

COSMOS INFRA ENGINEERING (INDIA) PRIVATE V. RAJIV SAINI

1. COSMOS INFRA ENGINEERING (INDIA) PRIVATE
LIMITED
1/6, RISHI APARTMENT, 4 BATTERY LANE, CIVIL LINES
DELHI

.....Appellant(s)

Versus

1. RAJIV SAINI
S/O PURAN CHAND SAINI, R/O A-402, SAMANVAY
APARTMENT, PLOT NO-82 SEC-56
GURGAON-122011

.....Respondent(s)

Case No: FIRST APPEAL NO. 963 OF 2021

Date of Judgement: 11 Jan 2023

Judges:

HON'BLE MRS. JUSTICE DEEPA SHARMA, PRESIDING MEMBER

For the Appellant : Mr. Sahil Kalia, Advocate

**For the Respondent : Ms. Medhya Ahluwalia, Advocate and
Mr. Apurv, Advocate with Respondent in
person**

Facts:

Complainant booked an apartment in "Cosmos Golden Heights" and was allotted apt B-1002. Total sale consideration was Rs 28,19,350/- as per construction linked payment plan. Possession was to be handed over within 36 months (by 2011) but was not. Complainant paid Rs 25,36,524 (90% of sale value)

to builder. Builder demanded additional delayed interest and maintenance charges. Complainant sent legal notice in 2016 for refund with interest but builder did not respond.

Court's Opinions:

Builder was served notice and appeared through its General Manager but did not file written statement within time. Right to file WS was closed. Builder arguing that it was not their duty to obtain Completion Certificate. However court held this amounts to unfair trade practice as builder had undertaken to handover possession and execute conveyance deed in allotment letter/agreement. Offer of possession in 2013 without CC shows deficiency in service by builder. Impugned order by State Commission based on uncontradicted evidence by complainant. No infirmity found.

Arguments:

For Builder:

Complainant suppressed facts about builder's responsibility to obtain CC. No fresh notice issued after closure of right to file WS. Offer of possession made in 2013 but complainant did not take it.

For Complainant:

Builder did not disclose in agreement that it was not responsible for CC. Had promised possession and conveyance deed. Responsibility of builder to obtain CC before offering possession.

Referred Laws and Cases:

Provisions of Consumer Protection Act regarding filing written statement and deciding matter ex parte.

Orders:

Appeal of builder dismissed with costs of Rs 25,000/-. Builder directed to refund amount with interest.

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Court

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Full Text of Judgment:

1. This Application has been filed by the Appellant seeking condonation of delay of 631 days in filing the Appeal, for the reasons disclosed in the Application. Learned Counsel for the Respondent present along with the Respondent submits that she had no objection if the delay be condoned subject to costs.

In view of the submissions and no objection of the Respondent and for the reasons given in the Application, the Application is allowed and the delay is condoned subject to payment of costs of ₹10,000/-. Costs shall be paid by the Appellant to the Respondent/Complainant by way of demand draft within four weeks.

The Application stands disposed of.

Appeal

The present Appeal has been filed by the Appellant (hereinafter referred to as "the Builder") against the order dated 03.03.2020 of the State Consumer Disputes Redressal Commission, Delhi (for short "the State Commission") in Complaint No.1372 of 2016 filed by the Respondent (hereinafter referred to as "the Complainant") whereby the Complaint was allowed and the Builder was directed to refund the deposited amount along with interest @ 9% p.a. from the date of payment till the date of refund.

