

A M/S TREATY CONSTRUCTION & ANR.

v.

M/S RUBY TOWER CO-OP. HSG. SOCIETY LTD.

(Civil Appeal No. 5699 of 2019)

B JULY 19, 2019

**[ABHAY MANOHAR SAPRE AND
DINESH MAHESHWARI, JJ.]**

- Consumer Protection – Deficiency of service – Appellants*
- C *evolved a scheme of constructing a building consisting of flats and shops – Purchasers of those flats and shops formed a co-operative housing society – In relation to the project in question, dispute arose between the members of the respondent-society and appellants-builders – Respondent-society contended that appellants failed to complete the interior works and failed to obtain the completion certification as also the occupancy certificate – It was also alleged that appellants borrowed varied sums of money from the respondent-society on pretext of completing the unfinished work – On the other hand, appellants contended that delay was due to the obstruction caused and created by the respondent, who had made illegal*
 - D *construction/alterations – State Commission, inter alia, directed appellants to execute Deed of conveyance of the property in question after obtaining the completion certificate and occupancy certificate and entitled the respondent for refund of amount of Rs.26,25,000/-, which was given to obtain possession of the flat – Before, National Commission, appellants denied the receipt of the loan amount of Rs.26,25,000/- – The said submission was accepted by the National Commission, however, it held that appellants had agreed to pay a sum of Rs.25,00,000/- to the respondent-society in the meeting dated 17.12.2003, therefore, the appellants were bound by the admission so made by them and were liable to that extent – National Commission*
 - E *also directed appellants to pay compensation of Rs.3,00,000/- for not obtaining occupancy certificate and directed appellants to pay Rs.1000/- per day after 60 days of the order and until obtaining full occupancy certificate – On appeal, held: Direction by the National Commission as regards payment of sum of Rs.25,00,000/-*
 - F *Rs.26,25,000/- – The said submission was accepted by the National Commission, however, it held that appellants had agreed to pay a sum of Rs.25,00,000/- to the respondent-society in the meeting dated 17.12.2003, therefore, the appellants were bound by the admission so made by them and were liable to that extent – National Commission*
 - G *also directed appellants to pay compensation of Rs.3,00,000/- for not obtaining occupancy certificate and directed appellants to pay Rs.1000/- per day after 60 days of the order and until obtaining full occupancy certificate – On appeal, held: Direction by the National Commission as regards payment of sum of Rs.25,00,000/-*

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*by the appellants to the respondent requires no interference – A
Insofar other directions are concerned, there was no record to hold
the appellants liable for compensation – In other words, there was
no material on record to find if respondent-society or its members
suffered any loss – Therefore, part of order directing appellants to
pay compensation of Rs.3,00,000/- set aside – Also, Municipal
Corporation had issued notices regarding alterations by the
members of the respondent-society and dispute regarding the same
has not settled as the High Court has directed for inspection of the
building and necessary follow up steps – Thus, in the circumstances,
part of the impugned order requiring the appellants to pay Rs.1000/-
- per day after 60 days of the order, also set aside – Appellants and
respondent directed to complete all requisites on their part – After
completion of all the requisites by the parties, the appellants directed
to execute the Deed of conveyance in favour of the respondent-
society after obtaining necessary occupancy certificate –
Maharashtra Ownership Flats (Regulation of Promotion,
Construction, Sale, Management and Transfer) Act, 1963 – ss.4
and 11. B
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Partly allowing the appeal, the Court

HELD : 1. Indisputably, in the application dated 21.03.2013 as moved before the State Commission, the respondent-society restricted its prayer for money recovery to a sum of Rs.25,00,000/- with reference to the minutes of meetings dated 17.12.2003 and 14.12.2003. It is at once clear that the aforesaid sum of Rs. 25,00,000/- was agreed to be paid by the appellants in full and final settlement of the claim of the respondent-society. The appellants having agreed to make such payment, the National Commission has rightly put them to the terms of honouring their unequivocal commitment/promise. In the given set of facts and circumstance, this Court is unable to accept the contention that a particular part of order of the State Commission having not been challenged by the respondent-society, the National Commission could not have granted the relief otherwise available on the face of record. In an overall view of the matter, when such a relief emanates from the very commitment made by the appellants in the meetings aforesaid, E
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- A the National Commission had been fully justified in granting the same to the respondent-society. Therefore, there is no reason to consider any interference in this part of direction by the National Commission. [Para 10] [624-G-H; 625-A-B]
 - 2. Even when this Court finds no reason to interfere with
- B the above-mentioned parts of the order impugned, it appears difficult to approve the directions in the remaining parts thereof, particularly those relating to other pecuniary reliefs. The National Commission has saddled the appellants with a liability to pay compensation to the tune of Rs. 3,00,000/- for not obtaining Occupancy Certificate and has issued further directions to the appellants to obtain such certificate as also to execute the requisite Deed and to pay Rs. 1,000/- per day for every day of delay. True it is that Occupancy Certificate was not obtained by the appellants but then, fact of the matter remains that the members of respondent-society chose to take over possession
- C without such certificate; and then, several questions have arisen as regards the alteration allegedly carried out by them for which, the Municipal Corporation has the objections to raise. In any case, there appears nothing on record to find the basis for holding the appellants liable for compensation and then, for assessing the quantum of compensation, if at all there be any liability of the appellants. In other words, there is no material on record to find if the respondent-society or its members suffered any loss; and if so, the extent thereof. Therefore, this part of the order impugned, directing the appellants to pay compensation to the tune of Rs. 3,00,000/-, cannot be approved. [Para 11] [625-C-F]
- F 3. As regards direction to appellants to convey the title of the property in question by executing a registered Deed within a period of four months after obtaining Occupancy Certificate, though the appellants cannot avoid their legal obligation to execute the requisite Deed but then, having regard to the facts
- G and circumstances of the case and more particularly the facts relating to the issuance of notices by the Municipal Corporation; and the dispute/objection regarding alterations by the members of the respondent-society having not been settled as yet with the High Court having issued directions for inspection of the building and for necessary follow-up steps, awarding of Rs. 1,000/- per
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day for every day of delay seems rather unwarranted. In the given situation, where the Municipal Corporation had been of the view that there were visible illegal constructions made by the members of respondent-society because of which the Certificate cannot be issued; and in view of the orders dated 12.06.2017 and 07.01.2019 passed by the High Court in W.P. No. 970 of 2015, the penalty of Rs. 1,000/- per day deserves to be waived at present but with the requirements on the parties to complete the respective requisites, while leaving it open for them to take recourse to appropriate remedies, in case of any grievance arising in future. [Para 12] [625-G-H; 626-A-B]

