
(2014) 05 NCDRC CK 0058

In the National Consumer Disputes Redressal Commission

Pradeep Kumar Diwan

APPELLANT

Vs

Gayatri Devi Chokhani

RESPONDENT

Date of Decision : 23-05-2014

Acts Referred:

Citation : 2014 0 NCDRC 513 : 2014 3 CPJ 42

Hon'ble Judges : Rekha Gupta J.

Final Decision : Petition allowed

Judgement

1. REVISION Petition No. 2175 of 2013 has been filed by the petitioners/complainants against the order dated 18.4.2013, passed by West Bengal State Consumer Disputes Redressal Commission, Kolkata (short, "State Commission") in First Appeal No. 161 of 2011. The facts of the present case as per petitioners/complainants are that an agreement/contract was entered into between the land owners/vendors and developer and petitioners on 2.2.2006 for a self-contained flat on a total consideration of Rs. 4,59,828 measuring about 836 sq.foot (approx.) including 15% super built-up at 1/7, Ganpat Rai Khemka Lane, P.O. Liluah, Dist. Howrah -711204, P.S. Liluah being flat No. 1C on 1st floor with the facilities under the terms and conditions stated in the said agreement/contract dated 2.2.2006 and initially a sum of Rs. 31,000 as Earnest Money was paid to the developer by cheque No. 108750 dated 26.12.2005 drawn on Oriental Bank of Commerce, 32, Chowringhee Road, Kolkata -71 and the cheque was cleared from the Drawer's A/c and as per the terms of the said contract, the balance consideration amount had to be paid by the purchasers on transfer and possession of the said flat as well as the said building in finished condition including outside and inside common portions of cement plasters and colours. The said flat and building had to be delivered within three months from the date of this contract.

2. THE said flat was booked by the petitioners for use by themselves as well as by their family members. The petitioners were residing in a rented house at 38, Upper Haranathpur Road, P.O. Bhadrakali, Hooghly -712232 for last 8 years.

3. THE rented house was very old one it was very difficult to stay over there as the house was not in safe condition and part of its ceiling as well as side plasters were falling from time -to -time and can cause harm of life to the petitioners and/or family members.

4. AFTER booking the flat, the petitioners approached ICICI Bank Ltd. for sanction of home loan vide application No. 777 -5151169 accordingly, a sum of Rs. 4,26,421 was sanctioned by the Bank vide its sanction letter dated 29.3.2006 for payments up to 180 months (EMI) @ 8.5% p.a. interest and instalment of EMI as Rs. 4,200 p.m. Towards sanction of home loans a sum of Rs. 3,251 was also paid to ICICI Bank towards administration fee, service tax and other charges.

5. SOME papers were asked by the ICICI Bank Ltd. for safe custody of the flat as per their format but the developer provided the declaration deleting some points which were against their ulterior motive.

6. AGAIN the petitioners applied to Oriental Bank of Commerce, 32, Chowringhee Road, Kolkatta -700071 for home loans and a sum of Rs. 4,20,000 was sanctioned by the Bank by debiting a sum of Rs. 1,600 to their savings account with the same Oriental Bank of Commerce vide its sanctioned letter dated 20.3.2007 for a period of 14 years @9.5% interest p.a. and monthly EMI of Rs. 4,528 special condition: disbursement subject to registration of property. The said plot was sanctioned to construct a G+3 storeyed residential building by Bally Municipality vide No. 272, B.P. No. 212 dated 11.8.2004.

7. AS per Sr. No. 8 of page 6 Electrical Wiring, Generator, Common Meter and Meter Room was to be installed and provided by the developer which is included in consideration price but nothing had been done till filing of the case. Electrical Meter was not arranged by the developer for any of the purchasers as such the petitioners had applied for Electrical Meter in the name of Pradeep Kumar Diwan through web site with CESC on 6.6.2007.

8. THE petitioners have received notice from developer's Advocate Gautam Banerjee, Judges Court, Howrah's letter dated 15.3.2007 stating that they had defaulted payment and hence, the flat was cancelled but the petitioners had replied to the letter of the Advocate, Gautam Banerjee intended to take delivery of possession of the flat vide purchasers letter dated 7th April, 2007 vide registered letter No. A -9023 with A/D dated 7.4.2007 sent through Russel Street Post Office, Kolkata with a copy to Developer Company at registered office hence, there was no question of cancellation. A letter was also received by the petitioners of the flat from Amlesh Maji (Advocate) acting on behalf of the Developer -Company and reply to that letter was also sent to the Advocate Amlesh Maji stated intention to possess the flat.

