



NEWSLETTER – SEPTEMBER 2023

1. Builder cannot force allottee to take possession on the basis of “Deemed Occupation Certificate” - Landmark Judgement in the case titled as ‘Gaurav Upadhyaya Vs. Golf Green Infra Private Limited and Another’ by UPRER Appellate Tribunal, Lucknow being Appeal No.116/2021 decided on 29.05.2021.

The appellant purchased a unit in the project based on representations made by Respondent no.1 regarding timely possession, world-class facilities, and assurances of bearing the burden of pre-EMIs in case of construction delays. However, the project faced significant delays, and when Builder offered possession without the necessary completion and occupancy certificates, the appellant discovered that the unit was still under construction and lacked the promised amenities. This led the appellant to file a complaint seeking valid possession, delay penalty, and payment of pre-EMIs. The case raises concerns related to the obligations of developers, the rights of buyers, and the validity of possession without proper certifications.

The case at hand relates to a case involving a residential project 'Mahagun Mirabella' and a dispute between the appellant and respondent no.1. In light of this, it is pertinent to consider Section 18(3) of the Act, which outlines the obligations of the promoter. According to this provision, if the promoter fails to fulfill any obligations under the Act, Rules, Regulations, or the agreement for sale, they are liable to pay compensation to the allottees. This provision is significant in the context of the case as it establishes the legal framework for determining the liability of the promoter for any breach of obligations and provides a basis for seeking compensation in such instances. The appellant's complaint and the subsequent

legal proceedings will likely hinge on the interpretation and application of this provision to the specific facts of the case.

As per the provisions of Section 18, compensation can be sought by an Allottee in case of defective title of the land, and also if the promoter fails to discharge any other obligations imposed on him under this Act or the rules or regulations made there under or in accordance with the terms and conditions of the agreement for sale.

Facts in brief of present Appeal:

The present Appeal, was preferred by *Mr. Lokesh Bhola, Managing Partner, Legal Icons* on behalf of the Appellant challenging the Order, dated 10.09.2020 passed by the Real Estate Regulatory Authority, Regional Office, Gautam Budh Nagar has rejected the Complaint bearing no.NCR144/04/53359/2020 and gave directions in favour of the Respondent No.1:

The Appellant contends that although, the Real Estate Regulatory Authority, Regional Office, Gautam Budh Nagar has noticed the date on which the delivery of possession was to be received by the Appellant, however, it the basis for which the interest should be paid was ignored.

Issues involved:

(i) Whether under the scheme of the Act, 2016 and Rules, 2016 any mechanism has been provided for determination of the interest for the delay in handing over possession of the apartment/plot to the allottee, if the allottee does not intend to withdraw from the Project?

(ii) Whether the project of the appellant/promoter is delayed?



(iii) Whether it is necessary and mandatory for the Promoter to have first Completion Certificate (C.C.) and Occupancy Certificate (O.C.) under the provisions of the Act of 2016 and Rules of 2016, read with the U.P. Apartments (Promotion of Construction, Ownership and Maintenance) Act 2010 before offering possession as well as asking the allottee to settle the account and satisfy the final demand?

(iv) Whether under the Scheme of Act 2016 there is a provision for examining and deciding the issues relating to the provisions of assured return/committed charges or payment of Pre-EMI by promoter for a fixed period or till possession etc. or commercial effect in an allotment letter/builder buyer agreement for purchase of flat/apartment/plot?

(v) Whether the offer of possession dated 25.01.2020 issued by the respondent claiming to have deemed OC/CC is legal and in accordance with law?

(vi) Whether the appellant is entitled for interest for the delay in completion of the Project under the scheme of Act, 2016 and if yes, what rate of interest is required to be paid by the Promoter to the allottee?

Held:

In this case, the Hon'ble Uttar Pradesh Real Estate Appellate Tribunal at Lucknow while upholding the Order, dated 10.09.2020 passed by the Real Estate Regulatory Authority, Regional Office, Gautam Budh Nagar, the Hon'ble Uttar Pradesh Real Estate Appellate Tribunal at Lucknow has thus observed/held:

"17.3 As the appellant despite delay wants to continue with the project of respondent no. 1, therefore, in view of the provisions of Section 18(1) of the Act 2016, the appellant is entitled for interest for every month till handing over of the possession. However, the period of interest due to Force Majeure (due to Covid-19 Pandemic) from 25.03.2020 to

25.09.2020 will not be admissible to either of the sides.

