**IN THE NATIONAL CONSUMER DISPUTES REDRESSAL COMMISSION
AT NEW DELHI**

Reserved on 13.09.2024

Pronounced on 23/01/2025

CONSUMER COMPLAINT NO. 1852 OF 2017

1. Lalita Tanwar ... Complainant(s)
Wife of Shri Yogender Singh Tanwar
Resident of C 501, Vikram Vihar, AWHO
Colony, Sector 27, Panchkula
Haryana

2. Yogender Singh Tanwar
Son of Shri Het Ram Tanwar
Resident of C 501, Vikram Vihar, AWHO
Colony, Sector 27, Panchkula
Haryana

Versus

1. Hamilton Heights Pvt., Ltd. ... Opposite Party(ies)
B II/ 100, Mohan Cop-operative
Industrial Estate, Mathura Road
New Delhi – 110 044

Also At:

A – 41, Mohan Cop-operative
Industrial Estate, Mathura Road
New Delhi – 110 044

2. Espire Infrastructure Corporation Ltd.,
12/1 Delhi Mathura Road, Faridabad
Haryana - 121 003

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A - 41, MCIE, Mathura Road
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Also At:

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Industrial Estate, Mathura Road
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BEFORE:

HON'BLE MR. SUBHASH CHANDRA, PRESIDING MEMBER
HON'BLE AVM J. RAJENDRA, AVSM VSM (RETD.), MEMBER

For the Complainants	:	Mr. Aditya Parolia, Advocate Ms. Ishita Singh, Advocate Mr. Pranjal Mishra, Advocate Ms. Anvita Priyadarshi, Advocate
For the Opposite Party	:	Mr. Brijesh Chaudhary, Mr. Prins Kumar and Mr. Yashish Samkria, Advocates

ORDER

PER SUBHASH CHANDRA

1. This complaint filed under Section 21 (a) (i) of the Consumer Protection Act, 1986 (in short, the "Act") alleges deficiency in service by the Opposite Party in delay in handing over possession of the apartment booked by the Complainants in a project promoted and executed by the Opposite Party.

2. This common order will dispose of Consumer Complaint Nos. 1852 of 2017 and 1853 of 2017 as the facts in both complaints are similar and relate to the same Complainants and the same project of the Opposite Party. For reasons of convenience, Consumer Complaint No. 1852 of 2017 is taken as the lead case.

3. Upon notice, Opposite Party contested the complaint by way of written statement. Complainants thereafter filed their rejoinder. Parties filed their evidence by way of affidavit. Short synopsis of arguments was also filed by both the parties.

4. The relevant facts of the case, in brief, are that the Complainants had booked a 3 BHK with servant quarter apartment no. C 502, 5th Floor, Tower C admeasuring 1758 sq ft super built up area in the Opposite Party's project "Hamilton Heights", Sector 37, Faridabad on 15.01.2008 for a total consideration of Rs.78,42,825/-. As per the terms of the Buyers' Agreement/Agreement to Sell ("Agreement") dated 30.12.2008, by when Rs 10,78,700/- had been paid towards the consideration possession of the apartment was to be handed over within 36 months, i.e., by December 2011. However, the Opposite Party failed to fulfil this obligation and delivered physical possession only in October 2015, after an inordinate delay of nearly four years. Despite such delay, the Complainants have alleged that legal possession has yet to be handed over, as the Opposite Party failed to obtain the requisite Occupation Certificate for Tower C from the Director, Town and Country Planning (DTCP).

5. The Complainants have further alleged that the delay on part of the Opposite Party has caused significant financial loss, mental agony, and harassment to them. They contend that despite their making timely payments amounting to the entire sale consideration, the Opposite Party failed to complete construction in all respects and deliver essential amenities such as the club, solar water heating system, and separate entry/exit ramps for basement parking.

6. It is also averred by the Complainants that the Buyers' Agreement was one-sided and arbitrary. Despite compliance with payment demands, the Opposite Party unilaterally increased the area of the apartment and demanded additional charges without obtaining the consent of the Complainants. Moreover, the Opposite Party have failed to facilitate the registration of the property due to their inability to secure the Occupation Certificate, thereby rendering the possession illegal under law.

7. The Complainants have also drawn attention to Memo No. 11051 dated 21.11.2008 issued by the Director, Town and Country Planning, Haryana, wherein Clause 11 prohibits the occupation of any building without a valid Occupation Certificate. It is alleged that the Opposite Party, in violation of this clause, handed over possession illegally and concealed material information regarding the non-issuance of the Occupation Certificate. Furthermore, the Opposite Party illegally charged

Rs.1,75,000/- for parking space, which, as per Clause 13 of the same Memo, forms part of common areas and cannot be separately transferred or leased to flat owners.