9. APART from the above payment on verbal request of the developer petitioners had made further payment by cheque No. 108760 dated 5.4.2006 for Rs. 38,000 drawn on Oriental Bank of Commerce, 32, Chowringhee Road, Kolkata -71 and the cheque was cleared on 6.4.2006 from the drawer's account Again a self

cheque No. 140328 dated 8.2.2006 for Rs. 30,000 drawn on Oriental Bank of Commerce, 32, Chowringhee Road, Kolkata -71 was given in the presence of Sujata Diwan, Sweta Diwan from the account of second petitioner, Sujata Diwan which was also drawn in cash on 10.2.2006 by the developer's person but for such self cheque no Money Receipt was issued by the developer in spite of several verbal reminders and by one registered reminder and lastly on 25.3.2007, the Land Owner/Director Sri Sandip Kumar Chokhani as well as Executive Sri Pradip Kumar Chokhani refused to issue money receipt for which a diary had been lodged with Liluah Police Station being diary No. 1216 dated 25.3.2007.

10. A letter dated 17.10.2006 was sent by registered post with A/D to the developer's registered address but the same had been returned undelivered with postal remarks "NOT KNOWN" and a complaint was lodged on 28.3.2007 with Registrar of Companies, West Bengal with a copy to Regional Director, Kolkata. Few electrical switches, as required to meet requirement of the flat were purchased by the purchasers of their own choice with payment of their own separately which were lying unfitted in the registered office of the developer. A sink purchased for Kitchen was still lying in the above flat. The intention of land owners/developers were mala fide as such returned a draft No. 012314 dated 15.3.2007 for Rs. 69,000 drawn on Bank of India, Liluah Branch, which was lying with the purchasers of the flat unencashed for their instruction.

11. DURING the pendency of this case, respondent No. 4/opposite party No. 4, Saligram Mishra filed Affidavit on 17.3.2010 and stated that they had sold the flat which was subject matter of this case to his wife Suraj Moni Mishra. Thereafter, on the basis of application filed by the petitioner, Court directed the respondent No. 4 to file the original sale deed. Respondent No. 4, on 20.5.2010 supplied one Xerox copy of the deed dated 20.2.2009. After going through the copy of the deed, it appeared to the petitioner that the flat which petitioners had booked and agreed to purchase and which was the subject matter of the dispute of this case, said property had been transferred by the respondents in favour of Smt. Surajmoni Mishra -wife of Saligram Mishra. From the deed, it was appearing that deed was executed by Smt. Gayatri Devi Chokhani -respondent No. 1, Smt. Aparna Chokhani -respondent No. 2, Sri Sandip Kumar Chokhani -respondent No. 3 as owners/vendors as party of the first part and M/s. Pransive Concrete (Pvt.) Ltd., represented by its Director as Developer/confirming party and Smt. Surajmani Mishra as purchaser. The petitioners preferred appeal before the State Commission being SC Case No. FA/09/100 and before State Forum petitioner appeared and contested there. State Commission disposed of the case allowing appeal on 10.2.2009. It was matter of great surprised that during pendency of the appeal before State Commission, respondents never disclosed about the transfer of flat by them in favour of other person. Not only that but also after starting of proceeding/case after remand, respondents had not stated anything about the transfer of property by them. The respondents had no right to transfer the property which was the subject matter of the dispute without any intimation

to Court to other parties. From the deed, it is crystal clear that purchaser was wife of respondent No. 4 and such transfer was nothing but a paper transaction only to eye wash of the learned Court and only to frustrate the case and proceedings, which was going on. From the deed itself, it was very much clear that the respondents have no respect towards law and procedure and has no respect before the Court. During pendency of this case, the transfer of the property which was the subject matter of the case was not only illegal but also it was disregard to Court.

12. THE respondent Nos. 1 to 3 in their written statement before the District Consumer Protection Forum at Howrah (short, "District Forum") stated that: "5. The averments made in paragraph (a) of the said application are matter of record. It is submitted that the impugned agreement for sale dated 2.2.2006 does not bear the requisite amount of stamp duty as stipulated under the prevailing and thus, unless the said instrument is impounded in accordance with law, the said document can neither admitted in evidence nor the above proceedings can be continued. The learned Forum is thus required to decide the admissibility of the said instrument dated 2.2.2006 at first which hits the vey root of the proceedings.

9. The statement made in paragraph (i) of the said complaint though are matter of record, but the installation/erection of meter room does not mean for exclusive user of the complainants but for the common users for intending purchasers of the respective flats for which the proportionate expenses have to be borne by them.

