

\$~119 (Appellate side)

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ CM(M) 664/2018 CM Appl. 23358/2018 and CM Appl. 5843/2019

LUCINA LAND DEVELOPMENT LTD Petitioner
Through Ms. Kanika Agnihotri,
Mr. Vaibhav Agnihotri, Ms. Yashodhara
Gupta, Mr. Madhav Bhatia and Mr. Rohan
Anand, Advs.

versus

UNION OF INDIA & ORS Respondents
Through Mr. Sushil Kumar Pandey,
Senior Panel Counsel with Mr. Rahul
Mourya, Adv. for Respondent 1
Mr. Piyush Singh, Mr. Akshay Srivastava
and Ms. Aditi Sinha, Advs. for remaining
respondents

CORAM:
HON'BLE MR. JUSTICE C. HARI SHANKAR

% **J U D G M E N T (O R A L)**
27.04.2022

1. These proceedings emanate from Consumer Case No. 1204/2017, which was a complaint filed before the learned National Consumer Disputes Redressal Commission (NCDRC) against the petitioner Lucina Land Development Ltd. and others by 51 allottees of flats in a project of the petitioners, titled "Indiabulls Greens Panvel" ("the project", hereinafter). The complaint, preferred under Section

21(a)(i)¹ read with Section 12(1)(c)² and 22(1)³ of the Consumer Protection Act, 1986 (“the 1986 Act”) alleged that the petitioners were guilty of deficiency in service and were involved in unfair trade practices within the meaning of Section 2(1)(g)⁴ and 2(1)(r) of the 1986 Act.

2. The respondents, who were allottees of units in the project, alleged, in the complaint filed by them before the learned NCDRC, that they were “consumers” of the petitioners within the meaning of Section 2(1)(d)(ii)⁵ of the 1986 Act, as the units had been booked by the respondents for residence. Paras 4 and 11 to 19 of the complaint, which set out the grievances of the respondents, may be reproduced thus:

¹**21. Jurisdiction of the National Commission.** – Subject to the other provisions of this Act, the National Commission shall have jurisdiction –

- (a) to entertain –
 - (i) complaints where the value of the goods or services and compensation, if any, claimed exceeds rupees one crore;

²**12. Manner in which complaint shall be made.** –

- (1) A complaint in relation to any goods sold or delivered or agreed to be sold or delivered or any service provided or agreed to be provided may be filed with a District Forum by –

- (c) one or more consumers, where there are numerous consumers having the same interest, with the permission of the District Forum on behalf of, or for the benefit of, all consumers so interested;

³**22. Power and procedure applicable to National Commission.** –

- (1) The provisions of sections 12, 13 and 14 and the rules made thereunder for the disposal of complaints by the District Forum shall, with such modifications as may be considered necessary by the Commission, be applicable to the disposal of disputes by the National Commission.

⁴(g) “deficiency” means any fault, imperfection, shortcoming or inadequacy in the quality; nature and manner of performance which is required to be maintained by or under any law for the time being in force or has been undertaken to be performed by a person in pursuance of a contract or otherwise in relation to any service”

⁵(d) “consumer” means any person who –

- (ii) hires or avails of any services for a consideration which has been paid or promised or partly paid and partly promised, or under any system of deferred payment and includes any beneficiary of such services other than the person who hires or avails of the services for consideration paid or promised, or partly paid and partly promised, or under any system of deferred payment, when such services are availed of with the approval of the first mentioned person but does not include a person who avails of such services for any commercial purposes;

Explanation. – For the purposes of this clause, “commercial purpose” does not include use by a person of goods bought and used by him and services availed by him exclusively for the purposes of earning his livelihood by means of self-employment;

“4. That, this complaint is preferred on behalf of the Complainants and for the benefit of all the allottees, who are consumers and are having the same interest as a Class Actions Petition. The Complainants submit that the facts of the case of each of the Complainants and all the allottees are same and the issues involved, disputes & controversies are common in nature having a common interest and have suffered identical deficiency of service and unfair trade practice, the terms and conditions of allotment are almost same and rely on identical evidences and therefore, come under the definition of Complainant as per section 2(1)(b)(iv) of the Consumer Protection Act, 1986. The Complainants, therefore, seek leave of this Hon'ble Commission to file a common complaint under section 12(i)(c) of the Consumer Protection Act, 1986 (as amended till date). A separate application in this regard is also being filed on behalf of the Complainants for grant of permission by this Hon'ble Commission to file one complaint for the benefit of all consumers so interested.

