

Builder-buyer dispute regarding excess payment, lack of completion certificate, and deficient services: NATIONAL CONSUMER DISPUTES REDRESSAL COMMISSION

M/S. UNIVERSAL INFRASTRUCTURE & 2 ORS.

...Appellant

RAVINDER KAUR BEDI

...Respondent

Case No: FIRST APPEAL NO. 2027 OF 2019

Date of Judgement: 01 January 2024

Judges:

SUBHASH CHANDRA – PRESIDING MEMBER

DR. SADHNA SHANKER – MEMBER

For Appellant: MR. PUNIT JAIN, ADVOCATE

For Respondent: MR. SIDDHARTH JAIN, ADVOCATE

Facts:

The complainant, an NRI, was allotted a flat in a project by the builder M/s Universal Infrastructure. The total amount paid by the complainant to the builder was Rs. 78,45,360 against the flat's cost of Rs. 65,60,000 as per the agreement. The builder issued an account statement showing receipt of Rs. 68,45,360. Hence, there was an excess payment of Rs. 10,00,000 as per the complainant. The builder gave possession of the flat on 11.03.2016 but had not obtained the

completion/occupancy certificate. The complainant alleged that the possession was illegal. She also alleged that promised facilities like creche, pool etc. as per the project brochure were not provided. The complainant approached the State Commission seeking refund of excess payment, interest, compensation, and execution of sale deed. The State Commission partly allowed the complaint directing the builder to refund excess amount, obtain completion certificate, and execute sale deed. Aggrieved by the order, the builder has filed the present appeal.

Builder's Arguments:

The complainant purchased the flat for commercial purpose to earn profit. Hence, she is not a 'consumer' under the Consumer Protection Act. The complainant did not adhere to the payment plan nor did she execute the Agreement to Sell. The builder applied for partial completion certificate on 25.01.2016 which was recommended. Hence, there is no deficiency of service on part of the builder. The complainant visited the flat multiple times before taking possession. Therefore, she cannot allege any deficiency. The builder also applied for occupancy certificate on 12.10.2017 which was also recommended on 17.01.2018.

Complainant's Arguments:

The complainant paid Rs. 78,45,360 against the total cost of Rs. 65,60,000 as per the agreement. Hence, there is an excess payment of Rs. 10,00,000. Handing over possession without obtaining occupancy/completion certificate violates Section 14 of PAPRA, 1995 and relevant notifications. The builder has not provided the promised facilities like creche, pool etc. mentioned in the brochure. This amounts to deficiency in service. The sale deed has not been executed by the builder till date despite receiving full payment.

Court's Observations and Decision:

On the question of 'consumer':

The Court referred to the Supreme Court decision in Lilavati Kirtilal Mehta Medical Trust case regarding tests to determine 'commercial purpose'. The builder did not produce any evidence to show the dominant intention behind the purchase was for profit generation. In

the absence of the same, the complainant is held to be a 'consumer'.

On limitation:

As per clause 8(d) of the Buyer's Agreement, the builder had failed to execute the sale deed even after completion of construction and receipt of full payment. Hence, there was a continuous cause of action and the complaint was within limitation.

On excess payment:

The builder did not contend anywhere that it had not received the payment of Rs. 78,45,360 against the flat's cost of Rs. 65,60,000.

On completion/occupancy certificate:

The builder admitted that despite giving physical possession in 2016, no completion/occupancy certificate had been received till date. The Court referred to the Supreme Court decision in Samruddhi Co-op Housing Society case wherein failure to provide occupancy certificate was held to be a deficiency in service.

On lack of amenities:

The Court relied on the Supreme Court decision in Wing Commander Arifur Rahman Khan case wherein it was held that the developer is accountable for the representations regarding amenities made in brochures/advertisements. In view of the deficiency in service and considering all the facts and circumstances, the appeal was dismissed.

Sections:

Section 2(1)(d)(ii) – Definition of 'Consumer'

Section 14, Punjab Apartment and Property Regulation Act, 1995 – Completion Certificate

Section 19, Consumer Protection Act, 1986 – Appeals

Cases Referred:

Lilavati Kirtilal Mehta Medical Trust vs Unique Shanti Developers (Supreme Court)

Samruddhi Co-op Housing Society vs Mumbai Mahalaxmi Construction Pvt. Ltd. (Supreme Court)

Wing Commander Arifur Rahman Khan vs DLF Southern Homes Pvt. Ltd. (Supreme Court)

Harpal Arya vs Housing Board Haryana (National Commission)

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Court

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Full Text of Judgment:

1.The present appeal has been filed under Section 19 of the Consumer Protection Act, 1986(for short “the Act”) by M/s Universal Infrastructure (hereinafter referred to as the “builder”)assailing the Order dated 03.06.2019 passed by the State Consumer Disputes Redressal Commission, Chandigarh, Punjab (hereinafter referred to as the “State Commission”) in Complaint No. 39 of 2019 whereby the complaint filed by the complainants was partly allowed.