10. With reference to the averments made in paragraphs (k) and (l) of the impugned application, it is stated that the complainants initially intending to purchase the concern flat entered into an agreement for sale dated 2.2.2006 and paid total sum of Rs. 69,000 towards part payment earnest money but latterly they were not willing to purchase the said property, these opposite parties through their lawyer's letter dated 15.3.2007 repudiated and cancelled the said agreement for sale accompanying with Banker's cheque for the said sum of Rs. 69,000 drawn on Bank of India, Liluah Branch dated 15.3.2007. The impugned application for electric meter in the name of Pradeep Kumar Diwan is not only illegal but also without jurisdiction of him. He has not locus standi either to apply for or to get electric service in his name in the concerned flat and simultaneously the CESC Ltd. also has no right to entertain the impugned application of Pradeep Kumar Dewan in their regard.

11. With reference to the statement made in paragraphs (m) and (n) of the said application, it is stated that in compliance with the obligation and performance on the part of these opposite parties according to the agreement and further as per the desire of the complainant the stipulated expenditure exceeded to further amount in addition to the settled consideration as per the said agreement. The complainants though voluntarily agreed to pay such additional cost of the material and works in the meeting held on 27.1.2007 but they failed and refused

to pay the said additional amount and accordingly, the opposite parties have compelled to cancel the said agreement, through their lawyer's letter dated 15.3.2007 accompanying the said Banker's cheque for Rs. 69,000 as stated herein. Accordingly, the complainants or their own act, conduct and volition have disentitled themselves to any relief from the Hon'ble Forum.

13. The statement made in paragraph (q) of the said application are unnecessary misconceived and false. It is false to say that the complainants purchased the impugned electric switches for the concerned flat or that those are lying in the office of the Developer are all false. It is submitted further that after completion of the other flats, in the holding four intending purchasers have purchased their respective flats without having any misunderstanding and disputes with these opposite parties whatsoever.

14. These opposite parties further submit that the complainants immediately after entering into the above agreement for sale dated 2.2.2006 started creating disturbance and troubles this way or that to the opposite parties in the matter of construction work in various manner which would be apparent from the complainant's reply letter dated 7.4.2007 addressing to Mr. Gautam Banerjee, Advocate. It is further submitted that even after the completion of construction work, they have lodged complaint and objection with their mala fide motive before the Bally Municipality in the matter of obtaining completion certificate from the said authority. It is further submitted that by their own conduct they have proved their disentitlement to get the concerned flat by way of sale. It is further stated that apart from the law and facts stated above, serious disputed facts are involved in the proceedings which required extensive evidence from both sides and accordingly, this learned Forum should refused to entertain the above complainant. The complainants are not at all entitled any relief in any manner.

Respondent Nos. 4 and 6 i.e. Sri Shaligram Mishra and Pransive Concrete Pvt. Ltd. have stated in their reply that - - "The opposite party No. 5 Sri Pradip Kumar Chokhani has been unnecessary and illegally impleaded in the above complaint, since he is neither a co -sharer of the immoveable property in question nor he is developer nor he has any nexus with the opposite party No. 6 i.e., Pransive Concrete Pvt. Ltd. Accordingly, the complainant is not entitled any relief against him.

The impugned agreement for sale dated 2.7.2006 is made on insufficient non - judicial stamp paper, thus, it is hit by the provisions of the Indian Stamp Act and accordingly, unless the concerned document of agreement is impounded, the said instrument cannot be considered in the eye of law. Therefore, the above matter in question is required to be adjudicated first in accordance with law.

The statements made in para (a) of the said complaint are matters of record. It is not disputed that there was an agreement for sale dated 2.2.2006 for sell of the concerned flat and on execution of the said agreement the complainant paid

a sum of Rs. 31,000 as part payment.

With reference to the statement in para (j) of the said complaint, it is submitted that the subject matter of Sr. No. 8 in page No. 6 referred in the third schedule to the said agreement never means for exclusive users of the purchasers but are the common amongst the purchasers of the building for which the proportionate expenses shall have to be borne.

With reference to the statement made in para (k) of the said complaint, it is submitted that since the complainants were actually unwilling to purchase the flat and the opposite party Nos. 1 to 3 vide lawyers' letter dated 15.3.2007 had already cancelled the said agreement for sale, and thus, the opposite parties had no occasion nor any buildings to make arrangement for electric meter in the name of the complainants. It is further submitted that the impugned application by complainant No. 1 -Pradip Kumar Diwan to the CESC Ltd. through the website on 6.6.2007, if any, is absolutely ill -motivated, illegal and unauthorized attempt on the part of the complainant and without having the lawful ownership in the concerned building they had no locus standi to make any application for electric service connection and simultaneously the CESC Ltd. authority has also no locus standi to provide new service connection in the concerned holding in the name of complainant who even has no locus standi for such service connection.

