NATIONAL CONSUMER DISPUTES REDRESSAL COMMISSION
NEW DELHI

CONSUMER CASE NO. 1479 OF 2015

1. DEVELOPERS TOWNSHIP PROPERTY OWNERS WELFARE SOCIETY
505, Hemkunt Chambers, 89 Nehru Place,
New Delhi - 110 019. .....Complainant(s)

Versus

1. JAIPRAKASH ASSOCIATES LIMITED
Jaypee Greens, Sector -128,
Noida - 201 304
Uttar Pradesh. .....Opp.Party(s)

BEFORE:
HON'BLE MR. JUSTICE J.M. MALIK, PRESIDING MEMBER
HON'BLE DR. S.M. KANTIKAR, MEMBER

For the Complainant : Mr. Sahil Sethi, Advocate
Along with Mr. Shivam Sharma, Advocate

For the Opp.Party : Mr. Samik Narain, Advocate
Along with Mr. Kumar Mihir, Advocate

Dated : 02 May 2016

ORDER

ORDER

JUSTICE J. M. MALIK, PRESIDING MEMBER

"Home is a name, a word, it is strong one, stronger than magician, ever spoke or spirit, ever answered to, in the strongest conjuration (The act of calling or invoking a sacred name or Emanating from God)".

- 'Charles Dickens'.

1. The instant complaint has been filed by the Developers Township Property Owners Welfare Society, the Complainant, which is a society registered under the Societies Registration Act. As many as 10 consumers, booked apartments in "Kalypso Court" at Jaypee Greens, Sector 128, Noida. The Jaypee Group transacts the business of Engineering and Construction, Cement, Power, Real Estate, Fertilizers, Healthcare, etc. It is involved in creation/development of various

residential townships in the National Capital Region since 2002. As per the advertisement, the project in dispute was to consist 6 types of property units from 1 BHK to 4 BHK having super area from 1600 sq. ft. to 3250 sq.ft. The Advertisement further mentioned that this project would contain masterfully crafted apartments that celebrate the high efficiency of modern lifestyle and other facilities including social clubs and recreational facilities for the entire family were also promised. It is averred that in pursuant to booking in the apartments in the project and payment of booking amount in the range of Rs.10 to 14 lakhs, the OP made the allottees sign Application form for Provisional Allotment which contained various one-sided and arbitrary clauses as Standard Terms & Conditions (in short,"T&Cs"). Sample copy of Application form for Provisional Allotment has been placed on record as Annexure-4.

2. Thereafter, provisional allotments were issued to the complainants, wherein the delivery of the possession was promised within 36 months plus 90 days' grace period, from the date of the Provisional Allotment letter. Copies of the Provisional Allotment Letters issued to all the concerned members of the Complainant Society, have been placed on the record as Annexure C5 (colly). The 3 rd page of the allotment letter in the middle of the paper clearly, specifically and unequivocally mentions:-

> *"Subject to the Standard Terms and Conditions, the possession of the said apartment is expected to be delivered to you within a period of 36 (thirty six) months hereof".*

3. The grievance of the complainant is that their case has further delayed by four years and the Opposite Party has violated to make any headway towards their houses. Only structure has been raised within the span of eight years. As per the T & Cs, if there is delay in payment by the Allottee, it attracts 18% interest and if the delay is in delivery by the OP Company, it provides for a token compensation of Rs.10/- per sq. ft. for each month of delay.

4. The OP gave revised dates of possession, having failed to meet even one such deadline. The date of possession of apartments was revised many times and the question of handing over the possession is lingering on for the last 4 years. The complainants have paid the amounts to the extent of nearly 90% - 95% of the total consideration and their money stands stalled. There is no reasonable delay for such delay. Even the quality of construction is poor. The OP is guilty of unfair trade practices. It is further averred, as per the latest construction update provided by the OP Company on its website, i.e. Annexure C7, none of the towers in the project are ready for lawful possession. Again, there is non-availability of additional facilities.

5. The next grievance of the complainant is that the sale price/ consideration of the apartments in the project is calculated, charged and paid on the basis of the super area of the apartment. The

T & Cs handed over to members of the Complainant Society define "Super Area" as *"the covered area of the said premises inclusive of the area under the periphery walls, area under columns and walls within the said premises, half of the area of wall common with other premises adjoining the said premises, cupboards, plumbing shafts/lift shafts/ electric shafts of the said premises, total area of all balconies and terraces, and the*

proportionate share of the common areas". [EMPHASIS SUPPLIED].

