Wg. Cdr. Arifur Rahman Khan And Aleya ... vs Dlf Southern Homes Pvt. Ltd. (Now Known ... on 24 August, 2020

Equivalent citations: AIRONLINE 2020 SC 693

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Bench: K M Joseph, Dhananjaya Y Chandrachud

REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

Civil Appeal No. 6239 of 2019

Wg. Cdr. Arifur Rahman Khan and Aleya Sultana and Ors. ...Appellants

Versus

DLF Southern Homes Pvt Ltd ...Respondents

(now Known as BEGUR OMR Homes Pvt. Ltd.) and Ors.

With Civil Appeal No. 6303 of 2019 JUDGMENT Dr. Dhananjaya Y. Chandrachud, J 1 The National Consumer Disputes Redressal Commission 1 dismissed a consumer complaint filed by 339 flat buyers, accepting the defence of DLF Southern Homes Pvt. Ltd. and Annabel Builders and Developers Pvt. Ltd. that there was no deficiency of service on their part in complying with their contractual obligations and, that despite a delay in handing over the possession of the residential flats, the purchasers were not entitled to compensation in excess of what was stipulated in the Apartment Buyers Agreement2. 2 The complaint before the NCDRC was initially instituted by nine flat buyers. These nine complainants had booked residential flats in a project called Westend Heights at New Town, DLF, BTM Extension at Begu, Bengaluru. The project was being developed in an area admeasuring 27.5 acres and was to consist of 1980 units, spread across nineteen towers each consisting of a stilt and eighteen floors.

3 The Brochure of the first respondent advertised the nature of the project and the amenities which would be provided to buyers. It held out the following representations on the basis of which buyers were induced to invest:

> "NCDRC" "ABA" "New Town - the premier choice for Bangalore living. A premium residential enclave that celebrates life in all its resident splendor. Featuring spacious apartments and a rich selection of amenities, you will find in New Town, a residence specially appointed to maximize your comfort and convenience. In New Town premium high rise apartments are set against the backdrop of a vibrant living environment where fun, comfort, security, and serenity blend in perfect unison. Life at New Town satisfies all your needs and fulfils your heart's desire. Imagine a place where leisurely pursuits are always within reach. Imagine living where convenience is never more than around the corner.
>
> Westend Heights at New Tower DLF, BTM Extn.
>
> Designs, keeping in mind the modern day requirements and meeting them with apt amenities, Westend Heights is the first phase of New Town, with premium high-rise apartments at affordable prices. The complex brings you comfort living embodied in individual towers overlooking sprawling parks and vistas. This project is being developed in a land area of 27. 5 acres. The project consists of 1980 units spread across 19 towers that are Stilt+ 18 floors high.
>
> Amenities Fun, Fitness, Leisure, Right Next Door The most exclusive Club in Bangalore at New town, DLF BTM, EXTN, The Club set amidst a very comfortable setting is an impressive feature of New Town. It is specially designed to take care of all stresses brought on by the modern world. Altogether a beautiful composition, that blends seamlessly with your lifestyle.
>
> Swimming Pool:
>
> Gymnasium/ Aerobics Centre Restaurant & Bar Billiards Room Banquet Hall Tennis Courts Cards Room Squash Courts Spa, Massage & Beauty Parlour Ease, Enjoyment, Convenience. Right Next Door Convenient shopping facilities at New Town, DLF BTM EXTN Shop with ease at our convenience shopping centre, well equipped to handle your everyday needs. The shopping centre will offer an array of outlets to make your life a trouble free affair.
>
> Experience convenience at your doorstep Hope, Dreams, Future. Right Next Door Renowned Early Learning School at New Town DLF BTM EXTN.
>
> Our play school airs to care for your child in a stimulating safe, fun-filled environment. It symbolizes our conviction that nurtured roots lay the foundation of a fully grown blossomed tree.

> Health, Wellbeing. Assurance, Right Next Door State-of-the-art healthcare facilities at New Town DLF BTM EXTN.
>
> In these years of fast paced lives, your family's wellbeing is foremost in our minds. Our healthcare centre will better the latest in screening, diagnosis, and medical care with competent medical professionals by your side, we will make sure that you would always remain in the best of health.
>
> Comfort, Confidence, Peace of Mind Right Next Door.
>
> Keeping your loves ones safe and secure at New Town, DLF BTM EXTN.
>
> Let New Town set your mind at rest when it comes to security. Our advanced, state-of-the-art security system ensures comfort & peace of mind for you and your loved ones, with monitored gates, CCTV for parking and entrance lobby, video surveillance system and a rigorously screened 24-hour security guard workforce, New Town offers you a secure and a well-protected abode." (emphasis supplied)

4 Responding to the representation held out by the developer, the complainants booked flats in the residential project. The flat buyers entered into agreements with the developer. Clause 11(a) of the ABA indicated that the developer would endeavour to complete construction within a period of thirty-six months from the date of the execution of the agreement save and except for force majeure conditions. Clause 11(a) provided:

> "11. (a) Schedule for Possession of the Said Apartment The Company/LOC based on the present plans and estimates and subject to all just exceptions, endeavors to complete construction of the Said Building /Said Apartment within a period of thirty six (36) months from the date of execution of this Agreement unless there shall be delay or failure due to Force Majeure conditions including but not limited to reasons mentioned in Clauses 11(b) and 11(c) or due to failure of Allottee to pay in time the Total Price and other charges taxes, securities etc. and dues/payments or any failure on the part of the Allottee to abide by all or any of the terms and conditions of this Agreement."

5 Force majeure stipulations were illustrated in sub-clauses (b) and (c) of clause 11, which included delay due to the reasons beyond the control of the developer and failure to deliver possession due to Government rules, orders or notifications, respectively. Construction was behind schedule. The flat purchasers were informed on 12 January 2011 that possession of the apartments was expected to be completed by the middle of 2012. This assurance was not fulfilled. By a communication dated 18 June 2013, the developers issued a revised timeline intimating all flat buyers that the delivery of possession would commence from October 2013. However, on 8 August 2013 another communication was issued stating that the real estate industry was affected by an economic slow-down which had hampered the pace of construction. The date for handing over possession was extended to June 2014. A tentative schedule for delivery was indicated under which Towers D1 and

D2 would be handed over by January 2014, and Towers A3 to A6, A7, B3 and B4 would be handed over by May 2014. On 8 August 2014, the timelines for handing over possession were again extended by the developers : under the revised schedule the flats in Towers D1 and D2 were to be handed over in August 2014, those in A1 to A-7 in February 2015, B1 to B6 in April 2015 and C1 to C4 in June 2015. On 4 May 2015, the developers issued another communication indicating the progress of the work and informed the purchasers that site visits had been initiated for the project "till we receive the occupancy certificate for clusters A, B and C". This is an admission of the fact that until then the occupation certificate had not been received. The obligation to handover possession within a period of thirty-six months was not fulfilled.

6 The first batch of nine flat purchasers moved a consumer complaint before the NCDRC complaining of a breach by the developer of the obligation, contractually assumed, under the terms of the ABA. Since the nine complainants purported to represent the entire group of flat purchasers, a notice of the complaint under Section 12(1)(c) of the Consumer Protection Act 19863 was published in the newspapers.

7 Numerous applications for impleadment were allowed by the NCDRC and an amended complaint was ordered to be filed. On the complainants moving an application under Section 12(1)(c), the NCDRC by its order dated 21 November 2017 permitted them to file the complaint on behalf or for the benefit of all the flat buyers who were interested in the reliefs. However, flat buyers who had (i) executed deeds of conveyance; or (ii) executed affidavits while accepting the agreed compensation in full and final satisfaction; or (iii) received possession within the stipulated time period; or (iv) had sold their flats after the execution of the conveyance; or (v) who were subsequent purchasers having purchased the flat after the execution of the conveyance deed were to remain outside the purview of the proceedings. Further, the buyers from whom Preferential Location Charges, charges for the preferential location of the apartment, were not charged and were not chargeable were to remain out of the class on whose behalf or benefit the complaint was instituted. On a challenge to the order, this Court by an "CP Act 1986" order dated 10 April 2018 directed:

> "Since the complaint filed by the appellants was only by nine persons jointly for their benefit, the same could not be treated to be in representative capacity. Accordingly, the impugned order is set aside.
>
> Aggrieved parties are at liberty to file an appropriate fresh application under Section 12(1)(c) of the Consumer Protection Act, 1986 before the National Consumer Disputes Redressal Commission within two weeks from today. The same may be disposed of by the National Commission in accordance with law within three months from the date of filing of such an application."

8 Pursuant to the liberty which was granted by this Court, an I.A.4 was filed before the NCDRC under Section 12(1)(c). The application was disposed of on 13 July 2018 which led to an appeal before this Court.