The statements made in para 1 of the said complaint are matters relating to record. It is submitted that in compliance with the requisite formalities and obligations and performance on the part of the opposite parties in pursuance to said agreement as well as desired by the complainant which exceeded to a considerable further amount in addition to the initially settled consideration money as per the said agreement and the complainants voluntarily agreed to pay such additional cost to the opposite parties and for settlement of the same necessary conference was duly held in January, 2007, wherein the complainants agreed to pay the said additional/extra amount but surprisingly in spite of repeated demands, the complainants deliberately and knowingly failed and neglected to pay the additional amount with an ulterior motive and on such failure, the said agreement for sale dated 2.2.2006 had to be cancelled under the said changed circumstances and accordingly by the said lawyers letter dated 15.3.2007 the entire advance money of Rs. 69,000 was returned to the complainants by Bankers, cheque drawn on Bank of India, Liluah Branch dated 15.3.2007, due to the above conduct on the part of the complainants themselves the impugned agreement for sale dated 2.2.2006 has been lawfully and justly cancelled and accordingly, this opposite party had no objection on their part to transfer the said flat by way of sale in favour of the complainants provided the subsequently additional money is paid to them as has been stated herein before and since, the complainants of their own act, conduct and volition have backed out to pay the concerned additional money, they are not at all entitled to any relief before the Hon''ble Forum.

The averments made in para (q) and (r) of the complaint are all vague and

incorrect. The opposite parties submit that after completion of construction of other flats to four numbers of flats have been sold to Balchand Kochar and others, Ranjit Kumar Mishra and others, S.P. Sharma and others and Munni Lal Prasad and others.

Those opposite parties further submit that the complainants immediately after entering into the above agreement for sale dated 2.2.2006 started creating disturbance and troubles this way or that to the opposite parties in the matter of construction work in various manner which would be apparent from the complainant's reply letter dated 7.4.2007 addressing to Mr. Gautam Banerjee, Advocate. It is further submitted that even after the completion of construction work they have lodged complaint and objection with their mala fide motive before the Bally Municipality in the matter of obtaining completion certificate from the said authority. It is further submitted that by their own conduct they have proved their disentitlement to get the concerned flat by way of sale. It is further stated that apart from the law and facts stated above, serious disputed facts are involved in the proceedings which requires extensive evidence from both sides and, accordingly, this learned Forum should refused to entertain the above complaint. The complainants are not at all entitled any relief in any manner."

13. RESPONDENT No. 7, i.e. Suraj Moni Mishra has stated in their reply that - - "This respondent not at all aware as to whether there was at all any agreement for sale of the concerned flat between the complainant and Smt. Gayatri Devi Chokhani or not dated 2.2.2006 or any but this added respondent after perusal of the document is now confirm that the complainant has taken back the entire sum of Rs. 69,000 being the alleged part/advanced payment for alleged sale of the said flat vide Banker's pay order dated 15.3.2007 vide cheque No. 012314 drawn on Bank of India for a sum of Rs. 69,000 and accordingly an acknowledgement of the said sum alleged agreement for sale, if any, has been cancelled and/or repudiated by the complainant himself.

The complainant wilfully and deliberately concealed and suppressed the said fact of repudiation of the alleged contract of his part and has lodged the above complaint on false, frivolous and misconceived grounds having no genuine cause of action to file the same.

It is submitted that there was no registered agreement for sale at all - -the impugned agreement for sale, if any, is not at all admissible in evidence since the same have not been made upon proper stamp and as such the impugned agreement for sale apart from its genuinity and reputation of the same as said above is bound to be impounded in accordance with the Indian Stamp Act.

This added respondent is a bona fide purchaser of the said flat in question for value and she is in exclusive and khas possession of the same together with her family members and has possessed the same being the true and lawful owner upon exercising all acts of ownership.

Since the impugned agreement for sale upon which the complainant relies on is on insufficiently stamp, this Hon"ble Forum before further proceeding must impound the same according to the provision of Indian Stamp Act. It is further submitted that since the complainant has already refused to make payment of deficit stamp duties this Forum should have dismissed the above complaints far before. This added respondent has been unfortunately and unnecessarily impleaded and/or added, in the misconceived suit which should have been dismissed summarily for want of proper stamp duty, cause of action and also on account of acknowledgement of alleged advanced amount of Rs. 69,000."

14. DISTRICT Forum vide their order dated 3.3.2011, while dismissing the complaint has observed as under: "The case was heard by the parties in regard to the application wherein this Forum has dismissed the complaint petition on contest against the OP Nos. 1, 2, 3, 4, 6 and ex parte against OP No. 5 without any cost on 11.2.2009.