According to the complainant, super area means the internal area of the apartment, together with the common areas in the project. Vide Annexure C-9, the OP is now claiming that the super area of the apartments has increased. Consequence of which would be, additional financial burden of the concerned members of the complainant society, on account of such increase.

6. The said increase in super area was made without the consent and knowledge of members of the complainant society. Super area of the apartment is based on the complete plans and specifications approved by the local authority, i.e. New Okhla Industrial Development Authority in the present case. The OP-1 must submit details of such common areas and facilities to the Noida Authority as mandated under Section 12 of Uttar Pradesh Apartment (Promotion of Construction, Ownership and Maintenance Act, 2010 (in short, the U.P. Apartment Act, the legislation governing sale and purchase of apartments in Noida, Section 4 of the U.P. Apartment Act prohibits a promotor from revising the plans and consequently super area of apartments, without consent of the respective apartment owners. The proviso appended to the above said Section 4, sub-clause (3) of the UP Apartment Act, mentions:-

> *"Provided that the promoter shall not make any alterations in the plans, specifications and other particulars without the previous consent of the intending purchaser, project Architect, project Engineer and obtaining the required permission of the prescribed sanctioning authority, and in no case he shall made such alterations as are not permissible in the building byelaws".*

The complainant has also cited the judgment reported in ***M/s G.G. Associates & Ors. Versus Commodore Ravindra Kumar Narad & Anr. Revision Petition No. 1647 of 2014*** . It is also submitted that the OP, in contravention of the U.P. Apartment Act has tried to hide all details of all common areas and facilities and unilaterally claim escalation of super area of the apartments. The necessary details were withheld.

7. The further grouse of the complainant is that there has been unlawful sale of stilt/open parking slots. It is alleged that the OP Company has charged an extra amount from each concerned member of the Complainant Society towards reserved stilt parking slots in the project. It has no right to sell 'stilt parking spaces', as those are not "apartments" as per the definition given in the UP Apartment Act. These are to be treated as common areas and a promotor is entitled to charge for the same only as "common areas and facilities" from each apartment purchaser in proportion to the carpet area of the respective apartment. As a matter of fact, the OP

Company in clause 4.4 of the Terms and Conditions acknowledged that the 'Parking Slots' are part of "common areas and facilities". It provides that the allottee shall not have any interest, right or title in the reserved car parking slots (if any) except the right of user. Ultimately, this complaint was filed before this Commission, on 15.12.2015, with the following prayers:-

> *"i) Direct the Respondent to handover possession of Apartments, to respective members of the Complainant Society, complete in all respects and in conformity with the Provisional Allotment Letter and for the consideration mentioned therein, with all additional facilities and as per quality standards promised, and execute all the necessary and required documents in respect of the said apartment in favour of the respective members;*
>
> *ii) Direct the Respondent to pay interest @ 12% per*
>
> *annum on the amount deposited by respective members of the Complainant Society with the Respondent Company, with effect from 39 months from the date of respective Provisional Allotment Letters, till the date actual physical possession as per clause (a) above is handed over by the Respondent, along with all the necessary documents and common areas and facilities.*
>
> *iii) Direct the Respondent Company to provide adequate car parking spaces in the project for occupants therein and refund the excess amount collected from members of the Complainant Society towards car parting slots, with interest.*
>
> *iv) Direct to the Respondent to bear the increase the service tax with effect from 1 st June, 2015.*
>
> *v) Direct to the Respondent to pay a sum of Rs.5,00,000/- (rupees Five Lakh only) to the Complainant Society, as a whole, towards litigation costs;*
>
> *Pass any other and further relief which the Hon'ble Court thinks fit and proper in the facts and circumstances of the case in favour of the Plaintiff and against the Defendants".*

Defence :

8. According to the OP, it faced *'force majeure'* conditions because of which the possession could not be offered to complainant on stipulated date. It is contended that the construction of the apartment is almost complete and the possession would be offered very soon. Again, the possession has already been offered to Mr. Sumeet Kumar and Ritu Kumar, on 23.12.2015. Clause 5 of the Undertaking given by the allottees attached with the application form, reads as under:-

