

(2022) 01 SC CK 0106

In the Supreme Court Of India

Case No : Civil Appeal No. 180, 268 Of 2022

M/S Ireo Private Limited

APPELLANT

Vs

Aloke Anand And Others

RESPONDENT

Date of Decision : 21-01-2022

Acts Referred:

Consumer Protection Act, 1986 — Section 2(1)(d), 23
Haryana Fire Service Act, 2009 — Section 15(1)

Citation : (2022) 4 Scale 333

Hon'ble Judges : Dr. Dhananjaya Y. Chandrachud, J;Bela M Trivedi, J

Bench : Division Bench

Advocate : Ankur Saigal, E. C. Agrawala, Nina R. Nariman, Aditya Parolia, Piyush Singh, Nithin Chandaran, Akshay Srivastava, Sumbul Ismail, Rajesh Kumar, Gaurav Goel, Vaibhav Gaggar, Sumedha Dan, Utkarss Tiwari, Pai Amit

Final Decision : Dismissed

Judgement

Dr. Dhananjaya Y. Chandrachud, J

1 The appeals under Section 23 of the Consumer Protection Act 1986 ["COPRA"] arise from the decision of the National Consumer Disputes Redressal Commission ["NCDRC"] on complaints which were instituted against the appellant by the allottees of its housing project called "SKYON", located at Golf Course Extension Road in Sector 60 of Gurgaon, Haryana ["Project"]. The appellant advertised that the Project offered state of the art facilities such as home automation devices, Wi-Fi and high-end video door security systems in each apartment.

2 The Building Plans for the Project were approved by the Directorate of Town and Country Planning, Haryana ["TCP Haryana"] on 27 September 2011, subject to certain terms and conditions to be fulfilled by the appellant. Thereafter, on 31 July 2012, the State Environment Impact Assessment Authority, Haryana granted an Environment Clearance for the Project.

3 The appellant submitted an application to the Commissioner, Municipal

Corporation, Gurgaon ["CMC Gurgaon"], for approval of the Fire Fighting Scheme for the Project on 16 January 2012. The CMC Gurgaon granted the approval on 25 September 2013 ["Fire NOC"].

4 On 26 August 2016, the Occupation Certificate was issued by the Director General of TCP Haryana in respect of Tower D of the Project. Further, on 14 September 2017, the Occupation Certificate was issued in respect of Tower B of the Project.

5 Other than these common facts in relation to the Project, the appeals arise from separate complaints and have distinct facts. However, they raise a common issue. Hence, we shall set out the facts of the lead appeal (Civil Appeal No 180 of 2022) in detail.

6 In Civil Appeal No 180 of 2022, the first respondent filed a booking application for an apartment in the Project on 22 December 2010. An amount of Rs 15,00,000 was paid as booking amount by a cheque dated 14 October 2010.

7 The appellant issued a letter offering allotment to the first respondent on 14 January 2011, by which the appellant allotted an apartment having a tentative super area of 2809 sq ft, bearing No B3203, Floor 31 in Tower B of the Project. The appellant and the first respondent entered into an Apartment Buyers Agreement ["ABA"] on 14 February 2012.

8 Due to the apartment not being handed over in time by the appellant, the first respondent filed a consumer complaint [Consumer Complaint No 1277 of 2017] before the NCDRC on 3 May 2017. The reliefs claimed in the complaint were as follows:

"i. Direct the Opposite Parties to handover possession of Unit to the Complainant, complete in all respects and in conformity with the Allotment Letter and Apartment Buyers' Agreement, with all additional facilities and as per quality standards promised and execute all necessary and required documents in respect of the said apartment in favour of the Complainant within 6 months of this petition being filed before this Hon'ble Commission or as directed by this Commission;

ii. Direct the Opposite Parties for an immediate 100% refund of the total principal amount of Rs. 2,23,91,480/- (Rupees Two Crore Twenty Three Lakh Ninety One Thousand Four Hundred and Eighty Only) paid by the Complainant, along with a penal interest of 18% per annum from the date of the receipt of the payments made to the Opposite Parties, in case the Opposite Parties cannot deliver or fail to deliver the absolute, complete and final physical possession of the flat within a period of 6 months of this petition being filed before this Hon'ble Commission or as directed by this Hon'ble Commission;

iii. Direct the Opposite Parties to pay a delayed possession compensation equal to interest @ 18% per annum on the amount deposited by the Complainant with the opposite Parties, with effect from March 2015 i.e. date when possession was

promised, till the date of actual possession is handed over by the Opposite Parties along with all necessary documents and common areas and facilities as promised during the initial booking made by the Complainant;

[...]"

