

NATIONAL CONSUMER DISPUTES REDRESSAL COMMISSION

NEW DELHI

FIRST APPEAL NO. NC/FA/252/2019

(Against the Order dated 9th January 2019 in Complaint 328/2014 of the State Consumer
Disputes Redressal Commission Maharashtra)

KINGSTON PROPERTIES PVT. LTD. & ANR.

PRESENT ADDRESS - INTERNATIONAL BUSINESS PARK , OBEROI GARDEN ESTATE OFF
W.E. HIGHWAY, GOREGAON (EAST) , MUMBAI 400 063

MR. VIKAS OBEROI

PRESENT ADDRESS - DIRECTOR KINGSTON PROPERTIES PVT LTD, INTERNATIONAL
BUSINESS PARK , OBEROI GARDEN ESTATE OFF W.E. HIGHWAY, GOREGAON (EAST) ,
MUMBAI 400 063

.....Appellant(s)

Versus

NARAYAN PRASAD GOENKA & ANR.

PRESENT ADDRESS - 4-B, 903, WHISPERING PALMS, LOKHANDWALA TOWN SHIOP
KANDIVALI (EAST) , MUMBAI 400 101

MS. MEENA DEVI GOENKA

PRESENT ADDRESS - 4-B, 903, WHISPERING PALMS, LOKHANDWALA TOWN SHIOP
KANDIVALI (EAST) , MUMBAI 400101

.....Respondent(s)

BEFORE:

HON'BLE MR. BINOY KUMAR , PRESIDING MEMBER

HON'BLE MRS. JUSTICE SAROJ YADAV , MEMBER

FOR THE APPELLANT:

MR. SUKUMAR PATTJOSHI, SR. ADVOCATE MR. SANJOY KUMAR GHOSH,
ADVOCATE MS. ADITI KUMARI, ADVOCATE

FOR THE RESPONDENT:

MR. ROHIT GUPTA, ADVOCATE (IN VC)

DATED: 06/05/2025

ORDER

PER MRS. JUSTICE SAROJ YADAV, MEMBER

1. The present First Appeal has been filed under Section 19 read with Section
21(a)(ii) of the Consumer Protection Act, 1986 (*for short, "the Act"*) by the Kingston

Properties Limited and Mr. Vikas Oberoi (*hereinafter referred as Appellants/Opposite Parties*) against

Mr. Narayan Prasad Goenka and Ms. Meena Devi Goenka (*hereinafter referred as Respondents/Complainants*) assailing the Order dated 09.01.2019 passed by the State Consumer Disputes Redressal Commission, Maharashtra, Mumbai (*hereinafter referred as "State Commission"*) in the Consumer Complaint No. 328 of 2014 (CC/14/328) which was filed by Mr. Narayan Prasad Goenka and Ms. Meena Devi Goenka against the Appellants herein, whereby the Complaint filed by the Complainants was partly allowed and the Appellants were directed to pay Rs.25,000/- as Costs and Rs.1,00,000/- as compensation for mental agony. The Complainants are also directed to deposit Rs.1,14,960/- with the learned State Commission, and upon execution and registration of the agreement by the Appellants herein within two months, the Complainants shall deposit the balance amount of Rs.37,17,040/- with 9% p.a. interest from 01/10/2004 till the date of deposit, after which possession of the flat/Unit with all amenities and documents shall be handed over.

2. The facts in brief are, that the Complainants (Respondents herein), induced by representations made by the Opposite Parties (Appellants herein) regarding a project known as "Oberoi Woods" at Goregaon (East), agreed to purchase a flat/unit for a total consideration of Rs.38,32,000/-, and paid Rs.1,91,600/- as earnest money on 02.04.2004. Despite receiving the amount, the Opposite Parties failed to issue a receipt or execute a written agreement as mandated under the Maharashtra Ownership Flats Act, 1963 (*hereinafter referred to as "MOFA"*). The Opposite