> *"5. I/We have seen and understood the scheme of development, tentative plans/other documents as shown by the company, at Jaypee Greens and I/We also agree to abide by all the terms and conditions of YEA/NOIDA or any other statutory or Civic Authority, or any other condition which the Company may prescribe to which the Company, including the Applicant, is subject to".*

9. Consequently, the members of the complainant society understood that the plan was only tentative and subject to change, if necessary. Again, Clauses 4.2, 4.3, 6.8 & 7.1 run as follows:-

> *"4.2 The interest in land shall not be alienable/ transferable separately and shall always remain attached to the said premises and be a part of the said*
>
> *premises.*
>
> *Provided however that the proportion is subject to change and fluctuation with the construction/ removal/ demolition of additional floors & / or change and fluctuation with construction/ removal/ demolition of additional floor(s) & / change in number and size of Residential units being constructed/ to be constructed (hereinafter referred to as "Construction Changes") in*
>
> *the particular building.*
>
> *4.3……It is stated that nothing herein shall be construed to give the Applicant/ Allottee the right to raise any claim against the company on account of any such construction changes or the right to object to the additional construction or removal.*
>
> *6.8. The applicant has reviewed the Plans and has been made aware of and accepts that the plans, super area, specifications as more particularly described in the application form etc. are tentative and that there may be variations, deletions,*

additions, alterations made either by the Company as it may in its sole discretion deem fit and proper, or by or pursuant to requirements of a government authority, which alterations may involve changes, including change in the position/ location of the said premises, change in the number of units, change in its dimensions, change in the height of the building, change in the super area/ plot area, and the applicant hereby gives his consent to such variations, additions, deletions, alterations and modifications as aforesaid (the "Permitted Alterations"). The Consideration amount may be increased on account of the Permitted alterations and the Applicant shall pay without demur such increased amount of consideration at such times as may be required by the Company. In the event that the Consideration amount is decreased pursuant the Permitted Alterations, the excess amounts, if any, paid by the Applicant shall be refunded by the Company.

Provided further that any changes as a result of the Permitted Alterations shall not be construed to give rise to any claims, monetary or otherwise. Any increase or decrease in the Super Area/Plot Area of the said premises shall be payable or refundable on a pro rata basis without any interest at the agreed rate per Sq. Meter as may be more specifically described in the Allotment/ Provisional Allotment Letter and that the other charges as specified herein will be applicable for the changed area pursuant to Permitted Alterations at the same rate which the said premises were allotted.

7.1 The Company shall make best efforts to deliver possession of the Said Premises to the Applicant within the period more specifically described in the Allotment/ Provisional Allotment Letter with a further grace period of 90 (ninety) days. If the completion of the Said Premises is delayed by reason of non-availability or scarcity of steel and/or cement and/or other building materials and/or water supply and/or electric power and/or slow down, strike and/or due to dispute with the construction agency employed by the Company, lock-out or civil commotion or any militant action or by reason of war, or enemy action, or earthquake or any act of God or if non-delivery of possession is as a result of any Law or as a result of any restrictions imposed by a Governmental Authority or delay in the sanction of building/ zoning plans/ grant of completion/ occupation certificates by any Governmental Authority or for any other reason beyond the control of the Company (hereinafter referred to as "Force Majeure Events" and each individual event referred to as a ("Force Majeure Event") the Company shall be entitled to a reasonable extension of time for delivery of possession of the said Premises".

10. Again, Clause 7.2 of the Standard Terms and Conditions , the OP hereby agreed to pay a rebate on account of any delay in handing over the possession, excluding the time consumed by force majeure event) to the customers of the said project. The copies of the application forms for Provisional Allotment and the undertaking and Standard T & Cs executed by the members of the

Complainant Society are annexed as Annexure R-1 (Colly). The Members of the Complainant Society are, therefore, bound by the commitments made by them, under the said agreement on the basis which the provisional allotments were granted to them. The members of the Complainant Society signed the same of their own volition. The copy of such one such Provisional Allotment Letter dated 26.03.2008 in favour of Ms. Deepali Seth and Dr. Amit Seth, is placed on the record as Annexure R-2 (Colly).

