

**NATIONAL CONSUMER DISPUTES REDRESSAL COMMISSION
NEW DELHI**

FIRST APPEAL NO. 959 OF 2019

(Against the Order dated 26/02/2019 in Complaint No. 74/2017 of the State Commission Rajasthan)

1. MAJOR (RETD) J S YADAV

S/O. SHRI BHOLA RAM, R/O. FLA TNO I-3, TEH
GOVERNMENT EMPLOYEES CO -OPERATIVE GROUP
HOUSING SOCIETY , SECTOR 3 PART II,
REWARI
HARYANA

.....Appellant(s)

Versus

1. TREHAN HOME DEVELOPERS PVT. LTD. & 3 ORS.
THROUGH ITS AUTHORISED SIGNATORY, B-13, DLF
INDUSTRIAL AREA, 14 MILESTONE MATHURA ROAD
NEAR BSNL OFFICE
FARIDABAD
HARYANA

2. TREHAN HOME DEVELOPERS PVT. LTD
THROUGH ITS AUTHORIZED SIGNATORY, HILL VIEW
GARDEN , 8 MILESTONE ALWAR BY PASS ROAD
BHIWADI
RAJASTHAN

3. THD MAINTENANCE COMPANY
THROUGH ITS AUTHORIZED SIGNATORY, HILL VIEW
GARDEN , 8 MILESTONE ALWAR BY PASS ROAD
BHIWADI
RAJASTHAN

4. SHRI SANDEEP JAIN, DIRECTOR
PARAS PROP MART (P LTD , UG 5, SHOPPING COMPLEX
KONARK OASIS TIJARA ALWAR ROAD
BHIWADI
RAJASTHAN 301 019

.....Respondent(s)

BEFORE:

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

FOR THE APPELLANT : MR. SUNIL REWAR, ADVOCATE WITH
APPELLANT IN PERSON.

FOR THE RESPONDENT : FOR THE RESPONDENTS NO. 1-3 : MR. ROHAN KHANNA,
ADVOCATE

FOR THE RESPONDENT NO. 4 : EX PARTE VIDE ORDER
DATED 14.02.2020

Dated : 20 September 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") by Major (Retd.) J S Yadav (hereinafter referred to as the "complainant") assailing the Order dated 26.02.2019 passed by the State Consumer Disputes Redressal Commission, Rajasthan (hereinafter referred to as the "State Commission") in complaint No. 74 of 2017, whereby the complaint was partly allowed.
2. We have heard the learned counsel for the complainant and the learned counsel for the respondents no. 1 to no. 3 (hereinafter referred to as the 'builder') and have perused the record including *inter alia* the impugned order dated 26.02.2019 and the memorandum of appeal.
3. This Commission, vide its Order dated 14.02.2020, had condoned the delay in filing the appeal.
4. The facts, in brief, are that the complainant, who is senior citizen aged about 81 year, had applied for a 3BHK flat admeasuring 1350 sq. ft. in the upcoming project, namely, "Hill View Garden Housing Complex", Bhiwadi, launched by the builder, in the joint name of himself and his wife, Smt. Shanti Devi, being the first applicant and paid a sum of Rs. 2,50,000/- as booking amount on 25.10.2006. On 10.11.2006, the builder vide its letter communication bearing Ref. THD/BHW/Receipt No. 0486 addressed to wife of complainant confirmed registration of 3 B/R residential unit admeasuring 1350 sq.ft super area in "Hill View Garden Housing Complex" situated at Bhiwadi as per the terms of application form at a basic cost of Rs. 17,95,500/- plus PLC, DC and other charges. On 01.06.2007, the builder vide its letter communication addressed to wife of complainant raised demand of 3rd installment for an amount of Rs. 2,41,159/- with 18% interest payable within 15 days failing which penalty of Rs.10,000/- was to be levied over and above the interest. The grievance of the complainant is that the registration was made for 1350 sq. ft. but on 08.09.2008, the builder vide its letter communication addressed to wife of complainant offered possession of the Flat No. 7, in Tower "G", having super area 1389 sq. ft. in Hill View Garden Housing Complex, situated at 8 Milestone, Alwar By-pass Road, Bhiwadi (hereinafter referred to as "Subject Flat"), in an arbitrary and capricious manner and even without intimation and consent for any such change in super area of the subject flat and raised a demand for the differential super area of 39 sq.ft. which is nothing but unfair trade practice. It is pertinent to note that the builder, without obtaining Completion Certificate as well as Occupancy Certificate in its favour pertaining to the Residential Housing Scheme carved out under the name and style "Hill View Garden Housing Complex" by the concerned authority, offered the possession of the subject flat. It is pertinent to put on record that complainant vide several letter communications dated 01.08.2009, 31.10.2011, 27.04.2013, 29.06.2013 & 20.05.2015 repeatedly requested the builder to furnish "Completion Certificate" and "Occupancy Certificate" pertaining to "Hill View Garden Housing Complex" situated at Bhiwadi. However the builder failed to furnish the same to complainant. His further grievance is that despite the settled position of law that builder/developer/promoter cannot sell parking areas

