

**NATIONAL CONSUMER DISPUTES REDRESSAL COMMISSION
NEW DELHI**

FIRST APPEAL NO. 886 OF 2015

(Against the Order dated 29/09/2015 in Complaint No. 55/2010 of the State Commission
Maharashtra)

1. JHV CONSTRUCTION CO. PVT. LTD. & 2 ORS.
CO. PVT. LTD., HEAD OFFICE AT: C-/33/36-K, COLD
STORAGE, VIDYAPEETH ROAD, CHITTUPUR,
VARANASI-221001
UTTAR PRADESH

2. MR. HIRA LAL JAISWAL
DIRECTOR, C-33/36-K, COLD STORAGE, VIDYAPEETH
ROAD, CHITTUPUR,
VARANASI-221001
UTTAR PRADESH

3. MR. ABHISHEK JAISWAL
DIRECTOR, C-33/36-K, COLD STORAGE, VIDYAPEETH
ROAD, CHITTUPUR,
VARANASI-221001
NEW DELHI-110014

.....Appellant(s)

Versus

1. SHYAM SINGH
THROUGH HIS CONSITUTED ATTORNEY, MR.
DINDAYAL T. CHANDRUS, HARD ROCK CO-OP,
HOUSINGSOCIETY LTD., B-201, SECTION-7,
KHARGHAR,
NAVI MUMBAI,
MAHARASHTRA

.....Respondent(s)

FIRST APPEAL NO. 887 OF 2015

(Against the Order dated 29/09/2015 in Complaint No. 56/2010 of the State Commission
Maharashtra)

1. JHV CONSTRUCTION CO. PVT. LTD. & 2 ORS.
HEAD OFFICE AT: C-33/36-K, COLD STORAGE,
VIDYAPEETH ROAD, CHITTUPUR,
VARANASI-221001
UTTAR PRADESH

2. MR. HIRA LAL JAISWAL
DIRECTOR, C-33/36-K, COLD STORAGE, VIDYAPEETH
ROAD, CHITTUPUR,
VARANASI-221001
UTTAR PRADESH

3. MR. ABHISHEK JAISWAL
DIRECTOR, C-33/36-K, COLD STORAGE, VIDYAPEETH
ROAD, CHITTUPUR,
VARANASI-221001
NEW DELHI-110014

.....Appellant(s)

Versus

1. RAJIV KUMAR

THROUGH HIS CONSTITUTED ATTORNEY, MR.
DINDAYAL T. CHANDRUS, HARD ROACK CO-OP,
HOUSING SOCIETY LTD., B-201, SECTION-7,
KHARGHAR,
NAVI MUMBAI,
MAHARASHTRA

.....Respondent(s)

BEFORE:

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

FOR THE APPELLANT : MR. ADITYA NARAIN, SR. ADVOCATE WITH
MR. ABHISHEK AGARWAL, ADVOCATE
MR. KANICKA MITTAL, ADVOCATE
MR. PRAKHAR SRIVASTAVA,
MR. MISHRA RAJ SHEKHAR, ADVOCATE
FOR THE RESPONDENT : MR. ANAND PATWARDHAR, ADVOCATE

Dated : 05 April 2024

ORDER**DR. SADHNA SHANKER, MEMBER**

1. These two appeals have been filed under Section 19 of the Consumer Protection Act, 1986 (for short "the Act") in challenge to the common Order dated 29.09.2015 passed by the State Consumer Disputes Redressal Commission, Chandigarh (hereinafter referred to as the "State Commission") in complaints No. 55 and 56 of 2010 whereby the complaints were partly allowed.
2. Heard the learned counsel for the appellant (hereinafter referred to as the 'builder company') and the learned counsel for the complainants (hereinafter referred to as the 'complainants') and perused the record including the State Commission's impugned Order dated 29.09.2015 and the memorandum of appeal.
3. We see that similar facts and same questions of law are involved in these two appeals. As such they are being disposed of vide this common order, with appeal no. 886 of 2015 being taken as the lead case.

Appeal No. 886 of 2015 (lead case)

4. The brief facts of the case are that the complainant booked flat no. 203, in Hard Rock Building, situated at Plot no. 6-10, Sector 7, Kharghar, Navi Mumbai, admeasuring 1265 sq. ft. in the project developed by the builder company for a total consideration of Rs. 27,83,000/- by paying booking amount of Rs. 2,78,300/- on 24.09.2006. The allotment letter

dated 24.09.2006 with stagewise schedule of payment was issued. It is alleged that the builder company failed to execute the registered agreement even though advance payment of 10% of the agreed consideration was accepted and consequently failed to deliver the possession within time. The complainant is an N.R.I. and was operating through General Power of Attorney holder to materialize the contractual obligations to purchase the said flat.

5. The complainant filed a complaint before the State Commission.

6. The builder company contested the complaint by filing written statement and raised preliminary objection that the complainant is not a consumer as he was an N.R.I. and invested small amount to purchase the flat. It is further alleged that the complainant paid only Rs. 2,78,300/- and did not pay further due amount. Hence, the builder company cancelled the allotment of booked premises.

