

**NATIONAL CONSUMER DISPUTES REDRESSAL COMMISSION
NEW DELHI**

FIRST APPEAL NO. 197 OF 2022

(Against the Order dated 09/02/2022 in Complaint No. 231/2019 of the State Commission
Chandigarh)

1. SUSHMA BUILDTECH LTD.

THROUGH ITS AUTHORISED REPRESENTATIVE SHRI
BHUPINDER SINGH BEDI, UNIT NO. B-107, BUSINESS
COMPLX AT ELANTE MALL, 1ST FLOOR, INDUSTRIAL
AREA PHASE-1,
CHANDIGARH-U.T. 160002

.....Appellant(s)

Versus

1. ANIRAJ SHARMA & ANR.

S/O. MR. PREM CHAND SHARMA, R/O. HOUSE NO. 1295,
SECTOR-11,
PANCHKULA
HARYANA

2. MRS. NEELAM KUMAR

W/O. MR. ANIRAJ SHARMA, R/O. HOUSE NO. 1295,
SECTOR-11,
PANCHKULA
HARYANA

.....Respondent(s)

BEFORE:

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

FOR THE APPELLANT :

Dated : 27 May 2024

ORDER

For the Appellant

Mr Arjun Jain, Advocate with

Ms Simran Kumari, Advocate

For the Respondents

Mr Amarjeet Singh, Advocate

ORDER**PER MR SUBHASH CHANDRA**

1. This appeal under Section 51 of the Consumer Protection Act, 2019 (in short, the 'Act') challenges the order dated 09.02.2022 of the State Disputes Redressal Commission, U.T., Chandigarh (in short, the 'State Commission') in Complaint No. 231 of 2019 partly allowing the complaint and directing the appellant herein to hand over actual physical possession of the flat in question after providing the promised basic amenities within a period of three months and to compensate the respondent as directed. The impugned order is assailed on various grounds, *inter alia*, alleging that the order is *non est* in law since possession stands handed over and payment of compensation after this date is not justiciable.

2. Briefly put, the relevant facts of the case are that based on an application dated 26.07.2017 for a flat in appellant's project "Sushma Crescent", Zirakpur, Mohali the respondent was allotted apartment no. H-103 for a basic sale price of Rs 47,47,801/- payable as per a Special/Time-Linked Payment Plan vide allotment letter and Buyer's Agreement dated 13.09.2017. Possession was undertaken to be offered within 18 months with 6 months grace from date of Agreement, i.e. by 13.09.2019. Respondents obtained a loan from Punjab National Bank for Rs 25,00,000/- against mortgage of the apartment. Appellant issued 8 cheques for Rs 16,004/- each as discount (total Rs 1,22,869/-) and a further discount of Rs 10,00,000/- was provided towards Preferential Location Charges (PLC) and Floor Premium Charges. Appellant obtained a Partial Completion Certificate dated 15.12.2017 and an approval for re-numbering of towers from the competent authority dated 31.08.2020. An intimation of possession letter was issued by the appellant on 16.08.2019 along with a final demand for Rs 9,99,830/-. As the respondents failed to take possession, reminders were issued on 04.09.2019, 19.09.2019 and 04.10.2019. However, respondents filed Consumer Complaint No 231 of 2019 on 15.10.2019 seeking possession of the unit in a habitable condition with the promised amenities and other reliefs including compensation. On 07.11.2019 appellant cancelled the allotment. However, the appellant was directed by the State Commission vide order dated 04.09.2020 to hand over possession of the apartment which was done on 09.09.2020. The complaint was decided on contest by the State Commission which directed the opposite party as under:

19(i) To deliver actual physical possession of the unit in question complete in all respects i.e. after providing all the basic amenities referred to above, to the complainant within a period of three months from the date of receipt of a certified copy of this order on making remaining payment, if any, by them.

(ii) To pay compensation at Rs 5/- per sq ft per month of the super built-up area of the said unit as per Clause 14(d) of the Apartment Buyers Agreement Annexure C 2, and also interest @ 6% on the entire deposited amount starting

13.09.2019 till 31.01.2022 within a period of 30 days from the date of receipt of a certified copy of this order, failing which the entire accumulated amount shall carry penal interest @ 9% p.a. from the date of default till this payment is made.

(iii) To pay compensation at Rs 5/- per sq ft per month of the super built-up area of the said unit aforesaid and also interest @ 6% p.a. on the entire deposited amount w.e.f. 01.02.2022 onwards (per month). by the 10th of the following month to the complainants till actual delivery of physical possession of the unit complete in all respects.

(iv) To pay lump-sum compensation for mental agony and harassment and cost of litigation to the tune of Rs 50,000/- to the complainants within a period of 30 days from the date of receipt of a certified copy of this order failing which, the said amount shall carry interest at 9% p.a. from the date of passing of this order till realization.

