2024 INSC 542

Reportable

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

Civil Appeal No. 8176 of 2022

Kaushik Narsinhbhai Patel & Ors.
.... Appellant(s)

Versus

M/s. S.J.R. Prime Corporation Private Limited.
...Respondent(s)

J U D G M E N T

C.T. RAVIKUMAR, J.

1. The appellants, 46 in numbers, along with respondent Nos.2 to 6 herein (proforma respondents) filed Consumer Case No. 945 of 2019, against Respondent No.1 herein, complaining of deficiency in service raising various grounds, which culminated in the impugned order dated 15.09.2022 of the National Consumer Disputes Redressal Commission (NCDRC), New Delhi. Allured by the representation of the first respondent-builder, each of the appellants booked separate flats in its declared project namely, 'Fiesta Homes by SJR Prime'. A Construction Agreement dated

31.03.2012 was entered into between the complainant and Respondent No.1 (Annexure P-2). Going by Clause 6.1 of the Construction Agreement, possession of flats was liable to be handed over, after completion of the construction, on or before March, 2014, with a grace period of six months. However, considerable delay had occurred in completing and handing over possession of flats and as per the complainants, it was after about four years down the timeline that possession was handed over to them. Deficiency in construction aggravated the situation and made the appellants and the proforma respondents (hereinafter referred for brevity, 'the complainants' unless otherwise specifically mentioned) to approach the NCDRC by filing the aforesaid complaint seeking the following reliefs: -

> *"i. Pay to each of the complainants & to each buyer having same interest, compensatory interest @ 18% p.a. for abnormal & inordinate delay in handing over possession of flats to complainants, computing the total period of delay as indicated in Para 11.11 of the Consumer Complaint;*
>
> *ii. Refund the illegally charged car parking fee to complainants & to each buyer having same interest with an interest @ 18% p.a. & to hold the OP guilty*

of committing unfair and restrictive trade practice against the complainants & also against each buyer having same interest;

iii. Refund to the complainants & to all buyers having same interest, the excess and illegally charged "legal fee" at the actual with an interest @ 18% p.a. and also to declare the OP guilty of committing unfair & restrictive trade practice against the complainants and also against each buyer having same interest;

iv. Refund to the complainants & to all buyers having same interest, fee charged towards BESCOM & BWSSB charges after deducting as per actual with an interest @ 18% p.a. & also to declare the OP guilty of committing unfair and restrictive trade practice against the complainants & also against each buyer having same interest; and/or

v. Direct OPs to provide in time bound manner, Green Jogging Track and Convenience Store as promised in Brochure, else pay compensation of Rupees Five Lakhs to each complainant and to each buyer having same interest; and/or

vi. Pass any other and/or further relief, which this Hon'ble Commission thinks fit and proper, in the facts and circumstances of the case, in favour of the complainants and against the OP."

2. The complaint was partially allowed by the NCDRC as per the impugned order dated 15.09.2022. Before considering the rival contentions raised before us, it is worthwhile to refer to certain vital facts.

3. The complainants filed Consumer Complaint No.945 of 2019 in May, 2019. Subsequent to its filing, the first respondent-builder issued certain e-mails to complainants between January, 2020 to June, 2020, addressing them individually and requiring them to contact its legal department in connection with the grievance raised in C.C. No.945 of 2019. Though this was done during the pendency of the Consumer Complaint, and that too, in respect of the grievance raised in C.C. No.945 of 2019, notice to the first respondent remained unserved. Thereupon, the NCDRC passed an order on 27.01.2021 on the following lines: -

"Notice of the complaint still remains unserved. Issue fresh notice of the Complaint along with all pending applications to the Opposite Party under Section 38 (3) (a) of the Consumer Protection Act,

2019 making it clear that if the Opposite Party wishes to contest the allegations in the Complaint, it may file the Written Statement within thirty days of the receipt of notice in the complaint, failing which its right to file Written Statement may be closed."

4. The aforesaid order was challenged by the appellants before this Court in Civil Appeal No.715 of 2021 which was allowed as per (Annexure P-18, referred as such in the SLP) order dated 11.08.2021. Taking note of certain indisputable and undisputed factual position, this Court arrived at the conclusion that the first respondent-builder was well aware of the pendency of the C.C. No.945 of 2019 before the NCDRC and went on to hold thus: -

"The conduct on the part of respondent-builder in not filing written statement does not entitle him to any further benefit. It must, therefore, be declared that the respondent has forfeited his right to have filed written statement and it is hereby declared so.

