CHANDIGARH HOUSING BOARD

v.

M/S. PARASVANATH DEVELOPERS PVT. LTD. & ANR.

(Civil Appeal No. 10748 of 2016)

DECEMBER 17, 2019

[MOHAN M. SHANTANAGOUDAR AND R. SUBHASH REDDY, JJ.]

Consumer Protection:

Failure to deliver flat to the consumer – By the Developer – Due to the dispute between the Housing Board and the Developer which was referred for Arbitration – In the Award Arbitrator fixed the liability on the Developer and the Housing Board in respect of refund to the residential unit buyers in the ratio of 70:30 – National Consumer Commission directed refund of principal sum to the complainant @ 10% interest – It also directed payment of Rs. 1 lakh towards mental harassment and further Rs. 1 lakh towards litigation charges – In view of the award, ascertained the liability of Developer and Housing Board in the ratio of 70:30 – Appeal to Supreme Court by Housing Board questioning the liability fixed upon it in respect of litigation cost and for mental harassment and also enhancement of interest rate to 10% – Held: In view of Clause 9(c) of the Tripartite Agreement, liability to pay the cost towards litigation and mental harassment cannot be fixed on Developer alone as the cost does not qualify as compensation u/clause 9(c) – The apportionment of the liability is well founded – The increase in the interest rate was in exercise of discretionary power of the National Commission and is not liable to be interfered with.

Dismissing the appeal, the Court

HELD: 1.1 A close reading of Clause 9(c) of the Tripartite Agreement indicates two salient features– first, the liability to pay compensation under this Clause can only be affixed on the Developer if it fails to fulfill the condition under Clause 9(a) and perform its obligations under the Development Agreement, i.e. if it does not hand over the possession of the flat to the buyer within a period of 36 months from the date of signing of the

Development Agreement. The second feature of Clause 9(c) is that it envisages a fixed compensation of Rs. 107.60 per sq metre per month to be paid to the flat buyer. [Para 10][165-F]

1.2 Clause 9(c) is not attracted in the present case at all. First, there has been no fulfilment of the condition under Clause 9(a) for Clause 9(c) to come into operation. This is because the Developer never even began construction at the project site due to the dispute with the Housing Board about the encumbrances on the allotted land. Thus, the question of finishing such construction within the period mentioned under Clause 9(a) does not even arise. Consequently, Clause 9(c), which is concerned with the non-fulfilment of this obligation, is also not attracted. [Para 10.1][165-G-H; 166-A]

1.3 Thus, given that the breach of the Development Agreement is attributable to both, Housing Board and the Developer, the failure to hand over possession of the flat to the buyer cannot be said to be on account of the non-performance of the obligation of the Developer alone. Consequently, Clause 9(c) is not applicable to the present case. [Para 10.1][166-E]

1.4 The amount awarded by the National Commission in the impugned order, i.e. Rs. 1 lakh each towards mental harassment and litigation costs, cannot be read as compensation contemplated under Clause 9(c) of the Tripartite Agreement. Evidently, the litigation costs cannot be construed as compensation. Even with respect to the award of Rs. 1 lakh for mental harassment, such amount is in the nature of a general, lump sum compensation, which falls short of qualifying as compensation under Clause 9(c). This is especially because there is no mention of the stipulated fixed rate of Rs.107.60 per sq metre of the super area of the unit, per month in the impugned order. Thus, the liability of paying a total of Rs. 2 lakhs under those heads cannot be foisted on the Developer alone in terms of Clause 9(c). [Para 10.2][166-F-H]

1.5 The Appellant's reliance on the revocation deed is misplaced, as para 4 of this deed clearly states that "the parties have accepted the award" and chosen to act in accordance with

the same. Thus, it cannot be argued that this revocation deed displaces the arbitration award dated 09.01.2015 and the direction therein for the Developer and the Housing Board to pay compensation (if and when determined) in the ratio of 70:30. In any case, this revocation deed may, at best, arguably settle the rights and obligations or disputes between the parties in respect of the Development Agreement. Such settlement of rights and obligations cannot be extended in a manner that enables the Developer and the Housing Board to wriggle out of their liability under the Tripartite Agreement with the Complainant. Thus, the revocation deed cannot be invoked by the Appellant to escape its liability flowing from the Tripartite Agreement and the arbitration award. [Para 11][167-B-D]