2. The brief facts of the case are that the Complainant had booked an apartment in "Cosmos Golden Heights" and an allotment letter dated 02.04.2008 was issued to him. Another allotment letter dated 01.08.2008 was issued to him whereby he was informed that he was allotted apartment no.B-1002 in Tower-B having super area of 1930. The total consideration of the apartment was ₹28,19,350/- and the payment made was construction linked payment plan. The possession was to be handed over within 36 months from the date of signing of the

agreement. The due date of handing over of possession, as per the agreement, was in the year 2011 but the possession was not delivered or handed over to the Complainant till the date of filing of the Complaint in the year 2016. The case of the Complainant had been that he had suffered a lot due to undue delay in offering of possession. He has further alleged that the possession was offered to him without obtaining the Completion Certificate. He has further alleged in his Complaint that a tripartite agreement dated 25.10.2008 was executed between the Complainant, the Builder and the Axis bank and he was sanctioned loan of ₹22,55,480/- repayable in 133 monthly instalments of ₹25,951/- each. He had paid an initial booking amount of ₹2,35,885/- vide cheque dated 28.02.2008. He further paid a sum of ₹75,000/- on 04.08.2008. The Axis Bank released sum of ₹4,04,180/-, ₹3,00,105/-, ₹3,27,416/-, ₹1,78,766/-, ₹2,36,356/-, ₹4,76,710/- and ₹1,19,178/- on his behalf. A total sum of ₹25,36,524/-, which was 90% of the total sale consideration, was duly paid to the Builder. The Builder, however, demanded a sum of ₹3,10,302.30ps. as delayed interest. Vide demand letter dated 05.01.2016, the Builder also demanded holding charges @ ₹5/- per sq.ft. monthly common area maintenance charges. Thereafter, the Complainant alleged that he sent legal notice dated 06.04.2016 calling upon the Builder to pay compensation for the delayed period, to hand over the possession of the flat within three months or to refund the entire amount with compound interest @ 24% p.a. Since nothing was done by the Builder, the Complaint was filed by the Complainant.

3. The State Commission sent notice of the Complaint to the Builder and the Builder was served on 03.05.2017. As per the impugned order, appearance had been put in by the Builder through its General Manager Mr. Umesh Arora and he was supplied copy of the Complaint and was directed to file written version within 30 days. Since

the written version was not filed within the statutory period, the State Commission closed the right of the Builder to file written version vide order dated 21.09.2017. Thereafter, evidence was led by the Complainant. On the basis of the uncontradicted testimony, the Complaint was allowed by the State Commission. This order is impugned before me by the Builder on the ground that the Complainant had suppressed the material facts. He had not disclosed to the State Commission that the Builder was under no obligation to obtain the Completion Certificate and it was the responsibility of the integrated township. It is further submitted that although their right to file the written version was closed by the State Commission but the State Commission did not make the proceeding ex parte and in the absence of an order to that effect, no fresh notice was ever issued to them to plead their case after closing their right to file the written version. It is further contended that as per RTI obtained by the Builder, it was the duty of the person who had developed the township to obtain the Completion Certificate and since the State Commission has failed to appreciate this fact, the order suffers with illegality and infirmity. It is further submitted that the Complainant had concealed the fact that the offer of possession had been made by the Builder in the year 2013 and the possession was not taken by the Complainant and therefore, there was no deficiency in service on their part.

4. It is argued on behalf of the Complainant that in the allotment letter/agreement, the Builder had not disclosed that they were under no objection to obtain the Completion Certificate. It is argued that in the agreement executed between the parties, the Builder had promised to offer the possession and execute the Conveyance Deed. It is argued that since the Builder had undertaken to offer the possession and the possession can be offered only after obtaining the Completion

Certificate, it was the responsibility of the Builder to obtain the Completion Certificate.

5. I have given thoughtful consideration to the rival contentions and perused the relevant record.

6. Along with this Appeal, the Appellant Builder had also filed stay application which was rejected by this Commission vide order dated 02.02.2022. This Commission has observed as under:

“.....

