



Complainant did not take the possession of the flat despite offer of possession and also did not pay the balance amount and therefore, the Complaint was liable to be dismissed.

5. Parties led their evidences. The State Commission after going through the evidences and written submissions filed by the parties and hearing the arguments of the parties, has held as under:

**“18. The fact that the complainant had booked a flat with the OPs is undisputed. It is also uncontroverted fact that the possession was not offered within the time as agreed to, something evident from the letter of the OPs offering the possession. Further offering of the possession without obtaining the occupation certificate is no valid offer. Further the objection that the complainant had been defaulter cannot be accepted as the complainant having opted for construction linked plan had to make the**

-4-

**payment as per the progress done in the project. Secondly their argument that they had offered the possession of the flat within the time agreed to cannot be stretched beyond a point since that offer was, without the occupancy certificate or completion certificate and if that be the case the offer of possession was not valid. For this purpose reliance is placed on the judgment of the Hon’ble NCDRC in the matter of Treaty Construction and Anr. Versus Ruby Tower Co- op Hsg. Society Ltd. and ors as reported in II [2018] CPJ 54 (NC) holding in para 11 as under:-**

*So far as the question of obtaining the occupancy certificate is concerned, as per the provisions of MOFA the possession should not have been handed over to the members of the complainant society without obtaining occupancy certificate and this is a clear unfair trade practice. It is being argued on behalf of the OP that there are additions and modifications in the building and therefore, it is difficult to obtain the certificate and the matter is getting situation has been created by the OPs themselves as they offered possession without the occupancy certificate. Clearly, not obtaining occupancy certificate is the deficiency on the part of the OP/appellant.*

**Similar view was taken by the Hon’ble NCDRC in the matter of Kamal Kishore and anr. versus Supertech Limited as reported in II [2017] CPJ 483 (NC) holding inter alia that no payment is required to be made unless the possession is offered after obtaining the requisite occupancy certificate.**

19. **In that view of the matter the inevitable conclusion is that there was gross deficiency as defined in Section 2(1)(g) of the Act on the part of the OPs in its failure to deliver possession of the flat to the complainant in terms of the allotment letter. It is trite law that where possession of property is not delivered within the stipulated period, the delay so caused is not only deficiency of service, such deficiencies or omissions as per the law settled by their Lordships in the Apex Court in the matter of Lucknow Development Authority versus M.K. Gupta as reported in (1994) 1 SCC 243 tantamount to unfair trade practice as defined in Section 2(1)(r)(ii) of the Act as well.**
20. **Having arrived at the said conclusion, the point for consideration is as to how the Complainants are to be compensated for the monetary loss, mental and physical**

-5-

**harassment he has suffered at the hands of OPs on account of non-delivery of the allotted flat.**

21. **The provisions of the Act enable a consumer to claim and empower the Commission/Forum to redress any injustice done to a consumer. The Commission or the Forum is entitled to award not only value of goods or services but also to compensate a consumer for injustice suffered by him. The word compensation is of very wide connotation. It may constitute actual loss or expected loss and may extend the compensation for physical, mental or even emotional suffering, insult or injury or loss. Therefore, for the purpose of determining the amount of compensation, the Commission/Forum must determine the extent of sufferance by the consumer due to action or inaction on the part of the Opposite Party. In Ghaziabad Development Authority Vs. Balbir Singh - (2004) 5 SCC 65, while observing that the power and duty to award compensation does not mean that irrespective of facts of the case, compensation can be awarded in all matters on a uniform basis, the Hon'ble Supreme Court gave certain instances and indicated the factors, which could be kept in view while determining adequate compensation. One of the illustrations given in the said decision was between the cases, where possession of a booked/allotted property was directed to be delivered and the cases where only monies paid as sale consideration, are directed to be refunded. The Hon'ble Court observed, in this behalf, that in cases where possession is directed to be delivered to the Complainant, the compensation for harassment will necessarily have to be less because in a way that party is being compensated by increase in the value of the property he is getting. But in cases where monies are being simply refunded, then the party is suffering a loss inasmuch as he had deposited the money in the hope of getting a flat/plot. He is not only deprived of the flat/plot, he has been deprived of the benefit of escalation of the price of the flat/plot. Additionally, in my view, in such a situation, he also suffers substantial monetary loss on account of payment of interest on the loans raised; depreciation in the money value and escalation in the cost of construction etc.**
22. **From the above it is apparent that this Commission can pass orders regarding the refund of the amount**

-6-

**deposited to the company by the complainants, notwithstanding the proceedings pending in any other forum.**

23. **The Hon'ble NCDRC in the matter of Lakadwala Developers Pvt. Ltd. and ors versus Amarjeet Singh and Baryam Singh as reported in II [2020] CPJ 338 (NC) is pleased to the form of simple interest @ 9% p.a. to the complainant on the amount paid w.e.f. three years from the date of booking till the date on which possession is offered.**
24. **The Hon'ble Supreme Court in Bangalore Development Authority versus Syndicate Bank; (2007) 6 SCC 711 has laid down the principles on the basis of which compensation can be claimed in cases similar to that of the complainants herein:-**