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4. In the result:

(i) The impugned order dated 07.03.2018 is not interfered with, to the extent it relates to the payment of Rs. 25,00,000/- by the appellants to the respondent-society. The appellants shall make payment of this amount of Rs. 25,00,000/- within 45 days from today failing which, this amount shall carry interest @ 8% p.a. from today until payment; (ii) The other part of the order impugned, saddling the appellants with liability to pay compensation to the tune of Rs. 3,00,000/- is set aside; (iii) Yet another part of the order impugned, requiring the appellants to pay Rs. 1,000/- per day after 60 days of the order and until obtaining full Occupancy Certificate, is also set aside; (iv) As regards obtaining of Occupancy Certificate and execution of the Deed of Conveyance by the appellants, it is provided that: (a) the appellants shall complete all the requisites on their part for obtaining Occupancy Certificate within three months from today; and (b) the respondent-society and its members shall also ensure compliance of the requisites on their part (with reference to the orders passed by the High Court in W.P. No. 970 of 2015) within three months from today and for that matter, they may seek necessary directions from the High Court, if so required. Within two months of completion of all the requisites by the parties, the appellants shall execute the Deed of Conveyance in favour of the respondent-society after obtaining the necessary Occupancy Certificate. As regards this part of the matter, it is also left open for the parties to take recourse to appropriate remedies in

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- A **accordance with law, in case of any grievance arising in future; (v) The cost imposed on the appellants is waived and parties are left to bear their own costs of this litigation. [Para 14] [626-D-H; 627-A-B]**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 5699
B of 2019.

From the Judgment and Order dated 07.03.2018 of the National Consumer Disputes Redressal Commission at New Delhi in First Appeal No. 109 of 2015.

C Vinay Navare, Ms. Gwen Kartika, Ms. Abha R. Sharma, Advs. for the Appellants.

Sukumar Pattjoshi, Sr. Adv., Nitin S. Tambwekar, Seshatalpa Sai Bandaru, Vikas Nautiyal, Advs. for the Respondent.

The Judgment of the Court was delivered by

D **DINESH MAHESHWARI, J.** 1. Leave granted.

2. This appeal by special leave is directed against the judgment and order dated 07.03.2018, as passed by the National Consumer Disputes Redressal Commission ('the National Commission' hereafter) in First Appeal No. 109 of 2015, whereby the National Commission has

E modified the order dated 17.12.2014, as passed by the State Consumer Disputes Redressal Commission, Maharashtra, Mumbai ('the State Commission' hereafter) in Complaint Case No. 120 of 2005; and has issued directions to the effect that: (i) the appellants shall pay a sum of Rs. 28,00,000/- to the respondent-society (the complainant) within a period

F of 45 days, failing which the amount shall carry interest @ 8% per annum from the date of passing of the order till the date of payment; (ii) a sum of Rs. 1,000/- per day shall further be paid by the appellants after 60 days from the date of order till the time full Occupancy Certificate is obtained; (iii) the appellants shall convey the title of the property in question by executing a registered Deed in terms of the order passed by

G the State Commission within a period of 4 months after obtaining the Occupancy Certificate. The National Commission has also upheld costs of Rs. 50,000/-, payable by the appellant No.1 herein.

3. The background aspects of the matter, so far relevant for the present purpose, may be noticed, in brief, as follows:

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3.1. The appellants had evolved the scheme of constructing a building consisting of 64 flats and 13 shops on a plot bearing Survey No. 22, Hissa No. 7 [C.T.S. Nos. 99, 99 (1 to 16) and 114] at Sahakar Road, Off. S.V.Road, Jogeshwari (West) Mumbai. The persons who agreed to purchase respective flats and shops in the said project eventually formed a Co-operative Housing Society, who is the respondent in this appeal ('the respondent-society' hereafter). In relation to the project in question, several disputes ensued between the members of respondent-society on one hand and appellants-builders on the other, leading to a complaint before the State Commission, being Complaint No. 120 of 2005 by the respondent-society¹.

