

**NATIONAL CONSUMER DISPUTES REDRESSAL COMMISSION
NEW DELHI**

FIRST APPEAL NO. 1793 OF 2018

(Against the Order dated 07/03/2018 in Complaint No. 310/2013 of the State Commission
West Bengal)

1. ABHOY KUMAR BANDYOPADHYAY & ANR.
49,SHASTRI ROAD, NAIHATI, P.O. & P.S. NAIHATI,
24 PARGANAS (N)-743165
WEST BENGAL

2. MALAY KUMAR BANERJEE
FLAT ID 602, ALAKTIKA HOUSING COMPLEX, ACTION
AREA II-D, NEW TOWN P.S. NEW TOWN P.O. NEW TOWN
ACTION AREA II,
KOLKATA 700 161

.....Appellant(s)

Versus

1. M/S ELITA GARDEN VISTA PROJECT LTD.
3/1, DR. U.N. BRAHMACHARI STREET,
KOLKATA
WEST BENGAL 700 017

.....Respondent(s)

BEFORE:

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

FOR THE APPELLANT : MR. SOUVIK BANERJEE, AR (THROUGH VC)
FOR THE RESPONDENT : MR. PARTHA SIL, ADVOCATE WITH
MR. ABIRAJ CHOWDHARY, ADVOCATE (PHYSICAL)
MR. SAPTARISHI DUTTA, ADVOCATE (THROUGH VC)

Dated : 31 May 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 Abhoy Kumar Bandyopadhyay and Malay Kumar Banerjee (hereinafter referred to as the "complainants") assailing the order dated 07.03.2018 passed by the State Consumer Disputes Redressal Commission, West Bengal (hereinafter referred to as the "State Commission") in complaint No. 310 of 2013 whereby the complaint was partly allowed.

2. There is a delay of 148 days in filing the present appeal.

This Commission vide its Order dated 30.07.2020 has condoned the delay.

3. The facts, in brief, are that on 25.08.2012 the complainants, being senior citizens, applied for allotment of an apartment with M/s Elita Garden Vista Project Ltd., formerly known as M/s Keppel Magus Development Pvt. Ltd., (hereinafter referred to as the 'builder') and deposited a sum of Rs.1,00,000/- as booking charges. On 12.10.2012, an agreement for sale was executed whereby the complainants agreed to purchase a flat with a super built-up area of 1350 sq. ft and a built-up area of 1033 sq. ft. on the ground floor in Block 16, along with exclusive right to use a terrace sit-out area of 244 sq. ft. adjacent to the apartment and a right to one covered car parking space at Elita Garden Vista, Flat 1, Block 16, Ground Floor, Plot III-E/4 & III-E/4/1, Action Area-III, village and post Akandakeshari, P.S.- New Town, Kolkata, Dist. – North 24 Parganas for a total consideration of Rs.55,77,000/-. It is alleged that upon making all the payments, the builder executed a deed of conveyance in favour of the complainants on 05.03.2013 and they took possession of the flat on 08.03.2013. However, upon occupation, the complainants noticed numerous issues such as cracked walls, lack of water supply in the kitchen, rusting in the railings, and electrical system malfunctions. These concerns were communicated to the builder on 04.05.2013 and the keys were handed over to them for rectification. It is alleged that on 01.06.2013, the builder returned the keys to them with the assertion that the issues had been addressed. Subsequently, it became evident that the defects were not adequately rectified, which prompted the complainants to return the keys to the builder. A reassurance was given by the builder stating that all the issues would be resolved but upon inspection by the complainants, it was found that the condition of the flat had worsened. Hence, on 25.11.2013, a demand notice was sent to the builder outlining the grievances, which was met with no response. Consequently, alleging deficiency in service on the part of the builder, the complainants approached the State Commission seeking following reliefs:

“a) To admit the Complaint and issue show cause notice upon the opposite party.