Parties had assured possession within 8 months and agreed that the balance payment would be accepted at the time of possession. The Complainant's partner, Mr. Pawan Drolia, had also paid Rs. 2,24,000/- for a separate flat but later cancelled due to deficiencies in service and requested adjustment of the said amount towards the Complainant's booking; however, this request was ignored. Multiple letters dated 18.08.2004, 09.09.2004, and 15.09.2004 were sent by the Complainants requesting receipts and execution of the agreement, which the Opposite Parties failed to comply with. Eventually, the Opposite Parties issued a cheque of Rs.1,14,960/- dated 03.08.2004 after deducting 2% of the flat cost, citing non-payment of 20% of the total amount. Thereafter, the Complainants in their letter dated 26.10.2004 clarified that the cheque issued by the Opposite Parties was accepted without prejudice to his rights and contentions. The Complainants denied any agreement permitting a 2% deduction upon cancellation and refuted the claim that they failed to pay 20% of the flat's value, reiterating that it was agreed the balance payment would be made upon possession. As the Opposite Parties did not respond to this clarification, the Complainants, through a letter dated 23.11.2004, reminded them of the short payment and warned that failure to take corrective steps would result in legal action. However, instead of addressing the legitimate grievances, the Opposite Parties responded with false allegations in their reply dated 01.12.2004. Consequently, the Complainants filed Consumer Complaint No. 144 of 2005 (CC/05/144) before the District Consumer Disputes Redressal Forum, Mumbai Suburban (*hereinafter referred to as the "District Forum"*). However, the said complaint was subsequently withdrawn by the Complainants, as reflected from the Order of the District Forum dated 17.09.2013.

3. Thereafter, the Respondents/Complainants filed a complaint before the State Commission with the following prayer:

- “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) That the Hon’ble Forum may be pleased to direct the Opposite parties to hand over the possession of the flat no. in the building known as "Oberoi Woods' situated at Goregaon (East), Mumbai-63.***
- c) To direct the Opposite Parties to enter into duly registered and stamped Agreement in respect of the flat in the building known as "Oberoi Woods' Situated at- Goregaon (East), Mumbai-63***
- d) To direct the Opposite Parties to obtain Occupation Certificate and completion certificate in respect of the said building.***
- e) To direct the Opposite Parties to obtain water connection and electricity supply in respect of the said flat of the Complainant.***
- f) To direct the Opposite Parties to provide, all amenities in respect of the said building.***
- g) That the Hon'ble Forum may be pleased to direct the Opposite Parties to pay the interest at the rate of 21% on the amount of Rs. 1,91,600 /- from the date of payment till the date of handing over the possession of the said flat to the Complainant.***
- h) 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.50,000/- towards incidental expenses incurred by the Complainant.

i) For such other and further reliefs as the nature and circumstances of the case may deem fit and proper.”

4. After appreciation of the facts and evidence, the learned State Commission vide Order dated 09.01.2019, partly allowed prayer made and passed the following order:

“1. Consumer complaint is partly allowed with costs quantified at Rs.25,000/- (Rupees Twenty-Five Thousand only) payable to the complainants by the opponents.

2. Complainants should deposit the amount of Rs.1,14,960/- in this Commission under intimation to the opponents and from the said deposit within two months opponents should execute the agreement with the complainants and register it and thereafter or even before that complainants should deposit remaining consideration i.e. Rs.37,17,040/- (Rupees Thirty Seven Lakhs Seventeen Thousand Forty only) [Rs.38,32000/- minus Rs. 1,14,960/- - Rs.37,14,040/-] along with interest @ 9% p.a. from 01/10/2004 till date of deposit in this Commission under intimation to the opponents. On deposit of said amount, opponents should hand over possession of said flat to the complainants within two months along with all amenities and all the necessary documents such as Occupation Certificate and Completion Certificate.

3. Opponents are also directed to pay Rs. 1,00,000/-

(Rupees One Lakh only) as compensation on account of mental agony suffered by the complainants.

4. *Copies of the order be furnished to the parties.*”

5. The Appellants aggrieved by the order of the learned State Commission dated 09.01.2019 has filed the present appeal challenging the Order dated 09.01.2019 before this Commission with the following prayer:

“(i) To call for the records and proceedings from the Hon'ble Maharashtra State Commission, Mumbai and after perusing the same and hearing the parties allow the Appeal, and further quash /set aside/or modify the order dated 09/01/2019.

(ii) To stay the effect, execution and implementation of the order dated 09/01/2019 of the Hon'ble Maharashtra State Commission, Mumbai in Consumer Complaint no. 328 of 2014 pending the hearing and final disposal of the above numbered appeal.

(iii) ad interim reliefs in respect of prayer at clause (ii)

(iv) For such other and further reliefs as the nature and circumstances of this case may deem fit and proper

(v) For cost of this Appeal.”