1.6 Such division is well-founded as the sale proceeds from the flat buyers were apportioned in the same ratio of 70:30 between the Developer and the Housing Board. This is supported by the Escrow Agreement dated 01.06.2007 executed by the Housing Board and the Developer in pursuance of the Development Agreement. Clause 4(b) of this Escrow Agreement provides that 30% of the sale proceeds in respect of the residential units would first be transferred to the Housing Board and the remaining amount shall then be transferred to the Developer. In view of this, the amount directed to be paid by the National Commission in the impugned order must be paid by the Developer and the Housing Board in the ratio of 70:30. [Para 13][167-G-H; 168-A]

2.1 Clause 9(d) of the Tripartite Agreement requires the Developer and the Housing Board to refund the amounts received from the buyer with interest, if the Developer is unable to deliver the unit to the buyer due to non-approvals from the competent authorities. Here, under Clause 9(d), the parties are liable to refund the principal sum in the ratio of 70:30 as they had received the sale proceeds in the same ratio. [Para 14][168-B-C]

2.2 The increase in the interest rate to 10% was made by the National Commission in exercise of its discretionary power. It is possible that the National Commission chose to enhance the interest rate in view of the fact that it had already imposed

lesser compensation than the significantly higher compensation stipulated under Clause 9(c). National Commission was right in directing the Developer and the Housing Board to pay the principal sum of Rs. 1,03,31,250/- at 10% p.a. to the Complainant. Further, it is found that the direction to pay Rs. 2 lakhs in to towards mental harassment and litigation costs in the ratio of 70:30 between the Developer and the Housing Board is also correct. [Para 14, 15][168-C-E]

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 10748 of 2016.

From the Judgment and Order dated 11.05.2016 of the National Consumer Disputes Redressal Commission at New Delhi in Complaint No. 19 of 2011.

Sachin Datta, Sudhir Makkar, Sr. Advs., Mrs. Rachana Joshi Issar, Ms. Prerana Chaturvedi, Jay Kishor Singh, Prabhakar Tiwari, Jay Kishor Singh, Ms. Rukhsana Choudhury, Advs. for the appearing parties.

The Judgment of the Court was delivered by

MOHAN M. SHANTANAGOUDAR, J.

1. Delay condoned in filing appeal.

2. This appeal arises out of the final order dated 11.05.2016 passed by the National Consumer Disputes Redressal Commission at New Delhi (*hereinafter* 'National Commission') in Consumer Complaint (C.C.) No. 19 of 2011, vide which the Respondent No.1 and Appellant herein were directed to pay Respondent No. 2 herein a principal sum of Rs. 1,03,31,250/- with interest @ 10% p.a., Rs.1,00,000 for mental harassment and agony, and Rs.1,00,000 towards litigation costs in the ratio of 70:30.

3. The factual background to this appeal is as follows:

3.1 The Appellant herein, Chandigarh Housing Board (*hereinafter* 'CHB') invited bids to implement an integrated project with residential, commercial, and other related infrastructure facilities at the Rajiv Gandhi Chandigarh Technological Park in Chandigarh. The bid sent by Respondent No. 1 herein, M/s. Parasvanath Developers Ltd. (*hereinafter* 'Developer') was accepted by CHB. Consequently, CHB and the Developer entered into a Development Agreement dated

06.10.2006 for the grant of development rights in respect of land measuring 123 acres. The said land was allotted to the Developer by CHB for constructing residential units, who then advertised its project for the sale of flats and pent houses as "Parsvanath Pride Asia".

3.2 Respondent No. 2 herein (*hereinafter* 'the Complainant') applied for the allotment of a five-bedroom apartment in this project and paid a sum of Rs.1,03,31,250/- towards the total tentative price of Rs. 3,93,25,000/-. Later, a tripartite flat buyer agreement (*hereinafter* 'Tripartite Agreement') was executed between the Developer, CHB, and the Complainant on 23.04.2008. Clause 9(a) of this agreement stated that the construction of the flat was likely to be completed within a period of 36 months from the signing of the Development Agreement between CHB and the Developer, i.e., 06.10.2006.

