

IN THE DELHI STATE CONSUMER DISPUTES

REDRESSAL COMMISSION

Date of Institution: 20.05.2017

Date of Hearing: 03.09.2024

Date of Decision: 18.11.2024

COMPLAINT CASE NO.- 936/2017

IN THE MATTER OF

**MRS. VIJAYWATI TIWARI,
W/O MR. RAM BABU TIWARI,
R/O WZ- 109, 3RD FLOOR, GALI NO.8,
LAGWANTI GARDEN,
NEW DELHI – 110046.**

(Through: K.K. Tiwari & Associates)

...Complainant

VERSUS

**M/S J.M. HOUSING LIMITED,
REGD. OFFICE:
D-334, VIVEK VIHAR,
DELHI – 110095**

THROUGH TS MANAGING DIRECTOR

(Through: Kamal Kapoor & Associates)

...Opposite party

CORAM:

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

Present: Mr. Ram Babu Tiwari, husband of the complainant in person. Mr. Keshari K. Tiwari and Mr. Ramish Tiwari, counsel for the complainant (Email: kesharikumar.kk@gmail.com)

Mr. Kamal Kapoor (enrl.no. D787/2001), proxy counsel for Mr. Ashvani Ravi, counsel for the OP. Email: kamal724@yahoo.com)

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:

- "i. direct the respondent to pay a sum of Rs. 14,28, 053/-/- (Rs fourteen lakhs, twenty eight thousand fifty three only) to the complainant plus interest Rs 1,22, 000/- @ 248 per annum*
- ii. direct the respondents to pay the compensation on account of mental agony and harassment suffered by the complainant to the tune of Rs. 5, 00, 000/-(Rs Five lakhs only)*
- iii. award the cost of the complaint in favour of the complainant and against the respondents.*
- iv. Any other relief which this Hon'ble Forum deems fit and proper under the facts and circumstances of the case, may kindly be granted in favour of the complainant and against the respondents in the interest of justice."*

2. Brief facts necessary for the adjudication of the present complaint are that the Complainant vide application form dated 24.07.2014, booked an apartment bearing no. E-803 with super built up area of 1060 sq. ft, Tower-E, floor 8 in the project named JM Florence of the Opposite Party, situated at Greater Noida, Uttar Pradesh. Accordingly, the Complainant made total payment of Rs. 14,28,503/- by 25.07.2014, towards the said booking as

and when demanded by the Opposite Party. Subsequently, an allotment letter dated 20.09.2014 outlining the terms and conditions executed between the parties. As per term and condition 40 of the said allotment letter, the Opposite Party was to hand over the possession of the said apartment within 40 months from the date of the said allotment letter with grace period of 6 months subject to force majeure circumstances. However, the construction of the said apartment was lagging much behind the schedule. Also, as per term and condition 9 of the said allotment letter, in case where allottee at any time desires for cancellaton of the registration cum booking, the Opposite Party also liable to refund the amount deposited by the Complainant after deducting 10% service tax and service tax. Therefore, the Complainant decided to cancel the booking and reuested the Opposite Party to refund the total amount deposited by her along with interest. However, the Opposite Party failed to refund the amount till date. The Complainant over the time had paid a total sum of Rs. 14,28,503/- to the Opposite Party as and when demanded. The Complainant also sent a legal notice dated 21.03.2017 to the Opposite Party, seeking a refund of the amount along with interest but was of no avail.

3. The Opposite Party has contested the present matter and raised preliminary objections regarding the maintainability of the complaint. The counsel for the Opposite Party submitted that the Complainant does not qualify as a "consumer" under the Consumer Protection Act, 1986, as the Complainant purchased the said apartment for investment purposes with the intent of earning a profit, which constitutes a commercial purpose. He further submitted that the Complainant has no cause of action to file this complaint. He also submitted that the jurisdiction of this commission is barred as there is an arbitration clause in the allotment letter.