The appeal, therefore, stands allowed. The C.C.No.945 of 2019 shall now be proceeded

further without the written statement of the respondent-builder. It shall however, be open to the respondent-builder to participate in the proceedings."

5. We will refer to the contentions raised based on Annexure P-18 order and its tenability or otherwise, a little later. Subsequent to Annexure P-18 order, NCDRC considered C.C. No.945 of 2019, which culminated in the order impugned in this appeal.

6. Heard, Mr. Ajit Kumar Sinha, Senior Counsel appearing for the appellants and Mr. Balaji Srinivasan, learned counsel for the first respondent.

7. A scanning of the impugned order would reveal that the NCDRC has recorded a clear finding that there occurred delay in handing over the flats to the appellants. As a necessary sequel to such finding and findings on the other allied grievance and claims, the impugned order was passed on 15.09.2022. The operative portion of the impugned order reads thus: -

"In view of the aforesaid discussions, the complaint is partly allowed. The opposite party is directed to pay delayed compensation in the shape of interest @ 6 % per annum on the deposit of the

complainants from due date of possession as determined for each buyer in the manner as provided in paragraph-8 of the judgment till the date of offer of possession and construct Green Jogging Track and Convenience Store, within a period of two months from the date of this judgement."

8. It is to be noted that despite the nature of the impugned order and creation of liability on the first respondent, as above, the complainants alone have chosen to prefer appeal and the first respondent No.1 has not chosen to challenge the same. In the said circumstances, the findings of NCDRC on delayed handing over of the flats to the complainants and on non-construction of Green Jogging Track and Convenience Store can only be taken as having become final. Ergo, the scope of this appeal is limited to a few questions, which we will discuss and deal with later.

9. For a proper disposal of this appeal, it is apposite to refer to paragraph 8 of the impugned order, which reads as follows: -

"In the present case, due date of possession was September, 2014, while "occupancy Certificate"

was obtained 17.05.2017 and possession was delivered thereafter. The complainants have not given date-wise payment schedule. Schedule-E of this agreement contained "Construction Linked Payment Plan" under which, total sale consideration was payable in 12 instalments on different levels of the construction. As such for the purposes of delayed compensation, we think it appropriate that due date of possession will be considered after expiry of six month from the payment of 11th instalment by the home buyer. The developer would be entitled for further six months as grace period. The developer shall pay delayed compensation in the shape of interest @ 6% per annum on the deposit of the complainants from the due date of possession as determined in accordance of above formula till the date of actual possession."

10. One of the main contentions of the appellants is that ignoring Annexure P-18 order of this Court, the NCDRC virtually permitted the first respondent to introduce facts to dispute their claims and complaints inasmuch as the opportunity offered to the first respondent by NCDRC to

file written submissions was utilised by the first respondent to introduce new facts to resist their claims and contentions. Such newly introduced facts and factors by the first respondent through written submissions, obviously, weighed with NCDRC in adopting the formula followed in paragraph 8 of the impugned order, for the purpose of computation of compensation payable to the complainants, it is contended.

11. We will straight away verify the verity of the aforesaid contentions with reference to Annexure P-18 order dated 11.08.2021, firstly, to see whether the same was overreached and then, subject to its answer and consequences of its defiance. A bare perusal of Annexure P-21, which is the written submissions on behalf of the first respondent herein (opposite party therein) filed before the NCDRC and marked as such in this proceeding, without any peradventure would go to show that in and vide the said written submissions, the first respondent had introduced some pleadings to resist the claims and the contentions of the complainants in CC No.945 of 2019 and eventually, to offer its explanation for the delay in handing over possession of the flats. The *raison d'etre* for our remarks would be unravelled by a

mere perusal of Annexure P-21. Paragraph 3 thereof, opens thus: -

"The complainants do not deserve any compensation as,"

(underline supplied)

12. Thenceforth, under para 3 (i) to 3 (iii), the respondents gave the reasons therefor. Through paragraph 4 of Annexure P-21, the respondent introduced further reasons to support its stand that the complainants do not deserve compensatory interest for the delay in handing over possession of flats. It is to be noted that even after taking a stand at paragraph 5 thereof that there was no delay at all from its part, the first respondent proceeded to explain the delay in paragraph 6. The statements made in the further paragraphs of Annexure P-21 also carry, either the case of the first respondent or its explanations/reasons to counter the claim of the complainants. To put it pithily, the first respondent, on being given the opportunity to file written submission, made use of it to make good its failure to file a written statement despite the fact that its right to file the same was declared as forfeited by this Court.