6. We heard learned counsel for both the parties.

7. The Learned Counsel for the Appellants submitted that the Respondents had approached the Appellants in 2004 through a broker for booking a flat in the ‘Oberoi

Woods' project, where the total consideration was Rs.38,32,000/-, and it was clearly understood that an Agreement for Sale would be executed only upon payment of 20% of the sale price, after which specific details like flat number, wing, and floor would be allotted. However, the Respondents paid only Rs.1,91,600/-, approximately 5% of the total amount, and failed to meet the 20% threshold. Consequently, the booking was terminated on 03.08.2004 and a refund of Rs.1,14,960/- was issued via cheque No. 155913, drawn on UTI Bank Ltd., after deducting 2% as cancellation charges. This cheque was encashed by the Respondents, who, by their letters dated 26.10.2004 and 23.11.2004, expressly accepted the termination while reserving their right to dispute only the deduction of cancellation charges. The Respondents' grievance was limited to alleged short payment and not the termination itself. By this express correspondence and conduct, they accepted the termination and are now estopped from claiming any right to performance. Reliance is placed on ***Bhagwati Prasad Pawan Kumar v. Union of India* (2006) 5 SCC 311 (Paras 18 & 19)** and ***Hindustan Paper Corporation v. Navshakti Industries Pvt. Ltd.*, ILR (2012) V Delhi 737 (Paras 7 & 8)**. The Respondents had earlier filed a complaint in 2005 before the District Forum, which was withdrawn, and later refiled in 2014 before the State Commission without any explanation for the delay, rendering the complaint barred by limitation. The Hon'ble State Commission has erred in law and on facts in holding the Appellants guilty of deficiency in service for not executing an agreement for sale, as only 5% of the total sale consideration had been paid, and in terms of Section 4(1) of MOFA, the obligation to execute a written agreement arises only upon receipt of 20% of the consideration. The State Commission's finding is contrary to the statutory mandate

of MOFA and is unsustainable. Further, it was the Respondents who were in breach for failing to pay the balance amount. The direction to execute an agreement for sale, in the absence of finalized essential terms such as flat number, area, or wing, amounts to drafting of a new Contract, which is impermissible. Reliance is placed on ***Kollipara Sriramulu (Dead) by LRs v. T. Aswatha Narayana (Dead) by LRs*, AIR 1968 SC 1028**. Additionally, specific performance cannot be granted in the absence of a challenge to the termination of booking, as held by the Hon'ble Supreme Court in ***I.S. Sikandar (Dead) by L.R. v. K. Subramani & Ors.*, (2013) 15 SCC 27**. The State Commission has also erred in rejecting the plea of limitation. The booking was terminated on 01.10.2004, and the complaint was filed nearly a decade later on 19.08.2014 without any plea for condonation of delay or invocation of exclusion of time under the Limitation Act. There is no finding to suggest that the Respondents were prosecuting earlier proceedings before District Forum with bonafide intention. The observation that a continuing cause of action exists merely because possession is sought is contrary to law. The relief of possession or specific performance can only arise upon setting aside the termination, and no such relief has been sought. This omission is a deliberate attempt to evade the bar of limitation. Reliance is placed on ***Raghawendra Sharan Singh v. Ram Prasanna Singh* (2020) 16 SCC 601 (Paras 7–9)**, ***Hansa V. Gandhi v. Deep Shankar Roy* (AIR 2013 SC 2873)**, ***Vimlesh Kumar Kulshrestha v. Sambhajirao*, (2008) 5 SCC 58**, ***Vimaleshwar Nagappa Shet v. Noor Ahmed Sheriff* (AIR 2011 SCW 3391)**, and ***K.S. Vidyanadam v. Vairavan* (1997 AIR SC 1751)**. Furthermore, the Learned Counsel for the Appellants submitted that the Respondents, having accepted and encashed the refund, ceased to retain the status of a 'consumer' under the Act. The

contractual relationship stood extinguished and no allegation of deficiency in service can be entertained. This legal position is supported by ***Adarsh Developers v. Dr. Geetha Bhat & Anr., II (2015) CPJ 382 (NC)***. The Ld. Counsel further submitted that if the Respondents had truly sought possession, nothing prevented them from returning the cheque. Having accepted it, they are now barred from alleging any deficiency in service. Reliance is also placed on ***Consumer Case No. 102 of 2014, Mohanesh Malik & Anr. v. Pun Construction Pvt. Ltd. & Ors.***, decided on 08.09.2022.

