

NEWS LETTER: Landmark Judgments for Homebuyers

ABOUT US: PSP Legal is one of the leading Corporate & Commercial Disputes Resolution law firm of the country today. PSP Legal today proudly serves more than **30,000 clients** and has become a common name in many commercial sectors. PSP Legal today with its team of **45 lawyers** in Delhi supports its clients, based across the globe, in high-stake matters.

In recent times **Mr. Aditya Parolia and Mr. Piyush Singh, Partners & Founder of PSP Legal** have been instrumental in shaping the Real Estate & Commercial Law Jurisprudence of our country. At PSP, through our practice goals, we have been able to **create and preserve value** in providing legal services. Our principle of operation is the partners' personal commitment and their responsibility for content and result. PSP aims to provide these services promptly with particular emphasis on quality.

PSP Legal has been at the **forefront of protecting consumer (homebuyer) rights** at various fora. In the interest of all our existing clients, we have decided to share few of our landmark judgments from **National Consumer Disputes Redressal Commission(NCDRC)** here for their knowledge & reference.

PSP Legal has also been instrumental in protecting rights of the Homebuyers in few

larger bench judgments which will be shared in our second Newsletter of this series. Fe of these judgments gave following rights to the homebuyers:

1. To file a case as a class action/group;
2. To file a case through an voluntary consumer association;
3. Arbitration will not be bar to approaching NCDRC;
4. All remedies such as NCDRC, RERA & NCLT can be filed concurrently;

The highlights of the cases pursued and resolved at National Consumer Disputes Redressal Commission, New Delhi ("NCDRC") are as brought out:

1. **Manish Sharma & Anr. vs. Unitech Reliable Projects Private Limited, CC No. 1207 of 2016.**

(Project-Unitech-Uni World City- Capella)
The Hon'ble NCDRC based on the arguments of **Mr. Aditya Parolia**, observed that the onus of proving force majeure circumstances which prevented the Builder from delivering the possession of the allotted Apartment to the Consumers within the stipulated time period mentioned in the agreed squarely lies on the Builder.

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2. **Kaushik Guha vs. Bengal Unitech Universal Infrastructure Limited, CC No. 804 of 2017**

(Project-Unitech-Uniworld City Cascades)

The Hon'ble NCDRC based on the arguments of **Mr. Piyush Singh of PSP Legal**, observed that a Consumer books a residential flat for the purpose of having a roof over his head and not for the purpose of claiming refund with compensation at a later date. Therefore, the primary attempt of the Buyer is to get possession of the residential flat booked by him even if there is some delay in obtaining the said possession. Therefore, the Buyer would like to wait for the Builder to deliver unless, the Builder refuses to deliver the possession or the Buyer loses all hope of getting possession and therefore, does not want to wait anymore for the Builder to deliver the possession of the Flat. In such a case, the Buyer *has a recurrent cause of action till the time either the Builder delivers the possession or refused to deliver possession or expresses his inability to construct the flat sold by him. The cause of action may also arise earlier if the Buyer asks for refund of the entire amount paid from the Builder.*

3. **Govindan Raghavan v. Pioneer Urban Land & Infrastructure Limited, CC No. 239 of 2017 [Affirmed by the Hon'ble Supreme Court in Civil Appeal No. 12238 of**

2018, Pioneer Urban Land & Infrastructure Limited v. Govindan Raghavan]

(Project-Pioneer's Araya),

The Hon'ble NCDRC based on the arguments of **Mr. Aditya Parolia of PSP Legal**, observed that the Builder, having not exercised the right to cancel the allotment due to default in payments by the Buyers, cannot deny refund and compensation to the flat buyer who have been making payments in time or from whom interest for delay in payment has been charged. Further, identified the clauses, such as the termination clause, as patently unfair, besides being one sided and observed that if such clauses are given effect, it would result in a situation where a flat buyer, despite the failure of the builder to offer possession within the time stipulated in this regard and without there being any justification for doing so, will be practically remediless for a considerable period from the date of the default, no interest or compensation will be paid to him for the period his money is utilized by the builder, and even the principal amount will be repaid to him in an uncertain future, when the builder has already sold the apartment which was allotted to him. Such a term in the contract would be wholly one sided, unfair and unjust particularly when examined in the light of the fact that as far as the builder is concerned, he has a right to terminate the transaction in the event of even a single default on the part of the flat

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buyer and not only forfeit the earnest money but also deduct the other charges specified in the Buyers Agreement. That given the unfair and one-sided nature of the clauses of the Agreement, the same cannot bind the flat buyers, operating only to the detriment of the flat buyers without any corresponding detriment to the builder.

