IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

Civil Appeal Nos 3703-3704 of 2020

Experion Developers Pvt Ltd .... Appellant(s)

Versus

Pawan Gupta ....Respondent(s)

O R D E R

1 We are not inclined to interfere with the order of the National Consumer Disputes Redressal Commission dated 26 August 2020 in Consumer Complaint Nos 285 and 286 of 2018.

2 The appeals are accordingly dismissed.

3 Pending application, if any, stands disposed of.

...J.
[Dr Dhananjaya Y Chandrachud]

...J.
[Sanjiv Khanna]

New Delhi;
January 12, 2021

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NATIONAL CONSUMER DISPUTES REDRESSAL COMMISSION
NEW DELHI

CONSUMER CASE NO. 285 OF 2018

1. PAWAN GUPTA
R/O H-6/6, MALVIYA NAGAR,
NEW DELHI-110017 ....Complainant(s)

Versus

1. EXPERION DEVELOPERS PVT. LTD.
THROUGH:- MR. HEMANT TIKOO, CMD REGD.
OFFICE AT: F-9, FIRST FLOOR, MANISH PLAZA 1,
PLOT NO. 7, MLU, SECTOR-10, DWARKA,
NEW DELHI-110075 ....Opp.Party(s)

BEFORE:
HON'BLE MR. PREM NARAIN,PRESIDING MEMBER

For the Complainant : Mr. Chandrachur Bhattacharya, Advocate
For the Opp.Party : Mr. Gagan Gupta , Advocate with
Mr. Vivek Arya, Advocate

Dated : 26 Aug 2020

ORDER

These two consumer complaints have been filed by the complainant Pawan Gupta against the opposite party Experion Developers Pvt. Ltd.

2. As the parties in these complaints are same and the complaints relate to the request for handing over the possession in both the cases, these complaints are being considered together for passing final order.

3. Brief facts of both the complaints are as under:-

CC 285 of 2018

3.1. The complainant had purchased 2 residential flats in a project by the name of "Windchants" of the opposite party. The present case is for Unit no. WT-05/1202 allotted to the complainant. The total consideration of the apartment was Rs.2,92,89,639/- which was later unfairly raised to Rs.3,10,48,232/- (due to an increase in the sale area) and the builder -buyer's agreement was signed on 26.12.2012. As per clause 10(a) of the agreement, possession was to be given within 42 months plus 6 months as the grace period, from the date of approval of building plans; or date of receipt of the approval of the Ministry of Environment and Forest, Govt. of India for the project; or execution of the agreement dated 26.12.2012, whichever is later. Thus, the possession was to be given latest by 26.12.2016. It has been alleged in the complaint that despite the total payment

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of Rs.2,61,58,237/- towards the sale consideration, the opposite party failed to handover the possession of the allotted unit within the stipulated time period. Hence the complainant has filed the present complaint with the following prayers:-

1. To direct the opposite party to handover the legal possession of the unit along with all the promised facilities and amenities to the complainant.

2. To direct the opposite party to pay to the complainant interest @ 12% p.a. on the amount deposited by the complainant, for the total delay in handing over the possession.

3. To direct the opposite party to refund the entire amount collected on account of service tax, car parking, and the extra price charged on account of the alleged increase in common areas along with 18% interest.

4. To restrain the opposite party from imposing on the complainant any additional charge on account of the arbitrary increase in the price of the flats.

5. To award the cost of the complaint to the complainant.

3.2. The complaint has been resisted by the opposite party by filing the written statement. It has been stated that the complainant has multiple bookings which prove that the complainant is not covered under the definition of 'consumer' as provided in the Consumer Protection Act 1986 (in short the "Act"). It has been stated that the issue in the present complaint relates to the interpretation and implementation of the terms of the said builder buyer's agreement which can only be decided by a Civil Court. It has been further stated that the dispute arising from builder buyer's agreement does not relate to the rendering of services under Sec 2(1) (o) of the Act. As per clause 10.1, 10.2, and 13.1, it was agreeable to the complainant that there could be some delay beyond 48 months and the complainant specifically agreed for the remedy provided in the agreement for such delay. It has been stated that the complaint by the complainant falls outside the scope of Sec 14 of the Act and is, thus beyond the jurisdiction of this Commission **.** It was requested to dismiss the complaint.

