



2024 INSC 132

Non-reportable

**IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION**

CIVIL APPEAL NO. 971 OF 2023

Venkataraman Krishnamurthy and another ... Appellants

Versus

Lodha Crown Buildmart Pvt. Ltd. ... Respondent

JUDGMENT

SANJAY KUMAR, J

1. National Consumer Disputes Redressal Commission, New Delhi (in short, 'NCDRC'), decided Consumer Complaint No. 35 of 2018, *vide* order dated 09.11.2022. Disgruntled with the said order, the complainants therein preferred this statutory appeal.

2. The appellants intended to purchase an apartment in a building to be constructed by the respondent-company at New Cuffe Parade, Wadala, Mumbai. The parties executed Agreement to Sell dated 29.11.2013

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(hereinafter, 'the Agreement'), whereby the 4BHK apartment bearing No. B-602, on the sixth floor of the proposed building named 'Lodha Evoq', with a carpet area of 1966 sq. ft. was allotted to the appellants. The sale consideration was fixed at ₹7,55,50,956/-. As per the payment schedule, this sale consideration was to be paid in four sets of 'application money', viz., ₹18,00,000/-, ₹57,55,096/-, ₹74,79,545/- and ₹21,62,700/- respectively, and the balance amount, being ₹5,83,53,615/-, was to be paid on initiation of fit outs. It is not in dispute that the appellants paid ₹2,25,31,148/- in all to the respondent-company by the date of institution of their consumer complaint before the NCDRC and were not in default. As per the Agreement, possession of the apartment was to be delivered to the appellants for fit outs by 30.06.2016 or, with a grace period of one year, by 30.06.2017. Alleging that the respondent-company had not delivered possession of the apartment for fit outs by the said date and that they had terminated the Agreement, the appellants approached the NCDRC. Their prayer was for refund of the amount paid by them with compound interest thereon @ 18% p.a. along with compensation for the harassment, mental agony and torture suffered by them, apart from litigation costs.

3. By the impugned order dated 09.11.2022, the NCDRC disposed of the appellants' consumer complaint with the following directions: -

i. OP shall deliver the actual physical possession of the unit in question, complete in all respects, as per specifications and with amenities and facilities, including the club house etc. as promised in the brochure and/or ABA within 3 months of date of this order.

ii. OP shall arrange a joint inspection of the unit in question with Complainants/their representative and OP's representative within 15 days of date of this order. If as a result of this inspection, any deficiencies are noticed, the same shall be rectified by the OP within 30 days from the date of joint inspection. Immediately on rectification of all the defects, OP shall intimate, in writing, to the Complainants about the readiness of the unit in all respects for actual physical possession, giving him 15 days' time from the date of such communication to complete various formalities with respect to taking possession and remitting balance dues, if any, as per the payment plan/terms and conditions of the ABA. OP shall charge EDCs/IDCs, and other charges like car parking, IBMS, club membership etc. strictly as per ABA dated 29/11/2013. No maintenance and/or holding charges shall be payable by Complainants till the date of actual physical possession after issuance of communication about readiness of the unit for physical possession. Complainants shall be liable to pay service tax/other applicable taxes etc. payable to government agencies as per prevailing rates notified by the government and OP shall be bound to duly deposit such amounts to concerned government authorities within 45 days of receipt of such amounts under intimation to the Complainants. However, if government authorities have not raised any demand with respect to VAT etc. and OP considers that it is likely to be raised in future and create a liability which has to be borne by the Complainants, OP may take an indemnity bond from the Complainants in this regard to pay such amount in future, as and when demanded by the Government Authorities.

iii. OP shall pay delay compensation in the form of simple interest @ 6% p.a. on the total amount paid from the committed date of possession as per ABA (30/06/2016) till the date of offer of possession (29/11/2017).

iv. Parties to bear their respective litigation cost.

v. In case the Complainants does not wish to take possession of the unit in question now, for whatsoever reasons, and wishes to seek a refund, as prayed for, he shall make a specific request in this regard, in writing, to the OP within 15 days of this order. In such a situation OP shall be entitled to deductions/forfeiture of earnest money as per provisions of the agreement. OP shall, on receipt of such written request for refund the amount paid by the Complainants after making deductions towards forfeiture of earnest money, as per provisions of the agreement, within two months from the date of request from the complainants.'