3.2. The respondent-society submitted before the State Commission, *inter alia*, that several sale deeds were executed between the period 1994 to 2002 whereby, its members purchased certain apartment units as also commercial units of varied sizes but, despite making payment over and above the agreed sale consideration, the appellants failed to discharge their part of the contract inasmuch as the interior works remained incomplete; and the appellants also failed to obtain the Completion Certification as also the Occupancy Certificate. It was also alleged that pending completion of the building works, the appellants borrowed and collected varied sums of money from the members of the respondent-society, on the pretext that the money would be used towards finishing the incomplete works; and this aspect was recorded in the minutes of the meeting held on 12.07.1998.

3.2.1. It was further alleged that after some time, the respondent-society demanded reimbursement of the amount given by its members; and though the appellants agreed to reimburse a lump sum of Rs. 25,00,000/- on 17.12.2003 but, even after a lapse of about a decade, the appellants had failed to reimburse the amount; failed to obtain the Occupancy Certificate; and also failed to complete the pending works to the satisfaction of respondent. It was yet further alleged that as an added burden, upon taking possession of their individual units, the members of respondent-society had to spend additional sums of money to complete the interior works in their respective flats and the building; and had also to pay excess of taxes under various heads. Thus, according to the respondent, there was a clear deficiency of services on the part of

¹ Apart from the present appellants, several other persons were also joined as opposite parties in the said complaint case who have since been deleted from the array of parties.

A appellants and there was a clear violation of Sections 4 and 11 of The Maharashtra Ownership Flats (Regulation of the Promotion, Construction, Sale, Management and Transfer) Act, 1963. ('MOFA').

3.2.2. With the submissions aforesaid, the respondent-society sought the following reliefs before the State Commission in the complaint:

- B *"a) To hold and declare the Opposite Parties guilty of deficiency in service as well as unfair trade practice under the provision of the said Act.*
- b) To direct the Opposite Parties to convey the said land/ property in favour of the Complainant's Society by completing all requisites formalities at their own expenses.*
- c) To direct the Opposite Parties to handover the Completion Certificate, Occupation Certificate, to the Complainants' realization of the same.*
- D *d) To refund the amount collected towards temporary loan to the tune of Rs. 35,16,820/- to the Complainants' Society along with the interest @ 21% from the date of payment till the realization of the same.*
- E *e) To refund the amount collected toward possession Charges to the tune of Rs. 26,25,000/- to the Complainants' Society along with the interest 21% from the date of payment till the realization of the same.*
- F *f) To direct the opposite parties to reimburse the expenses incurred by the Complainant's Society 'to the tune of Rs. 46,40,000/- towards the completion of interior civil work along with the interest 21% from the date of payment till the realization of the same.*
- g) To direct the Opposite Parties to develop the garden on the plot reserved for the same.*
- G *g) (sic) That the Hon'ble Forum may be pleased to direct the Opposite Party to pay an amount of Rs. 2,00,000/- towards compensation mental agony and cost of the above numbered Complaint and further an amount of Rs. 1,00,000/- towards incidental expenses incurred by the Complainant.*

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*h) For such other and further reliefs as the nature and A
circumstances of the case may deem fit and proper."*

3.3. The appellants filed their separate counter versions to the complaint aforesaid. Apart from stating that the claim of the respondent was exaggerated, they also contended that there was a clear admission of the fact that the appellants had undertaken to reimburse a sum of Rs. 25,00,000/- towards full and final settlement of the grievances raised by the respondent, and the said amount was to be realized by consuming the unconsumed FSI available on the said plot of land, as per the stipulations incorporated in the registered agreement for sale, which fact had been concealed by respondent. The appellants further submitted that the delay was not on their part but had been due to the obstruction caused and created by the respondent and its members who, after purchasing their respective flats, had made illegal constructions/alterations, which had clearly been brought out in the show-cause notices issued by the Municipal Corporation. The appellants also denied the contention of the respondent that the members completed their respective interior civil works.

3.4. During the course of hearing of the matter and pending disposal of the complaint, the respondent-society filed an application dated 21.03.2013 before the State Commission with the submissions that the prayer (d) of the complaint was not pressed; the amount claimed in prayer (f) was restricted to Rs. 25,00,000/-; and that although there was no illegal alteration by the flat purchasers, yet the complainant was agreeable to remove the same as required by the Municipal Corporation. The respondent-society stated in this application as under:

- "1) That the complainant is not pressing the prayer of Rs. 35,16820/- [claimed in prayer (d) i.e. temporary loan] alongwith interest 21% interest.*
- 2) That the complainant is restricting the prayer 10(f) to amount of Rs. 25,00,000/- as per the minutes of meeting dtd 17/12/03 & 14/12/03 which was signed by both the parties.*
- 3) That the complainant says that there is no illegal alteration made by the flat purchasers. However, the complainant consent to remove the same (if any) as required by BMC."*

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A 3.4.1. At this juncture, for their relevance, we may also take note of the minutes of the aforesaid meetings dated 14.12.2003 and 17.12.2003 as under:-

"Minutes of meeting held with Ruby Tower Members on 14/12/03

B 1. *It was discussed that BMC expenses upto procuring of Occ. Certificate will be that of the Builders which the Builders have agreed.*

2. *Regarding the settlement of accounts for which the Builders had offered Rs. 15,00,000/- in the last meeting held, the members offered Rs. 25,00,000/-, subject to the above condition as full and final settlement towards all loans, liabilities, etc of the Builder.*