as independent unit as the same is extended as common areas and facilities for the Owners, it charged Rs.50,000/- towards covered car parking.

5. Being aggrieved, the complainant filed a complaint before the State Commission with the following prayer:-

- a. Direct the opposite parties to provide 'Completion Certificate' and Occupancy Certificate' to the complainant.
- b. Direct the opposite parties to pay 18% p.a. interest on total cost of Rs.21,72,390/- to the complainant from the date of offer of possession till date of providing Completion/ Occupancy Certificates.
- c. Direct the opposite party to pay Rs.16 lakhs as compensation amount.
- d. Direct the opposite parties to refund excess amount of Rs.46,550/- charged towards 39 sq.ft. increased area of the flat @ Rs.1330/- per sq.ft. along with 18% p.a. interest.
- e. Direct the opposite parties to refund Rs.50,000/- charged towards cost of covered parking along with rate of interest.
- f. Direct the opposite parties to pay Rs.1,00,000/- as expenditure for chasing the case for 8 long years.
- g. Direct the opposite party no. 3 to charge monthly maintenance charges only on physical occupation of flat on receipt of Completion and Occupancy certificates.

6. After appreciation of the facts of the case, the State Commission vide its order dated 26.02.2019, partly allowed the complaint directing the builder to pay compensation of Rs.1,50,000/- for not furnishing the occupancy certificate and completion certificate and to supply the completion certificate and occupancy certificate of the property to the complainant along with Rs.25,000/- as cost of proceedings.

7. Not satisfied with the order dated 26.02.2019, the complainant has filed the present appeal before this Commission.

8. Before this Commission, the counsel for the complainant strongly argued that despite the fact that the registration was made for 1350 sq. ft., the builder, vide its letter communication dated 08.09.2008 offered possession of the subject flat having super area of 1389 sq. ft. to the complainant, in an arbitrary and capricious manner and even without intimation and consent of the complainant for any such change and charged for the differential super area of 39 sq.ft. which is nothing but unfair trade practice.

9. Further, it is submitted that complainant vide letter 01.08.2009 categorically demanded "Completion Certificate" and "Occupancy Certificate" and vide several letters dated 31.10.2011, 27.04.2013, 29.06.2013 and 20.05.2015 repeatedly requested the builder to furnish the same pertaining to "Hill View Garden Housing Complex" situated at Bhiwadi in

which the subject flat is situated but the builder failed to furnish the same to complainant which is nothing but sheer negligence and deficiency of service on the part of builder.