The appellants are referred to as 'complainants' in the order extracted above while the respondent-company is 'OP'.

4. Aggrieved by the disposal of their case on the aforestated lines and more particularly, para 'v' of the directions set out hereinabove, the appellants assert before us their right to terminate the Agreement and claim unconditional refund of the total amount paid by them with interest thereon.

5. It would be appropriate at this stage to note the terms and conditions which were arrived at by and between the parties and reduced to writing in the Agreement executed by them. The relevant definitions, set out in Clause 1, titled 'Definition and Interpretation', read as under: -

‘1.13 “Date of Offer of Possession (for fit outs)” shall mean the date as specified in Annexure 2 herein on which the Company shall endeavor to make available to the Purchaser the Unit for fit outs subject to the receipt by the Company of the Total consideration and all other taxes and charges payable under this Agreement. This shall be the date on which the notice for readiness of the Unit for fit outs is issued by the Company plus 15 days.

1.14 “Date of Offer of Possession” shall mean that date on which the occupation certificate is issued (or deemed to be issued as per the relevant provisions of legislation)’

6. Clause 11 of the Agreement is most relevant for the purposes of this case. It is titled ‘Fit Outs and Possession’ and the relevant paragraphs thereof are extracted hereunder: -

‘11. Fit Outs and Possession: -

11.1. Subject to the Purchaser not being in breach of any of the terms hereof and the Purchaser having paid all the dues and amounts hereunder including the Total Consideration, the Company shall endeavor to provide the Unit to the Purchaser for fit outs on or before the date as set out in Annexure “2” hereto. The Company shall endeavor to make all necessary submissions to obtain the occupation certificate in respect of the Unit of the Building and make available the key Common Areas and Amenities in respect of the Building within a period of 1 (one) year from the Date of Offer of Possession (for Fit Outs) as set out in Annexure “2” hereto and this shall be deemed to be the final possession of the Unit.

11.2. The Company shall without being liable to the Purchaser, be entitled to a grace period of 1 (One) year beyond the aforesaid dates mentioned in the Clause 11.1. The date on which the occupation

certificate is issued (or deemed to be issued as per the relevant provisions of legislation) shall be deemed to be the "Date of Offer of Possession".

11.3. Delay in handover of possession (for fitouts) subject to the provisions of Clause 11.5 hereof and the Purchaser having paid all the amounts due and payable hereunder, in the event the Company fails to offer the possession of the Unit for fit outs by the date stated in Annexure – 2 and the aforesaid grace period, then within 30 (thirty) days of expiry of such grace period, the Company shall inform the Purchaser the revised date by which the Unit is likely to be ready for being offered for possession for fit out. Upon expiry of such grace period, the Purchaser may elect to continue with this Agreement in which case, the date of offer of possession for fit outs mentioned in Annexure-2 shall stand revised to and substituted by the revised date of offer of possession (for fit outs) as communicated by the Company. Alternatively, the Purchaser may by giving notice in writing elect to terminate this Agreement. Provided that such right to terminate shall be exercised by the Purchaser within a period of 90 days from the expiry of the aforesaid grace period. In the event, the letter of termination is not received by the Company within the said period of 90 days or is received after the said period of 90 days, the Purchaser shall, without the Company being liable to the Purchaser be deemed to have elected to continue with the Agreement to Sell and the Purchaser shall deemed to have waived his right to terminate this Agreement. In the event that the termination is done within 90 days from the expiry of the aforesaid grace period, the Company shall refund to the Purchaser the Total Consideration amount or part thereof paid by the Purchaser in 12 equal monthly installments through post dated cheques together with simple interest thereon at the rate of 12% per annum from the date of receipt of the Total Consideration or part thereof till repayment. The first monthly

installment shall commence from the 13th month of the date of receipt of the said letter of termination and ending on the 24th month thereof.