3.3. The complainant submitted in the rejoinder that incomplete possession of the unit was offered to him on 27.12.2018.

3.4. Both parties filed their evidence by way of affidavits which have been taken on record. The opposite party has stated that the opposite party has completed the construction of the apartment and has obtained occupation certificate dated 24.12.2018 and issued Notice of Possession dated 27.12.2018 to the complainant.

CC 286 of 2018

3.5. The present case is for Unit no. WT-07/2701 allotted to the complainant. The total consideration of the apartment was Rs.1,66,28,890/- which was later unfairly raised to Rs.1,81,54,839/- (due to an increase in the sale area) and the builder -buyer's agreement was executed on 09.02.2013. The complainant has paid the entire amount towards the sale consideration. The last installment was paid on 08.01.2018. As per clause 10(a) of the agreement, possession was to be given within 42 months plus 6 months as the grace period, from the date of approval of building plans; or date of receipt of the approval of the Ministry of Environment and

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Forest, Govt. of India for the project; or execution of the agreement dated 09.02.2013, whichever is later. Thus, the possession was to be given latest by 08.02.2017. It has been alleged in the complaint that paper possession of the unit was offered on 08.12.2017 without proper facilities and amenities as promised in the agreement. Hence the complainant has filed the present complaint with the following prayers:-

1. To direct the opposite party to handover the legal possession of the unit along with all the promised facilities and amenities to the complainant.

2. To direct the opposite party to pay to the complainant interest @ 18% p.a. on the amount deposited by the complainant, for the total delay in handing over the possession.

3. To direct the opposite party to refund the entire amount collected on account of service tax, car parking, and the extra price charged on account of the alleged increase in common areas along with 18% interest.

4. To direct the opposite party to refund an amount of Rs. 6,36,445/- which is the additional extra amount arbitrarily charged with 18% interest.

5. To direct the opposite party to provide all the facilities and amenities as promised. In the alternative, direct the OP to pay an amount of Rs. 20,00,000/- for non-provision of promised facilities and amenities.

6. To award the cost of the complaint to the complainant.

3.6. The opposite party has contested the complaint by filing written statement. It has been stated that the opposite party has completed the construction of the apartment and has obtained occupation certificate dated 06.12.2017 and issued Notice of Possession dated 08.12.2017 to the complainant.

4. As similar issues are involved in both the complaints, they are being decided together and CC 285 of 2018 will be taken as the lead case.

5. Heard the learned counsel for the parties and perused the record. Learned counsel for the complainant stated that the booking was made on 17.7.2012 by paying Rs.11,00,000/- as the booking amount. The builder- buyer agreement has been executed on 26.12.2012. Thus, there was delay of about six months even in executing the builder-buyer agreement which itself is a deficiency in service on the part of the opposite party. As per the agreement, possession was to be given within 48 months (including six months of grace period) and thus, the possession was due on or before 26.12.2016. The learned counsel for the complainant claimed that on 27.12.2018 only paper possession was offered and actual possession was not handed over. There were various shortcomings in the property and therefore, there was a joint inspection on 4.4.2019 and about 25 deficiencies have not yet been rectified. Learned counsel stated that the complainant has already paid the entire consideration by 08.01.2019 including registration charges. However, even the registration of sale deed has not yet been executed.

6. Apart from various shortcomings in the construction of the property, the opposite party has unauthorisedly demanded Rs.13,18,240/- for excess area which was not there at the time of original agreement. This additional demand was sent on 27.09.2017. The complainant asked the

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details of increase in area by sending e-mail 04.10.2017. The complainant got a reply from the opposite party that the excess area is based on the certificate of the architect. However, certificate of the architect is dated 30.01.2018, which is based on his inspection on 16.01.2018. From this, it is clear that the decision to raise the super area was taken by the opposite party without any certificate of the architect and to justify the same opposite party got a certificate dated 30.1.2018. Clearly, there is no basis for increase in the area and this is a pure unfair trade practice on the part of the opposite party. It was requested that this demand be set aside.

