

**NATIONAL CONSUMER DISPUTES REDRESSAL COMMISSION
NEW DELHI**

FIRST APPEAL NO. 263 OF 2018

(Against the Order dated 02/11/2017 in Complaint No. 328/2015 of the State Commission
West Bengal)

1. BAIBHAB SUR

S/O. GOPAL CHANDRA SUR EE119, FLA NO GF/2/2
SECTOR II SALT LAKE CITY (NEAR TANK NO 10)
KOLKATA 700 091
WEAST BENGAL

.....Appellant(s)

Versus

1. SWAPAN SENGUPT & 6 ORS.

S/O. LATE PRATUL CHANDRA SENGUTPA
REPRESENTING AS DEVELOPER M/S. SHIRDI SAI BABA
ENTERPRISE 45/1 RAMANTH BATTACHARJEE STREET P
O BELUR MATH PS BALLY
HOWRAH 711 202
WEST BENGAL

.....Respondent(s)

2. SRI SAMARTAT SENGUPTA

S/O. LATE JYOTI RANJAN SENGUPTA C/O. SRI SAMART
SENGUPTA OWNER OF LAND 12/1A, CENTRE SINTHEE
ROAD
KOLKATA 700 050
WEAST BENGAL

3. SRI SMRITI RANJAN SENGUPTA

S/O. LATE MONORANJAN SENGUPTA C/O. SRI SAMART
SENGUPTA OWNER OF LAND 12/1A, CENTRE SINTHEE
ROAD
KOLKATA 700 098
WEAST BENGAL

4. SRI PRASANTA SENGUPTA

S/O. LATE MONORANJAN SENGUPTAM C/O. SRI
SAMART SENGUPTA OWNER OF LAND 12/1A, CENTRE
SINTHEE ROAD
KOLKATA 700 050
WEAST BENGAL

5. SMT CHANDANA SEN

D/O. LATE MONORANJAN SENGUPTA C/O. SRI SAMART
SENGUPTA OWNER OF LAND 12/1A, CENTRE SINTHEE
ROAD
KOLKATA 700 098
WEAST BENGAL

6. SMT KIKHA SENGUPTA

DAUGHTER IN LAW OF LATE MONORANJAN SENGUPTA
C/O. SRI SAMART SENGUPTA OWNER OF LAND 12/1A,
CENTRE SINTHEE ROAD
KOLKATA 700 050
WEST BENGAL

7. SMT RANTNABALI SENGUPTA
GRAND DAUGHTER OF LATE MANORANJAN
SENGUPTA C/O. SRI SAMART SENGUPTA OWNER OF
LAND 12/1A, CENTRE SINTHEE ROAD
KOLKATA 700 098
WEAST BENGAL

BEFORE:

**HON'BLE MR. SUBHASH CHANDRA, PRESIDING MEMBER
HON'BLE DR. SADHNA SHANKER, MEMBER**

FOR THE APPELLANT :

Dated : 02 August 2024

ORDER

For the Appellant Mr P D Gupta, Amicus Curiae with Ms Kiran

Bala Agarwal, Advocate

For the Respondents NONE

ORDER

PER SUBHASH CHANDRA

1. The present appeal under section 21 (b) of the Consumer Protection Act, 1986 (in short, 'the Act') read with Regulation 14 of the Consumer Protection Regulations 2015, assails order in Complaint no. 328 of 2015 on 02.11.2017 passed by the West Bengal State Consumer Disputes Redressal Commission, Kolkata (in short, 'the State Commission) in allowing the complaint and directing the opposite parties jointly and severally directed to deliver the possession and to execute the deed of conveyance in respect of the flat and the car parking space as mentioned in the schedule of the agreements for sale in favour of the complainant within 60 days from the date of the order subject to payment of balance consideration amount.

2. The brief facts of the case are that the appellant had filed a complaint before the State Commission against the Developer (respondent no.1) and Land Owners (respondent nos. 2 to 7) alleging deficiency in service in the construction and transfer of flat after receipt of the requisite payment of consideration. The appellant states that on 24.03.2013 he entered into two Agreements for Sale (in short, 'the Agreements') with the respondents for the purchase of a flat measuring about 650 sq ft super built up area on the 2nd floor and one car parking space of 120 sq ft on the ground floor in a four storied building situated at 12/1A, Centre Sinthee Road, P K Sinthee, Kolkata, 700 050 Ward no.2 of Kolkata Municipal Corporation for a total consideration of Rs.24,05,000/- and Rs.4,00,000/- respectively, totaling to Rs.28,05,000/- The appellant alleges that he had paid a total sum of Rs.25,25,000/- as part

consideration (Rs.25 lakh for the flat and Car Parking and Rs.25,000/- for a separate electric meter) and that Rs.3,05,000/- was due to be paid at the time of delivery of possession or registration of the sale deed. The appellant claimed that the respondents were under obligation to hand over the subject property in a habitable condition within 18 months from the date of Agreements but failed to do so. The appellant submitted that he was ready to pay the balance amount of Rs.3,05,000/- but the respondents have been dishonest in fulfilling their terms of the contract. Hence, the appellant was constrained to approach the State Commission on 26.08.2015 in Complaint no. 328 of 2015. However, aggrieved by the impugned order of the State Commission, the appellant has prayed before us to:

- a. Admit the instant First Appeal;
- b. Call for the records of the CC no. 328 of 2015 before the State Commission disposed of on 02.11.2017 and to issue notice to show cause to the respondent as to why this First Appeal not be allowed and after the causes shown and after hearing the parties to allow the appeal on the reliefs claimed herein;
- c. To award interest in favour of the appellant in terms of Clause 7 of the agreement for sale dated 24.03.2013 with the ready flat and car parking for use;
- d. Alternatively some interest amount for the loss for mental agony of the appellant;
- e. Any other reliefs as may be applicable for the appellant against respondent no.1/developer and respondent nos 2 to 7 for serious default;
- f. Cost, litigation charge penalty rate of interest and expenses also to be enhanced against respondent nos.2 to 7 and to enhance against respondent no.1; and
- g. Such other or further relief/s as may be thought fit and proper.

3. The case was contested by the respondent landowners' nos.2, 4, 7 and 8, before the State Commission. However, respondent no.1 did not appear despite service of notice. The appellant filed his evidence by way of affidavit and also reply against the questionnaire set by respondent nos. 2, 4, 7 and 8. Respondent no.4 filed his evidence by way of affidavit. The appellant submits that the respondent had replied to the questions forwarded by the appellant. It has been mentioned that none of the respondents had disputed the case of the appellant as per agreement dated 24.03.2013. The appellant sought appointment of an amicus curiae in this case to argue the matter in view of inability to bear legal fees.

4. Vide its order dated 02.11.2017, the State Commission after hearing the learned counsel for the parties held as under:

Consequently, the petition of complaint is allowed *ex parte* against OP No.1/developer and also against OP Nos. 3 and 6 and on contest against OP Nos. 2, 4, 7 and 8. The Opposite Parties are jointly and severally directed to deliver possession and to execute the deed of conveyance in respect of the flat and the car parking space as mentioned in the schedule of the agreements for sale in favour of the complainant within 60 days from date subject to payment of balance consideration amount. The OP No.1 /developer is further directed to pay compensation of Rs. 3,00,000/- and litigation cost of Rs. 10,000/- totalling Rs. 3,10,000/- in favour of the complainant within 30 days from date otherwise the amount shall carry interest @ 8% p.a. from date till its realisation.

5. Aggrieved by the order of the State Commission, the appellant has filed this appeal before us. The delay of 60 days in filing the appeal as per the Registry was considered in light of the application for condonation of delay. In the interest of justice, the delay is condoned for the reasons advanced.
6. We have heard the learned counsel for the appellant. However, none appeared on behalf of the respondent since 07.12.2021 on 6 subsequent dates of hearings. Hence, he was proceeded *ex parte* on 20.02.2024 and the matter reserved.
7. Learned counsel for the appellant stated that parents of the appellant booked no.12/1A, Centre Sinthee Road, Kolkata 700 005, Ward no. 2 of Kolkata Municipal Corporation admeasuring 650 sq ft super built up area with car parking and entered into two separate Agreements for Sale (flat and car parking) with the respondent nos.1 to 8. Appellant submitted that respondent no.1 (Developer) entered into a Development Agreement based on a Power of Attorney in his favour by respondent nos. 2 to 7 (Landowners) on 04.07.2011 for construction of a ground plus three (G + 3) building. The Developer was responsible for erecting the building and to handover the respective flats/ portions to the landowners/ respondent nos. 2 to 7 and to the prospective purchasers under the Development Agreement and Power of Attorney. Appellant submitted that he had entered into 2 separate Agreements on 24.03.2013 for the flat for Rs.24,05,000/- and for car parking for Rs.4,00,000/-. Rs.25,000/- was also to be paid towards electric supply line. The total sale consideration was for Rs.28,30,000/-. Appellant submits that he paid Rs.25,25,000/- to the developer within time and without default including for electric supply line as per the agreements. According to the appellant the property was to be handed over to the appellant within 18 months by 24.09.2014 but despite paying Rs.25,25,000/- by this date with and only a balance amount of Rs.3,05,000/- payable, the property was not ready to be handed over. The appellant visited the property/ premises and found that many items of works remained incomplete and that on 10.04.2015 none of the other flats was handed over. Appellant submits that between 10.04.2015 to 21.07.2015 the appellant issued notices to all the respondents seeking Rs.3,05,000/-. Between 29.04.2015 to 12.06.2015 respondent no.1/ developer replied asking for enhanced sale consideration on the grounds of additional work and materials. However, the joint inspection/ verification by both the parties in the building did not substantiate this, including the electric line. In his written submission, appellant submitted that the Developer declined to hand over the property as the same was not completed even on or after 21.07.2015; rather, he demanded additional payment after joint inspection/ verification of the property which had failed to establish the basis for the demands. The appellant was therefore, constrained to file a complaint before the State Commission on 26.08.2015 which came to be decided vide the impugned order.
8. From the material on record, it is evident that two Agreements were signed on 24.03.2013 between the parties. As per the agreements, respondent undertook to handover the subject property in habitable condition within 18 months from the date of Agreement, i.e., 23.09.2014. The date of handing over after 18 months as per clause 8 was 23.09.2014. The appellant undertook to make payment as demanded by the respondent. The payment of Rs.25,25,000/- by the appellant is not in dispute. The respondent has not brought on record any reasons for not handing over possession of the flat and car park as per the agreements. From the material filed by the appellant, it does not emerge that there was any default on his part.

