NATIONAL CONSUMER DISPUTES REDRESSAL COMMISSION
NEW DELHI

CONSUMER CASE NO. 304 OF 2015

1. THANGAVEL PALANIVEL & ANR.
Permanent Communication Address at. F6, VGS Golden Roof Apartments, 122, East Car Street,
Chidambaram - 608 001. .....Complainant(s)

Versus

1. M/S. DLF SOUTHERN HOMES PRIVATE LTD.
Old No. 828, New No. 268, Poonamalee High Road, Kilpauk,
Chennai - 600 010. .....Opp.Party(s)

BEFORE:
HON'BLE MR. JUSTICE V.K. JAIN,PRESIDING MEMBER

For the Complainant : Mr. Shiv K. Suri, Advocate
Mr. Shikhil Suri and Mr. Satendra K. Rai Advocates

For the Opp.Party : Mr. Sukumar Pattjoshi, Sr. Advocate with
Ms. Seema Sundd, Advocate
Mr. Aakarshan Sahay, Advocate
Mr. Saurabh Kumar, Advocate

Dated : 29 Aug 2016

ORDER

JUSTICE V.K. JAIN, PRESIDING MEMBER

The complainants booked a 3 BHK plus 3 T Plus servant quarter flat, along with a car park, in a Project namely DLF Garden City, which the opposite party was to develop at Chennai and Apartment No. C08072 was allotted to them vide allotment letter dated 24.10.2009. The parties then entered into an Apartment Buyers Agreement dated 26.3.2010, incorporating their respective contractual obligations. As per the agreed design of the flat, it was to have two external doors, including an external door to the servant quarter. According to the complainants, the opposite party first delayed the execution of the Buyers Agreement by not sending the same to them and then did not send signed copy of the agreement to them till mid-March, 2010, though they had signed and handed over the agreement to the opposite party sometime in late 2009. The total sale consideration of the flat was agreed at Rs.58,58,960/-, which was payable in installments, as per the Schedule of Payment agreed between the parties. The said schedule was Annexure-3 to the Apartments Buyers Agreement. As per Clause 11(a) of the Buyers Agreement, the opposite party was to endeavor to complete construction of the apartment within a period of 27 months from

the date of the said agreement, unless there was delay or failure due to force majeure conditions or due to failure of the allottee to pay in time. It was further stipulated in Clause 14 of the agreement that in the event of the builder being unable to give possession within the stipulated period, it would pay compensation @ Rs.5/- per sq.ft. of the super area of the Apartment for each month of such delay. The adjustment of compensation was to be done only at the time of execution of the conveyance deed of the apartment and not earlier.

2. Vide Email dated 14.1.2012, the opposite party informed the complainants they were tentatively planning to deliver possession of the Tower-8 in which their flat was to be located in April, 2012. Vide letter dated 13.4.2012, the opposite party informed the complainants that they had started handing over possession of the apartments beginning with Tower-37.

3. Vide Email dated 24.8.2012, the opposite party sent to the complainant a letter dated 10.8.2012, stating therein that based upon feedback from the customers, they had redesigned the apartment thereby increasing the size of the servant room and converting the same to a study room with the door entry from inside the Apartment, as a result of which the saleable area had increased to 2064 sq. ft. The revised floor plan of the apartment allotted to the complainant was also sent to them. As per the said floor plan, there was no external entry to the area which was initially designed as servant room. The complainants however, protested against the said change and design by way of email dated 30.8.2012 and clearly stated that they wanted the apartment as per the floor plan attached to the Buyers Agreement and will not accept any change. According to the complainants, on 04.2.2013, one of them met the Vice President of the opposite party namely Mr. Surender, who assured to make arrangement to fix the external door to the servant room / study room as per the original design and deliver possession by April, 2013.

4. Vide letter dated 28.2.2014, the opposite party informed the complainants that their apartment was complete. They were asked to remit payment as per the statement of account enclosed therewith and also furnish certain document. This is also the case of the complainants that when one of them came to inspect the flat, several defects were noticed and it was found that no external door on the servant room / study room had been fixed. According to the complainants, one of them met two officials of the opposite party namely Mr. Satish Singampalli and Sandhya Baskar, who promised to do the needful, if it was structurally possible. The grievance of the complainants, however, was not addressed despite the aforesaid promises alleged to have been made by the officials of the opposite party. The complainants have already paid a sum of Rs.70,68,481/- to the opposite party towards the cost of the flat which according to them ought to have been delivered by June, 2011. The complainants are therefore before this Commission, seeking refund of the entire amount paid by them, along with interest @ 18% per annum quantified at Rs.51,12,498/- upto 10.4.2015. They have also sought Rs.20.00 lacs as compensation for the mental torture and agony, Rs.5.00 lacs as compensation for International travel and telephone costs and Rs.5.00 lacs towards the cost of litigation.