2.There is a delay of 110 days in filing the present appeal. In the interest of justice and considering the reasons mentioned in the application forcondonation of delay, the delay in filing the appeal is condoned.

3.The facts, in brief, are that the complainant, who was an NRI, was allotted a Flat No.1001, Block Lyra, category 4-BHK, location 1th, Floor 10 in “The Taj Towers” located at Sector104, Pearl City, Mohali and for which the complainant paid the total amount of Rs. 78,45,360/- to the builder. As per the agreement dated 17.08.2016 executed between the builder and thecomplainant, cost of the flat was Rs.65,60,000/-. It is alleged that the builder put the date onpossession letter as 11.03.2016 whereas the dates of allotment and the agreement are 10.08.2016and 17.08.2016. It is alleged that the offer of possession was totally illegal as the builder had not obtained the completion certificate and the construction was going on at the site. It is further alleged that the builder issued an account statement dated 07.05.2016 and acknowledged the receipt of an amount of Rs. 68,45,360/- whereas the complainant had paid an amount ofRs.78,45,360/- as per the receipts placed on record. Hence, an amount of Rs.10,00.000/- has been received in excess from the complainant as per the difference between the account statement and the receipts placed on record. The complainant brought the fact of

excesspayment to the notice of the builder but the builder refused to refund any kind of amount and threatened the complainant to cancel the allotment. On careful perusal of the receipts by the complainant it was found that an amount of Rs. 10,00,000/- has been received against interest whereas the complainant was not a defaulter and no payment of interest was to be paid by her as she has not executed any agreement mentioning the terms and conditions of payment of interest to the builder. It is further alleged that an amount of Rs.2,85,360/- was paid towards service tax without providing any statement of account to show the deposit of the same with the Government Department on her behalf. It is furthermore alleged that the builder is receiving the amount towards maintenance under the garb of maintenance charges without executing any maintenance agreement and without obtaining the completion certificate and without providing the facilities as promised and the builder was requested to execute the sale/conveyance deed but the builder failed to execute the same and without execution of the agreement the builder charged delayed interest ignoring the fact that there is no default of any kind on the part of the complainant. It is further averred that the builder did not comply with the notification dated 02.09.2014 of the GMADA whereby it is mandatory to obtain completion certificate and, hence, the builder acted in contravention to the provisions of the Punjab Apartment and Property Regulation Act, 1995 (in short, "PAPRA"). The complainants also claimed that despite payment of the entire sale consideration, the promised facilities and services outlined in the terms and conditions of the allotment letter and the builder buyer's agreement were not provided. In this regard, the relevant portion of the brochure as mentioned in para 12 of the complaint, is reproduced below for reference:

"Creche & Child Care Facility, Entertainment Zone for all age groups, World Class ClubHouse, Restro Bar, Jogging Track, Swimming Pool, Guest Room at Club Taj, Non-stop Water Supply, Mini Cineplex, Wi-Fi Zone, 24 Hours Chemist Shop, Fully equipped Fitness Centre, 3-Tier Security, Dietician prescribed Catering, Shopping Area within proximity, spacious balconies and turfed garden, play area for kids seesaws and slides, 80% green/open area, clubhouse, separate entertainment for elders and bad minton court."

4.The complainants filed a complaint before the State Commission with the following prayer:-

i.To execute the conveyance deed/sale deed in favour of the complainant immediately.

ii.To pay interest on the deposited amount @9% from the date of illegal possession i.e.11.03.2016 till issuance of completion certificate by the competent authority.

iii.To refund an amount of Rs. 10,00,000/- received towards interest along with interest @9%from the date of deposit i.e. 13.04.2016 till realization.

iv.To refund an amount of Rs. 73,000/- received from the complainant towards maintenancecharges as no completion certificate has been obtained till date.

v.To pay an amount of Rs. 1,00,000/- for mental agony and harassment.

vi.To pay litigation expenses of Rs. 1,00,000/-

vii.Any other relief as the Hon'ble Court deems fit in the facts and circumstances of thepresent case may kindly be allowed.