This order is impugned before us praying for the following reliefs:

- a. Set aside the impugned Order dated 09.02.2022 passed by the Hon'ble State Commission in CC No. 231 of 2019; or
- b. Modify the impugned Order dated 09.02.2022 passed by the Hon'ble State Commission in CC No. 231 of 2019 in the First Appeal to expunge the findings of paper possession and delay in offering possession and the subsequent operative directions numbers 19(ii), 19(iii) and 19(iv); and
- c. Direct the Respondents to forthwith take possession of the Unit by making all balance payments including Sale Consideration, Delayed Payment Charges, Holding Charges, etc.,; and
- d. To pass such other and further orders as may be deemed just as necessary in the facts and circumstances of the present case.

3. We have heard the learned counsel for the parties and carefully considered the material on the record.

4. The appellant's case is that the appeal is limited to the extent of the compensation granted under two heads by the State Commission although no prayer for compensation was made by the respondents/complainants and that since possession had been offered and accepted on 09.09.2020, compensation could not have been granted after this date. Therefore, it was submitted that the impugned order is un-implementable as it has directed handing over of possession which has already been done and awards compensation beyond this date. The appellant relied on judgments in *Krishna Priya Ganguly Vs. University of Lucknow & Ors. etc.*, AIR 1984 SC 186; *Om Prakash & ors. Vs. Ram Kumar & Ors.*, AIR 1991 SC 409; *Bharat Amratlal Kothari Vs. Dosukhan Samadkhan Sindhi & Ors.*, AIR 2010 SC 475; *Fertilizer Corporation of India Ltd. & Anr. Vs. Sarat Chandra Rath & Ors.*, AIR 1996 SC 2744. It was argued that a Buyer's Agreement was entered into on 13.09.2017 whereunder the sale consideration of Rs 47,47,801/- was to be paid as per a Special/Time-Linked Payment Plan. Under this Plan, based upon incentives provided, including a discount of Rs 10,00,000/- towards Preferential Location Charges (PLC), appellant issued 7 cheques of Rs.16,004/- each (total Rs.1,22,869/-) to the respondents. A Partial Completion Certificate

dated 15.12.2017 and an intimation of possession was issued on 16.08.2019 by the appellant seeking payment of final dues of Rs 9,99,830/- which the respondents failed to do. Several reminders were issued between 04.09.2019 and 04.10.2019. Since respondents failed to do so, appellant issued a cancellation of allotment on 07.11.2019. A clarification on tower numbers was received from the competent authority on 31.08.2020. The respondents approached the State Commission through a complaint which was disposed of on 09.02.2022 directing appellants to hand over possession complete in all respects within 3 months subject to respondents making payment of balance dues and appellants paying compensation @ Rs 5/- per sq ft per month of the super built area and compensation @ 6% p.a. on the deposited amount from 13.09.2019 till 31.01.2022 or with 9% interest in default. State Commission also directed payment of interest @ 6% on the entire deposited amount from 01.02.2022 till actual delivery before the 10th of every month till delivery was handed over. In addition, compensation of Rs 1,50,000/- for harassment, agony and litigation cost was awarded within 30 days failing which with interest @ 9% for the period of default. As possession was handed over on 09.09.2020 as per Possession Certificate filed, compensation beyond this date was not justifiable, according to the appellant. It was also contended that in view of various concessions and discounts already offered by the appellant including waiver of PLC and floor premium charges, the claim of further relief by the respondent was contested. In addition, it was argued that the respondents were not 'consumers' since they were residents of Panchkula and had not disclosed details of properties purchased or sold in terms of **Kavita Ahuja Vs. Shipra Estate Ltd.**, CC No. 137 of 2020 and also not discharged the burden of proving that they were 'consumers' as per judgment of the Hon'ble Supreme Court in **Branch Manager, Indigo Airlines, Kolkata & Anr. Vs. Kalpana Rani Debbama & Ors.**, 2020 SCC Online SCC 90. The appellant also contended that since possession had been handed over on 09.09.2020 as per offer of possession dated 16.08.2019, the State Commission erred in entertaining the complaint as the main relief sought was of Rs 10,50,000/- and hence pecuniary jurisdiction did not vest with it as per this Commission's judgment in **Amrish Kumar Shukla Vs. Ferrous Infrastructure Pvt. Ltd.**, in CC 97 of 2016 dated 07.10.2016. Jurisdiction also did not lie with the State Commission since only the branch office of the appellant was in Chandigarh and the Supreme Court had held in **Sonic Surgical Vs. National Insurance Co. Ltd.**, (2010) 1 SCC 135. It was alleged that respondents suppressed material facts willfully with regard to the offer of possession and subsequent acceptance of possession, and discounts obtained by the respondent. The appellant argued that the complaint deserved to be set aside in view of the Supreme Court's judgment in **S.P. Chengalvaraya Naidu Vs. Jagannath**, 1994 (1) SCC 1. Time was argued to not be of the essence since the date of possession was not guaranteed under the contract and the Buyer's Agreement needed to be viewed holistically. It was further argued that relief cannot be beyond the ambit of the pleadings. It was also submitted that as held in **Bharti Knitting Vs. DHL Worldwide Courier**, (1996) 4 SCC 704 the terms of the contract are binding and relief can only be limited to the liability under the contract. Relief by way of interest had also been held by the Apex Court to not be excessive or under multiple heads. It was contended that the Supreme Court had held that the Contract Act, 1872 shall apply when parties under the Consumer Protection Act had consented without objections/challenges. The State Commission was stated to have erred in holding that non completion of provision of certain amenities did not amount to deficiency especially since possession stood handed over. Reliance was placed on **Wg Cdr Arifur Rahman Khan & Ors. Vs. DLF Southern Homes Pvt. Ltd. & Ors.**, CA Nos 6239 and 6303 of 2019 dated 24.08.2020 to argue that

