

**NATIONAL CONSUMER DISPUTES REDRESSAL COMMISSION
NEW DELHI**

FIRST APPEAL NO. 404 OF 2019

(Against the Order dated 03/08/2018 in Complaint No. 326/2013 of the State Commission
Maharashtra)

1. LATE MOHAN S. KALE (SINCE DECEASED) MRS.
CHHAYA MOHAN KALA

REP. THROUGH HIS LR.s. SAHYADRI, C/011, PLOT NO 13,
SECTOR 10, KAMOTHE

NAVI MUMBAI 410 209

MAHARASHTRA

2. SAGARIKA MOHAN KALA (DECEASED OF MR.
MOHAN S. KALE)

REP. THROUGH HIS LR.s. SAHYADRI, C/011, PLOT NO 13,
SECTOR 10, KAMOTHE

NAVI MUMBAI 410 209

MAHARASHTRA

3. MONIKA MOHAN KALE (DECEASED OF MR. MOHAN
S. KALE)

REP. THROUGH HIS LR.s. SAHYADRI, C/011, PLOT NO 13,
SECTOR 10, KAMOTHE

NAVI MUMBAI 410 209

MAHARASHTRA

4. AASHISH MOHAN KALE (DECEASED OF MR. MOHAN
S. KALE)

REP. THROUGH HIS LR.s. SAHYADRI, C/011, PLOT NO 13,
SECTOR 10, KAMOTHE

NAVI MUMBAI 410 209

MAHARASHTRA

.....Appellant(s)

Versus

1. HILLARI VICTOR D'SOUZA

PLOT NO 7, JEEVDHA NIVAS, ANAND NAGAR,
SHEDAVLI , KHOPOLI

RAIGAD

MAHARASHTRA 410 203

.....Respondent(s)

BEFORE:

HON'BLE MR. SUBHASH CHANDRA, PRESIDING MEMBER

HON'BLE DR. SADHNA SHANKER, MEMBER

FOR THE APPELLANT : MR. UDAY B. WAVIKAR, ADVOCATE WITH
MR. VIKAS NAUTIYAL, ADVOCATE

FOR THE RESPONDENT : MS. SHRUIT MUNJAL, ADVOCATE WITH
MS. CHETNA VERMA, ADVOCATE

Dated : 06 November 2024

ORDER

DR. SADHNA SHANKER, MEMBER

1. The present appeal has been filed under Section 19 of the Consumer Protection Act, 1986 (for short “the Act”) in challenge to the Order dated 03.08.2018 passed by the State Consumer Disputes Redressal Commission, Maharashtra (hereinafter referred to as the “State Commission”) in Complaint No. 326 of 2013, whereby the complaint was partly allowed.
2. We have heard the learned counsel for the appellant – Mohan S. Kale, proprietor of M/s Project Developers Sahyadri (since deceased) represented through legal heirs (hereinafter referred to as the ‘developer’) and the learned counsel for the respondent (hereinafter referred to as the ‘complainant’) and perused the record including the State Commission’s impugned Order dated 03.08.2018 and the memorandum of appeal.
3. There is a delay of 179 days in filing the present appeal.

In the interest of justice and considering the reasons mentioned in the application for condonation of delay, the delay in filing the appeal is condoned.

4. The facts, in brief, are that the complainant booked a flat, bearing no. A/1012, ‘A’ wing, admeasuring built-up area 99.24 sq. mtr. with parking space on first floor Block-A, "Sahyadri", Sector-10, Kamothe, Navi Mumbai, Tal. Panvel, Dist. Raigad, for total consideration of Rs.64,56,768/- with the developer. An agreement to sale was executed on 18.07.2011 and the same was registered on 19.07.2011. It is alleged that as per the agreement to sale the possession of the flat was to be given by March 2013. The complainant paid an amount of Rs.62,63,060/- i.e. 97% of total consideration and the balance 3% of the total consideration was to be given at the time of handing over possession of the flat. However, possession of the flat was not given, as agreed and assured, and hence, the complainant filed a complaint before the State Commission seeking direction to the developer to hand over possession of the flat along with interest at the rate of 20% per annum on the deposited amount from 01.04.2013 till handing over of possession and Rs.23,08,788/- towards rate difference. The complainant also prayed for a direction to the developer to pay Rs. 2,37,101/- towards rate of appreciation along with Rs. 4 lakh towards loss of earning, conveyance from Qatar to India and other expenses and Rs. 5 lakh as compensation towards harassment and mental agony and Rs. 25,000/- towards expenses in consulting lawyers and Rs. 50,000/- as legal and other incidental expenses.