*Where a development authority forms layouts and allots plots/flats by inviting applications, the following general principles regulate the granting of relief to a consumer who complains of delay in delivery or non-delivery and seeks redressal under the Consumer Protection Act, 1986.*

- a. *Where the redevelopment authority having received the full price, does not deliver possession of the allotted plot/flat/house within the time stipulated or within a reasonable time, or where the allotment is cancelled or possession is refused without any justifiable cause, the allottee is entitled for refund of the amount paid, with reasonable interest thereon from the date of payment to date of refund. In addition, the allottee may also be entitled to compensation, as may be decided with reference to the facts of each case.*
- b. *Where no time is stipulated for performance of the contract, or where time is not the essence of the contract and the buyer does not issue a notice making time the essence by fixing a reasonable time for performance, if the buyer, instead of rescinding the contract on the ground of non-performance, accepts the belated performance in terms of the contract, there is no question of any breach or payment of damages under the general law governing contracts. However, if some statue steps in and creates any*

*statutory obligations on the part of the development authority in the contractual field, the matter will be governed by the provisions of that statute.*

- c. *Where an alternative site is offered or delivered (at the agreed price) in view of its inability to deliver the earlier*

-7-

*allotted plot/flat/house, or where the delay in delivering possession of the allotted plot/flat/house is for justifiable reasons, ordinarily the allottee will not be entitled to any interest or compensation. This is because the buyer has the benefit of appreciation in value.*

- d. *Though the relationship between Development Authority and an applicant for allotment is that of a seller and buyer; and therefore governed by law of contracts, (which does not recognise mental agony and suffering as a head of damages for breach), compensation can be awarded to the consumer under the head of mental agony and suffering, by applying the principle of Administrative Law, where the seller being a statutory authority acts negligently, arbitrarily or capriciously.*
- e. *Where an alternative plot/flat/house is allotted and delivered, not at the original agreed price, but by charging current market rate which is much higher; the allottee will be entitled to interest at a reasonable rate on the amount paid towards the earlier allotment, from the date of deposit to date of delivery of the alternative plot/flat/house. In addition, he may be entitled to compensation also, determined with reference to the facts of the case, if there are no justifiable reasons for non-delivery of the first allotted plot/flat/house.*
- f. *Where the plot/flat/house has been allotted at a tentative or provisional price, subject to final determination of price on completion of the project (that is acquisition proceedings and development activities), the Development Authority will be entitled to revise or increase the price. But where the allotment is at a fixed price, and a higher price or extra payments are illegally or unjustifiably demanded and collected, the allottee will be entitled to refund of such excess with such interest, as may be determined with reference to the facts of the case.*
- g. *Where full payment is made and possession is delivered, but title deed is not executed without any justifiable cause, the allottee may be awarded compensation, for harassment and mental agony, in addition to appropriate direction for execution and delivery of title deed.*
- h. *Where the allotment relates to a flat/house and construction is incomplete or not in accordance with the agreed specifications, when it is delivered, the allottee will be entitled to compensation equivalent to the cost of completing the building or rectifying the defects.*
- i. *The quantum of compensation to be awarded, if it is to be awarded, will depend on the facts of each case, nature of harassment, the period of harassment and the nature of arbitrary or capricious or negligent action of the authority which led to such harassment.*

-8-

- j. *While deciding whether the allottee is entitled to any relief and in moulding the relief, the following among other relevant factors should be considered;*
- k. *Whether the layout is developed on 'no profit no loss' basis, or with commercial or profit motive; whether there is any assurance or commitment in regard to date of delivery of possession; whether there were any justifiable reasons for the delay or failure to deliver possession; whether the complainant has alleged and proved that there has been any negligence, shortcoming or inadequacy on the part of the developing authority or its officials in the performance of the functions or obligations in regard to delivery; and (v) whether the allottee has been subjected to avoidable harassment and mental agony.*

**25. Having regard to the discussion done and the legal position explained I am of the view that the ends of justice would be met if a direction is issued to the OPs:-**

- a. ***to complete the project if not already done;***
- b. ***to pay to the complainant interest for the delayed period @ 9% from the date the possession was to be handed over till the date the possession is handed over;***

c. to pay Rs. 10,000/- as the litigation cost.

**26. Ordered accordingly leaving the parties to bear the cost.”**

6. A Review Application against the said order had been filed by the Builder which was also dismissed by the State Commission. Hence, the present Appeal.

7. It is submitted by the Builder that the impugned order is perverse and illegal in view of the fact that Complaint was filed after the offer of possession on obtaining the Occupancy Certificate and that the delayed compensation in the form of interest @ 9% p.a. ought to have been granted till the date of offer of possession only and not till the date of handing over of actual

-9-

possession. It is further argued that the State Commission has erred in not directing the Complainant to pay the balance amount before handing over of the possession. The impugned orders have been challenged on these two counts only. The Builder has relied on “**M/s Supertech Ltd. vs. Rajni Goyal, Civil Appeal No.6649-50 of 2018**” and “**IREO Grace Realtech Pvt. Ltd. Vs. Abhishek Khanna & Ors., Civil Appeal No.5785 of 2019**” passed by the Hon’ble Supreme Court and “**M/s Lakadwala Developers Pvt. Ltd. & ors. vs. Amarjeet Singh Baryam Singh, FA No.276 of 2013**” passed by this Commission.

