

**NATIONAL CONSUMER DISPUTES REDRESSAL COMMISSION
NEW DELHI**

CONSUMER CASE NO. 2895 OF 2017

1. PANKAJ THAPLIYAL & ANR.Complainant(s)

Versus

1. M/S. PIONEER URBAN LAND & INFRASTRUCTURE
LAND LIMITED
through its managing director redg. off. A-22, 3rd floor Green
Park Aurobindo Marg
New Delhi-110016.

.....Opp.Party(s)

BEFORE:

HON'BLE DR. INDER JIT SINGH, PRESIDING MEMBER

For the Complainant : Mr. Amit Singh Chauhan, Advocate

For the Opp.Party : Appearance not marked

Dated : 23 Mar 2023

ORDER

1. The present Consumer Complaint (CC) has been filed by the Complainants against Opposite Party (OP) as detailed above, inter alia praying for directions to the OP to:-
 - i. return the total amount paid so far i.e., Rs.1,48,94,040/- alongwith interest @ 18% interest per annum;
 - ii. pay compensation, not less than Rs.20,00,000/- towards damages for the physical and mental torture, agony, discomfort and undue hardships;
 - iii. pay compensation, not less than Rs.20,00,000/- for the deficiency in service and unfair trade practices;
 - iv. pay pendente lite and future interest @ 18% per annum;
 - v. pay towards travel expenses incurred by the Complainants in their visits to the site, telephone etc. incurred in corresponding with Opposite Party and his counsel along with such interest;
 - vi. pay a sum of Rs.2,50,000/- to the Complainants towards the cost of litigation.

2. Notice was issued to the OP. Parties filed Written Statement/Reply, Rejoinder, Evidence by way of an Affidavit and Written Arguments/Synopsis etc. as per details given in the Table at Annexure-A. The details of the flats allotted to the Complainant(s)/other relevant details, based on pleadings of the parties and other records of the case are also given in the Table at Annexure- A.

3. It is averred/stated in the Complaint that:-

- i. The OP had widely advertised the launch of its luxurious residential project/group housing project in Village Ghata, Sector 62, Gurgaon, Haryana known as 'Araya' (Project). It was represented that the Project would offer impeccable and incomparable lifestyle to purchasers on account of the ultra modern and peripheral facilities like open spaces, clubs, Jacuzzi and steam baths inside the flat, gymnasium etc. offered by the OP. It was also represented that all the requisite permissions from the concerned government authorities were in place to deliver the Project within time. Meeting with the higher management who reiterated and re-affirmed the earlier representations and made additional representations, had further assured the complainants that project would be delivered in 39 months.
- ii. Relying upon the said representations, assurances and the promise of possession within 39 months of booking made by the officials and especially the higher managers of the OP, complainants decided to book a flat in the Project of the OP and accordingly, as requested by the officials of the OP, tendered an amount of Rs.40,00,000/- towards the booking amount. The application forms, terms and conditions were never provided to the complainants.
- iii. Allotment letter was issued by the OP on 22.11.2012, whereby Flat No. 2301 Tower –D, admeasuring approx. 5761 sq.ft. was allotted to the complainants. It is also contended by the complainants that the buyer's agreement or terms and conditions of the application form were not shared or provided to the complainants.
- iv. By January 31, 2013, the complainants paid Rs.1,08,94,040/- against the demands raised by the OP in addition to the payment of Rs.40,00,000/- towards booking of the Flat in the project of the OP. The Buyers' Agreement dated 02.09.2013, which was never shown to the Complainants prior to execution, is one sided agreement as there are arbitrary clauses like in case of delayed payments by the Complainants interest @18% was being charged whereas in case of delay by the OP a meagre compensation of @10 per sq.ft. Incorporation of such clauses have been held to be unfair trade practices. Only obligations of the intending allottee has been specified in the agreement but no obligation has been prescribed for the OP. EDC/IDC is being collected on Super Area, whereas in law it is only payable on built up area. Entire agreement is designed in such a way that consumer cannot terminate. In the eventuality the consumer terminates, he shall be liable deduction of interest/taxes/other levies, whereas the builder could terminate the agreement for a minor breach or any whimsical reason. Although timely payment by the complainants were made as essential pre-requisite condition in the terms and conditions , timely delivery of possession by the OP has not been given.

