

**NATIONAL CONSUMER DISPUTES REDRESSAL COMMISSION
NEW DELHI**

CONSUMER CASE NO. 326 OF 2019

1. MITESH BHALLA & ANR.

.....Complainant(s)

Versus

1. EXPERION DEVELOPERS PRIVATE LIMITED

Through its directors Having Registered Office at; F-9, First
Floor, manish Plaza 1, Plot No.7, MLU, Sector 10,Dwarka,
NEW DELHI-110075

.....Opp.Party(s)

BEFORE:

HON'BLE MR. JUSTICE SUDIP AHLUWALIA,PRESIDING MEMBER

FOR THE COMPLAINANT : MS. VRIDHI SHARMA, ADVOCATE

FOR THE OPP. PARTY : MR. PANKAJ VIVEK, ADVOCATE.

Dated : 13 November 2024

ORDER

JUSTICE SUDIP AHLUWALIA, MEMBER

This Consumer Complaint has been filed under Section 21(a)(i) of the Consumer Protection Act, 1986 alleging deficiency in service on the part of the Opposite Parties and, seeking refund of the deposited amount along with ancillary reliefs.

2. The facts leading up to the present Complaint, in brief, are that the Complainants approached the Opposite Party in 2012 after being influenced by advertisements for a residential project called “The Heartsong” in Gurgaon, Haryana. These advertisements promised that the project would be an ideal investment, luring buyers like the Complainants. Initially, the Complainants were interested in a 2BHK Flat, but the sales executives of the Opposite Party persuaded them to opt for a 3BHK unit, assuring them that it could be converted back to a 2BHK if required, prior to the final possession. Believing this representation, the Complainants applied for a 3BHK Flat on 13.12.2012 and paid an initial booking amount of Rs. 7,00,000/-. The Opposite Party provisionally allotted them Unit No. B1/0703 on 28.12.2012.

3. On 18.04.2013, the Opposite Party executed a formal Agreement with the Complainants, under which the Flat was to be purchased for Rs. 1,00,78,614/- under an instalment payment plan. The possession of the Flat was to be handed over within 36 months from the date of the Agreement. However, despite the passage of five months, the Complainants discovered that construction had not even begun, contrary to the assurances of the Opposite Party. Despite raising concerns, the Opposite Party continued to delay the project while still demanding payments from the Complainants. By 17.09.2014, the Complainants had already paid Rs. 42,69,334/- including car parking charges, yet the project was still far from completion.

4. The Complainants’ financial situation worsened due to personal difficulties, including the ill health of their father and the delay in receiving retirement benefits. Further compounding their difficulties, the Complainants’ father was falsely implicated in a criminal case in 2015, which was only resolved with his acquittal in February 2018. Given these hardships, the Complainants approached the Opposite Party to request a conversion from a 3BHK to a

2BHK, as originally discussed. However, despite repeated requests, the Opposite Party refused to honour the commitment, denying the request via Email on 12.05.2015. This refusal, despite the earlier assurance that conversion was possible, left the Complainants feeling cheated.

5. In the face of minimal construction progress and feeling misled, the Complainants stopped making further payments. The Opposite Party responded by cancelling the Complainants' allotment on 28.02.2017, and informed them that a significant amount of the total payment, i.e. Rs. 39,37,227/- had been forfeited, leaving only Rs. 3,06,458/- for refund. The Complainants allege that the Opposite Party deliberately misled them and other innocent buyers, causing significant financial loss and emotional suffering. Despite attempts to resolve the issue through Legal Notice and negotiations, the Opposite Party failed to provide any meaningful remedy, prompting the Complainants to seek redressal through this Complaint with the following prayer -

“a. Refund the amount of Rs. 42,69,334/- along with 18% interest p.a from the date of instalment paid till the date of the Realization;

b. To pay Compensation to the amount of Rs. 5 lakh, for mental trauma and agony caused to the Complainant.

c. To pay the costs of the proceedings to the Complainant.”

6. The Opposite Party filed its Written Statement and resisted the Complaint. The Opposite Parties denied all allegations, statements, contentions, and submissions raised by the Complainants in the present Complaint, except those specifically admitted; The Opposite Parties submitted that the relief claimed by the Complainants, amounting to Rs. 90,33,999/-, is less than the required Rs. 1 crore threshold for the jurisdiction of this Commission, which should render the complaint ineligible. Additionally, the Opposite Party claims that the complaint is time-barred. According to the Opposite Party, the cause of action arose in 2014 or at the latest in May 2015, making the Complaint beyond the two-year limitation period under the Consumer Protection Act, 1986.