b) To direct the Opposite Party to rectify all the glitches to the satisfaction of Complainants within a specific period or pay the amount of Rs. 8,00,000 (Eight Lac) only for rectify all the glitches or service of the said flat or to refund the price said Flat price of Rs. 55,77,000/- (Fifty five lac and Seventy Seven thousand) only along with other consideration of money as stated in paragraphs 6 to 9 as aforesaid together with 18% interest on and from cause of action till realization of the same.

c) To direct the Opposite Party to pay compensation of Rs.30,000.00 (thirty Lac) only for loss, harassment and mental agony to the complainants as they are senior Citizen of India.

d) litigation cost assessed, and other miscellaneous cost at 1,000,00/- (One lac) only.

e) To direct an interest 9% per annum shall accrue over the entire sum due to the credit of the Complainants till full realization.

f) and to pass such other or further Order(s)/Direction(s) as the Ld. Commission may deem fit and proper.”

4. The builder filed the written version raising preliminary issues that the complainants had become absolute owners of the flat in question and in view of the transfer of title, the complainant cannot be considered to be a consumer and that the deed of conveyance entered into between the parties contains an arbitration clause and in view of such arbitration clause any dispute arising out of the deed of conveyance would have to be decided under the provisions of the Arbitration and Conciliation Act, 1996. It was further stated that the allegations contained in the complaint are an afterthought inasmuch as after the execution of the Deed of Conveyance on March 05, 2013, a joint inspection of the flat was conducted on March 8, 2013 and a snag list was prepared and all the issues had been resolved. It was further stated that there was no defect in the flat at the time of handing over the possession. It was further stated that after taking possession of the flat on 08.03.2013, the complainants do not raise any immediate complaint with regard to the flat in question and it was only after two months i.e. only on May 2, 2013 the complainants alleged that there was some minor issues with regard to the subject flat and the builder rectified all the defects. It was further alleged that there was no deficiency on the part of the builder.

5. The Joint Registrar of the State Commission in compliance of the order dated 10.02.2016 of the State Commission, appointed an Engineer Commissioner to ascertain the damages in the flat in question and the Engineer Commissioner has submitted report dated 28.03.2016 pointing out certain defects in the flat in question.

6. After appreciation of the facts of the case, the State Commission vide its order dated 07.03.2018 partly allowed the complaint and directed the builder to rectify all the glitches/defects in respect of two numbers of toilets, living/dining room, main bed room and second bed room and to pay Rs.50,000/- in favour of complainants as compensation towards the harassment and mental agony along with Rs. 10,000/- as litigation cost as also to hand over the keys of the flat to the complainants by 30.06.2018 after removing the defects as mentioned in the report of the Engineer Commissioner.

7. Not satisfied with the order of the State Commission, the complainants have filed the present appeal before this Commission.

8. Before us, the authorised representative of the complainants strongly argued that the State Commission erroneously recorded that New Town Kolkata Development Authority (NKDA), a statutory authority under Government of West Bengal issued grant of Occupancy Certificate in respect of building including the subject flat on 17.12.2012. He further argued that the document presented by the builder was actually a Partial Occupancy Certificate, which expired on November 28, 2013, thereby indicating the builder's failure to fulfill their statutory obligation by not obtaining the Occupancy Certificate to date. The authorized representative further contended that the builder provided less saleable area, as highlighted in the report of the Engineer Commissioner, which indicated an abnormally high ratio of built-up and super built-up area exceeding 30%, suggesting unfair trade practices by the builder. The report also highlighted severe defects within the 2BHK apartment, such as heavy water seepage and leakage, attributed to poor workmanship by the builder. The authorized representative argued that the builder used substandard materials and made false representations about the condition of the property, entitling them to claim compensation under the applicable laws for the denial of promised facilities or benefits. Additionally, the authorized representative raised concerns about severe electrical faults within the flat, which

