

V.

(Civil Appeal No. 6380 of 2021)

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APRIL 13, 2023

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CIVIL APPELLATE JURISDICTION: Civil Appeal No. 6380
of 2021.

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With

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Sachin Datta, Sr. Adv., Rajesh P., Deeptanshu Jain, Ms. Harvinder Chowdhury, Vishal Kumar, Sahieya Singh, Tarun Gupta, Abhishek Sharma, Ms. Sonam Gupta, Anurag Tandon, Kshitiz Rao, Manish Jha, Kartikey Gupta, Divyam Agarwal, Mrs. Rachna Joshi Issar, Ms. Nidhi Tewari, Advs. for the appearing parties. A

The Judgment of the Court was delivered by B

M. R. SHAH, J.

1. Feeling aggrieved and dissatisfied with the impugned common order dated 05.02.2020 passed by the National Consumer Disputes Redressal Commission, New Delhi (for short, 'National Commission') passed in the respective Appeal Executions dismissing the same, the developer – Parsvnath Developers Limited (hereinafter referred to as the 'Developer') has preferred four appeals bearing Civil Appeal Nos. 6380/2021, 6383/2021, 6385/2021 & 6384/2021. C

1.1 Feeling aggrieved and dissatisfied with the orders dated 04.10.2017 passed by the National Commission in I.A. Nos. 14331 & 14332 of 2017 (for modification) dismissing the said applications, the Chandigarh Housing Board (hereinafter referred to as the 'CHB') has preferred Civil Appeal Nos. 6382 and 6381 of 2021. D

2. The facts leading to the present appeals in nutshell are as under:

That the Chandigarh Administration on 01.12.2005 appointed CHB as the nodal agency for development of residential, commercial and other related infrastructure facilities as an integrated project at Rajiv Gandhi Chandigarh Technological Park in Chandigarh by the name "Pride Asia". The bid of the appellant – developer was accepted by the CHB. Consequently, CHB and the developer entered into a Development Agreement dated 06.10.2006 for grant of development rights in respect of land measuring 123 acres. The said land was allotted to the appellant – developer by CHB for constructing residential units, who then advertised its project for the sale of flats and pent houses in the name and style as "Parsvnath Pride Asia". E F G

2.1 The respective private respondents applied for allotment of apartments in the said project. Later, Tripartite Agreements were executed between the Developer, CHB and the private respondents/flat owners/allottees. Clause 9(a) of the said agreement provided that the construction of the flats was likely to be completed within 36 months H

A from the date of signing of the Development Agreement between CHB and the appellant, i.e., 06.10.2006. That the appellant could not carried out the construction as, according to the appellant, the CHB failed to handover the possession of the unencumbered land to it for raising the construction.

B 2.2 A dispute arose between the appellant – developer and the CHB and in terms of the development agreement, the dispute was referred to the arbitrator. A former Judge of this Court was appointed as the sole arbitrator to adjudicate the dispute between the appellant and the CHB.

C 2.3 Pending arbitral proceedings, due to delay in allotment of the flats to the allottees, the allottees filed individual complaints before the District Consumer Disputes Redressal Commission (for short, ‘District Forum’), the State Consumer Disputes Redressal Commission (for short, ‘State Commission’) and before the National Commission. The District Forum and the State Commission allowed a batch of almost 75 complaints which were impugned before the National Commission by way of First Appeal No. 269 of 2012 and other connected appeals and the revision petitions, which were disposed of by the National Commission *vide* its common order dated 05.03.2013. The National Commission modified the orders passed by the District Forum and the State Commission to the extent that it had directed payment of uniform rate of interest to the allottees, i.e., 9%. Insofar as the payment of compensation under clause 9(c) of the Flat Buyer Agreement was concerned, the National Commission directed that the payment of compensation be made by way of interim measure, subject to final outcome of the arbitration proceedings between the appellant and the CHB.

F 2.4 Being aggrieved by the common order dated 05.03.2013 passed by the National Commission, the appellant filed Special Leave Petition bearing S.L.P.(Civil) Nos. 17133-17134 of 2013 and connected matters. This Court *vide* order dated 10.05.2013 issued notice and stayed the operation of the judgment and order dated 05.03.2013 of the National Commission in part to the extent of the payment of compensation under clause 9(c) of the Flat Buyer Agreement.