5. The builder contested the complaint by filing its written statement and raising preliminary objections that the complainant was not a consumer as she was residing and settled in Canadaand purchased the residential unit in the project to earn profit and hence the complaint was notmaintainable in its present form and also the complaint is based on misrepresentation. The builder further raised another objection that it was barred by limitation. The builder explainedthat they applied for a partial completion certificate for the project on 25.01.2016 and after due inspection by the competent authority, a partial completion certificate was recommended to beissued. The complainant visited the flat multiple times to inspect it and only proceeded to takepossession after ensuring its condition. Regarding the Occupancy Certificate, the builder appliedfor its issuance on 12.10.2017. An inspection was carried out, findings recorded and recommended the issuance of the completion certificate in a report dated 17.01.2018. It is further stated that there is no deficiency on the part of the builder and hence, the complaint isliable to be dismissed.

6. After appreciation of the facts of the case, the State Commission partly accepted the complaint and held as under:

Following directions are issued to the opposite parties:-

i. to refund Rs. 10,00,000/- charged in excess from the complainant along with interest at the rate of 9% per annum from the date of deposit i.e. 13.04.2016 till the date of actual payment within three months.

ii. to obtain 'Completion Certificate' and 'Occupancy Certificate' in respect of the flat/project in question from the competent authorities concerned within a period of three months and hand over the copies thereof to the complainants, failing which to pay interest at the rate of 9% per annum on the total amount paid by the complainants towards the total sale consideration of the flat in question from 03.09.2019 till such certificates are obtained and delivered to them;

iii. to refund Rs. 73,000/- charged on account of maintenance charges within three months.

iv. Not to charge maintenance charges till the date of obtaining Completion Certificate and Occupancy Certificate from the competent authorities.

v. to execute conveyance deed/sale deed in favour of the complainant immediately.

vi. To pay Rs. 22,000/-, as litigation expenses within three months.

7. The builder has filed the present appeal before this Commission with the following prayer:

a. allow the present appeal by setting aside the impugned final Judgment & order dated 03.06.2019 passed by Ld. State Consumer Dispute Redressal Commission, Punjab at Chandigarh in Consumer Complaint No. 125 of 2019;

b. Pass such other order(s) as this Hon'ble Commission may deem fit under the facts and circumstances of the case.

8. The learned counsel for the builder has argued that complainant does not fall within the definition of 'consumer' as defined under the Act as she has purchased the flat to earn some profit from the open market. The builder emphasized that the agreement to sell of even date was prepared and supplied to the complainant for execution but the

complainant, as an investor, refused to execute the agreement to sell as she wanted to sell the said flat in the open market to fetch profit. He further argued that neither the complainant adhered to the payment plan nor did she execute the agreement to sell and the builder offered the possession of the flat vide letter of possession dated 11.03.2016 and the complainant was requested to clear off all the due amount of sale consideration along with interest on delayed payments. In so far as the point of completion certificate is concerned, he further argued that the builder asserted that they had duly approached and applied before the competent authority within a reasonable timeframe for partial completion as well as for the completion certificate as per the provisions outlined in Section 14 of the PAPRA, 1995. He further more argued that since the complainant had not made the payment within time prescribed nor had she executed the agreement to sell, the fault lies with her and not with the builder and there is no deficiency on the part of the builder. In support of its contention that the complainant is not a consumer, he relied upon the judgment dated 04.01.2016 of this Commission in the cases of Harpal Arya Versus Housing Board Haryana, Revision Petition No. 3338 of 2007.

9. The learned counsel for the complainant has contended that the complainant had paid a total amount of Rs. 78,45,360/- within a period of three years i.e. from 2013 to 2016 while as per the builder buyers' agreement, the total cost of the flat is Rs. 65,60,000/- i.e. Rs. 10,00,000/- in excess. He further argued that the builder's act of handing over possession of the flat without obtaining the occupancy and completion certificate is in violation of Section 14 of PAPRA and Clause 3.12 (i) of the Notification dated 07.07.2015 published in the Punjab Government Gazette Extraordinary by the Department of Local Government. He further argued that the promised facilities and amenities outlined in the brochure were not provided, which constitutes deficiency in service on the part of the builder.

10. We have heard the learned counsel for both the parties and have gone through the material available on record.

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

12. In so far as the question whether or not the complainant is 'consumer' is concerned, we may refer to the Hon'ble Supreme Court's judgment in the

Lilavati Kirtilal Mehta Medical Trust vs. Unique Shanti Developers & Ors. IV (2019) CPJ 65 (SC) case wherein the Hon'ble Court has held as under:

7. To summarize from the above discussion, though a straight-jacket formula cannot be adopted in every case, the following broad principles can be culled out for determining whether an activity or transaction is 'for a commercial purpose':

(i) The question of whether a transaction is for a commercial purpose would depend upon the facts and circumstances of each case.

