

(2016) 05 NCDRC CK 0092

In the National Consumer Disputes Redressal Commission

Case No : 398 of 2015

SIPRA THOMES

APPELLANT

Vs

BENGAL UNITECH UNIVERSAL INFRASTRUCTURE PVT. LTD.

RESPONDENT

Date of Decision : 19-05-2016

Acts Referred:

[Consumer Protection Act, 1986](#), [Section 24A](#) - Limitation period

Citation : 2016 3 CPR 279

Hon'ble Judges : V.K. Jain, Anup K Thakur

Advocate : Sushil Kaushik, Himanshi Singh, Mamta Tiwari, Aranya Moulick

Judgement

1. The complainant in CC No. 398 of 2015 namely Sipra Thomes booked a residential flat with the opposite party namely Bengal Unitech Universal Infrastructure Pvt. Ltd. on 15.09.2008. The parties entered into a Buyers Agreement dated 22.10.2008 whereby a flat having super area of 2249 sq. feet was allotted to the complainant for a total consideration of Rs. 73,14,272/-. As per the said Buyers Agreement, the possession was expected to be delivered to the complainant by 30.09.2011, subject of course to force majeure circumstances. The aforesaid complainant has paid a sum of Rs. 70,18,377/- to the opposite party but the construction of the said flat is nowhere near completion. Being aggrieved, she is before this Commissioner seeking refund of the amount paid by her alongwith interest @ 18% per annum compounded quarterly, thereby making a total sum of Rs. 1,70,52,551/-. She has also claimed Rs. 5 lacs towards damages for mental harassment and mental agony caused to her by the opposite party.

2. The complainant in CC No. 414 of 2015 namely Atul Ojha also booked a residential flat in the same project with the opposite party on 22.02.2007 and a Buyers Agreement dated 24.02.2007 was executed between the parties, whereunder a flat having super area of 1462 sq. feet was allotted to the complainant for a total consideration of Rs. 43,15,347/-. The aforesaid complainant has already paid Rs. 40,74,183/- to the opposite party. In his case,

the possession was expected to be delivered to him by 31.03.2010, subject of course to force majeure circumstances. Since there is default in fulfilment of the said commitment, he is also seeking refund of the entire amount paid by him alongwith compound interest @ 18% per annum, thereby making a total sum of Rs. 1,41,22,591/-. He has also claimed a sum of Rs. 10 lacs towards damages for mental agony.

3. The complainant in CC No. 1188 of 2015 namely Debraj Chatterjee and his wife Sushmita Chatterjee booked a residential flat in the same project on 31.01.2007 and entered into a Buyers Agreement dated 06.02.2007 whereunder a residential flat with a super area of 2128 sq. feet was allotted to them for a total consideration of Rs. 57,69,504/-. The possession in their case was expected to be delivered to him by 31.03.2010. Since the opposite party has defaulted on the aforesaid commitment, the aforesaid complainants are also seeking refund of Rs. 55,42,279/- paid by them alongwith interest @ 18% per annum compounded quarterly, which comes to more than Rs. 1 Crore.

4. The complaints have been resisted by the opposite party on identical ground. Though the booking made by the complainants as well as the Buyers Agreement with them has been admitted, it is alleged that there was delay in grant of statutory approvals and permissions related to infrastructural work such as road, electricity, water and sewerage which were beyond the control of the opposite party. It is further stated in the written version filed by the opposite party that in the event of delay, the complainants are entitled only to the compensation agreed in the Buyers Agreement which is Rs. 5/- per sq. feet of the super area per month. Another plea taken by the opposite party is that the complainant is barred by limitation prescribed under section 24A of the Consumer Protection Act.

5. The first question which arises for consideration in these cases is as to whether the opposite party has been able to justify the delay in construction of the flats which it had agreed to sell to the complainants. Though it is alleged that there was delay in obtaining the approvals and permissions required for infrastructural works such as road, electricity, water and sewerage, there is no evidence to prove that the alleged delay occurred on account of reasons not attributable to or beyond the control of the opposite party. In order to justify the delay on the aforesaid ground, the

opposite party was required to disclose the dates on which it applied for the requisite permission and the date on which the said permission was granted. It was also required to place on record the entire correspondence between it and the concerned statutory authority in order to demonstrate that the said delay was attributable solely to the concerned statutory authority and not to any deficiency or defect on its part in seeking such a permission from the concerned statutory authority. Moreover, the opposite party was also required to specify how much was the delay attributable to the time taken by the statutory authorities in granting approvals for infrastructural services. Only then, it could have justified the delay to the extent it was attributable solely to the concerned

statutory authority. In this regard, it has to be kept in mind that the delay in these cases is not of just a few months. Here, they were required to deliver the possession by March 2010/September 2011 and about 5/6 years from the possession deadline have already expired. Therefore, even if it is presumed for the sake of arguments that there was delay of a few months on the part of the concerned statutory authorities in granting approvals for infrastructural services, that cannot justify the delay of five - six years.