7. The Opposite Party also stated in the Written Statement that the Complaint lacks a valid cause of action as the project is complete, and the Apartment is ready for possession. They submit that the Occupation Certificate was obtained in March 2017, and the possession could not be offered to the Complainants because they defaulted in making payments. The Opposite Party asserts that there has been no delay in construction and that over 350 conveyance deeds have been executed for other Allottees in the project.

8. The Opposite Party further averred that the Complainants never intended to use the Apartment for residential purposes but instead booked it for speculative investment, by hoping to sell it for profit. It claims that the Complainants stopped making payments in 2014 due to a downturn in the real estate market. The Opposite Party maintains that the Complainants were irregular in making payments and were eventually in default under the terms of the Apartment Buyer Agreement. Consequently, the Opposite Party cancelled the allotment in February 2017 and forfeited an appropriate amount of the payments made by the Complainants as per the Agreement.

9. The Opposite Party has also claimed that it acted in good faith and has developed the project in accordance with the agreed terms. They argue that the Complainants' allegations

regarding oral assurances are unfounded, and that the terms of the Agreement did not allow for conversion of the Apartment from 3BHK to 2BHK as requested by the Complainants. The Opposite Party maintains that the Complainants defaulted on their contractual obligations and only raised the present claims as a means to exit the investment when the real estate market failed to yield the expected returns.

10. Rejoinder on behalf of the Complainants to the Written Statement by the Opposite Party has been filed; It has been stated in the Rejoinder that the claim by the Opposite Party that this Commission lacks jurisdiction based on the relief sought being less than Rs. 1 crore is incorrect. The value of goods and services, in this case, the Flat valued over Rs. 1 crore, along with the compensation claimed, must be considered in determining pecuniary jurisdiction. The objection raised by the Opposite Party is therefore unfounded and misconceived.

The Complainants have also contended that the cause of action arose not on the dates suggested by the Opposite Party, but when the allotment of their unit was arbitrarily cancelled by the Opposite Party on 28.02.2017, and a significant portion of their payment was forfeited. Furthermore, the refusal to refund the admitted sum of Rs. 3,06,458/- and the response to the Legal Notice in April 2017 are part of the ongoing cause of action, thus making the complaint within the prescribed time limit.

11. It was further stated in the Rejoinder that the assertion by the Opposite Party that there was no delay in construction is incorrect. The Opposite Party was contractually obligated to deliver possession by 18.04.2016, yet they obtained the Occupancy Certificate only on 02.03.2017, clearly reflecting a delay. This delay constitutes an unfair trade practice. The Opposite Party's arbitrary cancellation of the allotment and forfeiture of Rs. 39,37,227/- further adds to the cause of action. The Complainants firmly deny the allegation that their transaction was for commercial purposes. The Flat was booked for personal use, in view of their future residential needs. The Opposite Party's suggestion that the Complainants intended to resell the property for profit is entirely unfounded and irrelevant to the matter.

12. The Complainants further deny any assertion of financial incapacity or misconduct. While there may have been delays in payment due to financial difficulties, these were openly communicated to the Opposite Party. Rather than rejecting their request for conversion from a 3BHK to a 2BHK, the Opposite Party engaged with the Complainants for a considerable period, creating a false sense of assurance and ultimately cancelling the allotment after two years to unjustly forfeit the substantial payments already made. The Complainants dismiss the Opposite Party's claim that they are not "Consumers" under the Consumer Protection Act. The Flat was booked for personal use, and the Complainants were students with no financial intent to engage in commercial activity.

13. Evidence by way of Affidavit has been filed by Complainant No. 1 Mr. Mitesh Bhalla and Complainant No. 2 Mr. Rajat Bhalla; Evidence by way of Affidavit has been filed on behalf of Opposite Party by Mr. Ashok Kumar, Authorized Representative of the Experion Developers Pvt. Ltd.

14. Ld. Counsel for Complainants has argued that despite already having paid Rs. 42,69,334/-, including parking charges, the Opposite Party continued to raise demands for additional payments. The Complainants were financially strained by personal issues, including the ill health of their father and delays in retirement benefits. In addition, the Complainants' family was embroiled in a legal case under the Prevention of Corruption Act, which was eventually resolved in February 2018 with the acquittal of their father.

15. Ld. Counsel for Complainants further argued that faced with both financial difficulties and lack of progress in the construction, they requested to convert the 3BHK Flat into a 2BHK. Despite repeated visits and discussions, the Opposite Party ignored this request and eventually denied it in an email on 12.05.2015. The Sales Executive had incorrectly assured that the conversion was possible, which was not done eventually, because of which the Complainants stopped further payments, especially since there was little progress in construction.