8. The Complainants have, therefore, approached this Commission alleging gross deficiency in service, unfair trade practices, and fraudulent conduct on the part of the Opposite Party. They assert that the delay in construction, failure to obtain statutory permissions, and concealment of facts have caused them immense hardship. Alleging deficiency in service as the Opposite Party failed to remedy the grievances, the Complainant has filed this Complaint praying for the following reliefs: -

(a) Direct the Opposite Party, jointly or severally to handover the legal possession of the Apartment by obtaining all the requisite permissions and Occupation Certificate and then get the Apartment registered in favour of the Complainants within two months of this petition being filed before this Hon'ble Commission or as directed by this Commission.

(b) Direct the Opposite Party(s), jointly or severally, to handover legal possession of the Apartment to the Complainants which is complete in all respects and in conformity with the Buyers' Agreement.

c) Direct the Opposite Party(s), jointly or severally, to pay interest @ 12% per annum on the amount paid by the Complainant(s) to the Opposite Party(s), with effect from the date of delivery promised till the date of obtaining the requisite permissions like the Occupation Certificate so as to offer legal possession to the Complainant(s) in the project "Hamilton

Heights" along with all necessary documents and common areas and facilities as promised during the initial booking made by the complainants.

d) Direct the Opposite Party(s), jointly or severally, to refund the price charged for unilateral increase in super area from 1758 Sq. Ft. to 1890 Sq. Ft. i.e. Rs.3,82.031/- (Rupees Three Lakh Eighty Two Thousand Thirty One Only).

e) Direct the Opposite Party(s), jointly or severally, to refund Rs.1,75,000/-(Rupees One Lakh Seventy Five Thousand Only) charged for allotment of parking space with interest @ 18% p.a.

f) Direct the Opposite Parties to refund wrongfully charged taxes, which includes but not limited to Service Tax, and other charges along with the interest on amount at the rate of 18% from the date of receipt of such wrongfully levied charges and taxes.

g) Direct the Opposite Party(s), jointly or severally, to pay Rs.6,000/- (Rupees Six thousand Only) per day to the Complainant(s), in case of failure to provide the legal possession within the stipulated time as directed by this Hon'ble Commission.

h) Direct the Opposite Party(s), jointly or severally, to pay compensation of Rs.30,00,000/- to the Complainant(s), before this Hon'ble Tribunal, for mental agony, harassment, discomfort and undue hardships caused to the Complainant(s) as a result of the above acts and omissions on the part of the Opposite Party(s).

i) Direct the Opposite Party(s), jointly or severely, to pay a sum of Rs.1,00,000/- (Rupees One Lakh Only) to the Complainant(s)towards litigation costs.

j) Pass any other order and/or further relief in favour of the Complainant(s) as the Hon'ble Commission may deem fit and proper in the fact and circumstances of the case.

9. We have heard the learned Counsel for the parties and perused the records carefully.

10. Counsel for the Complainants submitted that the Opposite Party, as per Clause 4.1 of the Agreement to Sell dated 30.12.2008, had promised to deliver possession of the allotted unit to the complainants by December 2011. However, the Opposite Party failed to honour the terms of the Agreement, and possession was delivered only in October 2015, contrary to the Agreement.

11. The counsel for the complainants further argued that the Agreement itself was drafted unilaterally and contained arbitrary, one-sided, and unreasonable terms. It was submitted that the Opposite Party collected substantial amounts from the complainants prior to executing the Agreement, which itself was delayed by 11 months, a fact that highlights the unfair trade practices of the Opposite Party. In addition to the agreed amounts, the Opposite Party also demanded additional External Development Charges on account of escalated charges imposed by the authorities. It was contended that such demands were neither justified nor permissible under the terms of the Agreement.

12. It is argued that the Opposite Party, under the pretext of providing timely possession, collected an amount of Rs.60,60,204/- from the complainants by November 2011. However, despite receiving this payment, possession of the apartment was not offered in December 2011 as promised.

13. The complainants contend that the Opposite Party unilaterally increased the area of the apartment from 1758 sq ft to 1800 sq ft (super built area) and demanded additional charges for the same. The complainants, having no other recourse, were coerced into paying the said amounts, fearing that any refusal would lead to cancellation of the allotment and forfeiture of earnest money.