11.5. Notwithstanding the provisions hereof, the Company shall without being liable to the Purchaser be entitled to reasonable extension of time for making available the Unit for fit out or completion of said Building beyond the aforesaid dates mentioned in Clause 11, if the same is delayed for reasons beyond the control of the Company including on account of: -

- (i) Non-availability of steel, cement, other building material water or electric supply, or
- (ii) Labour problems, shortage of water supply or electric power or by reason of any act of God, or
- (iii) non delivery of possession is as a result of any notice, order, rule or notification of the Government and/or any other public or Competent authority or of the court or on account of delay in issuance or non-issuance or receipt of NOC's, in issuance, Occupation Certificate, Approvals etc. or non availability of essential amenities, services and facilities such lifts, electricity and water connections or sewage or drainage lines or for any other reason technical or otherwise or for any reason beyond the control of the Company, or Economic Hardship
- (iv) Delay in receipt of documents and/or Approvals.'

In keeping with and in continuance of Clause 11.1 set out hereinbefore, Annexure 2 to the Agreement stipulated that the date of offer of possession for fit outs would be 30.06.2016.

7. Clause 21 of the Agreement is titled 'Purchaser's Covenants'. To the extent presently relevant, it reads as under:

'21. PURCHASER'S COVENANTS

The Purchaser for himself with intention to bring all persons into whosoever hands the Unit may come, doth hereby covenant with the Company as follows:

.....u. The Purchaser acknowledges that as on the Date of Offer of Possession (for fit outs) works in the Unit shall be complete and the Unit shall have regular water and electricity supply, as well as lift access. There may be certain works which may be ongoing in the Building/development/Property at such time but all due care shall be taken to ensure that the fit outs of the Unit are not affected in any manner by such works. It is clarified that the Offer of Possession (for fit outs) entitles the Purchaser to carry on interior and other related works in the Unit but does not entitle the said Unit to be occupied till such time that the Occupation Certificate is received in relation to the said Unit.'

8. Cursory overview of the above clauses manifests that the respondent-company was to deliver possession of the apartment to the appellants for fit outs by 30.06.2016 but grace period of one year was provided under Clause 11.2, whereby the date for delivery of such possession stood extended till 30.06.2017. Clause 21.u indicates that the works in the apartment, so far as the respondent-company is concerned, were to be completed by that date and the apartment was to have regular water and electricity supply, apart from lift access, and the appellants could carry on interior and other related works therein. Further, as per Clause 11.1, the respondent-company was required to obtain the Occupation Certificate in respect of the apartment and make available the key common

areas and amenities in the building within one year from the date of offer of possession for fit outs. That was deemed to be the final possession of the apartment in terms of Clause 11.2. This date for delivery of final possession was also extendable by one year, i.e., up to 30.06.2018.

9. Significantly, Clause 11.3 makes it clear that delay in delivery of possession of the apartment for fit outs, subject to Clause 11.5 and payment of the sale consideration amounts due and payable, would entail two possible situations. Firstly, the respondent-company could inform the purchaser, within thirty days of the expiry of the grace period, the revised date by which the unit was likely to be ready for being offered for possession for fit outs and if the same is accepted by the purchaser, the contract would stand extended. Secondly, the clause provides that upon expiry of the grace period, the purchaser could elect either to continue with the agreement or, in the alternative, give notice in writing electing to terminate the agreement. The purchaser was required to exercise this right within ninety days from the expiry of the grace period.