3.3 Having received no intimation from the Developer about the status of the project, between September-October 2009, the Complainant inquired and found that construction had not been commenced at the project site. Consequently, he sought a refund of the deposit amount of Rs.1,03,31,250 with interest at 20% p.a. When the refund was not made, the Complainant approached the National Commission on 24.02.2011. It is crucial to note here that similar complaints were filed by other flat buyers before the State Commission and the National Commission.

3.4 Before the National Commission, it was the case of the Developer that the construction could not be carried out in time, as CHB had failed to hand over the possession of unencumbered land to it for raising the construction. On the contrary, CHB argued that disputes only existed for land earmarked for commercial activities, and there was no dispute with respect to the 123 acres of land handed over to the Developer for the construction of residential units. Therefore, it was contended by CHB that the Developer was liable to satisfy the claim of the flat buyer and the complaint was bad as against CHB for misjoinder of party. Notably, the dispute between the Developer and the CHB with respect to the Development Agreement was referred to arbitration.

3.5 Pending the arbitration proceedings, the National Commission passed an order in a similar matter on 05.03.2013, noting that the flat buyers could not be deprived of their legitimate claims due to an *inter se* dispute between CHB and the Developer. Observing that the Developer had failed to construct the residential units and hand over possession in

A time, the National Commission passed an interim order directing the Developer to pay compensation to the flat buyer in terms of Clause 9(c) of the Tripartite Agreement at Rs. 107.60 per sq metre, subject to the final outcome of the arbitration proceedings. Further, in terms of Clause 9(d) of the Tripartite Agreement, the Developer and CHB were directed to pay interest at the uniform rate of 9% p.a. on the amount to be refunded
B to the flat buyers in the ratio of 70:30.

3.6 Finally, on 09.01.2015, the learned arbitrator passed an award in the arbitration proceedings between CHB and the Developer. The award specifically noted that since the flat buyers were not party to the arbitration, the award would only bind CHB and the Developer, and the
C entitlement of the residential flat buyers would have to be decided based on the facts of each case in independent proceedings. However, with respect to the liability to refund the advances collected from the residential unit buyers, the learned arbitrator found that the non-completion of the project was a result of breaches committed by *both*, the Developer and
D CHB. Therefore, he directed that any amount payable on account of refund of price, interest, or compensation (if and when finally determined by the National Commission or the Supreme Court) would be borne by the Developer and CHB in the ratio of 70:30.

3.7 Meanwhile, an order was passed by a 3-judge Bench of this
E Court on 21.04.2015 in an SLP filed against the order of the National Commission dated 05.03.2013 and other connected matters. Dismissing the SLP, the Court took note of the arbitration award dated 09.01.2015 and observed that Clause 9(c) of the Tripartite Agreement, which stipulates the payment of compensation, would only be applicable as against the Developer if it is not in a position to offer a flat to the buyer
F after the expiry of 36 months as stated in Clause 9(a) of the Tripartite Agreement.

3.8 Finally, vide the impugned order dated 11.05.2016, the National Commission disposed of the consumer complaint filed by Respondent No. 2 herein. Taking into account the observations in the final arbitral
G award attributing responsibility of breach of the Development Agreement to the Developer and CHB, as well as the fact that the Developer had received the deposit sum from the Complainant long ago and had benefited from it, the National Commission directed CHB and the Developer to pay the principal sum of Rs. 1,03,31,250/- to the Complainant at 10%
H p.a. from the date of deposit till realization. Further, Rs. 1 lakh was

awarded for mental harassment and another Rs. 1 lakh was awarded towards litigation charges. Both of these were directed to be borne by the Developer and CHB in the ratio of 70:30. The instant appeal has been preferred by CHB against this order, contesting the liability fixed upon it with respect to the payment for litigation costs and mental harassment, as well as the enhancement in interest rate.