5. The complaint has been resisted by the opposite party which has taken a preliminary objection that the complainants are not consumers, as defined in the Consumer Protection Act because they had purchased the flat for earning profit and since the agreed sale consideration was less than Rs.1.00 crore, this Commission lacks pecuniary jurisdiction to entertain the complaint. On merits, the booking made by the complainants and the allotment of flat has been admitted. The opposite party has also admitted execution of the

Flat Buyers Agreement. It is also not in dispute that the possession of the flat was not offered to the complainant within 27 months from the execution of the Buyers Agreement. As regards change in the design of the flat, it is claimed that the said change was within the competence of the opposite party. It is also alleged that the final demand was paid by the complainants on 07.4.2014 and not on the due date which was 31.3.2014.

6. The first question which arises for consideration in this complaint is as to whether this Commission has the requisite pecuniary jurisdiction to entertain this complaint. Section 21(a)(i) of the Consumer Protection Act confers jurisdiction upon this Commission to entertain complaint where the value of the goods or services and the compensation, if any, claimed exceeds Rs.1.00 crores. The complainants, in addition to the principal amount of Rs.70,68,481/- paid to the opposite party are claiming interest amounting to Rs.51,12,498/-, computed @ 18% per annum. They are also claiming Rs.20.00 lacs towards compensation for the physical and mental torture and the hardship alleged to have been suffered by them. The following view was taken by this Commission in **Consumer Complaint No.347 of 2014, Swarn Talwar & Ors. Vs. Unitech Ltd.** and connected matters, decided on 14.8.2015, on the issue of pecuniary jurisdiction of this Commission is relevant in this regard:

> *"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.*

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

> > *"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.

That compensation cannot be uniform and can best of 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 complaint exceeds Rs.1,00,00,000/- and, therefore, this Commission does possess the requisite pecuniary jurisdiction.

Being aggrieved from the order passed by this Commission, the opposite party approached the Hon'ble Supreme Court by way of an appeal. The said Appeal being Civil Appeal D.No.35562/2015 was dismissed by the Hon'ble Supreme Court vide its order dated 11.12.2015 which 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 judgement impugned does not warrant any interference.

The Civil Appeal is dismissed."

If the compensation claimed by the complainant is added to the sale consideration of the flat booked by the complainant, the aggregate amount comes to more than Rupees one crore. This Commission therefore, possesses the requisite pecuniary jurisdiction.

7. Though, the opposite party has alleged that the Apartment in question was purchased by the complainant for earning profit, there is no material on record to substantiate the said allegation. The complainant No.1, vide his Email dated 04.4.2013, informed the opposite party that he wanted to keep the servant room / study room for his family members while letting out the other part of the apartment. In my view, the intention of the complainant No.1 expressed in the year 2013, to let out the flat except the servant quarter, does not

necessarily lead to an inference that the said flat was booked by the complainants for a commercial purpose. The flat came to be booked in October, 2009, years before the aforesaid mails were sent. The complainant No.1, at the time of booking the Apartment, was working with United Nations, whereas the complainant No.2 who is his wife and their daughters were living in India, in a town namely Chidambaram in Tamil Nadu. The house was booked in order to have a home for the family in Chennai for its use. As rightly stated in the rejoinder, had the apartment been booked for a commercial purpose, the complainant would not have been insisting upon the servant room having an independent entrance and would not have bothered about the direction of the main entrance and / or the kitchen of the flat. The complainants and their daughters having moved to New York from India in May, 2010, they temporarily did not require the whole of the flat at the time the email was sent. The complainants were planning for a residence after the retirement of the complainant No.1. The intention to let out the flat for a temporary period till their retirement, does not justify the inference that the flat was purchased by them for a commercial purpose.

The expression 'commercial purpose' has not been defined in the Act and therefore, as held herein below by the Hon'ble Supreme Court in **Laxmi Engineering Works Vs. P.S.G. Industrial Institute (1995) 3 SCC 583**, we have to go by the dictionary meanings. Going by the Dictionary meaning of the expression 'Commerce' as far as hiring or availing services are concerned, a person can be said to have hired or availed services only if they are connected or related to the business or commerce in which he is engaged. In other words, the services in order to exclude the hirer from the ambit of Section 2(1)(d) of the Act should be availed for the purpose of promoting, advancing or augmenting an activity, the primary aim of which is to earn profit with use of the said services. It would ordinarily include activities such as manufacturing, trading or rendering services. In the case of the purchase of a house which the service provider undertakes to construct for the purchaser, the purchase can be said to be for a commercial purpose only where it is shown that the purchaser 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 houses.

I therefore, find no merit in the plea that the complainants are not the consumers of the opposite party as defined in the Consumer Protection Act.