11. There was shortage of labor, scarcity of water, restrictions in excavations etc., which continued to exist for a period of 3-4 years. It was also agreed that if *' force majeure'* events occur, the Company has the right to alter the T & Cs of the allotment/provisional allotment of the said premises as stated or if the *' force majeure'* events so warrant, the Company may suspend the performance of its obligations for such period as it may consider expedient and no such suspension shall constitute a breach of the obligations of the Company thereunder. Again, Clause 7.6 runs as follows:-

> *" 7.6 It is hereby clarified that the total construction period as stipulated in Clause 7.1 herein shall stand automatically extended, without any further act or deed on the part of the Company, by the period during which a Force Majeure Event occurs….."*

Under the circumstances, the OP is entitled for a reasonable extension of time.

12. The National Green Tribunal vide its interim order dated 28.10.2013, in the case of ***Amit Kumar Vs. Union of India & Ors*** ., ordered that any new project which is being considered for the purpose of issuance of Environmental Clearance by the State Level Environment Impact Assessment Authority (SEIAA) or by the MoEF, if it falls within the radius of 10 km. from the boundary of Okhla Bird Sanctuary, environmental clearance shall not be granted unless the authority is satisfied that the National Board for Wild Life (NBWL) has given no objection for the projection. It was also contended that the Notification issued by MoEF shall be subject to the decision of the NBWL and till the time, the clearance of NBWL is obtained, the authority concerned shall not issue completion certificates to projects. That application was disposed of by the National Green Tribunal on

03.04.2014, wherein it was ordered:-

> *" In such view of the matter, we dispose of the application with the following directions:*

i. *The State of Uttar Pradesh shall send its response to the queries raised by MoE&F within two (2) weeks from the date of receipt of the copy of the order, to the MoEF.*
ii. *The state of Delhi as well as Haryana who are likely to be affected by fixation of eco sensitive zone shall also send their proposals to the MoEF within four (4) weeks from today.*

iii. *After receipt of the said proposal as well as comments by the respective governments within the time stipulated above, we direct the Secretary, MoEF Government of India to call for the concerned officers of all the State Government concerned and have interaction and decide finally about the fixation of the eco sensitive zoned in respect in respect of Okhla Bird Sanctuary.*

iv. *While such decision is taken, the Secretary, MoEF in the said meeting shall take into consideration about the demarcation of boundaries in fixing the eco sensitive zone apart from the issues as to whether it is site specific etc. While making such decision the Secretary, Ministry of Environment and Forest shall also make necessary consultations with the National*

Board for Wildlife.

i. *After such decision is taken in the meeting convened by the MoEF, the concerned State Governments shall grant their consent within two (2) weeks after the meeting. After such consent obtained, the Ministry of Environment and Forest shall issue necessary notification as per the powers conferred under the Environment Protection Act 1986, expeditiously.*

ii. *Till such notification is issued, the interim order passed by this Tribunal as modified subsequently shall continue to be in operation.*

iii. *It is needless to state that any decision taken by the Government in notifying the Eco-Sensitive Zone shall be subject to the final decision of the Hon'ble*

Supreme Court in the matter pending before it."

13. The Hon'ble Supreme Court also declined to interfere in the matter.

14. It is further averred that in view of the aforesaid orders, the relevant authorities have been restrained granting Completion Certificates to the OP herein, since 28.10.2013. Despite these embargo, the OP has tried to complete the following infrastructure, i.e, a 500-bedded hospital, Higher Secondary School, Golf Course Club – 18 Holes + 9 - Holes, shopping complex, all internal roads, electric, power back-up, water supply, sewer lines, security infrastructure, temporary club and parks. 100 families have already shifted to the said project and possession of 4000 other apartments in the project would be offered, once the completion certificate is received from the authority.