4. Atma Krishna v. Orris Infrastructure Private Limited & Anr., CC No. 1590 of 2016

(Project- Greenopolis by Orris & 3Cs)

The Hon'ble NCDRC based on the arguments of **Mr. Aditya Parolia of PSP Legal**, observed that the order of the Hon'ble High Court of Punjab and Haryana with respect to bar on drawing ground water, does not put a ban on the construction activity nor any ban on use of water. Thereby, the same cannot be treated as a force majeure condition as the Builder ought to have taken measure. *Once an apartment buyer agreement is signed between the parties, the Builder has to keep in mind the adverse situations that may arise and they should be ready to counter those conditions so that the Buyers need not suffer for the same.*

5. Ajai Kumar & Anr. vs. M/s Supertech Limited, CC No. 1639 of 2017

(Project- Supertech's UP Country),

The Hon'ble NCDRC based on the arguments of **Mr. Piyush Singh of PSP Legal**, observed that the absence of

Occupation Certificate despite the lapse of a considerable time since submission of completion drawings by the Builder inevitably infers to presence of some deviations/deficiencies in the Project on account of which the requisite Occupation Certificate has not been issued. Buyers cannot be made to suffer for such an act of the Builder and cannot be made to wait indefinitely for their allotted Unit.

6. Vishal Malik & Anr. vs. Pioneer Urban Land & Infrastructure Limited, CC NO. 1238 of 2017

(Project- Pioneer's -Araya),

The Hon'ble NCDRC based on the arguments of **Mr. Aditya Parolia of PSP Legal**, observed that if the Allottee is paid only the potential rental value of the house booked by him, the same would result in a situation where the builder, after collecting funds from the allottees, diverts those funds to another project undertaken by the Builder or for his other business purposes and there is no compulsion on him to complete the construction within the time stipulated by him. The Builder would in that case, be inclined to prolong the construction, knowing well that he would at best have to pay the potential rental value of the apartment to the flat buyers, such rental value being only a fraction of the interest the builder would have to pay if he arranges funds from the other sources such as banks and financial institutions.

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It would therefore, be necessary in such cases where a private builder undertakes development of a project and commits a timeline for completion of the construction, to award such compensation which would dissuade the builder from engaging into an unfair trade practice in diverting the funds collected from the flat buyers to the other projects undertaken by him or to his other business ventures and activities.

7. Anila Jain vs. Emaar MGF Land Limited, CC No. 2208 of 2017 (Project Emaar's - Palm Gardens)

The Hon'ble NCDRC based on the arguments of **Mr. Aditya Parolia of PSP Legal**, observed that a Buyer cannot be made to suffer for the default, if any, committed by other Buyers of the Project. If the other buyers in the project have defaulted in making payment in terms of their agreement with the Builder, it was for the Builder to cancel their allotment, sell those flats on the open market, raise funds from alternative sources and complete the construction of the allotted flats within the timeframe committed in this regard or within a reasonable time, thereafter. Further, the Hon'ble NCDRC observed that the sole fact that a person is a resident of another city does not throw off such a person from the ambit of a "consumer" under the Consumer Protection Act.

8. Anil Kumar Jain & Anr. vs. M/s Nexgen Infracon Private Limited, CC No. 1605 of 2018

(Project- Mahagun Mezzaria)

The Hon'ble NCDRC based on the arguments of **Mr. Aditya Parolia of PSP Legal**, dealt with the defense taken by the Builder as to presence of *Force Majeure Conditions* in detail and observed that a) given the language of orders passed by the Hon'ble National Green Tribunal ("NGT"), cited in by the Builder, the Builder was required to take permission from the Competent Authority in the State Government but if the Builder had not taken such a permission before selling Flats in the Project, it only has itself to blame for creating a situation in which the order passed by the NGT came to be applied on the Project. Further, the restrained on the Builder from extracting underground water in Noida/Greater Noida could have been easily eliminated if the Builder arranged water from the alternative source so as to fulfil their contractual obligation to the Flat Buyers;

b) The order dated 14.08.2013 passed by the NGT directing to stop construction work going on within a radius of 10 kms of the Okhla Bird Sanctuary, without prior Environmental Clearance or in contravention of the same, it was observed that the said order would not apply to the Project in question as the scope of the order

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passed by NGT was limited to the construction activity carried out without requisite Environmental Clearance or in contravention of the Environmental Clearance. If the Builder had commenced construction of the Project in question without obtaining requisite Environmental Clearance or the said construction was in contravention of the Environmental Clearance, it has only itself to blame for the said construction being stopped by the National Green Tribunal. Further, the order did not stay further construction of the projects where requisite Environmental Clearance had been obtained, and only Completion Certificate was withheld till clearance from the National Board of Wildlife;

c) Defense of Default of Contractor, impact of demonetization and implementation of GST, without any documentary evidence in favour, were not treated as *Force Majeure Conditions* and the same was not accepted to mean that the Builder could not arrange adequate labour or building material required for timely completion of the Project;

Furthermore, it was observed that if the Builder fails to comply with the contractual obligation and at the same time, is unable to show that the delay in completion of the Flat and offering its possession to the Consumer is on account of circumstances

beyond his control, this would constitute deficiency on the part of the Builder/Service Provider in rendering services to the Consumer. If presumed that the Builder can indefinitely postpone and delay the construction of the Flat and the Flat Buyer has no option but to wait till the Builder decides to complete the construction and offer possession to the Buyer, that would be nothing but a travesty of justice and result in a situation where the Flat Buyer is left at the mercy of the Builder, without recourse to an appropriate legal remedy. Such an interpretation was held to defeat the very objective behind the enactment of the Consumer Protection Act, as far as housing construction is concerned.