13. We are at a loss to understand as to how, such an opportunity could have been utilised by the first respondent in defiance to the specific directions of this Court under Annexure P-18 order and to file a written submission of such a nature. Under Annexure P-18 order, this Court declared that the first respondent had forfeited its right to file a written statement and then permitted, rather, directed to proceed further without the written statement of the first respondent-builder. True that even then its right to participate in the proceedings was protected, presumably, taking into account the position of law in that regard. We will deal with the scope of such permitted participation as also the consequence of the act of defiance of Annexure P-18 order depending on its degree of defiance and its impact. In doing so, we will have to keep reminded of the principle of law that what cannot be done directly, cannot be done indirectly.

14. The discussion as above, would take us to the next question as to what is the impact of forfeiture of opportunity to file written statement? We are fully aware of the fact that all the provisions in the Code of Civil Procedure, 1908, (for short 'the CPC') are not *proprio vigore* applicable to proceedings before Consumer

Forums created under the Consumer Protection Act, 2019, except to the extent it is provided under Section 38 (9) of the Consumer Protection Act. Be that as it may, in the absence of specific provisions dealing with the consequence of forfeiture of the right to file a written statement, it is only appropriate to refer to the provisions and positions dealing with such situations in the CPC to know the general law on this question. In this context, it is worthy to refer to a decision of this Court in ***Nanda Dulal Pradhan & Anr. v. Dibakar Pradhan & Anr***[1]. It was held therein thus: -

> *"……as observed and held by this Court in the case of Sangram Singh (supra) on setting aside the ex parte decree and on restoration of the suit the parties to the suit shall be put to the same position as they were at the time when the ex parte judgment and decree was passed and the defendants may not be permitted to file the written statement as no written statement was filed. However, at the same time they can be permitted to participate in the suit proceedings and cross examine the witnesses. In that view of the matter the impugned judgment and order passed by the*

[1] 2022 SCC OnLine SC 822

High Court is unsustainable. Still, on setting aside the ex parte judgment and decree, though the defendants who had not filed the written statement, can be permitted to participate in the suit and cross examine the witnesses. Therefore, the High Court is not right in observing that as no written statement was filed by the defendants, the reopening of the suit by setting aside ex parte judgment and decree will become futile. As observed hereinabove the High Court has not at all observed anything on the correctness of the order passed by the First Appellate Court setting aside the ex-parte judgment and decree on merits.

15. Thus, the position is that even if the defendant/opposite party failed to file a written statement and, in that matter, even if forfeiture of the right to file written statement has occasioned it would not disentitle that party from participating in the further proceedings, without filing a written statement and in such circumstances, the said party would also be having the right to cross-examine the witness(es), if any, of the plaintiff/complainant.

16. In the contextual situation, it is also appropriate to refer to Rule 1 & 2, Order VI of the CPC which reads thus:-

> *"**Pleading**. - "Pleading" shall mean the plaint or written statement."*
>
> Rule 2, Order VI, in so far as, reads thus: -
>
> *"(1) Every pleading shall contain, and contain only, a statement in a concise form of the material facts on which the party pleading relies for his claim or defence, as the case may be, but not the evidence by which they are to be proved."*

17. The rigour of the rule of pleadings is evident from Rule 7 of Order VI, CPC, which mandates that *'no pleading shall, except by way of amendment, raise any new ground of claim or contain any allegation of fact inconsistent with the previous pleadings of the party pleading the same'*.