8. The Learned Counsel for the Respondents submitted that the Appellants deliberately concealed the essential details of the flat (such as flat number, size, and specifications) at the time of booking despite accepting an earnest payment of Rs.1,91,600/- on 02.04.2004 towards the total sale consideration of Rs.38,32,000/-. It was expressly agreed that possession would be delivered within eight months, and the balance amount would be paid at the time of possession. The Appellants subsequently allotted Flat No. 901, 9th Floor, Tower 'B' in 'Oberoi Woods', Goregaon (East), Mumbai, but failed to enter into a written agreement for sale, in contravention of Section 4 of the MOFA. Despite repeated written requests and reminders from the Respondents for execution of the agreement and adjustment of payments, the Appellants neither responded nor fulfilled their statutory obligation. The Appellants abruptly cancelled the booking of the flat on 04.10.2004 without notice or justification. The Appellants on being confronted, issued a letter dated 01.12.2004 containing terms and conditions that had never been previously disclosed. The Respondents were never informed about any requirement of paying

20% of the total sale consideration prior to the agreement, nor were they ever demanded to do so. The Learned Counsel further submitted that the Hon'ble State Commission rightly held that upon acceptance of part consideration, the Appellants were legally obligated to execute the agreement under Section 4 of MOFA, and failure to do so amount to deficiency in service. Furthermore, the Appellants' argument regarding third-party sale is untenable, as they have not furnished any proof of such transaction nor disclosed any details regarding the same. The Commission rightly directed possession to be handed over to the Respondents, and the Respondents have already complied by depositing Rs.1,14,960/- as directed by the State Commission. The Appellants, having suppressed material facts and having failed to demonstrate any irreparable harm, are not entitled to any relief. Their non-compliance with statutory duties, concealment of material particulars, and mala fide conduct clearly establish deficiency in service. The Ld Counsel for the Respondents further placed their reliance on the Judgment of the Hon'ble Supreme Court in ***Devraj Dogra and Ors. Vs. Gyan Chand Jain and Ors., AIR 1981 SC 981 (Para 6), Amit Kumar Shaw and Ors. Vs. Farida Khatoon, AIR 2005 SC 2209 (Para 15, 16), Hardev Singh VS. Gurmail Singh(Dead) Lrs., AIR 2007 SC 1058 (Para 3,10), Usha Sinha vs. Dina Ram and Ors. AIR 2008 SC 1997, (Para 14,19), Thomson Press (India) Ltd. Vs Nanak Building and Investors P. Ltd. and Ors., AIR 2013 SC 2389 (Para 24,25,49 and Shingara Singh vs. Daljit Singh and Ors., (2024) 6 ALD 113 (Para 15).***

9. We have considered the rival contentions and perused the material available on record.

10. The first question that arises for our consideration is whether the filing of the consumer complaint before the State Commission in 2014, after the withdrawal of an earlier complaint in 2005, is barred by limitation under the Act. It is an admitted position that the Respondents initially filed a consumer complaint (CC/144/2005) before the District Consumer Forum, Mumbai Suburban in 2005 well within the two year limitation period from the date of the alleged cancellation letter dated 04.10.2004. The subsequent withdrawal and re-filing before the State Commission on 19.08.2014 occurred after the District Forum expressly permitted withdrawal for lack of pecuniary jurisdiction. There is neither any evidence nor any allegation that the Respondents prosecuted the earlier complaint before the District Forum in bad faith. The law is well settled that where proceedings are bona fide pursued before a forum without jurisdiction, the period is excludable under Section 14 of the Limitation Act, 1963. The Appellants' argument that the complaint was barred by limitation is without merit. The State Commission has rightly rejected the contention of Appellant with cogent reasoning.

11. Further, another key question that arises for our consideration is whether the Appellants violated Section 4 of the Maharashtra Ownership Flats Act (MOFA) by failing to execute a written agreement after receiving around 5% earnest money? It is an admitted fact that the flat was booked for a total consideration of Rs.38,32,000/-, out of which the Respondents paid an amount of Rs.1,91,600/- on 02.04.2004. It is also undisputed that despite receiving the said amount, the Appellants failed to execute a written agreement for sale in favour of the Respondents. Section 4 of MOFA states that,

“4. (1) Notwithstanding anything contained in any other law, a promoter who intends to construct or constructs a block or building of flats, all or some of which are to be taken or are taken on ownership basis, shall, before, he accepts any sum of money as advance payment or deposit, which shall not be more than 20 percent of the sale price enter into a written agreement for sale with each of such persons who are to take or have taken such flats, and the agreement shall be registered under [the Registration Act, 1908 (hereinafter in this section referred to as "the Registration Act")] and such agreement shall be in the prescribed form.”

12. Section 4 of MOFA explicitly prohibits a promoter from accepting any advance amount exceeding 20% of the sale price before executing a written and registered agreement for sale. Therefore, it does not imply that no agreement is required if a lesser amount is accepted. This provision mandates that *before* accepting *any* amount (not exceeding 20%) by way of advance or deposit, the promoter must first enter into a written and registered agreement for sale in the prescribed form. The Appellants' contention that such obligation arises only upon receipt of 20% of the total sale consideration is a misinterpretation of the law. In the present case, the Appellants accepted Rs.1,91,600/-, which was just under 20% of the total sale consideration of Rs.38,32,000/-, without executing the mandatory agreement. This failure, despite repeated requests by the Respondents, constitutes a direct breach of the statutory duty under MOFA and amounts to a deficiency in service as defined under the Consumer Protection Act. Thus, the State Commission rightly held that there was a clear violation of Section 4 of the Maharashtra Ownership Flats Act, 1963 (MOFA).