14. Counsel for the complainants submitted that after a delay of 3 years, on 07.03.2015, the Opposite Party issued an "Interim Possession-cum-Final Demand Notice." In compliance, the complainants paid the outstanding amounts as demanded. The complainants submit that they have paid a total sum of Rs.78,42,825/- which is the entire sale consideration. Subsequently, possession of the apartment was handed over in October 2015.

15. The counsel for the complainants argued that, upon receiving possession, it was revealed that the apartment was not fit for habitation and the Opposite Party had failed to obtain the requisite registry of the apartment. It has also been contended that the Opposite Party demanded maintenance charges for the period from April 2015 to March 2016, despite the fact that physical possession was delivered only in October 2015.

16. Counsel for the Complainant further submitted that the complainants were shocked to learn from Memo No. 11051 dated 21.11.2008 obtained from the DTCP, Haryana under the Right to Information Act, that the apartment lacked legal sanctity and was invalid in the eyes of law since it had been handed over without an Occupancy Certificate. The possession handed over, therefore, was not only delayed but also in violation of legal requirements.

17. The complainants' counsel also argued that the Opposite Party had not only failed to deliver possession within the stipulated time but also engaged in fraudulent conduct by delivering an incomplete and uninhabitable unit.

18. Complainants primarily placed reliance on the following judgments of the Hon'ble Supreme Court:

(i) ***Experion Developers Pvt. Ltd. Vs. Sushma Ashok Shiroor***, 2022 SCC OnLine SC 416

(ii) ***Pioneer Urban Land & Infrastructure Ltd. Vs. Govindan Raghavan***, (2019) 5 SCC 725

(iii) ***Laureate Buildwell Pvt. Ltd. Vs. Charanjeet Singh***, 2021 OnLine SC 479

(iv) ***Newtech Promoters and Developers Pvt. Ltd. Vs. State of UP,*** (2021) 18 SCC 1

(v) ***DLF Universal Ltd. & Anr. Vs. Vikas Mittal***, Civil Appeal No. 3343 of 2020

The Complainants case is that it is entitled for compensation for delay in the handing over of the flat in question in view of the fact that the Agreement which was delayed and done after a substantial amount had been collected, was one sided and onerous and imposed unfair conditions and amounted to unfair trade practice on part of the Opposite Party. There was an admitted delay in the handing over of possession which constituted deficiency in service. The collection of Rs 1.75 lakhs for parking and maintenance charges from a date prior to the offer of possession as well as Service Tax was stated to be unjustified. Compensation was therefore due as per the prayer for relief sought.

19. Counsel for the Opposite Party submitted that the complaint is barred by limitation under Section 24A of the Consumer Protection Act, 1986. The complainants filed the present complaint on 29.06.2017, whereas the alleged cause of action, arose on 07.03.2015, when the Opposite Party offered interim possession of the said flat. This delay of over four months beyond the statutory limitation period of two years renders the complaint time-barred. The complainants have neither provided any justification for the delay nor filed an application seeking condonation of the same.

20. It is submitted by the counsel for the Opposite Party that the complainants do not qualify as "consumers" under Section 2(1)(d) of the Consumer Protection Act, 1986. The complainants purchased two flats in the Opposite Party's project, one of which (Flat No. C-402) has been used for commercial purposes. This is substantiated by documentary evidence, including the Aadhaar Card of the tenant, rent agreement, and rent receipts. By earning rental income from Flat No. C-402, the complainants have demonstrated that the said flat was purchased for profit-making purposes rather than for residential use. Furthermore, Complainant No. 2 is a retired defence personnel receiving a pension, which negates any claim of financial dependency on rental income. The assertion that both flats were purchased for residential purposes is, therefore, factually incorrect and legally untenable.

21. The Opposite Party further submits that the complainants have deliberately concealed material facts from this Commission. Specifically, they failed to disclose that one of the flats was being rented out for commercial purposes.

22. It is also submitted that the complainants have engaged in repeated litigation on the same cause of action. A previous complaint (CC No. 1458/2015) was filed by the Residents' Welfare Association of Hamilton Heights against the Opposite Party and others, which was subsequently withdrawn as per order dated 17.04.2017. The present complaint, being the second round of litigation on the same issue, is clearly intended to harass the Opposite Party.

23. Counsel for the Opposite Party contended that the complainants' allegations concerning the increase in the area of the flat and the corresponding revision in the sale price, were unjustified as these were entirely in accordance with the terms of the Agreement executed between the parties. Clauses 4.8, 4.9, and 5.14 of the Agreement explicitly provide for revisions in the area and authorize the developer to recover additional amounts. The complainants, being educated individuals, entered into the agreement after thoroughly reviewing its terms and conditions. Moreover, the complainants have already benefited financially by renting out one of the flats, which undermines any grievances they may have regarding the price revision.