9 On 28 September 2018, this Court set aside the order of the NCDRC with the following directions:

> "Having heard learned counsel for the appellants, we are of the view that the impugned judgment dated 13.07.2018 needs to be set aside. We set it aside and direct the National Consumer Disputes Redressal Commission to treat the complaint, as amended, that has been filed, as a complaint filed on behalf of all 339 persons and to proceed on merits.
>
> It will be open for the respondents to give their say on the merits of each of the 339 complainants.
>
> The Commission will decide the matter within a period of six months from today.
>
> The Civil Appeals are disposed of accordingly."

10 Procedural directions issued upon several impleadment applications resulted in a further order of this Court of 8 May 2019 reiterating that the complaint would be treated as having been filed on behalf of 339 persons. By its order dated 28 September 2018, which was reiterated again on 8 May 2019, this Court had laid down a peremptory time schedule of six months for the disposal of the complaint. Eventually, on 2 July 2019, the complaint was dismissed by the NCDRC.

11 Civil Appeal No 6239 of 2019 comprises of 83 appellants. Civil Appeal No 6303 of 2019 comprises of 88 appellants. Thus, there are before this Court a total of 171 flat purchasers in the appeals. The complaint before the NCDRC, which was confined by the order of this Court dated 28 September 2018 to 339 complainants, now covers a more restricted field of 171 flat purchasers. Annexure-1 to Civil Appeal No 6239 of 2019 contains a tabulation of (i) names of the flat purchasers; (ii) dates on which the flats were booked; (iii) dates on which the ABAs were signed; (iv) dates by which possession was to be handed over under the ABAs; and (v) dates on which the letter for possession was issued by the developers.

12 The NCDRC divided the group of 339 flat buyers into six groups based on whether or not they had taken possession, executed deeds of conveyance, settled the dispute or sold the flats before or during the pendency of the complaint or their applications for impleadment:

> Group A: Complainants who took possession of their flats before the filing of the complaint/impleadment applications.
>
> Group B: Complainants who took possession and executed deeds of conveyance during the pendency of the complaint/impleadment applications.
>
> Group C: Complainants who took possession during the pendency of the complaint/impleadment applications but have not executed deeds of conveyance.
>
> Group D: Complainants who settled their dispute during the pendency of the complaint/ impleadment applications.

Group E: Complainants who sold their flats during the pendency of the complaint/impleadment applications.

Group F: Complainants who have not taken possession of the flats and have not executed a deed of conveyance.

13 The NCDRC held that flat buyers in Groups A and B who had taken possession before the filing of the complaint / impleadment applications and those who took possession and executed deeds of conveyance before or during the pendency of the proceedings would not be entitled to pursue their claims. The execution of the deed of conveyance, according to the NCDRC, is a transfer of a right in property and it is not within the jurisdiction of the Commission to entertain a grievance that the conveyances have been entered into under coercion. Additionally, according to NCDRC, under the conveyance deed, such flat buyers had accorded their satisfaction to the services provided by the developer and voluntarily discharged the developer of all its liabilities under the ABA. As regards flat purchasers in Group C, the NCDRC noted that even those who have taken possession but have not executed a deed of conveyance have voluntarily discharged the developer. The NCDRC observed that flat buyers in Group C had taken possession without protest, without its permission and without lodging any complaint with it after taking the possession. Those in Group D who had settled their dispute during the pendency of the complaint were held to be estopped from pursuing their grievances. The NCDRC did not accept the contention of the flat buyers in Group D that that they had settled the matter under coercion and undue influence since, according to the NCDRC, no specific facts and circumstances were pleaded by such flat buyers which made them surrender their free will. The buyers in Group E who have sold their flats during the pendency of the complaint were held to have no subsisting right. The NCDRC noted that as regards Group F (complainants who had neither taken possession nor executed a conveyance), as many as 337 out of 339 flat purchasers had in fact taken possession. The NCDRC had to deal with the claims of two remaining complainants, who had accepted the delayed compensation but did not accept possession. Their complaints were dismissed.

14 The primary grounds on which compensation have been sought before the NCDRC were:

(i) Delay in handing over possession of the flats;

(ii) Reimbursement of taxes and interest charged to the flat purchasers under clause 1.10 of the ABA;

(iii) Deficiency in providing amenities;

(iv) Levy of electricity charges by the developer; and

(v) Failure to construct the club house.

15 The NCDRC, in the course of its judgment, observed that delay in the handing over of flats to the flat purchasers was admitted. While recording a finding of fact that there was an admitted delay on the part of the developer, the NCDRC held that the agreements provided compensation at the rate of Rs 5 per square foot of the super area for every month of delay. The NCDRC held that the flat purchasers who agreed to this stipulation in the agreements were not entitled to seek any amount in addition. Paragraph 470 of the judgment of the NCDRC contains its finding:

"470. There is no dispute to the fact that the completion of the project had been delayed. Delay had been acknowledged by the opposite parties. They had also offered to these complainants the delayed compensation calculated @ Rs 5/- per sq. ft. of the super area." The NCDRC observed that the developer had while computing the final demand made an adjustment on account of delayed compensation at the rate stipulated in the ABA. The flat purchasers having been provided credit at the rate agreed by the developers, it was held that no further entitlement existed under the law. In the view of the NCDRC, the flat purchasers had failed to prove that the stipulation contained in the agreement for the payment of compensation at Rs 5 per square foot was unreasonable. In taking this view, the Commission has lent support to its decision by relying upon the decisions of this Court in DLF Homes Panchkula Pvt. Ltd. v. D S Dhanda, Etc.5 ("Dhanda") and Ghaziabad Development Authority v. Balbir Singh6("Balbir Singh"). On the merits of the other grievances, the NCDRC has held that

(i) The charges recovered towards tax and interest are in terms of clause 1.10 of the ABA;

(ii) Charges recovered for electricity are in terms of the ABA;

(iii) The levy of parking charges is valid; and

(iv) The club house has been constructed.

16 In order to facilitate the final disposal of the Civil Appeals, counsel appearing on behalf of the appellants formulated the nature of the grievances of the flat buyers in the written submissions tendered during the hearing. Mr Prashant Bhushan, learned Counsel appearing for the appellants has formulated his submissions under the following heads:

(i) There is a gross delay ranging between two and four years in handing over possession and the flat buyers ought not to be constrained by the terms of the agreement which are one-sided and unreasonable;

(ii) The execution of conveyances or settlement deeds would not operate to preclude the flat buyers from claiming compensation. The emails of the developer clearly indicate that the flat buyers were not permitted to execute conveyances or to receive possession under protest;

(iii) The amenities which have been contracted for have not been provided 2019 SCC OnLine SC 689 (2004) 5 SCC 65 by the developers; and

(iv) The flat buyers are not liable to indemnify the developer for the demand of interest and penalty raised by the tax authorities as a result of the failure to deposit the tax on time. During the oral arguments, it was clarified that only interest has been recovered from the flat buyers.

The above submissions of Mr Prashant Bhushan have been reiterated in the submissions urged before the Court by Mr Bishwajit Bhattacharya, learned Senior Counsel appearing on behalf of another group of purchasers. Mr R Balasubramanian, learned Senior Counsel has, while adopting the submissions which were urged by Mr Prashant Bhushan, advanced submissions on the levy of electricity charges and charges for parking spaces.