were reported to the builder but remained unresolved, leading to discomfort and inconvenience. The authorized representative disputed the State Commission's ruling regarding the common area and club house, asserting their entitlement to relief as they had paid for these facilities and owned a proportionate share in the land. It was contended by the complainants that deficiencies with respect to common area and club house are a cause of discomfort as they have paid for it and they own undivided proportionate share in the land with all benefits of common facilities. They also highlighted the absence of promised amenities during possession / handover and the ongoing incompleteness of the project, indicating undue pressure from the builder to sign documents and register the deed of conveyance. Finally, the complainant requested for enhancement of compensation for alleged service deficiencies and requested rectification of the defects in the apartment in line with the Engineer Commissioner's report.

To support their above contentions, reliance has been placed on following judgments:

a. *Chaya Pradeep Bavadekar & Ors. Vs. M/S Kamla Ankur Developers CC/622/2015 (NCDRC)*

b. *Shri Rajeev Nohwar & Anr. Vs M/S Shahajanand Hi Tech Construction Pvt. Ltd. CC/346/2014(NCDRC)*

c. *Wg. Cdr. Arifur Rahman Khan and Aleya Sultana and Ors. Vs. DLF Southern Homes Pvt Ltd Civil Appeal No. 6239 of 2019*

d. *M/s Narne Construction P. Ltd. Vs Union of India Civil Appeal Nos. 4432-4450 of 2012.*

9. The counsel for the builder vehemently countered the complainants' claims and argued that the builder has already complied with the impugned order and has already tendered the compensation amount and litigation cost vide letter dated 22.03.2018 and tendered an amount of Rs.30,000/- to each complainant, by way of cheque which were refused by them. Additionally, vide the same letter, the builder also asked for the keys of the said flat for rectification of the defects, however, till date the complainants have not handed over the keys. Further it was argued that additional plea of the complainants for non-availability of occupation/completion certificate, independent electricity meter, poor conditions of common areas, deviation from the approve lay out, refund of maintenance amount, maintenance corpus, etc. in respect of the said Project were neither pleaded in the consumer complaint nor necessary amendments were made in the complaint. It was contended that unless the allegation is made in complaint, the allegations made otherwise cannot be considered by this Commission. Reliance is placed on ***Dr. S.Gurunathan (Dead) Vs. Vijiya Health Centre III (2002) CPJ 211 (NC)***.

Furthermore, the learned counsel for the builder argued that the sit-out area of 244 sq. ft. is part of the common area but has been exclusively granted for the complainants' enjoyment without granting ownership rights. They referred to Clause 1 of the Sale agreement dated 12.10.2012, stating that the appellants have exclusive rights to use the terrace/sit-out area. They also argued that the State Commission rightly concluded that such claims regarding common areas and amenities were not initially raised in the consumer complaint, nor was

permission granted to pursue the complaint in a representative capacity under Section 12(1) (c) of the Act.

Lastly, the learned counsel for the builder asserted that they have obtained the Occupation Certificate for the mentioned tower, which has been periodically renewed by the New Town Kolkata Development Authority. They clarified that the project is being developed in phases, and until the entire project is completed, obtaining a completion certificate is not applicable. They emphasized that it is established practice for homebuyers to occupy and reside in flats based on the occupation certificate issued by the competent authority.

10. We have heard the authorised representative of the complainants and the learned counsel for the builder and have perused the record, including the Order dated 07.03.2018 of the State Commission and the memorandum of appeal.

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

12. The first ground taken in appeal is regarding the partial occupancy certificate, which expired on 28th November 2013.