24. As for the issue of car parking charges, it is submitted that these charges were included in the total sale consideration and were not levied separately. The bifurcation of the total price into various heads was done solely to reduce the tax liability of the complainants, which ultimately worked to their financial advantage.

25. Counsel for the Opposite Party contended that that delay in obtaining the Occupation Certificate, was not attributable to the Opposite Party. The Opposite Party filed the application for the Occupation Certificate timely, and it was expected by August 2018. However, objections raised by the competent authorities and the subsequent delays caused by the Covid-19 pandemic resulted in unavoidable delays. The Opposite Party has remained in constant communication with the authorities to expedite the process and is committed to completing the registration of the flat upon receipt of the occupation certificate.

26. The preliminary objections of the Opposite Party relating to limitation under Section 24A and the eligibility of the Complainants to classify as "consumers" under Section 2(1)(d) of the Act are considered at the outset. It has been held in a catena of judgments that possession of a flat has to be legal and valid possession which includes an Occupancy Certificate from the appropriate authority to be obtained by the builder/Opposite Party. In projects involving several residential towers comprising of multiple dwelling units/flats, the issue of a Completion Certificate covering the entire project has been held to be valid at the end of the completion of the project including all amenities promised as part of the project. However, Occupancy Certificate in respect of individual towers covering specifically the flat in question has been held to be an essential requirement for handing over of possession. It has also been held in various judgments of the Hon'ble Supreme Court and this Commission that the offer of possession may comprise of two stages, i.e., for fit-outs and thereafter for occupation and that Agreements for Sale do often provide for such offers. In the instant case, possession was offered in October 2015 whereas Occupation Certificate was obtained only on 29.08.2023. Therefore, the Complainants had a continuing cause of action till the filing of the complaint before this Commission and therefore, cannot be ousted on the ground of limitation under Section 24A of the Act.

27. As for the contention of the Opposite Party that the Complainants were not qualified to be "consumers" under the Act since they had booked two flats and had rented out one flat, and had, therefore, booked the flats for commercial purpose, this issue needs to be considered in light of the Hon'ble Supreme Court's judgment in ***Laxmi Engineering Works Vs P.S.G Industrial Institute,*** (1995) 3 SCC 583 as per which 'commercial purpose' needs to be determined from case to case based on its facts. It has also been held by this Commission in ***Kavita Ahuja Vs. Shipra Estate & Jai Krishna Estate Developers Pvt. Ltd. & Ors.,*** I (2016)

CPJ 31 (NC) that the mere fact that a person buys multiple units does not establish commercial purpose and that the onus lies upon the Opposite Party to establish that the property in question was being used for the purpose of buying and sale. Admittedly the Complainant is a defence personnel and the mere fact of his putting one flat on rent does not prove that the purpose was 'commercial' since the letting out of one's property for some time alone does not establish "commercial purpose" which may be done for various personal reasons and not necessarily for a 'commercial purpose' evidenced by commercial activity of leasing such property for rent which has not been established. The exclusion of the Complainant on this ground from the ambit of the Act as argued by the Opposite Party is therefore considered to not be a valid argument.

28. The contention of the Opposite Party with regard to *force majeure* circumstances warranting delay in the offer and handing over of possession have also been considered. Admittedly, the application for the Occupation Certificate to the authorities was made by the Opposite Party late and was expected by August 2018 which was ultimately received in August 2023. The Opposite Party was contractually obliged under the Agreement to offer possession by December 2011 and therefore was required to apply for the Occupation Certificate prior to this date. Evidently, this has not been done. Its claim of *force majeure* circumstances including the Covid 19 pandemic, to justify the delay, cannot be sustained in view of the delay beyond December 2011 by when it had already received Rs. 60,60,204/- on 11.10.2011. In any case, no evidence has been brought on record to establish how the *force majeure* circumstances specifically impeded the project as has been held in various judgments of this Commission such as ***Anil Kumar Jain & Anr. Vs. M/s Nexgen Infracon Private Limited*** in Consumer Complaint No. 1605 of 2018 dated 23.12.2019 and ***Manoj Kawatra and Others Vs Pioneer Urban Land and Infrastructure Ltd.,*** in CC no.1442 of 2018 decided on 01.11.2021. In the absence of such evidence, mere reliance on a bald assertion is not sustainable and cannot be accepted.