C 3. *It was finalized that another meeting would be held on Wednesday i.e. 17/12/03 after Namaz-e-Isha at 9:00 p.m.*

D 4. *It is agreed that henceforth transfer charges of Ruby Tower will be of the Ruby Tower Soc. (Prop).*

5. *The meeting held was concluded in a cordial atmosphere and all present Society members have happily agreed to this proposal.*

E *"Date: 17.12.2003*

Minutes of the meeting held with members of Ruby Tower

F 1. *As decided on 14.12.03, the meeting for finalizing the settlement of all pending dues/liabilities of the Builder was conducted at 9.30 p.m. at the Builder's office.*

2. *The Builders agreed to the demand of Rs. 25,00,000.00 raised by the members in the last meeting. However, it was clarified that the first priority would be that of regularizing 'Ruby Tower' with respect to BMC.*

G 3. *Regarding payment of the agreed amount of Rs 25,00,000/-, it was proposed by the Builder that he would arrange for the same within six to nine months, which the members agreed.*

H 4. *It was clarified by the present members that their decision was binding on all the members and all had authorized the*

members present to finalize the matter in the meeting held A among themselves on 16.12.03.

5. The meeting concluded in a cordial atmosphere. “

3.5. On consideration of the material on record, the State Commission observed that the Municipal Corporation had raised the alleged objections by their letter/notice dated 09.07.1993 whereas the flat owners were put in possession somewhere between 1995 to 2002; that the Society was established in the year 2005; and the frantic efforts made by the owners/members of respondent-society for execution of the Deed of Conveyance and for obtaining Occupancy Certificate was just and legitimate. The State Commission further observed that the respondent had produced certain sample receipts to show that charges amounting to Rs. 26,25,000/- were collected for handing over possession of the flats and such charges were collected beyond the stipulated agreed consideration. The State Commission, however, found that there was no documentary evidence to show that the additional amount of Rs. 46,40,000/- was spent to complete the interior civil works.

3.6. In view of its findings, the State Commission partly allowed the complaint while directing the appellants to execute the Deed of Conveyance of the property in question after obtaining the Completion Certificate and Occupancy Certificate within 90 days and else, to pay Rs. 1,000/- per day until the date of compliance. The State Commission also observed that the complainants had not pressed for refund of the loan amount of Rs. 35,16,820/- and, therefore, the respondent-society was held entitled only for the refund of the amount of Rs. 26,25,000/-, which was given to obtain possession of the flat, together with interest @ 9% p.a. from the date of filing of the complaint and payable within 90 days, failing which the said amount shall bear an interest @ 12% p.a.

3.7. The State Commission, *inter alia*, observed and directed as under:-

“[8]. On going through the record and documentary evidence relied upon by parties, we find that the prayer for refund of Rs. 26,25,000/- which was extended as loan by the complainant society members is justified as few sample receipts showing the charges collected for handing over the possession of flats. On carefully going through the terms and conditions of the registered agreement, it appears that the opponents

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- A *have collected these charges under the guys (sic) of possession of the flats beyond the stipulated agreed consideration. Therefore, we find that complainants are entitled to get refund of an amount of Rs. 26,25,000/- since it was illegally collected by the opponents from the flat buyers of the complainant society. Complainants have not pressed refund of Rs. 35,16,820/- allegedly extended as temporary loan to the opponents for completion of balance work. Therefore, we do not want to comment further. There is not documentary evidence to demonstrate that Rs. 46,40,000/- were incurred by the complainant society to complete the interior civil works.*
- B *Therefore, we are not inclined to consider this monetary claim. The registered agreement does not provide for development of garden. Therefore, prayer beyond the stipulations of agreement cannot be considered as pleaded by the learned counsel of the opponents.*
- C *[9]. Considering facts and circumstances of the case, opponents have failed to comply their statutory obligations u/s. 11 of the MOFA Act to execute the deed of conveyance and obtain Completion Certificate and Occupation Certificate. Therefore, the complainant's prayer seeking directions to the opponents to fulfill statutory obligations are just and proper. Complainant society has discharged initial burden to prove deficient service rendered by the opponents. Therefore, complaint must succeed for issue of directions to the opponents to fulfill the statutory obligations and refund of illegally collected excess amount from the members of the complainant society.*
- D *[9]. Considering facts and circumstances of the case, opponents have failed to comply their statutory obligations u/s. 11 of the MOFA Act to execute the deed of conveyance and obtain Completion Certificate and Occupation Certificate. Therefore, the complainant's prayer seeking directions to the opponents to fulfill statutory obligations are just and proper. Complainant society has discharged initial burden to prove deficient service rendered by the opponents. Therefore, complaint must succeed for issue of directions to the opponents to fulfill the statutory obligations and refund of illegally collected excess amount from the members of the complainant society.*
- E *[9]. Considering facts and circumstances of the case, opponents have failed to comply their statutory obligations u/s. 11 of the MOFA Act to execute the deed of conveyance and obtain Completion Certificate and Occupation Certificate. Therefore, the complainant's prayer seeking directions to the opponents to fulfill statutory obligations are just and proper. Complainant society has discharged initial burden to prove deficient service rendered by the opponents. Therefore, complaint must succeed for issue of directions to the opponents to fulfill the statutory obligations and refund of illegally collected excess amount from the members of the complainant society.*
- F *[9]. Considering facts and circumstances of the case, opponents have failed to comply their statutory obligations u/s. 11 of the MOFA Act to execute the deed of conveyance and obtain Completion Certificate and Occupation Certificate. Therefore, the complainant's prayer seeking directions to the opponents to fulfill statutory obligations are just and proper. Complainant society has discharged initial burden to prove deficient service rendered by the opponents. Therefore, complaint must succeed for issue of directions to the opponents to fulfill the statutory obligations and refund of illegally collected excess amount from the members of the complainant society.*