Being aggrieved and dissatisfied with the order of this Forum the complainants - appellants Pradeep Kumar Diwan and Smt. Sujata Diwan have preferred an appeal before the Hon"ble Consumer Disputes Redressal Commission, West Bengal, against the respondents Smt. Gita Debi Chokhani and others wherein the Hon"ble State Commission after hearing the parties passed a final order on 10.6.2009 and set aside the impugned order the Forum below was directed to decide the matter afresh after granting the parties opportunity to adduce their respective evidence on affidavit and granting respective parties opportunity to file questioners and replies and, accordingly, appeal was allowed without cost.

At the very outset, the OPs take a defence to the effect that the aforesaid agreement for sale was not properly stamped and as such it cannot be taken into consideration as evidence unless the same is impounded.

In view of the aforesaid initial objection taken by the OPs the Forum after hearing both sides found that the complainants relied upon the aforesaid agreement for sale dated 2.2.2006 which was not properly stamped. The Forum also found that according to Section 35 of the Indian Stamp Act no instrument chargeable with the duty shall be admitted in evidence. Under the Indian Stamp Act as applicable to the State of West Bengal an agreement of sale requires stamp duty payable on the conveyance deed under Article 23 of the Schedule IA to that Act. That means that document of the nature of agreement to sell requires stamp duty on the basis of market value of the property which is the subject matter of the agreement.

Accordingly, the Forum passed order No. 16 dated 12.6.2008 directing complainants to take necessary step for impounding the deed of agreement for sale dated 2.2.2006.

It may be noted here that initially complainants were willing to impound the document and took several adjournments on the ground of collecting requisite stamp duties, etc. and finally he informed the Forum that he is unable to pay the

deficit stamp duty and the penalty for impounding the document.

Accordingly, the Forum passed order No. 20 dated 31.12.2008 where the Forum refused to mark the document as exhibit for evidence.

Consequently, the case was heard without considering the aforesaid agreement for sale dated 2.2.2006. Since, the agreement for sale dated 2.2.2006 cannot be considered according to law, my predecessor held that the complainant have failed to establish the fact that they had an agreement for sale in respect of the flat in question. For the same reason cancellation of agreement by the OPs for non -payment of the additional consideration amount by the complainant shall not have any relevance as the original agreement for sale appears to be non est in the eye of law.

Now the only question remains for consideration whether the complainant are entitled to get an order and refund consideration money paid by him to the OP as the flat in question was not delivered.

In deciding the aforesaid question, it appears that according to the version of the complainants they paid total amount of Rs. 99,000 i.e. Rs. 31,000 was paid by cheque to the developer on 26.12.2005 and thereafter Rs. 38,000 was paid by cheque to the developer on 5.4.2006 and Rs. 30,000 was paid by a self -drawing cheque dated 8.2.2006.

This fact has not been controverted by the OPs only dispute arose that complainant paid Rs. 30,000 to the OP by self -drawing cheque dated 8.2.2006. The only question at this stage falls for consideration whether the complainants actually paid the said Rs. 30,000 on 8.2.2006 to the OP and if so they are entitled to get an order for refunding of the said amount.

In order to prove the aforesaid disputed payment of Rs. 30,000 on 8.2.2006 complainant filed a Xerox copy of the cheque dated 8.2.2006 drawn on Oriental Bank of Commerce, 32, Chowringhee Road, Kolkata -700071, which shows that the cheque was issued by the complainants as "self". It is alleged by the complainants that as per request of the developer he issued the said self -drawing cheque which was encashed on 10.2.2006. But in spite of repeated requests the developer did not issue any receipt and as such, he lodged a complaint with the local P.S.

Besides, the complainants did not file any papers showing whether any police case was started against the developer for the aforesaid allegation and whether any such investigation was done. In course of hearing after remand the complainants neither filed any cogent evidence regarding payment of Rs. 30,000 to the developer nor any other documents adduced to prove the same. Moreover, the alleged amount of Rs. 30,000 by self -drawing cheque does not appear to be convincing. The Xerox copy of the cheque dated 8.2.2006 shows that the complainant issued the said cheque for self -drawing and he did not take any receipt for payment from the developer. It may also be noted that in case of

other two admitted payments of Rs. 31,000 and Rs. 38,000 on 26.12.2005 and 5.4.2006 respectively complainants issued the account payee cheque in favour of the developer and took money receipt. But for payment of the disputed amount of Rs. 30,000 by a self - drawing cheque he did not get any money receipt and no suitable explanation could be furnished by the complainants for such acts. Though, the opportunities were given to the complainants to produce or adduce cogent evidence after remand but the complainants failed to adduce any such evidence and consequently, the evidence by this it can be proved that the complainants have paid a sum of Rs. 30,000 to the developer by a self -drawing cheque. It is evident that the claim of the complainant for further part payment of Rs. 30,000 by a self cheque which is totally denied and disputed by the developer.

