

IN THE DELHI STATE CONSUMER DISPUTES
REDRESSAL COMMISSION

Date of Institution: 27.03.2021

Date of hearing: 19.09.2022

Date of Decision: 09.01.2023

COMPLAINT CASE NO.- 71/2021

IN THE MATTER OF

MR. AURANGZEB KHAN,

S/o Mr. Abdul Latif Khan,

R/o 1006, Shipra Apartment,

Kaushambi, Ghaziabad.

(Through: Mr. Pardeep Mahajan & Sudhir Mahajan, Advocates)

...Complainant

VERSUS

M/S BPTP LTD.,

(Through its MD/Authorized Signatory),

Registered office at:

M-11, Middle Circle,

Connaught Circus, New Delhi-110001.

(Through: Mr. Sargam Aggarwal & Arun Prakash, Advocates)

...Opposite Party

CORAM:

HON'BLE JUSTICE SANGITA DHINGRA SEHGAL (PRESIDENT)

HON'BLE MS. PINKI, MEMBER (JUDICIAL)

Present: Mr. Sudhir Mahajan, Counsel for the Complainant.

Mr. Anoop George, Proxy counsel for Mr. Pragyan Pradip

Sharma, Counsel for Opposite Party.

PER: HON'BLE JUSTICE SANGITA DHINGRA SEHGAL,

PRESIDENT

JUDGMENT

1. The present Consumer Complaint has been filed before this Commission under Section 47 of the Consumer Protection Act, 2019, by the Complainant alleging deficiency in service and Unfair Trade Practice on the part of Opposite Party and has prayed for the following reliefs:
 - a) *“To return the amounts paid by the Complainant on various dates together with 18% p.a. interest on the amounts paid by the Complainant.*
 - b) *Compensation of Rs. 10 lacs for causing mental agony and harassment to the Complainant*
 - c) *Cost of the complaint.*
 - d) *To pass such further order or orders as this Hon'ble Commission may deem fit and proper for granting complete relief to the Complainant.”*
2. Brief facts necessary for the adjudication of the present complaint are that the Complainant on 07.09.2012, booked a 3 BHK residential Flat bearing no. T21-802 in the project of the Opposite Party namely “BPTP Terra” situated at Sector 37D Gurgaon, Haryana which was allotted to the Complainant vide the Allotment Letter dated 07.12.2012. Thereafter, the Opposite Party entered into a Buyer’s Agreement dated 21.01.2013 with the Complainant. The Opposite Party assured the Complainant that the possession of the Flat will be offered to him within 42 months and by all stretch of imagination the possession of the flat ought to have been offered by July 2016. The Complainant had availed a Housing loan amounting Rs. 82,00,000/- from Indiabulls (IHFL) to accomplish the demands of Opposite Party. Till date, the Complainant has paid an amount of Rs. 1,09,56,755/- to the Opposite Party in accordance with the Construction linked payment plan

opted by him. However, till date the possession of the said flat has not been offered by the Opposite Party, aggrieved by which, the Complainant also got served a legal notice dated 02.01.2021 to the Opposite Party but of no avail. Thus, left with no other option, alleging deficiency of service and unfair trade practice on the part of the Opposite Party, the Complainant approached this Commission.

3. The Opposite Party contested the present case and raised some preliminary objections as to the maintainability of the present complaint and contended that due to the presence of Arbitration clause in the agreement, any dispute arising due to the agreement is to be referred to an arbitrator. The counsel for the Opposite Party contended that the said flat has been purchased solely for the purpose of investment, merely for "*Commercial Purpose*", hence, the complainant is not a *Consumer* within the provisions of the Consumer Protection Act, 2019. The Counsel also contended that the Complainant has failed to establish any kind of deficiency in providing service on the part of Opposite Party. Pressing the aforesaid preliminary contentions, the Opposite Party prayed that the present Consumer Complaint should be dismissed.
4. The Complainant had filed his 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 and also filed the written arguments on their behalf.
5. We have perused the material available on record and heard the counsel appeared on behalf of both the parties.
6. The fact that the Complainant had booked a flat with the Opposite Party is evident from the Buyer's Agreement dated 21.01.2013, executed between the contesting parties. Payment to the extent of Rs. 1,09,56,755/- has been made by the Complainant to the Opposite Party is also evident from the

statement of account dated 23.10.2018 *annexed at page no. 45* of the present Complaint.