From the prayers, it is clear that the first respondent sought a direction to the appellant to provide the apartment, compliant with all the requirements mentioned in the ABA, within six months of the complaint, i.e., by 3 November 2017. In relation to this prayer, the first respondent also filed an interim application [IA No 17613 of 2017] before the NCDRC seeking a direction to the appellant for the delivery of possession of the apartment. Along with this, the first respondent sought compensation for delayed possession, calculated at the rate of 18 per cent per annum on the amount deposited with the appellant from the date on which actual possession was to be delivered (March 2015). However, if the appellant failed to deliver the possession of the apartment within six months, the first respondent sought the refund of the principal amount of Rs 2,23,91,480, with interest at 18 per cent per annum from the date the amount was paid by the first respondent to the appellant.

9 The appellant issued a notice to claim possession to the first respondent on 25 September 2017. On 16 February 2018, the NCDRC passed an interim order, inter alia, in relation to the interim application:

"Arguments on IA No. 17613 of 2017 filed by the complainant heard. By this application, complainant is seeking direction to the opposite parties to deliver possession of the allotted apartment being unit no. SY-B-32-03. Learned counsel for the complainant submits that he is ready and willing to take possession of the flat if found in fit condition and he is also ready and willing to pay the payment raised by the opposite party subject to the decision in this complaint. Learned counsel for the opposite party has no objection if interim order is passed as stated by learned counsel for the complainant.

In view of the above, application is disposed of with the direction that opposite parties shall deliver possession of the allotted apartment to the complainant on payment of demanded dues by the complainant within one month of the date of payment. It is made clear that this order is subject to final outcome of the complaint. Counsel for the opposite parties state that in view of the interim order passed today on the application of complainant, he does not press his IA No. 2661 and 2662 of 2018."

10 On 17 May 2018, the first respondent filed another interim application bringing on record several photographs showing that the apartment was not complete and was not in a habitable condition. In response to an email from the first respondent, the appellant sent the following email on 25 September 2018:

"We have noted the content of your email and wish to apprise you that due to limited workforce, the finishing work is slow at the site. We expect the same to

resume in full force in near future and thereafter, we may look at completing the work at the earliest for the handover.”

Thus, it is clear the apartment which had been offered for possession by the appellant was not complete in all respects nor was it in a habitable condition.

11 By its judgment dated 1 November 2021, the NCDRC held that the appellant did not contest that an amount of Rs 2,23,91,480 had been paid by the first respondent. It then noted that the first respondent would be considered as a consumer within the meaning of Section 2(1)(d) of COPRA since the appellant had not brought on record anything to prove that the first respondent was indulging in the business of buying/selling apartments. On merits, the NCDRC relied on a decision rendered by it on 6 December 2019 in relation to the appellant’s Project (Siddharth Vasisht v. IREO Pvt. Ltd. and Ors Consumer Case No 1062 of 2018), which was upheld by this Court on 11 December 2020 [Civil Appeal (Diary) No 21634 of 2020]. The NCDRC thus ordered a refund of Rs 2,23,91,480 with simple interest at the rate of 10.25 per cent per annum, which it noted was the rate of interest payable under the Real Estate (Regulation and Development) Act 2016 in Haryana in respect of cases where refund is made to flat buyers due to the delay of the developer in handing over possession.

