Mrs. Mansi Khanna vs M/S Puma Realtors on 11 January, 2017

Daily Order

STATE CONSUMER DISPUTES REDRESSAL COMMISSION,

U.T., CHANDIGARH

Complaint case No.

:

456 of 2016

Date of Institution

:

12.08.2016

Date of Decision

:

11.01.2017

Mrs.Mansi Khanna wife of Sh.Kabir Khanna
Sh.Kabir Khanna son of Sh.V.B. Khanna

Correspondence address: House No.1747, Sector 4, Panchkula-134112.

.....Complainants

V e r s u s

M/s Puma Realtors Private Limited, a Company incorporated under the Companies Act, 1956
M/s Puma Realtors Private Limited, a Company incorporated under the Companies Act, 1956

....Opposite Parties No.1 and 2.

Housing Development Finance Corporation Limited, SCO No.142, First Floor, Above

.....Proforma Opposite Party No.3

Complaint under Section 17 of the Consumer Protection Act, 1986.

BEFORE: JUSTICE JASBIR SINGH (RETD.), PRESIDENT.

MR. DEV RAJ, MEMBER.

MRS. PADMA PANDEY, MEMBER Argued by: Sh.Deepak Aggarwal, Advocate for the complainants.

Sh.Ramnik Gupta, Advocate for opposite parties no.1 & 2.

Opposite party no.3 not served, in view of statement given by Counsel for the complainants.

PER MR. DEV RAJ, MEMBER The facts in brief are that being allured of various advertisements given by the opposite parties, through newspapers, media, marketing emails etc., regarding attractive salient features of their project, launched by them, under the name and style of 'IREO RISE', Sector 99, SAS Nagar, Mohali, the complainants, vide application dated 28.07.2011 Annexure C-1, applied for allotment of a flat therein. An amount of Rs.4.50 lacs, was paid by the complainants, as booking amount vide cheque no.044526 dated 26.07.2011 Annexure C-2. It was stated that, thereafter, vide Provisional Allotment Letter dated 01.08.2011 Annexure C-4, the complainants were allotted flat bearing no.001, 5th Floor, Tower Cassia Court-D, 3B2TS, measuring

1609 square feet of super area, with one car parking space. It was further stated that, vide letter dated 02.09.2011 Annexure C-5, opposite party no.2, informed the complainants that allotment made in their favour, is under the subvention scheme, subject to approval of loan by Proforma opposite party no.3/HDFC Bank. Apartment Buyer's Agreement Annexure C-6 was executed between the complainants and opposite parties No.1 and 2, on 22.08.2011. It was further stated that the complainants opted for construction linked plan. As per Clause 3.1 of the Buyer's Agreement, total sale consideration of unit was fixed at Rs.52,66,620/- which included Basic Sale Price @3273.22/- per square feet of super area. Besides above, the complainants were also required to pay Rs.100/- per square feet of super area of flat, towards External Development Charges (EDC). It was further stated that Tripartite Agreement dated 28.02.2012 Annexure C-7, under subvention plan, was executed between the parties. As per the said plan, opposite parties no.1 and 2 were liable to pay interest on the amount deposited towards the unit, in question, till its possession is delivered. It was further stated that opposite parties no.1 and 2, paid interest to opposite party no.3, under subvention plan uptill 31.03.2012, which fact is evident from the Certificates Annexure C-8 (colly.), which was issued by Proforma opposite party no.3. It was further stated that, thereafter, interest on the loan amount, is being paid by the complainants.

It was further stated that as per Clause 13.3, of the Buyer's Agreement, subject to force majeure circumstances and also the allottee having complied with all the formalities, opposite parties no.1 and 2 were liable to handover physical possession of unit, in question, within a period of 30 months i.e. on or before 21.02.2014. It was further stated that, opposite parties no.1 and 2 were also required to obtain completion/occupation certificate from the Competent Authorities, within a further period of 6 months i.e. uptill 21.08.2014, failing which, as per Clause 13.4 of the Buyer's Agreement, they were liable to pay penalty @Rs.7.50/- per square feet of the super area, per month, for the period of delay. It was further stated that, as per the demands raised by the opposite parties no.1 and 2, the complainants kept on making payment of installments towards the unit, in question, however, possession of the unit was not offered by the stipulated date i.e. 21.02.2014.

It was further stated that by January 2015, the complainants had paid Rs.52,97,183.82Ps. against total sale consideration of Rs.52,66,620/- but possession was not offered to them. It was further stated that various visits to the site reveal that construction work has been put to halt. It was further stated that various visits made to the office of opposite parties no.1 and 2, requesting them to complete the construction and deliver possession of the unit, also did not yield any result. It was further stated that the act of receiving entire sale consideration by January 2015 and on the other hand, by not completing the construction of the unit, by that time and also not handing over possession to the complainants, even till the date of filing of this complaint, amounts to failure on the part of opposite parties no.1 and 2, to honour the warranties, leading frustration of the Agreement. It was further stated that necessary permissions and certificates have also not been obtained by opposite parties no.1 and 2, in respect of the project in question. It was further stated that request made by the complainants vide email dated 02.08.2016 Annexure C-11, to make refund of the amount deposited alongwith interest, did not yield any result.

It was further stated that the aforesaid acts of opposite parties no.1 and 2, amounted to clear and unambiguous failure of the warranties leading frustration of the Agreement and also an act of

deficiency in rendering service, negligence and adoption of unfair trade practice. When the grievance of the complainants, was not redressed, left with no alternative, a complaint under Section 17 of the Consumer Protection Act, 1986 (hereinafter to be called as the Act only), was filed, seeking refund of amount of Rs.52,97,183.82Ps. alongwith interest @18% per annum from the respective due dates of deposits till realization; payment of compensation in the sum of Rs.10 lacs, on account of mental agony, physical harassment, deficiency in service, unfair trade practice and financial loss; and cost of litigation, to the tune of Rs.2 lacs.

