A NBCC (INDIA) LIMITED

v.

SHRI RAM TRIVEDI

(Civil Appeal No 274 of 2020)

MARCH 08, 2021

B **[DR. DHANANJAYA Y CHANDRACHUD AND M. R. SHAH, JJ.]**

Consumer Protection:

Allotment of residential unit by builder – Clause 20 of the allotment letter stipulated for handing-over of the unit in two and half years and for compensation at the rate of Rs. 2 per sq. feet of the unit per month for the period of delay beyond one year form the stipulated date – Failure to hand-over the possession within the time agreed upon – Consumer complaint – Consumer Commission directed the builder to pay compensation with 10% interest pa. on the amount deposited by the complainant from June 2015 till actual date of possession i.e. on July 26, 2018 – Consumer Court also awarded an amount of Rs. 2 lakhs towards loss of rent and Rs.25,000/- as costs – Appeal to Supreme Court – Held: The compensation @ Rs. 2/- per sq.ft. was one sided and constitutes an unfair trade practice – As per clause 20 of allotment letter, the builder was required to hand-over the possession within three and half years (including extention due to force majeure) which came to an end by the end of December 2015 – Therefore, the interest would become payable from January 1, 2016 – In the light of prevailing market conditions, rate of interest @ 10% pa. is excessive and therefore, the rate is fixed at 7% pa. – Also, there was no justification to award an amount of Rs. 2 lakhs, once interest for delayed handing-over of possession was granted – Order of Consumer Commission modified.

Words and Phrases:

G *"endeavour" – Meaning of.*

Partly allowing the appeal, the Court

HELD: 1. Clause 20 of the letter of allotment provides that the appellant shall "endeavour" to complete the construction of

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the dwelling unit within two and a half years from the date of the letter of allotment. The expression 'endeavour' meant that the appellant would make an earnest effort to hand over possession by that date. Even if the expression does not mean an absolute commitment to hand over possession on or before a specified date, this expression has to be read in the context of the entirety of the clause. To construe the expression as leaving the date for handing over possession indefinite and at the absolute discretion of the developer would leave the purchaser at the mercy of the builder. Clause 20 must be construed to require the builder to make all reasonable efforts to comply with the duty to hand over possession by the stipulated date. The burden would lie on the developer to explain the steps taken to comply with the contractual stipulation. Clause 20 envisages that, save and except for delay on account of force *majeure,* the appellant would pay compensation at the rate of Rs 2 per sq ft of the super area of the dwelling unit per month for the period of delay beyond one year from the stipulated date. It stipulates that compensation would be payable after four years (plus a valid extension due to force *majeure*) from the date of allotment. The above condition would indicate that beyond a period of one year, from the expiry of two and a half years, which was envisaged under Clause 20, the appellant agreed to pay compensation to the flat buyer. The latter stipulation of four years is incongruous, because previously, a period of one year beyond the stipulated period of 2.5 years is fixed, beyond which compensation becomes payable. This indicates that three and a half years was by all accounts the period for handing over possession beyond which the purchaser was entitled to compensation. [Para 7][287-A-F]

2. The NCDRC was justified in taking the view that the condition in the allotment of payment of compensation at the rate of Rs 2 per sq ft is one-sided and constitutes an unfair trade practice. The letter of allotment is in a standard form. The purchaser has no option but to sign on the dotted line. On the other hand, under Clause 16, if the buyer were to delay in the payment of any instalment, a liability to pay simple interest at the rate of 12% per annum is attracted. Clause 20, in other words, is

not even-handed. While, on the one hand, it contemplates only compensation at the rate of Rs 2 per sq ft in the event that there is a delay on the part of the appellant, the buyer is required to pay a substantially higher rate of interest (12%) for any delayed payment on his part. [Para 8][290-B-D]

Pioneer Urban Land and Infrastructure Limited v. Govindan Raghavan **(2019) 5 SCC 725 : [2019] 5 SCR 1169;** *Wg. Cdr. Arifur Rahman Khan and Aleya Sultana & Ors. v. DLF Southern Homes Pvt Ltd.* **2020 (16) SCC 512 – relied on.**