7. The *first contention* raised by the Opposite Party is that *since there exists an arbitration clause in the Buyer's Agreement dated 23.01.2013, 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.”

8. 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 relevant paragraph of *Emaar MGF Land Limited (supra)*. In the present case also, the Complainant opted for the special remedies provided under the Consumer protection Act, 2019 and this Commission can refuse to relegate the present case to the arbitration. Hence, this Commission is authorised to adjudicate the case and the existence of an arbitration clause in the agreement does not affect the jurisdiction of this Commission.
9. The *next question* for consideration before us is *whether the Complainant falls under the definition of 'Consumer' as per the Consumer Protection Act, 2019* as the Opposite Party submitted that the said flat has been

purchased solely for the purpose of investment and the Complainant has also invested his money in another unit bearing no. P-1101 in the other project of Opposite Party namely "Spacio" which is situated at Sector 37-D, Gurgaon, Haryana. The Opposite Party further submitted in its written statement that the possession of the unit bearing no. P-1101 has already been offered to the Complainant.

10. To resolve this issue, we deem it appropriate to refer to dicta titled as ***Kavit Ahuja vs. Shipra Estate Ltd. and Ors.*** reported as ***1 (2016) CPJ 131 (NC)***, wherein, Hon'ble National Commission has held as under:

"8. In any case, it is not appropriate to classify such acquisition as a commercial activity merely on the basis of the number of houses purchased by a person, unless it is shown that he was engaged in the business of selling and purchasing of houses on a regular basis. If, for instance, a person has two-three children in his family and he purchased three houses one for each of them, it would be difficult to say that the said houses were purchased by him for a commercial purpose. His intention in such a case is not to make profit at a future date but is to provide residential accommodation to his children on account of the love and affection he has for his children. To take another example, if a person has a house say in Delhi but he has business in other places as well and, therefore, purchases one or more houses at other places where he has to live presently in connection with the business carried by him, it would be difficult to say that such acquisition is for commercial purpose. To give one more example, a person owning a house in a Metropolitan City such as Delhi, or Mumbai, may acquire a house at a hill station or a place, which is less crowded and more peaceful than a Metropolitan City, in my view, it cannot be said that such acquisition would be for commercial purpose. In yet another case, a person may be owning a house but the accommodation may not be sufficient for him and his family, if he acquires one or more additional houses, it cannot be said that he has acquired them for commercial purpose. Many more such examples can be given. Therefore, it

cannot be said that merely because of the complainant had agreed to purchase three flats in the same complex the said acquisition was for a commercial purpose.”

11. Further 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. Moreover, the National Commission in case titled as “*Aloke Anand Vs. M/s. Ireo Pvt. Ltd. & Ors.*” bearing *Consumer Complaint No. 1277 of 2017* decided on *01.11.2021* relied on its earlier order in *Kavita Ahuja Vs. Shipra Estate Ltd. and Jai Krishna Estate Developers Pvt. Ltd.*, further held that in such cases burden is upon the builder to prove that the Complainant was indulging in commercial activities and held as under:

“12. It is, therefore, clear that burden is squarely upon the opposite party to prove the fact that complainant is indulging in the business of sale and purchase of the flats. There is no contention in the written version that the complainant is indulging in the business of sale/purchase of the properties. Since the opposite party has failed to discharge this burden, we hold that complainant is consumer within the meaning of Section 2 (1) (d) of the Act.”

13. Further, the findings of National Commission in *Aloke Anand (supra)* wherein the National Commission had relied on *Kavita Ahuja's case*, were confirmed by the *Hon'ble Supreme Court* in *Civil Appeal No. 180 of 2022* titled *M/s. Ireo Private Limited Vs. Aloke Anand* dated *21.01.2022*.