13. Additionally, an important question to be adjudicated is that whether the unilateral cancellation of the flat booking by the Appellants, on the ground of non-payment of 20% within 30 days, is valid in the absence of any disclosed or agreed contractual condition to that effect? The Appellants have argued that they cancelled the booking due to non-payment of 20% within 30 days and refunded the earnest money (after deducting 2%). This cancellation letter dated 04.10.2004 and accompanying refund cheque for Rs.1,14,960/- do not constitute a valid defence, either in law or equity. There is no contemporaneous evidence showing that any such 30 days payment condition was disclosed to or agreed upon by the Respondents at the time of booking of flat. On the contrary, the Respondents consistently asserted that the understanding was that the remaining consideration was to be paid at the time of possession. The cancellation, being without notice and without valid contractual basis, is patently arbitrary. The refund of part of the amount without any cogent reason and the imposition of cancellation charges further highlights the Appellants' unfair trade practice.

14. The another key question that arises for our consideration is whether the acceptance of a refund cheque by the Respondents, amounted to a waiver of their right to claim possession of the flat? The Learned Counsel for the Appellants submitted that a cheque for

Rs.1,14,960/- was enclosed with the purported letter of cancellation dated 04.10.2004, and that the Respondents subsequently encashed the said cheque. It was contended that, by doing so, the Respondents had acquiesced to the cancellation of the booking and thereby relinquished their right to seek possession

of the flat. The Learned Counsel for the Respondents emphasized that the letter expressly stated, at the very outset, that the cheque was being accepted “without prejudice” to the Respondents’ rights and contentions. Also, in this context, Section 8 of the MOFA, 1963 is relevant. The said provision reads as follows:

“8. Refund of amount paid with interest for failure to give possession within specified time or further time allowed—

If—

(a) the promoter fails to give possession in accordance with the terms of his agreement of a flat duly completed by the date specified, or any further date or dates agreed to by the parties, or

(b) the promoter, for reasons beyond his control and of his agents, is unable to give possession of the flat by the date specified or the further agreed date and a period of three months thereafter, or a further period of three months if those reasons still exist,

then, in any such case, the promoter shall be liable on demand (but without prejudice to any other remedies to which he may be liable) to refund the amounts already received by him in respect of the flat (with simple interest at nine per cent. per annum from the date he received the sums till the date the amounts and interest thereon is refunded), and the amounts and the interest shall be a charge on the land and the construction if any thereon in which the flat is or was to be constructed, to the extent of the amount due, but subject to any prior encumbrances.”

It is evident from the language of the statute that refund under Section 8 is without prejudice to any other legal remedies that the flat purchaser may be entitled to. In the present case, not only did the Appellants fail to refund the entire amount along with interest but even assuming that a refund had been lawfully made, such

refund would not, per se, extinguish the Respondents' right to pursue other reliefs, including specific performance and possession. Therefore, the State Commission rightly held that the mere acceptance of partial refund does not divest the Respondents of their right to claim possession.

15. The another issue that arises for our consideration is whether the Respondents are entitled to possession of a flat upon payment of the remaining consideration along with interest @ 9% p.a.? The Respondents stated unequivocally that they were and continue to be willing to pay the full balance amount at the time of possession. The Appellants, however, never made a formal demand for the balance nor offered to execute the agreement. The Appellants' claim that all flats in "Oberoi Woods" have been sold is both vague and legally impermissible as a defence. No evidence has been placed on record showing when such alleged third-party sales occurred, nor was any application made before the Commission seeking permission to sell the disputed unit during the pendency of litigation. In view of the above, the State Commission rightly entitled the Respondents of possession of a flat in the said project, on payment of the balance consideration along with interest @ 9% p.a. from 01.10.2004 till the date of actual payment. The impugned order of the State Commission is reasoned, fair, and calls for no interference.

16. In view of the foregoing, it is evident that the learned State Commission's order is reasoned, just and warrants no interference. Accordingly, the appeal is dismissed, and the order of the State Commission dated 09.01.2019 is affirmed in its entirety.

Pending application(s), if any, stand disposed of.

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**BINOY KUMAR
PRESIDING MEMBER**

**.....J
SAROJ YADAV
MEMBER**