3. As the facts of the present case indicate, the period of two and a half years, which was stipulated under Clause 20 of the letter of allotment, came to an end at the end of December 2014. Allowing thereafter for an additional period of one year, the extended period would come to an end by the end of December 2015. The NCDRC granted interest at the rate of 10% with effect from July 2015. While the NCDRC is justified in directing the payment of interest, the direction should be modified in two respects, firstly, as regards the date from which interest would become payable and, secondly, as regards the rate of interest. As regards, the date on which interest would become payable, having regard to the one year period which is stipulated, beyond two and a half years from the original period under Clause 20, interest would become payable from 1 January 2016. Secondly, insofar as the rate of interest is concerned, the interest should be fixed at 7% per annum instead and in place of 10% which has been awarded by the NCDRC. Interest at the rate of 10% is excessive, in light of prevailing market conditions. The appellant shall pay simple interest to the respondent at the rate of 7% per annum from 1 January 2016 until 26 July 2018 which is the date on which possession was handed over to the respondent. [Paras 9 and 13(i)][290-D-G; 292-C-D]

Central Bank of India v Ravindra **(2002) 1 SCC 367 : [2001] 4 Suppl. SCR 323 – relied on.**

4. Once the NCDRC awarded interest for the delayed handing over of possession, there would be no justification to

award an additional amount of Rs 2,00,000. The direction in regard to the payment of an amount of Rs 2,00,000 towards loss of rent shall stand set aside. [Paras 10 and 13 (ii)][290-G-H; 292-D-E]

5. The plea of the appellant that there was a delay on the part of the respondent in paying the fifth instalment does not merit acceptance. In the present case, it is evident that the appellant itself was not in a position to hand over possession of the dwelling unit by the end of December 2014. Hence, the requirement of paying the penultimate instalment in September 2014 must be looked at from that perspective. [Para 11] [291-A-C]

6. Similarly, there is absolutely no substance in the *force majeure* defense. The appellant has alleged that a dispute with the contractor over termination and a boundary wall dispute with neighbouring landowners constituted a *force majeure* condition under Clause 20 of the allotment letter. The appellant, being an experienced developer, must be conscious of routine delays caused by business exigencies. This would not frustrate the contract or absolve the appellant of the obligations assumed under the terms of the agreement. [Para 12][291-C-E]

DLF Home Developers Ltd v. Capital Greens Flat Buyers Association **[2021] 5 SCC 537– relied on.**

Case Law Reference

[2019] 5 SCR 1169	**relied on**	**Para 8**
2020 (16) SCC 512	**relied on**	**Para 8**
[2001] 4 Suppl. SCR 323	**relied on**	**Para 9**
[2021] 5 SCC 537	**relied on**	**Para 12**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 274 of 2020

From the Judgment and Order dated 20.09.2019 passed by National Consumer Disputes Redressal Commission in CC No. 84/2017

Kiran Kumar Patra, Adv. for Appellant.

Nitish Banka, Ammet Singh, Ms. Pareena Swarup, Ms. Nida Khana, K. P. Singh and Praveen Swarup Advs. for Respondent.

A The Judgment of the Court was delivered by

DR. DHANANJAYA Y CHANDRACHUD, J.

1. Admit.

2. This appeal arises from a judgment of the National Consumer Disputes Redressal Commission[1] dated 20 September 2019.

B 3. In 2012, the appellant floated a group housing project at Sector 89, Gurgaon. An advertisement was issued, inviting prospective flat buyers. The respondent submitted an application on 14 March 2012 for the allotment of a dwelling unit in the project described as "NBCC Heights". The terms and conditions for allotment were set out in a standard C form. Instalments towards the purchase price were payable under a time-linked plan. An allotment letter was issued to the respondent on 30 June 2012 for dwelling unit F-402 in the project. The terms of allotment envisaged that the appellant would "endeavour" to hand over possession within two and a half years from the date of allotment. Clause 20 provides as follows:

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> "20. Subject to the terms of this Application and the Agreement including but not limited to timely payment of the Total Price, stamp duty and other charges due and payable according to the payment plan applicable to the Applicant or as per demand raised by NBCC and the Applicant complying with all the terms and conditions of
>
> E the Application, **NBCC shall endeavor to complete the construction of the Dwelling Unit within 2 ½ (two years and six months) from the date of allotment letter.** NBCC on obtaining certificate of occupation and / or use from the competent authorizes shall offer the Dwelling Unit to the Applicant for his / her occupation & use and subject to the applicant having complied
>
> F with all the terms and conditions of the agreements.
>
> **In the event of the Applicant failure to clear all the outstanding dues including interest, if any and / or takeover / occupy the Dwelling Unit within 30 days from the date of intimation in writing by NBCC, then the same shall lie at**
>
> G **the Applicant's risk and cost and the Applicant shall be liable to pay a compensation to NBCC (for maintaining the complex) @ Rs. 2/-per sq. ft. of the super area per month for the entire period of such delay.** This compensation shall be

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H [1] "NCDRC"

in addition to the other dues / claims of interest etc. as per terms of sale / allotment.

The applicant agrees that if however the completion of the said Complex is **delayed due to force majeure (such as acts of god or the public enemy, expropriation, compliance with any order or request of government authorizes, act of war, rebellions, sabotage, fire, floods illegal strikes, or riots etc.) then NBCC shall be entitled to extension of time for delivery of possession of the Dwelling Unit.** NBCC agrees to pay to the allottee and subject to the applicant not being in default under any terms of this Application/ agreement Compensation @ Rs. 2/- per sq ft of the use super area of the Dwelling Unit per month for the period of such delay beyond One year (plus valid extend period due to force majeure reasons) from the stipulated date of completion of the complex. Thus the compensation, if any shall be payable only after four years plus valid extension due to force majeure reasons from date of allotment. The adjustment of such compensation shall be done only at the time of execution of conveyance deed of the Dwelling Unit."

(**emphasis supplied**)

4. In January 2017, the respondent instituted a consumer complaint before the NCDRC[2] since possession of the unit had not been handed over. The appellant obtained an occupation certificate from the Town and Country Planning Department of Haryana on 19 July 2017. Upon receiving the occupation certificate, the appellant issued a notice to allottees on the same day, informing them of the receipt of the occupation certificate and requesting them to clear all their dues before taking possession. A letter of possession was issued to the respondent on 9 February 2018. The respondent made part payment towards the fifth and sixth instalments on 28 February 2018 and the balance payment on 6 March 2018. Possession was eventually handed over to the respondent on 26 July 2018 against an indemnity, as directed by the NCDRC in its order dated 6 June 2018. The NCDRC, in its impugned order dated 20 September 2018, directed the appellant to pay compensation computed at 10% per annum on the amount deposited by the respondent from June 2015 till the actual date of possession. In addition to this, the

[2] Consumer Case No 84 of 2017

A respondent was awarded an amount of Rs 2,00,000 towards loss of rent and costs of Rs 25,000. Time for payment was fixed at four weeks from the date of receipt of a copy of the order, failing which interest was to be payable at 12%.

5. The submissions which have been urged on behalf of the B appellant are that:

(i) The respondent had been allotted a residential unit under a time-linked plan which envisaged the making of payments in accordance with a prescribed schedule. While the first four instalments were paid on time, there was a delay in C paying the fifth instalment which was due on September 30 2014, while the final instalment was payable on the issuance of the letter of possession;

(ii) Since the respondent had delayed in the payment of the fifth instalment, there was no reason or justification to award D interest;

(iii) The appellant committed that it would "endeavour" to complete the project within two and a half years of the date of allotment and there was no unconditional commitment for delivery by a specific date;

E (iv) Clause 20 stipulated compensation at the rate of Rs 2 per sq ft of the super area; and

(v) The appellant was entitled to the benefit of supervening *force majeure* conditions.