ORDER

- (1) *Complaint is partly allowed.*
- (2) *Opponents, jointly and severally, are directed execute Deed of Conveyance, by obtaining completion certificate and occupation certificate for transferring rights, interest and title of building and piece of land bearing Survey No. 22, Hissa No. 7, and bearing C.T.S. Nos. 99, 99(1 to 16) and assessed by Municipal Corporation of Greater Bombay in Ward No. KN 150512-00 No. K-5125 (1-2) 89A, 90, K-5125 (3) 898,*
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K-5126 (1), 88 and K-5126 (3) 8890, in favour of complainant society within period of 90 days from date of this order, failing which opponent shall pay Rs. 1,000/- per day to the complainant society from the date of this order till compliance. A

(3) Opponents, jointly and severally, are directed to pay Rs. 26,25,000/- [amount illegally collected for having over the possession of the flats] along with interest @ 9% p.a. effective from the date of filing of complaint i.e. 04/10/2005 within period of 90 days from the date of this order, failing which the rate of interest shall be payable @ 12% p.a. from 04/10/2005 till its realization. B

(4) Opponents shall bear their own costs and pay costs of Rs. 50,000/- to the complainant society within period of 90 days from the date of this order. C

(5) Certified copies of this order be furnished to the parties". D

3.8. In appeal against the order of the State Commission before the National Commission, the appellants denied the receipt of loan amount of Rs. 26,25,000/- and argued that the deletion of the name of the then President of the respondent-society, who was a signatory to all the receipts, was not warranted, as his presence would have clarified all the issues which formed the subject-matter of the complaint; and that due to the failure on the part of the respondent-society to remove the changes/ alterations made to the building, the Municipal Corporation refused to issue the Occupancy Certificate. It was also argued that the State Commission had no pecuniary jurisdiction in relation to the complaint in this matter. E

3.9. The National Commission rejected the contention that the State Commission had no pecuniary jurisdiction for the reason that the same was not urged before the State Commission and the matter was decided on merits. The National Commission examined the record and found that there was absolutely no evidence on record to show that the alleged money was taken by the appellants for the purpose of completing the pending works in the building. The National Commission, however, observed that having agreed to pay a sum of Rs. 25,00,000/- to the respondent-society, the appellants were bound by the admission so made by them and were liable to that extent. As regards the arguments relating F

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- A to Occupancy Certificate, the National Commission was of the view that the appellants were negligent and there had been deficiency in service inasmuch as the appellants should not have handed over possession of the flats without obtaining the Occupancy Certificate. However, for the purpose of regularizing and legalizing the title of the members of respondent-society, it was preferred that a time bound order be made and, accordingly, the National Commission upheld the order passed by the State Commission with certain modifications.
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3.10. The National Commission, *inter alia*, observed, held and directed as under:-

- C *"10. I have carefully considered the arguments of both the learned counsel and have examined the material on record. Basically I agree with the contention of the learned counsel for the appellant that all the receipts were issued by the President of the Society and he has been deleted from the array of the parties on the request of the complainant and therefore, there is no proof that the money has been paid to the appellant. The State Commission has ordered only on presumption. Thus, the OP/appellant herein cannot be saddled with the responsibility to refund the amount of Rs. 26,25,000/- to the complainant as loan repayment. However, this is also true that the appellant has admitted that he had agreed in the meeting dated 17.03.2003 to pay Rs. 25 lakhs to the complainant for the deficiency in service. Clearly this amount has not been paid by the OP to the complainant and therefore, the appellant No. 1 is liable to pay Rs. 25 lakhs to the complainant as per his own admission in the list of dates filed along with the present appeal."*
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- G *"11. So far as the question of obtaining the Occupancy Certificate is concerned, as per the provisions of MOFA the possession should not have been handed over to the members of the complainant society without obtaining occupancy certificate and this is a clear unfair trade practice. It is being argued on behalf of the OP that there are additions and modifications in the building and therefore, it is difficult to obtain the certificate and the matter is getting delayed. This argument is not tenable as the situation has been created by*
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the OPs themselves as they offered possession without the occupancy certificate. Clearly, not obtaining occupancy certificate is the deficiency on the part of the OP/appellant. A

