2021, 04.10.2021 to the opp party asking for possession reiterating that interest be paid to the bank by OP. The above letters were received by the opp party but OP has neither given possession or given the penalty as per agreement dated 15.03.2011. The act of the OP in not giving possession amounts gross deficiency in service.

12. The complainant no 1 is a retired government servant and had paid the 38 installments after taking loan and from his retirement benefits. The acts of the opp party have caused grave mental torture, pain and anguish to the complainants who are entitled to refund and comp. The complainant no 1 has suffered heart ailment and has stents installed.

13. It is alleged that the opp party resides and works for gain within the jurisdiction of this Commission. It is alleged that the cause of action for filing the present complaint arose on 15/11/2011, and on all the dates when the payments towards flat in question were made by the complainant and receipts issued by the opp party. It further arose on all the dates that request for possession was made by the complainants to the opp party but possession has not been offered or given to the complainants. The cause of action is still continuing. The complaint is well within the period of limitation and this Commission has pecuniary jurisdiction.

14. It is prayed that OP be directed to refund the amount of Rs.26,47,852/-(Rupees Twenty Six Lakh Forty Seven Thousand Eight Hundred Fifty Two along with interest @ 24% from the dates of payment till realization, and compensation of Rs.10,00,000/- (Rupees Ten Lakh) be awarded for mental torture pain and harassment for deficiency in service by OP.”

2. The District Commission after taking into consideration the material available on record passed the judgment dated 16.02.2023, whereby it held as under:

“ 24. As regards the objection taken by OP that complaint was bad for non-joinder of parties. Counsel for complainant has relied upon the judgment passed by Hon'ble Nation Consumer Disputes Redressal Commission, New Delhi in Consumer case No. 1506 of 2018 titled Atulya Gupta Vs.M/s Jaiprakash Associates Ltd. and in Case No. 344 of 2019 tiled Mukesh Arora Vs. M/s. Jaiprakash Associates Limited wherein it was held as under:

"In case the complainant has taken loan from Bank(s)/other financial institutions) and the same/any portion of the same is still outstanding, the refund amount will be first utilized for repaying the outstanding amount of such loans and balance will be retained by the complainant. The complainant would submit the requisite documents from the concerned bank(s)/financial institution(s) to the OP(s) four weeks from receipt of this order to enable them to issue refund cheques/drafts accordingly."

25. As regards the objection taken by OP that this Commission does not have pecuniary jurisdiction it is to be noted that the present complaint has been filed on 13.01.2021 after enactment of the Consumer Protection Act, 2019 which came into force on w.e.f. 24.07.2022. Section 34(1) as Act which relates to jurisdiction of District Commission provides as under:

"Subject to the other provisions of this Act, the District Commission shall have jurisdiction to entertain complaints

where the value of the goods or services paid as consideration does not exceed one crore rupees. In view thereof this Commission has pecuniary jurisdiction as the subject matter of property in question is Rs.26,47,852/- (Rupees Twenty Six Lakh Forty Seven Thousand Eight Hundred Fifty Two as alleged in the complaint and admitted in the para 7 of reply on merits in the written statement. We accordingly reject the said contention.”

26. It is further to be noted that the fact that complainants booked a flat in the project of OP is an admitted case as evident from the evidence of the parties. The complainant had relied on agreement dated 15.03.2011. The copies of receipt of payments of Rs. 13,06,926.00/- (Rupees Thirteen Lakh Six Thousand Nine Hundred Twenty six) issued by OP and payment of remaining amount of Rs.1,70,000/- (Rupees One Lakh Seventy Thousand) made by Syndicate bank as complainant had taken loan from the bank.

27. It was contended on the behalf of the complainant that OP was deficient in providing services as possession of the flat was not given nor penalty was paid as per the agreement dated 15.03.2011. It was stated possession was to be handed over within 30 months of the execution of agreement. As regards deficiency in services, Hon'ble Supreme Court has held in Arifur Rahman Khan and Ors. V. DLF Southern Homes Pvt. Ltd. And Ors. 2020(3) RCR Civil 544 that the failure of the developer to comply with the contractual obligation to provide the flat to a flat purchaser within the contractually stipulated time frame, amounts to deficiency.

28. It was also held in Lucknow Development Authority Vs. M.K. Gupta, 2 1994(1) SCC 243 by Hon'ble Supreme Court that when a person hires the services of a builder, or a contractor, for the construction of a house or a flat, and the same is for a consideration, it is a "service" as defined by Section 2 (o) of the Consumer Protection Act, 1986. The inordinate delay in handing over possession of the flat clearly amounts to deficiency of service. Person cannot be made to wait indefinitely for possession of the flat allotted to him, and is entitled to seek refund of the amount paid by him, along with compensation. It is to be noted that it was held by

Hon'ble Supreme Court in CA No. 12238/2018 titled Pioneer Urban Land and Infrastructure Ltd. Vs. Govindan Raghavan :

"Flat purchaser could not be compelled to take possession of the flat, even though it was offered almost 2 years after the grace period under the Agreement expired. Flat purchaser was entitled to be granted the relief prayed for i.e. refund of the entire amount deposited by him with interest. "

29. On the other hand it was also argued on behalf of OP that the complainant has not been able to establish any deficiency of service or consumer dispute as contemplated under the Consumer Protection Act, which could be attributable to the OP, therefore, the Complaint is liable to be dismissed.

30. As regards the said contention it is to be noted Section 2 (47) of the Consumer Protection Act, 2019, defines 'unfair trade practices' in the following words: "unfair trade practice" means a trade practice which, for the purpose of promoting the sale, use or supply of any goods or for the provision of any service, adopts any unfair method or unfair or deceptive practice" and includes any of the practices enumerated therein. The Hon'ble Supreme Court held in above case of Lucknow Development Authority Vs. M.k. Gupta, 1994(1) SCC 243, that when possession is not handed over within the stipulated period, the delay so caused is not only deficiency of service but also unfair trade practice.