Upon notice, reply was filed by opposite parties no.1 and 2, wherein, it was pleaded that in the face of existence of arbitration Clause in the Agreement, to settle disputes between the parties through Arbitration, in terms of provisions of Section 8 (amended) of 1996 Act, this Commission has no jurisdiction to entertain the consumer complaint. It was further pleaded that since the unit, in question, was purchased by the complainants for commercial purpose i.e. for investment purpose, as such, they did not fall within the definition of consumer. It was further stated that the complainants have concealed the ownership of the house, which was under their occupation, at Amritsar. It was further stated that the consumer complaint was not maintainable, as the matter relates to a dispute of contractual nature and an agreement to sell/purchase of flat, which is an immovable property. It was stated that no services were to be provided by opposite parties no.1 and 2 to the complainants. It was further stated that, in this view of the matter, consumer complaint was not maintainable and only a Civil Court could adjudicate the dispute, in question. Territorial and pecuniary jurisdiction of this Commission was also disputed.

On merits, sale of the unit, in question, to the complainants was not disputed. It was stated that total sale consideration of the unit was fixed at Rs.56,11,403/- and not Rs.52,66,620/- as alleged by the complainants. It was further stated that out of the amount of Rs.52,97,183.82Ps. allegedly paid by the complainants, towards price of the unit, an amount of Rs.3,03,905/- had been paid by opposite parties no.1 and 2 to proforma opposite party no.3, towards interest on the loan taken by the complainants, under subvention scheme. The said amount was deducted by opposite party no.3 directly, out of the amount paid by it, in relation to demand made by opposite parties no.1 and 2, for a sum of Rs.15,57,678.79Ps. It was further stated that since, as per condition no.13.3 of the Agreement, opposite parties no.1 and 2 proposed to handover possession of the said unit, within a period of 30 months from the date of execution of the same (Agreement) or approval of the building plans, whichever is later. It was further stated that construction work of the unit is almost finished, and as and when possession of the unit is delivered to the complainants, damages will be paid to them, as per terms and conditions of the Agreement. Receipt of email dated 02.08.2016 Annexure C-11, vide which request was made by the complainants, to make refund of the amount deposited alongwith interest, was admitted. However, it was stated that, in response to the said email, the complainants were telephonically informed that opposite parties no.1 and 2 have applied for occupation certificate, in respect of the unit, in question. It was further stated that opposite parties no.1 and 2 had already applied for occupation certificate in respect of the unit, in question, vide letter dated 11.08.2016. The remaining averments were denied, being wrong.

In view of the statement given by Counsel for the complainants, on 17.08.2016, notice was not served upon opposite party no.3, as nothing was claimed against it, by the complainants.

In the rejoinder filed, the complainants, reiterated all the averments contained in the complaint and repudiated those contained in written version of opposite parties no.1 and 2.

The complainants and opposite parties no.1 and 2, led evidence, in support of their case.

We have heard Counsel for the complainants, opposite parties no.1 and 2, and have gone through the record of the case very carefully.

The first question that falls for consideration is as to whether, the complainants are investors and did not fall within the definition of a consumer, under Section 2 (1) (d) (ii) of the Act, as alleged by opposite parties no.1 and 2 or not. It may be stated here that there is nothing on the record, that the complainants are property dealers, and deal in the sale and purchase of property, on regular basis, and as such, the unit, in question, was purchased by them, by way of investment, with a view to resell the same, as and when, there was escalation in the prices thereof. On the other hand, the complainants have specifically stated in para no.2 of the complaint that they have purchased the said unit, for their residential purpose. At the same time, in their rejoinder filed, the complainants have also clarified that they were not the owners of house, at Amritsar. Since, opposite parties no.1 and 2 have leveled allegations against the complainants, as such, the onus lays upon them, to prove it, which they filed to do so. Thus, in the absence of any cogent evidence, in support of the objections raised by the opposite parties no.1 and 2, mere bald assertion i.e. simply saying that the complainants being investor, did not fall within the definition of a consumer, cannot be taken into consideration. In a case titled as Kavita Ahuja Vs. Shipra Estate Ltd. and Jai Krishna Estate Developer Pvt. Ltd. 2016 (1) CPJ 31, by the National Consumer Disputes Redressal Commission, New Delhi, it was held that the buyer(s) of the residential unit(s), would be termed as consumer(s), unless it is proved that he or she had booked the same for commercial purpose. Similar view was reiterated by the National Commission, in DLF Universal Limited Vs Nirmala Devi Gupta, 2016 (2) CPJ 316. Not only this, recently in a case titled as Aashish Oberai Vs. Emaar M GF Land Limited, Consumer Case N o . 70 of 2015, decided on 14 Sep 2016, under similar circumstances, the National Commission negated the plea taken by the builder, while holding as under:-

> "In the case of the purchase of the houses which a builder undertakes to construct for the buyer, the purchase can be said to be for a commercial purpose where it is shown, by producing evidence, that the buyer is engaged in the business of a buying and selling of houses and or plots as a trading activity, with a view to make profits by sale of such houses or plots. A person cannot be said to have purchased a house for a commercial purpose only by proving that he owns or had purchased more than one houses or plots. In a given case, separate houses may be purchased by a person for the individual use of his family members. A person owning a house in a city A may also purchase a house in city B for the purpose of staying in that house during short visits to that city. A person may buy two or three houses if the requirement of his family cannot be met in one house.

The principle of law, laid down, in the aforesaid cases, is fully applicable to the present case. The complainants, thus, falls within the definition of a 'consumer', as defined under Section 2(1)(d) of the Act. Such an objection, taken by opposite parties no.1 and 2, in their written reply, therefore, being devoid of merit, is rejected.

The next question that falls for consideration, is, as to whether, this Commission has territorial jurisdiction to entertain and decide the complaint or not. According to Section 17 of the Act, a consumer complaint can be filed, by the complainants, before the State Consumer Disputes Redressal Commission, within the territorial Jurisdiction whereof, a part of cause of action arose to them. In the instant case, it is evident from Clause 33 of the Agreement, that the parties had agreed that "Hence this Agreement shall be deemed to have been executed at Chandigarh even if the Proposed Allottee has prior thereto executed this Agreement at any place(s) other than Chandigarh", meaning thereby that the Agreement in question, was deemed to be signed/executed at Chandigarh. Not only this, Provisional Allotment Letter dated 01.08.2011 as also payment receipts (at pages 119 to 128), also reveal that the same were issued by opposite parties no.1 and 2 from their Chandigarh Office, as the same bore address of the Company as "SCO 6-7-8, Sector 9-D, Madhya Marg, Chandigarh". Since, as per the documents, referred to above, a part of cause of action arose to the complainants, at Chandigarh, this Commission has got territorial Jurisdiction to entertain and decide the complaint. The objection taken by opposite parties no.1 and 2, in their written version, in this regard, therefore, being devoid of merit, must fail, and the same stands rejected.

