

**NATIONAL CONSUMER DISPUTES REDRESSAL COMMISSION  
NEW DELHI**

**FIRST APPEAL NO. 402 OF 2017**

(Against the Order dated 16/08/2016 in Complaint No. 213/2016 of the State Commission  
Chandigarh)

1. EMAAR MGF LAND LTD. & ANR.  
THROUGH ITS MANAGING DIRECTOR, ECE  
HOUSE, 28 KASTURBA GANDHI MARG,  
NEW DELHI-110001  
2. M/S. EMAAR MGF LAND LIMITED  
THROUGH IT BRANCH HEAD, 1ST FLOOR, SCO  
120-122, SECTOR-17-C,  
CHANDIGARH

.....Appellant(s)

Versus

1. GOVIND PAUL  
S/O. MOHINDER PAL SADANA, R/O. AT PRESENT  
HOUSE NO. 1253, SECTOR-68,  
MOHALI-160062  
PUNJAB

.....Respondent(s)

**BEFORE:**

**HON'BLE MR. DR. S.M. KANTIKAR, PRESIDING MEMBER  
HON'BLE MR. DINESH SINGH, MEMBER**

**For the Appellant :** Mr. Sanchar Anand, Advocate

**For the Respondent :** Mr. Jagpal Singh Dhupar, Advocate  
Mr. S.S. Komal (Dhupar), Adv.  
Mr. Sukhbir Singh, Advocate

**Dated : 26 Jul 2018**

**ORDER**

**HON'BLE MR. DINESH SINGH, MEMBER**

1. This is a first appeal under Section 19 of The Consumer Protection Act, 1986 (the Act), professed by the appellants against the Order dated 16-08-2016 of the State Commission Chandigarh.

2. Brief salient facts of the case are that the respondent-complainant paid Rs. 7,00,000/- by cheque dated 24.08.2011 to the appellants-builder co. through an application dated 24-08-2011 for

allotment of an apartment in their residential project. The complainant was allotted a residential apartment (the unit) by the builder co. vide provisional allotment letter dated 30-08-2011 for a total consideration of Rs.42,18,200 / 79p. The complainant took down payment plan. An agreement dated 27-09-2011 was executed between the parties. For making part payments towards the said unit, the complainant availed loan of Rs. 32,88,056/- from bank (ICICI Bank). An amount of Rs. 32,88,056/- was paid by the complainant to the builder co. through cheque dated 14-10-2011. Accordingly 7,00,000 + 32,88,056/- = Rs. 39,88,056/- was the total amount paid (principal amount) by the complainant to the builder co. towards the unit in question.

3. The complainant filed his consumer complaint in the State Commission Chandigarh on 15-05-2016 *inter alia* stating that the possession of the unit has been delayed and *inter alia* seeking refund of the principal amount; interest thereon; compensation; cost of litigation.

4. The relief sought by the complainant was as follows:

a) *Direct the opposite parties to refund the full sale amount i.e. Rs. 58,22,626/- at the enhanced rate along with interest 18% p.a. till realisation of the said amount.*

b) *Direct the opposite parties to pay whole of the interest amounting to Rs. 12,66,679 upto 10.04.2016 which the complainant has paid to the bank while getting the loan to pay the balance sale amount of Rs. 32,88,056/- and Rs. 70,000/- as interest which the complainant has paid while getting the amount of Rs. 7,00,000/- as loan from his relative which he has given as earnest money at the time of application of allotment.*

c) *Award compensation/punitive damages in the sum of Rs. 10,000,00/- under section 14 (1) (d) of the Act of mental torture, pain and agony, harassment and the inconvenience caused to and suffered by the complainant at the hands of opposite parties by not rendering him proper services.*

d) *Award the total amount of rent which the complainant has paid in order to live at Mohali from the month of October 2013 which comes out Rs. 5,11,600/- upto April 2016.*

e) *Award costs of the proceedings of the complaint reckoned to Rs. 25,000/- to the complainant and against the opposite parties.*

f) *Award compensation as per clause 23 of the Buyers agreement @ Rs. 5 per sq. ft. month from the day of delay which comes out to be Rs. 1,28,250/- upto April, 2016, as it is calculated after the expiry of 36 months from the date of allotment.*