16. On 28.02.2017, the Opposite Party cancelled the Complainants' allotment and claimed that out of the Rs. 42,43,685/- paid, only Rs. 3,06,458/- would be refunded, while Rs. 39,37,227/- would be forfeited, citing Clause 5.1 of the Agreement. Ld. Counsel for the Complainants has asserted that the terms of the Agreement were one-sided and unfair, as the Opposite Party had inserted several unilateral clauses without accommodating the Complainants' concerns. These arbitrary terms were executed under undue influence due to the Opposite Party's dominant position.

17. Ld. Counsel for the Complainants has further argued that this forfeiture is unlawful, as the Earnest money should not exceed 10% of the total price of the as per the decision of this Commission in "DLF Ltd. vs. Bhagwanti Narula, RP/3860/2014". The Complainants had sent a Legal Notice on 18.03.2017, but the Opposite Party failed to address their grievances adequately, by only agreeing to refund Rs. 3,06,458/-, which remains unpaid despite the Opposite Party's claims.

18. Ld. Counsel for the Opposite Party has argued that that the construction of the Apartment was completed on time, with the Occupancy Certificate being obtained on 02.03.2017. However, the Complainants failed to make timely payments, becoming chronic defaulters. The Opposite Party repeatedly issued demand notices and reminders to the Complainants for the outstanding payments, but they did not respond or make any substantial payment after 17.09.2014. Consequently, the Opposite Party was compelled to cancel the allotment on 28.02.2017 and forfeited a sum of Rs. 39,37,227/- in accordance with the terms of the Agreement, while offering a refund of Rs. 3,06,458/- which was duly refunded by cheque and accepted by the Complainants.

19. Ld. Counsel for Opposite Party further argued that the Complainants had no genuine intention to occupy the Apartment and were instead seeking to profit from the resale of the unit. Due to a downturn in the real estate market, the Complainants could not realize their investment objectives, leading them to stop making payments; That the Complainants have no cause of action as the construction was completed on time, and the Opposite Party has already handed over possession to several other Allottees. Further, the Complainants' request to reduce the size of the unit from a 3BHK to a 2BHK was denied in 2015, as there was no agreement or assurance from the Opposite Party to accommodate such request.

20. Ld. Counsel for the Opposite Party has also argued that the Complaint is time-barred under Section 24(A) of the Consumer Protection Act, 2019, as the cause of action arose as early as 17.09.2014 or, at the latest, on 12.05.2015, when the Opposite Party refused to reduce the size of the unit; That the Complainants have no basis for the present Complaint as they defaulted on their payments, leading to the cancellation of the allotment, and the forfeiture of a portion of the amount paid was entirely in accordance with the agreed terms. Furthermore, the Complainants are not consumers under the Consumer Protection Act, as their intent was to resell the Apartment for profit, rather than for personal use.

21. This Commission has heard both the Ld. Counsel for Complainants and the Opposite Party, and perused the material available on record.

22. The Apartment Buyers Agreement between the parties was executed on 18.2.2013, according to which possession of the Flat allotted to the Complainants was to be delivered in 36 months' time i.e. in the month of April, 2016. But, according to the own case of the Complainants, they had stopped making any payments towards the consideration price w.e.f. May, 2014 which was 2 years prior to the scheduled date of possession, as they noticed that there was no progress in actual construction. This claim has been vehemently denied on behalf of the Opposite Party which contends that all the demand notices from its side were sent to the Complainants at the appropriate stages of construction in accordance with the agreed payment schedule. To support this contention, attention was drawn to the ledger pertaining to the Complainants from which it would transpire that the start of excavation was on 22.5.2013, after which the date of completion of the basement roof slab was noted as 16.5.2014, followed by completion of the first floor 3rd floor, 5th floor, 7th floor, 9th floor and top floor roof slabs on 28th August, 10th October, 2nd December of 2014, 27th January, 9th March and 15th June of 2015 respectively, while completion of the external brick work, completion of the 80% of the flooring, door and windows upto 7th floor, and thereafter similar completion upto the top floor had been completed on 11.9.2015, 2.7.2016 and 1.8.2016 respectively. But the Complainants had stopped the payments from May, 2014 itself which was at the stage of completion of first basement roof slab, which consequently would appear to falsify their contention that there was absolutely no progress in construction. It is also a matter of record that after completion of the construction, the Opposite Party had applied for the Completion Certificate in August, 2016, which was about 4 months after the scheduled date of possession, and it actually obtained such Certificate on 2.3.2017.