No doubt, in the written version, an objection was also taken by opposite parties no.1 and 2, that as per Clause 36 of the Agreement, the Courts at Mohali and the Punjab and Haryana High Court at Chandigarh, shall have Jurisdiction, to entertain and adjudicate the complaint, and, as such, the Jurisdiction of this Commission was barred. It may be stated here that all the provisions of the Code of Civil Procedure are not applicable, except those, mentioned in Section 13 (4) of the Act, to the proceedings, in a Consumer Complaint, filed under the Act. For determining the territorial jurisdiction, to entertain and decide the complaint, this Commission is bound by the provisions of Section 17 of the Act. In Associated Road Carriers Ltd., Vs. Kamlender Kashyap & Ors., I (2008) CPJ 404 (NC), the principle of law, laid down, by the National Commission, was to the effect, that a clause of Jurisdiction, by way of an agreement, between the Parties, could not be made applicable, to the Consumer Complaints, filed before the Consumer Foras. It was further held, in the said case, that there is a difference between Sections 11/17 of the Act, and the provisions of Sections 15 to 20 of the Civil Procedure Code, regarding the place of jurisdiction. In the instant case, as held above, a part of cause of action arose to the complainants, within the territorial Jurisdiction of this Commission, at Chandigarh. In Ethiopian Airlines Vs Ganesh Narain Saboo, IV (2011) CPJ 43 (SC)= VII (2011) SLT 371, the principle of law, laid down, was that the restriction of Jurisdiction to a particular Court, need not be given any importance in the circumstances of the case.

In Cosmos Infra Engineering India Ltd. Vs Sameer Saksena & another I (2013) CPJ 31 (NC) and Radiant Infosystem Pvt. Ltd. & Others Vs D.Adhilakshmi & Anr I (2013) CPJ 169 (NC) the agreements were executed, between the parties, incorporating therein, a condition, excluding the Jurisdiction of any other Court/Forum, in case of dispute, arising under the same, and limiting the Jurisdiction to the Courts/Forums at Delhi and Hyderabad. The National Commission, in the aforesaid cases, held that such a condition, incorporated in the agreements, executed between the parties, excluding the Jurisdiction of a particular Court/Forum, and limiting the Jurisdiction to a particular Court/Forum, could not be given any importance, and the complaint could be filed, at a place, where a part of cause of action arose, according to Sections 11/17 of the Act. The principle of law, laid down, in the aforesaid cases, is fully applicable to facts of the instant case. It may also be stated here, that even if, it is assumed for the sake of arguments, that the complainants had agreed to the terms and conditions of the agreement, limiting the Jurisdiction to the Courts, referred to above, the same could not exclude the Jurisdiction of this Commission, at Chandigarh, where a part of cause of action accrued to them, to file the complaint. The submission of Counsel for opposite parties no.1 and 2, in this regard, therefore, being devoid of merit, must fail, and the same stands rejected.

The next question, that falls for consideration, is, as to whether, there is a contract to sell a flat/apartment only, to the complainants and no services were to be provided as alleged, by opposite parties no.1 and 2, to them (complainants), as such, consumer complaint is not maintainable. It may be stated here that it is not the case of opposite parties no.1 and 2 that they sold the unit, in question, in an open auction, on "as is where is basis". The builder(s)/opposite parties no.1 and 2 are bound to provide necessary facilities such as roads, drainage, drinking water, sewerage, street lighting etc. etc., for full enjoyment of the same by the allottees. In Haryana State Agricultural Marketing Board vs. Bishamber Dayal Goyal and Ors., Civil Appeal No.3122 of 2006, decided on 26.03.2014, the Hon'ble Supreme Court, while placing reliance on Municipal Corporation, Chandigarh & Ors. vs. Shantikunj Investment (P) Ltd. & Ors., (2006) 4 SCC 109, held that though it was not a condition precedent but there is an obligation on the part of the Administration to provide necessary facilities such as roads, drainage, drinking water, sewerage, street lighting etc. etc., for full enjoyment of the same by allottees. The principle of law laid down in the aforesaid cases is fully applicable to the present case. In view of above, the plea taken by opposite parties no.1 and 2, in this regard, stands rejected.

The next question, that falls for consideration, is, as to whether, in the face of existence of arbitration Clause in the Agreement, to settle disputes between the parties through Arbitration, in terms of provisions of Section 8 (amended) of 1996 Act, this Commission has no jurisdiction to entertain the consumer complaint. This question has already been elaborately dealt with by this Commission in case titled ' Sarbjit Singh Vs. Puma Realtors Private Limited', IV (2016) CPJ 126. Paras 25 to 35

of the said order, inter-alia, being relevant, are extracted hereunder:-

25. The next question, that falls for consideration, is, as to whether, in the face of existence of arbitration Clause in the Agreement, to settle disputes between the parties through Arbitration, in terms of provisions of Section 8 (amended) of 1996 Act, this Commission has no jurisdiction to entertain the consumer complaint.

26. To decide above said question, it is necessary to reproduce the provisions of Section 3 of the Consumer Protection Act 1986 (in short the Act), which reads as under;

"3. Act not in derogation of any other law.--

The provisions of this Act shall be in addition to and not in derogation of the provisions of any other law for the time being in force."

27. It is also desirable to reproduce unamended provisions of Section 8 of 1996 Act, which reads thus:-

"8. Power to refer parties to arbitration where there is an arbitration agreement.--

(1) A judicial authority before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so applies not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration.

(2) The application referred to in sub-section (1) shall not be entertained unless it is accompanied by the original arbitration agreement or a duly certified copy thereof.

(3) Notwithstanding that an application has been made under sub-section (1) and that the issue is pending before the judicial authority, an arbitration may be commenced or continued and an arbitral award made."