7. Learned counsel for the complainant further stated that the possession has not yet been handed over to the complainant and it was requested that the opposite party be directed to hand over the possession within a reasonable time. It has also been requested that compensation in the form of interest @18% p.a. on the amount paid by the complainant be also ordered to be paid to the complainant.

8. It was vehemently contested by the learned counsel for the complainant that the complainant was not a consumer. It was stated that the complainant is not engaged in the trade of plots or flats. In support of his arguments the learned counsel referred to the following judgment:-

> **Vasant Prabhakar Darekar & anr. Vs. Anand Vyankatesh Horaddi & anr. FA No.1388 of 2016, decided on 01.012.2016 (NC).** It has been held that:-
>
> *7. As regards the question as to whether or not the Complainant is a "consumer" because of his having booked two flats with the Appellant, in our view, the argument is stated to be rejected for the simple reason that the Appellant has not adduced any evidence to show that the Complainant was engaged in a real estate business.*

9. On the other hand, learned counsel for the opposite party has stated that it is true that the possession was due on 26.12.2016, however, there was some delay in completion of the project due to factors beyond the control of the opposite party. The occupation certificate was obtained on 24.12.2018 and the possession was offered on 27.12.2018. As the possession was offered only after obtaining the occupation certificate, it was a legal and valid possession and it cannot be called a paper possession. Learned counsel further stated that the defects/deficiencies found in the joint inspection were very minor and the opposite party is ready to rectify them.

10. Learned counsel for the opposite party further pleaded that the complainant has booked two houses with opposite party and therefore, the complainant is not a consumer and is a pure investor. No reason has been given by the complainant for booking two houses with the opposite party. Therefore, the complainant is not covered under the explanation attached to Section 2(1)(d) of the Consumer Protection Act, 1986. Thus, the complaint itself is not maintainable.

11. Learned counsel for the opposite party further stated that there is already a provision in the builder-buyer agreement that the area may change upto 10%. However, in the present case, it is very nominal and is much less than 10%, therefore, the complainant is required to pay for additional area as per the provisions of the builder-buyer agreement.

12. Learned counsel further explained that the opposite party had internally got calculated the area by architect and based on that calculation the demand of additional area was sent. However, when the complainant asked for the documentary proof, then the proper certificate from the architect was obtained. Thus, there is no illegality in making a demand for the additional area. It

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was further argued by the learned counsel that there is already provision for compensation to the allottee. If the possession is delayed, as per clause 13 of the agreement, a compensation of Rs.7.50/- per sq.ft. per month is to be paid for the period of delay. The complainant is only entitled to the agreed compensation in the agreement. In support of this contention, the learned counsel for the opposite party referred to the following judgments:-

1. **DLF Homes Panchkula Pvt. Ltd. & anr. Vs. D S Dhanda, ETC; Sudesh Goyal, ETC, 2019 Law Suit (SC) 1207.** It has been observed:-

"16. The District Forum under the Consumer Protection Act, 1986. (1986 Act) is empowered inter-alia to order the opposite party to pay such amount as may be awarded as compensation to the consumer for any loss or injury suffered by the consumer due to the negligence of the opposite party including to grant punitive damages. But the forums under the Act cannot award interest and/or compensation by applying rule of thumb. The order to grant interest at the maximum of rate of interest charged by nationalised bank for advancing home loan is arbitrary and no nexus with the default committed. The appellant has agreed to deliver constructed flats. For delay in handing over possession, the consumer is entitled to the consequences agreed at the time of executing buyer's agreement. There cannot be multiple heads to grant of damages and interest when the parties have agreed for payment of damages at the rate of Rs.10/- per sq.ft. per month. Once the parties agreed for a particular consequence of delay in handing over of possession then, there has to be exceptional and strong reasons for the SCDRC/NCDRC to award compensation at more than the agreed rate.