18. In the context of the aforesaid provisions under the CPC, it is apt to refer to a decision of a Division Bench of the Karnataka High Court in ***Nalini Sunder v. GV Sunder***[2]. It was held therein that a party could not make out a case on the basis of evidence for which he/she has

[2] AIR 2003 Kar 86

laid no foundation in the pleadings. It is fairly settled that no amount of evidence can prove a case of a party who had not set up the same in his/her pleadings, it was further held therein. According to us, it is the correct proposition of law. In the absence of any specific provisions dealing with non-filing of written statements/forfeiture of the right to file a written statement, taking note of the general position as above, it can only be held that it should bar the opposite party in a proceeding before the Consumer Redressal Forums to bring in pleadings, indirectly to introduce its/his case and evidence to support such case. In the situations mentioned above, the right of the opposite party is confined to participate in the proceedings without filing a written statement and to cross-examine witness(es), if any, examined by the complainant(s). It be the position of law, the first respondent who is bound by Annexure P-18 order could not have been permitted to introduce its case to defend the case of the complainants through written submissions though it was rightly permitted to participate in the proceedings. There is no case for the first respondent that it sought permission to cross-examine Kaushik Narsinhbhai Patel who filed affidavit of evidence and produced documentary evidence. At any

rate, no such case was put forth by the first respondent and no grievance of denial of such opportunity was also raised. In the circumstances expatiated above, in view of Annexure P-18 order the reply and objection filed by the first respondent herein in this proceeding also cannot be looked to the extent it carries pleadings relating its case, the reasons and objections which could have been let in through a written statement. In short, the first respondent could be permitted only to argue the legal questions arising based on authorities and provisions of law as also regarding lapses or laches and the consequential non-admissibility or otherwise of evidence, let in by the appellants.

19. Having held as above, the next question to be looked into is whether NCDRC had given weight to any such pleadings and contentions taken by the first respondent in its written submissions and/or whether the decision of NCDRC is based on any fact, factors or data furnished by the first respondent beyond the extent permissible on account of the legal trammel of forfeiture of its opportunity to file a written statement. At this juncture, we may hasten to add that even when the defendant's/opposite party's right to file a written statement is forfeited that by itself will not make it

obligatory on the part of the NCDRC to pass an order in favour of a complainant in case the complainant concerned failed to establish its case. This power is to be read into the jurisdiction of a body with adjudicating power. This is because there is distinct difference between a situation of non-filing of a written statement pursuant to a declaration that the opposite party had forfeited the right to file a written statement and absence of denial of specific pleadings of complainant in the written statement filed by an opposite party. Certainly, in the latter case, absence of denial of specific pleadings on facts they can be taken as admitted. In the case on hand, it is to be noted that actually as per order dated 27.01.2021, NCDRC had granted time to the first respondent to file a written statement with a caution that in case of failure to file the same within the stipulated time, the right to file a written statement would be closed. It is this order dated 27.01.2021 that was challenged by the complainants that ultimately culminated in Annexure P-18 order of declaration of forfeiture.

20. A close scrutiny of the impugned order in juxtaposition with the written submissions filed by the first respondent would go to show that NCDRC had not

actually accepted the case of the first respondent raised in defence in its written submissions or in that matter, no reason or objection raised in the written statement was also adverted to, for rendering its decision on the complaint. In such circumstances, though the action on the part of the first respondent who suffered Annexure P-18 order, in bringing on record its case and contentions to resist the case and contentions of the complainants, cannot be appreciated, the contention of the appellants based on the same became inconsequential. As stated earlier, in view of Annexure P-18 order, we are also not going to advert to any case, claims or contentions of the first respondent raised in its reply and objection filed in this proceeding, except to the legally permissible limit, in case any such material is available on record. We have already concurred with the decision of the Karnataka High Court in ***Nalini Sunder's*** case (*supra*) that a party could not make out a case on the basis of evidence for which he/she had laid no foundation in the pleadings. In the absence of a written statement, naturally, there can be no pleadings, in the case, for the first respondent in the eyes of law. Though the first respondent participated in the proceeding before the NCDRC, it could not bring-forth anything admissible in

view of the impact of forfeiture under Annexure P-18 order.