6. It is next contended by the learned counsel for the opposite party that the booking having been made way back in the year 2007/2008 and the date stipulated in the Buyers Agreement for delivering possession also having expired more than two years before these complaints were filed, the said complaints are clearly barred by limitation. We however, are unable to accept the contention. It has to be kept in mind that a person books a residential flat for the purpose of having a roof over his head and not for the purpose of claiming refund with compensation at a later date. Therefore, the attempt of the buyer would be to get possession of the residential flat booked by him even if there is some delay in obtaining the said possession. Therefore, he would like to wait for the buyer to deliver till the time either the seller refuses to deliver the possession or till he loses all hopes of getting possession and therefore does not want to wait any more for the seller to deliver the possession of the flat. In such a case, the buyer, in our opinion, has a recurrent cause of action till the time either the seller delivers the possession or refuses to deliver possession, or expresses his inability to construct the flat sold by him. The cause of action may also arise earlier if the buyer asks the builder to refund the amount paid by him. In that case, if he does not approach the Consumer Forum within two years of demanding the refund, the claim may become barred by the limitation prescribed in Section 24A of the Consumer Protection Act. However, as far as these cases are concerned, considering that the opposite party never refused to deliver possession to the complainant, it would be difficult for us to say that the complaints are barred by limitation.

7. The contention that since the apartment in question was purchased for less than Rs. 1 crore and therefore, this Commission lacks jurisdiction to entertain this matter has already been rejected by this Commission in *Swarn Talwar & Ors. Vs. Unitech Ltd.*, C.C. No.347 of 2014 and connected matters decided on 14.08.2015. The said order, to the extent, it is relevant reads as under:

The learned counsel for the opposite party submits that since the apartment in question was purchased for less than Rs.1 Crore, this Commission lacks pecuniary jurisdiction to entertain this complaint and the complainants should be relegated to the concerned State Commission for the redressal of their grievance. We however find no merit in this contention. This issue was raised by the opposite party in *Swarn Talwar (Supra)* and was rejected. The aforesaid decision to the extent relevant to this plea reads as under:-

"5. The first question which arises for our consideration in these cases is as to

whether this Commission possesses the requisite pecuniary jurisdiction to entertain these complaints. Section 11(1) of the Consumer Protection Act read with Section 21 of the Consumer Protection Act to the extent it is relevant provides that this Commission shall have jurisdiction to entertain complaints where the value of the goods or services and compensation if any claimed exceeds Rs.1,00,00,000/-. The contention of the learned counsel for the opposite party is that interest claimed by the complainants cannot be termed as compensation and if the interest component is excluded, the pecuniary value of the complaint does not exceed Rs.1,00,00,000/- except in one case. The learned counsel for the complainants on the other hand contended that the interest which they have claimed along with refund of the principal sum even if not so described specifically, is by way of compensation only, since the opposite party has been deficient in rendering services to the complainants by not delivering possession of the flats on or before the time agreed in this regard.

6. In our view, the interest claimed by the flat buyers in such a case does not represent only the interest on the capital borrowed or contributed by them but also includes compensation on account of appreciation in the land value and increase in the cost of construction in the meanwhile. As noted by us in CC No.232 of 2014, *Puneet Malhotra Vs. Parsvnath Developers Ltd.* decided on 29-01-2015, there has been steep appreciation in the market value of the land and cost of construction of the residential flats in Greater Noida in last about 7-10 years and consequently the complainants cannot hope to get a comparable flat at the same price which the opposite party had agreed to charge from them. In fact it would be difficult to get a similar accommodation, even at the agreed price plus simple interest thereon at the rate of 18% per annum. Therefore, the payment of interest to the flat buyers in such a case is not only on account of loss of income by way of interest but also on account of loss of the opportunity which the complainants had to acquire a residential flat at a particular price.

7. In *Ghaziabad Development Authority Vs. Balbir Singh* (2004) 5 SCC 65, the Hon"ble Supreme Court inter alia observed and held as under:

"However, the power to and duty to award compensation does not mean that irrespective of facts of the case compensation can be awarded in all matters at a uniform rate of 18% per annum. As seen above what is being awarded is compensation i.e. a recompense for the loss or injury. It therefore necessarily has to be based on a finding of loss or injury and has to correlate with the amount of loss or injury. Thus the Forum or the Commission must determine that there has been deficiency in service and/or misfeasance in public office which has resulted in loss or injury. No hard and fast rule can be laid down, however a few examples would be where an allotment is made, price is received/paid but possession is not given within the period set out in the brochure...

....Along with recompensing the loss the Commission/Forum may also compensate for harassment/injury both mental and physical. Similarly, compensation can be given if after allotment is made there has been cancellation

of scheme without any justifiable cause.

That compensation cannot be uniform and can best be illustrated by considering cases where possession is being directed to be delivered and cases where only monies are directed to be returned. In cases where possession is being directed to be delivered the compensation for harassment will necessarily have to be less because in a way that party is being compensated by increase in the value of the property he is getting. But in cases where monies are being simply returned then the party is suffering a loss inasmuch as he had deposited the money in the hope of getting a flat/plot. He is being deprived of that flat/plot. He has been deprived of the benefit of escalation of the price of that flat/plot. Therefore the compensation in such cases would necessarily have to be higher.