17 Opposing the submissions which have been urged on behalf of the appellants, Mr Pinaki Misra, learned Senior Counsel urged that:

(i) Despite the order of this Court dated 28 September 2018, no evidence has been led by the complainants to discharge the onus placed upon them to establish coercion or duress while executing conveyances or settlements;

(ii) Possession of the complex, which is situated on land admeasuring about 27 acres and comprising of 813 apartments in nineteen towers has been handed over between four to six years ago and the developer has transferred his right, title and interest to the Residents Welfare Association ("RWA");

(iii) The allottees have benefited by the appreciation in the value of their flats;

(iv) Out of 171 applicants, 145 have received compensation at the agreed rate while handing over possession. The allotments were escalation free and the burden of increased costs has been borne by the developer;

(v) Under clause 14 of the ABA, the flat buyers have been compensated at the rate of Rs 5 per square foot per month which would work out to about Rs 7500 per month for a flat admeasuring 1500 square feet. No proof or measure of actual loss suffered has been adduced;

(vi) The facts pertaining to the appellants would indicate that:

(a) Eighteen appellants executed conveyances before filing the complaints;

(b) Fifty-four appellants executed conveyances during the course of the proceedings;

(c) Fifty appellants executed conveyances after the impugned judgment;

(d) The above individuals include 11 who have entered into written settlement deeds;

(e) There is no delay in offering possession to seven appellants;

and

(f) Three appellants are continuing to agitate their grievances despite having transferred their rights in the flats. Out of 171 appellants, 122 executed conveyances before the complaint;

during the pendency of the proceedings or thereafter. Eleven appellants who have entered into settlements did not raise a ground of coercion prior to a reply which was filed in December 2018 shortly before the final hearing;

(vii) As regards the construction of facilities and amenities, a club house containing a swimming pool, gymnasium, tennis court, indoor badminton court and squash courts has been constructed and an occupation certificate has been received on 13 May 2019. The RWA is conscious of the fact that difficulties in the allotment arose as a result of the action of the Bangalore Development Authority7 which led to the filing of writ proceedings before the High Court of Karnataka both by the developer and the RWA. Even after the receipt of the occupation certificate, the developers have been corresponding with BDA for permission to hand over possession to the RWA. Other amenities including a school and health care facilities were going to be developed in the entire township comprising of 80 acres of which the complex of 27 acres was a part. The flat buyers were aware of the fact that under the terms of the ABA, the allottees have no right, title or interest in the amenities outside their residential complex and forming a part of the wider complex of 80 acres. Moreover, this issue is rendered academic since the area around DLF township has become urbanized where adequate facilities are available;

“BDA”

(viii) Clauses 1.3, 1.10, 2 and 3 require the allottees to bear tax liabilities including towards works contract tax. When the project commenced in 2009, there was an absence of clarity in regard to the liability on account of works contract tax which was settled eventually by the judgment of this Court in Larsen and Toubro Limited v. State of Karnataka8. It was as a result of this judgment that the issue was settled following which, the developer while computing the amount payable in the final statements of accounts passed on the liability on account of the interest (but not towards penalty) on a proportionate basis in terms of clause 1.10 of the ABA;

(ix) Clause 23(b) entitles the developer to raise a demand on a proportionate basis from the flat buyers for electricity charges. Initially, BESCOM provided a connection for electricity but subsequently as a substantial load was required, the developer was permitted to build its own electricity sub-station. This was built at a cost of Rs. 18.01 crores for which the pro rata cost could be allocated to flat buyers in terms of clause 23(b); and

(x) The price of the apartment, as agreed in the ABA, included in the breakup, parking charges for exclusive use of earmarked parking spaces. Parking charges were also revealed upfront in the brochure. The appellants had erroneously relied on the decision of this Court in Nahalchand Laloochand Private Limited v. Panchali Cooperative (2014) 1 SCC 708 Housing Society Limited9, which turned on the construction of the provisions of the Maharashtra Apartment Ownership Act 1971 and Development Control Regulations for Greater Bombay 1991. This has subsequently been explained in the decision in DLF Limited v. Manmohan Lowe10. There is no prohibition in the Karnataka Apartment Ownership Act upon the developer providing earmarked parking charges in the breakup of the total price of the apartment. The rival submissions will now be analysed.

Compensation for delayed possession 18 The fulcrum of the case of the developer rests on clause 14 of the ABA which is in the following terms:

> "14. The Allottee agrees and understands that if the company is unable to give possession within the period as mentioned above or such extended period as permitted under this Agreement, due to reasons other than those mentioned in this Agreement, then the Company agrees to pay only to the Allottee and not to anyone else, subject to the Allottee, not being in default under any terms of this Agreement compensation @ Rs. 5/- per sq. feet of the Super Area of the said apartment per month for the period of such Delay. The adjustment of such compensation shall be done only at the time of execution of the Conveyance Deed of the Said Apartment to the Allottee first named under this Agreement and not, earlier."

19 Clause 11(a) of the ABA indicates that subject to "all just exceptions" the developer endeavoured to complete construction within a period of thirty-six months from the date of the execution of the agreement unless hindered by force (2010) 9 SCC 536 (2014) 12 SCC 231 majeure conditions. Undoubtedly, the expression „endeavour indicates that the developer did not bind itself to an inflexible timeline of thirty-six months. But then again, the timeline of thirty-six moths was subject to just exceptions and could be excused in the event of force majeure conditions coming into operation. By the provisions of clause 14, the developer agreed to compensate the flat buyers at the rate of Rs. 5 per square feet of the super area of the apartment per month for the period of delay. According to the developer (i) the flat purchasers are bound by the above stipulations under which their entitlement was to receive compensation at the agreed rate (and hence not beyond); and (ii) no evidence has been adduced to indicate that the rate which has been prescribed in the agreement is unreasonable. The developer relies on the observation in the decision of this Court in Dhanda11 that when parties have agreed to a consequence of delay in handing over possession, there must be exceptional and strong reasons for the consumer fora to award compensation at more than the agreed rate. In assessing these submissions, we must at the outset note the submission of Mr

Prashant Bhushan, learned Counsel that:

> "There are a total of 4 blocks in „WESTEND HEIGHTS project. In Blocks A, B and C, the delay is huge, over 4 years. For block D, the average delay is 2 years. Out of 339 complainants, for 268, the delay is huge, over 4 years.
>
> The Builder sought repeated extension of time to deliver possession, vide communications dated 18.06.201312, 8.8.201313, 8.8.201414, 4.5.201515 etc." 2019 SCC OnLine SC 689 Annexure A9 @ page 929 Annexure A10 @ page 932, 933 Annexure A11 @ page 936 Annexure A12 @ page 938

20 The extent of the delay as set out in the above submissions has not been controverted in the submissions which were urged before this Court by the developer. On the contrary, the finding of the NCDRC in paragraph 470 of its judgment is that:

> "...there is no dispute to the fact that the completion of the project has been delayed. Delay has been acknowledged by the opposite parties...."

21 The existence and extent of the delay constitute an admitted factual position. In fact, in the written submissions which have been filed by the developer, it has been admitted that out of 171 appellants, 145 were given compensation in terms of the rate prescribed in clause 14 of the ABA. Once the developer has accepted that there was a delay on his part which triggered of the liability to pay compensation (albeit, according to the developer, in terms of clause 14) there can be no manner of doubt that:

> (i) the developer assumed an obligation in terms of the ABA to endeavour to hand over possession in thirty-six months of the date of the execution of the agreement;
>
> (ii) there was a failure on the part of the developer to comply with the contractual obligation;
>
> (iii) the failure of the developer was neither relatable to a "just exception" or the prevalence of force majeure conditions referable to clause 11; and
>
> (iv) the payment of compensation to the flat buyers or at least 145 of the group of 171 represents an admission by the developer of its breach, thereby triggering a liability to pay compensation.

22 The only issue which then falls for determination is whether the flat buyers in these circumstances are constrained by the stipulation contained in clause 14 of ABA providing compensation for delay at the rate of Rs 5 per square feet per month. In assessing the legal position, it is necessary to record that the ABA is clearly one-sided. Where a flat purchaser pays the instalments that are due in terms of the agreement with a delay, clause 39(a) stipulates that the developer would "at its sole option and discretion" waive a breach by the allottee of failing to make

payments in accordance with the schedule, subject to the condition that the allottee would be charged interest at the rate of 15 per cent per month for the first ninety days and thereafter at an additional penal interest of 3 per cent per annum. In other words, a delay on the part of the flat buyer attracts interest at the rate of 18 per cent per annum beyond ninety days. On the other hand, where a developer delays in handing over possession the flat buyer is restricted to receiving interest at Rs 5 per square foot per month under clause 14 (which in the submission of Mr Prashant Bhushan works out to 1-1.5 per cent interest per annum). Would the condition which has been prescribed in clause 14 continue to bind the flat purchaser indefinitely irrespective of the length of the delay? The agreement stipulates thirty-six months as the date for the handing over of possession. Evidently, the terms of the agreement have been drafted by the developer. They do not maintain a level platform as between the developer and purchaser. The stringency of the terms which bind the purchaser are not mirrored by the obligations for meeting times lines by the developer. The agreement does not reflect an even bargain.