*And any other additional relief which the complainant is found entitled to and which this Hon'ble Commission deems fit just proper and expedient be granted in favour of the complainant and against opposite parties in the light of facts and the circumstances of the case to render justice, equity and good consciences.*

*(para 17 of the complaint)*

5. The builder co. contested the case *inter alia* contending that time was not the essence of the contract and that the unit is being completed and its possession though delayed would be offered soon after completion.
6. The State Commission decided the case vide its Order dated 16-08-2016 awarding refund of the principal amount; interest thereon; compensation; and cost of litigation to the complainant.
7. The State Commission in its Order dated 16-08-2016 *inter alia* directed for the following:
  1. Refund of principal amount of Rs. 39,88,056/- .
  2. With rate of interest of 15% compounded quarterly from the respective dates of deposits onwards.
  3. Compensation of Rs. 3,00,000/- .
  4. Cost of litigation of Rs. 25,000/-.

Penal interest / interest in case payment of awarded amounts was not made in a stipulated period of 02 months was also directed for.

( *first para 28*)

1. *However, it is made clear that, if the complainant has availed loan facility from any banking or financial institution, for making payment of instalments towards the said unit, it will have the first charge of the amount payable, to the extent, the same is due to be paid by him (complainant).*

(*second para 28*)

8. Being aggrieved with the impugned Order of the State Commission the builder co. preferred first appeal in this Commission.

This Commission vide its interim Order dated 30-03-2017 had *inter alia* directed that the appellants to deposit the entire principal amount ordered to be refunded by the State Commission with the State Commission. The said amount was deposited by the builder co. with the State Commission on 20-04-2017.

9. We have heard learned counsels of both sides, and perused the record.
10. In the interest of justice, the delay was condoned.
11. In the case at hand the State Commission in its Order dated 16-08-2016 has given reasoned findings that the complaint was not barred by limitation (para 19 of the State Commission's Order); the complainant is a consumer within the definition of 'consumer' under Section 2(1) (d) of the Act (para 16, 22); existence of an arbitration clause in the agreement does not bar the jurisdiction of the State Commission to entertain this consumer complaint (para

15); the State Commission Chandigarh has the territorial jurisdiction to entertain this consumer complaint (para 17); the State Commission has the pecuniary jurisdiction to entertain this consumer complaint (para 18) ; which are accepted.

12. Here it may be stated that the Act is for better protection of the interests of consumers, to provide speedy and simple redressal to consumer disputes.

Section 3 of the Act specifically provides that the provisions of this Act shall be in addition to and not in derogation of the provisions of any other law for the time being in force. That is, the remedy provided under the Act is in addition to the provisions of any other law for the time being in force; the provisions of this Act give the consumers an additional remedy besides those that may be available under other existing laws.

13. It may also be stated that it flows straightaway from section 3 of the Act (ref.: para 12 above) that existence of an arbitration clause in the agreement does not bar the jurisdiction of the State Commission.

14. There are two fundamental questions inherent in this case:

First: Whether in the facts and specificities of the case the complainant has the option to claim refund of the principal amount; interest thereon; compensation; and cost of litigation from the builder co.

Second: If so, what is a fair amount that should be paid by the builder co. to the complainant.

15. To examine the builder co.'s contention that 'time was not the essence of the contract', clause 21.1 and clause 23.1 of the agreement require to be critiqued:

*Clause 21.1 Subject to Force Majeure conditions and reasons beyond the control of the Company, and subject to the Allottee not being in default of any of the provisions of this Agreement and having complied with all provisions, formalities, documentation etc. and the terms and conditions of this Agreement, the Company proposes to hand over the possession of the Unit within a period of 36 months from the date of allotment. The Allottee agrees and understands that the Company shall be entitled to a grace period of ninety (90) days, after the expiry of 3 months for applying and obtaining the occupation certificate in respect of the Group Housing Complex.*

*Clause 23.1 Subject to the Allottee having fulfilled all the terms of this Agreement and having complied with all the terms and conditions of this Agreement, and not being in default if any provisions thereof and having met all his obligations, in the event of the Company not being able to hand over the possession of the Unit to the Allottee under the time stipulated in this Agreement or any extensions thereof, and in the event that the delay is not for reason of existence of any force Majeure event, the Company shall be liable to pay compensation payment of compensation for delay at the rate of Rs. 5/- (Rupees Five only) per sq. ft. per month of the super area to the Allottee till the date of notice offering the possession to the Allottee in*