9. The State Commission's finding in the matter is that :

The facts and circumstances clearly indicates that after receipt of almost entire consideration amount phase wise the developer did not handover or execute the sale deed in favour of the complainant for which certainly the developer is deficient or negligent in rendering services to the buyer.

The OP Nos.2 to 8/landowners may have allegations against the developer but when the developer intended to sell out the subject flat or the car parking space from his own portion to a buyer, the landowners have no right to raise any objection in view of the Power of Attorney executed by them. In other words, the landowner has no right to stand in the way to the claim of the buyer/purchaser. In a landmark decision reported in (2008) 10 SCC 345 (Faqir Chand Gulati – vs. – Uppal Agencies Pvt. Ltd. & Anr.) while discussing over the matter, the Hon'ble Supreme Court in paragraph - 23 of the said decision has observed thus – “ ... Where the builder commits breach of his obligations, the owner has two options . He has the right to enforce specific performance and/or claim damages by approaching the Civil Court or he can approach the Forum under the Consumer Protection Act, for relief as ‘Consumer’ , against the builder as a service – provider. Section 3 of the Act makes it clear that the remedy available under the Act is in addition to the normal remedy or other remedy that may be available to the complainant “.

Considering all the above, I find that the complainant being a ‘Consumer’ as defined in Section 2(1)(d)(ii) of the Act hired the services of OP No.1/developer on payment of consideration but the OP No.1 is found negligent or deficient within the meaning of Section 2(1)(g) read with Section 2(1)(o) of the Act.

10. As the respondent no.1 remained unrepresented despite note, based on the above, the impugned order directs as under:

Consequently, the petition of complaint is allowed *ex parte* against OP No.1/developer and also against OP Nos. 3 and 6 and on contest against OP Nos. 2, 4, 7 and 8. The Opposite Parties are jointly and severally directed to deliver possession and to execute the deed of conveyance in respect of the flat and the car parking space as mentioned in the schedule of the agreements for sale in favour of the complainant within 60 days from date subject to payment of balance consideration amount. The OP No.1 /developer is further directed to pay compensation of Rs. 3,00,000/- and litigation cost of Rs.10,000/- totalling Rs. 3,10,000/- in favour of the complainant within 30 days from date otherwise the amount shall carry interest @ 8% p.a. from date till its realisation.

11. The Hon'ble Supreme Court has held in *Fortune Infrastructure Vs Trevor D' Lima* (2018) 5 SCC 442 that:

‘a buyer cannot be expected to wait indefinitely for possession and in a case of an unreasonable delay in offering possession, the consumer cannot be compelled to accept possession at a belated stage and is entitled to seek refund of the amount paid with compensation’.

12. It has laid down in *Kolkata West International City Pvt. Ltd. Vs Devasis Rudra II* (2019) CPJ 29 SC decided on 25.03.2021 as under:

“.....It would be manifestly unreasonable to construe the contract between the parties as requiring the buyer to wait indefinitely for possession. By 2016, nearly seven years had elapsed from the date of the agreement. Even according to the developer, the completion certificate was received on 29.03.2016. This was nearly seven years after the extended date for the handing over of possession prescribed by the agreement. A buyer can be expected to wait for possession for a reasonable period. A period of seven years is beyond what is reasonable. Hence, it would have been manifestly unfair to non-suit the buyer merely on the basis of the first prayer in the reliefs sought before the SCDRC. There was in any event a prayer for refund. In the circumstances, we are of the view that the orders passed by SCDRC and by the NCDRC for refund of moneys were justified.”