21. The discussion as above would lead to the last question as to whether the impugned order invites interference on any other ground. The core contention of the appellants that while passing the impugned order, NCDRC failed to consider the relevance and impact of Clause 6.1 of the Construction Agreement. No doubt, it is a matter that requires consideration. Clause 6 of the said Construction Agreement reads thus: -

> *"6)* ***COMPLETION & DELIVERY OF POSSESSION:***
>
> *6.1) The possession of the Schedule 'C' apartment in Schedule 'A' Property will be delivered by the Second Party to the First Party after completion of construction as far as possible on or before the month of March year 2014 with Six months grace period additionally.*
>
> *6.2) ….*
>
> *6.3) In case of delay in delivery of the apartment for reasons other than what is stated above, the Second Party is entitled to a grace period of Six months and if the delay persists, the Second Party shall pay the First Party damages at Rs. 2/- (Rupees Two Only) per Sq. Ft. super built up area per*

month of delay of the Schedule 'C' Apartment till delivery, provided the First Party has/ have paid all the amounts payable as per this Agreement and within the stipulated period and has not violated any of the terms of this agreement and Agreement to Sell…."

22. A perusal of Clause 6.1 of the Construction Agreement would reveal that it specifically mentions the promised date for handing over the possession viz., the due date for handing over possession as *'on or before March, 2014'*. True that in terms of Clause 6.1, additionally, six months grace period is available to the first respondent-builder. Thus, going by the terms of Construction Agreement, the due date for handing over possession of flats could have been, rather should have been fixed only in terms of Clause 6.1 of the said Agreement. However, the impugned order would reveal that without considering Clause 6, the due date for handing over of possession of flats was fixed by the NCDRC by reckoning six months grace period from the date of payment of instalment No.11 (eleven), by the home buyer. Therefore, the question is which among the two methods is legally permissible. While the appellants

contend that the former is bound to be followed in the matter of fixing the due date for handing over possession of flats, the first respondent would contend that the method adopted by the NCDRC is just and reasonable and there is no warrant or justifiable reason for any kind of interference. The decision in ***R.V. Prasannakumaar & others. V. Mantri Castles Private Limited & Another.***[3]***,*** referred to by the NCDRC, itself would answer this issue. In ***R.V. Prasannakumaar's*** case (*supra*), going by the terms of the flat purchase agreement, possession of flats was liable to be handed over to the buyers on 31.01.2014. In that case about two years delay had occurred in the matter of handing over of possession. Consequently, NCDRC took the due date for handing over of possession with reference to the flat purchase agreement and fixed it as 01.02.2014. The fixation of the due date for possession as 01.02.2014 was upheld by this Court in ***R.V. Prasannakumaar's*** case (*supra*). If that be so, in the absence of any exceptional circumstances, NCDRC should have fixed the date for possession in the same manner as has been done in ***R.V. Prasannakumaar's*** case (*supra*), viz., in terms of the conditions in the Construction Agreement. True that in

[3] (2020) 14 SCC 769

view of the specific condition for grant of six months grace period additionally to the buyer, the due date for possession in terms of Clause 6.1 of the agreement ought to have been fixed by reckoning six months from March, 2014, the promise date for handing over the flats mentioned in the Construction Agreement. A scanning of the impugned order would reveal no exceptional circumstances for making deviation from the formula followed in ***R.V. Prasannakumaar's*** case (*supra*) for fixing the due date for possession. NCDRC observed that the complainants have failed to give date-wise payment schedule. We are at a loss to understand as to how that can be a reason for fixing the due date for possession in total disregard to the method adopted in ***R.V. Prasannakumaar's*** case (*supra*). The discussion in paragraph 8 would suggest that NCDRC after taking into account the fact that Schedule-E of the agreement contained 'Construction Linked Payment Plan' whereunder the sale consideration was to be paid in 12 instalments on different levels of construction, formed the opinion that the fixation of due date for possession is closely linked with payment of instalments as mentioned in Schedule-E. We have no hesitation to hold that there is no rationale for such a conclusion for the reason that as