4. The OP in their written statement/reply stated that:

- i. the prayers made by the complainants are devoid of any merit and have been filed solely to harass the OP, the project 'Araya', is near completion. The complainants have filed the complaint since the real estate market had gone down and the complainants were not able to fetch the price which they anticipated at the time of booking. It is further contended that the complainants till date have not terminated the Agreement and are now seeking for refund after they had waived of their right under the Builder Buyer's Agreement dated 02.09.2013. The complainants appear to be speculative investors who have invested for higher returns and were waiting for the real estate industry to pick up so that they may sell their unit at an appropriate stage.
 - ii. The complainants are not covered under the provisions of the Consumers defined under section 2(d) of the Consumer Protection Act, 1986 as they apparently belong to the affluent elite class already residing in one of the posh society with many real estate properties in their name.
 - iii. The complainants never adhered to the payment schedule and defaulted in making payments within the first year of signing of the agreement itself. The OP could have legally cancelled his allotment due to non-payment of demanded instalments from time to time inspite of giving sufficient time and various reminders to the complainants, but OP did not cancel his rights due to consumer welfare and also due to the recessionary real estate market and instead of making the payment he chose to file this frivolous litigation.
 - iv. The delivery of a project is dynamic and dependent upon various circumstances and various reasons. The foremost reason for delay in handing over of the possession of the Apartment is that some of the customers have never made payment even on receiving the demand notices, reminders from OP. The OP has limited funds and it had procured all the licenses and approvals and thereafter it sold the apartment on construction linked plan to various customers like complainants. The period of 45 months were only tentative and subjective to give an idea to the customers that if everything went well and OP did not face any challenges stopping or delaying the construction then the delivery may happen within 45 months from the date of Agreement or sanction of Building Plan, whichever is later. At the time of Application Form, it was categorically made clear that the OP will endeavour to deliver the possession within 45 months, from the very beginning the complainants were aware that it may be possible that the possession can get delayed. The OP had given the contract of construction to the agency M/s Urban Ecoinfra Pvt. Ltd for construction. However, from time to time, it was observed that the Contractor was not constructing the Project as per the assured timelines and resulted into the labour slowdown and increase in labour disputes. Finally, on 02.05.2016 the contract was foreclosed and terminated when the contractor had left behind half of the work. The OP thereafter took over the construction from midway on its own.
 - v. The OP duly paid the EDC as per license awarded in its favour. The State Government was supposed to lay the whole infrastructure in that Licensed area for providing the basic amenities. However even on repeated requests the department paid no heed and ignored to provide such basic amenities in these upcoming new sectors of Gurgaon. Further, there was delay due to the reasons like shortage of raw material, granting approvals by the State Government and demonetization. The OP stopped its development activities in compliance with the National Green Tribunal order to stop construction in April, 2015 and November 2016 due to emission of dust.
5. Heard counsels of both sides. Contentions/pleas of the parties, on various issues raised in the Complaint, based on their Complaint/Reply, Rejoinder, Evidence, Written Arguments, and Oral Arguments advanced during the hearing, are summed up below.