4. The counsel for the Opposite Party submitted that this commission lacks the pecuniary jurisdiction to adjudicate the present matter. He further submitted that the Complainant is regular defaulter in making payment towards the said apartment, therefore, miserable failed to adhere to the terms and condition of the allotment letter dated 20.09.2014. He lastly submitted that the Complainant failed to disclose any deficiency on the part of the Opposite Party. Pressing the aforesaid objections, the counsel appearing on behalf of the Opposite Party argued that the present complaint 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. The Complainant has filed written arguments, reiterating the allegations and grievances already stated in the complaint, primarily focusing on not refunding the amount deposited by her towards the said apartment despite the fact there was inordinate delay in completing the construction of the said apartment.
7. On the other hand, the Opposite Party has also submitted written arguments, repeating the contentions raised in their objections. They argue that the commission lacks jurisdiction, that the Complainant concealed material facts, and that there is no deficiency in service on their part, requesting the complaint be dismissed.
8. We have perused the material available on record and heard the counsel for the parties.
9. The next question for consideration before us is **whether the Complainant is consumer under the Consumer Protection Act, 1986?**
10. The Opposite Party contended that the Complainant is not Consumer as defined under the Consumer Protection Act, 1986 as she 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.”

11.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.”*

12.From the aforesaid dicta of the Hon’ble National Commission, it flows that it is for the Opposite Party 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 Complainant.

13. In the present case, the Opposite Party has merely made a statement that the Complainant purchased the said apartment for commercial purpose and 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 apartments. 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.

14. *The second question for consideration before us whether the Complainant has cause of action to approach this commission?*

15. The next issue to be adjudicated is whether the Complainant has cause of action to approach this commission. It is imperative to refer to Section 24A of the Consumer Protection Act, 1986 wherein it is provided 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 as this 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.”

16. A perusal of the above statutory provision of law reflects that the complaint shall be filed before the State Commission within two years from the date on which the cause of action has arisen. It is clear from the record that till date neither possession of the said apartment has been delivered nor the amount has been refunded to the Complainant by the Opposite Party.
17. We further deem it appropriate to refer to **Mehnga Singh Khera and Ors. Vs. Unitech Ltd. as reported in I (2020) CPJ 93 (NC)**, wherein the Hon'ble National Commission has held as under:
- “It is a settled legal proposition that failure to give possession of flat is continuous wrong and constitutes a recurrent cause of action and as long as the possession is not delivered to the buyers, they have every cause, grievance and right to approach the consumer courts.”*
18. Relying on the above settled law, it is clear that failure to deliver possession being a continuous wrong constitutes a recurrent cause of action in favour of the buyer and therefore, till the time possession is not delivered to the Complainant, she is within right to file the present complaint before this commission.
19. The next question for consideration is whether **the existence of arbitration clause in the allotment letter barred the jurisdiction of this commission?**
20. The next preliminary objection raised by the Opposite Party is that since there exists an arbitration clause in the Allotment Letter, 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.”

21. 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 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 allotment letter does not affect the jurisdiction of this commission.
22. **The next question for consideration is whether this commission has pecuniary jurisdiction to adjudicate the present complaint?**
23. The Opposite Party contended that this commission does not have the pecuniary jurisdiction to adjudicate the present complaint. We deem it appropriate to refer to Section 17 of the Consumer Protection Act, 1986 which provides as under:
- “(1) Subject to the other provisions of this Act, the State Commission shall have jurisdiction—*
- (a) to entertain-*

(i) complaints where the value of the goods or services and compensation, if any, claimed [exceeds rupees twenty lakhs but does not exceed rupees one crore]; and
(ii) appeals against the orders of any District Forum within the State; and

(b) to call for the records and pass appropriate orders in any consumer dispute which is pending before or has been decided by any District Forum within the State, where it appears to the State Commission that such District Forum has exercised a jurisdiction not vested in it by law, or has failed to exercise a jurisdiction so vested or has acted in exercise of its jurisdiction illegally or with material irregularity.