8. The next question which arises for consideration in this case is as to whether the complainants were justified in refusing possession of the flat on the ground that the opposite party had unilaterally changed its design resulting in the removal of the external entrance to the servant room. Admittedly, the possession was offered for the first time vide letter dated 28.2.2014, whereas the committed date of possession expired in June, 2012 even if March, 2010 is taken as the date of the buyers agreement though the complainants had signed the said document sometime in late 2009. It is not in dispute that as per the design annexed to the buyers agreement, the flat was to have two external doors, one of which was meant for the servant quarter. Obviously, the complainants, for security reasons or otherwise, did not want the servant to access the flat through main entrance. The servant also would not have his own privacy if he does not have an independent entrance to us quarter. It is also not in dispute that the complainants never agreed to the change in the design of the flat. When the opposite party vide letter dated 10.8.2012, intimated the change in the design of the flat to the complainants, they immediately protested against the said change and sent an email dated 30.8.2012 insisting therein that they would not accept any changes and wanted the

apartment as per the plan, forming part of the agreement. Even thereafter, the complainants were time and again impressing upon the opposite party not to change the design of the flat booked by them. On 04.2.2013, one of the complainants met Mr. Surender, an officer of the opposite party, who according to the complainants, assured to make arrangements to fix external door to the servant room / study room as per the original design and deliver possession by 2013. That admittedly, was not done.

9. Relying upon Clause 9, 10 and 35 of the Buyers Agreement, it was contended by the learned counsel for the opposite party that the design of the flat could be changed by the opposite party even without the consent of the complainants and they had no option but to accept the changed design, even if it was not to their liking. In my view considering the assurance given by Mr. Surender, an officer of the opposite party to the complainants, to fix external door to the servant room as per the original design, I need not go into the question as to whether the terms of the Buyers Agreement empowered the opposite party to unilaterally change the design of the flat or not. Once the aforesaid commitment had been made, the opposite party was under an obligation to honour the said commitment. That having not been done, the complainants, in my view, were right in refusing to take possession of the flat, without the promised change.

10. This is also the case of the opposite party that the balance amount demanded from the complainants vide letter dated 28.2.2014, was paid by them on 07.4.2014 though it should have been paid by 31.3.2014. The aforesaid delay, in my view is of no consequence since the opposite party did not exercise its right to cancel the allotment on account of the delay in the aforesaid balance payment. In any case, having accepted the delayed payment, the opposite party could not have resorted to cancellation of the allotment.

11. When this matter last came up for hearing on 29.7.2016, the learned counsel for the opposite party stated that they are ready and willing to provide an independent door, giving access to the room which was previously described as servant room at the cost of the opposite party. The complainant however, declined the said offer, on the ground that no such offer was made either in the written version or in the affidavit filed by the opposite party by way of evidence. In my view, since the opposite party committed default in performing its contractual obligation, by failing to offer possession of the flat to the complainants on or before the date committed in the Buyers Agreement, the complainants cannot be compelled to accept the possession of the said flat at this belated stage. In the facts and circumstances of the case, including the fact that neither the possession as offered by the committed date nor did the opposite party provide an independent entrance to the servant room, despite having promised to do so, the complainants are entitled to insist upon refund of the amount paid by them to the opposite party, along with appropriate compensation in the form of interest on that amount.

12. The last question which arises for consideration in this regard is as to whether the opposite party is liable to pay only the compensation stipulated in the Buyers Agreement or a compensation which commensurates with the loss suffered by the complainants on account of the deficiency on the part of the opposite party in rendering services to them. This question has been considered by this Commission in a number of cases including **Satish Kumar Pandey & Anr. Vs. Unitech Ltd. and connected matters, decided on 08.6.2015.** The following view taken in Satish Kumar Pandey (supra) is relevant in this regard:

"It is an undisputed proposition of law that ordinarily the parties are bound by the terms and conditions of the contract voluntarily agreed by them and it is not for a Consumer Forum or even a Court to revise the said terms.

However, a term of a contract, in my view will not be final and binding if it is shown that the consent to the said term was not really voluntary but was given under a sort of compulsion on account of the person giving consent being left with no other choice or if the said term amounts to an unfair trade practice. It was submitted by the learned counsel for the complainants that the term providing for payment of a nominal compensation such as Rs.5/- per square foot of the super area having become the order of the day in the contracts designed by big builders, a person seeking to buy an apartment is left with no option but to sign on the dotted lines since the rejection of such term by him would mean cancellation of the allotment. He further submitted that a person seeking to acquire a built up flat instead of purchasing a plot and then raising construction on it, therefore, is not in a position to protest resist the inclusion of such a term in the Buyer's Agreement, and has to rely upon the reputation of the builder, particularly if he is a big builder such as Unitech Ltd. He also submitted that the format of the Buyer's Agreement is never shown to the purchasers at the time of booking the apartment and if he refuses to sign the Buyer's Agreement on the format provided by the builder, not only will he lose the booking, even the booking amount/earnest money paid by him will be forfeited by the builder. I find merit in the above referred submissions of the learned counsel. A person who, for one reason or the other, either cannot or does not want to buy a plot and raise construction of his own, has to necessarily go in for purchase of the built up flat. It is only natural and logical for him to look for an apartment in a project being developed by a big builder such as the opposite party in these complaints. Since the contracts of all the big builders contain a term for payment of a specified sum as compensation in the event of default on the part of the builder in handing over possession of the flat to the buyer and the flat compensation offered by all big builders is almost a nominal compensation being less than .25% of the estimated cost of construction per month, the flat buyer is left with no option but to sign the Buyer's Agreement in the format provided by the builder. No sensible person will volunteer to accept compensation constituting about 2-3% of his investment in case of delay on the part of the contractor, when he is made to pay 18% compound interest if there is delay on his part in making payment.