6. It is contended by the OP that Complainants were the defaulters in paying instalments which arose before the tentative due date, paid only three instalments and had stopped paying since March 2013, is not entitled to any refund or interest thereon. The complainants defaulted on 13 instalments prior to due date for which several reminders were issued, including a show cause notice dated 19.02.2014, but the complainants neither responded to the said notice nor paid any amount. OP further contends that if Commission finds that complainants are entitled to refund, it should be without any interest considering that on the date of filing complaint, OP itself was entitled to a sum of Rs.5.33 crores from the complainants. Further, if the Commission holds that complainants are entitled to interest, it should be for a period till the filing of complaint and not beyond.
7. Complainants on the other hand argued that construction of project is still not complete, OC has not been obtained by OP, and possession has not been offered yet. There is a deficiency of service (failure to deliver possession) on the part of OP and unfair trade practices have been adopted. Even during the time which OP states that work was stopped, it continued to raise demands and complainants were thus constrained to withhold payments. Complainants have also contended that sub-contractor-Urban Ecoinfra, to whom the delay is being attributed is a sister concern of OP and has same registered address. As late as June 2015 the Opposite Party did not have a sanctioned zoning plan and as late as August 2014 the OP did not have the consent to establish. No construction could commence prior to the said approvals. Implying that any/all demands raised were frivolous. Either the Opposite Party did not have the requisite approvals and whatever little approvals which were there had lapsed or not renewed. Thus, the Complainants were constrained to withhold payments. The Complainants cannot be expected to keep making payments in a project which is doomed and not likely to be completed in the near future leading to frustration of the reason for the purchase of the same. Thus, the demands raised or reminders were void ab-initio. The construction activity of the said project has been delayed not on account of the factors stated to be beyond the Opposite Party's control but because the deliberate action of the Opposite Party of diverting these funds to other projects and failure to obtain requisite/statutory approvals.
8. Committed date of possession as per ABA dated 02.09.2013 was 39 months from the date of excavation, with a grace period of six months i.e. total 45 months. Even after a gap of more than five years from the committed date, construction is not complete, OC has not been obtained and no offer of possession has been made. It was held by Hon'ble Supreme Court in **Wg. Cdr. Arifur Rahman Khan and Aleya Sultana and Ors. vs DLF Southern Homes Pvt. Ltd. & Ors.** (2020) 16 SCC 512, "*failure of the developer to comply with the contractual obligation to provide the flat to a flat purchaser within the contractually stipulated period, amount to deficiency*". In **Kolkata West International City Pvt. Ltd. Vs. Devasis Rudra-** (2020) 18 SCC 613, Hon'ble Supreme Court observed that "*A buyer can be expected to wait for possession for a reasonable period.*" We tend to agree with the reasons given by the complainants for not making further payments on account of construction not taking place as per the schedule. The OP choose not to cancel the booking on account of default on the part of the complainants for obvious reasons as project was not progressing as per schedule and many of its approvals had lapsed. Even now OP is not in a position to give any firm commitment for handing over the possession with OC. Hence, the contention of OP that complainants being defaulters are not entitled to refund or interest, is not tenable.
9. The objection that the Complaint is barred by limitation is not accepted. The OP(s) have failed to deliver the possession of the unit to the complainant till date and therefore, the cause of action is continuing. The contention that complainants are not consumers as they belong to elite class, have many properties and have purchased the unit for commercial/investment purposes is also rejected as no such evidence has been adduced by the OP in this regard. It has been observed by this Commission in various cases (**Kavita Ahuja Vs Shipra Estates Ltd**, CC 137 of 2010, decided on 12.02.2015,