13. It is seen that the partial occupancy certificate was dated 17.12.2012 and the flat was handed over to the complainants. The complainants have admittedly taken possession of the said flat after execution of conveyance deed on 08.03.2013. On that date, a valid occupancy certificate was available with the builder and possession was taken. In this regard, it is admitted by the builder that necessary renewals have been taken from time to time as per the West Bengal Municipal (Building) Rules, 2007 under which partial and block-wise occupancy certificates are issued. Further, the builder has objected to this ground of appeal by highlighting that it was never a part of the original complaint and it cannot be raised in appeal. Since this is a question of fact, which was never agitated before the State Commission, which passed the order dated 07.03.2018, relying on the judgment of **Dr. S. Gurunathan (dead) vs. Vijiya Health Centre III (2002) CPJ 211 (NC)**, the said ground cannot be adjudicated upon at the appellate stage.

The next ground of appeal is that the State Commission did not adjudicate in respect of issues raised in M.A. No. 662 of 2015 and M.A. No. 109 of 2016 relating to super built-up area and the built-up area raised by them. In this respect, it is seen that M.A. No. 662 of 2015 and M.A. No. 109 of 2016 were disposed of by the State Commission vide order dated 10.02.2016 wherein specifically the points related to the super built up area and the built up area in number 5 and 6 were decided not to be referred to the Engineering Commissioner.

Further, the complainants have prayed that they are entitled to get back the amount less saleable area but the State Commission in its order has stated that this claim for refund of amount on account of less saleable area did not find any place in the pleadings and therefore, the same cannot be adjudicated upon. Therefore, in view of the finding of the State Commission, we are of the opinion that the same cannot be adjudicated at the appellate stage.

14. As regards the issue related to the sit out area, it is seen from the record that the complainants have the right to use the sit out area but do not own the sit out area. The

Engineer Commissioner has pointed out certain defects in the tiles of the set out area being damaged. However, he has clearly stated that this may reoccur in the course with time due to upper floor installation of air conditioner and window grills by flat owners.

15. Another ground of appeal is regarding the non-release of domestic electricity connection by the New Town Kolkata Development Authority. It has been submitted that the domestic electricity connection has not been released as the builder has been non-compliant as per the requirements. This point was raised through M.A. No.1059 of 2016, which has been taken up in November 2010 and it has been observed that this point will be taken up at the time of final hearing. However, it is seen that this point has not be adjudicated by the State Commission in its final order. Therefore, we are of the view that the builder has to take all steps necessary so that a domestic electricity connection may be made available to the complainants, as lack of electricity connection is a deficiency in service.

16. It has been submitted by the builder that they had sent the compensation and cost of litigation vide letter dated 23.2.2018 to each of the complainant by way of cheque. However, the letters were refused by the complainants and returned with the postal remarks ‘refused’. It is seen that through the letter dated 22.03.2018, the builder had also requested the complainants to handover the key of the flat to the builder for removing the defects as directed by the State Commission. However, till the date of filing of the written submissions by the builder in 2021, the keys of the said flat were not handed over by the complainants to the builder. The complainants have not denied or controverted these assertions of the builder. So, it is clear that the key of the flat remains with the complainants. As the compensation and litigation cost was sent by the builder within time but refused, no interest can accrue on the same.

17. In view of the above discussion, the Order dated 07.03.2018 of the State Commission is modified as under:

- i. The complainants are directed to hand over the key of the flat for necessary rectification as per the defects pointed out by the learned Engineer Commissioner within thirty days of the date of this order.
- ii. The builder is directed to rectify all the defects, including set out area, within 60 days from the date of receipt of the keys from the complainants.
- iii. The builder is directed to handover the provision of domestic electricity connection within a period of 60 days from the date of this order.
- iv. The directions of the State Commission to grant compensation and litigation cost are upheld, without an interest component.

18. As regards common area, the complainant in this appeal has stated that some have not been provided while others have been provided late. It has been stated that the Engineer Commissioner’s report has highlighted some deficiencies in the club house. The same may be rectified by the builder in time period as specified in para 17(ii).

19. In view of the above, the appeal is disposed of. All pending application, if any, shall stand disposed of.

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**SUBHASH CHANDRA
PRESIDING MEMBER**

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**DR. SADHNA SHANKER
MEMBER**