IA/887/2022 (Stay)

I have heard Mr. Rahul Kumar, learned Counsel for the Appellant and perused the averments made in the Application and the Affidavit filed along with it as also the Order dated 03.03.2020 passed by the Delhi State Consumer Disputes Redressal Commission, New Delhi (hereinafter referred to “as the State Commission”) by which the Opposite Party i.e. the Appellant herein was directed to refund the amount of Rs.25,36,524/- along with interest @ 9% p.a. from the date of payment till the date of refund. From perusal of the Order dated 03.03.2020 passed by the State Commission, impugned in the present Appeal, I find that the State Commission has categorically recorded that the present Appellant was served for 03.05.2017 and appearance was also put though its General Manager, Mr. Umesh Arora and a Copy of the Complaint was supplied and Written Statement was directed to be filed within thirty days. The Appellant did not file the Written Statement and the right to file the Written Statement was closed vide Order dated 21.09.2017, thereafter, nobody had appeared before the State Commission on behalf of the Appellant. In para 5 of the Memo of Appeal, the Appellant has stated as follows:

“5) That thereafter, on 03.05.2017 an employee of the

Appellant who has since left the services of the Appellant appeared however no counsel appeared along with the employee of the Appellant. The matter was then posted for 21.09.2017. However, as no one entered appearance on behalf of the Appellant on the next date the right of the Appellant to file a Written Statement was closed and the Complainant/ Respondent was given 8 eight weeks to file his evidence. It is pertinent to note that no fresh notice was issued thereafter to the Appellant or an order proceeding ex parte against the Appellant was ever passed. That multiple opportunities to the Complainant were given to file his evidence which was finally filed on 11.09.2019, 2 years after the notice was issued. However, in the interim no fresh notice was issued in the interest of justice to proceeding to hear the matter on merits.

It is very strange that if on a particular date an employee of the Appellant i.e. the General Manager, Mr. Umesh Arora had appeared and was granted time to file the Written Statement, but for reasons best known, the Written Statement was not filed and right was closed. There is no provision in law that if nobody appears on subsequent dates, the Commission shall issue a fresh notice to that person. The State Commission was justified in deciding the matter ex parte. Mr. Rahul Kumar, learned Counsel for the Appellant submitted that Mr. Umesh Arora, left the services of the Appellant in the year of 2018, be that it may, it is the responsibility of the Appellant that even if an employee, who was earlier appearing before the State Commission in a Consumer Complaint leaves the services of the Appellant, somebody else is deputed, which was not done in the present case. Prima facie no case is made out for grant of stay. The stay Application is accordingly rejected.”

7. It is also apparent from the grounds of Appeal mentioned in the Appeal itself that the Builder has not disputed service of notice of the Complaint upon them and the appearance of their General Manager before the State Commission. The Builder has not disclosed any reason as to why after closure of their right to file written version, they did not continue to appear and contest the case before the State Commission. The Builder has also failed to show to me any rule or regulation under the Consumer Protection Act which requires issuance of fresh notice to the Opposite Party on closure of their right to file written version. Therefore, the argument of the learned Counsel for the Builder that the State Commission ought to have issued fresh notice after closure of their right to file written version, has no merit.

8. The other argument of the Builder that it was not their duty to obtain the Completion Certificate, rather it was the duty of the person who was developing the township, is nothing but amounts to adopting unfair trade practice by the Builder while dealing with the consumers. The allotment letter or agreement executed between the parties does not anywhere show that the Builder had absolved itself from the responsibility of arranging/obtaining the Completion Certificate. Under the agreement, the Builder had promised to hand over the possession to the Complainant which they had offered in the year 2013. It is obvious that no valid offer of possession can be made without obtaining the Completion Certificate because a property cannot be occupied unless Completion Certificate had been issued qua that. The argument of learned Counsel that offer of possession had been made in the year 2013 and therefore, there is no deficiency on their part, has no merit. The offer of possession being made without obtaining the Completion Certificate itself shows deficiency on the part of the Builder and also unfair trade practices on its part. It

is apparent from the agreement entered into between the parties, the Builder had promised to execute the Conveyance Deed. Naturally, no Conveyance Deed can be executed by the Builder unless they would have obtained the Completion Certificate. What arrangement had been made by the Builder with the developer of the township was never made known to the Complainant before the allotment letter was made or agreement was being executed between the parties.

9. In light of these submissions, I found no illegality or infirmity in the impugned order. The impugned order is based on the uncontradicted testimony led by the Complainant. The Appeal has no merit and the same is dismissed with costs of ₹25,000/- which shall be paid by the Builder to the Complainant by way of demand draft within four weeks.