



IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION
CIVIL APPEAL NO.858 OF 2023

**OMKAR REALTORS AND DEVELOPERS
PVT. LTD.**

...APPELLANT(S)

VERSUS

**KUSHALRAJ LAND DEVELOPERS
PVT. LTD. & ANR.**

...RESPONDENT(S)

J U D G M E N T

PANKAJ MITHAL, J.

1. This is a statutory appeal under Section 67 of the Consumer Protection Act, 2019¹.
2. The challenge in the appeal is to the judgment and order dated 23.12.2022 passed by the National Consumer Disputes Redressal Commission² in Consumer Complaint No.141 of 2020. NCDRC by the said judgment and order has partly allowed the complaint of the respondent and

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Indu Maniwal
Date: 2024.08.23
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Reason:

¹ hereinafter referred to as 'the Act'

² in short 'NCDRC'

directed the appellant to refund within 2 months an amount of Rs.7,16,41,493/- (Rupees Seven Crore Sixteen Lakh Forty One Thousand Four Hundred and Ninety Three only) along with delay compensation @ 6% per annum from the respective dates of deposits till its payment, failing which the rate of interest payable would stand increased to 9% per annum.

- 3.** The respondent is a private limited company in the business of real estate development. It booked a flat for residential use of one of its directors and his family members with the appellant on 22.09.2015 in its project 'Omkar 1973 Worli' on payment of booking amount of Rs.51,00,000/- (Rupees Fifty One Lakh only). Subsequently, respondent paid part consideration i.e. a total of Rs.6,79,97,071/- (Rupees Six Crore Seventy Nine Lakh Ninety Seven Thousand and Seventy One only) to appellant.
- 4.** Thereafter, the respondent was issued an Allotment Letter dated 29.06.2016 with addenda dated 30.06.2016 whereby Flat No.5001, 50th Floor, Tower-B of the said project was allotted to it on a total sale consideration of

Rs.34,50,00,000/- (Rupees Thirty Four Crore Fifty Lakh only). The date of possession was mentioned as latest by 31.12.2018 in the letter of allotment.

- 5.** The appellant on 08.03.2017 advanced the date of possession from 31.12.2018 to the first quarter of 2017. On the basis of the part occupancy certificate received by appellant on 07.03.2017 from Slum Rehabilitation Authority, the respondent was asked to take possession of the allotted flat immediately and was directed to pay the balance amount of Rs.28,87,80,526/- (Rupees Twenty Eight Crores Eighty Seven Lakhs Eighty Thousand Five Hundred Twenty Six only) within 30 days.
- 6.** The respondent tried to arrange necessary finance for the purpose through financial institutions but failed. The respondent, through the correspondence with the financial institutions, came to know that the flat allotted to him, is already reserved/allotted to one Mr. Nakul Arya. The respondent on 18.03.2017, probably for want of arrangement of necessary funds, part occupancy certificate and due to the allotment of the said flat to one another person, declined to take possession and to pay

the balance amount as required by the appellant. The appellant, thus, cancelled the booking/allotment of the respondent vide Termination Letter dated 31.08.2017.

- 7.** The respondent, thus, issued a letter dated 22.09.2017 seeking refund of the entire amount of Rs.7,16,41,493/- (Rupees Seven Crore Sixteen Lakh Forty One Thousand Four Hundred and Ninety Three only) along with interest. The appellant, instead of refunding the amount, *vide* letter dated 18.11.2017 forfeited the amount deposited by the respondent.
- 8.** In the above background, the respondent approached the NCDRC complaining about the deficiency in services and of adopting unfair trade practices with the prayer to refund the entire amount deposited by it with 18% interest along with litigation expenses and compensation for mental harassment and torture.
- 9.** The appellant contested the complaint by filing its written reply alleging that the respondent is not a consumer within the purview of Section 2 (7) of the Act. It alleged that since respondent is a real estate development company and that it had purchased the flat for

commercial purpose, therefore, the complaint is not maintainable. The allotment of the respondent was rightly cancelled as despite demand it failed to pay the balance sale consideration. The appellant had the right to advance the date of delivery of possession and that there was no stipulation that the possession would be offered to the respondent only on the receipt of full occupancy certificate.

10. Basically, two points arose before the NCDRC for adjudication. First, whether the complaint, as filed by the respondent, was maintainable inasmuch as respondent was alleged not be a 'consumer' within the meaning of Section 2(7) of the Act. Secondly, whether there was any deficiency in service on part of the appellant or whether the appellant was justified in terminating the allotment of the respondent and forfeiting the deposits.
11. The NCDRC allowed the complaint holding the respondent to be a 'consumer' under Section 2 (7) of the Act, relying upon the decisions of this Court in **Lilavati Kirtilal Mehta Medical Trust vs. Unique Shanti**

Developers and Others³ and Crompton Greaves Limited and Others vs. Daimler Chrysler India Private Limited⁴. In context with the deficiency and unfair trade practice, if any, adopted by the appellant, NCDRC opined that the appellant had created confusion by double allotment of the flat in question. It was first allotted to one Nakul Arya on 10.04.2013 and then to the respondent on 29/30.06.2016. The controversy with regard to the aforesaid double allotment was resolved by the rectification deed executed on 17.03.2018. Therefore, the NCDRC held that the appellant was not justified in cancelling the booking/allotment of the respondent and forfeiting the amount deposited by respondent before resolving the controversy of double allotment. Thus, it was held that there was deficiency in service on the part of appellant.

- 12.** We have heard Shri Vinay Navare, learned senior counsel for the appellant and Smt. Malvika Kapila, learned counsel for the respondent and have perused the

³ (2020) 2 SCC 265

⁴ 2016 SCC OnLine NCDRC 2121

impugned judgment and order of the NCDRC as well as the other relevant documents relied upon by the parties.