*accordance with the terms of this Agreement. Any amount payable to the Allottee under this Clause shall be adjusted in the last instalment payable by Allottee.*

16. It may first be seen that the consumer - complainant is not seeking specific performance of a contract in a civil court; he is seeking consumer justice from a quasi-judicial machinery for redressal of consumer disputes under the provisions of the Consumer Protection Act, 1986.

17. The applicability and effect of the clauses 21.1 and 23.1 of the agreement in this case need to be determined. The clear sum and substance and import of “.... *the Company proposes to hand over the possession of the Unit within a period of 36 months from the date of allotment...*” in clause 21.1 read in conjunction with “.....*the Company shall be liable to pay compensation payment of compensation for delay at the rate of Rs. 5/- (Rupees Five only) per sq. ft. per month of the super area to the Allottee till the date of notice offering the possession to the Allottee....*” in clause 23.1 as evident to a reasonable man of normal intelligence is that the builder co. would hand over possession of the unit within a period of 36 months from the date of allotment, and, in case there is some short reasonable delay in offering possession, the builder co. would pay compensation for such short reasonable delay @ Rs. 5/- per sq. ft. per month of the super area till the date of notice of possession. That in clause 21.1 the word “*proposes*” was used and not “*shall*” or “*will*” does not in any manner take away the import of the proposition intended to be conveyed and understood. And the compensation for delay provided for in clause 23.1 (Rs. 5/- per sq. ft. p.m.) cannot be for an unreasonably protracted period or indefinite; at best it can be for a short period that would appear to be reasonable *per se* and would be acceptable as such to a reasonable man. The proposition forwarded by the builder co. that “*proposes*” in clause 21.1 and a laid-down provision for compensation for delay in clause 23.1 implies that the delay could be for any period above 36 months, short or protracted, reasonable or otherwise, and the (self-evidently meagre) compensation for delay provided for in clause 23.1 could be paid indefinitely for any period above 36 months is misconceived. As already stated, the clear import and intent of “*proposes to hand over the possession of the unit within a period of 36 months*” in clause 21.1 read with the compensation provided for in clause 23.1 is that the possession would be handed over not later than 36 months and for a short reasonable delay beyond 36 months a (somewhat token) compensation would be paid. To say that the possession can be delayed indefinitely or unreasonably and a token compensation for delay can be paid indefinitely or for an unreasonably protracted period is erroneous. Indefinite or unreasonable delay with token compensation for delay cannot continue *ad nauseam, ad infinitum* ( such situation would be absurd).

18. From the afore discussion, an axiom flows that the builder co. had to hand over possession of the unit within a period of 36 months from the date of allotment as provided for in clause 21.1 and a short reasonable delay would have attracted token compensation as provided for in clause 23.1. This token compensation for a short period, would, by its very nature, have to be only and only for a short period which a reasonable man would not agitate.

And two natural corollaries flow therefrom; one, the consumer-complainant has the fundamental option to obtain the possession of the unit as and when it is offered by the builder co. and in addition seek equitable and just compensation under the Act 1986 for delay in offering possession beyond the conveyed and understood period of 36 months if the delay was unreasonable; two, the consumer-complainant has the other option to claim refund of the principal amount; interest thereon; compensation; and cost of litigation if the offering of possession of the unit is unreasonably delayed beyond 36 months.

19. Summing up, the consumer- complainant has both options available, one, to obtain possession of the unit as and when offered by the builder co. and to in addition seek equitable and just compensation under the Act 1986 for unreasonable delay in possession, and, two, to opt for a fair amount from the builder co. if the possession of the unit is unreasonably delayed.

20. The first question (ref. para 14) is accordingly answered.

21. Here the agreement was executed on 27-09-2011, the consumer-complainant went to the State Commission on 15-05-2016 i.e. almost 20 months after expiry of 36 months from the date of execution of the agreement. Significantly, the possession of the unit in question was not offered even in the subsequent period of litigation in the State Commission (upto 16-08-2016 ; about 03 more months) and also in the still subsequent period of litigation in the National Commission (upto 03-07-2018; yet about 23 more months). Such delay in offering possession cannot be said to be reasonable or normal. The complainant's right to seek either of the two remedies summed-up in para 19 above is well and clearly evident, and accepted.