12 In Siddharth Vasisht (supra), relying on its previous decision in Shamshul Hoda Khan v. IREO Victory Valley Pvt. Ltd. and Anr. Consumer Case No 2110 of 2016, decided on 17 January 2019, the NCDRC had rejected the appellant’s argument that the calculation of the period for the delivery of possession of the apartment under Clause 13.3 of the ABA would only start from the date the Fire NOC was granted. In Shamshul Hoda Khan (supra), the NCDRC had rejected the developer’s submission by noting that the Haryana Fire Service Act 2009 [“HFS Act”] did not prohibit the commencement of construction on a housing project after Building Approval was sanctioned and pending a Fire NOC if the Building Approval did not contain such a condition and, in any case, the appellant had commenced construction on the housing project before it received the Fire NOC. Similarly, in Siddharth Vasisht (supra), the NCDRC also noted that the appellant had commenced construction on the Project before it received the Fire NOC.

13 This Court rejected the appeal against the decision in Siddharth Vasisht (supra) by relying on its earlier order dated 3 May 2019 [Civil Appeal No 4801 of 2019] rejecting the appeal against Shamshul Hoda Khan (supra). This Court has thereafter rejected a review petition [Review Petition (Civil) No 2339 of 2019] against its order rejecting the appeal against the decision in Shamshul Hoda Khan (supra) by an order dated 15 October 2019, where it noted that the NCDRC had correctly pointed out that since the appellant began construction before the Fire NOC was granted, it could not argue that the period for delivery of possession should start only from the date the Fire NOC was granted. This Court held:

“Delay in filing the review petition is condoned.

The principal submission raised in the review petition is on the basis of Section 15(1) of the Haryana Fire Service Act, 2009. It is submitted that the construction of a building could only begin after the Fire Scheme was approved by the concerned authority and as the Fire Safety Scheme in the present case was approved on 28.10.2013 the period ought to be reckoned from that date.

The submission was dealt with by the National Commission and the relevant portion from para 10 was as under:

"It is an admitted position that the opposite party had been raising demand based upon the stage of construction even prior to 28.10.2013 when the first fire safety clearance came to be issued. The payment plan agreed between the parties envisaged payment of the 3rd instalment on commencement of excavation, 4th on casting of basement roof slab and the 5th on casting of ground floor roof slab. The 6th instalment was payable on casting of 3rd floor roof slab. It is an admitted position that even the 4th instalment which was payable on casting of basement roof slab was demanded on 5.2.2013. The 5th and 6th instalments were demanded on 21.3.2013 and 18.9.2013 respectively. Admittedly, the fire safety clearance had not been received by that time."

In view of the circumstances on record this Court refused to interfere and dismissed the civil appeal.

We have gone through the review petition and do not find any substance in the submissions raised therein. This review petition is, therefore, dismissed."

14 In the present appeal, Mr Ankur Saigal, learned Counsel appearing on behalf of the appellant, has submitted that:

(i) Clause 13.3 of the ABA stipulates that possession would be handed over within forty-two months after the pre-conditions were fulfilled, and there was a grace period of 180 days. It has been submitted that the Building Plan sanctioned on 27 September 2011 contained a requirement of a Fire NOC, and the Fire NOC was received only on 25 September 2013. Hence, the contractual date for handing over possession, including the 180 days" grace period, would be 24 September 2017. In this context, reliance has been placed on the communication of the appellant dated 25 September 2017 making an offer of possession;

(ii) In view of the judgment of this Court dated 11 January 2021 in IREO Grace Realtech Private Limited v. Abhishek Khanna and Others (2021) 3 SCC 241, the period for delivery of possession begins only from the date the Fire NOC is granted; and

(iii) A direction for refund together with interest was not warranted because the relief sought in the consumer complaint before the NCDRC was possession of the flat and the prayer for refund was set up in the alternate, in the event that possession could not be offered. Since the appellant offered possession within the contractual period, there is no valid basis to order a refund.

15 Opposing these submissions, Ms Nina R Nariman, learned Counsel appearing on behalf of the first respondent, submitted that:

(i) The first respondent moved an interim application before the NCDRC seeking a direction for the delivery of possession. On 16 February 2018, the NCDRC disposed it off with a direction to the appellant to deliver possession upon the payment of the outstanding dues, within a month of the date of payment;

(ii) On 25 September 2018, nearly seven months after the interim order of the NCDRC, the appellant addressed an email, inter alia, stating that "...due to limited workforce, the finishing work is slow at the site". The appellant's email stated that it expected "the same to resume in full force in near future and thereafter...may look at completing the work at the earliest for the handover". In view of the above email, the appellant was not in a position to hand over possession even as on 25 September 2018; and

(iii) The construction of the Project started even before the issuance of the Fire NOC, as is apparent from the fact that letters of demand were addressed to the first respondent commensurate with the casting of slabs on 18 February 2013, 27 May 2013 and 3 December 2013. Hence, the plea that the period for the delivery of possession of the apartment commenced only from the date of the Fire NOC is not tenable.