17.4 On due consideration, we are of the view that the impugned order of the Regulatory Authority dated 10.09.2020 is not sustainable. Accordingly, the same is hereby set aside and while rejecting the claim with respect to Pre-EMI of the loan taken by the appellant from the financial institution (ICICI Bank) [in view of the answer given by us of question no. (iv) hereinabove], the instant appeal is partly allowed with the following directions:

17.5 The respondent no. 1 is directed to provide possession to the appellant of the booked unit i.e. Unit No.1702 on 17 floor in 'Florentia Tower' having a saleable area of 2720 sq. ft. after completing all the facilities and amenities as per the terms and conditions of the allotment letter dated 07.03.2016 along with OC/CC and the respondent will execute the conveyance deed/lease deed after taking necessary stamp fee from the appellant and other charges.

17.6 The respondent no. 1 will pay interest @ MCLR+1% on the deposited amount of the appellant from 01.04.2018 till the date of legal offer of possession. The amount of interest will be adjusted towards final payment and if the amount of interest exceeds the amount due then the excess amount will be returned to the complainant/appellant as per rules. Keeping in view the Force Majeure period due to Covid-19 pandemic, the interest shall not be calculated for delay of the project from 25.03.2020 to 25.09.2020 on the default of either side."

Analysis and Conclusion of the case:

In conclusion, the appellant's complaint against respondent no.1 has been partly allowed by the Hon'ble Uttar Pradesh Real Estate Appellate Tribunal. The Tribunal emphasized the importance of timely



possession and upheld the appellant's entitlement to interest until possession is provided as Builder has failed to provide valid possession and cannot rely upon deemed occupation certificate.

2. Judgement of Hon'ble Supreme Court of India in 'National Insurance Co. Ltd. versus Harsolia Motors and Others', decided on 13.04.2023 (CIVIL APPEAL NO(S).5352-5353 OF 2007)

Can the insured person be excluded from the definition of "consumer" under the Act if the insurance policy they purchased amounts to renting a service for "commercial purposes"?

Section 2(1)(d) of Consumer Protection Act of 1986 :

(d). "consumer" means any person who,—

(i) buys any goods for a consideration which has been paid or promised or partly paid and partly promised, or under any system of deferred payment and includes any user of such goods other than the person who buys such goods for consideration paid or promised or partly paid or partly promised, or under any system of deferred payment, when such use is made with the approval of such person, but does not include a person who obtains such goods for resale or for any commercial purpose; or

(ii) ¹² [hires or avails of] any services for a consideration which has been paid or promised or partly paid and partly promised, or under any system of deferred payment and includes any beneficiary of such services other than the person who ¹² [hires or avails of] the services for consideration paid or promised, or partly paid and partly promised, or under any system of deferred payment, when such services are availed of with the approval of the first mentioned person ¹³ [but does not include a person who avails of such services for any commercial purpose];

FACTS IN BRIEF:

In the case, Harsolia Motors and Rakesh Narula and Co. sought compensation for fire-related losses they suffered during the Godhra Riots of 2002 in the amounts of Rs. 75,38,000 and Rs. 90,00,000 respectively. The Godhra Riots were a tragic and extremely sensitive episode that took place in Gujarat and resulted in extensive destruction, fatalities, and financial loss. Both Harsolia Motors and Rakesh Narula & Co. requested compensation from their insurance company, National Insurance Co. Ltd., after suffering significant losses to their assets and properties during the riots. The initial compensation claim was made to National Insurance Co. Ltd. by Harsolia Motors and Rakesh Narula and Co. Rakesh Narula And Co.'s claim for Rs. 54,29,871 was accepted by the National Insurance Co. Ltd., but Harsolia Motors' claim was denied. The Gujarat State Commission Disputes Redressal Commission received complaints from both parties. According to the State Commission, the insured are not considered consumers as that term is defined in Section 2(1)(d) of the Consumer Protection Act of 1986 (Act). It was determined that the insured's operation of a business from the premises for the purpose of making money fell within the meaning of the phrase "for commercial purpose" and therefore their case was not maintainable under the Act. The National Consumer Dispute Redressal Commission overturned the decision and ruled in favor of the insured after hearing an appeal. Ultimately, the Supreme Court of India was consulted to decide the case.

FINDING:

The Court made the observation that it must be established whether the services were used for any commercial purpose or whether the commodities were purchased for resale or other commercial purposes. The insured would not be considered a "consumer" if it were for the aforementioned two purposes. The Court determined that the insurance service had no direct connection to the activity



that generated profits after applying the principle to the particular situation. It was made clear that an insurance contract always covers losses and that getting an insurance policy does not involve making money. The Court did, however, emphasize that this should be considered on a case-by-case basis and that the State Commission should promptly decide the insured's complaint not later than one year from now.

IMPACT:

An important precedent for insurance claims resulting from instances of civil disturbance or intergroup violence is established by the judgement in this case. It underlines the requirement that insurance providers uphold their end of the bargain by covering policyholder losses in the event of such tragic occurrences.