2. **Rasheed Ahmad usmani & 8 Ors. Vs. DLF Ltd., CC No.1055 of 2015,decided on 02.07.2019 (NC).** It has been held:

"477. From the above propositions of law it is apparent that the compensation for delay in delivery of possession has to be calculated as per the agreed terms & conditions and where the complainants are able to prove the loss and injury suffered by them due to such delay, the compensation for such loss and injury can also be granted. In the case of Balbir Singh (supra) the Hon'ble Supreme Court has clearly stated that it is for the Commission to determine the loss and injuries. This loss could be determined on the basis of loss of rent which the complainant could have earned after taking possession by letting it out or if the complainant is staying in a rented premises, he could have saved by shifting to the allotted accommodation. The burden is upon the complainant to prove such loss or injury. In the present case, the nature of loss or injury suffered by these complainants have not been contended. The facts relating to the loss and injury are the facts which could be in the personal knowledge of these complainants and therefore as discussed above, could only be proved by them by leading evidences of these facts. None of these complainants have deposed before the Court. The Commission is not supposed to presume or assume the losses or injury simply because there is a delay in giving the possession and for which adequate remedy has been agreed upon by the parties under ABA. The Three Judges Bench of Hon'ble Supreme Court in a latest judgment decided on 10 th May, 2019 in ***D.S. Dhanda*** *(supra) has clearly held that " for the delay in handing over possession, the consumer is entitled to the consequences agreed at the time of executing buyers agreement. There cannot be*

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multiple head to grant damages and interest when the parties have agreed for payment of damages @ Rs.10/- per sq. ft. per month" The Hon'ble Court has further held that " *once the parties agreed for a particular consequence of delay in handing over of possession then, there has to be* <u>*exceptional and strong reasons*</u> *for the SCDRC/NCDRC to award compensation at more than the agreed rate."* "

13. On the basis of the above judgments, the learned counsel claimed that any compensation in terms of interest on the amount paid is not justified as the allottee has already got the benefit of appreciation in the price of the property and will also get the damages as agreed by the parties in the builder-buyer agreement.

14. I have carefully considered the arguments advanced by the learned counsel for the parties and examined the record. First of all, it is seen that the contention of the opposite party that the complainant is not a consumer because he has purchased two flats is not tenable. This has now been established that mere booking of more than one flat does not take the allottee out of the purview of the Consumer Protection Act. This Commission in ***Aashish Oberai Vs. Emaar MGF Land Limited, Consumer Case No. 70 of 2015, decided on 14.09.2016*** , has held as follows:-

> " *In the case of the purchase of the houses which a builder undertakes to construct for the buyer, the purchase can be said to be for a commercial purpose where it is shown, by producing evidence, that the buyer is engaged in the business of a buying and selling of houses and or plots as a trading activity, with a view to make profits by sale of such houses or plots. A person cannot be said to have purchased a house for a commercial purpose only by proving that he owns or had purchased more than one houses or plots. In a given case, separate houses may be purchased by a person for the individual use of his family members. A person owning a house in a city A may also purchase a house in city B for the purpose of staying in that house during short visits to that city. A person may buy two or three houses if the requirement of his family cannot be met in one house. Therefore, it would not be correct to say that in every case where a person owns more than one house, the acquisition of the house is for a commercial purpose* ".

It was also observed that:-

> " *It would be pertinent to note that there is no evidence of the complainant having purchased and then sold any residential property. Therefore, it would be difficult to say that he was engaged in the business of the buying and selling of the property or that villa in question was booked by him for speculative purposes* ".

15 . In another case, ***Kavit Ahuja Vs. Shipra Estate Ltd. & Jai Krishna Estate Developers Pvt. Ltd., I(2016) CPJ31(NC),*** wherein three flats were booked by the complainant, this Commission held the complainant to be a consumer within the meaning of Section 2(1)(d) of the Consumer Protection Act, 1986 and held as follows:-

> " *In the case of the purchase of houses 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. If however, a house to be constructed by the*

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service provider is purchased by him purely as an investment and he is not undertaking the trading of houses on a regular basis and in the normal course of the business profession or services in which he is engaged, it would be difficult to say that he had purchased houses for a commercial purpose. A person having surplus funds available with him would not like to keep such funds idle and would seek to invest them in such a manner that he gets maximum returns on his investment. He may invest such funds in a Bank Deposits, Shares, Mutual Funds and Bonds or Debentures etc. Likewise, he may also invest his surplus funds in purchase of one or more houses, which is/are proposed to be constructed by the service provider, in the hope that he would get better return on his investment by selling the said house(s) on a future date when the market value of such house (s) is higher than the price paid or agreed to be paid by him. That by itself would not mean that he was engaged in the commerce or business of purchasing and selling the house (s).