15. Again, Mr. Nikhil Nanda, Member, has defaulted in making payments and has to pay a sum of Rs.1,23,51,332/-. Timely payment of the money is the essence of the agreement, as mentioned in Clauses 3.1, 5.4, 5.5, 5.6, 5.13 of the Standard T & Cs. Even additional charge for increased area is just, proper and consented to by the members of the complainant Society. It is elucidated that after construction, upon measurement, it was realized that the area of the subject matter apartment had increased due to functional engineering necessities. In the respective undertakings, Members of the complainant society acknowledged the below mentioned fact :-

> *" I/We have seen and understood the scheme of development, tentative plans / other documents as shown by the company at Jaypee Greens and I / We also agree to abide by all the terms and conditions of YEA / NOIDA or any other statutory or civic authority or any other condition which the company may prescribe, to which the company, including the Applicant, is subjected to".*

Furthermore, even the provisional allotment letter states, as follows :

> *"For the purpose of clause 6.8 of the Standard Terms and Conditions, any increase or decrease in the area of the said apartment shall be payable or refundable*
>
> *on pro-rata basis".*

16. Moreover, there is a provision for damages in case of delay @ Rs.10/- per sq.ft., per super area of said premises. In clauses 7.2, 7.4, 9.1.5, the allottees were also entitled to cancel the allotment vide clause 9.1.5. The members of the complainant Society availed the services of the OP for non-commercial purposes. There was no delay and it was stated at Bar that from 22.04.2016, the offer of possession will be made to the complainant, within three months and one offer was also given to one of the complainants. All the other allegations have been denied.

SUBMISSIONS AND FINDINGS :

17. We have heard the counsel for the parties. The first submission made by the counsel for the OP is that the complainant Society is not competent to file the present complaint as it has failed to show that the allottees/complainants mentioned in the complaint are Members of the Complainant Society. The Complainant Society has neither filed its Members' Memorandum nor any list of Members to prove that on whose behalf the complaint has been filed or actually, who are its Members.

18. The argument urged by the learned counsel for the OP is bereft of merits. The complainant has filed on record Certificate of Registration, Ex. C-1. The complainants have also filed copy of the Minutes of the Meeting, Ex. C-2. This is an indisputable fact that the present complaint was filed on behalf of the flat buyers of Kalypso Court at Jaypee Greens, Sector – 128, Noida. The OP has failed to rebut the said evidence, consequently, its objection has to be eschewed out of consideration.

19. The next submission made by the counsel for the OP is that none of the allottees' claim is more than Rs.1.00 crore and they have joined only to meet the pecuniary jurisdiction and to avoid to going to State Commission, which cannot be allowed by this Commission, as per the judgment of this Commission in ***K.V. Gouri Shankar & Sons Vs. M/s. Adel Landmarks Ltd, CC No. 29 of 2016, decided on 04.02.2016.***

20. This argument too, is devoid of force. There lies no rub in filing the joint complaint as per Section 2(1) (c) of the C.P. Act, 1986, which lays down that ***"one or more consumers, where there are numerous consumers, having the same interest, with the permission of the District Forum, on behalf of, or for the benefit of, all consumers, so interested ;"*** .

21. The Order dated 05.01.2016, passed by this Bench, mentions, as under :-

> *"Counsel for the complainant present.*
>
> *This complaint is filed by 10 consumers. The complainant is a society. Affidavits of all the complainants have been filed. This satisfies the requirement of Sections 12 (1) (C) 13 (6) of Consumer Protection Act and Order 1 Rule 8 of the CPC. The permission to proceed with the case is hereby granted.*
>
> *The case stands admitted. ……..…."*.

22. The third submission made by the counsel for the OP was that the complainants have failed to show that the allottees or on whose behalf the complaint was filed have not booked any other apartment/flat or that the booking is not for the investment purposes. Reference was made to the judgment of this Bench in case reported in ***Anil Dutt Vs. Business Park Town Planners Ltd., (BPTP), IV (2013) CPJ 349 (NC)*** where, as many as 10 flats were applied for, it was held as under :-

> "In ***Chilkuri Adarsh Vs. ESS ESS VEE Constructions, III (2012) CPJ 315,*** it was has held, that t *his has been the consistent view of this Commission. It has held that even when a consumer has booked more than one unit of residential premises; it amounts to booking of such premises for investment/commercial purpose. This Commission in the case of* ***Jagmohan Chabra & Anr. Vs. DLF Universal Ltd, IV (2007) CPJ 199*** *, is a somewhat similar case held that the complaint was not maintainable under the C.P. Act, 1986. It had, therefore, disposed the complaint with liberty to the complainant to approach Civil Court. The said order has since been upheld by the*

Hon'ble Supreme Court as ***Civil Appeal No. 6030-6031 of 2008*** *, filed before the Supreme Court stands dismissed vide the Apex Court's order dated 29.09.2008".*