23 On behalf of the flat purchasers it has been urged by Mr. R Balasubramanian (a submission which has not been controverted in rejoinder) that 95 per cent of the purchase price was paid during the course of the first two and a half to three years. The agreement did not stipulate that the developer would pay any interest on the amount which had already been received. A large chunk of the purchase price was thus available to the developer to complete construction. The court must take a robust and common-sense based approach by taking judicial notice of the fact that flat purchasers obtain loans and are required to pay EMIs to financial institutions for servicing their debt. Delays on the part of the developer in handing over possession postpone the date on which purchasers will obtain a home. Besides servicing their loans, purchasers have to finance the expenses of living elsewhere. To postulate that a clause in the agreement confining the right of the purchaser to receive compensation at the rate of Rs 5 per square foot per month (Rs 7,500 per month for a flat of 1500 square feet) precludes any other claim would be a manifestly unreasonable construction of the rights and obligations of the parties. Where there is a delay of the nature that has taken place in the present case ranging between periods of two years and four years, the jurisdiction of the consumer forum to award reasonable compensation cannot be foreclosed by a term of the agreement. The expression deficiency of services is defined in Section 2 (1) (g) of the CP Act 1986 as:

> “(g) "deficiency" means any fault, imperfection, shortcoming or inadequacy in the quality, nature and manner of performance which is required to be maintained by or under any law for the time being in force or has been undertaken to be performed by a person in pursuance of a contract or otherwise in relation to any service”

24 A failure of the developer to comply with the contractual obligation to provide the flat to a flat purchaser within a contractually stipulated period amounts to a deficiency. There is a fault, shortcoming or inadequacy in the nature and manner of performance which has been undertaken to be performed in pursuance of the contract in relation to the service. The expression „service in Section 2 (1) (o) means a service of any description which is made available to potential users including the provision of facilities in connection with (among other things) housing construction. Under Section 14(1)(e), the jurisdiction of the consumer forum extends to directing the opposite party inter alia to remove the deficiency in the service in question. Intrinsic to the jurisdiction which

has been conferred to direct the removal of a deficiency in service is the provision of compensation as a measure of restitution to a flat buyer for the delay which has been occasioned by the developer beyond the period within which possession was to be handed over to the purchaser. Flat purchasers suffer agony and harassment, as a result of the default of the developer. Flat purchasers make legitimate assessments in regard to the future course of their lives based on the flat which has been purchased being available for use and occupation. These legitimate expectations are belied when the developer as in the present case is guilty of a delay of years in the fulfilment of a contractual obligation. To uphold the contention of the developer that the flat buyer is constrained by the terms of the agreed rate irrespective of the nature or extent of delay would result in a miscarriage of justice. Undoubtedly, as this court held in Dhanda, courts ordinarily would hold parties down to a contractual bargain. Equally the court cannot be oblivious to the one-sided nature of ABAs which are drafted by and to protect the interest of the developer. Parliament consciously designed remedies in the CP Act 1986 to protect consumers. Where, as in the present case, there has been a gross delay in the handing over of possession beyond the contractually stipulated debt, we are clearly of the view that the jurisdiction of the consumer forum to award just and reasonable compensation as an incident of its power to direct the removal of a deficiency in service is not constrained by the terms of a rate which is prescribed in an unfair bargain. 25 Numerous judgments of this Court have elaborated on the nature and extent of the jurisdiction of the consumer forum to award just and reasonable compensation. Since the decision of this Court in Lucknow Development Authority v. M K Gupta16 , it has been a settled principle of law that the jurisdiction of the consumer forum extends to the award of compensation to alleviate the harassment and agony to a consumer. In Balbir Singh17, a two judge Bench of this Court, while explaining the ambit of the jurisdiction of the adjudicatory fora under the CP Act 1986 observed:

> "6...The word compensation is of a very wide connotation. It may constitute actual loss or expected loss and may extend to compensation for physical, mental or even emotional suffering, insult or injury or loss. The provisions of the Consumer Protection Act enable a consumer to claim and empower the Commission to redress any injustice done. "

26 The court observed that the award of compensation has to be based on a finding of loss or injury and must correlate to it. The court observed that no "hard and fast rule" could be prescribed:

> (1994) 1 SCC 243 (2004) 5 SCC 65 "8...No hard-and-fast rule can be laid down, however, a few examples would be where an allotment is made, price is received/paid but possession is not given within the period set out in the brochure. The Commission/Forum would then need to determine the loss. Loss could be determined on basis of loss of rent which could have been earned if possession was given and the premises let out or if the consumer has had to stay in rented premises then on basis of rent actually paid by him. Along with recompensing the loss the Commission/Forum may also compensate for harassment/injury, both mental and physical. " Where possession has been given, one of the circumstances which must be factored in is that the purchaser has been compensated by the increase in the value of the property.

27 In R V Prasannakumaar v. Mantri Castles Pvt Ltd18 under the terms of the ABA, possession of the flats was to be handed over to the buyers on 31 January 2014. However, the developer received an occupation certificate only on 10 February 2016 and it was thereafter from May 2016 that the developer started issuing letters offering possession. Based on this, the NCDRC awarded compensation in the form of interest at the rate of 6 per cent per annum. The developer had pleaded that since the agreement provided compensation at the rate of Rs. 3 per square foot per month for delayed possession, the purchasers were not entitled to anything in addition. Dealing with the submission, this Court observed:

> "9. We are in agreement with the view of the NCDRC that the rate which has been stipulated by the developer, of compensation at the rate of 3 per sq. ft. per month does not provide just or reasonable recompense to a flat buyer who 2019 SCC OnLine SC 224 has invested money and has not been handed over possession as on the stipulated date of 31 January 2014. To take a simple illustration, a flat buyer with an agreement of a flat admeasuring a 1000 sq. ft. would receive, under the agreement, not more than Rs. 3000/- per month. This in a city such as Bangalore does not provide just or adequate compensation. The jurisdiction of the NCDRC to award just compensation under the provisions of the Consumer Protection Act, 1986 cannot in the circumstances be constrained by the terms of the agreement. The agreement in its view is one sided and does not provide sufficient recompense to the flat purchasers." The Court observed that there was a delay of two years and hence the award of interest at the rate of 6 per cent was reasonable and justified.

> 28 In Pioneer Urban Land and Infrastructure Limited v. Govindan Raghavan19, there was a delay of almost two years in obtaining an occupancy certificate after the date stipulated in the ABA. As a consequence, there was a failure to provide possession of the flat to the purchaser within a reasonable period. This Court dwelt on the terms of the ABA under which the builder was entitled to charge interest at 18 per cent per annum for the delay in payment of instalments by the purchaser. On the other hand, the failure to provide possession on the part of the developer was subject to a grace period of twelve months followed by a termination notice of ninety days and a further period of ninety days to the developer to effect a refund. Adverting to these clauses, the court noted:

> "6.4. A perusal of the apartment buyer's agreement dated 8-5- 2012 reveals stark incongruities between the remedies available to both the parties. For instance, Clause 6.4(ii) of the agreement entitles the appellant builder to charge interest (2019) 5 SCC 725 @18% p.a. on account of any delay in payment of instalments from the respondent flat purchaser. Clause 6.4(iii) of the agreement entitles the appellant builder to cancel the allotment and terminate the agreement, if any instalment remains in arrears for more than 30 days. On the other hand, as per Clause 11.5 of the agreement, if the appellant builder fails to deliver possession of the apartment within the stipulated period, the respondent flat purchaser has to wait for a period of 12 months after the end of the grace period, before serving a termination notice of 90

> days on the appellant builder, and even thereafter, the appellant builder gets 90 days to refund only the actual instalment paid by the respondent flat purchaser, after adjusting the taxes paid, interest and penalty on delayed payments. In case of any delay thereafter, the appellant builder is liable to pay interest @9% p.a. only.

6.5. Another instance is Clause 23.4 of the agreement which entitles the appellant builder to serve a termination notice upon the respondent flat purchaser for breach of any contractual obligation. If the respondent flat purchaser fails to rectify the default within 30 days of the termination notice, then the agreement automatically stands cancelled, and the appellant builder has the right to forfeit the entire amount of earnest money towards liquidated damages. On the other hand, as per Clause 11.5(v) of the agreement, if the respondent flat purchaser fails to exercise his right of termination within the time limit provided in Clause 11.5, then he shall not be entitled to terminate the agreement thereafter, and shall be bound by the provisions of the agreement." Justice Indu Malhotra speaking for the Court noted:

> "6.8. A term of a contract will not be final and binding if it is shown that the flat purchasers had no option but to sign on the dotted line, on a contract framed by the builder. The contractual terms of the agreement dated 8-5-2012 are ex facie one-sided, unfair and unreasonable. The incorporation of such one-sided clauses in an agreement constitutes an unfair trade practice as per Section 2(1)(r) of the Consumer Protection Act, 1986 since it adopts unfair methods or practices for the purpose of selling the flats by the builder." The Court observed that in these circumstances, the flat purchasers could not be compelled to obtain possession which was offered almost two years after the grace period under the agreement had expired. Hence, the NCDRC was held to have correctly awarded interest at the rate of 10 percent per annum.
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> 29 The decision of this Court in Dhanda20 has been relied upon by learned Senior Counsel appearing on behalf of the developer as elucidating the principle that where a flat buyers agreement stipulates a consequence for delayed possession, exceptional and strong reasons must be established before the forum constituted under the Act of 1986 awards compensation in addition to what has been contractually agreed. In Dhanda's case, the SCDRC issued a direction for handing over physical possession of the residential unit to the complainant and for execution of a sale deed. In addition, compensation was awarded by way of interest at the rate of 12 per cent per annum with effect from twelve months after the stipulated date under the agreement. In an appeal by the developer, the NCDRC directed that the rate of interest for a house building loan for the corresponding period in a scheduled nationalised bank would be appropriate and if a floating rate of interest was prescribed, the higher rate of interest should be taken for the computation. A sum of Rs. 1 lac per annum from the date for handing over possession to the actual date of possession was regarded as appropriate in the facts of the case. In that case under the terms of the buyer s agreements, possession was to be delivered within twenty-four months of the execution of the agreement i.e. 10 February 2013 – failing which the

developer was liable to pay compensation at the rate of Rs. 10 per square foot per month for the delay. The developer contended that construction activities were delayed as a result of an injunction granted by this Court over a period of eight months 2019 SCC OnLine SC 689 and consequently sought an extension of the period for handing over possession by one year. Alternatively, the developer offered to refund the money deposited with interest at 9 per cent per annum. Construction of 258 independent floors was completed while about 1,500 units were nearing completion. In two sets of Civil Appeals which came up before this Court earlier, agreed terms were arrived at providing for the award of interest at 9 per cent per annum from the date of deposit till refund. While considering the order of the NCDRC, this Court observed:

"16. The District Forum under the Consumer Protection Act, 1986 is empowered inter-alia to order the opposite party to pay such amount as may be awarded as compensation to the consumer for any loss or injury suffered by the consumer due to the negligence of the opposite party including to grant punitive damages. But the forums under the Act cannot award interest and/or compensation by applying rule of thumb. The order to grant interest at the maximum of rate of interest charged by nationalised bank for advancing home loan is arbitrary and no nexus with the default committed. The appellant has agreed to deliver constructed flats. For delay in handing over possession, the consumer is entitled to the consequences agreed at the time of executing buyer's agreement. There cannot be multiple heads to grant of damages and interest when the parties have agreed for payment of damages at the rate of Rs. 10/- per sq. ft. per month. Once the parties agreed for a particular consequence of delay in handing over of possession then, there has to be exceptional and strong reasons for the SCDRC/NCDRC to award compensation at more than the agreed rate." 30 The orders of the SCDRC and NCDRC were held to be without any foundation being led by the complainant and based purely on a "rule of thumb".

The court noted that the amount of interest represents compensation to the beneficiaries who are deprived of the use of the investment which has been made and will take into its ambit the consequence of a delay in not handing over possession. The court held that both the SCDRC and NCDRC awarded compensation under different heads on account of a singular default of not handing over possession. This was held not to be sustainable. The court held that:

"19. Thus, we find that the complainant is entitled to interest from the Appellant for not handing over possession as projected as is offered by it but it is not a case to award special punitive damages as one of the causes for late delivery of possession was beyond the control of the Appellant. Therefore, in view of the settlement proposal submitted by the Appellant in earlier two set of appeals in respect of same project, and to settle any further controversy, the Appellant is directed as follows:

i) To send a copy of the occupation certificate to the Complainants along with offer of possession. The Appellant shall also direct the Jones Lang LaSalle - the real estate

maintenance agency, engaged by the Appellant to undertake such maintenance works as is necessary on account of damage due to non-occupation of the flats after construction etc.

ii) It shall be open to the Complainants to seek the assistance of the maintenance agency to attend to the maintenance work which may arise on account of non-occupation or on account of natural vagaries.

iii) Such maintenance work shall be completed by the Appellant within two months of the offer of possession but the payment of interest at the rate of 9 per cent per annum will be for a period of two months from the date of offer of possession in all situations.

v) Since the Complainants have been forced to invoke jurisdiction of the consumer forums, they shall be entitled to consolidated amount of Rs. 50,000/- in each complaint on all accounts such as mental agony and litigation expenses etc. The complainant shall not be entitled to any other amount over and above the amount mentioned above.

vi) In case, the original allottee has transferred the flat, the transferee shall be entitled to interest at the rate of 9 per cent per annum from the date of expiry of three years from the agreement or from the date of transfer, whichever is later." 31 The judgment in Dhanda's case does not prescribe an absolute embargo on the award of compensation beyond the rate stipulated in the flat buyers agreement where handing over of the possession of a flat has been delayed.

Dhanda's case was preceded by consent terms which were presented before this Court in two earlier civil appeals under which interest at the rate of 9 per cent had been granted. The decision lays down that the award of interest cannot be arbitrary and without nexus to the default which has been committed. Hence, the award of interest at the maximum rate of interest charged by a nationalised bank for advancing home loans was construed to be arbitrary. It was in this context that the court observed that the parties having agreed to a consequence for delay, exceptional and strong reasons must exist for the consumer fora to depart from the agreed rate. The decision, in other words, does not lay down that there is an absence of jurisdiction in the adjudicatory fora constituted under the CP Act 1986 to award remedial compensation to a flat buyer for the delay of the developer in handing over possession on the agreed date. 32 In the present case, there exist, clear and valid reasons for not holding down the flat buying consumers merely to the entitlement to receive compensation at the rate of 5 per square foot per month in terms of clause 14 of the ABA:

(i) There has been a breach on the part of the developer in complying with the contractual obligation to hand over possession of the flats within a period of thirty-six months of the date of the agreement as stipulated in clause 11(a);

(ii) The failure of the developer to hand over possession within the contractually stipulated period amounts to a deficiency of service within the meaning of Section 2 (1) (g), warranting the invocation of the jurisdiction vested in the NCDRC to issue a direction for the removal of the deficiency in service;

(iii) The triggering of an obligation to pay compensation on the existence of delay in handing over possession is admitted by the developer for, even according to it, it has adjusted compensation at the agreed rate of Rs 5 per square foot per month to 145 out of the 171 appellants;

(iv) The agreement is manifestly one-sided: the rights provided to the developer for a default on the part of the home buyer are not placed on an equal platform with the contractual right provided to the home buyer in the case of a default by the developer;

(v) There has been a gross delay on the part of the developer in completing construction ranging between two and four years. Despite successive extensions of time to deliver possession sought by the developer, possession was not delivered on time;

(vi) The nature and quantum of the delay on the part of the developer are of such a nature that the measure of compensation which is provided in clause 14 of the ABA would not provide sufficient recompense to the purchasers; and

(vii) Judicial notice ought to be taken of the fact that a flat purchaser who is left in the lurch as a result of the failure of the developer to provide possession within the contractually stipulated date suffers consequences in terms of agony and hardship, not the least of which is financial in nature. Having paid a substantial amount of the purchase price to the developer and being required to service the debt towards loan installments the purchaser is unable to obtain timely possession of the flat which is the subject matter of the ABA.

But, it has been submitted by the developer – a submission which found acceptance by the NCDRC – that the execution of the Deed of Conveyance by a flat purchaser precludes a consumer claim being raised for delayed possession. During the course of the proceedings before the NCDRC, the flat purchasers relied upon the communications which were issued by the developer to demonstrate that the purchasers were not permitted by the developer to execute a Deed of Conveyance or to take possession under protest. The material which was produced before the NCDRC supports this submission, which was urged before the Court by Mr Prashant Bhushan, learned Counsel. By a communication dated 16 February 2016, the developer informed a flat buyer that in terms of the ABA, the allottee is required to take possession of the apartment by making payments and executing documentation after the developer has obtained a certificate for occupation from the competent authority and has offered possession of the apartment to the allottee. The developer stated:

> "We may also like to bring to your notice, that if the acceptance of offer of possession terms is being conveyed by the allottee under protest the Company will not be in a position to hand over the possession and execute the Conveyance Deed and as such your request to take over the possession and execute the documents under protest is untenable."

33 By an email dated 24 December 2016, another flat buyer was informed that:

> "It would be a pleasure to progress with possession once you submit the affidavit. However we can't accept any documents to this effect under protest or claim of coercion. This affidavit has to be unconditionally submitted and possession taken." By another communication dated 21 December 2016, a flat purchaser was informed that:
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> "It was explained to you in our FDN itself and our earlier reply/clarifications, that any kind of protest 'is not tenable if you wish to take possession and register the property as well. Kindly execute the affidavit as advised and proceed for further process on registering the property." By a communication dated 1 December 2016, the developer informed a flat purchaser that "Your letter that you took possession and executed the documents under protest is untenable and unacceptable and the company will not be in a position to execute the conveyance deed under protest." Copies of these communications are marked as Annexures P-28, P-29, P-30 and P-31 to Civil Appeal 6239 of 2019.