Further, we find that in course of proceeding the Forum vide order No. 16 dated 12.6.2008 directed the complainants to take necessary step for impounding the impugned agreement but after taking several adjournments the complainant informed the Forum that he is unable to pay the deficit stamp duty and penalty.

Thus, after hearing this Forum has passed a final order dated 11.2.2009 dismissing the complaint and thereafter in pursuance of the order of the learned State Commission as well as this Forum, one Shaligram Mishra, Director of Pransive Concrete Pvt. Ltd. submits an affidavit with a copy of notice of Gautam Banerjee, Advocate dated 15.2.2007 annexing the Xerox copy of Banker's cheque dated 15.3.2007 for a sum of Rs. 69,000 only drawn on Bank of India, Liluah, Howrah in favour of Pradeep Kumar Diwan with a certificate dated 31.12.2008 issued by the Manager, Bank of India, Liluah (W) Branch certifying that the aforesaid pay order has been encashed by said Pradeep Kumar Diwan/ complainant on 10.8.2007.

Having heard on both sides and considering the materials on record, we are of the view that the impugned agreement for sale on a non -judicial stamp paper of Rs. 10 only is impoundable under the Indian Stamp Act and the complainant has unequivocally expressed that he is unable to pay the deficit stamp duty and penalty for impounding the document.

Accordingly, there is no existence of any agreement for sale for consideration of this Forum.

That apart, we also find that the complainant himself has taken back by way of refund of Rs. 69,000 by encashment by the pay order dated 15.3.2007.

The instant complaint case cannot be entertained and the flat sold to Smt. Surajmoni Mishra, OP No. 7 is a bona fide purchaser for value and is in Khas possession of the said flat.

Thus considering the sum and substance of the materials on record, we are in view that the complaint petition cannot be tenable on the ground of non - existence of any agreement and also for want of cogent evidence regarding

further payment of Rs. 30,000 as claimed by the complainants.

That the consumer complaint is dismissed on contest against the OP Nos. 1, 2, 3, 4, 6 and 7 and ex parte against OP No. 5 without any cost."

Dissatisfied with the order of the District Forum, petitioners filed an appeal before the State Commission. The State Commission, allowed the appeal vide their order dated 18.4.2013. They held as under: "As regards the insufficiency of stamp paper in respect of the agreement, we are of the considered view that when both the parties rely on the agreement and, especially, in a proceeding under summary procedure the question of insufficiency of stamp paper of the agreement is not germane.

It appears that the agreement for sale was executed on 2.2.2006 and the agreement is said to have been cancelled by the letter of the learned Advocate dated 15.3.2007. The payment was made by the complainants to the tune of Rs. 31,000 by cheque dated 26.12.2005 and for Rs. 38,000 by cheque dated 5.4.2006. The fact remains that the sum of Rs. 69,000 remained in the custody of the OPs for a long time and while making refund of the said sum no interest was paid thereon. Another aspect of the case which requires consideration is that the flat in question was transferred by OP No. 4 to OP No. 7. Such conduct on the part of the OPs is sufficient to award compensation in favour of the complainants. In this connection we rely judgment of the Hon"ble National Commission as reported in, 2012 (1) CPR 2 (NC) (supra), wherein it was held that builder cannot dupe buyer by selling booked flat to a third party. Since the agreement has been cancelled and the complainants having received the refund of the amount so advanced by them, it is not possible to pass an order for the delivery of flat in question and registration of the deed in favour of the complainants. But in view of the circumstances aforesaid, we are of the view that the complainants are entitled to get compensation of Rs. 50,000 from the OPs.

In the result, the appeal is allowed in part. We set aside the impugned judgment and order. The complaint is also allowed in part. The OPs are jointly and severally directed to pay compensation of Rs. 50,000 to the complainants within 45 days from the date of passing this order failing which the interest @ 9% per annum shall accrue on the said amount till realization."

15. HENCE , the revision petition.

16. THE main grounds for the revision petition are that: "Because the Hon"ble State Commission, Kolkata below gravely erred in not appreciating the fact that as per agreement the respondents were bound to deliver the flat to the petitioners within three months but did unreasonable. Although, the petitioners have fulfilled all terms of agreement and never defaulted in payments. Therefore, the cancellation of booking was illegal ab initio.

• Because the Hon"ble State Commission below gravely erred in not appreciating the fact that the respondents did not communicate the petitioners

regarding completion of the construction of the flat and ask the petitioners to receive the delivery of the flat.