3. Judgement Of Hon'ble National Consumer Disputes Redressal Commission in '*Army Welfare Housing Organization Vs Chief Administrator, Huda & Anr.*', Decided On 09.06.2023 (Consumer Complaint No.258 Of 2011)

The New Delhi bench of the National Consumer Disputes Redressal Commission (NCDRC) bench comprising presiding members, C. Vishwanath and Subhash Chandra, recently held that the presence of an arbitration clause in an agreement does not prevent Consumer Fora from exercising their jurisdiction to entertain a Complaint. To emphasize the stance further, reference was made to Section 3 of the Consumer Protection Act, 1986 which clearly states that the Act's provisions are in addition to and not in derogation of any other prevailing law. The NCDRC also affirmed its jurisdiction in cases involving some questions of law and facts.

BRIEF FACTS :-

The Army Welfare Housing Organisation's ("Complainant") case is that they were given 5 acres of land in Ambala City by the Haryana Urban Development Authority (HUDA) in 1991, for a price of Rs.1,58,48,000/-. They received possession of the land in 1993 and made the final payment to HUDA in 1996. However, in 1997, HUDA demanded an additional amount of Rs.5097990.78 for enhanced compensation based on a court judgment dated 06.05.1992 of Ld. Additional District Judge, Ambala. HUDA never informed the complainant about this additional amount before the final payment was made. Resultantly, the complainant paid the enhanced compensation as determined by the judgment. HUDA's demand came more than six years after the court order and was higher than the compensation awarded. The complainant sent a legal notice seeking clarification of the inflated demand, but HUDA threatened to impose a penalty instead of providing an explanation. HUDA also charged for the land that was part of the green belt, which was illegal. The complainant requested the exclusion of the green belt from the land allotment but received no response. Instead, HUDA raised further demands in 2000, 2005, and 2008, which were paid under protest by the complainant. The total amount demanded by HUDA exceeded the actual cost of the land.

The complainant filed a complaint seeking a refund of the amounts paid, along with interest and costs. HUDA argued that the complaint was not valid as the complainant would not qualify as a "consumer" under the Consumer Protection Act. HUDA also claimed that the complaint was barred by limitation and that the complainant was legally obligated to pay the increased compensation as per the terms of the allotment letter and the HUDA Act. It was also mentioned that the green belt area was included in the allotted land and that the complainant had been given the benefit of the green belt.



HUDA further contended that the Complaint is essentially a claim for monetary recovery, which should be pursued in a Civil Court instead of a Consumer Court. It was emphasized that the Complaint involved complex factual issues that are better suited for resolution in a Civil Court. Additionally, HUDA highlighted that Clause No. 22 of the allotment letter requires disputes to be resolved through arbitration, suggesting that the Complaint is barred by this clause and should not be entertained by the Consumer Commission.

OBSERVATIONS OF THE COMMISSION:

The National Consumer Disputes Redressal Commission ("NCDRC") observed that the complaint was well within the limitation period as per Section 12 of the Limitation Act, 1963 as it was filed just after the dismissal of the case under the Monopolies and Restrictive Trade Practices Act, 1969 (MRTP Act). Relying on Supreme Court's judgment in *MS. Agriculture Industries 2009 CTJ 481 (SC)*, the NCDRC further held that involvement of some questions of law and fact cannot be a ground for limiting the jurisdictions of the consumer fora. Additionally, this case did not involve any complicated questions on law and facts.

It was further held that the remedy provided by the Consumer Protection Act, of 1986 is an additional remedy and is not restricted by any specific law. Reliance was placed on the Supreme Court case of *M/s Emaar MGF Land Limited vs. Aftab Singh I (2019) CPJ 5 (SC)*, wherein it was affirmed that an arbitration clause in an agreement does not bar the jurisdiction of Consumer Fora to entertain a Complaint. Furthermore, Section 3 of the Consumer Protection Act, 1986 explicitly states that the provisions of the Act are 'supplementary to' and not 'derogatory to' any other existing law, the NCDRC noted.

Regarding the payment of enhanced compensation and interest, the NCDRC referred to the case of *Pankaj Aggarwal &*

Others vs State of Haryana & Another (2015), wherein the Punjab & Haryana High Court declared that a corporation was empowered to recover the enhanced compensation from the allottee, as per the terms of the allotment letter. Therefore, considering the provisions of the allotment letter, the Regulations, and the judgment in *Pankaj Aggarwal & Others vs State of Haryana & Another (2015)*, the NCDRC held that HUDA had the right to recover the enhanced compensation, awarded by the District Judge, from the Complainants. According to Clause 9 of the allotment letter, the Complainants were obligated to make the payment within 30 days. As the Complainant failed to meet this deadline, HUDA rightfully charged interest on the outstanding amount, the NCDRC held.

In conclusion, the NCDRC was of the view that the HUDA charged enhanced compensation from the Complainant in accordance with the terms of the allotment letter and the relevant regulations. Hence, the Complaint was dismissed.