16 The primary relief which was sought by the appellant before the NCDRC was the handing over of possession of the flat allotted under the ABA. The bona fides of the first respondent are apparent from the fact that interim application was moved before the NCDRC for handing over possession. In other words, consistent with the plea in the complaint, the first respondent sought possession in the first instance. An interim order was passed on 16 February 2018 directing the appellant to hand over possession.

17 The core submission of the appellant is that the date for handing over possession would be 24 September 2017, having regard to the provisions of Clause 13.3 of the ABA. Clause 13.3 provided as follows:

"13.3 Subject to Force Majeure, as defined herein and further subject to the Allottee having complied with all its obligations under the terms and conditions of this Agreement and not being in default of any provision(s) of this Agreement including but not limited to the timely payment of all dues and charges including the total Sale Consideration, registration charges, stamp duty and other charges and also subject to the Allottee having complied with all formalities or documentation as prescribed by the Company, the Company proposes to hand over the possession of the said Apartment to the Allottee within a period of 42 (forty two) months from the date of approval of the Building Plans and/or fulfillment of the preconditions imposed thereunder ('Commitment Period'). The Allottee further agrees and understands that the Company shall additionally be entitled to a period of 180 days ('Grace Period'), after the expiry of the said Commitment Period to allow for unforeseen delays in obtaining the Occupation

Certificate etc., from the DTCP under the Act, in respect of SKYON Project.”

18 According to the appellant, in terms of the above clause, the date by when the offer of possession could be made would be 24 September 2017. This submission runs contrary to the orders of this Court dismissing the appeals against NCDRC’s decisions in Shamshul Hoda Khan (supra) and Siddharth Vasisht (supra), both of which are of two-judge Benches. However, in support of this proposition, the appellant has placed reliance on the decision of this Court in Abhishek Khanna (supra), which is a decision by a three-judge Bench.

19 In Abhishek Khanna (supra), which was in relation to another housing project of the appellant, one of the issues before this Court was:

“22.1. (i) Determination of the date from which the 42 months period for handing over possession is to be calculated under Clause 13.3, whether it would be from the date of issuance of the fire NOC as contended by the developer; or, from the date of sanction of the building plans, as contended by the apartment buyers.”

After analysing the provisions of the HFS Act, Clause 13.3 of the ABA (which contained the same condition as the ABA in this case, that the period for delivery of possession would commence from the “date of approval of the Building Plans and/or fulfillment of the preconditions imposed thereunder”), and Clauses 3 and 17(iv) of the sanctioned Building Approval (which are identical to Clauses 317 and 17(v)18 of the sanctioned Building Approval in the present case), the Court held that the period for delivery of possession would only commence from the date the Fire NOC was granted. This Court held:

“25.7. The environmental clearance granted by the Ministry of Environment & Forest Government of Haryana on 12-12-2013 required the developer to submit a copy of the fire safety plan approved by the Fire Department, before commencing construction of the project. General Condition (vi) under Part B of the environmental clearance stipulated that the developer shall obtain all other statutory clearances, including the approval from the Fire Department, prior to construction of the project. Clause (vi) provides that:

“(vi) All other statutory clearance such as the approvals for storage of diesel from Chief Controller of Explosive, Fire Department, Civil Aviation Department, Forest Conservation Act, 1980 and Wild Life (Protection) Act, 1972, Forest Act, 1927, PLPA 1900, etc. shall be obtained as applicable by project proponents from the respective authorities prior to construction of the project.”

(emphasis supplied)

17 “3. FIRE SAFETY:

[...]