23. This argument was raised for its outright rejection. There is not even an iota of evidence that the complainants have booked any other flat/flats. The OP has made a vain attempt to make bricks without straw. The above said case is distinguishable on the ground that, because the record itself shows that the complainant in the cited case, had applied for 10 flats. No such evidence is available in this respect, on record. It appears to be a brain-wave of the OP. Neither the above said authority nor Jagmohan Chabra & Anr. (supra) and ***Indrajit Dutta Vs. Samriddhi Developers Pvt. Ltd. & Ors., II (2015) CPJ 342 (NC)*** cited by the counsel for the OP itself, have got application to this case.

24. Due to lack of evidence, we hereby reject this argument.

25. It was further submitted that even the additional charge increase, is just, proper and consented to by the Members of the complainant Society. It transpired that after construction, upon measurement, it was realized that the area of the subject matter apartment(s), had increased due to functional engineering necessities. The change in area was approved with the prior consent of the complainant Society. Again, before booking, Members of the Complainant Society were aware of the Scheme of Development and the Development Plans. The original plan was tentative and subject to changes, as is evident from Clause 5 of the undertakings given by the allottees, which has already been reproduced above. Moreover, as per Clause 6.8 of the Standard T& Cs, already reproduced above, the Members of the Complainant Society agreed to accept to any variation / addition/alteration only, in the plan and even agreed to make payments on pro-rata basis for such variation, addition, alteration in the plan.

26. It was submitted that, under these circumstances, change in area was only after prior consent of the Members of the Complainant Society who had consented for the same, with open eyes and out of free-will. The Members of the Complainant Society are, therefore, to be deemed to have waived any right to challenge variation in area and / or further estopped from claiming anything contrary to what is agreed and reduced to writing in the form of Standard T & Cs. Further, the rate being charged for the increased area is the original rate at the time of booking of the unit and not the present market rates.

27. We find force in these arguments in a measure. It must be borne in mind that the Sale Price / consideration of the apartments in the Project is calculated, charged and paid on the basis of the super area. Super area means, the internal area of the apartment, together with the proportionate shares in the common areas in the said project. Although, the internal area has not been changed, even by an inch, yet, the OP is claiming that the super area of the apartments has increased on account of increase in common areas, a consequence of which, would be a financial burden on Home Buyers.

28. Counsel for the complainant also pointed out that the alleged increase in super area was done without the consent of the allottees or even in the knowledge of the members of the complainant Society. The calculation of the super area is to be done by the OP, based on the details of all common areas and facilities as per the approved Layout Plan or Building Plan. The proviso appended to Section 4, including Section 4 (4) (b) of the Uttar Pradesh Apartment Act, is reproduced here, as under :

> *" **DUTIES AND LIABILITIES OF PROMOTERS***
>
> ***4. General Liabilities of Promoter***
>
> *4. (1) Any promoter who intends to sell an apartment, shall, on being so required by an intending purchaser or the Competent Authority, make a full and true disclosure in writing of-(a) rights and his title to the land and the building in which the apartments have been or proposed to be constructed;*
>
> *(b) all encumbrances, if any, on such land or building, and any right, title, interest or claim of any person in or, over such land or building;*
>
> *(c) the plans and specifications approved by or submitted for approval to the local authority of the entire building of which such apartment forms part;*
>
> *(d) detail of all common areas and facilities as per the approved lay-out plan or building plan;*
>
> *(e) the nature of fixtures, fittings, and amenities, which have been or proposed to be provided;*
>
> *(f) the details of the design and specifications of works or and standards of the material which have been or are proposed to be used in the construction of the building, together with the details of all structural, architectural drawings, layout plans, no objection certificate from Fire Department, external and internal services plan of electricity, sewage, drainage and water supply system etc. to be made available with the Association;*
>
> *(g) all outgoings, including ground rent, municipal or other local taxes, water and electricity charges, revenue assessments, maintenance and other charges, interest on any mortgage or other encumbrance, if any, in respect of such land, building and apartments;*
>
> *(h) such other information and documents as may be prescribed.*
>
> *(4) After plans, specifications and other particulars specified in this section as sanctioned by the prescribed sanctioning authority are disclosed to the intending purchaser and a written agreement of sale is entered into, the promoter may make such minor additions or alterations as may be required by the owner or owners, or such minor changes or alterations as may be necessary due to*

architectural and structural reasons duly recommended and verified by authorised Architect or Engineer after proper declaration and intimation to the owner.