That wherever the Builder commits a particular date or time frame for completion of the construction and offering possession to the Buyer, they must necessarily honor the commitment made by them, though a minor delay may not constitute deficiency in the service rendered by them to the Buyer.

9. Avnish Kumar vs. M/s Sare Gurugram Private Limited, CC No. 1010 of 2018

(Project- Sare Homes-Crescent ParC)

The Hon'ble NCDRC based on the arguments of **Mr. Piyush Singh of PSP Legal**, observed that the interest rate on the compensation awarded to a Buyer has to be awarded to meet the ends of justice

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specially keeping in view several aspects such as whether a loan has been availed by the Buyer; whether the Buyer has been forced to live in a rental accommodation due to failure of delivery of possession within the stipulated time; the loss of opportunity of the Complainant due to depletion in resources and finally taking into consideration the principal of *restitutio in integrum* which specifies that the aggrieved person should necessarily be compensated for the financial loss suffered due to the event and get that sum of money which would put him in the same position as he would have been if he had not sustained the wrong.

10. Narender Gupta v. DLF Limited & 8 Ors., CC No. 1036 of 2018 (Project- DLF CREST)

The Hon'ble NCDRC based on the arguments of **Mr. Aditya Parolia of PSP Legal**, went into the depth of the submissions made by the parties and observed that **a)** the onus to establish that a Buyer who has purchased more than one flat is dealing in real estate to earn profit through resale, is on the Builder by way of documentary evidence; **b)** that in light of the judgement passed by the Hon'ble Supreme Court in *Nahalchand Laloochand v. Panchali Co-operative Housing Society*¹ and keeping in view of Section 3 of

Haryana Apartment Owners Act which specifies car parking to be part of the common area, it was concluded that a Builder cannot in law realize any amount from the Buyer towards car parking despite the Builder not specifying car parking in the common area in the buyer agreement. That the Builder himself is liable to bear the brunt of not disclosing the area of car parking in the common areas and, therefore, cannot demand proportionate amount of the area of car parking from the Complainant;

b) that the demand for execution of an indemnity/undertaking as a prerequisite for delivery of possession cannot be forced. Such undertaking, preventing genuine flat purchasers from making genuine claim against the Builder, including any claim on account of delay in delivery of possession or with respect to any kind of discrepancies in the statement of accounts and further any deficiency or defects in the Apartment, is ultra-virus to the Provisions of Section 23 and 28 of the Indian Contract Act, 1872 and would construe as unfair trade practice as defined under Section 2(r) of the Consumer Protection Act, 1986.

11. Surbhie Sindwaani & Anr. v. M/s Prateek Infraprojects India Private Limited, CC No. 3266 of (Project-Prateek Edifice)

¹ Civil Appeal No. 2544 of 2010, decided on 31.08.2010

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The Hon'ble NCDRC based on the arguments of **Mr. Piyush Singh of PSP Legal**, observed that a Builder cannot raise demand on account of the payment of enhanced compensation to the farmers without providing for a set clause in the Agreement, entitling the Builder to charge the said demand.

12. Yash Pal Sabharwal vs. Vatika Limited CC No. 1874 OF 2018

(Project - Vatika- Tranquil Heights)

The Hon'ble NCDRC based on the arguments of **Mr. Aditya Parolia of PSP Legal**, went into the depth of the submissions made by the parties and observed the Complainants cannot be made to wait indefinitely as the possession of the flat has not been handed over to them so far and the Opposite Party is enjoying the benefits of their hard-earning money deposited with it. Therefore, the Complainants are also entitled for refund of the principal amount with reasonable interest and compensation.

13. Springdale Core Consultants Private Limited vs. Pioneer Urban Land & Infrastructure Limited, CC No. 349 of 2017, the Hon'ble NCDRC vide **order dated 16.03.2020** clarified whether a company purchasing a residential unit for the residential use of their Directors, would fall within the ambit of a "consumer" as defined under Section 2(1)(d) of the

Consumer Protection Act, 1986 or not. Based on the arguments of Mr. Singh of PSP Legal, the Hon'ble NCDRC going into the depth of the meaning of the term consumer, observed that the legal status of the Buyer, be it a company, a partnership firm, a society, an association of persons or an individual is not relevant for deciding whether the buyer is a consumer within a meaning of Section 2(1)(d) of the Consumer Protection Act or not, the relevant factor being the *purpose for which the residential plot/house is bought or booked by the buyer*.

Further, it was clarified that a company incorporated under The Companies Act, 2013 is not excluded from the definition of 'person' under Section 2(1)(m) of the Act, it can be 'consumer' under the Act, if, for a particular purpose, it meets the requirements of 'consumer' as defined in Section 2(1)(d) of the Act but whether a company is 'consumer' for a particular purpose has to be adjudged in the given facts and specificities of the case, on reason and logic, and cannot be put into a straightjacketed formula.