10. Further, it is submitted that State Commission erred to appreciate the fact that despite its own concrete finding that Completion Certificate pertaining to Tower/Block-G issued in favor of builder vide letter dated 25.01.2018 by the concerned authority, then how physical possession could have been handed over to the wife of complainant way back on 20.09.2009 against the settled position of law. It is a legal obligation of the builder to obtain the requisite occupancy certificate before delivering possession of the flat to the buyer. No flat can be legally offered for being occupied by the purchaser without obtaining the requisite occupancy certificate nor can the purchaser legally occupy the flat without a certificate. In support of the above contention, reliance has been placed on ***Kamal Kishore & Anr. Versus M/s. Supertech Limited, Consumer Case No. 1009 of 2016 and Chaya Pradeep Bavadekar & 2 Ors. Vs M/S. Kamla Ankur Developers CC No. 622 of 2015.***

11. Further, it is submitted that despite the settled position that builder/developer/promoter cannot sell parking areas as independent unit as the same is extended as common areas and facilities for the Owners, the builder contrary to the settled position of law and in contravention of clause 3 of the flat buyer's agreement forming part of the proceeding, charged Rs.50,000/- towards covered car parking from the complainant, which amounts to unfair trade practice.

12. The learned counsel for the builder rebutted the claims made by the complainant, contending that according to Section 2(i)(d) of the Consumer Protection Act, 1986, the complainant cannot be considered to be a 'consumer' as on 21.04.2009, the complainant under his handwriting put forward an application to the builder and informed that "I have booked flat No, G-7 in the joint name of himself and his wife i.e. Jhabar Singh Yadav and Smt. Shanti Devi. I want to withdraw my name and ownership of the flat should be in the name of my wife Smt. Shanti Devi" and the said application dated 21.04.2009 was disposed of by removing the name of the complainant from the record of the flat.

13. Further, learned counsel drew the attention of the bench to clause 1.2(c) of the flat buyers' agreement dated 30.06.2007 which provides as under:

"It is made clear that the super area of the flat is tentative and subject to change till the construction of the GROUP HOUSING COMPLEX is complete. The Sale price payable shall be recalculated upon confirmation by the DEVELOPER of the final super area of the said FLAT and any increase or decrease in the super area of the said FLAT shall be payable or refundable without any interest, as per Schedule-II. If there shall be an increase in super area, the FLAT ALLOTTEE(S) agrees and undertakes to pay for the increase in super area immediately on demand by the DEVELOPER and if there shall be reduction in super area, then the refundable amount due to the FLAT ALLOTTEE(S) shall be adjusted by the DEVELOPER from the final installment as set forth in the schedule of payments appended in Annexure I".

He further argued that the complainant signed the flat buyers agreement accepting this term and bound with the agreement and there is no unfair trade practice on the part of the builder.

14. Further, it was argued that in Clause 28(a) of the flat buyers agreement dated 30.06.2007 it is clearly mentioned that “to provide necessary maintenance services the DEVELOPER shall, upon the completion of the said Tower/said GROUP HOUSING COMPLEX, maintain the said tower /said GROUP HOUSING COMPLEX by M/s Maintenance Agency the DEVELOPER in its sole discretion may deem fit. The FLAT ALLOTTEE(S) hereby agrees to execute Maintenance Agreement. The FLAT ALLOTTEE(S) further undertakes to abide by the terms and conditions of the Maintenance Agreement and to pay promptly, all the demands, bills, and charges as may be raised by the Maintenance Agency from time to time. The DEVELOPER reserves the right to change, modify, amend and impose additional conditions in the Maintenance Agreement at its discretion from time to time.”

15. Further, it was submitted that the builder issued an offer of possession to the complainant’s wife, Smt. Shanti Devi on 19.08.2009 and the complainant's wife Shanti Devi on 20.09.2009 satisfactorily accepted the possession without any protest. Therefore, there is no deficiency on the part of the builder.

16. Further, on 25.01.2018 UIT issued Completion Certificate for Tower G in which the flat of the complainant was booked which was produced and provided to the complainant.

17. The question which falls for our consideration is whether there is any deficiency in service on the part of the builder.