(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.”*

24. Analysis of Section 17 of the Consumer Protection Act, 1986 leads us to the conclusion that this commission shall have the pecuniary jurisdiction in cases where the total claim including the compensation is more than twenty lakhs and less than One Crore.
25. Having discussed the statutory position, the facts of the present case reflect that the value of the said apartment and the compensation prayed for by the complainant is beyond Rs. 20 Lakhs but does not exceed Rs. 1 Crore, accordingly, this commission has the pecuniary jurisdiction to deal with the present complaint
26. The main question of consideration before us is **whether the Opposite Party is actually deficient in providing its services to the Complainant or not?**
27. The counsel for the Opposite Party further contented that the Complainant defaulted in making payment towards the said apartment, therefore, failed to adhere to agreed terms and condition of the allotment letter dated 20.09.2014. Therefore, there is no deficiency on the part of the Opposite Party. 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 14 term and condition of the allotment letter dated 20.09.2014 entered into by both the contesting parties. It reflects that the Opposite Party was bound to handover the possession of the said apartment within 40 months from the date of allotment letter subject to force majeure circumstances.

29. However, it is evident from the letter dated 14.11.2016 that the Complainant had requested cancellation of the booking of the allotted apartment from the Opposite Party approximately 2 years and 2 months after the date of the allotment letter dated 20.09.2014. Therefore, it cannot be contended that there was any delay in the completion of the said apartment by the Opposite Party, as they were allowed 2 years, including a grace period, to complete construction. Nevertheless, as per clause 9 of the allotment letter dated 20.09.2014, the Complainant was entitled to receive the refund of the earnest money, after deducting 10% of the basic sale price, which the Opposite Party failed to refund despite repeated requests from the Complainant. Furthermore, the Opposite Party has not provided any justification for its failure to refund the earnest money.
30. Further, the default on the part of the Complainant happened when the third instalment payable for on 'on completion of 12th floor slab', was not paid. The Opposite Party was entitled to cancel the allotment on account of the aforesaid default. However, the Opposite Party did not cancel the allotment despite the letter from the Complainant seeking cancellation of her allotment, it must necessarily pay interest on the amount which was required to refund to the Complainant with effect from the date on which the very first default committed by the Complainant, there would have been no occasion for demanding any interest on the delayed payments. Once the default had happened, it ought to have cancelled the allotment, forfeited the permissible earnest money and refunded the balance amount to the Complainant. Therefore, the Opposite Party is not entitled to any interest on the delayed payments. The brokerage/commission charges will have to be borne by the Opposite Party out of the earnest money which it is permitted to forfeit.
31. In the view of the aforesaid discussions, we hold that the Opposite Party is deficient in providing its services to the Complainant as the Opposite Party

failed to refund the money after deducting earnest money and kept the hard-earned money of the Complainant.

32. Keeping in view the facts of the present case and the extensive law as discussed above, we direct the Opposite Party to refund an amount of **Rs.11,19,689/-** [After deduction of 10% of the basic price of the apartment i.e., R.30,88,416/- plus service tax] along with simple interest as per the following arrangement:

- A. An interest @ **6% p.a.** calculated from the date 14.11.2016 (cancellation letter sent by the Complainant) till **18.11.2024** (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 **18.01.2025**;
- 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 **18.01.2025**, the entire amount is to be refunded along with an interest @ **9% p.a.** calculated from the date on which the allotment was cancelled by the Opposite Party till the actual realization of the amount.

19. 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/-.

20. Applications pending, if any, stand disposed of in terms of the aforesaid judgment.

21. The judgment be uploaded forthwith on the website of the commission for the perusal of the parties.
22. File be consigned to record room along with a copy of this Judgment.

(JUSTICE SANGITA DHINGRA SEHGAL)

PRESIDENT

(PINKI)

MEMBER (JUDICIAL)

Pronounced On: **18.11.2024**

LR-ZA