6. The NCDRC rejected the submission that the appellant had F only agreed to "endeavour" to provide possession within two and a half years of the date of allotment. It held that even if time is not the essence of the contract, substantial reasons have to be furnished by the developer for not handing over possession in terms of the date agreed in the letter of allotment. The NCDRC computed the period of two and a half years G from the month of June 2012 when the letter of allotment was issued and, thus, concluded that possession ought to have been delivered by December 2014. Giving the appellant a further grace period of six months, it directed the payment of interest at 10% per annum from July 2015 till the actual date on which possession was handed over. The correctness of the decision falls for determination in the backdrop of the submissions H recorded earlier.

7. Clause 20 of the letter of allotment provides that the appellant shall "endeavour" to complete the construction of the dwelling unit within two and a half years from the date of the letter of allotment. The expression 'endeavour' meant that the appellant would make an earnest effort to hand over possession by that date. Even if the expression does not mean an absolute commitment to hand over possession on or before a specified date, this expression has to be read in the context of the entirety of the clause. To construe the expression as leaving the date for handing over possession indefinite and at the absolute discretion of the developer would leave the purchaser at the mercy of the builder. Clause 20 must be construed to require the builder to make all reasonable efforts to comply with the duty to hand over possession by the stipulated date. The burden would lie on the developer to explain the steps taken to comply with the contractual stipulation. Clause 20 envisages that, save and except for delay on account of *force majeure*, the appellant would pay compensation at the rate of Rs 2 per sq ft of the super area of the dwelling unit per month for the period of **delay beyond one year from the stipulated date.** It stipulates that compensation would be payable after four years (plus a valid extension due to *force majeure*) from the date of allotment. The above condition would indicate that beyond a period of one year, from the expiry of two and a half years, which was envisaged under Clause 20, the appellant agreed to pay compensation to the flat buyer. The latter stipulation of four years is incongruous, because previously, a period of one year beyond the stipulated period of 2.5 years is fixed, beyond which compensation becomes payable. This indicates that three and a half years was by all accounts the period for handing over possession beyond which the purchaser was entitled to compensation.

8. The NCDRC held that the condition in the allotment of payment of compensation at the rate of Rs 2 per sq ft is one-sided and constitutes an unfair trade practice. In **Pioneer Urban Land and Infrastructure Limited** v. **Govindan Raghavan**[3], a two-judge bench of this Court considered a similar agreement where there was a delay on the part of the Builder. This Court upheld the NCDRC's award of compensation at the rate of 10 per cent per annum, instead of the contractually stipulated rate by holding the following:

[3] (2019) 5 SCC 725

A "6.8. A term of a contract will not be final and binding if it is shown that the flat purchasers had no option but to sign on the dotted line, on a contract framed by the builder. The contractual terms of the agreement dated 8-5-2012 are ex facie one-sided, unfair and unreasonable. The incorporation of such one-sided clauses in an agreement constitutes an unfair trade practice as per Section 2(1)(r) of the Consumer Protection Act, 1986 since it adopts unfair methods or practices for the purpose of selling the flats by the builder."

A two judge bench of this Court in **Wg. Cdr. Arifur Rahman Khan and Aleya Sultana & Ors.** v. **DLF Southern Homes Pvt Ltd (now known as Begur OMR Homes Pvt Ltd)**[4] followed the decision in **Pioneer Urban** in interpreting an Apartment Buyers' Agreement that was, *inter alia*, breached by the Developer on the ground of a gross delay. This Court noted:

"22 The only issue which then falls for determination is whether the flat buyers in these circumstances are constrained by the stipulation contained in clause 14 of ABA providing compensation for delay at the rate of Rs 5 per square feet per month. In assessing the legal position, it is necessary to record that the ABA is clearly one-sided. Where a flat purchaser pays the instalments that are due in terms of the agreement with a delay, clause 39(a) stipulates that the developer would "at its sole option and discretion" waive a breach by the allottee of failing to make payments in accordance with the schedule, subject to the condition that the allottee would be charged interest at the rate of 15 per cent per month for the first ninety days and thereafter at an additional penal interest of 3 per cent per annum. In other words, a delay on the part of the flat buyer attracts interest at the rate of 18 per cent per annum beyond ninety days. On the other hand, where a developer delays in handing over possession the flat buyer is restricted to receiving interest at Rs 5 per square foot per month under clause 14 (which in the submission of Mr Prashant Bhushan works out to 1-1.5 per cent interest per annum). Would the condition which has been prescribed in clause 14 continue to bind the flat purchaser indefinitely irrespective of the length of the delay? The agreement stipulates thirty-six months as the date for the handing over of