• Because the State commission failed to appreciate the fact that respondents after a long gap of more than one year of agreement and receiving earnest money, on 15.3.2007 with mala fide intention refunded the amount to the petitioners. Although, the petitioners have waited more than 5 months and on 10.8.2007 had encashed the pay order amount of Rs. 69,000 with permission of the District Forum, Howrah to deposit the DD for safe custody. Therefore, the agreement cannot be cancelled unilaterally.

• Because the State Commission below gravely erred in not appreciating the fact that story of the respondents to further sell the flat to another person was completely just a paper work as respondent No. 7 is a house wife and having no means of self -earning, moreover she is wife of respondent No. 4. Therefore, this transfer was mere a paper work, done just to mislead the Court and the Court could not appreciate this fact.

• Because the State Commission did not consider the factual background of the case while computing the reasonableness of the compensation amount awarded. The petitioners did not get justice as the compensation amount of Rs. 50,000 does not satisfy the suffering and the loss occurred to the petitioners. As today, in same locality if petitioners would be required to spend amount of Rs. 30,09,600 at the current market rate. As today the price of flat is going on at the rate of Rs. 3,600 per sq. ft. Therefore, the State Commission has erred in not appreciating the fact of escalating rate of property and failed to compensate the petitioners in present scenario."

We have heard the learned Counsel for the petitioner as well as petitioner who is present in person and have gone through the record.

17. THE petitioner now has prayed that directions may be given to the respondents to deliver the possession of the said flat to the petitioners after receiving consideration amount and interest on earnest money of Rs. 31,000 as per agreement dated 2.2.2006; failing which directions may be issued to the respondents to pay Rs. 30,09,600 as per the present market value of the flat and compensation of Rs. 10,00,000 for mental agony and harassment.

18. IT is an admitted fact that the petitioner booked a flat in February, 2006 at cost of Rs. 4,59,828. The petitioner paid Rs. 31,000 as earnest money vide cheque dated 26.12.2005 and, thereafter, another cheque for Rs. 38,000 on 5.4.2006. He has himself stated in his complaint that his home loan of Rs. 4,20,000 was sanctioned by Oriental Bank of Commerce vide letter dated 23.2.2007. He has also alleged that a self cheque dated 8.2.2006 for Rs. 30,000 drawn on Oriental Bank of Commerce from the account of second petitioner, Sujata Diwan also drawn in cash on 10.2.2006 by the developer but no money receipt was issued for the same. The petitioners could, however, give no evidence to support this fact. The petitioner, further, has nowhere mentioned

when and whether he checked up with the respondents regarding the readiness of the flat and to ascertain the date on which the possession would be given. It is evident from a reading of the papers on record that the petitioner from time to time raised various issues to justify his delay and procrastination in taking possession of the flat. In his letter dated 25.3.2007 to the Inspector in -charge, Liluah Police Station, he had alleged that the respondent wanted to make some illegal construction on the premises for which the petitioner was adamant and opposed.

19. IN his complaint, he has stated that "Electrical Wiring, Generator, Common Meter and Meter Room is to be installed and provided by the developer which is included in consideration price but nothing has been done till filing of this case. Electrical Meter was not arranged by the developer in any of the purchasers."

20. ON 15.3.2007, Mr. Gautam Banerjee, Advocate served a legal notice on behalf of his client M/s. Pransive Concrete Pvt. Ltd. in which it was recorded that: "That my said client in total compliance with the said agreement have already performed their obligations arising out of the said agreement and as completion of entire work of construction of concerned flat, my said client had repeatedly intimated to you as regards total accomplishments of completion of concerned flat with further intimations as regards considerable amount of money invested by my said client to make the concerned flat fully constructed as was desired by you of your own accord which has exceeded to a considerable further amount in addition to the price initially settled as per the said agreement, whereas you have voluntarily agreed to pay such addition, cost to my said client on settlement of accounts with my said client in that regard and such conference was held sometime in January, 2007.

That my said client having had implicit faith and trust in you awaited for your response as to completion of proposed settlement regarding actual cost of the concerned flat so as to complete proposed sale, whereas latterly, it has transferred to my said client that you with an ulterior motive have wilfully avoided yourself to sit with my said client and to conclude the concerned matter but to utt(sic) surprise and/or dismay of my said client, you are wilfully abstained yourself for reasons best known to you and such act and conduct on your part have unequivocally proved and/or evidenced your deliberate act of non - performance of your part of contract tantamounting to total unwillingness to perform your part of obligations and thus your said act and conduct have irresistibly proved that you have deliberately avoided the said agreement for sale and accordingly, your said act and conduct comprehensively and/or in actuality lead to total rescission of the said agreement for sale and thus for all practical purpose because of your said admitted and wilful non -cohesion to the same, the purported agreement for sale dated 2.2.2006 thus stands cancelled and/or rescinded forever.