4. Heard learned Counsel for the parties.

5. Learned Counsel for the Appellant (CHB) submitted that the impugned order is liable to be set aside as it wrongly saddles CHB with the liability to pay the Complainant 30% of the amount due towards mental harassment and litigation costs. It is argued that such amount is in the nature of compensation and must therefore be borne by the Developer as Clause 9(c) of the Tripartite Agreement provides that the Developer shall be liable to pay compensation to the flat buyer at Rs. 107.60 per sq metres in case of non-delivery of possession of the residential units in time. Further, alluding to a revocation deed dated 04.02.2015 entered into by CHB and the Developer *after* the arbitral award, learned Counsel argued that all third party liabilities have now been taken over by the Developer and can thus not be affixed on CHB. As far as the liability to return the principal amount is concerned, it was submitted that 30% of the principal sum has already been paid by CHB as per Clause 9(d) of the Tripartite Agreement. However, as regards the interest rate payable on the same, it was contended that the National Commission erred in enhancing the rate from 9% p.a. to 10% p.a. without giving any reasons for the same.

6. Per contra, learned Senior Counsel for Respondent No. 1 emphasized that the finding of the arbitrator that *both* the Developer and CHB are guilty of breach, and are therefore liable to make refund of price, interest, or compensation in the ratio of 70:30, should be given utmost importance. This is because the order of the National Commission dated 05.03.2013 passed in a similar matter, made the direction as to the payment of compensation under Clause 9(c) *subject* to the outcome of the arbitration proceedings. Similarly, the interim order of this Court dated 21.04.2015 affirms the findings in the arbitration award as to the interpretation of Clause 9(c) of the Tripartite Agreement. Thus, it was argued that in all these orders, the *inter se* apportionment of liability has been relegated in terms of the arbitration award, and therefore, the ratio of 70:30 stipulated therein should be given effect. Further, learned Senior

A Counsel argued that Clause 9(c) was not made applicable to the instant case, as this clause deals with compensation payable upon non-performance of obligations, which is different from the nature of compensation awarded in the impugned order.

7. In addition to this, learned Senior Counsel representing the B Complainant (Respondent No. 2) argued that the amount awarded to the Complainant vide the impugned order is only in the nature of a general, lump sum amount and is not the compensation contemplated under Clause 9(c) of the Tripartite Agreement. In any case, he submitted that an *inter se* dispute between CHB and the Developer as to the apportionment of liability should not come in the way of the Complainant's right to receive C compensation.

8. Upon perusing the record and hearing the arguments advanced by the parties, two issues arise for our consideration in this appeal:

(a) whether the National Commission was right in directing the payment of amount towards mental harassment and litigation D costs in the ratio of 70:30, or whether such amount falls within the purview of compensation under Clause 9(c) of the Tripartite Agreement so as to be paid solely by the Developer.

(b) whether the interest rate awarded on the principal sum was rightly increased from 9% p.a. to 10% p.a. E

9. As regards the first issue, it would be useful to refer to the relevant portions of the Tripartite Agreement executed between the Complainant, CHB, and the Developer on 23.04.2008:

"**9. (a)** Construction of the residential units is likely to be completed F within a period of thirty six (36 months) of the signing of the Development Agreement on 06.10.2006 between the Developer and CHB and/or as may be extended terms of the Development Agreement shall be subject to force majeure and circumstances beyond the control of the developer, and any restrain restrictions G from any Courts/Authorities. The delay in grant of development clearances beyond 12 months of the signing of the Development Agreement shall not be counted towards the said portion of 36 months.

…**(c)** In case possession of the built up area is not offered to the buyer within a period of 36 months or extended period as stipulated H

in sub-clause (a) above, the buyer shall be entitled to receive from the developer compensation @ Rs.107.60 per Sq. Mtrs. (Rs. 10/- per Sq. Ft.) of the super area of the unit per month and to no other compensation of any kind. In case the buyer fails to clear his account and take possession of the unit within 30 days of offer, the buyer shall be liable to pay to the developer holding charges @ Rs. 107.60 per Sq Mtrs. (Rs. 10/- per Sq. Ft.) of the super area of the unit per month in addition to the liability to pay interest to the sellers and other consequences of default in payment.