G 2.5 That finally on 09.01.2015, the learned arbitrator passed an award in the arbitration proceedings between the appellant and the CHB. In the award, the learned arbitrator also held that any amount payable

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on account of refund of price, interest or compensation (if and when finally determined by the National Commission/Supreme Court) would be borne by the appellant and the CHB in the ratio of 70:30. A

2.6 That the special leave petitions filed before this Court came to be disposed of *vide* order dated 21.04.2015 upholding the order dated 05.03.2013 passed by the National Commission, holding that the compensation under clause 9(c) of the Flat Buyer Agreement is payable. B
At this stage, it is required to be noted that the award passed by the learned arbitrator was brought to the notice of this Court and it was submitted that in view of the award passed by the learned arbitrator, the period that is stipulated in the agreement has been extended from 06.10.2006 to 05.02.2008. However, this Court observed that the Court is not inclined to enter into this controversy and if for any reason, the allottees/buyers file any execution petition for execution of the judgment and order passed by the Commission, the Developer would be at liberty to take such objections based on award passed by the learned arbitrator and if such objections are raised, it is for the executing court to consider the same and pass appropriate orders in accordance with law. With these observations, this Court disposed of the respective special leave petitions and civil appeals. C D

2.7 That thereafter, by order dated 08.05.2015, the National Commission disposed of First Appeal No. 352/2014 and connected appeals in view of the order passed by this Court dated 21.04.2015. E

2.8 That thereafter, the respective buyers – original complainants filed execution petitions before the State Commission. That the State Commission passed an order dated 19.01.2016 in E.A. No. 100/2015 directing the appellant – Developer – Parsvnath Developers Ltd. **only** to pay compensation to the allottees in terms of clause 9(c) of the Flat Buyer Agreement dated 28.02.2008. Similar orders were passed by the State Commission in other execution applications filed by the respective buyers/allottees. F

2.9 Aggrieved by order dated 19.01.2016 passed by the State Commission, the appellant herein filed the present Appeal Execution before the National Commission. At this stage, it is required to be noted that the similar Appeal Execution No. 41/2016 was dismissed by the National Commission, against which the appellant preferred a special leave petition before this Court being S.L.P.(Civil) No. 9961/2017. G H

- A In a similar matter being Consumer Complaint No. 19/2011, the National Commission by order dated 11.05.2016 directed the appellant and CHB to pay principal sum with interest @ 10% and compensation to the complainant/buyer/allottee. Both the appellant and CHB were directed to borne the aforesaid amount in the ratio of 70:30 as mentioned in the award. Challenging the said direction, the CHB filed Civil Appeal
- B No. 10748 of 2016 before this Court. This Court *vide* judgment and order dated 17.12.2019 dismissed the civil appeal filed by the CHB. This Court specifically observed that clause 9(c) is not applicable. This Court also observed that the split of 70:30 under the arbitration award must be given effect, having attained finality.
- C 2.10 That thereafter, by the impugned common order, the National Commission has dismissed the respective Appeal Executions, which are the subject matter of the present appeals at the behest of the Developer.
- D 3. Shri Sachin Datta, learned senior counsel has appeared on behalf of the Developer and Mrs. Rachna Joshi Issar along with Ms. Harvinder Chowdhury, learned counsel have appeared on behalf of the Chandigarh Housing Board.
- E 3.1 Shri Sachin Datta, learned senior counsel appearing on behalf of the Developer has vehemently submitted that the impugned order passed by the National Commission is just contrary to the decision of this Court in ***Civil Appeal No. 10748/2016, titled Chandigarh Housing Board v. M/s Parasvanath Developers Pvt. Ltd., decided on 17.12.2019***, wherein this Court had categorically held that clause 9(c), i.e., compensation on account of delay in construction is not applicable.
- F 3.2 It is submitted that in the present case, it was found that both the appellant – developer as well as the CHB were responsible for delay and therefore clause 9(c) of the Flat Buyer Agreement shall not be attracted, more particularly when there has been no fulfilment of conditions in clause 9(a).
- G 3.3 It is further submitted that even the impugned judgment and order/s is/are inconsistent with other orders passed by the National Commission in similar Appeal Executions emanating from the same order dated 08.05.2015, which was also the subject matter of First Appeals. It is submitted that even otherwise, in view of the arbitration award dated
- H 09.01.2015 which attained finality, it provided that the liability to pay the

amount to the buyers/allottees including the amount of compensation shall be paid in the ratio of 70:30 and even this Court also while disposed of Civil Appeal No. 10748/2016 specifically observed that split of 70:30 under the arbitration award must be given effect, having attained finality. The impugned order passed by the National Commission and even the State Commission directing the appellant-developer to pay the entire amount of compensation is therefore unsustainable. A
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3.4 Making above submissions, it is prayed to allow the present appeals preferred by the Developer – Parsvnath Developers Ltd.

4. While opposing the present appeals, learned counsel appearing on behalf of the CHB have vehemently submitted that under the Tripartite Agreement/Flat Buyer Agreement and as per clause 9(c), it is the exclusive liability of the developer to pay the compensation to the buyers/allottees. It is submitted that the plain language of clause 9(c) of the Flat Buyer Agreement/Tripartite Agreement, which is a commercial agreement, is binding upon the parties. C
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4.1 It is submitted that the liability to pay compensation under clause 9(c) of the Flat Buyer Agreement of the developer has been affirmed by this Court in the judgment and order dated 21.04.2015.

4.2 Making above submissions and relying upon the orders passed by this Court dated 21.04.2015 in Special Leave Petition (Civil) Nos.17133-17134/2013 and other allied special leave petitions/civil appeals and the subsequent order passed by this Court on 17.12.2019 in Civil Appeal No. 10748/2016, it is prayed to dismiss the appeals preferred by the developer. E
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5. We have heard learned counsel for the respective parties at length.