It is being intimated to you that out of good gesture my said client remitting herewith a Bank Pay Order of Rs. 69,000 only in the name of addressee No. 1,

i.e., Pradeep Kumar Diwan dated 15.3.2007, drawn on Bank of India, Liluah (W), Howrah -711204, by way of refunding to you the entire amount of advance money as stated hereinbefore."

In response to the same vide his letter dated 7.4.2007, while protesting that he was still desirous on taking possession, the petitioner stated that the flats were not being prepared as per sanctioned plan of Bally Municipality the flats for which he had submitted a letter to the Municipality and also urged that the developer should obtain the Completion Certificate. He also stated that many works had been left pending.

21. THEREAFTER , Amales Maji, Advocate vide his letter dated 18.5.2007 again under instructions of his client M/s. Pransive Concrete Pvt. Ltd. sent another legal notice which stated that: "That as per the purported agreement for sale you were to payment of settled consideration money to my said client and, accordingly, to accomplish sale of concerned flat within reasonable time. But despite completion of total construction work of the concerned flat and despite your "No Objection" as to lawful transferable right of my said client you have done nothing from your end as yet to prove your readiness and/or willingness to purchase the concerned flat, rather in order to hoodwink your own fault and laches to perform your obligation and/or promise arise out of the contract and as such a sum of Rs. 69,000 only which was paid by you to my said client was lawfully remitted back to you by my said client by pay order drawn on "Bank of India", Liluah Branch being No. 012314 which was duly received by you on 15.8.2007 and thus your acceptance of the said pay order coupled with your conduct as to remain silent without ever endeavouring to accomplish and/or finalize sale of concerned flat unequivocally prove your unwillingness to purchase the concerned flat, whereas the said act and conduct on your part irresistibly concludes cancellation and/or rescission of the concerned agreement for sale dated 2.2.2006.

In the above context, I on behalf of said client in the perspective of your deliberate unwillingness to complete proposed sale of concerned flat, my said client is thus lawfully and/or of right cancels and/or rescinds the purported agreement for sale, dated 2.2.2006 forever which please note."

22. IN response, the petitioner sent a letter dated 21.5.2007 now taking another plea that the flat was not completed as he had personally visited the said flat and electrical switches, doors, plumbing work to fix up, tabs, etc. were yet to be completed. He also now for the first time raised the issue of compensation of losses due to delay in handing over the possession of the flat. We have carefully gone through the State Commission's order dated 18.4.2013. The State Commission came to the conclusion that petitioner had failed to adduce any such evidence to prove that payment of Rs. 30,000 by self cheque had been made to the respondent and received by them. It was accepted that only payment of Rs. 69,000 had been made by the petitioner which had since been returned to the petitioners and the cheques encashed by them. The only deficiency on the part of the respondents as per State Commission, is that "Rs. 69,000 remained in the

custody of the, opposite parties for a long time and while making refund of the said sum no interest was paid thereon. The second aspect of the case was the sale of the flat which had earlier been allotted by the petitioner to respondent No. 7." and that "Such conduct on the part of the opposite parties is sufficient to award in favour of the complainants." Based on only these two grounds, the State Commission vide its order dated 18.4.2013 then set aside the order of the District Forum and the complaint was allowed in part and opposite parties were jointly and severally directed to pay compensation of Rs. 50,000 to the complainants.

23. IN view of the facts mentioned earlier, it is apparent that Rs. 69,000 did not remain with the respondents for a long time and further, it was retained by them as they expected the petitioners to take possession of the house after making balance payment. It is only when they concluded by the behaviour and acts and conduct of the petitioner that he did not appear keen for taking the possession, by making balance payment, that allotment was cancelled vide letter dated 15.3.2007. The fact that the petitioners were unwilling to proceed with the purchase of flat can be concluded by the fact when Rs. 69,000 was returned to the petitioner by pay order dated 15.3.2007 drawn on the Bank of India, Liluah Branch, the same was encashed without protest. Hence, the petitioner's acceptance of the said pay order coupled with his silence and failure to take further action to conclude the sale of concerned flat proved his reluctance and unwillingness to purchase the concerned flat at that point of time. Hence, the sale of the said flat to respondent No. 7 vide deed dated 20.2.2009 cannot be taken as a deficiency of service or unfair trade practice by the respondents. In view of the above, revision petition stands allowed and the order of the State Commission is set aside and order of the District Forum is upheld and the consumer complaint is dismissed, without any cost.