12. Coming to the question of FSI, though there is a provision in the agreement in condition no. 42 that the allottees/ purchasers shall not object to OP utilizing additional FSI, which may be available at the time of agreement or being made available even in a future date. However, this provision goes against the spirit of MOFA as this Commission in Vaibhav Development Corporation and others (supra) has held that it is obligatory upon the builder to obtain a full Occupancy Certificate, without which a Conveyance Deed in favour of the complainant society cannot be executed. However, there has to be a reasonable time for execution of conveyance deed in favour of the Society and this according to the said Rule has to be within four months if no period of conveying the title to the Society is mentioned in the Sale Agreement. B
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13. As the OP has given possession to the members of the Society without obtaining Occupancy Certificate, the possession of allottees has become illegal. As the purchasers have paid full consideration of the flats, they are entitled to have legal possession and legal right and title. It is also seen from the observation of the State Commission that the appellants/opposite parties have not replied to the queries raised by the Municipal Corporation and therefore, they themselves were negligent and deficient in taking steps for getting the Occupancy Certificate. As complaint has been filed by the society, it is essential that the possession of its members is regularized and title of the members as well as of the Society is legalized. This can only be legalized if OP obtains Occupancy Certificate. E
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Therefore, it is necessary to direct the OP to obtain the Occupancy Certificate in a time bound manner. In this respect, the order of the State Commission is perfectly valid so far as it relates to directing the OP to obtain Occupancy Certificate within 90 days. Once the Occupancy Certificate is obtained the title has to be conveyed to the Society within four months. G

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- A *From this point of view, the condition No. 42 is against the provisions of MOFA. Hence, this condition will not be a binding on the other party. Therefore, the existence of this condition in the agreement shall only be seen as unfair trade practice. As the OP has not obtained the occupancy certificate and thereby the OP is not able to register the conveyance deed in favour of the complainant Society, the continuing deficiency on the part of the appellant/OP is evident. Therefore, I do not find any error in the order of the State Commission in respect of the OP obtaining occupancy certificate and then executing the conveyance deed in favour of the Society. The penalty of Rs. 1,000/- per day was effective from 17.03.2015, however, looking at the difficulties of the appellant in getting the occupancy certificate due to some modifications, additions and alterations in the building, I deem it appropriate to put a lump sum compensation of Rs. 3 lakhs to be paid to the Complainant Society by the appellant for not obtaining occupancy certificate till today. It is further ordered that the order of the State Commission for paying Rs. 1,000/- per day shall be applicable now from the expiry of 60 days from the date of this order. This amount shall be paid regularly at every month to the complainant society till the occupancy certificate is obtained and conveyance deed is executed in favour of the Society.*
- B *14. As regard the objection of the appellants regarding pecuniary jurisdiction of the State Commission, it appears that this objection has not been taken before the State Commission specifically. As the matter has now been decided by the State Commission on merits, the technical objection of pecuniary jurisdiction cannot be raised at this stage. This view gets support from the decision of the Hon'ble Supreme Court in *Harshad Chiman Lal Modi Vs. DLF Universal and Anr.*, AIR 2005 SC 4446, wherein the Hon'ble Apex Court has held as follows:-*
- C *"So far as territorial and pecuniary jurisdictions are concerned, objection to such jurisdiction has to be taken at the earliest possible opportunity and in any case at or before settlement of issues. The law is well settled on the*
- D *"So far as territorial and pecuniary jurisdictions are concerned, objection to such jurisdiction has to be taken at the earliest possible opportunity and in any case at or before settlement of issues. The law is well settled on the*
- E *"So far as territorial and pecuniary jurisdictions are concerned, objection to such jurisdiction has to be taken at the earliest possible opportunity and in any case at or before settlement of issues. The law is well settled on the*
- F *"So far as territorial and pecuniary jurisdictions are concerned, objection to such jurisdiction has to be taken at the earliest possible opportunity and in any case at or before settlement of issues. The law is well settled on the*
- G *"So far as territorial and pecuniary jurisdictions are concerned, objection to such jurisdiction has to be taken at the earliest possible opportunity and in any case at or before settlement of issues. The law is well settled on the*
- H *"So far as territorial and pecuniary jurisdictions are concerned, objection to such jurisdiction has to be taken at the earliest possible opportunity and in any case at or before settlement of issues. The law is well settled on the*

*point that if such objection is not taken at the earliest, it A
cannot be taken at a subsequent stage."*

15. Based on the above discussion, the appellants are directed to pay Rs. 28,00,000/- (rupees twenty eight lakhs only) to the respondent No. 1 Society within a period of 45 days, failing which this amount shall carry an interest @ 8% p.a. from date of this order till actual payment. Appellants are further directed to pay Rs. 1,000/- (rupees one thousand) per day after 60 days from date of this order to the Complainant Society till obtaining of the full Occupancy certificate. It is further directed that appellants shall convey the title of the property as detailed in the order of the State Commission in favour of the complainant Society by registered deed within a period of four months after obtaining the Occupancy Certificate. The impugned order of the State Commission stands modified accordingly. The cost of Rs. 50,000/- is also upheld. First Appeal No. 109 of 2015 stands disposed of accordingly."

4. Assailing the order aforesaid, learned counsel for the appellants has argued that as per the admitted position on record, the members of the respondent-society had carried out additional constructions/alterations to the building due to which, the Municipal Corporation was not issuing the Occupancy Certificate and hence, the National Commission ought not to have issued directions for obtaining the Occupancy Certificate. The learned counsel has referred to the reply letter dated 01.10.2002 by one Shri Nazeer H. Kadri in support of the contention that the members of respondent-society did carry out alterations to their respective flats/shops. The learned counsel has further submitted that the respondent-society violated the terms of undertaking as mentioned in the pursi dated 21.03.2013 filed before the State Commission, wherein they had undertaken to remove the illegal alteration, if so required by the Municipal Corporation. The learned counsel has further pointed out that removal of additional structures/changes/additions put up by the members of respondent-society was the subject-matter of a writ petition, being W.P. No. 970 of 2015, filed before the High Court of Judicature at Bombay, which was disposed of by the order dated 12.06.2017 with directions that a designated officer of the concerned ward shall visit the property in question so as to ascertain whether there were illegal constructions/unauthorized changes/additions/ alterations; and if such violations were

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- A found, then to intimate the necessary parties prior to taking of any action for demolition or removal².