Provided that with due permission of the prescribed sanctioning authority the promoter may make major changes in the plans and specification subject to owner first obtaining written consent in writing from all those persons with whom he has entered into written agreement for sale" .

[EMPHASIS SUPPLIED *].*

29. The counsel for the complainant has placed reliance on the authority reported in ***M/s. G.C. Associates & Ors. Vs. Commdore Ravindra Kumar Narad & Anr., RP 1647/2014*** , which is para-materia of Section 7 of the Maharashtra Flat Owners' Act, 1963.

30. In ***eLegalix – Allahabad High Court's case, titled M/s. Designarch Infrastructure Pvt. Ltd. & Anr., Vs. Vice Chairman, Ghaziabad Development Authority,*** it was held as under :-

" (7) Under Section 5 (1) of the U.P. Apartment Act, 2010 every person to whom any apartment is sold or transferred by the promoter shall subject to other provisions of the Act be entitled to exclusive ownership and possession of the apartment so sold or otherwise transferred. He is under sub-section (2) entitled to the exclusive ownership and possession of apartment and shall be entitled to such percentage of undivided interest in the common areas and facilities as may be specified in the deed of apartment and such percentage shall be computed by taking, as a basis, the area of the apartment in relation to the aggregate area of all apartments of the building. Such percentage of undivided interest under sub-section (3) (a) in the common areas and facilities shall have a permanent character, and shall not be altered without the written consent of all the apartment owners and approval of the competent authority, and which shall not be separated from the apartment to which it pertains. It shall be deemed to be conveyed or encumbered with apartment, even though such interest is not expressly mentioned in the conveyance or other instrument. The common areas and facilities under sub-section (4) can not be transferred and will remain undivided with the apartment. These can not be partitioned or subject to any division and will be enjoyed by the apartment owner under sub-section (5), without hindrance or encroaching upon the lawful rights of the other apartment owners".

(14) The FAR or any additional FAR is a property,

appended to rights in the property on which the building is constructed, and is thus a property in which the apartment owners have interest by virtue of the provisions of the UP Apartment Act, 2010. The purchase of additional FAR is not permissible to be appropriate by the promoter without any common benefits to the apartment owners.

The consent of the apartment owners obtained by resolution in the meeting of the apartment owners by majority will be necessary for purchasing additional FAR. Its utilization will also be subject to the consent of the apartment owners".

31. This Commission in the case of ***M/s G.G. Associates & Ors. Vs. Commodore Ravindra Kumar Narad & Anr. Revision Petition No. 1647 of 2014, decided on 16.10.2014, placed reliance*** on a Ruling reported in ***Kalpita Enclave Co-op. Housing Society Ltd. Vs. Kiran Builder of the Hon'ble Bombay High Cour*** t, it was observed that "if the original plans and specifications on the basis of which the persons were persuaded to purchase the flats discloses that certain areas will be kept open it would be clear contravention of the agreement as well as the law if the promoter proceeds to construct additional structure on those places even with the sanction of the Municipal Corporation".

32. We find enough force in the arguments submitted by the counsel for the complainants. If there is any increase in the internal area, the OP is entitled to get the additional amount, that too, at the rate fixed at the time of booking. However, no such proof has been produced on record. Consequently, we hereby hold that the OP is not entitled to any additional amount.

33. Now, we turn to the question of unlawful sale of stilt/open parking slots. The learned counsel for the OP, at the very outset, admitted that they were not aware of the Hon'ble Supreme Court's celebrated authority reported in ***Nahalchand Laloochand Private Limited Vs. Panchali Co-operative Housing Society Ltd., Civil Appeal Nos. 2544 of 2010 with Nos. 2449 and 2456 of 2010 and 2545-48 of 2010, decided on 31.08.2010*** , which came subsequently, wherein, at paras 49, 55 & 65, it was held as under :-

"49. The question then is as to whether the stilted portion or stilt area of a building is a garage under MOFA. A 3stilt area is a space above the ground and below the first floor having columns that support the first floor and the building. It may be usable as a parking space but we do not think that for the purposes of MOFA, such portion could be

treated as garage.