Therefore, 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 the fact that the Complainant had booked more than one flat with the Opposite Party does not take him out of the definition of consumer as defined under section 2(7) of the Consumer Protection Act, 2019.

14. Further, on perusal of the record before us, we fail to find any material which shows that the Complainant is 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. Having discussed the preliminary objections raised on behalf of the Opposite Party, the *final issue* which arises 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 Apartment to a Apartment 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 Apartment 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. Apartment purchasers suffer agony and harassment, as a result of the default of the developer. Apartment purchasers make legitimate assessments in regard to the future course of their lives based on the Apartment 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.”

16. As per the above dicta of the Hon’ble Apex Court, where the builder defaults in handing over of the possession to the consumer within a stipulated time period, it is a clear case of deficiency of service as defined in the Consumer Protection Act, 2019. In the present case, even though the Complainant has contended that possession of the flat was to be offered within 42 months and by all stretch of imagination the possession of the flat ought to have been offered to the Complainant by July 2016, the perusal of the Buyer’s Agreement reflects that no such time limit has been prescribed for offering the possession of the Flat in question to the Complainant.
17. However, the law has been well settled that in case the Buyer’s Agreement does not mention a specific time period, the property in question is to be

handed over within a reasonable time. What constitutes reasonable time has been discussed by the Hon'ble National Commission in *First Appeal No. 348 of 2016* titled *Ajay Enterprises Pvt. Ltd. and Ors. vs. Shobha Arora and Ors.* dated *10.05.2019* wherein it has been held as under:

".....under Section 46 of the Indian Contract Act, 1872, the following provision is there:

46. Time for performance of promise, where no application is to be made and no time is specified - Where, by the contract, a promisor is to perform his promise without application by the promisee, and no time for performance is specified, the engagement must be performed within a reasonable time.

Explanation - The question "what is a reasonable time" is, in each particular case, a question of fact".

19. From the above provision it is clear that if there is no time limit for the performance of a particular promise given by one party, it is to be performed within a reasonable time. In most of the builder buyer agreements, the period ranges from 24 to 48 months and the most common agreement seems to be for 36 months plus grace period of six months for completion of construction and delivery of possession. If the possession is delivered beyond 42 months or beyond 48 months, the deficiency in service on the part of the opposite party shall stand proved."

18. Returning to the facts of the present case, the fact that the Complainant had booked a Flat with the Opposite Party and made a payment to the extent of Rs. 1,09,56,755/- is well established from the evidence on record. Further, perusal of record reflects that Buyer's Agreement was executed between the contesting parties in January 2013. However, till 2021 i.e. the year in which the present complaint case was filed, there was nothing on the part of the Opposite Party to show that it was in a position to offer the possession of the Flat in question to the Complainant.
19. Moreover, it is well settled law that the Complainant cannot be expected to wait for an indefinite time period to get the benefits of the hard earned money which they have spent in order to purchase the property in question.

(Ref: Fortune Infrastructure v. Trevor D'Lima reported at (2018) 5 SCC 442).

20. Consequently, we hold that the Opposite Party is deficient in providing its services to the Complainant since it has failed to handover the possession of the Flat or even failed to offer the possession of the said flat within a reasonable time period and the Complainant is entitled for the refund of the money deposited by him by way of cash and by way of loan disbursement to the Opposite Party.
21. 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.1,09,56,755/-** 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 **09.01.2023** (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 **09.03.2023**;
 - 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 **09.03.2023**, 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.
22. 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. 4,00,000/- as cost for mental agony and harassment to the Complainant; and

B. The litigation cost to the extent of Rs. 50,000/-.

23. Application(s) pending, if any, stand disposed of in terms of the aforesaid judgment.
24. A copy of this judgment be provided to all the parties free of cost as mandated by the Consumer Protection Rules, 2020. The judgment be uploaded forthwith on the website of the commission for the perusal of the parties.
25. File be consigned to record room along with a copy of this Judgment.

(JUSTICE SANGITA DHINGRA SEHGAL)
PRESIDENT

(PINKI)
MEMBER (JUDICIAL)

Pronounced On:
09.01.2023