- 4.1 Learned counsel has also contended that when the State Commission had rejected the prayer for payment of Rs. 25,00,000/- to the respondent- society and the same was not the subject-matter of appeal, the National Commission has gravely erred in awarding this amount to the respondent. Learned counsel has further submitted that even if handing over possession of flats to the members of the respondent- society in the absence of the Occupancy Certificate was being questioned, fact of the matter remains that illegal/unauthorized construction/alterations were carried out by the members of respondent- society; and in these circumstances, the responsibility for delay in completion of all other requirements could not have been fastened on the appellants.

5. *Per contra*, learned counsel for the respondent-society has supported the order passed by the National Commission as regards holding the appellants responsible for the deficiency in services as also for the delay in obtaining the Occupancy Certificate. The learned counsel would submit that the appellants handed over the flats/commercial units not only without Occupancy Certificate but also without providing basic facilities such as water, electrical meter etc.; and in any case, non-compliance with the conditions to obtain Occupancy Certificate speaks volumes about the deficiency of services on the part of the appellants. According to the learned counsel, the building is in the same condition as it was on the day of handing over possession to the members of respondent-society; in other words, the members of respondent-society have not carried out any alterations/constructions in the said premises. While further refuting the contention of appellants that the Occupancy Certificate was not issued for unauthorized construction or alteration by the members of respondent-society, the learned counsel has contended, with reference to the correspondence with the Municipal Corporation, that Occupancy Certificate was not issued for want of compliance by the appellants of various requisites and the attempt to shift the burden in that regard on the members of the respondent-society was entirely

² The learned counsel for the appellants has further pointed out that the Municipal Corporation has initiated necessary proceeding, as noticed by the High Court in its order dated 07.01.2019 in Notice of Motion No. 221 of 2018 moved in W.P. No. 970 of 2015.

unjustified. According to the learned counsel, the appellants had attempted to amend the plan of the building which was resisted by respondent; and there exists a dispute between the parties in relation to a portion of a property demarcated for Recreational Ground inasmuch as the said portion is being used by one garage owner as a parking space at the behest of the appellants, which has resulted in harassment of the members of respondent-society.

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6. Having heard learned counsel for the parties and having perused the material placed on record, we are satisfied that in the given set of facts and circumstances, directions by the National Commission as regards payment of a sum of Rs. 25,00,000/ by the appellants to the respondent-society calls for no interference but then, other parts of the order impugned call for suitable modification.

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7. The contention on the part of appellants as regards pecuniary jurisdiction has only been noted to be rejected. The National Commission has observed, and rightly so, that such a plea was not specifically raised before the State Commission at the earliest opportunity; and the State Commission having already decided the matter on merits, such a technical objection as regards pecuniary jurisdiction could not have been countenanced before the National Commission. We find no error in the National Commission rejecting this plea as being wholly untenable at the given stage.

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8. As regards merits of the case, to put it in a nutshell, the respondent-society, while filing their complaint, sought for reimbursement of the amount of: (i) Rs. 35,16,820/- that was borrowed by appellants; (ii) Rs. 26,25,000/- collected towards possession charges; and (iii) Rs. 46,40,000/- towards the amount spent by the members for completing the interior works in their respective units. By way of the application dated 21.03.2013³ the respondent-society did not press on prayer (d) concerning the said amount of Rs. 35,16,820/- towards temporary loan and at the same time, restricted their claim in prayer (f) to the extent of Rs. 25,00,000/- with reference to the minutes of the meetings dated 17.12.2003 and 14.12.2003⁴. The State Commission, while issuing directions for executing the Deed of Conveyance by obtaining Completion Certificate and Occupation Certificate, also directed the appellants to pay Rs. 26,25,000/- with interest, being the amount illegally collected

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³ Reproduced hereinbefore in paragraph 3.4.

⁴ Reproduced hereinbefore in paragraph 3.4.1.