5. The developer contested the complaint by filing written version stating therein that the complainant is not a consumer as the complainant had given ‘Registered Power of Attorney’ to his father and the present complaint filed by the complainant through another POA, is not maintainable. The developer had admitted the booking of the flat, total consideration and the payment of 97% of the total consideration as also the execution of the registered agreement for sale. It was also contended that the CIDCO granted the extension of time for “completion and occupancy certificate” till 20.08.2014 and there was delay in construction because of the reasons beyond the control of the developer. It is also stated that there was no deficiency in service on the part of the developer.

6. After appreciation of the facts of the case, the State Commission, vide its order dated 03.08.2018 partly allowed the complaint. The order dated 03.08.2018 of the State Commission reads as under:

“1. Complaint is hereby partly allowed with costs quantified in the sum of Rs. 25,000/- (Rupees Twenty-Five Thousand Only) payable by opponent to complainant.

2. Opponent is directed to hand over possession of flat bearing No. A/1012 in A wing, admeasuring built-up area 99.24 sq. mtr. (1282.66 sq. ft.) with parking space on first floor Block A, “Sahyadri”, Sector 10, Kamothe, Navi Mumbai, Tal. Panvel, Dist. Raigad to the complainant within two months from the date of payment of remaining consideration of Rs. 1,93,708/- (Rupees One Lakh Ninety Three Thousand Seven Hundred Eight only). The complainant should deposit the said amount in this Commission under intimation to the opponent and from that date within two months possession should be handed over to the complainant. On handing over of possession of the flat to the complainant, the said amount be paid to opponent.

3. Opponent is directed to pay interest @20% p.a. on the amount of Rs. 62,63,060/- (Rupees Sixty Two Lakhs Sixty Three Thousand Sixty only) from 21/08/2014 till handing over of possession of flat to the complainant.

4. Opponent is directed to pay Rs. 1,00,000/- (Rupees One Lakh Only) to the complainant towards compensation for mental agony and harassment suffered by the complainant.

5. Copies of the order be furnished to the parties.”

7. The developer has filed the present appeal seeking setting aside of the order dated 03.08.2018 of the State Commission.

8. Before this Commission, learned counsel for the developer strongly argued that there was no negligence and deficiency in service on the part of the developer, therefore, the question to pay interest at the rate of 20% and compensation does not arise as possession has already been offered to complainant. He further argued that the possession letter dated 12.02.2019 has also been issued to him. Therefore, the order dated 03.08.2018 passed by the State Commission granting interest and compensation in favour of the complainant is not sustainable in the eye of law. Apart from this, he argued that the interest at the rate of 20% is much higher in the light of the prevailing market conditions. In support of this contention, he placed reliance on the decision in the case of *Central Bank of India vs. Ravindra (2002) 1 SCC 367 para 39*).

9. Further, it was argued that the CIDCO extended the project, which caused the delay and the developer is not liable. Additionally, agreement with M/s Sagarika constructions for purpose of changing/amending/upgrading amenities was to be executed but complainant did not enter into the agreement. This reveals that the developer did all their best to complete the project but was not getting support and cooperation from the complainant when required.