[4] Civil Appeal No 6239 of 2019

possession. Evidently, the terms of the agreement have been drafted by the developer. They do not maintain a level platform as between the developer and purchaser. The stringency of the terms which bind the purchaser are not mirrored by the obligations for meeting times lines by the developer. The agreement does not reflect an even bargain….

24 A failure of the developer to comply with the contractual obligation to provide the flat to a flat purchaser within a contractually stipulated period amounts to a deficiency. There is a fault, shortcoming or inadequacy in the nature and manner of performance which has been undertaken to be performed in pursuance of the contract in relation to the service. The expression "service in Section 2 (1) (o) means a service of any description which is made available to potential users including the provision of facilities in connection with (among other things) housing construction. Under Section 14(1)(e), the jurisdiction of the consumer forum extends to directing the opposite party inter alia to remove the deficiency in the service in question. Intrinsic to the jurisdiction which has been conferred to direct the removal of a deficiency in service is the provision of compensation as a measure of restitution to a flat buyer for the delay which has been occasioned by the developer beyond the period within which possession was to be handed over to the purchaser. Flat purchasers suffer agony and harassment, as a result of the default of the developer. Flat purchasers make legitimate assessments in regard to the future course of their lives based on the flat which has been purchased being available for use and occupation. These legitimate expectations are belied when the developer as in the present case is guilty of a delay of years in the fulfilment of a contractual obligation. To uphold the contention of the developer that the flat buyer is constrained by the terms of the agreed rate irrespective of the nature or extent of delay would result in a miscarriage of justice. Undoubtedly, as this court held in Dhanda, courts ordinarily would hold parties down to a contractual bargain. Equally the court cannot be oblivious to the one-sided nature of ABAs which are drafted by and to protect the interest of the developer. Parliament consciously designed remedies in the CP Act 1986 to protect consumers. Where, as in the present case, there has been a gross delay in the handing over of possession

A beyond the contractually stipulated debt, we are clearly of the view that the jurisdiction of the consumer forum to award just and reasonable compensation as an incident of its power to direct the removal of a deficiency in service is not constrained by the terms of a rate which is prescribed in an unfair bargain."

B In adverting to the facts of this case, the NCDRC was justified in taking the view that the condition in the allotment of payment of compensation at the rate of Rs 2 per sq ft is one-sided and constitutes an unfair trade practice. The letter of allotment is in a standard form. The purchaser has no option but to sign on the dotted line. On the other hand, under Clause 16, as noted by the NCDRC, if the buyer were to delay in C the payment of any instalment, a liability to pay simple interest at the rate of 12% per annum is attracted. Clause 20, in other words, is not even-handed. While, on the one hand, it contemplates only compensation at the rate of Rs 2 per sq ft in the event that there is a delay on the part of the appellant, the buyer is required to pay a substantially higher rate D of interest (12%) for any delayed payment on his part.

9. As the facts of the present case indicate, the period of two and a half years, which was stipulated under Clause 20 of the letter of allotment, came to an end at the end of December 2014. Allowing thereafter for an additional period of one year, the extended period would E come to an end by the end of December 2015. The NCDRC granted interest at the rate of 10% with effect from July 2015. In our view, while the NCDRC is justified in directing the payment of interest, the direction should be modified in two respects, firstly, as regards the date from which interest would become payable and, secondly, as regards the rate of interest. As regards, the date on which interest would become payable, F having regard to the one year period which is stipulated, beyond two and a half years from the original period under Clause 20, interest would become payable from 1 January 2016. Secondly, insofar as the rate of interest is concerned, the interest should be fixed at 7% per annum instead and in place of 10% which has been awarded by the NCDRC. Interest G at the rate of 10% is excessive, in light of prevailing market conditions.[5]

10. The NCDRC has, in addition to the award of interest, granted compensation of Rs 2,00,000 for loss of rent. Once the NCDRC awarded interest for the delayed handing over of possession, there would be no justification to award an additional amount of Rs 2,00,000.