compensation could not be awarded in perpetuity. It was argued the State Commission erroneously held that intimation of possession dated 16.08.2019 was a mere paper possession and incidental was unsustainable since the provision of amenities was ancillary and a Partial Completion Certificate for the purpose of possession has been upheld under the RERA, 2016. It was therefore prayed to allow the First Appeal.

5. *Per contra*, it was argued by the learned counsel for the respondents that the possession required to be handed over has to be valid, legal and within the timeframe promised. As per Clause 14 (d) of the Agreement, the due date for handing over possession was 18 months from the date of execution of Agreement with a six month grace period, i.e., by 13.09.2019. Possession stated to have been offered on 16.08.2019 was merely a paper possession as the unit was not habitable. The appellant deliberately and with *malafide* intention cancelled the allotment on 07.11.2019 after CC No 231 of 2019 was filed on 14.10.2019 before the State Commission. It was submitted that the impugned order had recorded that “*OP has failed to place on record any evidence to establish that on the date of offer of possession all the amenities and facilities as promised were there at the site unit allotted to the complainants*” relying on this Commission’s order in ***Emaar MGF Land Ltd. vs Krishan Chander Chandra***, FA No. 873 of 2013 dated 29 09 2014. The cancellation of allotment was argued to be arbitrary following the filing of the consumer complaint even though there was no delay on part of the respondents to make the requisite payments which were all made within time. The State Commission, vide order dated 04.09.2020 had directed the appellants to hand over physical possession on the deposit of Rs 4,00,000/- by the respondents and accordingly possession was accepted by the respondents on 07.09.2020. However, the appellants failed to provide documents such as letter of intent, licence issued by a competent authority under PAPRA, copy of approved site completion certificate etc. Only a partial completion certificate dated 15.12.2017 was produced which contained conditions relating to maintenance of fire safety and environment clearance machinery, the obtaining of NOC from various departments. The State Commission had, therefore, concluded that an adverse inference be drawn against the appellants that the necessary approvals for launching of the project had not been approved. It is contended that there was no Completion or Occupation Certificate produced before the court except a partial completion certificate which was in violation of Section 14 of PAPRA. The State Commission’s reliance on ***Vision India Realtors Pvt Ltd Vs. Sanjeev Malhotra***, FA 855 of 28 dated 13.06.2018 was supported by the respondent. It was pointed out that neither before the State Commission nor in these proceedings had a Completion Certificate or Occupation Certificate been obtained and produced. As regards delay in the payment of the final instalment by the respondents, the State Commission had rightly relied upon ***HUDA Vs Mrs Raj Mehta*** Appeal (Civil) 5882 of 2002 decided on 24.09.2004 and ***Prasad Homes Private Limited Vs E Mahender Reddy and Ors.***, 1 (2009) CPJ 136 (NC) to hold that the complainants were correct in stopping payment after making payment of 95% of the unit cost. The setting aside of the termination letter dated 07.11.2019 by the State Commission was argued to be correct and proper. It was contended that the State Commission had rightly relied upon the Hon’ble Supreme Court’s judgement in ***Wg Cdr Arifur Rehman Khan*** (supra) to award compensation at 6% per annum in addition to the penalty amount under the agreement till the date of actual delivery. The reliance of the appellant on a judgement of the RERA Appellate Tribunal, Mohali to argue that a partial completion certificate issued by a competent authority did not require the builder to apply or register that part of the project for registration under RERA since that case

is distinguishable and the facts do not apply to the instant case. In the present case, the partial completion certificate dated 15.12.2017 was issued post the coming into effect of RERA in May 2017 and hence it was submitted that as on the date of coming into force of the RERA Act and Rules, no partial completion certificate was actually available. It was therefore argued that the order of the State Commission be upheld and the appeal dismissed.