It can hardly be disputed that a term of this nature is wholly one sided, unfair and unreasonable. The builder charges compound interest @ 18% per annum in the event of the delay on the part of the buyer in making payment to him but seeks to pay less than 3% per annum of the capital investment, in case he does not honour his part of the contract by defaulting in giving timely possession of the flat to the buyer. Such a term in the Buyer's Agreement also encourages the builder to divert the funds collected by him for one project, to another project being undertaken by him. He thus, is able to finance a new project at the cost of the buyers of the existing project and that too at a very low cost of finance. If the builder is to take loan from Banks or Financial Institutions, it will have to pay the interest which the Banks and Financial Institutions charge on term loan or cash credit facilities etc. The interest being charged by the Banks and

Financial Institutions for financing projects of the builders is many times more than the nominal compensation which the builder would pay to the flat buyers in the form of flat compensation. In fact, the opposite party has not even claimed that the entire amount recovered by it from the flat buyers was spent on this very project. This gives credence to the allegation of the complainants that their money has been used elsewhere. Such a practice, in my view, constitutes unfair trade practice within the meaning of Section 2(r) of the Consumer Protection Act, 1986 since it adopts unfair methods or practice for the purpose of selling the product of the builder. Though, such a practice does not specifically fall under any of the Clauses of Section 2(r) (1) of the Act that would be immaterial considering that the unfair trades, methods and practices enumerated in Section 2(r) (1) of the Act are inclusive and not exhaustive, as would be evident from the use of word "including" before the words "any of the following practices".

"The learned counsel for the opposite party has referred to the decision of the Hon'ble Supreme Court in LIC & Anr. Vs. Smt. S. Sindhu (2006) (V) 258 where the Hon'ble Court inter alia observed that the courts and tribunals cannot re-write contracts contrary to the terms of the contract to the defaulting parties. In the above referred case, the policy was treated as a paid up policy on account of default in payment of premium. As per the terms of the policy, the premium paid in such a policy was to be refunded without interest. The Consumer Fora, despite the above referred policy condition, directed payment of interest on the amount of the premium at the rate of 12% per annum. In the said case case no deficiency on the part of the LIC in the services rendered to the insured was found. On the other hand in the cases before us there has been gross deficiency on the part of the opposite party in rendering services to the complainants who have paid about 95% of the cost of the flat and waited for a number of years in the hope of getting roof over their head. Nowhere has the Hon'ble Supreme Court held that even in such a case of gross deficiency in rendering services to the complainant compensation in the form of interest cannot be awarded against the service provider. The learned counsel for the opposite party has also referred to the decision of this Commission in Shahbad Cooperative Sugar Mills Vs. National Insurance Co. Ltd., II(2003) CPJ 81 (NC) where it was held that the interest cannot be added to the principal for the purpose of determining the pecuniary jurisdiction. In the judgment relied upon by the learned counsel interest was not claimed as compensation on account of deficiency in rendering services to the complainant. The aforesaid judgment, therefore, would not apply to the cases before us".

The view taken in Satish Kumar Pandey (supra) reiterated by this Commission in Swarn Talwar (supra) and the decision of this Commission, as noted earlier, was upheld by the Hon'ble Supreme Court.

Therefore, I have no hesitation in reiterating that the compensation which the builder has to pay to the buyers in such cases cannot be restricted to the compensation stipulated in the wholly one side Buyers Agreement and has to be based upon the loss suffered by the consumer on account of deficiency in the services rendered to him.

13. For the reasons stated hereinabove, considering the cost of finance during the relevant period, the opposite party is directed to refund the entire amount paid to it by the complainants, along with compensation in the form of simple interest @ 10% per annum on the aforesaid amount from the date of each payment, till the date, the entire amount, along with compensation in terms of this order is refunded to the complainants. The opposite party shall also pay a sum of Rs.10,000/- as the cost of litigation to the complainants.

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V.K. JAIN

PRESIDING MEMBER