55. It is true that interpretation clause or legislative definition in a particular statute is meant for the purposes of that statute only and such legislative definition should not control other statutes but the parts of the property stated in clauses (2), (3) and (6) of Section 3(f) as part of `common areas and facilities' for the purposes of MAOA are what is generally understood by the expression `common areas and facilities'. This is fortified by the 3fact that the areas which according to the learned senior counsel could be termed as `common areas' in a building regulated by MOFA are substantially included in afore-noticed clauses of Section 3(f) of MAOA. Looking to the scheme and object of MOFA, and there being no indication to the contrary, we find no justifiable reason to exclude parking areas (open to the sky or stilted portion) from the purview of `common areas and facilities' under MOFA.

65. We think this argument does not bear detailed examination. Suffice it to say that if the argument of learned senior counsel and counsel for promoter is accepted, the mischief with which MOFA is obviously intended to deal with would remain unabated and flat purchasers would continue to be exploited indirectly by the promoters. In our opinion, MOFA does restrict the rights of the promoter in the block or building constructed for flats or to be constructed for flats to which that Act applies. The promoter has no right to sell any portion of such building which is not `flat' within the meaning of Section 2 (a-1) and the entire land and building has to be conveyed to the organisation; the only right remains with the 6 (2008) 4 SCC 144 4promoter is to sell unsold flats. It is, thus, clear that the promoter has no right to sell `stilt parking spaces' as these are neither `flat' nor appurtenant or attachment to a `flat'".

34. Therefore, we hold that the OP has no right to sell the stilt parking spaces and decide this point in favour of the complainant Society.

35. Lastly, we turn to the point of delay. This is an indisputable fact that no stay was granted by the National Green Tribunal at any time. The complainant has raised much ado about nothing. There was no rub in constructing the houses/flats. The OP has failed to bolster its case with any kind of evidence. It should have produced solid and unflappable evidence to show that there was shortage of labour, scarcity of water, restrictions in excavations, etc.

36. The OP did not come to grips with the real problem, but touched the unimportant ones. The story advanced by the OP does not just stack up. The OP does not have a bone to pluck with the complainants. He has raised copious objections, merely for the sake of cavil. He has made a vain attempt to tilt at windmills (to contend against imaginary opponents).

37. Counsel for the complainant has also cited ***Satish Kumar Pandey & Anr. Vs. Unitech Ltd., starting from CC 427/2014 onwards, decided on 08.01.2015*** , wherein it granted interest @ 18% p.a. In ***K.A. Nagamani Vs. Karnataka Housing Board, Civil Appeal Nos. 6730-31 of 2012, decided on 19.09.2012,*** the Hon'ble Apex Court, granted interest @ 18% p.a., payable by the OP on the amount(s) deposited by the complainants, from the date(s) of deposit(s), till realization.

FINAL ORDER :

i) It was stated by the counsel for the OP at Bar that they would send offers of possession of allotment within three months from 22.04.2016. There is already huge delay. We accept the offer made on behalf of the OP and direct the OP to handover the possession of the premises in dispute within three months from 22.04.2016 to 21.07.2016, otherwise, it will pay penalty in the sum of Rs.5,000/- per flat / per allottee/allottees, per day, till the needful is done;

ii) For the delayed period, the OP is directed to pay interest @ 12% p.a., on the amount(s) deposited by the respective complainants w.e.f. 39 months' from the date of respective provisional allotment letters, till the actual physical possession as per prayer clause (a), is handed over by the OP. All the necessary documents, common areas and facilities be also provided.

iii) The OP is further directed to provide adequate car parking spaces in the project for the complainants therein and refund the excess amount, if any, collected from the members of the Complainant Society towards car parking slots, with interest @ 12% p.a., from the date(s) of charging, till its realization.

iv) As per law laid down in ***K.A. Nagamani (supra),*** we further impose costs in the sum of Rs.50,000/- payable to each of the flat allottee/allottees, total being Rs.5,00,000/-, for all the flat owners. The said amount be paid within 90 days' from the date of receipt of copy of this order, otherwise, it will carry interest @ 9% p.a., till its realization.

.....J
J.M. MALIK
PRESIDING MEMBER
.....
DR. S.M. KANTIKAR
MEMBER