10. It was not the case of the respondent-company that Clause 11.5 had a role to play in the case on hand and it was not its claim that any sale consideration amounts payable by the appellants remained outstanding at that point of time. The respondent-company, however, asserted that it had

received the Occupation Certificate for the appellants' apartment on 08.06.2017, which was well before the expiry of the grace period, and it had called upon the appellants by e-mail on the very same day to make the balance payment in order to initiate the possession process. It alleged that the appellants had failed to make the balance payment and the default, therefore, lay with them. It relied on Clause 11.2, which provided that the date on which the Occupation Certificate is issued shall be deemed to be the date of offer of possession and contended that the appellants could not claim that it had not offered possession of the apartment before expiry of the grace period. Further, it contended that the appellants wanted to back out of the contract as they did not wish to bear the additional burden of the newly introduced Goods and Service Tax payable by them in relation to the subject transaction.

11. Perusal of the certificate dated 08.06.2017 relied upon by the respondent-company reflects that it is titled 'Part Occupancy Certificate'. It was issued by the Town & Country Planning Division of the Mumbai Metropolitan Region Development Authority and recorded, under Condition No. 6 thereof, that the respondent-company should complete the unfinished internal works before applying for grant of a Full Occupation Certificate of the building or before handing over physical possession of the premises for

habitation, whichever was earlier. Notably, in the State of Maharashtra, 'Occupancy Certificate' is defined under Regulation 6(7) of the Development Control Regulations, 1991, and it reads as follows: -

'6(7). Occupancy Certificate: - On receipt of the acceptance of completion certificate in the form in Appendix XXI, the owner through his licensed surveyor/engineer/structural engineer/supervisor of this architect shall submit to the Commissioner a development completion certificate in the form in Appendix XVIII with three copies of the completion plan, one of which shall be cloth mounted for record. The Commissioner may inspect the work and after satisfying himself that there is no deviation from the sanction plans, issue an occupancy certificate in the form in Appendix XXII or refuse to sanction the occupancy certificate within 21 days from the date of receipt of the said completions certificate....'

It is clear from the aforesaid definition that the 'Occupancy Certificate' denotes completion of the project in all respects and this is fortified by the format of the 'Occupancy Certificate' in Appendix XXII to the Development Control Regulations, 1991, which reads thus:

'The full development work of a residential building comprising of ____ + ____ + ____ upper floors on plot bearing C.S. No./CTS No. of Division/Village _____ at _____ is completed under the supervision of Shri. _____, Lic. Architect, Lic. No. _____; Shri _____, Lic. Site Supervisor, Lic. No. _____ and Shri. _____, RCC Consultant Lic. No. _____ and as per completion certificate issued by Chief Fire Officer u/no. _____ dated _____, the same may be occupied and completion certificate submitted by you is hereby accepted.'

12. Significantly, the 'Part Occupancy Certificate' obtained by the respondent-company is not in the aforestated format and states to the effect that a 'Full Occupation Certificate' may still have to be obtained thereafter. The said certificate cannot, therefore, be equated to the 'Occupancy Certificate' issued under Regulation 6(7) of the Development Control Regulations, 1991. The respondent-company's argument that issuance of the aforestated certificate should be construed to mean that there was no delay on its part in delivering possession of the apartment is utterly misconceived. Clauses 1.13 and 1.14 of the Agreement demonstrate, in no uncertain terms, that two separate dates for delivery of possession are contemplated - one being the 'date of offer of possession for fit outs' and the other being the 'date of offer of possession'. The 'date of offer of possession for fit outs', allowing for the grace period of one year, was 30.06.2017 and it is the admitted position that the respondent-company did not offer such possession before that date. Without doing so, it was not open to the respondent-company to proceed directly to the next date, viz., the 'date of offer of possession' under Clause No. 1.14, which is linked with the 'Occupation Certificate' which it did not even have by that date. Further, it is not even its case that it made available the key common areas and amenities, as provided in the Agreement. In effect, expiry of the

‘date of delivery of possession for fit outs’, with the grace period, being 30.06.2017, the appellants were well within their rights, under Clause 11.3, in getting issued a legal notice on 01.07.2017 stating that they had not received any letter of offer of possession for fit outs and that they had elected to terminate the Agreement. The respondent-company was called upon, in consequence, to refund the monies paid by them with interest thereon. The respondent-company, however, disclaimed liability, by its reply legal notice dated 21.07.2017, constraining the appellants to move the NCDRC.