Santosh Johri Vs M/s Unitech Ltd, CC 429 of 2014 and connected Cases, decided on 08.06.2015, **Aloke Anand Vs M/s Ireo Grace Pvt Ltd & Others**, CC no 1277 of 2017 decided on 01.11.2021) that purchase of a house can only be for a commercial purpose if the purchaser is engaged in the business of purchasing and selling houses or plots on a regular basis, solely with a view to make profit by way of sale of such houses, if the house is purchased purely as an investment and the purchaser is not undertaking the trading of houses on regular basis, then it would be difficult to say that he had purchased it for commercial purpose. The reasons for delay advanced by OP are not valid as even after a gap of more than 05 years from the committed date given in the ABA, possession of flat has not been given. Non payment of certain instalments by complainants and/or other allottees is due to project not progressing as per schedule. Complainants cannot be made to suffer for any default on the part of contractors engaged by the OP. It was held by Hon'ble Supreme Court in **NBCC (India) Ltd. Vs Shri Ram Trivedi** (2021) 5 SCC 273 that "dispute with the contractors over termination does not constitute force majeure as the appellant being an experienced developer, must be conscious of routine delays caused by business exigencies. This would not frustrate the contract or absolve the appellant of the obligations assured under the terms of the agreement." As regards contention of OP that committed date of delivery of 39 months plus a grace period of six months was only tentative, Hon'ble Supreme Court in **NBCC (India) Ltd.** (supra) while interpreting the statement 'endeavour' to complete the construction of the dwelling unit within two and a half years from the date of allotment observed that "*The expression 'endeavour' meant that the appellant would make an earnest effort to hand over possession by that date. Even if the expression does not mean an absolute commitment to hand over possession on or before a specified date, this expression has to be read in the context of the entirety of the clause. To construe the expression as leaving the date for handing over possession indefinite and at the absolute discretion of the developer would leave the purchaser at the mercy of the builder. Clause 20 must be construed to require the builder to make all reasonable efforts to comply with the duty to hand over possession by the stipulated date. The burden would lie on the developer to explain the steps taken to comply with the contractual stipulation.*"

10. In the instant case, there is an inordinate delay in handing over the possession of flat by the OP. The complainants cannot be made to wait for an indefinite time and suffer financially. Hence, the complainants in the present circumstances have a legitimate right to claim refund alongwith fair delay compensation/interest from the OP.
11. For the reasons stated hereinabove, and after giving a thoughtful consideration to the entire facts and circumstances of the case, various pleas raised by the learned Counsel for the Parties, the Consumer Complaint is allowed/disposed off with the following directions/reliefs: -
 - (i) The OP shall refund the entire principal amount of Rs.1,48,94,040/- (Rupees one crore forty eight lakh ninety four thousand and forty only) to the complainant, alongwith compensation in the form of simple interest @ 9% per annum from the date of each payment till the date of refund. The principal amount refundable mentioned in this para is subject to verification of actual amount paid by the complainant based on receipts etc.
 - (ii) The OP shall pay a sum of Rs.25,000/- as cost of litigation to the complainants.
 - (iii) The payment in terms of this order shall be paid within three months from today.
 - (iv) In case the complainants have taken loan from Bank(s)/other financial institution(s) 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 four weeks from receipt of this order to enable them to issue refund cheques/drafts accordingly.

12. The pending IAs, in any of the Consumer Complaints, if any, also stand disposed off.

Annexure-A

Details of the Unit and other related details

Sr No	Particulars	'Áraya'
1	Project Name/Location etc	Sector 62, Gurgaon
2	Apartment no	D-2301
3	Size (Built up/Covered/Super Area)	5761 sq.ft.
4	Date of application	21.11.2012
5	Date of allotment	22.11.2012
6	Date of signing Apartment Buyer's Agreement (ABA)	02.09.2013
7	Committed date of possession as per Agreement (with six months' Grace period)	02.06.2017
8	Total Consideration as per agreement	Rs.7,32,00,556/-
9	Amount Paid	Rs.1,48,94,040/-
10	D/o Filing CC in NCDRC	28.09.2017
11	D/o Issue of Notice to OP(s)	27.10.2017
12	D/o Filing Reply/Written Statement by OP	08.01.2018
13	D/o filing Rejoinder by the Complainant(s)	28.03.2018
14	D/o Filing Evidence by way of Affidavit by the Complainant(s)	04.04.2018
15	D/o filing Affidavit of admission/denial of documents filed by Complainant(s)	28.03.2018
16	D/o Filing Evidence by way of Affidavit by the OP	20.04.2018
17	D/o filing Affidavit of admission/denial of documents filed by OP	20.04.2018
18	D/o filing Written Synopsis by the Complainants	01.11.2019
		17.11.2021
19	D/o filing Written Synopsis by the OP	30.11.2021

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DR. INDER JIT SINGH
PRESIDING MEMBER