However, ordinarily, 'commercial purpose' is understood to include manufacturing/industrial activity or business-to-business transactions between commercial entities.

(ii) The purchase of the good or service should have a close and direct nexus with a profit-generating activity.

(iii) The identity of the person making the purchase or the value of the transaction is not conclusive to the question of whether it is for a commercial purpose.

It has to be seen whether the dominant intention or dominant purpose for the transaction was to facilitate some kind of profit generation for the purchaser and/or their beneficiary.

(iv) If it is found that the dominant purpose behind purchasing the good or service was for the personal use and consumption of the purchaser and/or their beneficiary, or is otherwise not linked to any commercial activity, the question of whether such a purchase was for the purpose of 'generating livelihood by means of self-employment' need not be looked into.

13. In our opinion the builder has not brought any evidence of record to prove that the complainant has purchased the said flat for commercial purpose and there is 'close and direct nexus' with any profit-generating activity. Therefore, in absence of the same the complainant is a 'consumer' within the definition under Section 2(1)(d)(ii) of the Consumer Protection Act, 1986.

14.As regards the point of limitation is concerned, it is seen that the sale deed has not been executed till date and in clause 8(d) of the Purchaser's Agreement dated 17.08.2016, it has been specifically been mentioned as under:

8(d) Execution of the Sale Deed:

"That the developer shall execute the sale deed if required by the authorities and cause it to be registered in favour of the purchaser(s) after completion of construction of the apartment and after receipt from the purchaser(s) of the full sale consideration and/or other dues and other charges mentioned in the agreement."

From a perusal of the above clause, it is clear that the builder had failed to execute the sale deed after completion of construction of the flat and after receipt of full consideration and/or other dues and other charges mentioned in the agreement. Hence, there is continuous cause of action and the complaint is well within the limitation period.

15.In so far as another point of execution of sale deed/conveyance deed is concerned, the builder has not produced any documentary evidence to prove that it had made any correspondence with the complainant to execute the sale deed and it is unbelievable that the complainant has refused to execute the sale deed in her favour.

16.In so far as excess payment is concerned, from a perusal of the builder buyer's agreement, it is seen that the cost of the flat is Rs. 65,60,000/- whereas the builder has nowhere stated that it has not received the payment of Rs. 78,45,360/-.

17.It is admitted by the builder that despite the physical possession of the flat being delivered on 11.03.2016, the Completion/Occupation certificate has not been received to this date. In this regard, we would like to refer to the decision of the Hon'ble Supreme Court in Samruddhi Co-op Housing Society V. Mumbai Mahalaxmi Construction Pvt. Ltd., 2022 SCC On Line SC 35 ,the relevant extract of which is reproduced below:

"25. 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

occupancy 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."

18. As regards the lack of amenities as provided in the brochure and the lack thereof till date, we would like to quote the recent judgment of the Hon'ble Supreme Court in the case of Wing Commander Arifur Rahman Khan and Aleya Sultana and Ors. Vs. DLF Southern Homes Pvt. Ltd., (2020) 16 SCC 512 wherein it was held as:

"53. In other words, what the developer holds out as a defence is that though there has been a failure on their part to provide the amenities, the flat buyers have the benefit of facilities in the surrounding area which has become urbanised. We cannot agree with this line of submissions. The reply of the developer seeks to explain the failure to construct the facilities on the ground that the "existing population cannot sustain these facilities" – a school, commercial complex and healthcare facilities. This is a case involving an experienced developer who knew the nature of the representation which was being held out to the flat purchasers. Developers sell dreams to homebuyers. Implicit in their representations is that the facilities which will be developed by the developer will provide convenience of living and a certain lifestyle based on the existence of those amenities. Having sold the flats, the developer may find it economically unviable to provide the amenities. The flat purchasers cannot be left in the lurch or, as in the present case, be told that the absence of facilities which were to be provided by the developer is compensated by other amenities which are available in the area. The developer must be held accountable to its representation. A flat purchaser who invests in a flat does so on an assessment of its potential. The amenities which the builder has committed to provide impinge on the quality of life for the families of purchasers and the potential for appreciation in the value of the flat. The representation held out by the developer cannot be dismissed as chaff."

19. In view of the above, we are of the view that the State Commission has passed a well-reasoned order, which does not call for any interference as deficiency in service is evident in this case.

20. The appeal being devoid of merit is dismissed.