7. Generating profit by way of trading, in my view is altogether different from earning capital gains on account of appreciation in the market value of the property unless it is shown that the person acquiring the property was engaged in such acquisition on a regular basis and it was by way of a business activity.

8. As observed by the Hon'ble Supreme Court in Laxmi Engineering Works (supra) what is a 'commercial purpose' is a question of fact to be decided in the facts of each case and it is not the value of the goods that matters but the purpose for which the goods brought are put to. The same would be equally applicable to for hiring or availing services.

9. In any case, it is not appropriate to classify such acquisition as a commercial activity merely on the basis of the number of houses purchased by a person, unless it is shown that he was engaged in the business of selling and purchasing of houses on a regular basis. If, for instance, a person has two-three children in his family and he purchased three houses one for each of them, it would be difficult to say that the said houses were purchased by him for a commercial purpose. His intention in such a case is not to make profit at a future date but is to provide residential accommodation to his children on account of the love and affection he has for his children. To take another example, if a person has a house say in Delhi but he has business in other places as well and therefore, purchases one or more houses at other places where he has to live presently in connection with the business carried by him, it would be difficult to say that such acquisition is for commercial purpose. To give one more example, a person owning a house in a Metropolitan city such as Delhi, or Mumbai, may acquire a house at a hill station or a place, which is less crowded and more peaceful than a Metropolitan city, in my view, it cannot be said that such acquisition would be for commercial purpose. In yet another case, a person may be owning a house but the accommodation may not be sufficient for him and his family, if he acquires one or more additional houses, it cannot be said that he has acquired them for commercial purpose. Many more such examples can be given. Therefore, it cannot be said that merely because of the complainant had agreed to purchase three flats in the same complex the said acquisition was for a commercial purpose ".

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16 . This Commission, in ***Rajesh Malhotra & Ors. Vs. Acron Developers & 2 Ors., First Appeal No. 1287 of 2014, decided on 05.11.2015*** has held as follows:-

> "12. *Therefore, in order to determine whether the goods are purchased for commercial purpose, the basic pre-requisite would be whether the subject goods have been purchased or the services availed of with the prime motive of trading or business activity in them, for the purpose of making profit, which, as held in Laxmi Engineering (supra) is always a question of fact to be decided in the facts and circumstances of each case".*

17. The complaints have been filed mainly for two reasons. The first is that the opposite party has demanded extra money for excess area and second is the delay in handing over the possession. In respect of excess area, the complainant has made a point that without any basis the opposite party sent the demand for excess area and the certificate of the architect was sent to the complainant, which is of a later date. The justification given by the opposite party that on the basis of the internal report of the architect the demand was made for excess area is not acceptable because no such report or any other document has been filed by the opposite party to prove the excess area. Once the original plan is approved by the competent authority, the areas of residential unit as well as of the common spaces and common buildings are specified and super area cannot change until there is change in either the area of the flat or in the area of any of the common buildings or the total area of the project (plot area) is changed. The real test for excess area would be that the opposite party should provide a comparison of the areas of the original approved common spaces and the flats with finally approved common spaces/ buildings and the flats. This has not been done. In fact, this is a common practice adopted by majority of builders/developers which is basically an unfair trade practice. This has become a means to extract extra money from the allottees at the time when allottee cannot leave the project as his substantial amount is locked in the project and he is about to take possession. There is no prevailing system when the competent authority which approves the plan issues some kind of certificate in respect of the extra super area at the final stage. There is no harm in communicating and charging for the extra area at the final stage but for the sake of transparency the opposite party must share the actual reason for increase in the super area based on the comparison of the originally approved buildings and finally approved buildings. Basically the idea is that the allottee must know the change in the finally approved lay-out and areas of common spaces and the originally approved lay-out and areas. In my view, until this is done, the opposite party is not entitled to payment of any excess area. Though the Real Estate Regulation Act (RERA) 2016 has made it compulsory for the builders/developers to indicate the carpet area of the flat, however the problem of super area is not yet fully solved and further reforms are required.