On receipt of the above request the Commissioner, Municipal Corporation, Gurgaon after satisfying himself that the entire fire protection measures

proposed for the above buildings are as per NBC and other Fire Safety Bye Laws, and would issue a NOC from Fire safety and means of escape/access point of view. This clearance/NOC from Fire Authority shall be submitted in this office along with a set of plans duly signed by the Commissioner, Municipal Corporation, Gurgaon within a period of 90 days from the date of issuance of sanction of building plans. Further, it is also made clear that no permission for occupancy of the building shall be issued by Commissioner, Municipal Corporation, Gurgaon unless he is satisfied that adequate firefighting measures have been installed by you and suitable external firefighting infrastructure has been created at Gurgaon, by Municipal Corporation, Gurgaon. A clearance to this effect shall be obtained from the Commissioner, Municipal Corporation, Gurgaon before grant of occupation certificate by the Director General."

18 "17. GENERAL:-

[...]

(v) That the colonizer shall obtain the clearance/NOC as per the provisions of the Notification No. S.O. 1533 (E) Dated 14.09.2006 issued by Ministry of Environment and Forest, Government of India before starting the construction/execution of development works at site."

25.8. We are of the view that it was a mandatory requirement under the Haryana Fire Service Act, 2009 to obtain the fire NOC before commencement of construction activity. This requirement is stipulated in the sanctioned building plans, as also in the environment clearance.

25.9. The 42 months' period in Clause 13.3 of the Agreement for handing over possession of the apartments would be required to be computed from the date on which fire NOC was issued, and not from the date of the building plans being sanctioned."

Based on this, the Court held [Paragraph 44] that allottees who had been offered possession and in respect of whose apartments the Occupation Certificate had been issued, were bound to take possession (after having been paid compensation for the delay in offering possession) and could not terminate the ABA. However, it is important to note that the Court found that the construction in respect of their apartments was complete.

20 In the present case, since the Fire NOC was only granted on 25 September 2013, the period for delivery of possession of the apartment (the forty-two months period, along with the 180 days" grace period) would end on 24 September 2017. The appellant issued a notice of possession to the first respondent on 25 September 2017.

21 However, even if this submission of the appellant is accepted, it is apparent that the appellant was not in a position to comply with the interim order of the NCDRC for the handing over of possession. Though the interim direction was issued on 16 February 2018, the email of the appellant dated 25 September

2018 indicates that possession could not be handed over due to the absence of an adequate work force at the site. Thus, it is evident that the appellant was not in a position to hand over possession of the apartment even after the interim order. In this backdrop, the order of the NCDRC for the grant of refund at the appropriate rate of interest cannot be faulted.

22 For the above reasons, we affirm the judgment of the NCDRC, since the position in the present case is distinguishable from the facts before this Court in *Abhishek Khanna* (supra).

23 In Civil Appeal No 268 of 2022, the first respondent was allotted an apartment in Tower D of the Project. The ABA was signed on 6 September 2013. The appellant issued a notice of possession on 6 September 2016. The first respondent filed a consumer complaint [Consumer Case No 417 of 2017] before the NCDRC on 14 February 2017 seeking a refund of the amount paid with interest at 18 per cent per annum or the possession of the apartment, if the appellant was willing to complete the apartment in accordance with the specifications in the ABA in a time bound manner and not charge any further amount over and above the sale consideration. By its judgment dated 22 November 2021, which takes note of the decision of this Court in *Abhishek Khanna* (supra), the NCDRC directed the appellant to refund the principal amount to the first respondent with interest at the rate of 10.25 per cent per annum.

24 We have heard Mr Ankur Saigal, learned Counsel for the appellant and Mr. Vaibhav Gaggar, learned Counsel for the respondent.

25 The finding of fact which has been recorded by the NCDRC in its impugned judgment dated 22 November 2021 is that the amenities which were promised by the appellant have not been provided in the Project and the apartment. In the course of discussion, the NCDRC has, in fact, tabulated the amenities which were to be but have not been provided. In this view of the matter, the direction for the refund of the amount paid together with interest, cannot be faulted. The appellant made a solemn representation to the flat buyer of the amenities which would be provided in the flat and the Project. A breach of this representation is actionable at law.

26 The appeals are accordingly dismissed.

27 Pending applications, if any, stand disposed of.