6. The issue which falls for consideration in this case is whether the possession offered on 16.08.2019 and the possession handed over on 09.09.2020 is valid since the same is based upon a Partial Completion Certificate dated 15.12.2017 and whether the respondents are liable for the reliefs awarded under the impugned order of the State Commission.

7. Addressing the preliminary issues raised, the contention of the appellant that respondents were not 'consumers' has not been established through any documentary evidence that the respondents were engaged in the business of purchase and sale of flats as held in *Kavita Ahuja* (supra). The onus of proving this lies on the appellant which has not been discharged. The territorial jurisdiction of the complaint was admitted by the State Commission on the basis of the branch office of the appellant being situated in Chandigarh, as held by Hon'ble Supreme Court in *Sonic Surgical* (supra).

8. On merits, based on analysis of the material on the record and the submissions made, it is manifest that the offer of possession made by the appellant is based on the Partial Completion Certificate issued by the competent authority. It is also manifest that the towers were re-numbered and that the occupation certificate is subject to the appellant obtaining various approvals. This document has no mention of the status of other buildings which are part of the amenities promised in terms of the Agreement. The contention of the appellant that the amenities and facilities mentioned in the brochure were only indicative and the only proposed amenities were those which were mentioned in the Buyer's Agreement has been considered. However, even these are not yet completed since only a partial completion certificate is available which does not list the buildings/ amenities.

9. In *Samruddhi Cooperative Housing Society Vs Mumbai Mahalaxmi Construction Pvt. Ltd.*, CA No. 4000 of 2019 decided on 11.01.2022, the Hon'ble Supreme Court laid down that the builder was responsible for transferring the title to the flats to the society along with occupancy certificate and that "*The failure of the respondent to obtain the occupation certificate is a deficiency in service for which the respondent is liable.*" In the instant case, the appellant was required to hand over possession and to convey legal title to the respondent based on, *inter alia*, an Occupancy Certificate. In the instant case the possession offered is based on a partial occupation certificate dated 15.12.2017 which is subject to the builder/appellant obtaining various statutory clearances. It is, therefore, evident that the offer is yet incomplete from a legal standpoint. When the fact of deficiency in service in handing over valid and legal possession stands established, the award of compensation is a consequence that cannot be faulted and must necessarily follow.

10. The contention of the appellant that the impugned order has awarded reliefs not prayed for needs consideration in light of the foregoing. The State Commission has directed the appellant to deliver possession within 3 months complete with the amenities promised with compensation @ Rs 5/- per sq ft per month based on super area with interest @ 6% on the deposited amount from 13.09.2019 till 31.01.2022 within 30 days or with 9% in case of

default and compensation @ 6% w.e.f. 01.02,2022 till actual delivery and composite amount of Rs 50,000/- towards mental agony, harassment and litigation. Notwithstanding the contentions regarding offer and acceptance of possession, it is manifest that during the pendency of litigation, as per direction of the State Commission, respondent accepted possession on 09.09.2020. This was done on the basis of the partial completion certificate and the available amenities/facilities. Therefore, the direction of the State Commission to pay compensation beyond this date cannot be sustained. However, appellant is liable to compensate the respondent till this date i.e. 09.09.2020 and not the stated date of offer of possession since on that date it did not possess the order pertaining to the re-numbering of the Towers for which partial completion certificate was available and there was no way the respondent could relate the offer of possession with the actual flat. It is also apparent that the State Commission has awarded compensation under multiple heads contrary to the law laid down by the Hon'ble Supreme Court in *D.S. Dhanda* (supra). This direction therefore, needs to be set aside. Similarly, compensation for mental agony and harassment, being already subsumed under the compensation awarded by way of interest, needs to be modified.

11. In view of the discussion above, and the facts and circumstances of this case, the appeal is found to have merits and is liable to be allowed. It is accordingly partly allowed and the order of the State Commission is modified as under:

(i) in view of possession having been handed over by the appellant to the respondent on 09.09.2020, the appellant shall compensate the respondent @ Rs 5/- per sq ft per month based on super area from 13.09.2019 the promised date of possession, till 09.09.2020 when possession was handed over, along with interest @ 6% p.a. for this period on the amount deposited with the appellant

(ii) the direction at (i) above shall be complied with within 8 weeks of this order failing which the rate of interest payable shall be 9% p.a.;

(iii) appellant shall pay the respondent litigation expenses of 50,000/- along with the compensation as directed above.

(iv) all other directions of the State Commission are set aside.

12. 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
MEMBER