Further, it was submitted that it is imperative to state that the developer persistently offered possession of the flat but the complainant having ulterior motives refused to take possession, hence, the developer cannot be held liable for the fault committed by the complainant. Complainant not only declined to take up the possession but also refused to pay pending 3% of total consideration. It was further argued that the delay in handing over possession of the flat is not on part of developer because they have applied to the concerned authority for issuance of occupancy certificate but the concerned authority delayed in the process and hence, developer cannot be held liable for the same.

10. Further, it is submitted that the Supreme Court in catena of judgments has observed that the developers/developers should not be imposed cost which is excessive and unfair in light of prevailing market conditions. In order to bolster the arguments, reliance is placed on:

a. ***Central Bank of India v Ravindra, (2002) 1 SCC 367 para 39***

b. ***M/s Rajan Handa vs M/s M3M India Developers 2021 LawSuit(CO) 321 decided on 15.09.2021***

c. ***M/s Laureate Buildwell Pvt Ltd vs Charanjeet Singh, Civil Appeal No 7042 of 2019, passed on 21.06.2021***

11. The learned counsel for the complainant vehemently countered the developer's claims. He relied on the Hon'ble Supreme Court decision in ***Lucknow Development Authority Vs. M.K.Gupta [(1994) 1 SCC 243]***, for the proposition that when a person hires a services of Developer or Contractor, for construction of house or flat and the same is for a consideration, it is "service" as defined under Section 2 (o) of the Consumer Protection Act, 1986 and further the Apex Court in ***Pioneer Urban Land & Infrastructure Ltd. Vs. Govindan Raghavan, [(2019) 5 SCC 725]***, has held that inordinate delay in handing over possession of property, amounts to deficiency of service.

12. Further, it was argued that the developer has not obtained the Occupancy Certificate and offered the possession of the property in February 2019 to the complainant that is after the order dated 03.08.2018 of the State Commission. Since the property cannot be legally offered, 20% interest levied upon the developer is just and fair, as the developer, is also entitled to the same interest in case of late payments, as is provided in Clause 5 of the said Agreement. It was further argued that the complainant not only paid an additional amount for getting the possession of the property by December 2011, but also spent huge amount in taking multiple trips to India for checking the status of construction and taking over of the possession of property. The complainant was ignored and humiliated by the developer, which caused extreme mental agony and harassment to the complainant and thus, the quantum of compensation, as is granted by the State Commission vide order dated 03.08.2018, is just, apt and reasonable.

13. Further, as regards the issue of entering into an agreement with M/s Sagarika, it was submitted that an agreement to enter into an agreement is not enforceable nor does it confer any right upon the parties. Once a contract is reduced in writing, it is not open for any of the parties to prove terms of the contract with reference to some oral or documentary evidence. Furthermore, handing over of any list for making changes / amendments in relation to the

property would be of no consequence, as merely expresses an intention to enter into a contract and does not create binding legal relationship between the parties. In support of the above contention, they placed reliance on:

a. *Speech & Software Technologies (India) Private Limited Vs. Neos Interactive Limited [(2009) 1 SCC 474]*

b. *Tamil Nadu Electricity Board & Another Vs. N. J. Raju Reddiar & Anr. [(1996) 4 SCC 551]*

c. *Rajasthan Co-Operative Diary Federation Ltd. Vs. Mahalaxmi Mingrate Marketing Service Pvt. Ltd. [(1996) 10 SCC 405]*

14. Further, it was argued that the complainant is a Non Resident India (NRI). Irrespective of being an NRI, the complainant cannot be debarred from purchasing a dwelling place in India. The Hon'ble National Commission in the case titled as ***Smt. Reshma Bhagat & Anr. Vs. M/s Supertech Ltd., Consumer Complaint No. 118 of 2012*** has held that it cannot be made a rule of thumb that NRIs cannot purchase a property in their native land, as every NRI has to return to their native place, for which reason, any NRI could purchase a house in his own name.

15. The question which falls for our consideration is whether there is deficiency in service on the part of the developer.