(d) If as a result of any Rules or directions of the Government or if any competent authority delays, withholds, denies the grant of necessary approvals for the Project, or if due to any force majeure conditions, the developer is unable to deliver the unit to the buyer, the developer and CHB shall be liable to refund to the buyer the amounts received from the buyer with interest at the SBI term deposit rate as applicable on the date of refund."

From the above, it is evident that the Developer and CHB agreed to complete the construction of the residential units within a period of 36 months from the date of signing of the Development Agreement on 06.10.2006. In the event that such construction was not done, Clause 9(c) would come into operation and the Developer would become liable to compensate the buyer at Rs. 107.60 per sq metre of the super area of the unit, per month.

10. A close reading of Clause 9(c) of the Tripartite Agreement indicates two salient features– *first*, the liability to pay compensation under this Clause can only be affixed on the Developer if it fails to fulfill the condition under Clause 9(a) and perform its obligations under the Development Agreement, i.e. if it does not hand over the possession of the flat to the buyer within a period of 36 months from the date of signing of the Development Agreement. The *second* feature of Clause 9(c) is that it envisages a fixed compensation of Rs. 107.60 per sq metre per month to be paid to the flat buyer.

10.1 When the facts of the instant case are examined in light of these observations, it becomes clear that Clause 9(c) is not attracted in the present case at all. *First*, there has been no fulfilment of the condition under Clause 9(a) for Clause 9(c) to come into operation. This is because the Developer never even began construction at the project site due to the dispute with CHB about the encumbrances on the allotted land. Thus,

A the question of finishing such construction within the period mentioned under Clause 9(a) does not even arise. Consequently, Clause 9(c), which is concerned with the non-fulfilment of this obligation, is also not attracted. It is notable that the arbitrator has also arrived at a finding to this effect in his award dated 09.01.2015 as follows:

B "**296**. Consequently, if any amount is payable on account of refund of price, interest, or compensation (if and when finally determined), respondent is liable to bear and pay 30% thereof, the balance of 70% being payable by the claimant (PDL). Article 14.2.5 no doubt makes the developer solely and exclusively responsible to residential unit buyers, but that is only in regard to non-performance C of its obligations. The said provision does not make claimant responsible for the breaches committed by the respondent, nor absolve the respondent from liability for the consequences of its defaults/breaches, which contributed to the non-performance of the obligations by the developer towards the residential unit buyers." D

(emphasis supplied)

Thus, given that the breach of the Development Agreement is attributable to both, CHB and the Developer, the failure to hand over possession of the flat to the buyer cannot be said to be on account of the E non-performance of the obligation of the Developer alone. Consequently, Clause 9(c) is not applicable to the present case. This reading of Clause 9(c) has also been affirmed by this Court in its order dated 21.04.2015, and for the reasons mentioned supra, we do not deem it fit to interfere with the same.

F 10.2 *Secondly*, we find that the amount awarded by the National Commission in the impugned order, i.e. Rs. 1 lakh each towards mental harassment and litigation costs, cannot be read as compensation contemplated under Clause 9(c) of the Tripartite Agreement. Evidently, the litigation costs cannot be construed as compensation. Even with respect to the award of Rs. 1 lakh for mental harassment, we find that G such amount is in the nature of a general, lump sum compensation, which falls short of qualifying as compensation under Clause 9(c). This is especially because there is no mention of the stipulated fixed rate of Rs.107.60 per sq metre of the super area of the unit, per month in the impugned order. Thus, the liability of paying a total of Rs. 2 lakhs under those heads cannot be foisted on the Developer alone in terms of Clause H 9(c).

10.3 Hence, the contention of the learned Counsel for the Appellant that the impugned order is liable to be set aside on the ground that the amount towards mental harassment and litigation costs is in the nature of compensation that is solely payable by the Developer in terms of Clause 9(c) of the Tripartite Agreement, cannot be accepted.