28. Many a times, by making reference to the provisions of Section 8 of 1996 Act, in the past also, such objections were raised and the Hon'ble Supreme Court of India, when interpreting the provisions of Section 3 of 1986 Act, in the cases of Fair Air Engg. Pvt. Ltd. & another Vs. N. K. Modi (1996) 6 SCC 385, C.C.I Chambers Coop. Housing Society Ltd. Vs Development Credit Bank Ltd. (2003) 7 SCC 233, Rosedale Developers Private Limited Vs. Aghore Bhattacharya and others, (Civil Appeal No.20923 of 2013) etc., came to a conclusion that the remedy provided under Section 3 of 1986 Act, is an independent and additional remedy and existence of an arbitration clause in the agreement, to settle disputes, will not debar the Consumer Foras, to entertain the complaints, filed by the consumers.

29. In the year 2015, many amendments were effected in the provisions of 1996 Act. After amendment, Section 8 of 1996 Act, reads as under:-

> "8. Power to refer parties to arbitration where there is an arbitration agreement.--
>
> (1) A judicial authority, before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party to the arbitration agreement or any person claiming through or under him, so applies not later than the date of submitting his first statement on the substance of the dispute, then, notwithstanding any judgment, decree or order of the Supreme Court or any Court, refer the parties to arbitration unless it finds that prima facie no valid arbitration agreement exists."

30. Now it is to be seen, whether, after amendment in Section 8 of the principal Act, any additional right has accrued to the service provider(s), to say that on account of existence of arbitration agreement, for settling the disputes through an Arbitrator, the Consumer Foras have no jurisdiction to entertain a consumer complaint. As has been held by Hon'ble Supreme Court of India, in various cases, and also of the National Commission, in large number of judgments, Section 3 of the 1986 Act, provides additional remedy, notwithstanding any other remedy available to a consumer. The said remedy is also not in derogation to any other Act/Law.

31. Now, we will have to see what difference has been made by the amendment, in the provisions of Section 8 of 1996 Act. After amendment, it reads that a Judicial Authority is supposed to refer the matter to an Arbitrator, if there exists an arbitration clause in the agreement, notwithstanding any judgment, decree, order of the Hon'ble Supreme Court of India, or any other Court, unless it finds that prima facie, no valid arbitration agreement exists. The legislation was alive to the ratio of the judgments, as referred to above, in earlier part of this order. Vide those judgments, it is specifically mandated that under Section 3 of 1986 Act, an additional remedy is available to the consumer(s), which is not in derogation to any other Act. As and when any argument was raised, the Hon'ble Supreme Court of India and the National Commission in the judgments, referred to above, have made it very clear that in the face of Section 8 of 1996 Act and existence of arbitration agreement, it is still opened to the Consumer Foras to entertain the consumer complaints. None of the judgments ever conferred any jurisdiction upon the Consumer Foras to entertain such like complaints. Only the legal issues, as existed in the Statute Book, were explained vide different judgments. If we look into amended provisions of Section 8 of the principal Act, it explains that judicial Authority needs to refer dispute, in which arbitration agreement exist to settle the disputes notwithstanding any judgment/decree or order of any Court. That may be true where in a case, some order has been passed by any Court, making arbitration Agreement non-applicable to a dispute/parties. However, in the present case, the above said argument is not available. The jurisdiction of Consumer Foras to entertain consumer complaints, in the face of arbitration clause in the Agreement, is in-built in 1986 Act. It was not given to these Foras, by any judgment ever. The provisions of Section 3 of 1986 Act interpreted vide judgments vis a vis Section 8 of un-amended 1996 Act, were known to the legislature, when the amended Act 2015 was passed. If there was any intention on the part of the legislature, then it would have been very conveniently provided that notwithstanding any remedy available in 1986 Act, it would be binding upon the judicial Authority to refer the matter to an

Arbitrator, in case of existence of arbitration agreement, however, it was not so said.

32. We can deal with this issue, from another angle also. If this contention raised is accepted, it will go against the basic spirit of 1986 Act. The said Act (1986) was enacted to protect poor consumers against might of the service providers/multinational companies/traders. As in the present case, the complainant has spent his life savings to get a unit, for his residential purpose. His hopes were shattered. Litigation in the Consumer Fora is cost effective. It does not involve huge expenses and further it is very quick. A complaint in the State Commission can be filed, by making payment between Rs.2000/- to Rs.4000/- (in the present case Rs.4000/-). As per the mandate of 1986 Act, a complaint is supposed to be decided within three months, from the date of service to the opposite party. In cases involving ticklish issues (like the present one, maximum not more than six months to seven months time can be consumed), whereas, to the contrary, as per the principal Act (1996 Act), the consumer will be forced to incur huge expenses towards his/her share of Arbitrator's fees. Not only as above, it is admissible to an Arbitrator, to decide a dispute within one year. Thereafter, the Court wherever it is challenged may also take upto one year and then there is likelihood that the matter will go to the High Court or the Hon'ble Supreme Court of India. Such an effort will be a time consuming and costly one. Taking note of fee component and time consumed in arbitration, it can safely be said that if the matter is referred to an Arbitrator, as prayed, in the present case, it will defeat the very purpose of the provisions of 1986 Act.

33. The 1986 Act provides for better protection of interests and rights of the consumers. For the said purpose, the Consumer Foras were created under the Act. In Section 3 of 1986 Act, it is clearly provided that the said provision is in addition to and not in derogation of any provisions of any other law, for the time being in force. The 1986 Act is special legislation qua the consumers. The poor consumers are not expected to fight the might of multinational companies/traders, as those entities have lot of resources at their command. As stated above, in the present case, the complainant has spent his entire life earnings to purchase the plot, in the said project, launched by the opposite party. However, his hopes were shattered, when despite making substantial payment of the sale consideration, he failed to get possession of the plot, in question, in a developed project. As per ratio of the judgments in the case of Secretary, Thirumurugan Cooperative Agricultural Credit Society v. M. Lalitha (2004) 1 SCC 305 and United India Insurance Co. Ltd. Vs. M/s Pushpalaya Printers, I (2004) CPJ 22 (SC), and LIC of India and another Vs. Hira Lal, IV (2011) CPJ 4 (SC), the consumers are always in a weak position, and in cases where two interpretations are possible, the one beneficial to the consumer needs to be accepted. The opinion expressed above, qua applicability of Section 8 (amended) of 1996 Act, has been given keeping in mind the above said principle.