It would, thus, be seen that the Hon'ble Supreme Court recognized that the interest to the flat buyers in such cases is paid by way of compensation. Therefore, there is no reason why the interest claimed by the complainants or at least part of it should not be taken into consideration for the purpose of deciding the pecuniary jurisdiction of this Commission. If this is done, the aggregate amount claimed in each of the complaints exceeds Rs.1,00,00,000/- and, therefore, this Commission does possess the requisite pecuniary jurisdiction.

In the cases where the complainant does not want refund and is seeking possession, alongwith compensation for the delayed possession, this Commission would have jurisdiction to entertain the complaint, if the aggregate of the value of the flat, on the date of filing of the complaint and the compensation claimed for the delay in delivering possession, exceeds Rs. 1 Crore. In terms of Section 21(a) of the Consumer Protection Act, this Commission can entertain complaints where the value of the goods or services and compensation exceeds Rs. 1 Crore. Since the buyer is seeking possession of the flat booked by him, the value of the service, in such a case in our opinion, in terms of Section 21(a) of the Consumer Protection Act means the value of the flat as on the date of filing of the complaint and not the value on the date the flats were booked.

An appeal preferred by the opposite party against the above referred decision of this Commission was dismissed by the Hon'ble Supreme Court vide order dated 11.12.2015, which, to the extent it is relevant, reads as under:

"We have heard learned counsel for the appellant and perused the record. We do not see any cogent reason to entertain the appeal. The judgment impugned does not warrant any interference.

The Civil Appeal is dismissed."

8. In the present case, the total amount claimed by the complainant is more than Rs. 1 crore. Therefore, considering the extent of the claim made in the complaint, this Commission does possess the requisite pecuniary jurisdiction to entertain and decide this complaint.

9. As regards payment of compensation only at the agreed rate of Rs. 5 per sq.

feet per month of the super area, as per the Buyers Agreement, such contentions have repeatedly been rejected by this Commission. The following view taken by this Commission in Swarn Talwar (supra) is relevant in this regard:

8. As regards the plea that in terms of Clause (c) of the allotment letter the opposite party is required to pay only the holding charges calculated at the rate of Rs.5/- per sq.ft. per month of the super area for the period the possession is delayed, such a contention was expressly rejected by us in Puneet Malhotra (supra) holding that such clause applies only in a case where construction of the flat is delayed but despite delay the buyer accepts the possession of the flat from the seller and consequently the accounts have to be settled between the parties. We observed in this regard that the buyer would have to pay the agreed holding charges to the seller and the seller to pay the agreed compensation on account of delaying the construction of the flat. The said clause, however, does not apply to a case where the buyer on account of delay on the part of the seller in constructing the flat is left with no option but to seek refund of the amount which he had paid to the seller. We further held that such a clause where the seller in case of default on the part of the buyer seeks to recover interest from him at the rate of 24% per annum will amount to an unfair trade practice since it gives an unfair advantage to the seller over the buyer. We also noted in this regard that enumeration of the unfair trade practices in Section 2(r) of the Act is inclusive and not exhaustive.

This plea was also negated by us in a batch of complaints CC No.427 of 2014, Satish Kumar Pandey & Anr. Vs. Unitech Ltd. and connected matter, decided on 08-06-2015. All those complaints were filed against none other than the opposite party in these matters, namely, Unitech Ltd.

10. Since the opposite party has failed to offer possession of the flat agreed to be sold to the complainants by the date stipulated in the Buyers Agreement in this regard and 5/6 years have already expired from the said committed date for delivery of possession. The complainants cannot be compelled to wait any more for the builder to deliver and they are entitled to seek refund of the money paid by them alongwith appropriate compensation.

11. The learned counsel for the complainants, states on instructions that though this Commission has in some cases awarded interest @ 18% per annum, he, in order to avoid further litigation by the builder, is restricting his claim to compensation in the form of simple interest @ 12% per annum, alongwith separate compensation for the mental agony and harassment which the complainants have suffered on account of the acts of omissions and commission committed by the opposite party. Considering the cost of borrowing from the Banks/Financial Institutions, the claim for compensation at the aforesaid is eminently justified.

12. Considering all the facts and circumstances of the case, the complaints are disposed of with the following directions:

(a) The opposite party shall refund the entire amount received from the complainants alongwith compensation in the form of simple interest @ 12% per annum from the date of each payment till the date on which the entire amount alongwith compensation in terms of this order is paid.

(b) The opposite party shall also pay Rs. 2 lacs each as compensation in each complainant for the mental agony and harassment suffered by the complainants at its hand.

(c) The opposite party shall pay Rs. 10,000/- as the cost of litigation in each complaint.

(d) The payment in terms of this order shall be made within three months from today.