18. Now coming to the compensation for the delay in handing over the possession, it is seen that the possession in both the cases has been offered after obtaining the occupation certificate. Thus, the possession cannot be called a paper possession as alleged by the complainant. The opposite party is already ready to rectify the defects noted in the joint inspection. In these circumstances, the complainant will be entitled to compensation for delay only upto 3 months beyond the offer of possession from the date of due possession in each case. Hon'ble Supreme Court in **DLF Homes Panchkula Pvt. Ltd. & anr. Vs. D S Dhanda, ETC; Sudesh Goyal, ETC,** (supra) has clearly observed that when the contract/agreement has been signed by the builder and the allottee, both of them are bound by the terms of the agreement and from this aspect, the allottee is only entitled to get the compensation as mentioned in the agreement. The Hon'ble Supreme Court has given some compensation for mental agony and harassment to such allottee. In the present case, a

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compensation of Rs.7.50/- per sq.ft. per month is agreed between the parties for delay in possession and therefore, in the light of the decision of the Hon'ble Supreme Court in **DLF Homes Panchkula Pvt. Ltd. & anr. Vs. D S Dhanda, ETC; Sudesh Goyal, ETC,** (supra), it is difficult to compensate the complainant by ordering interest on the amount paid by the complainant. The complainant must have faced lot of mental agony and harassment due to delay in handing over possession and therefore, appropriate lump sum compensation shall be granted for the same. Accordingly, in CC 285 of 2018, I deem it appropriate to grant a compensation of Rs.5,00,000/- for mental agony and harassment to the complainant. Similarly in CC 286 of 2018, I am inclined to grant a compensation of Rs.3,00,000/- to the complainant for mental agony and harassment, caused due to delay in offering possession.

19. On the basis of the above discussion, both the complaints being CC No.285 of 2018 and CC No.286 of 2018 are partially allowed as under:-

(i) The demand for excess area is cancelled and the opposite party is directed to send revised demand excluding for the demand of excess area without adding any new demand within a period of 30 days along with the offer of possession.

(ii) The opposite party shall rectify all the defects as noted in the joint inspection within a period of 30 days.

(iii) Opposite party is directed to hand over the possession within a period of 30 days from the date of issue of such offer letter. The possession should be complete in all respects as per the agreement.

(iv) The opposite party will also pay an amount of Rs.5,00,000/- (rupees five lakhs only) in CC No.285 of 2018 and Rs.3,00,000/- (rupees three lacs only) in CC No.286 of 2018 to the complainant for mental agony and harassment.

(v) The opposite party shall pay compensation @ Rs.7.50 per sq.ft. per month as agreed in the agreement from the due date of possession upto three months after the date of earlier offer of possession given in December 2018.

....
PREM NARAIN
PRESIDING MEMBER

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ITEM NO.6 Court 6 (Video Conferencing) SECTION XVII-A

S U P R E M E C O U R T O F I N D I A
RECORD OF PROCEEDINGS

Civil Appeal No(s).3703-3704/2020

EXPERION DEVELOPERS PVT. LTD. Appellant(s)

VERSUS

PAWAN GUPTA Respondent(s)

(WITH I.R. and IA No.118979/2020-PERMISSION TO FILE ADDITIONAL DOCUMENTS/FACTS/ANNEXURES)

Date : 12-01-2021 These appeals were called on for hearing today.

CORAM :
HON'BLE DR. JUSTICE D.Y. CHANDRACHUD
HON'BLE MR. JUSTICE SANJIV KHANNA

For Appellant(s) Sh. Neeraj Kishan Kaul, Sr. Adv.
Sh. Subash Bhat, Adv.
Ms. Chanan Parwani, Adv.
Mr. Sunando Raha, Adv.
Mr. Anupam Raina, AOR

For Respondent(s)

UPON hearing the counsel the Court made the following
O R D E R

1 The appeals are dismissed in terms of the signed order.

2 Pending application, if any, stands disposed of.

(SANJAY KUMAR-I) (SAROJ KUMARI GAUR)
AR-CUM-PS COURT MASTER
(Signed order is placed on the file)

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