23. But much prior to that on 9.5.2015, Mr. Ashok Bhalla, father of both the Complainants had sent an Email on their behalf in which he admitted that he was unable to pay the instalment amount of Rs. 45,52,141/- which had been demanded at the stage of completion of the 9th floor roof slab, as having been implicated in a corruption case he had remained under judicial custody for a prolonged period before being released on bail. He therefore being unable to pay the instalment amount due to financial stringency in the given circumstances requested in the said Email for allotment of a 2BHK Flat instead of a 3BHK originally allotted to him, which was convenient for him at that stage considering his financial situation. In the said Email he also mentioned that the Sales Executive of the Opposite Party had persuaded him to apply for a 3 BHK Flat. But in the said Email, the Complainant's father never stated that he had been given any assurance that if the arrangement for a 3BHK Flat did not suit him, then he would have any option to seek a change over to a 2BHK Flat for his sons. The aforesaid Email has been marked Ex. CW-1/4 in this Complaint.

24. The Opposite Party replied to the aforesaid Email by way of their own Email dated 12.5.2015, Ex. CW-1/5, in which they regretted their inability to accept requested to change the unit size from 3 to 2 BHK "since we do not have such provision in line with our Company's Policy".

25. The background noted above clearly goes to show that the conduct of the Complainants in the matter of making payments towards their allotted dwelling unit was not clean or sincere. By their own case, they had stopped making the payments within a few months from the date of the original Apartment Buyers Agreement on the pretext that "there was no progress in construction" even though from the evidence led from the side of the Opposite

Party, it becomes clear that several stages of construction had been completed by it before 17.9.2014, till which date the Complainants claim to have paid an amount of Rs. 42,69,334/-. 26. This Commission is also not inclined to lend any credence to the averments of the Complainants, that they had been orally assured by the Sales Executive of the Opposite Party, that they would have the option of changing their allotment from 3BHK to 2BHK Apartment, if warranted at any stage. This is so because no prudent person is expected to put any huge investments in a property, until he is sure as to whether he finally wants such property or not. The Email dated 9.5.2015 sent by the Complainant's father to the Opposite Party also makes no mention whatsoever of any such verbal assurance. In any case, under Sections 91/92 of the Indian Evidence Act, in a situation where the terms and conditions regarding sale of the Apartment in question had been reduced to writing in the form of the Apartment Buyers Agreement dated 18.4.2013, any evidence of any additional oral agreements is rendered inadmissible.

27. Consequently, the Complainants are clearly not entitled to seek refund of the entire consideration amount paid by them alongwith interest as claimed.

28. However, in view of the decision of this Commission in the case of "DLF Ltd. Vs. Bhagwanti Narula, RP No. 3860 of 2015, decided on 6.1.2015"; the Opposite Party would not appear to be entitled to forfeiture of any amount in excess of 10% of the sale price, in the event of cancellation of the purchaser's allotment. The relevant observations in the said case are extracted as under –

"13. For the reasons stated herein above, we hold that (i) an amount exceeding 10% of the total price cannot be forfeited by the seller, since forfeiture beyond 10% of the sale price would be unreasonable and (ii) only the amount, which is paid at the time of concluding the contract can be said to be the earnest money. The Petitioner Company, therefore, was entitled to forfeit only the sum of Rs.63,469/-, which the complainant had deposited with them at the time of booking of the apartment. We, therefore, direct the Petitioner Company to pay the balance amount of Rs.81,534/- to the complainant within 4 weeks from today, failing which, the said amount shall carry interest @ 12% p.a. from the date of this order till payment. However, in the facts and circumstances of the case, we find no justification for grant of any compensation or cost of litigation to the complainant. The orders passed by District Forum and State Commission stand modified accordingly."

29. The aforesaid decision was thereafter followed by this Commission in Emaar MGF Land Ltd. & Anr. Vs. Hardeep Mahajan & Anr., FA No. 496 of 2015, decided on 28.6.2018"; and "Bijay Madan Vs. Unitech Ltd. & Anr., CC No. 505 of 2014, decided on 1.10.2015".

30. Consequently, the Complaint is allowed to the extent that the Opposite Party is directed to refund any amount forfeited by it in excess of 10% of the total consideration price of the Complainant's allotted Apartment. Also, considering that the instant Complaint was filed almost two years after the Complainant's allotment had already been cancelled, this Commission is of the opinion that the Complainants would be entitled to a reasonable interest of 6% p.a. on the amount refundable to them only from the date of filing the Complaint itself.

31. Parties to bear their own costs.

32. The Opposite Party is therefore directed to refund the amount as ordered above, within two months from the date of this Order failing which any outstanding amount(s) shall attract an interest @ 9% p.a. till the time of final realization.

33. Pending application(s), if any, also stand disposed off as having been rendered infructuous.

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SUDIP AHLUWALIA
PRESIDING MEMBER