34 The developer has not disputed these communications. Though these are four communications issued by the developer, the appellants submitted that they are not isolated aberrations but fit into a pattern. The developer does not state that it was willing to offer the flat purchasers possession of their flats and the right to execute conveyance of the flats while reserving their claim for compensation for delay. On the contrary, the tenor of the communications indicates that while executing the Deeds of Conveyance, the flat buyers were informed that no form of protest or reservation would be acceptable. The flat buyers were essentially presented with an unfair choice of either retaining their right to pursue their claims (in which event they would not get possession or title in the meantime) or to forsake the claims in order to perfect their title to the flats for which they had paid valuable consideration. In this backdrop, the simple question which we need to address is whether a flat buyer who seeks to espouse a claim against the developer for delayed possession can as a consequence of doing so be compelled to defer the right to obtain a conveyance to perfect their title. It would, in our view, be manifestly unreasonable to expect that in order to pursue a claim for compensation for delayed handing over of possession, the purchaser must indefinitely defer obtaining a conveyance of the premises purchased or, if they seek to obtain a Deed of Conveyance to forsake the right to claim compensation. This basically is a position which the NCDRC has espoused. We cannot countenance that view.

35 The flat purchasers invested hard earned money. It is only reasonable to presume that the next logical step is for the purchaser to perfect the title to the premises which have been allotted under

the terms of the ABA. But the submission of the developer is that the purchaser forsakes the remedy before the consumer forum by seeking a Deed of Conveyance. To accept such a construction would lead to an absurd consequence of requiring the purchaser either to abandon a just claim as a condition for obtaining the conveyance or to indefinitely delay the execution of the Deed of Conveyance pending protracted consumer litigation.

36 It has been urged by the learned counsel of the developer that a consequence of the execution of the Deed of Conveyance in the present case is that the same ceases to be a transaction in the nature of "supply of services" covered under the CP Act 1986 and becomes a mere sale of immovable property which is not amenable to the jurisdiction of Consumer Fora. In Narne Construction (P) Ltd. v. Union of India21, this Court distinguished between a simple transfer of a piece of immovable property and housing construction or building activity carried out by a private or statutory body falling in the category of „service within the meaning of Section 2 (1) (o) of the CP Act 1986. This Court held that:

> "8. Having regard to the nature of transaction between the appellant Company and its customers involved much more than a simple transfer of a piece of immovable property it is clear the same constitutes "service" within the meaning of the Act. It was not the case that the appellant Company was selling the given property with all its advantages and/or disadvantages on "as is where is" basis, as was the position in UT Chandigarh Admn v. Amarjeet Singh. It is a case where a clear-cut assurance was made to the purchasers as to the nature and extent of development that would be carried out by the appellant Company as a part of package under which a sale of fully developed plots with assured facilities was made in favour of the purchasers for valuable consideration. To the extent the transfer of site with developments in the manner and to the extent indicated earlier was a part of the (2012) 5 SCC 359 transaction, the appellant Company has indeed undertaken to provide a service. Any deficiency or defect in such service would make it accountable before the competent Consumer Forum at the instance of consumers like the respondents." The developer in the present case has undertaken to provide a service in the nature of developing residential flats with certain amenities and remains amenable to the jurisdiction of the Consumer Fora. Consequently, we are unable to subscribe to the view of the NCDRC that flat purchasers who obtained possession or executed Deeds of Conveyance have lost their right to make a claim for compensation for the delayed handing over of the flats.

37 However, the cases of the eleven purchasers who entered into specific settlement deeds with the developers have to be segregated. In the case of these eleven persons, we are of the view that it would be appropriate if their cases are excluded from the purview of the present order. These eleven flat purchasers having entered into specific deeds of settlement, it would be only appropriate and proper if they are held down to the terms of the bargain. We are not inclined to accept the contention of the learned counsel of the appellants, Mr. Prashant Bhushan, that the settlement deeds were executed under coercion or undue influence since no specific material has been produced on record to demonstrate the same.

38 Similarly, the three appellants who have transferred their title, right and interest in the apartments would not be entitled to the benefit of the present order since they have sold their interest in the apartments to third parties. The written submissions which have been filed before this Court indicate that "the two buyers stepped into the shoes of the first buyers" as a result of the assignment of rights and liabilities by the first buyer in favour of the second buyer. In HUDA v. Raje Ram22, this Court while holding that a claim of compensation for delayed possession by subsequent transferees is unsustainable, observed that:

> "7. Respondents in the three appeals are not the original allottees. They are re-allottees to whom re-allotment was made by the appellant in the years 1994, 1997 and 1996 respectively. They were aware, when the plots were re- allotted to them, that there was delay (either in forming the layout itself or delay in delivering the allotted plot on account of encroachment etc). In spite of it, they took re-allotment. Their cases cannot be compared to cases of original allottees who were made to wait for a decade or more for delivery and thus put to mental agony and harassment. They were aware that time for performance was not stipulated as the essence of the contract and the original allottees had accepted the delay." Even if the three appellants who had transferred their interest in the apartments had continued to agitate on the issue of delay of possession, we are not inclined to accept the submission that the subsequent transferees can step into the shoes of the original buyer for the purpose of benefiting from this order. The subsequent transferees in spite of being aware of the delay in delivery of possession the flats, had purchased the interest in the apartments from the original buyers. Further, it cannot be said that the subsequent transferees suffered any agony and harassment comparable to that of the first buyers, as a result of the delay in the delivery of possession in order to be entitled to compensation.
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> (2008) 17 SCC 407 Amenities

39 The brochure that was issued by the developers spoke of a "Distinctive DLF Living" while advertising the project, which was described as "DLF Westend Heights", New Town. This was described as "the premier choice for Bangalore living...a premium residential enclave featuring spacious apartments with a rich selection of amenities." Westend Heights at New Town was described as a project which was being developed on a land area of 27.5 acres. The brochure specifically referred to the amenities being provided. Among them were (i) "The most exclusive club in Bangalore"; (ii) a swimming pool; (iii) gymnasium/ aerobics centre; and (iv) a restaurant and Bar together with other sports facilities. Besides this, the brochure contained a representation of the setting up of a convenience shopping centre with an array of outlets, a renowned early - learning school and state of the art health care facilities. Clause 1.10(a) of the ABA, which imposes the liability to bear taxes on the allottees states that this liability will be proportionate to the ratio of the super area of the apartment to the total super area of all the apartments and other "shops, clubs etc" in the said complex. The grievance in regard to the alleged failure of the developer to provide amenities may be divided into two segments:

(i) The club house; and

(ii) Other amenities

Club house

40 The developer has stated before the court that a club house containing

appurtenant facilities including a swimming pool, gymnasium, billiards room, tennis court, indoor badminton court, squash court and community hall has been fully constructed and an occupation certificate has been received on 13 May 2019. The developer has stated that under the building regulations, it has to handover 5 per cent of the area of the group housing complex to BDA as a civic amenities ("CA") area. The RWA has to apply to BDA for allotment of the CA area in its favour. Upon allotment, the RWA hands over the area to the builder for construction of the club. The developer relinquished the CA area in favour of the BDA, constituted an RWA and applied to BDA on 22 June 2010 for the allotment of the CA site in favour of the RWA. The written submissions indicate that a dispute over the charges demanded by BDA towards lease rent led to a writ petition before the Karnataka High Court being instituted both by the developer and the RWA which was allowed on 29 June 2015. The developer submitted a building plan to the municipal body. A second writ petition had to be filed in which the High Court on 18 October 2016 directed the municipal body to proceed with the approval of the building plans. Sanction for the building plan was received on 18 May 2017 and after construction of the club building, an occupation certificate was received on 13 May 2019. The developer has stated that it has been following up with BDA to permit them to hand over possession and management of the club to the RWA. Since permission of BDA has still not been received legal action is contemplated again. The developer has produced photographs depicting the amenities which have been provided within the precincts of the club house. Membership fees for the club are stated to have been received in the account of the RWA and not in the account of the developer. The position which has been stated before the court as elucidated above has not been disputed by counsel for the appellants. Hence, we find that there has been no breach by the developer of the obligation to provide a constructed facility of a club for the RWA. Other amenities 41 As regards the other amenities, the defence of the developer is that these were to be developed as an integral element of the entire township of 80 acres of which the project admeasuring 27 acres (comprised in Westend Heights) was a part. The ABA stipulates that allottees of the complex have no right, title and interest in respect of the amenities or facilities outside the residential complex, which lie within the larger township. According to the developer, no part of the consideration which was paid by allottees, including the appellants, was towards the amenities and facilities falling outside the boundary of the complex. In this regard, the developer relies on the following stipulation accepted by allottees under clause 5 of the Booking Application Form:

> "The applicant confirms and represents that he has not made any payment to the Company in any manner whatsoever and that the Company has not indicated / premised / represented / given any impression of any kind in an explicit or implicit manner whatsoever, that the Applicant shall have any right, title or interest of any in whatsoever in any lands, buildings, common areas, facilities and amenities failing

outside the Said Complex..." The above stipulation is reiterated under clause 1.21 of the ABA:

> "The allottee acknowledges and confirms that the allottee is not entitled to or has not paid for the lands outside the said land/said complex whether the same is within said project or other. The said project would comprise of many complexes similar on different to said complex. Allottee has not paid any amount towards any other lands, areas, facilities and amenities including but not limited to those listed below, and as such, the allottee shall have no right interest of any nature whatsoever in the same and the same are specifically excluded from the scope of this agreement. The allottee acknowledges that the ownership of such land and facilities and amenities shall vest solely with the company/LDC and its associate companies subsidiaries and they alone shall have sole right and absolute authority to deal with the same including their usage and manner/method of use, disposal etc. creation of rights in favour of other person by way of sale, transfer, lease Joint venture, collaboration or any other including transfer of government, semi-government, any other person. "

42 Now, it is correct as the developer contends that the flat purchasers have no right, title or interest in respect of the amenities which were to be constructed by the developer as a part of the larger township of New Town. The entire area comprised 80 acres of which Westend Heights was situated on 27 acres. The absence of a title or interest in the flat purchasers in the amenities to be provided outside the area of 27 acres begs the question as to whether there was a breach of a clear representation which was held out to the flat purchasers by the developer. A deficiency under Section 2(1)(g) means a fault, imperfection, shortcoming or inadequacy in the quality, nature and manner of performance. This may be required to be maintained under law or may be undertaken to be performed in pursuance of a contract or otherwise in relation to any service. The builder invited prospective flat purchasers to invest in the project of Westend Heights on the basis of a clear representation that the surrounding area of New Town situated on 80 acres was being developed to provide a wide range of amenities including a shopping centre, health care facilities and an early learning school. The developer has failed to provide these amenities. In the reply, the developer has stated that:

> "It is stated that School, Commercial Complex and Health clinic are part of the facility which will be provided upon the completion of the Whole New Town project as these facilities, with existing population cannot sustain these facilities. Every matter has to be adjudicated in light of its own facts and circumstance..." In the written submissions of the developer, the failure to provide the amenities is sought to be glossed over by contending that:

> "...the issue of these facilities has since become completely academic since the area around the DLF Township has already become totally urbanized and well developed thanks in larger measure due to the DLF s activities in the area and there are now many proximate hospitals, schools, shopping areas that have mushroomed in the immediate vicinity and neighbourhood of the DLF Township which are in fact being

> regularly and conveniently used by the residents of the DLF residential complex which include the Appellants herein. As such, there is no loss or claim for any damages that could be said to have accrued to the Appellants either under the ABA or otherwise under this alleged head of claim."

43 In other words, what the developer holds out as a defence is that though there has been a failure on their part to provide the amenities, the flat buyers have the benefit of facilities in the surrounding area which has become urbanised. We cannot agree with this line of submissions. The reply of the developer seeks to explain the failure to construct the facilities on the ground that the "existing population cannot sustain these facilities" – a school, commercial complex and health care facilities. This is a case involving an experienced developer who knew the nature of the representation which was being held out to the flat purchasers. Developers sell dreams to home buyers. Implicit in their representations is that the facilities which will be developed by the developer will provide convenience of living and a certain lifestyle based on the existence of those amenities. Having sold the flats, the developer may find it economically unviable to provide the amenities. The flat purchasers cannot be left in the lurch or, as in the present case, be told that the absence of facilities which were to be provided by the developer is compensated by other amenities which are available in the area. The developer must be held accountable to its representation. A flat purchaser who invests in a flat does so on an assessment of its potential. The amenities which the builder has committed to provide impinge on the quality of life for the families of purchasers and the potential for appreciation in the value of the flat. The representation held out by the developer cannot be dismissed as chaff. True, in a situation such as the present it may be difficult for the court to quantify the exact nature of the compensation that should be provided to the flat buyers. The general appreciation in land values results in an increase in the value of the investment made by the buyers. Difficulties in determining the measure of compensation cannot however dilute the liability to pay. A developer who has breached a clear representation which has been made to the buyers of the amenities which will be provided to them should be held accountable to the process of law. To allow the developer to escape their obligation would put a premium on false assurances and representations made to the flat purchasers. Hence, in factoring in the compensation which should be provided to the flat buyers who are concerned in the present batch of appeals, we would necessarily have to bear this issue in mind.

Tax 44 The ABA contained specific provisions in regard to the payment of taxes. Clause 1.3 of the ABA provided:

> "1.3 The Allottee shall make the payment of the Total price as per the payment plan set out in annexure -III of this Agreement. Other charges, securities, payments etc. (as specified in this Agreement), Taxes and increase thereof (as provided in clause 1.10) shall be payable by the Allottee, as and when demanded by the Company." Clause 1.10 contained a specific provision in regard to the obligation of the allottee to pay taxes in addition to the total price. Clause 1.10 provided:
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> "1.10. The Allottee agrees and understands that in addition to Total price, the Allottee shall be liable to pay the Taxes, which shall be charged and paid as under:

a) A sum equivalent to the proportionate share of Taxes shall be paid by the Allottee to the Company. The Proportionate share shall be the ratio of the Super Area of the said Apartment to the total super area of all the apartments other buildings shop, club etc. in the said complex.

b) The Company shall periodically intimate to the Allottee herein, on the basis of certificates from a Chartered Engineer and /or a Chartered· Accountant, the amount payable as stated above which shall be final and binding on the Allottee and the Allottee shall make payment of such amount within 30 (thirty days) of such intimation." The ABA also contains the following provisions:

"2. Payment for taxes on land, wealth-tax, cesses etc. by Allottee: -

The Allottee agrees and confirms to pay all Government rates, tax on land, municipal tax, property taxes, wealth tax, Building and Other Construction Workers Welfare Fund (Cess),taxes, one time building tax, luxury tax if any, fees or levies of all and any kind by whatever name called, whether levied or Leviable now or in future by the Government or municipal authority or any other governmental authority on the Said Complex and I or the Said Building or land appurtenant thereto as the case may be as assessable or applicable from the date of the Application if the Said Apartment is assessed separately and if the Said Apartment is not assessed separately then the Allottee shall pay directly to the concerned authority and if the same is levied on or paid by the Company or the Allottee then the same shall be borne and paid by the Allottee on pro-rata basis and such determination of proportionate share by the Company and demand shall be final and binding on the Allottee. However, if the Said Apartment is assessed separately the Allottee shall pay directly to the Government Authority.

3. Amount paid by Allottee with Application The Allottee has paid a sum of Rs. 3,00,000/- (Rupees 3 Lakhs only) alongwith the Application, the receipt of which the Company doth hereby acknowledge and the Allottee agrees to pay the remaining price of the Said Apartment as prescribed in schedule of payments (Annexure-III) attached with this Agreement along with all other charges, Taxes, securities etc. as mentioned in this Agreement and as per the de-mand raised by the Company in accordance with the Agreement." The ABA contains the definition of taxes in the following terms:

""Taxes" shall mean any and all taxes payable by the Company/LOC and/or its contractors, suppliers, consultants, etc. by way of value added tax (VAT), state sales tax, central sales tax, works contract tax, service tax, cess, levies and educational cess and any other taxes levies, charges by whatever name called levied and collected by Government Agency in connection with Development / construction of the Said Apartment/Said Building/Said Complex." The expression total price is also defined in the ABA so as to be exclusive inter alia of taxes.

45 The two certificates of the Chartered Accountant issued on 26 July 2013 and 9 August 2014 indicate that taxes inclusive of interest have been recovered. According to the appellants, the builder admitted that it had "not properly discharged" his liability towards taxes for a period of thirty-six months between 2011-2012 and 2013-2014 and that tax dues were paid on 25 March 2015 together with penalty and interest. Hence, it has been urged that the liability to pay interest which arose on account of the default of the developer in discharging the tax liability on time cannot be fastened upon the buyers. 46 On behalf of the developer it has been submitted that when construction commenced in 2009, there was an absence of clarity on whether works contract tax was liable to be paid in relation to agreements between owners-developers and allottees of apartments where the apartments were to be delivered in future. In 2013, this Court delivered its judgment in Larsen and Toubro Limited v State of Karnataka23 as a result of which the liability towards works contract tax was adjudicated upon. Consequently, while computing the amount payable in the final statements of accounts, the developer passed on the interest burden but not the penalty on a proportionate basis in terms of clause 1.10. The allottees were required to pay their proportionate share of the works contract tax in terms of the ABA and the final demand was raised at the time of the offer of possession. 47 The specific conditions contained in the ABA clearly imposed the liability to bear the proportionate share of taxes on the purchasers. Clauses 1.3 and 1.10 leave no manner of doubt in regard to the position. The developer has offered an explanation of why as a result of pending litigation, the dues towards works contract tax were not paid earlier. Indeed, if they were paid earlier, the purchasers would have been required to reimburse their proportionate share of (2014) 1 SCC 708 taxes earlier as well. No part of the penalty imposed on the developer has been passed on to the purchasers. In view of the terms of the ABA and the explanation which has been submitted by the developer, there is no deficiency of service in regard to the demand of interest payable on the tax which was required to be deposited with the revenue.