It may be specifically seen that in para 10 of its reply to the consumer complaint before the State Commission the builder co. has itself stated as follows:

*.....The possession for the above unit is delayed and presently and internal finishing works of flats is being undertaken and the possession of the flats shall be offered soon after completion . That for the period of delay the opposite parties are bound to pay the delayed penalty as per the agreed terms and conditions of the buyer agreement. The complainant may explore the option of relocation to another unit/project where possession can be offered shortly .....*

*(emphasis supplied)*

22. Regarding the second question (ref. para 14), it is seen that of the two options available to the consumer-complainant (as determined in para 19 above), he opted for getting a fair amount from the builder co. Again, the said amount has to be equitable and just.

The unit was nearing completion and the case of the builder co. was that they would offer possession of the unit to the complainant in the due course soon after completion. The complainant did not opt for obtaining possession (admittedly delayed by both sides) and seeking in addition compensation for delay in possession. In the stead, he opted for a fair amount. As already said, the amount to be paid by the builder co. to the complainant in this situation has to be equitable and just.

23. Regarding the principal amount, i.e. the 7,00,000/- + 32,88,056/- = Rs. 39,88,056/- paid by the complainant to the builder co., this amount has to be refunded in full by the builder co. to the complainant irrespective of whether or not there was deduction clause etc. in the agreement and irrespective of whether or not there is a "business practice" of deduction etc. (for the simple factum that delay in offering possession of the unit cannot be unreasonable or indefinite).

24. Regarding interest on the principal amount, it is always desirable and preferable, to the extent feasible and appropriate in the facts and specificities of a case, that some objective logical criteria may be identified and adopted to determine an apt rate of interest. The rate of interest

cannot be arbitrary or whimsical, some reasonable and acceptable rationale has to be evident, subjectivity has to be minimised.

25. In clause 21.10.2 of the agreement it was stated that interest of 15% compounded quarterly would be charged by the builder co. from the complainant in case of delayed payment on the latter's part. This cannot be adopted for determining the rate of interest to be charged from the builder co. in respect of the interest to be paid on the principal amount in the contingency that the possession of the unit has been unreasonably or indefinitely delayed. It may be seen that the appropriateness and applicability of this rate of interest of 15% compounded quarterly for delayed payments by the complainant to the builder co. has in itself not been tested (that question did not arise in this case). The only test made in this case has been of the interest of Rs. 5/- per sq. ft. p.m. of the super area (clause 23.1) that was proposed by the builder co. to be paid in case of (short reasonable) delay in offering possession (note: it has failed the test in this case). Adopting the figure of rate of interest of 15% compounded quarterly from clause 21.10.2 of the agreement (which is not relevant or applicable) could be poetic justice, but is not justice.

26. On the other hand, adopting any other figure [simple or compound (quarterly or something else)] in an arbitrary or whimsical manner has to be avoided. A logical correlation has to be established, rationale has to be evident, subjectivity has to be minimised. Albeit detailed arithmetic or algebra is not required. Logical, (to the extent feasible) objective parameters should be adopted. Rounding off simplification etc. to make the computation doable could be adopted.

27. In this case it is seen that a major part of the payment made by the complainant to the builder co. was through loan from bank ( $32,88,056 / 39,88,056 \times 100 =$  about 82.5%). The rate of interest paid by the complainant to bank for availing the loan can therefore be a logical parameter for applying for the period that the amount paid by the complainant to the builder co. was deposited with the builder co. And for the period this amount was deposited with the State Commission a logical parameter can be the interest it would have fetched in fixed deposit in bank.