16. It is undisputed that the complainant booked a flat for total consideration of Rs.64,56,768/- and paid Rs.62,63,060/- i.e. 97% of the total sale price. It was agreed between the parties that remaining 3% will be paid at the time of taking possession. It is seen that the possession was agreed to be given on or before March 2013 but till date the possession has not been handed over to the complainant. Further, it is seen that it was contended that on completion and occupancy certificate from CIDCO, the developer will hand over possession of the flat and also extension was given for the same but there is no occupancy certificate placed on record. It is the responsibility of the developer to obtain the occupancy certificate within time and not of the complainant. This proves clear deficiency in service on the part of the developer.

17. As regards the rate of interest is concerned, it is seen that complainant has claimed interest at the rate of 20% p.a. on the deposited amount. As per evidences placed on record, it is seen that there was delay in handing over of the possession and the reasons cited for delay by the developer is force majeure conditions that prevailed at the time of construction and also CIDCO by the said letter extended the time for completion of construction upto 20.08.2014. The objection that the delay was due to reasons beyond the control of the developer or due to Force Majeure circumstances is devoid of merit. In this regard, attention is drawn to Order of this Commission in ***CC 379 of 2013 Sivarama Sarma Jonnalagadda & Anr vs. M/s Maruthi Corporation Limited & Anr*** decided on 21.09.2021 wherein it was held that:

“We are of the view that that the Complainant cannot be made to wait indefinitely for the delivery of possession and the act of the Opposite Party in relying on force majeure

clause while retaining the amounts deposited by the Complainant, is not on only an act of deficiency of service but also amounts to unfair trade practice.”

The contention of the developer that the complainants should wait for unreasonable and uncertain period on ground of force majeure circumstances has no force and the same is rejected. Any interested person/buyer purchases a flat/plot with the dream of getting it within agreed time or with reasonable time. The delay in handing over a valid possession after a considerable lapse of time constitutes a deficiency in service on part of the developer.

18. Furthermore, the Hon'ble Supreme Court in the case of ***DLF Homes Panchkula Pvt. Ltd. Vs. D.S. Dhandra***, in CA Nos. 4910-4941 of 2019 decided on 10.05.2019 has held that multiple compensations for singular deficiency is not justifiable. Therefore, the award of compensation of Rs.1,00,000/- on account of mental agony awarded by the learned State Commission is untenable.

19. As regards the rate of interest, we are of the view that the complainant is entitled to get compensation in the form of simple interest at the rate of 6% per annum from the promised date of possession till the actual date of handing over of the possession on the amount deposited. Reliance has been placed on the judgment of the Hon'ble Supreme Court in the case of ***Wing Commander Arifur Rahman Khan and Aleya Sultana and Ors. Vs. DLF Southern Homes Pvt. Ltd., (2020) 16 SCC 512.***

20. In view of the above discussion, the order dated 03.08.2018 of the State Commission is modified as under:

- a. The developer is directed to hand over the possession of the flat in question to the complainant complete in all respects after receiving the balance amount due towards booking of the flat from the complainant. In case the developer refuses to accept the balance amount, the complainant shall deposit the balance amount with the State Commission under intimation to the developer and from that date within two months possession should be handed over to the complainant. On handing over possession of the flat in question, the amount deposited with the State Commission be paid to the developer.
- b. The developer is directed to provide occupancy/completion certificate to the complainant at the time of handing over of the possession.
- c. The developer is directed to pay compensation in the form of interest at the rate of 6% p.a. on the deposited amount from the promised date of possession till the date of handing over of the possession within a period of 8 weeks, failing which the rate of interest shall be enhanced to 9%.
- d. The developer is directed to pay Rs.20,000 to the complainant as cost of litigation.
- e. The direction to pay an amount of Rs.1,00,000/- awarded by the State Commission towards compensation for mental agony and harassment suffered by complainant is set aside.
- f. The direction to pay cost of Rs.25,000/- imposed on the developer is set aside.

21. The appeal is disposed of in above terms. All pending applications, if any, stand disposed of.

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SUBHASH CHANDRA
PRESIDING MEMBER

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DR. SADHNA SHANKER
MEMBER