34. Not only this, recently, it was also so said by the National Commission, in a case titled as Lt. Col. Anil Raj & anr. Vs. M/s. Unitech Limited, and another, Consumer Case No.346 of 2013, decided on 02.05.2016. Relevant portion of the said case, reads thus:-

> "In so far as the question of a remedy under the Act being barred because of the existence of Arbitration Agreement between the parties, the issue is no longer res-integra. In a catena of decisions of the Hon'ble Supreme Court, it has been held that even if there exists an arbitration clause in the agreement and a Complaint

> is filed by the consumer, in relation to certain deficiency of service, then the existence of an arbitration clause will not be a bar for the entertainment of the Complaint by a Consumer Fora, constituted under the Act, since the remedy provided under the Act is in addition to the provisions of any other law for the time being in force. The reasoning and ratio of these decisions, particularly in Secretary, Thirumurugan Cooperative Agricultural Credit Society Vs. M. Lalitha (Dead) Through LRs. & Others - (2004) 1 SCC 305; still holds the field, notwithstanding the recent amendments in the Arbitration and Conciliation Act, 1986. [Also see: Skypak Couriers Ltd. Vs. Tata Chemicals Ltd. - (2000) 5 SCC 294 and National Seeds Corporation Limited Vs. M. Madhusudhan Reddy & Anr. - (2012) 2 SCC 506.] It has thus, been authoritatively held that the protection provided to the Consumers under the Act is in addition to the remedies available under any other Statute, including the consentient arbitration under the Arbitration and Conciliation Act, 1986."

35. In view of the above, the plea taken by the opposite party, that in the face of existence of arbitration clause in the Agreement, to settle disputes between the parties through Arbitration, in terms of provisions of Section 8 (amended) of 1996 Act, this Commission has no jurisdiction to entertain the consumer complaint, being devoid of merit, is rejected."

In view of the above, the plea taken by opposite parties no.1 and 2, that in the face of existence of arbitration clause in the Agreement, to settle disputes between the parties through Arbitration, in terms of provisions of Section 8 (amended) of 1996 Act, this Commission has no jurisdiction to entertain the consumer complaint, being devoid of merit, is rejected.

Another objection raised by Counsel for opposite parties no.1 and 2 was that since the issues raised in the present complaint relate to the interpretation and scope of the specific clauses of the said Agreement and being contractual in nature, as such, only the Civil Court has power to adjudicate the same, and this Commission did not have the jurisdiction to adjudicate the present complaint. At the time of arguments also, it was also contended by Counsel for opposite parties no.1 and 2, that the complainants are seeking directions from this Commission to re-write the agreed terms and conditions of the Agreement. As stated above, the complainants hired the services of opposite parties no.1 and 2, for purchasing the unit, in question, in the manner, referred to above. Opposite parties no.1 and 2 were to deliver possession of the unit, in question, in a time bound manner, referred to above, with complete basic amenities. By not completing the development and construction within the stipulated period, opposite parties no.1 and 2 violated the terms and conditions of the Agreement and were deficient in rendering service. Section 2 (1) (o) of the Act, defines service as under:-

> "service" means service of any description which is made available to potential users and includes, but not limited to, the provision of facilities in connection with banking, financing insurance, transport, processing, supply of electrical or other energy, board or lodging or both, housing construction, entertainment, amusement or the purveying of news or other information, but does not include the rendering of any service free of charge or under a contract of personal service".

From the afore-extracted Section 2(1)(o) of the Act, it is evident that housing/construction, also comes within the definition of a service. In Narne Construction P. Ltd., etc. etc. Vs. Union Of India and Ors. Etc., II (2012) CPJ 4 (SC) it was held that when a person applies for the allotment of a building or site or for a flat constructed by the Development Authority and enters into an agreement with the Developer, or the Contractor, the nature of transaction is covered by the expression 'service' of any description. Housing construction or building activity carried on by a private or statutory body constitutes 'service' within the ambit of Section 2(1)(o) of the Act. Similar principle of law, was laid down, in Haryana Agricultural Marketing Board`s case (supra). Under these circumstances, the complaint involves the consumer dispute, and the same is maintainable. Not only this, Section 3 of the Act, provides an alternative remedy. Even if, it is assumed that the complainants have a remedy to file a suit, in the Civil Court, the alternative remedy provided under Section 3 of the Act, can be availed of by them, as they fall within the definition of consumer, as stated above. In this view of the matter, the objection raised by opposite parties no.1 and 2 in this regard, being devoid of merit, must fail, and the same stands rejected.

Another objection taken by the opposite parties, with regard to pecuniary jurisdiction of the Commission, also deserves rejection. It may be stated here, that the complainants have sought refund of amount of Rs.52,97,183.82Ps., (excluding interest claimed @18% p.a. from the respective dates of deposits); compensation to the tune of Rs.10 lacs, for mental agony and physical harassment; and cost of litigation, to the tune of Rs.2 lacs, aggregate value whereof fell above Rs.20 lacs and below Rs.1 crore.

No doubt, opposite parties no.1 and 2 have relied upon the ratio of judgment titled as Ambrish Kumar Shukla and 21 ors. Vs. Ferrous Infrastructure Pvt. Ltd., Consumer Case No.97 of 2016, decided on 07.10.2016, to say that if interest claimed @18% p.a. on the amount, referred to above, is added to other reliefs, this Commission has no pecuniary Jurisdiction to entertain the complaint. In the first instance, it is very necessary to mention here that, in the present case, even if for the sake of arguments, interest claimed is added in the reliefs claimed by the complainants, the aggregate value thereof comes to Rs.97,47,511.94Ps. which is below Rs.1 crore. As such, in no way, it can be said that this Commission has no pecuniary Jurisdiction to entertain the present complaint.