7. The State Commission, vide its order dated 29.09.2015 partly accepted the complaint and directed to handover vacant and peaceful possession of flat no. 203 in Hard Rock Building, admeasuring 1265 sq. ft., plot no. 6-10, Sector 7, Kharghar, Navi Mumbai, to the complainant after accepting the balance consideration of Rs. 25,04,700/- from the complainant or in alternative the builder company was directed to handover vacant and peaceful possession of the flat of identical size in the same locality to the complainant and to pay the balance amount of Rs. 25,04,700/- to the builder company and in case the builder company refuse to accept the amount, the complainant is directed to deposit the said amount in the office of the State Commission. The builder company was also directed to pay Rs.1,00,000/- as compensation to the complainant towards mental harassment with Rs. 25,000/- as litigation cost.

8. Aggrieved by said order of the State Commission, the builder company filed an appeal before this Commission for setting aside the order of the State Commission.

9. Learned counsel for the builder company has argued that the State Commission had failed to appreciate that the complaint is barred by limitation as the complaint was filed on 06.10.2009 while the cause of action had arisen on 24.09.2006 when the allotment was made. In this regard, he further stated that the occupation certificate was issued on 07.05.2007 meaning thereby that the project was complete. He further submitted that the complainant had failed to make the payment as per construction link plan, knowing well that the construction is at an advanced stage, therefore, the builder company has cancelled the allotment. He further stated that the complainant is not a 'consumer' within the meaning of the definition given in section 2(1)(d) of the Act 1986 as he has bought it for investment purpose.

10. The learned counsel for the complainant has vehemently argued that as per the payment schedule, the complainant approached the builder company for signing the agreement and got it registered before the Sub-Registrar, Navi Mumbai so as to enable the complainant to process the loan from his banker and pay the balance consideration but the builder company failed to execute the agreement for sale as agreed by the opponents on 23.07.2007 and the non-execution of the agreement is in violation of section 4 of the MOFA Act, 1963, which is deficiency in service. As regards further payments, he further argued that no letter of demand was received by the complainant from the builder company, hence, no

payment could be made by the complainant. He further submits that the cause of action had first arisen when the builder company had failed to execute the agreement and continued till they unilaterally cancelled the booking vide letter dated 12.07.2008 and the complaint was filed within limitation period. He further submits that after booking the flat, the price thereof has gone up and for not executing the agreement and by arbitrary terminating the booking, the builder company has indulged in unfair trade practice to make profit by selling the said flat to the third party at the current market rate. It is further stated that the State Commission has passed a well-reasoned Order and the appeal is liable to be dismissed.

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

12. As regards point of limitation is concerned, the builder company has not been able to produce any document to show that any letter regarding cancellation of the allotment was communicated to the complainant and the affidavit filed by Mr. Hira Lal Jaiswal son of Late Ram Nath Jaiswal, Director of the builder company clearly states that 'the cancellation of allotment was communicated to the Respondent but no cancellation letter was issued to the respondent'. It is apparent that the builder company had only sent the first letter dated 12.07.2008 and before that he has not made any communication with the complainant. This letter is said to be a reply to a legal notice but cancelled the allotment as per para 4. Initially, the complainant filed a consumer complaint before the District Commission Raigad in the year 2009 but for want of pecuniary jurisdiction, the same was disposed of granting liberty to the complainant to file the same. It is stated by the complainant in the evidence that the complaint was filed on 03.04.2010. The first written communication regarding termination was made on 12.07.2008. If we count the period from the letter dated 12.07.2008, the complaint is within limitation period.

13. In so far as the point whether the complainant is a consumer or not is concerned, the builder company has not been able to produce any documentary evidence that the complainant is engaged in purchasing and selling the plots. In view of this Commission's judgment in *Kavita Ahuja Vs. Shipra Estate Ltd. and Jaikrishan Estate Developers Pvt. Ltd. and Ors., I (2016) CPJ 31 (NC)* the onus of proof to prove the same lies upon the builder company which has not been discharged.

It has also been argued by the builder company that the allottees are not consumers as the amount that were paid at the time of allotment were paid from the account of the Power of Attorney Holder. It has been pointed out that the payments and allotment letter were of dated 24.09.2006 while the power of attorney is dated 14.08.2008.

It is seen that the receipts have been issued in the name of the complainant and the allotment letter was also issued in his name. The source of money is, in our view, not relevant. In view of the same, it is undisputed that the allotments were made in the name of the complainant.

14. As regards the point of payment, the builder company has not produced any documentary evidence that any demand letter was issued to the complainant. Even the builder company has failed to produce any cancellation letter prior to 12.07.2018. If some payment was due on the part of the complainant, it is obligatory on the part of the builder

company to issue demand letter. In the interest of justice, it is not apt to cancel the allotment outrightly without giving any notice to the complainant.

Furthermore, the complainant has made an application dated 06.06.2007 to the builder company to execute the agreement for sale so as to secure the required loan amount and to make the payments but the builder company has not produced any document to show that they had executed agreement for sale at that time, which is in violation of section 4 of the MOFA Act.

15. In view of the above, we are of the opinion that there is clear deficiency on the part of the builder company and the Order of the State Commission is a well-reasoned Order and the same does not suffer from any illegality or irregularity.

16. The appeal fails and the same is dismissed. Pending I.A., if any, stands disposed of with this Order.

17. The appeal is dismissed.

F.A. No. 887 of 2015

18. The appeal no. 887 of 2015 is disposed of in terms of the examination and reasons contained hereinabove apropos appeal no. 886 of 2015 (the lead-case) with similar directions *mutatis mutandis*.

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SUBHASH CHANDRA
PRESIDING MEMBER

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DR. SADHNA SHANKER
MEMBER