31. As regards the objection taken by OP that complaint is not maintainable as complainants are not consumer within the meaning of Consumer Protection Act. We are of the view that no evidence was brought on record by OP to show that Complainant booked the flat for sale. In this regard it has been held by Hon'ble Supreme Court in Sai Everest Developers vs. Harbans Singh Kohli, 2015 SCC online NCDRC 1895, that:- "the OP should establish by way of documentary evidence that the complainant was dealing in real estate or in the purchase and sale of the subject property for the purpose of making profit." Thus as no evidence was

brought on record by OP to prove the said contention we are of the view that the same is without any merit. We are also of the view that the terms of agreement dated 15.03.2011 were totally one sided in favour of OP as complainant had made all payments as demanded by OP and the delayed payments were paid with interest @18% even though project was not developed. We also find merits in the submission of complainants that they had to pay interest on the loan taken for purchasing the flat.

32. We are further of the view that the cause of action is a continuing one as the amount paid by complainants was not refunded nor possession of the flat was handed over, the complaint is within the period of limitation.

33. We also find force in the contention of the complainants that the terms of agreement were one sided, it provided that for delayed payment complainants were liable to pay interest @ 21%, and @24% in case of default in payment beyond 90 days whereas OP was to pay interest @9% on total sale consideration in case it was unable to hand over possession.

34. We thus, hold that OP/DI Infrastructure Limited guilty of deficiency in services. We accordingly direct OP/DI Infrastructure Limited to refund the amount Rs.26,47,852/- (Rupees Twenty Six Lakh Forty Seven Thousand Eight Hundred Fifty Two to the complainants with interest @12% p.a. from the date of each deposit within 6 weeks from the date of receipt of the order failing which OP will be liable to pay interest @18% p.a. till realization. We also award compensation of Rs. 2,00,000/- (Rupees Two Lakh) each to each complainant for mental agony and harassment and Rs. 50,000/- (Rupees Fifty Thousand) as cost of litigation to complainants.

35. In view of the judgment of Hon'ble NCDRC referred to above the amount which is to be refunded will first be utilized for repaying the outstanding amount of loan and the balance will be retained by the complainants. Complainants will submit the requisite documents from the concerned bank to OP within 2 weeks from the receipt of the order, to enable them to issue refund draft.”

3. Aggrieved by the aforesaid judgment of the District Commission, the Appellant has preferred the present appeal contending that District Commission failed to consider that the Respondents are not consumer under the Consumer protection Act, 2019 as the apartment was purchased for commercial purpose. He further submitted that the Respondents failed to make timely payments as per the schedule and the Ld. District Commission awarded interest at an exorbitant rate without any justification. Pressing the aforesaid contentions, the Appellant prayed to set aside the order of the District Commission.
4. The Respondents, on the other hand, denied all the submissions of the appellant and submitted that the District Commission had perused all the material on record before pronouncing the said judgment. The counsel for the Respondents further prayed for dismissal of the instant appeal with costs.
5. We have perused the Appeal, Reply of the Respondents, Written submissions, the District Commission Record and Impugned judgment dated 16.02.2023.
6. To resolve the issue as to whether the Respondents falls under the category of consumer as defined under the Consumer Protection Act, 2019, 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.”

7. It is also 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.”*

8. From the aforesaid dicta of the Hon’ble National Commission, it flows that it is for the Appellant to prove that the apartment 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 Respondents.
9. The Appellant contended that the Respondents failed to make timely payments as per the schedule provided in the agreement dated 15.02.2011 and therefore, the Respondents are at fault for not handing

over possession of the said apartment within stipulated time. It is noted that the delayed payments made by Respondents were duly penalised by the Appellant by charging interest @ 18% per annum despite of the fact that the project was not even developed timely, therefore, this contention of the Appellant holds no merit now and is dismissed in its entirety.

10. With respect to the contention of the Appellant that the District Commission had awarded an exorbitant rate of interest while refunding money to the Respondents, it is noted that the Respondents had taken loan from Syndicate Bank for the purchase of said apartment and due to fault of the Appellant in not giving possession of the said apartment within stipulated time as stated in agreement dated 15.02.2011, the Respondents suffers doubly, as they are deprived of both the enjoyment of the apartment and are burdened with the obligation to continue paying the EMIs to the bank. An innocent consumer had to suffer on the hands of builder for so many years and his dreams of enjoyment to the apartment purchased by them after paying huge interest was also shattered by the builder. It is further noted that the Respondents had also been deprived of the benefit of appreciation in property in the present case due to default of the Appellant in handing over possession of the said apartment within the stipulated time. Therefore, we do not find any merit in the said contention of the Appellant and the objection raised on behalf of the Appellant is answered in the negative.
11. Consequently, we are in agreement with the reasons given by the District Commission and fail to find any cause or reasons to reverse the findings of the District Commission. Consequently, we uphold the judgment dated 16.02.2023 passed by the District Consumer Disputes

Redressal Commission-VI, M Block, 1st Floor, Vikas Bhawan New Delhi - 110002.

12. Application(s) pending, if any, stands disposed of in terms of the aforesaid judgment.
13. The judgment be uploaded forthwith on the website of the commission for the perusal of the parties.
14. File be consigned to record room along with a copy of this Judgment.

**(JUSTICE SANGITA DHINGRA SEHGAL)
PRESIDENT**

**(PINKI)
MEMBER (JUDICIAL)**

Pronounced On:
25.06.2024

L.R-ZA