13. This being the factual backdrop of the case, the NCDRC noted that there was ‘some delay’ in handing over of possession of the apartment by the respondent-company, but opined that it was not ‘unreasonable’, whereby the appellants could cancel the Agreement and seek a refund. The NCDRC further opined that in the event they wish to seek a refund, the respondent-company was entitled to deduction/forfeiture of the earnest money as per the provisions of the Agreement. Having said so, the NCDRC observed that the respondent-company was still bound to provide actual physical possession of the apartment, complete in all respects, and issued the directions set out hereinabove.

14. At this stage, it may also be noted that, by letter dated 29.11.2017, the respondent-company informed the appellants that their apartment was ready for possession and called upon them to make the payment due at the earliest to enable the process to hand over possession being initiated.

15. Once the parties committed themselves to a written contract, whereby they reduced the terms and conditions agreed upon by them to writing, the same would be binding upon them. In the event such a written contract provided for the consequences that are to follow in the event of breach of the conditions by one or the other of the parties thereto, such consequences must necessarily follow and if resisted, they would be legally enforceable. In the case on hand, the Agreement stipulated the date of delivery of possession of the apartment for fit outs with a grace period of one year. In terms thereof, the date for delivery of possession of the apartment for fit outs, with the grace period, was 30.06.2017. Admittedly, the respondent-company did not offer delivery of possession of the apartment for fit outs by that date. The 'date of offer of possession', under Clause 1.14, linked with issuance of the 'Occupation Certificate' was distinct and separate from the 'date of delivery of possession for fit outs' and Clause 11.3 unequivocally provided the consequences in the event of delay in that regard. The right of election given thereunder to the appellants

to either continue or to terminate the Agreement within ninety days from the expiry of the grace period was absolute and it was not open to the NCDRC to apply its own standards and conclude that, though there was delay in handing over possession of the apartment, such delay was not unreasonable enough to warrant cancellation of the Agreement. It was not for the NCDRC to rewrite the terms and conditions of the contract between the parties and apply its own subjective criteria to determine the course of action to be adopted by either of them.

16. In this regard, we may refer to the Constitution Bench decision in ***General Assurance Society Ltd. vs. Chandumull Jain and another***¹, wherein it was observed that, in interpreting documents relating to a contract of insurance, the duty of the Court is to interpret the words in which the contract is expressed by the parties because it is not for the Court to make a new contract, however reasonable, if the parties have not made it themselves. Thereafter, in ***Rajasthan State Industrial Development & Investment Corporation vs. Diamond & Gem Development Corporation Ltd.***², this Court reiterated that a contract, being a creature of an agreement between two or more parties, is to be interpreted giving the actual meaning to the words contained in the contract

¹ AIR 1966 SC 1644

² (2013) 5 SCC 470

and it is not permissible for the Court to make a new contract, however reasonable, if the parties have not made it themselves.

17. More recently, in ***Shree Ambica Medical Stores vs. Surat People's Coop. Bank Ltd.***³, it was observed that, through its interpretative process, the Court cannot rewrite or create a new contract between the parties and has to simply apply the terms and conditions of the agreement as agreed between the parties. Again, in ***GMR Warora Energy Ltd. vs. Central Electricity Regulatory Commission***⁴, it was observed that Courts cannot substitute their own view of the presumed understanding of commercial terms by the parties, if the terms are explicitly expressed. It was held that the explicit terms of a contract are always the final word with regard to the intention of the parties.

18. Though the respondent-company would argue that the appellants accepted and acquiesced with its proposal to dispense with delivery of possession of the apartment for fit outs, we do not find merit in this contention. According to the respondent-company, the appellants were informed of the change proposed by it on 30.05.2017 and 07.06.2017. However, the response of the appellants on 12.06.2017 discloses that the 'Part Occupancy Certificate' was not even made available to them at that

³ (2020) 13 SCC 564

⁴ (2023) 10 SCC 401

time and the first appellant specifically requested the respondent-company to update him as soon as the 'Occupancy Certificate' was uploaded on its website, so that he could initiate steps for securing a loan. He further stated that his wife and he would like to see the unit before the handing over of possession. It was agreed by and between the parties that the appellants would be permitted to visit the apartment on 14.06.2017 but it is an admitted fact that the apartment was not shown to them on that day. They were informed that they would not be able to see any other similar unit till the end of July, 2017 and that their own apartment would be ready for inspection only in August, 2017 or later.