8. It is argued on behalf of the Complainant that it has never been the case of the Builder either in the written version or in the evidence that they had obtained the Occupancy Certificate. It is submitted that the Builder never had any intention to hand over the possession to the Complainant and this fact is also clear from the conduct of the Builder before this Commission. It is submitted that this Commission had directed, during the pendency of this Appeal, the Builder to hand over the possession of the subject flat but the Builder did not hand over the possession and this Commission has observed in its order dated 23.02.2022 that the Commission would take into consideration this conduct of the Builder at the time of

-10-

final order. It is further argued that since it has not been the case of the Builder that they had obtained the Occupancy Certificate and no evidence has been led and the Occupancy Certificate was not proved on record by the Builder, they cannot at the later stage of arguments come up with the new plea that they had obtained the Occupancy Certificate. It is submitted that even in the offer of possession, it is not mentioned that the offer has been made after obtaining the Occupancy Certificate. Copy of the Occupancy Certificate was also not attached with the offer of possession and therefore, the Complainant was not in a position to know whether the flat has been completed as per the agreement and that is why he had raised queries through written letter dated 27.07.2015. Although this letter was replied by the Builder but the queries remained unanswered. It is submitted that in a recent judgment of this Commission against the Appellant, these facts have been taken note of and the Appeal has been dismissed by this Commission. Reliance is placed on order dated 12.01.2022 in “**Consumer Case No.3321 of 2017 titled as Anil Agarwalla & Anr. vs. Imperial Housing Ventures Pvt. Ltd. & Anr.**” and order dated 21.02.2022 in “**Consumer Case No.2502 of 2017 titled as Rajesh Singh vs. Imperial Housing Ventures Pvt. Ltd.**”

-11-

9. I have heard the arguments and perused the record and gone through the written submissions.

10. Admittedly, there has been a delay in making the offer of possession. The issue is whether there was an actual offer of possession till 27.07.2015. It is an admitted fact that an offer of possession can be made only after obtaining the Occupancy Certificate/Completion Certificate. In this case, from the perusal of offer of possession, it is apparent that there is no mention in the said letter that the Builder had

obtained the Occupancy Certificate qua the subject flat. The Complainant, therefore, was not aware regarding the completion of the subject flat. It is apparent that the Complainant had written a letter dated 27.07.2015 to the Builder showing his queries which were not answered, although the said letter was replied by the Builder. In the reply also, there is no mention that the Builder had obtained the Occupancy Certificate qua the subject property. It is apparent that in the written version to the Complaint, there is no plea by the Builder that they had obtained the Occupancy Certificate. No copy of the Occupancy Certificate was also filed along with the written version. Even the witness of the Appellant has not deposed that the Occupancy Certificate has been obtained by the Builder. It,

-12-

therefore, is clear that it was not the case of the Builder that they had made the offer of possession only after obtaining Occupancy Certificate. In view of these proved facts, the findings in Rajni Goyal, Abhishek Khanna and Amarjeet Singh Baryam Singh's cases (supra) are not applicable to the facts and circumstances of the case.

11. Since there is not an iota of evidence on record before the State Commission that the Builder had obtained the Occupancy Certificate, the plea taken in the written submissions before the State Commission that they had obtained the Occupancy Certificate is meaningless in view of the fact that at the first occasion, when the Builder had the opportunity to take up the defence that they had obtained the Occupancy Certificate, had not been taken and document had not been proved on record.

12. In view of the above discussion, it is apparent that the directions of the State Commission to pay compensation in the form of interest @ 9% p.a. till the date the possession is handed over, is not perverse or illegal and I found no illegality in the impugned order.

13. The conduct of the Builder, as noted by this Commission in its order dated 23.02.2022 also shows that the Builder has not

-13-

really been interested in handing over the possession and that is why, they had not handed over the possession to the Complainant despite specific directions of this Commission vide order dated 27.12.2021. In this context, this Commission has noted in its order dated 23.02.2022 as under:

**“IA/563/2022 & EA/51/2022 (Modification of order, execution)**

Opposite party has not handed over the possession of the subject flat despite our directions. This conduct of the opposite party shall be part of the final order when the complaint be disposed of.

The above applications stands disposed of with these observations.

List the matter on 18.07.2022, the date already fixed.”

14. Learned Counsel for the Complainant on instructions has submitted that whatever payable dues are there in terms of the Flat Buyer's Agreement dated 31.05.2011, he is ready to pay at the time of taking the possession and he is also ready to take the possession. The Complainant shall remain bound by this undertaking.

15. I found no illegality, infirmity or perversity in the impugned orders. The Appeal has no merit and the same is dismissed.

.....J  
**DEEPA SHARMA**  
**PRESIDING MEMBER**