it was arrived at without considering the relevant condition contained in Clause 6.1 of the Construction Agreement which relates to fixation of due date for possession. True that Schedule-E contained 'Construction Linked Payment Plan' and it provides for payment in 12 instalments on different levels of construction. Certainly, it was so incorporated to obligate the buyer to pay the due instalment depending upon the stage of construction. Hence, delay in effecting construction cannot be a reason for denying compensation, which was also contemplated under Clause 6 of the Construction Agreement. The effect of 'Construction Linked Payment Plan' is that it obligates the builder to complete construction up to a particular required level at the given point of time and upon such accomplishment, obligates the buyer to effect the due instalment. According to us, the non-furnishing of a date-wise payment schedule could not have been a reason for deviating from the formula followed in the matter of fixation of due date of possession in ***R.V. Prasannakumaar's*** case (*supra*). That apart, in the case on hand, the fact is that the complainants have effected the payment of sale consideration and were handed over possession of flats. The compensation is claimed by the

complainants for the considerable concutation in construction and in handing over possession of flats. At any rate, in the circumstances obtained in this case and especially taking note of the fact that owing to the forfeiture of the right to file a written statement, the first respondent-builder did not make out any exceptional circumstance, the NCDRC was not justified in not following the formula followed in ***R.V. Prasannakumaar's*** case (*supra*) in the matter of fixing the due date for possession for the purpose of computing compensation for the delay. In this context, it is also to be noted that in ***R.V. Prasannakumaar's*** case (*supra*), the NCDRC found that payment in the shape of interest at the rate of 6% per annum on the deposit of home buyers from the due date of possession till the offer of possession is the adequate method to compensate the buyers for the delay. This court only found the course of action adopted by NCDRC as just and reasonable. In the case on hand, NCDRC rightly followed the same method adopted in ***R.V. Prasannakumaar's*** case (*supra*) and the claimants are entitled to compensation in the shape of interest at 6% per annum from the due date of possession till the date on which the respective complainant-buyers are offered possession. In the said circumstances and in

view of the decision in ***R.V. Prasannakumaar's*** case (*supra*), on this issue, the only modification required is with respect to the method adopted for fixing the due date for possession, in the manner mentioned earlier. Though the complainants contended that they are entitled to be compensated in the manner provided under clause 6 of the agreement, in view of the decision in ***R.V. Prasannakumaar's*** case (*supra*), we are of the view that compensation in the shape of interest at the rate of 6 % per annum for the period mentioned earlier would be in tune with the formula followed in ***R.V. Prasannakumaar's*** case (*supra*). This is because such a course was adopted in ***R.V. Prasannakumaar's*** case (*supra*) despite the stipulation for payment of compensation at the rate of Rs.3/sq. ft. per month for delayed handing over of possession. It is to be noted that in the case on hand, the stipulation for payment of compensation for delayed handing over of possession is only at the rate of Rs.2/sq. ft. per month.

23. True that the complainants claimed for refund of charge for car parking fee charged, with interest. The same was declined by NCDRC by assigning the reason that the said question was decided in favour of the developer by NCDRC in CC/913/2016 viz., in ***RV***

Prassana Kumars 47 Ors. vs. Mantri Castles Pvt. Ltd. was confirmed by this Court in ***R.V. Prasannakumaar's*** case (*supra*). In that view of the matter, we decline to interfere with the finding of NCDRC on the claim for refund of car parking charge.

24. Paragraph 9 of the impugned order would reveal that the prayer for refund of legal fee realised by the developer for execution of conveyance deed was declined by NCDRC on the ground that the complainants had not adduced any evidence based on which legal fee could be determined by it. We are not inclined to interfere with the said finding of NCDRC, as well. The same is the position with respect to the claim for refund of legal fee charge for conveyance on the ground that it was charged excessively. As relates the prayer to provide Green Jogging Track and Convenience Store as promised in the brochure, NCDRC has already issued directions for constructing them within the time stipulated thereunder.

25. In the circumstances, this appeal is allowed in part by modifying the formula formulated under paragraph 8 of the impugned judgment by NCDRC in the matter of payment of compensation for delay in handing over possession of flats and it is ordered that the liability of the

developer to pay interest at the rate of 6% per annum shall be from the due date for possession fixed as above viz., from September, 2014 till the date on which the respective complainant-buyers are offered possession.

26. Needless to say, that NCDRC in execution of impugned order as modified by this judgment, shall verify with reference to each flat purchaser the date on which offer of possession has been made to him/her and fix the liability on the builder in the manner mentioned above.

27. Pending application(s), if any, stands disposed of.

......, J.
(C.T. Ravikumar)

......, J.
(Sanjay Kumar)

New Delhi;
July 22, 2024.