Now coming to the stand of opposite parties no.1 and 2, taken under the ratio of judgment Ambrish Kumar Shukla and 21 ors. (supra), it may be stated here that to clarify the position, a similar question fell for determination before this Commission in Surjit Singh Thadwal Vs. M/s Emaar MGF Land Pvt. Ltd., and another, Consumer Case No. 484 of 2016, decided on 15.12.2016 , wherein while negating the said plea, it was held as under:-

> "Now we will deal with another contention of the opposite parties that for want of pecuniary jurisdiction, it is not open to this Commission to entertain and adjudicate this complaint. As per admitted facts, the complainant has sought refund of amount paid i.e. Rs.48,95,264/- alongwith interest @12% p.a. from the respective date of deposits; compensation to the tune of Rs.5 lacs, for mental agony and physical

harassment and cost of litigation to the tune of Rs.55,000/-. It is argued by Counsel for the opposite parties that if his entire claimed amount is added, alongwith interest claimed, it will cross Rs.1 crore and in that event it will not be open to this Commission to entertain and adjudicate this complaint, for want of pecuniary jurisdiction. To say so, reliance has been placed upon ratio of judgment of a Larger Bench of the National Commission, in the case of Ambrish Kumar Shukla (supra). In the said case, it was specifically observed that when determining pecuniary jurisdiction of the Consumer Foras, it is the value of the goods and services, which has to be noted and not the value of deficiencies claimed. Further, that interest component also has to be taken into account, for the purpose of determining pecuniary jurisdiction.

In the first blush, if we look into the ratio of the judgment, referred to above, it appears that this Commission will not have pecuniary jurisdiction to entertain this complaint. However, on deep analysis, we are going to differ with the argument raised by Counsel for the opposite parties. Judgment in the case of Ambrish Kumar Shukla (supra) was rendered by Three Judges Bench of the National Commission, without noting its earlier view of the subject. This issue, whether, when determining pecuniary jurisdiction of the State Commission/ Consumer Foras, interest is to be added with other relief claimed or not, came up for consideration, before the Three Judges Bench of the National Commission in Shahbad Cooperative Sugar Mills Ltd. Vs. National Insurance Co. Ltd. And Ors., II 2003 CPJ 81 (NC). In the said case, noting similar arguments, it was observed as under:-

"3. Complaint (at pp 17-36) was filed with the following prayer :

"It is, therefore, respectfully prayed that the complaint be allowed and the opposite parties be directed to pay the claim to the tune of Rs. 18,33,000/- plus interest @ 18% from the date of claim till its realization. Also the suitable damages caused to the complainant be ordered to be paid to the complainant."

4. Bare reading of the prayer made would show that the interest claimed by appellant pertains to the period upto the date of filing complaint, pendente lite and future. Rate and the period for which interest has to be allowed, is within the discretion of State Commission and the stage for exercise of such a discretion would be the time when the complaint is finally disposed of. Thus, the State Commission had acted erroneously in adding to the amount of Rs. 18,33,000/- the interest at the rate of 18% per annum thereon till date of filing of complaint for the purpose of determination of pecuniary jurisdiction before reaching the said stage. Order under appeal, therefore, deserves to be set aside. However, in view of change in pecuniary jurisdiction w.e.f. 15.3.2003, the complaint is now to be dealt with by the District Forum instead of State Commission."

It was specifically stated that interest claimed by appellant/complainant pertained to the period upto the date of filing complaint, pendente lite and future, need not be added in the relief claimed, to determine pecuniary jurisdiction of the State Commission/Consumer Foras. It was rightly said that the rate and period for which the interest has to be allowed, is within the discretion of the particular Consumer Fora, and the stage for exercise of such discretion would be the time, when final order is passed. We are of the considered opinion that the view taken is perfectly justified. There may be cases, where the complainant may not be entitled to claim any interest upon the amount paid, like the one, where he is rescinding his contract and further at what rate interest is to be granted will be determined by the competent Consumer Fora, by looking into the facts of each case. All cases cannot be put into a straitjacket formula, to add interest claimed, to determine pecuniary jurisdiction of the Consumer Foras. The interest, which is a discretionary relief, cannot be added to the value of the goods or services, as the case may be, for the purpose of determining the pecuniary jurisdiction of the Consumer Foras. As per provisions of the Consumer Protection Act, 1986 (Act) value of the goods purchased or services plus (+) compensation claimed needs to be added only, for determining pecuniary jurisdiction of the Consumer Foras.

As per ratio of the judgment of the Supreme Court in the case of New India Assurance Co. Ltd. Vs. Hilli Multipurpose Cold Storage Pvt. Ltd., Civil Appeal No.10941-10942 of 2013, decided on 04.12.2015, we would like to follow the view expressed by Three Judges Bench (former Bench) of the National Commission in Shahbad Cooperative Sugar Mills Ltd. case (supra), in preference to the ratio of judgment passed by a Bench of co-equal strength (subsequent Bench) of the National Commission in the case of Ambrish Kumar Shukla case (supra).

In New India Assurance Co. Ltd. case (supra), it was specifically observed by the Supreme Court that when a former Bench of co-equal strength has given a finding qua one legal issue, it is not open to the subsequent Bench of co-equal strength to opine qua that very legal issue and give a contrary finding. At the maximum, the subsequent Bench of co-equal strength can refer the matter to the President/Chief Justice of India to constitute a bigger Bench, to look into the matter and reconsider the legal proposition. It was further specifically held that, in case, there are two contrary views by the former and later co-equal strength Benches, the former will prevail. It was so said by looking into the ratio of judgment rendered by the Five Judges Bench of the Supreme Court of India, in Central Board of Dawoodi Bohra Community & Anr. Vs. State of Maharashtra & Anr. (2005) 2 SCC 673, wherein, when dealing with similar proposition, it was observed as under:-

> "12. Having carefully considered the submissions made by the learned senior counsel for the parties and having examined the law laid down by the Constitution Benches in the abovesaid decisions, we would like to sum up the legal position in the following terms :-

(1) The law laid down by this Court in a decision delivered by a Bench of larger strength is binding on any subsequent Bench of lesser or co-equal strength.

(2) A Bench of lesser quorum cannot disagree or dissent from the view of the law taken by a Bench of larger quorum. In case of doubt all that the Bench of lesser quorum can do is to invite the attention of the Chief Justice and request for the matter being placed for hearing before a Bench of larger quorum than the Bench whose decision has come up for consideration. It will be open only for a Bench of coequal strength to express an opinion doubting the correctness of the view taken by the earlier Bench of coequal strength, whereupon the matter may be placed for hearing before a Bench consisting of a quorum larger than the one which pronounced the decision laying down the law the correctness of which is doubted.