28. These parameters for rate of interest will make the total quantum of interest lower than what was awarded by the State Commission. This may be seen in the light of what has been discussed earlier in paras 24 to 27 above and also keeping in view that the unit / project was nearing completion, the consumer-complainant did not want delayed possession with in addition compensation for delay (his right), he opted out for a fair amount to be awarded immediately (his parallel right); the situation is *prima facie* of delayed execution on the part of the builder co. and not mischief fraud etc; other similarly placed consumers are awaiting the completion of the project (note: they can as their right seek compensation under the Act 1986 for delay in possession), an arbitrarily or whimsically high rate of interest for one consumer (while being inappropriate *per se*) could cause a 'sudden run' on the builder co. by some other similarly placed consumers and thereby cause impediments in the completion of the project which would be detrimental to yet other similarly placed consumers awaiting completion and possession, conversely, an arbitrarily or whimsically low rate of interest for any consumer (while being inappropriate *per se*) could also cause the builder co. to 'go slow' on the execution and hold on indefinitely to the 'cheap money' available from the consumer/s (the possible direct or indirect consequences of an arbitrarily or whimsically high or low rate of interest on other similarly placed consumers, the holistic picture, has also to be kept in view). Both contingencies, an arbitrarily or whimsically high rate of interest OR an arbitrarily or whimsically low rate of interest are inappropriate and have to be remedied (here the former was the case).

29. In respect of the compensation to be awarded, it may first be seen that the compensation should neither be meagre, nor exorbitant, but equitable and just, commensurate with the loss and injury. In this case the delay in handing over possession was for a period of almost 20 months from the expiry of 36 months of the date of execution of the agreement before the consumer-complainant sought relief under the Act. The possession of the unit in question was not offered even in the subsequent period of litigation in the State Commission (upto 16-08-2016 ; about 03 more months) and also in the still subsequent period of litigation in the National Commission (upto 03-07-2018; yet about 23 more months). The consumer - complainant was in a continuous position of harassment, uncertainty and difficulty even after making payment of 39,88,056 / 42,18,200 = about 94.5% of the consideration amount way back in Aug, Oct.'11. Equitable and just compensation is necessary (note: it could be less than or more than what the complainant asked for or what the State Commission determined, at the considered wisdom of the adjudicating authority / court in the facts and specificities of the case).

In our considered view compensation of Rs. 5,00,000/- is just and appropriate in the facts and specificities of the case.

30. In respect of cost of litigation too, equitable and just cost is necessary (by its very nature needs no elaboration).

In our considered view cost of litigation of Rs.50,000/- is just and appropriate in the facts and specificities of the case.

31. And consumer justice in the true sense has to be met. The principal amount has to be refunded in full by the builder co. without deduction etc. The liability created for the consumer qua bank / financial institution for the duration the loan amount was lying with the builder co. has to be fully met by the builder co. An appropriate rate of interest, drawing from logical objective criteria capable of being applied to the case, has to be ensured for the complainant's contribution from self or other sources and has to be met by the builder co. Equitable ad just compensation, and equitable and just cost of litigation, have to be met by the builder co.

Once the afore are adjudicated and determined, the onus is on the builder co. to be dutiful in making the necessary payments within the stipulated time. Creating yet further harassment, uncertainty and difficulty for the consumer by delaying payments or making reduced payments etc. (if the adjudication is not stayed or quashed or modified by a higher authority / court) will be an unacceptable situation, to be viewed seriously - the harassment, uncertainty and difficulty of the consumer should end promptly and fully, the chapter should close. Therefore, if the builder co. delays the adjudicated payments beyond the time stipulated, it would and should attract higher / penal interest and other compensation / costs.

32. It is also to say that it would be inappropriate not to protect the lawful interests of the bank / financial institution that provided loan to the complainant, when the actual dispute is between the complainant and the builder co. only and the bank / financial institution but provided loan to the complainant in the normal wont of its functioning.

33. During arguments on 03.07.2018 ld. counsel for the appellants - builder co. principally emphasised that, one, existence of an arbitration clause (clause 43) restrains the State ( / National)

Commission from entertaining the consumer complaint, and, two, clause 21.1 and clause 23.1 as provided for in the agreement entered into by both sides willingly has to be strictly implemented in letter.

However, the applicability and effect of clause 43 as well as clause 21.1 and 23.1 in this case have been examined and determined in paras 11 and 13 and in paras 15 to 19 above.