Electricity 48 The submission by Mr. R. Balasubramanian, learned Senior Counsel is that the initial collection of Rs. 1.50 lacs from each buyer towards BESCOM /BWSSB charges for electricity and water are admitted. Subsequently, invoking clause 23(b) of the ABA, the developer collected two lacs from each buyer towards additional electricity charges. The appellants contest the entitlement of the developer to claim these charges.

Clause 23(b) of the ABA is in the following terms:

> "23. (b) Payments and other charges for bulk supply of electrical energy If Company or the Maintenance Agency decides to apply for and thereafter receives permission from BESCOM or from any other body / commission/ regulator/ licensing authority constituted by the Government of Karnataka for such purpose, to receive and distribute bulk supply of electrical energy in the Said Project/Said Complex then the Allottee undertakes to pay on demand to the Company proportionate share as may be determined by the Company of all payments and charges paid/ payable by the Company or the Maintenance Agency to BESCOM...The proportionate share of cost incurred by the Company for creating infrastructure like HT feeder, EHT sub stations etc shall also be payable by the Allottee on demand."

49 According to the developer, initially an electricity connection was provided by BESCOM without insisting on the requirement of an electric sub-station. Subsequently as occupation certificates were received for additional towers, BESCOM required a dedicated electric sub-station which was constructed by the developer at a cost of Rs. 18.01 crores. The pro rata cost for setting up this additional infrastructure was, according to the developer, payable by the allottees. When offers for possession were issued to the buyers, the following stipulation was contained in the letter:

> "Our initial effort was to obtain and energize the power supply to the entire project of 1830 apartments through individual ll KV feeders from Golahalli 66/llKV Substation. On this basis, the costing for infrastructure towards provisioning of utilities as per clause 1.14, 1.15, 23(b) and JDC of ABA was estimated at rate Rs. 127.96/sft., which was reflected in the Final Demand to D Block customers. However, after a detailed evaluation of the load requirement for the project as per norms, BESCOM has now stipulated that, in accordance with clause 3.2.4 of KERC Regulations, we establish a dedicated 66/11 kv Substation within our project site to cater to the needs of the project, instead of the earlier proposed scheme of 11 Kv feeders from Golahalli. The increase in cost because of this new sub-station and allied works, over and above the originally envisaged 11KV scheme is estimated @Rs. 18.01 Cr., thereby increasing the total infrastructure cost recovery towards provisioning of utilities to Rs. 188.00/sft. In view of the above said amounts are being recovered on the basis of provisional estimates. On commissioning and energizing the substation, the company shall arrange a certificate from independent chartered accountant/ chartered engineer to arrive at the actual cost incurred. Your share of the said actual cost by the Company shall be duly intimated to you accordingly. If it is found that excess amount paid by you, over and above the actual cost incurred by the company, said excess amount so collected shall be refunded to you without interest. If the actual expenses exceeds the estimated amount computed @Rs.

188/-sq. ft. then demand for the shortfall amount shall be raised through further demand on the owner of the property and shall be payable by you. We would further like to bring to your kind attention that the provision of 66/llKV substation will ensure better quality uninterrupted power supply as compared with the previously planned scheme of 11KV reeders." 50 Mr. R. Balasubramanian, learned Senior Counsel contends that clause 23(b) relates to receiving and distributing the bulk supply of electrical energy to "the said project /said complex" which is defined as "project under the name and style of "New Town DLF BTM Extension". According to the submission, the charges have been collected for the entire New Town project and not for Westend Heights alone. In this context it has also been submitted that distribution of electricity is governed by the KERC Regulations 2006. While planning the project, the developer calculated the cost of the 66/11 KV sub-station and collected charges from each of the 1830 buyers. Hence, it has been submitted that there was no requirement of additional bulk supply of electricity for the nineteen hundred buyers. In this context, the formulation in the written submissions is extracted below:

> "(under) regulation 3.02 (e) of KERC (Conditions of Supply of Electricity by the Distribution Licensee) Regulations 2004, it is mandatory to set up 66 KV supply line/

> KV substation if the demands goes beyond 7500 KVA. Further under regulation 3.2.4 KERC (Recovery of Expenditure for Supply of Electricity) Regulations 2004 : "In case of layouts/buildings requiring power supply and the requisitioned load is more than 7500 KVA, the developer/ Applicant shall provide the space for erection of sub-station and also bear the entire charges of such a sub-station and associated lines/equipments. The work shall be carried out either by the Licensee duly recovering the charges as per estimate or by the Applicant himself through appropriate class of licensed contractor by paying 10% of the estimate as supervision charges to the Licensee."

51 The NCDRC has upheld the collection of the charges towards electricity based on the terms of the ABA. There is no infirmity in the finding of the NCDRC, which is based on the provisions contained in clause 23(b) of the ABA. The charges recovered are not contrary to what was specified in the contract between the parties.

Parking 52 The appellants seek a refund of an amount of Rs. 2.25 lacs collected from each buyer towards car parking. The submission is that under Section 3(f) of the Karnataka Apartment Ownership Act 197224 , common areas and facilities include parking areas. According to the appellants, the flat buyers had already paid for the super area in terms of clause 1.6 of ABA including common areas and facilities which would be deemed to include car parking under the KAO Act. The relevant portion of clause 1.6 is extracted below:

> "1.6. The Allottee agrees that the Total price of the said Apartment is calculated on the basis of its Super Area only (as indicated in clause 1.1.) except the parking space, additional car parking space which are based on fixed valuation...."(emphasis supplied)

53 We are unable to accede to the above submission. The ABA contained a break-up of the total price of the apartment. Parking charges for exclusive use of earmarked parking spaces were separately included in the break-up. The parking charges were revealed to the flat buyers in the brochure. The charges recovered are in terms of the agreement.

54 The decision of this Court in Nahalchand Laloochand Private Limited v.

"KAO Act" Panchali Cooperative Housing Society Limited25 turned on the provisions of the Maharashtra Ownership Flats Act 1971, as explained in the subsequent decision of this Court in DLF Limited v. Manmohan Lowe26. The demand of parking charges is in terms of the ABA and hence it is not possible to accede to the submission that there was a deficiency of service under this head. 55 For the above reasons we have come to the conclusion that the dismissal of the complaint by the NCDRC was erroneous. The flat buyers are entitled to compensation for delayed handing over of possession and for the failure of the developer to fulfil the representations made to flat buyers in regard to the provision of amenities. The reasoning of the NCDRC on these facets suffers from a clear perversity and patent errors of law which have been noticed in the earlier part of this judgment. Allowing the appeals in part, we set aside the impugned judgment and order of the

NCDRC dated 2 July 2019 dismissing the consumer complaint. While doing so, we issue the following directions:

> (i) Save and except for eleven appellants who entered into specific settlements with the developer and three appellants who have sold their right, title and interest under the ABA, the first and second respondents shall, as a measure of compensation, pay an amount calculated at the rate of 6 per cent simple interest per annum to each of the appellants.

The amount shall be computed on the total amounts paid towards the purchase of the respective flats with effect from the date of expiry of thirty-six months from the execution of the respective ABAs until the (2010) 9 SCC 536 (2014) 12 SCC 231 date of the offer of possession after the receipt of the occupation certificate;

(ii) The above amount shall be in addition to the amounts which have been paid over or credited by the developer at the rate of Rs 5 per square foot per month at the time of the drawing of final accounts; and

(iii) The amounts due and payable in terms of directions (i) and (ii) above shall be paid over within a period of one month from the date of this judgment failing which they shall carry interest at the rate of 9 per cent per annum until payment.

56 The civil appeals are accordingly allowed in the above terms. 57 Pending application(s), if any, shall stand disposed of.

………………………………………….........................J. [Dr. Dhananjaya Y Chandrachud]
....J. [K M Joseph] New Delhi;

August 24, 2020.