(3) The above rules are subject to two exceptions : (i) The abovesaid rules do not bind the discretion of the Chief Justice in whom vests the power of framing the roster and who can direct any particular matter to be placed for hearing before any particular Bench of any strength; and

(ii) In spite of the rules laid down hereinabove, if the matter has already come up for hearing before a Bench of larger quorum and that Bench itself feels that the view of the law taken by a Bench of lesser quorum, which view is in doubt, needs correction or reconsideration then by way of exception (and not as a rule) and for reasons given by it, it may proceed to hear the case and examine the correctness of the previous decision in question dispensing with the need of a specific reference or the order of Chief Justice constituting the Bench and such listing. Such was the situation in Raghubir Singh and Hansoli Devi."

In Ambrish Kumar Shukla case (supra), ratio of judgment- Shahbad Cooperative Sugar Mills Ltd. (supra) was not even discussed and considered. In view of above proposition of law laid down by the Five Judges Bench in Central Board of Dawoodi Bohra Community & Anr.`s and also Three Judges Bench of the Supreme Court, in New India Assurance Co. Ltd. Vs. Hilli Multipurpose Cold Storage Pvt. Ltd. case (supra), it is not open to the Bench of co-equal strength to give contrary findings, to the view already expressed by a Former Bench of same strength. In Shahbad Cooperative Sugar Mills Ltd. case (supra), decided on 02.04.2003, it was specifically observed by Three Judges Bench of the National Commission that when determining pecuniary jurisdiction of the Consumer Foras, interest component claimed by the complainant/party, is not to be added. We are of the considered view that in view of proposition of law, as explained above, the view taken in Shahbad Cooperative Sugar Mills Ltd. case (supra), to determine pecuniary jurisdiction without taking interest claimed,

will prevail. As such, in the present case, we are not looking into the interest claimed by the complainant, when determining pecuniary jurisdiction of this Commission. If the interest part is excluded, the amount claimed in the relief clause fell below Rs.1 crore and above Rs.20 lacs. Hence, this Commission has pecuniary jurisdiction to entertain and decide the present complaint. In view of above, the objection raised by the opposite parties, in this regard, being devoid of merit, must fail and the same stands rejected. "

Thus, the objection taken by opposite parties no.1 and 2, that this Commission lacks pecuniary Jurisdiction, being devoid of merit, must fail and the same stands rejected.

It is an admitted case that even by now, possession of the built-up unit has not been offered by opposite parties no.1 and 2 to the complainants. It is only stated that application to get occupation certificate is pending with the competent Authorities and after getting the said certificate, possession of the unit will be offered to the complainants. On the other hand, the complainants have placed on record, a copy of the letter dated 18.10.2016, which was obtained by them under RTI Act, from GMADA, during pendency of the complaint. In the said letter, it has clearly been mentioned by the Competent Authority i.e. Executive Officer (Licencing), Senior Town Planner, that opposite parties no.1 and 2 had applied for partial completion certificate vide letter dated 16.07.2015, but on account of incomplete file, the matter is pending before it. Opposite parties no.1 and 2 were told to supply some documents, which they have not done. As per Clause 13.3 of the Buyer's Agreement possession needs to be handed over to the purchaser within 30 months from the date of execution of the Agreement or approval of building plans. Commitment to deliver possession is subject to force majeure circumstances. Opposite parties no.1 and 2 were further entitled to get 180 days, to get occupation certificate etc. Clause 13.4 of the Agreement envisages that in case of delay beyond the period, as referred to above, in handing over possession, opposite parties no.1 and 2 shall be under an obligation to pay penalty amount for the delayed period. Even if we go upon the contention raised by Counsel for opposite parties no.1 and 2 that possession of the unit was to be delivered from the date of approval of building plans and not from the date of signing of Agreement, even then, perusal of record reveals that the building plan qua the project, in question, was approved on 18.01.2012, as such, at the maximum, possession was to be delivered to the complainants by 17.01.2015 (i.e. within 36 months from 18.01.2012). Even if we presume that opposite parties no.1 and 2 are entitled to further 12 months of extended delay period, as per Clause 13.5 of the Agreement, date of handing over possession would come to an end on 17.01.2016. Admittedly, possession of the unit has not been made till date. Probably, the project is not complete. At the same time, it has also been proved on record that the case of issuance of partial completion certificate, in respect of the unit, in question, had not been considered by the Competent Authorities, as opposite parties no.1 and 2, in the

first instance, failed to submit the requisite documents, while applying for the same (partial completion certificate) and when the same were demanded by them (Competent Authorities), they (opposite parties no.1 and 2) failed to do so, which fact is evident from the contents of RTI Information, referred to above. The complainants have proved their case that this act of opposite parties no.1 and 2, amounts to failure on their (opposite parties no.1 and 2), to honour the warranties, leading frustration of the Agreement. At the same time, not even a single word has been stated by opposite parties no.1 and 2, in their joint written statement, as to on which date, possession of the unit, in question, will be delivered to the complainants. Even the stage of construction has not been apprised to this Commission. Mere saying that the construction is almost finished, has no significant value, in the absence of any cogent and convincing evidence in that regard. The complainants cannot be made to wait for an indefinite period. Under above circumstances, prayer of the complainants to claim refund of the amount, actually paid, cannot be negated. Non-delivery of possession of the unit, in question, by the stipulated date, is a material violation of the terms and conditions of the Agreement, on the part of opposite parties no.1 and 2. Recently in a case titled as Aashish Oberai Vs. Emaar M GF Land Limited, Consumer Case N o . 70 of 2015, decided on 14 Sep 2016, under similar circumstances, the National Commission negated the plea taken by the builder, while holding as under:-

"I am in agreement with the learned senior counsel for the complainants that considering the default on the part of opposite parties no.1 and 2 in performing its contractual obligation, the complainants cannot be compelled to accept the offer of possession at this belated stage and therefore, is entitled to refund the entire amount paid by him along with reasonable compensation, in the form of interest."