H [5] Central Bank of India v Ravindra, (2002) 1 SCC 367 para 39

11. The submission of the appellant that there was a delay on the part of the respondent in paying the fifth instalment does not merit acceptance. The fifth instalment was payable in the month of September 2014, while the final instalment, as learned counsel submitted, was payable at the time of the issuance of the letter of possession. This was to take place in December 2014. In the present case, it is evident that the appellant itself was not in a position to hand over possession of the dwelling unit by the end of December 2014. Hence, the requirement of paying the penultimate instalment in September 2014 must be looked at from that perspective. Admittedly, as the NCDRC has noticed, the appellant has paid an amount of over Rs one crore, out of the total sale consideration of Rs 1,00,54,478.

12. Similarly, there is absolutely no substance in the *force majeure* defense. The appellant has alleged that a dispute with the contractor over termination and a boundary wall dispute with neighbouring landowners constituted a *force majeure* condition under Clause 20 of the allotment letter. We find no merit in this argument as the appellant, being an experienced developer, must be conscious of routine delays caused by business exigencies. This would not frustrate the contract or absolve the appellant of the obligations assumed under the terms of the agreement. Similar delays were rejected as *force majeure* grounds by a three-judge bench of this Court in **DLF Home Developers Ltd** v. **Capital Greens Flat Buyers Association**[6] where the Court noted:

> "6. At the outset, we must deal with the force majeure defence. The NCDRC has carefully evaluated the basis on which the defence was set up and has come to the conclusion that there is no cogent evidence in regard to the nature of the delay and the reasons for the delay in the approval of the building plans. Quite apart from this finding of fact, it is evident that a delay in the approval of building plans is a normal incident of a construction project. A developer in the position of the appellant would be conscious of these delays and cannot set this up as a defence to a claim for compensation where a delay has been occasioned beyond the contractually agreed period for handing over possession. As regards the stop work orders, there is a finding of fact that these were occasioned by a succession of fatal accidents which took place at the site and as a result of the failure of the appellant to

[6] Civil Appeal Nos 3864-3889 of 2020

A follow safety instructions. This is a pure finding of fact. There is no error of law or fact. Hence, we find no substance in the *force majeure* defence."

13. We accordingly uphold the principal findings of the NCDRC in regard to the entitlement of the respondent to receive compensation B for the delayed handing over of possession. The *force majeure* defense raised by the appellant was justifiably rejected by the NCDRC. The respondent was entitled to be compensated for the delay of the appellant for which an appropriate direction for interest is necessary. However, as indicated above, the order of the NCDRC in regard to the rate of interest and the date from which it becomes payable has to be modified. C For this purpose, we allow the appeal partially in the following terms:

(i) Instead and in substitution of the direction issued by the NCDRC, the appellant shall pay simple interest to the respondent at the rate of 7% per annum from 1 January 2016 until 26 July 2018 which is the date on which possession D was handed over to the respondent;

(ii) The direction in regard to the payment of an amount of Rs 2,00,000 towards loss of rent shall stand set aside having regard to the compensation which has been granted to the respondent in terms of (i) above; and E

(iii) The appellant shall cooperate in completing all necessary formalities for completing the documentation (including formalities for registration) in respect of the dwelling unit which has been sold to the respondent, if not already completed, within a period of one month from the date of F receipt of a certified copy of this order. The payment of interest in terms of (i) above shall also be effected within one month.

14. The appeal is disposed of in the above terms. No order as to costs.

G 15. Pending application, if any, stands disposed of.

Kalpana K. Tripathy Appeal partly allowed.