11. We also find that the Appellant's reliance on the revocation deed dated 04.02.2015 is misplaced, as para 4 of this deed clearly states that "*the parties have accepted the award*" and chosen to act in accordance with the same. Thus, it cannot be argued that this revocation deed displaces the arbitration award dated 09.01.2015 and the direction therein for the Developer and CHB to pay compensation (if and when determined) in the ratio of 70:30. In any case, this revocation deed may, at best, arguably settle the rights and obligations or disputes between the parties *in respect of the Development Agreement* dated 06.10.2006. In our considered opinion, such settlement of rights and obligations cannot be extended in a manner that enables the Developer and CHB to wriggle out of their liability under the Tripartite Agreement with the Complainant. Thus, we find that the revocation deed dated 04.02.2015 cannot be invoked by the Appellant to escape its liability flowing from the Tripartite Agreement and the arbitration award dated 09.01.2015.

12. We also note that the finding in the arbitration award dated 09.01.2015 as to the apportionment of liability between the Developer and CHB to pay the principal sum and general compensation, must be given effect. To this extent, we find merit in the argument raised by the learned Senior Counsel for Respondent No. 1 that the prior National Commission order dated 05.03.2013 and the subsequent order of this Court dated 21.04.2015 both relegate the *inter se* apportionment of liability between the Developer and CHB to the arbitration award. Thus, the split of 70:30 under the arbitration award must be given effect, having attained finality.

13. In any case, we find that such division is well-founded as the sale proceeds from the flat buyers were apportioned in the same ratio of 70:30 between the Developer and CHB. This is supported by the Escrow Agreement dated 01.06.2007 executed by CHB and the Developer in pursuance of the Development Agreement dated 06.10.2006. Clause 4(b) of this Escrow Agreement provides that 30% of the sale proceeds in respect of the residential units would first be transferred to CHB, and the remaining amount shall then be transferred to the Developer. In view of this, we find that the amount directed to be paid by the National

A Commission in the impugned order must be paid by the Developer and CHB in the ratio of 70:30.

14. With respect to the second issue concerning the enhancement of interest rate, Clause 9(d) of the Tripartite Agreement is relevant. As mentioned supra, this Clause requires the Developer and CHB to refund
B the amounts received from the buyer with interest if the Developer is unable to deliver the unit to the buyer due to non-approvals from the competent authorities. Here, under Clause 9(d), the parties are liable to refund the principal sum in the ratio of 70:30 as they had received the sale proceeds in the same ratio. It has been brought to our notice that CHB has already paid 30% of the principal sum at 9% interest p.a. in
C accordance with the directions of the National Commission in order dated 05.03.2013 passed in a similar matter. Notably, the interest rate was revised to 10% p.a. in the impugned order and has been challenged by the Appellant. We do not find any reason to interfere with the same, as the increase was made by the National Commission in exercise of its
D discretionary power. It is possible that the National Commission chose to enhance the interest rate in view of the fact that it had already imposed lesser compensation than the significantly higher compensation stipulated under Clause 9(c). Thus, the contention of the Appellant on this front is liable to be dismissed.

E 15. In view of the foregoing observations, we find that the National Commission was right in directing the Developer and CHB to pay the principal sum of Rs. 1,03,31,250/- at 10% p.a. to the Complainant herein. Further, it is found that the direction to pay Rs. 2 lakhs *in toto* towards mental harassment and litigation costs in the ratio of 70:30 between the Developer and CHB, is also correct.

F Accordingly, the instant appeal deserves to be dismissed. We note that the Appellant herein (CHB) has already paid its share of the principal sum along with interest at 9% p.a. Further, in pursuance of the order of this Court dated 04.12.2019, the Developer has also deposited the amount awarded by the National Commission with interest at 10% p.a.. In view
G of our findings, we now direct CHB to pay the remaining amount, i.e. 30% of the total Rs. 2 lakhs awarded by the National Commission to the Complainant towards mental harassment and litigation charges, as well as an additional interest of 1% p.a. on its share of the principal sum. This amount shall be paid within a period of eight weeks from the date of this order. The instant appeal stands dismissed accordingly.

Kalpana K. Tripathy Appeal dismissed.