34. During arguments on 03.07.2018 Id. counsel for the respondent-complainant principally emphasised that not only the rate of interest of 15% compounded quarterly as awarded by the State Commission cannot be reduced but a still higher rate of interest was necessary inter alia considering that his money was locked up with the builder which he could otherwise have used as capital for investment etc. and the value of the land and property has risen in the interim.

However, an appropriate rate of interest in this case has been examined and determined in paras 24 to 28 above.

It is significant that in para 8 of its reply dated 30-06-2016 in the State Commission the builder co. had committed as below:

*- - - That the company stands committed to hand over the possession of the allotted flat to the complainant and in case of any value of land has increased the opposite parties are not claiming any increased price from complainant and are committed to allot the flat at the old price only and complainant only stands benefited from increase.*

*(emphasis supplied)*

Provisions of the Act are in addition to and not in derogation of provision of any other law in force. The Act is for consumer justice, not prospecting. The case is not of claiming damages for breach of contract in a civil court.

35. The arguments forwarded by Id. counsels for the appellants - builder co. and the respondent – complainant, both, were erroneous (ref.: para 33 ; 34).

36. Answering the second question (ref. para 14), in the facts and specificities of this case the following is judicious, equitable and fair:

1. Principal amount of Rs. 39,88,056/- deposited with the State Commission may be paid by the State Commission to the respondent within 2 weeks.
2. Rate of interest may be the rate of interest on which loan was taken by the respondent from bank / financial institution for the purpose of making part or whole payment of the principal amount to the appellants. If 'floating' / varying / different rates of interest were charged by bank / financial institution from which loan was taken by the respondent, the higher / highest rate may be taken for this instant computation.

The interest may be on the total principal amount of Rs.39,88,056/- (even if loan was taken to make part payment thereof) and may be from the respective dates of deposits by the respondent with the appellants and till the date the principal amount of Rs. 39,88,056/-

was deposited by the appellants with the State Commission in compliance of this Commission's interim Order of 30-03-2017.

If the State Commission had not kept the principal amount in fixed deposit, the rate of interest from the date the principal amount was deposited by the appellants with the State Commission and till the date of this Order may be the rate prescribed by bank / financial institution (from which loan was taken by the respondent for the purpose of making part or whole payment of the principal amount to the appellants) for fixed deposit for the same period. If varying / different rates of interest were prescribed, the higher / highest rate may be taken for this instant computation.

The total interest may be so calculated and so paid by the appellants to the respondent within 2 weeks of this Order.

3. Compensation of Rs. 5,00,000/- may be paid by the appellants to the respondent within 2 weeks of this Order.
4. Cost of litigation of Rs. 50,000/- may be paid by the appellants to the respondent within 2 weeks of this Order.
5. Two Paras are numbered Para 28 in the State Commission's Order dated 16-08-2016. The second Para 28, reproduced below, is endorsed and sustained.

*However, it is made clear that, if the complainant has availed loan facility from any banking or financial institution, for making payment of instalments towards the said unit, it will have the first charge of the amount payable, to the extent, the same is due to be paid by him (complainant).*

1. A copy of this Order may be duly provided by the appellants and the respondent (both, separately) to bank/s / financial institution/s from which loan was taken by the respondent for the purpose of making part or whole payment of the principal amount to the appellants within 1 week of this Order.
  2. If the payments to be made by the appellants to the respondent are delayed beyond the stipulated period, it would attract higher / penal interest and other compensation / costs (which would be determined by this Commission in the facts and specificities of that contingency if it so arises).
37. Certified copies of this Order may be provided free of cost by the Registry to the appellants-builder co. and to the respondent-complainant within one week of this Order. A certified copy may also be sent by the Registry to the bank/s / financial institution/s from which loan was taken by the respondent-complainant for the purpose of making part or whole payment of the principal amount to the appellants – builder co. within one week of this Order.
38. The appellants-builder co. may file a report-in-compliance [also annexing therewith the computation-sheet in respect of para 36(ii) above] with the Registry within 4 weeks of this Order. A copy of the report-in-compliance may also be provided by the appellants-builder co. to the complainant within 4 weeks of this Order.

39. The first appeal is disposed of with the above directions.

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**DR. S.M. KANTIKAR**  
**PRESIDING MEMBER**

.....  
**DINESH SINGH**  
**MEMBER**