13. In the instant case, the delay is of nearly 09 years and 05 months. Before the State Commission, the prayer of the appellant was as under:

- a. To admit the complaint and to issue notice to the opposite parties to show cause as to why this complaint shall not be allowed and after the causes shown and after hearing the parties to allow/ grant the complaint directing for removal of the ‘defects’ and ‘deficiency’ in the services in question and to comply with the terms of (2) agreement for sale dated 24.03.2013 for the said flat and the car parking space to hand over the same flat and the car parking space to the petitioner ready in all respect and to receive and accept balance outstanding after adjustment of all interest upon deposit of all money made over by the petitioner and with adjustment for handing over physical possession of the said flat ready in all respect without defects, fully described in the schedule hereto and the car parking as per agreement for sale and the Kolkata Municipal Corporation Sanctioned Plan;
- b. To rectify all defects and shortcoming in the said flat and to hand over peaceful vacant physical possession of the said flat of 650 sq ft or 647.11 sq ft to ad unto and in favour of your petitioner complainant free from all defects and obstruction with water and electricity within certain date;
- c. To withdraw the illegal demand of the excess space charges as not to be paid by the purchaser;
- d. To rectify and/ or withdraw unfair trade practice;
- e. To direct adjustment of excess payment for shortage of space of the flat and interest @ 12% per annum on all deposits made by the complainant/ petitioner from date for the flat and car parking, for delay in handing over the flat and the car parking to your petitioner within time, i.e., w.e.f. 01.10.2014 or 24.09.2014 till the flat and the car parking handed over to the petitioner ready in all respect;
- f. To pay Rs.5000/- per day/ per diem as compensation and damage and for continuous mental agony created to the petitioner by the opposite party no.1/ opposite parties w.e.f. 24.09.2014 or 01.10.2014 till the ready flat and the car parking with CC or OC of the KMC is/ are handed over to your petitioner;
- g. Permanent/ temporary injunction restraining the opposite party/ parties not to deal with the said flat and car parking with any third party/s in any manner detrimental to the said 2 (two) agreement for sale dated 24.03.2013 till the disposal of this complainant;

- h. Cost of the complaint Rs.50,000/- including legal charges, advocate's fees and misc. expenses and total adjustment with dues outstanding for delay payable Rs.17,83,026/- minus Rs.30,5000/-, i.e., 14,78026/-; and
- i. Such other or further order/s and relief/s as may be directed by the Hon'ble Commission.

14. From the foregoing, deficiency in service is manifest as possession has not been offered by the respondents despite payment of nearly 90% of the consideration agreed upon between the parties. Respondent has neither appeared before the State Commission nor before us to present his case despite notice. We are therefore, compelled to consider this conduct as admission of the claims of the appellant. The prayer of the appellant is for enhancement of the relief awarded.

15. The Hon'ble Supreme Court in *Experion Developers Pvt. Ltd. Vs. Sushma Ashok Shiroor*, C.A. No. 6044 of 2019 decided on 07.04.2022, has laid down that compensation awarded should be compensatory and restitutionary and where refund is ordered, 9% per annum simple interest is fair compensation. However, the Apex Court in *GDA vs Balbir Singh*, (2004) 5 SCC 65 had also held that compensation may be varied from case to case based on the facts and circumstances of the case. In the case on hand the delay of 9 years is definitely inordinate and the amount involved is substantial, as nearly 90% of the sale consideration stood paid to the respondent no.1. The conduct of the respondents both before the State Commission and before this Commission is one of the impunity and deficiency which needs to be deprecated strongly.

16. After careful consideration of the various aspects and in view of the facts and circumstances of the instant case, we are inclined to allow the appeal with the following directions:

1. Respondent shall hand over the possession to appellant within two months without any charges. Respondents shall, jointly and severally, compensate the appellant for the delay in handing over possession @6% per annum from the date of promised possession till the date of valid offer with completion certificate from the authorities concerned;
2. In case the project is not complete, the amount received shall be refunded with compensation @ 12% per annum within 8 weeks failing which with interest @ 15% per annum till realization without any deductions;
3. Respondents shall also pay litigation cost of Rs.1.00 lakh to appellant; and
4. These orders will apply in respect of both the agreements in equal terms.

17. Pending IAs, if any, stand disposed of with this order.

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SUBHASH CHANDRA
PRESIDING MEMBER

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DR. SADHNA SHANKER