19. It is not clear as to when the appellants were actually provided with the 'Part Occupancy Certificate' dated 08.06.2017 obtained by the respondent-company, but it is not in dispute that the appellants took steps to terminate the Agreement immediately after expiry of the grace period on 30.06.2017, by getting a legal notice issued on 01.07.2017. As there was no novation of the contract in writing by the parties and as it was not open to one of the parties thereto, viz., the respondent-company, to unilaterally change the agreed terms and conditions, the action of the appellants in terminating the Agreement on the first available date, as provided therein, cannot be found fault with. Mere exchange of correspondence by and

between the parties prior to expiry of the grace period, when the appellants were not even seized of all the facts, cannot be held against them by treating it as an act in acceptance of or acquiescence with the change impliedly suggested by the respondent-company.

20. The fact that the appellants were anxious to avoid the additional tax liability, owing to the introduction of the Goods and Service Tax regime, cannot be held against them or be imputed to them as an underhand motive for backing out of the Agreement. Avoidance of tax is neither illegal nor equivalent to tax evasion and, therefore, the urgency shown by the appellants in trying to complete the process quickly so as to avoid an additional tax burden was natural. Further, it cannot be presumed that the appellants, who were willing to spend over ₹7.5 Crore for the apartment, would back out at the eleventh hour only because the tax component was increasing by ₹40 lakh or so.

21. Reliance is placed by the respondent-company on the decision of this Court in *Ireo Grace Realtech Pvt. Ltd. v. Abhishek Khanna*⁵ in the context of the rate of interest payable on the refund. However, we find that the aforesaid decision is distinguishable on facts. Therein, the contract condition provided for payment of delay compensation and in the event of such delay exceeding twelve months from the end of the grace period, the

⁵ (2021) 3 SCC 241

allottee could opt for termination of the contract and for refund of the amount paid by him. The contract condition, however, provided that the refund would be made without any interest thereon. It is in this factual scenario that this Court, in equity, decreed that the amount should be refunded with simple interest thereon @ 9% p.a. On the other hand, in the present case the Agreement itself provided for the interest component on the refund amount and stipulated the rate thereof as 12% p.a. That being so, the respondent-company cannot seek reduction of the rate of interest contrary to the agreed rate.

22. On the above analysis, we have no hesitation in holding that the NCDRC overstepped its power and jurisdiction in ignoring the binding covenants in the Agreement and in introducing its own logic and rationale to decide as to what the future course of action of the parties and more particularly, the appellants, should be. As we are informed that the appellants did not choose to act upon the belated offer of the respondent-company, in its letter dated 29.11.2017, and are still intent on terminating the Agreement as per Clause 11.3 of the Agreement, we set aside the order dated 09.11.2022 passed by the NCDRC and allow Consumer Complaint No. 35 of 2018, directing the respondent-company to refund the deposited amount of ₹2,25,31,148/- in twelve equal monthly

installments, through post-dated cheques, with simple interest thereon @ 12% p.a., from the date of receipt of the said amount or parts thereof till actual repayment. The first such installment shall be payable on the 5th of April, 2024, and the succeeding installments shall be payable on the fifth of each calendar month thereafter, till fully paid.

The appeal is allowed to the extent indicated above.

Pending IAs, if any, shall stand closed.

In the circumstances, parties shall bear their own costs.



LEGALERA
BY THE PEOPLE. FOR THE PEOPLE. OF THE PEOPLE

.....,J
(ANIRUDDHA BOSE)

.....,J
(SANJAY KUMAR)

**February 22, 2024;
New Delhi.**