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- A towards possession charges. The State Commission, however, held that there was no documentary evidence to establish that the amount of Rs. 46,40,000/- was incurred by the members of the respondent-society to complete the interior civil works. On the other hand, the National Commission agreed with the submissions of the appellants that the directions regarding refund of Rs. 26,25,000/- could not have been issued
- B when there was no cogent proof and when the President of the society, who had issued the receipt in question, was deleted from the array of the parties on the request of the complainant. However, the National Commission ordered payment of Rs. 25,00,000/- by the appellants as agreed by them in the meeting dated 17.12.2003.
- C 9. When the prayers made in the complaint are read along with the contents of the application dated 21.03.2013 as also with the findings of the State Commission and the National Commission, it may appear at the first blush that the amount claimed towards temporary loan in prayer (d) was given up by the respondent-society whereas no proof was found
- D in relation to amounts claimed in prayers (e) and (f) towards possession charges and interior civil works respectively. However, fact of the matter remains that there had been long drawn disputes between the parties on several issues, including those regarding monetary claims made by the respondent-society and its members; and meetings were held for resolution of such disputes. The prayers (d) to (f) for money recovery in the complaint and the submissions made in the application dated 21.03.2013 are required to be viewed in the context of such claims and the resolutions adopted in the meetings. In our view, it would be wholly inappropriate and unjustified to consider the prayers as made in the complaint and as modified in the application *de hors* the context and disjointed from the decisions taken in the meetings aforesaid.
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- G 10. Indisputably, in the application dated 21.03.2013 as moved before the State Commission, the respondent-society restricted its prayer for money recovery to a sum of Rs. 25,00,000/- with reference to the aforesaid minutes dated 17.12.2003 and 14.12.2003. It is at once clear that the aforesaid sum of Rs. 25,00,000/- was agreed to be paid by the appellants in full and final settlement of the claim of the respondent-society. The appellants having agreed to make such payment, in our view, the National Commission has rightly put them to the terms of honouring their unequivocal commitment/promise. In the given set of facts and circumstance, we are unable to accept the contention that a
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particular part of order of the State Commission having not been challenged by the respondent-society, the National Commission could not have granted the relief otherwise available on the face of record. In an overall view of the matter, when such a relief emanates from the very commitment made by the appellants in the meetings aforesaid, the National Commission had been fully justified in granting the same to the respondent-society. Therefore, we find no reason to consider any interference in this part of direction by the National Commission (as contained in paragraph 10 of the order impugned).

11. Even when we find no reason to interfere with the above-mentioned parts of the order impugned, it appears difficult to approve the directions in the remaining parts thereof, particularly those relating to other pecuniary reliefs. The National Commission has saddled the appellants with a liability to pay compensation to the tune of Rs. 3,00,000/- for not obtaining Occupancy Certificate and has issued further directions to the appellants to obtain such certificate as also to execute the requisite Deed and to pay Rs. 1,000/- per day for every day of delay. True it is that Occupancy Certificate was not obtained by the appellants but then, fact of the matter remains that the members of respondent-society chose to take over possession without such certificate; and then, several questions have arisen as regards the alteration allegedly carried out by them for which, the Municipal Corporation has the objections to raise. In any case, there appears nothing on record to find the basis for holding the appellants liable for compensation and then, for assessing the quantum of compensation, if at all there be any liability of the appellants. In other words, there is no material on record to find if the respondent-society or its members suffered any loss; and if so, the extent thereof. Therefore, this part of the order impugned, directing the appellants to pay compensation to the tune of Rs. 3,00,000/-, cannot be approved.

12. As regards direction to appellants to convey the title of the property in question by executing a registered Deed within a period of four months after obtaining Occupancy Certificate, in our view, though the appellants cannot avoid their legal obligation to execute the requisite Deed but then, having regard to the facts and circumstances of the case and more particularly the facts relating to the issuance of notices by the Municipal Corporation; and the dispute/objection regarding alterations by the members of the respondent-society having not been settled as yet with the High Court having issued directions for inspection of the building

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- A and for necessary follow-up steps, awarding of Rs. 1,000/- per day for every day of delay seems rather unwarranted. In the given situation, where the Municipal Corporation had been of the view that there were visible illegal constructions made by the members of respondent-society because of which the Certificate cannot be issued; and in view of the orders dated 12.06.2017 and 07.01.2019 passed by the High Court in W.P. No. 970 of 2015, the penalty of Rs. 1,000/- per day deserves to be waived at present but with the requirements on the parties to complete the respective requisites, while leaving it open for them to take recourse to appropriate remedies, in case of any grievance arising in future.
- B 13. Having regard to the fact and circumstances of this case and looking to the nature of dispute, we find no justification for saddling the appellants with cost of Rs. 50,000/- either. The cost deserves to be made easy in this case.
- C 14. In the result:
- D (i) The impugned order dated 07.03.2018 is not interfered with, to the extent it relates to the payment of Rs. 25,00,000/- by the appellants to the respondent-society. The appellants shall make payment of this amount of Rs. 25,00,000/- within 45 days from today failing which, this amount shall carry interest @ 8% p.a. from today until payment.
- E (ii) The other part of the order impugned, saddling the appellants with liability to pay compensation to the tune of Rs. 3,00,000/- is set aside.
- F (iii) Yet another part of the order impugned, requiring the appellants to pay Rs. 1,000/- per day after 60 days of the order and until obtaining full Occupancy Certificate, is also set aside.
- G (iv) As regards obtaining of Occupancy Certificate and execution of the Deed of Conveyance by the appellants, it is provided that: (a) the appellants shall complete all the requisites on their part for obtaining Occupancy Certificate within three months from today; and (b) the respondent-society and its members shall also ensure compliance of the requisites on their part (with reference to the orders passed by the High Court in W.P. No. 970 of 2015) within three months from today and for that matter, they may seek necessary directions from the High Court, if so required. Within two months of completion of all the requisites by the parties, the appellants shall execute the Deed of Conveyance in favour
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of the respondent-society after obtaining the necessary Occupancy Certificate. As regards this part of the matter, it is also left open for the parties to take recourse to appropriate remedies in accordance with law, in case of any grievance arising in future. A

(v) The cost imposed on the appellants is waived and parties are left to bear their own costs of this litigation. B

15. This appeal is partly allowed and the impugned order dated 07.03.2018 as passed by the National Commission stands modified to the extent and in the manner indicated above.

Ankit Gyan

Appeal partly allowed.