18. After considering the submissions and a thorough perusal of the evidence on record, it is established that the complainant paid the amount for the booking of the flat in October 2006, and a Flat Buyers Agreement was executed on June 30, 2007. The offer of possession was made to the complainant on 08.09.2008 prior to the issuance of a completion/occupancy certificate. Actual possession of the property was transferred to Smt. Shanti Devi on 20.09.2009. The factum of having taken possession of the said flat has been accepted by the complainant in the Letter of Intent dated 21.05.2018 vide para 10. However, even in that letter it is stated that due to lack of Occupation/completion certificate, they did not occupy the flat.

19. The complainant repeatedly requested the occupancy/completion certificates through letters dated October 31, 2011, April 27, 2013, June 29, 2013, and May 20, 2015, but the builder did not provide these documents. A partial Occupancy certificate dated 31.01.2014 was issued, but it does not include Tower G, where the complainant’s flat is located.

20. The learned counsel for the builder argued that the complainant had already taken possession of the unit. However, reference is made to the Supreme Court's decision in *Samruddhi Co-Operative Housing Society Ltd. v. Mumbai Mahalaxmi Construction Pvt. Ltd., Civil Appeal No. 4000 of 2019*, decided on January 11, 2022, which stated:

“In the present case, the respondent was responsible for transferring the title to the flats to the society along with the occupancy certificate. The failure of the respondent to obtain the occupation certificate is a deficiency in service for which the respondent

is liable. Thus, the members of the appellant society are well within their rights as 'consumers' to pray for compensation as a recompense for the consequent liability (such as payment of higher taxes and water charges by the owners) arising from the lack of an occupancy certificate."

Accordingly, the builder has exhibited a deficiency of service under the Act due to the undue delay in providing occupancy/completion certificate, resulting in hardships to the complainant.

21. Further, the complainant also contended that the builder increased the super built area of the flat from 1350 sq. ft. to 1389 sq. ft. and demanded additional payment. As per Clause 1.2(c) of the Flat Buyers Agreement dated 30.06.2007, the super area of the flat was stated as tentative and subject to change until the completion of the Group Housing Complex. The sale price was to be adjusted based on the final super area, with any increase or decrease in the area being payable or refundable without interest as specified in Schedule-II. Thus, the additional amount charged for the increased super area is valid, and the complainant is obligated to pay this amount. Therefore, this contention of the complainant is rejected.

22. Further, the complainant's assertion regarding charging of Rs.50,000/- towards covered parking area is found to be valid. Clause 1.2 of the buyers' agreement specifies that the sale price includes the exclusive right to use open/covered car parking. Consequently, the Rs.50,000/- charge for the parking space is deemed arbitrary and a breach of contract. Therefore, this amount shall be refunded to the complainant.

23. The Hon'ble Supreme Court in the case of *DLF Homes Panchkula Pvt. Ltd. vs. D.S. Dhanda*, 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.1,50,000/- granted by the State Commission is found to be not tenable.

24. In view of the above, the order of the State Commission is modified as under:

(a). The builder is liable to pay compensation in the form of interest at the rate of 6% per annum on the deposited amount from the date of possession i.e. 20.09.2009 till the date of obtaining Occupation/completion certificate i.e. 25.01.2018.

(b). The builder is directed to refund an amount of Rs.50,000/- to the complainant charged in lieu of covered parking area with interest at the rate of 6% p.a. from the date of deposit till its realisation.

(c). The builder is directed to hand over the occupation/completion certificate to the complainant, if not done.

(d). The compensation of 1,50,000/- awarded by the State Commission is set aside.

(e). The builder shall pay Rs.25,000/- as cost of litigation.

The order shall be complied with within six weeks from today, failing which, it shall carry interest at the rate of 9% per annum.

25. The appeal is disposed of accordingly. All pending applications, if any, stand disposed of.

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SUBHASH CHANDRA
PRESIDING MEMBER

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DR. SADHNA SHANKER
MEMBER