Not only this, in a case titled as Brig Ajay Raina (Retd.) and another Vs. M/s Unitech Limited, Consumer Complaint No. 59 of 2016, decided on 24.05.2016, wherein possession was offered after a long delay, this Commission, while relying upon the judgments rendered by the Hon`ble National Commission, ordered refund to the complainants, while holding as under:-

"Further, even if, it is assumed for the sake of arguments, that offer of possession, was made to the complainants, in July 2015 i.e. after a delay of about three years, from the stipulated date, even then, it is not obligatory upon the complainants to accept the same. It was so held by the National Commission in Emaar MGF Land Limited and another Vs. Dilshad Gill, III (2015) CPJ 329 (NC). Recently also, under similar circumstances, in the case of M/s. Emaar MGF Land Ltd. & Anr. Vs. Dr.Manuj Chhabra, First Appeal No.1028 of 2015, decided on 19.04.2016, the National Commission, held as under:-

"I am of the prima facie view that even if the said offer was genuine, yet, the complainants was not obliged to accept such an offer, made after a lapse of more than two years of committed date of delivery".

However, in the present case, the situation is worst, as possession has not been even offered to the complainants, what to speak of delay in offer thereof. In view of above, it is held that since there was a material violation on the part of opposite parties no.1 and 2, in not offering and handing over possession of the unit by the stipulated date or even till date, the complainants were at liberty to seek refund of the amount actually deposited, alongwith interest and compensation, by way of filing the instant complaint.

The next question, that falls for consideration, is, as to whether the complainants are entitled to refund of entire amount of Rs.52,97,183.82Ps., as claimed by them or not. At the time of arguments, it has vehemently been contended by Counsel for opposite parties no.1 and 2 that out of the said amount of Rs.52,97,183.82Ps., the opposite parties had deposited an amount Rs.3,03,905/- to proforma opposite party no.3, towards interest on the loan taken by the complainants, under subvention scheme. The said amount was deducted by opposite party no.3 directly, out of the amount paid by it, in relation to demand made by opposite parties no.1 and 2 for a sum of Rs.15,57,678.79Ps. This fact was fairly admitted by Counsel for the complainants. Since the said amount of Rs.3,03,905/-, had been paid by opposite parties no.1 and 2, in the manner, explained above, it has to be deducted from the amount prayed for refund. There being no dispute between the parties, with regard to above fact, as such, it is held that the complainants are entitled to refund of Rs.49,93,278.82Ps. (Rs.52,97,183.82Ps., minus (-) Rs.3,03,905/-).

It is to be further seen, as to what rate of interest, on the amount refunded can be granted, in favour of the complainants. It is not in dispute that an amount of Rs.49,93,278.82Ps. was paid by the complainants, without getting anything, in lieu thereof. The said amount has been used by opposite parties no.1 and 2, for their own benefit. Opposite parties no.1 and 2 were charging heavy rate of interest @15% per annum, with quarterly rests, as per Clause 7.3 of the Agreement, for the period of delay in making payment of installments by the complainants. It is well settled law that whenever money has been received by a party which ex ae quo et bono ought to be refunded, the right to interest follows, as a matter of course. The obligation to refund money received and retained without right implies and carries with it, the right to interest. It was also so said by the Hon'ble Supreme Court of India, in UOI vs. Tata Chemicals Ltd (Supreme Court), 2014 (2014) 6 SCC 335). In view of above, the complainants are certainly entitled to get refund of the amount deposited by them, alongwith interest @12% compounded quarterly (less than the rate of interest charged by opposite parties no.1 and 2).

In view of aforesaid position, opposite parties no.1 and 2 are also under an obligation to compensate the complainants, for inflicting mental agony and causing physical harassment to them, in not offering possession of the unit, even as on today, as a result whereof, they have to seek refund of amount paid.

Since, it has been held by this Commission that the complainants are entitled to refund of the entire amount alongwith interest and compensation, as such, the equity demands that the opposite parties no.1 and 2 should also get refund of amount of Rs.3,03,905/-, paid by them (opposite parties no.1 and 2) on their (complainants) behalf to opposite party no.3 towards pre-EMI interest under subvention scheme, referred to above. If interest @10.75% p.a. i.e. rate of interest charged by

opposite party no.3, from the date of payment thereof, till realization is granted on the amount of Rs.3,03,905/-, payable by the complainants, that will meet the ends of justice.

For the reasons recorded above, the complaint is partly accepted, with costs. Opposite parties no.1 and 2 are directed as under:-

To refund the amount of Rs.49,93,278.82Ps. received from the complainants, in the manner explained above, to them (complainants), alongwith interest @12% compounded quarterly, from the respective dates of deposits onwards.

To pay an amount of Rs.2.50 lacs, to the complainants, as compensation for mental agony, physical harassment, deficiency in rendering service and unfair trade practices.

To pay cost of litigation, to the tune of Rs.35,000/- to the complainants.

The amounts awarded in sr.nos(i) to (iii) shall be paid by opposite parties no.1 and 2 to the complainants, within a period of 45 days, from the date of receipt of a certified copy of this order, failing which, the amount mentioned at Clause (i), shall carry penal interest @15% compounded quarterly instead of 12%, from the date of default and amounts mentioned in Clauses (ii) and (iii), shall carry interest @12% compounded quarterly from the date of filing the complaint till realization.

The complainants are also directed to pay the amount of Rs.3,03,905/-, to opposite parties no.1 and 2 alongwith interest @10.75% p.a., from the date of payment to opposite party no.3, till realization/ adjustment by the opposite parties no.1 and 2 against the payable amount to the complainants.

However, it is made clear that, since the complainants have availed loan from opposite party no.3, as such, it shall have the first charge on the amount payable, to the extent, the same is due against them (complainants).

Since opposite party no.3 was impleaded as Proforma party to the complaint and no claim is pressed against it, as such, the complaint against it is dismissed with no order as to cost.

Certified Copies of this order be sent to the parties, free of charge.

The file be consigned to Record Room, after completion Pronounced.

11.01.2017 Sd/-

[JUSTICE JASBIR SINGH (RETD.)] PRESIDENT Sd/-

(DEV RAJ) MEMBER Sd/-

(PADMA PANDEY) MEMBER Rg.