29. The complainants have already taken possession of the apartment in question in October 2015. The sale consideration stands paid. The only issue is of the payment of charges claimed to be unjustified by the Complainants such as for additional floor area, parking charges, EDC and certain refunds apart from their entitlement for compensation, if any. As far as the floor area is concerned, the Agreement mentions an approximate area of 167.22 sq m or 1800 sq ft. Even considering an increase in the total built up area from 1758 sq ft to 1890 sq ft, the increase in area of 132 sq ft amounts to 6.98% of the initially notified area and as per Clause 4.9 of the Agreement such area was liable to be charged for at the rate of original allotment. It is not the case of the Complainant that the rate has been changed. The alteration in super built up area in large projects including common areas is a common feature and is acceptable if is within a reasonable variable of 5 to 10%. In the instant case it is less than 10% which is not arbitrary or unjustified. As per the contractual terms of the Agreement, Clause 2.4 (i) provides for covered parking in basement for Rs 1.75 lakhs and for enhanced EDC charges as levied by the State Government @ Rs 160/- per sq ft on a *pro rata* basis. The contention of the Complainants in this regard is therefore unwarranted.

30. As for the issue of compensation for delay in the offer of possession, the contention of the Complainant appears justified and valid. As laid down by the Hon'ble Supreme Court in ***Wg. Cdr. Arifur Rahman Khan Vs. DLF Southern Homes Pvt. Ltd.,*** (2020) 16 SCC 512, delay in handing over of possession constitutes deficiency in service. The Opposite Party has admitted delay in the handing over of possession which was admittedly without a valid Occupation Certificate when it was effected in October 2015. Considering the fact that Occupation Certificate was admittedly received on 29.08.2023, the offer of possession was legally valid only from that date. Even the Memo of the DTCP, Haryana dated 21.11.2008 conveying building plan permission stipulates that occupation permission be obtained prior to handing over of possession. The Opposite Party has clearly been in error in handing over possession without adhering to the legal requirement in this regard and is liable to compensate the Complainant. The Hon'ble Supreme Court has held in ***Wg Cdr Arifur Rahman Khan & Anr.*** (supra) that compensation @ 6% on the amount paid as on the stipulated date of possession be paid till the date of a valid offer of possession along with the payment of the contractual amount of compensation per sq ft per month. The complainants are therefore held eligible for similar compensation from

January 2016 to 29.08.2023 on the sum deposited by them as on the date of promised possession.

31. Maintenance charges levied by the Opposite Party are provided for under Clause 3 which includes contribution to an Interest Free Maintenance Security as per Clause 3.5. Payment of maintenance charges will apply if possession is delayed beyond 45 days of the offer of possession. However, we find merit in the contention of the Complainant that the commencement of such charges should commence only from the date of possession, i.e. October 2015 and not the date it is levied from, i.e. 30.12.2011. The various other prayers for relief of the Complainant have been considered in light of the law laid down by the Hon'ble Supreme Court in ***Sushma Ashok Shiroor*** (supra) that compensation must be just and equitable. We are also guided by the ratio laid down by the Hon'ble Supreme Court in ***DLF Homes Panchkula Pvt. Ltd. vs. D.S. Dhanda,*** (2020) 16 SCC 318 holding that multiple compensations for a singular act of deficiency are not justified while considering compensating an allottee.

32. In light of the forgoing discussions and the facts and circumstances of this case, we are therefore inclined to allow the complaint partially with the following directions:

(i) Opposite Party shall compensate the Complainants for the delay in the offer of possession in terms of Clause 4.3 @ Rs 5/- per sq ft of super built area of the flat in question per month and @ 6% per annum on the sum deposited with the

Opposite Party as on 30.12.2011 (the promised date of possession) till 29.08.2023, the date the Occupation Certificate was obtained by the Opposite Party within 8 weeks of this order, failing which it shall be paid with interest @ 9% p.a. till realization;

(ii) Maintenance charges levied from 30.12.2011 by the Opposite Party shall be liable to be paid only from October 2015 when the flat was handed over to the Complainant;

(iii) Opposite Party shall also pay litigation charges of Rs 50,000/- to the Complainant along with the above.

33. CC 1853 of 2017 also stands disposed of in the above terms.

34. Pending IAs, if any, are disposed of with this order.

National Consumer Disputes Redressal Commission * New Delhi-23 *

Sd/-
....
(SUBHASH CHANDRA)
PRESIDING MEMBER

27/01/2025

Sd/-
....
(AVM J. RAJENDRA, Retd.)
MEMBER

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