At the outset, it is required to be noted that the principal amount as well as the interest in terms of the order(s) of the State Commission have been paid to the respective complainants/allottees and the only issue involved in these appeals is as to whether the compensation awarded by the State Commission in terms of clause 9(c) of the Flat Buyer Agreement is payable solely by the developer – appellant herein or it is to be shared between the developer and the CHB in the ratio of 70:30? G
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- A 6. While considering the aforesaid issue, it is required to be noted that the learned arbitrator in the award dated 09.01.2015 in a dispute between the developer and the CHB had specifically directed that any amount payable on account of refund of price, interest or compensation (if and when finally determined by the National Commission/Supreme Court) would be borne by the appellant and the CHB in the ratio of
- B 70:30. The award passed by the learned arbitrator has attained finality. That thereafter, during the hearing of Special Leave Petition (Civil) Nos. 17133-17134/2013 and other allied connected matters, when the award passed by the learned arbitrator was brought to the notice of this Court, this Court specifically observed in paragraphs 6 & 7 as under:
- C “6. Further, it would be pertinent to note that the Commission has observed that its order would be subject to the pending arbitration proceedings between the Developers and the Chandigarh Housing Board.
- D 7. In this context, Shri Rakesh Dwivedi, learned senior counsel would state that in view of the award passed by the Arbitrator the period that is stipulated in the Agreement has been extended from 06.10.2006 to 05.02.2008. We are not inclined to enter into this controversy. If, for any reason, the respondent(s)/buyer(s) file any execution petition
- E 8 for execution of the judgment(s) and order(s) passed by the Commission, the Developer is at liberty to take such objections based on award passed by the Arbitrator. If such objections are raised, it is for the executing Court to consider the same and pass appropriate orders in accordance with law.”
- F Even thereafter when this Court disposed of/dismissed Civil Appeal No. 10748/2016, it is observed in paragraphs 12 & 13 as under:
- G “12. We also note that the finding in the arbitration award dated 09.01.2015 as to the apportionment of liability between the Developer and CHB to pay the principal sum and general compensation, must be given effect. To this extent, we find merit in the argument raised by the learned Senior Counsel for Respondent No. 1 that the prior National Commission order dated 05.03.2013 and the subsequent order of this Court dated 21.04.2015 both relegate the inter se apportionment of liability between the Developer and CHB to the arbitration award. Thus, the split of
- H 70:30 under the arbitration award must be given effect, having attained finality.

13. In any case, we find that such division is well-founded as the sale proceeds from the flat buyers were apportioned in the 16 same ratio of 70:30 between the Developer and CHB. This is supported by the Escrow Agreement dated 01.06.2007 executed by CHB and the Developer in pursuance of the Development Agreement dated 06.10.2006. Clause 4(b) of this Escrow Agreement provides that 30% of the sale proceeds in respect of the residential units would first be transferred to CHB, and the remaining amount shall then be transferred to the Developer. In view of this, we find that the amount directed to be paid by the National Commission in the impugned order must be paid by the Developer and CHB in the ratio of 70:30.”

7. In view of the above both, the State Commission as well as the National Commission have seriously erred in fastening the entire liability to pay compensation solely upon the appellant – developer. The compensation in terms of clause 9(c) of the Flat Buyer Agreement is to be shared between the developer and the CHB in the ratio of 70:30 as apportioned/determined by the learned sole arbitrator in the award dated 09.01.2015 and thereafter as observed by this Court while disposing of/dismissing Civil Appeal No. 10748/2016.

8. In view of the above, the impugned orders passed by the National Commission and that of the State Commission are required to be modified to the extent holding the appellant – developer liable to pay compensation under clause 9(c) of the Flat Buyer Agreement to the extent of 70% and 30% liability would be upon the Chandigarh Housing Board. The present appeals preferred by the appellant – developer are to be allowed to the aforesaid extent and the appeals preferred by the CHB are required to be disposed of in terms of the above.

9. Accordingly, in view of the above and for the reasons stated above, the appeals preferred by the Developer – Parsvnath Developers Limited are hereby partly allowed. The impugned common judgment and order dated 05.02.2020 passed by the National Commission in Appeal Execution No. 4/2016 and other connected Appeal Executions is hereby modified to the extent holding the appellant – developer liable to pay compensation to the respective allottees/buyers/original complainants to the extent of 70% and the liability to pay balance 30% of the compensation in terms of clause 9(c) of the Flat Buyer Agreement would be upon Chandigarh Housing Board.

A 10. In view of the above order passed in the appeals preferred by the Developer, no further orders are required to be passed in both the appeals preferred by the Chandigarh Housing Board, i.e., Civil Appeal Nos. 6382/2021 & 6381/2021 except ordering disposal of the said appeals. Ordered accordingly.

Nidhi Jain
(Assisted by : Abhishek Pratap Singh, LCRA)

Appeals disposed of.