- 13.** The first issue regarding the maintainability of the complaint of the respondent-claimant on the plea that it is not a consumer, is no longer *res integra*. It is more or less covered by the two decisions which have been relied upon by the NCDRC. In **Lilavati case** (supra), the Medical Trust that had purchased houses for the nurses was held to be a ‘consumer’ under the Act and its action in purchasing the houses was not held to be a commercial activity. In **Crompton Greaves case** (supra), the services availed for the personal use of the director of the company were not held to be for commercial purposes.
- 14.** Section 2 (7) of the Act defines “consumer” to mean any person who buys any goods for a consideration but does not include a person who obtains such goods for resale or for any commercial purpose. Therefore, purchase and sale of goods for resale or for commercial purpose is excluded from the purview of the definition of “consumer”.

15. In a very recent decision of this Court in **M/s Daimler Chrysler India Pvt. Ltd. vs. M/s Controls & Switchgear Company Ltd. & Anr.**, Civil Appeal No. 353 of 2008 decided on 09.07.2024 wherein one of us (Hon'ble P. Mithal, J.) was a member, this Court after considering all earlier decisions on the subject including **Lilavati Kirtilal Mehta Medical Trust** (supra) and **National Insurance Company Ltd. vs. Harsolia Motors and Ors.**⁵ ruled that in sum and substance to determine whether the goods purchased by a person (which would include a legal entity like a company) were for commercial purpose or not within the meaning of the Act 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. The purchase of the goods should have a close and direct nexus with a profit generating activity. If it is found that the dominant purpose behind purchasing the goods was for the personal use and

⁵ (2023) 8 SCC 362

consumption of the purchaser and/or the beneficiary, or was otherwise not linked with other commercial activities, the question whether such a purchase was for the purpose of “generating livelihood by means of self-employment” need not be looked into. In short, the dominant intention or the dominant purpose of the transaction is to be looked into to find out if it had any nexus with some kind of profit generation as part of the commercial activities.

- 16.** In the case at hand, the complainant specifically mentions that the flat was being purchased for the purpose of residence of one of its Directors and his family and that the company is a family owned company. The mere fact that the respondent-company is a real estate company, it does not mean that the flat was purchased by it for commercial purpose or for resale so as to earn profits. It is the appellant who is contending that the respondent is not a consumer and as such the complaint is not maintainable, therefore, the burden lies heavily upon it to lead evidence to prove that the respondent in purchasing the flat in question is indulging in real estate

business. There is no evidence on record to show that the flat so purchased by the respondent was in any way connected with the real estate business rather than for personal use of its Director and his family.

- 17.** In view of the aforesaid facts and circumstances of the case and the law as has been culled out above, we do not find any error or illegality in the finding of the NCDRC that the purchase of the aforesaid flat was for personal use and not as part of the commercial activity and as such the complaint filed by the respondent was maintainable.
- 18.** The second issue is regarding deficiency in service or unfair trade practice on part of the appellant in the matter of allotment of the flat in question in favour of the respondent and in its cancellation resulting in the forfeiture of the amount deposited.
- 19.** Undisputedly, the flat in question was allotted in favour of the respondent vide letter dated 29.06.2016 with an addendum dated 30.06.2016. The delivery of possession was notified by the appellant as latest by 31.12.2018 but was advanced to the first quarter of 2017. Thus, in order

to make finance arrangements, respondent entered into negotiation with the finance company whereupon it was revealed that the said flat stood already reserved/allotted in favour of one Mr. Nakul Arya. The aforesaid fact of reservation/allotment of the flat in favour of Mr. Nakul Arya is not in dispute. The explanation is that the flat allotted to the respondent and Mr. Nakul Arya were different but there was confusion with regard to the number of the flat allotted to each one of them. This confusion with regard to double allotment of the flat persisted till it was resolved by the appellant as per the deed of rectification dated 17.03.2018. It means that the confusion of double allotment of the flat notwithstanding some litigation in court prevailed and was finally resolved on 17.03.2018. In this view of the matter, the appellant could not have insisted for transferring possession of the flat and could not have terminated the allotment of the respondents vide its letter dated 31.08.2017 i.e. prior to the resolution dated 17.03.2018. At the same time, the appellant instead of refunding the amount deposited by the respondents, forfeited the same vide letter dated

18.11.2017. Since the very cancellation/ termination of the allotment of the respondents in the facts and circumstances of the case is not justified, consequently the forfeiture is also bad in law. The NCDRC upon consideration of the above facts and circumstances, irrespective of the fact that the appellant may have the power to advance the date of delivery of possession of the flat allotted or offer possession on the basis of part occupancy certificate, rightly held that the appellant was guilty of adopting unfair trade practice and since there was double allotment of the flat, there was deficiency in service.

- 20.** In the light of the above discussion, we agree with the NCDRC that the complaint of the respondents was maintainable and that since the services rendered by the appellant were held to be deficient. It has thus rightly issued directions to refund the forfeited amount of Rs. 7,16,41,493/- along with the delay compensation @ 6% per annum from the date of deposit till refund within two months, failing which the interest would be payable @ 9% per annum.

- 21.** The appellant is directed to refund a sum of Rs. 3,00,00,000/- (Rupees Three Crore only) out of the total amount, as directed to be refunded, within a period of two weeks from today and the balance be refunded on or before 31st December, 2024 either in lump sum or in piecemeal, failing which it will be open for the Collector concerned to recover the entire amount as arrears of land revenue.
- 22.** The present appeal thus lacks merit and is dismissed with no order as to costs.

..... **J.**
(PAMIDIGHANTAM SRI NARASIMHA)

..... **J.**
(PANKAJ MITHAL)

NEW DELHI;
AUGUST 23, 2024.