11. That it has come to the knowledge of the complainants that at the time when the initial booking amount was received by the Opposite Parties in the month of August / September 2009 from some of the complainants, the Opposite Parties were not in possession of all the approvals for going ahead with the construction of the Project proposed to be constructed by them, then how could they have accepted money for selling the flats from the complainants i.e., unfair trade practices on the part of the Opposite Parties under Section 2(1)(r) of the Consumer Protection Act. 1986.

12. *It is thus an admitted position that the Opposite Parties were involved in unfair trade practice and deceiving tactics against the general consumers and particularly the present group of complainants as well as other allottees as the said project was launched and payments towards booking of the particular flats were being received by the opposite Parties much before they obtained necessary approvals from the competent authorities, for construction of the said project including the various amenities promised and assured to the flat purchasers, on the basis of which the Complainants and all other were attracted to purchase the flats In the said project. Accordingly, the intention and motive of the Opposite*

Parties was always to deceive the allottees of the said project, particularly the complainants herein writ large on the face of record since inception. At the time all the government clearances from various departments for the project were not in place. Accordingly the Opposite Parties had engaged in unfair trade practice with the complainants and all other allottees and are guilty of violations of the provisions of Section 3(2) of MOFA, 1963⁶.

13. The Complainants are attaching herewith a Statement showing the details of each Complainant Tower/Building Number, Flat No., Area of the flat, total cost of the flat and the total consideration amount paid upto-date by each and every complainant to the Opposite Parties. Hereto annexed and marked as ANNEXURE "C-4" is the said Statement.

14. The Complainants are also attaching herewith the copy of the Ledgers account issued by the Opposite Parties showing the details of the payments made by the Complainants. In general the Complainants have paid upto 95% of the cost of the flats booked by them and allotted by the Opposite Parties. Hereto annexed and marked as ANNEXURE "C-5" (colly.) is a copy each of the Ledgers accounts issued by the Opposite Parties showing the details of the payments made by the Complainants to the Opposite "Parties.

15. The Complainants came to know about the Project since the year 2009 or later, through various means, including banners displayed by the Opposite Parties through giant hoardings, advertisements in News Papers and the Brochures distributed by the Opposite Party no.1 inviting the public at large for booking of the flats. The Sales Staff made aggressive sales pitches & representations on behalf of M/s. Lucina Land Development Limited for the project called INDIABULLS GREENS PANVEL showing beautiful Master Plans & layouts of flats and amenities like a school, hospital, dub house, shopping mall, on the basis of which they eventually took the important decision to make a choice to buy their preferred flat. The Opposite Parties coaxed & lured the Complainants to pay advance booking amount, offered construction linked payment schedules, delivery in 2 to 3

⁶ Maharashtra Ownership of Flats Act, 1963

years and to book flats in the project, based on those promises. The reputation of the builder and property appreciation from the proposed international airport were touted as additional incentives for the Complainants to book the flats. There are also cases where the Complainants had paid more than 90% as per allotment letters/Agreements for sale, including 18% interest/penalty in the case of delay in payment of instalments. The Complainants submit that at the time of booking of the flats Opposite Party no.1 had promised to give possession within 2/3 years of booking. As on date of filing the complaint in 2017, the Complainants have no clarity about the possession date and on enquiring Opposite Party no.1 has consistently been giving a further date. On following up for possession on the new date, yet again again a new delivery date is given. Presently the Opposite Parties are talking about giving possession in June, 2017, subject to various clearances, in other words there is total uncertainty even now.

16. The following is a summary of the grievances of the complainants:

a) Booking the Flat & Agreement related problems

- False representation on status of approval of the project from Government & Statutory bodies
- Presenting a Master plan with 15 storied building, gardens, school, hospital, club house & shopping mall, which was unilaterally changed next year, to 37 floors with a revised layout
- The super built/ salable area of the flats was increased by upto 25% depending on building and size of flat. There was no corresponding increase in the carpet area. *Protesting buyers were told by sales executives that this is due to change of layout, additional facilities amenities being provided.*
- Buyers were re-allotted flats in the new master plan and In many cases forced to re-book on higher floors, with floor rise/ PLC charges payable. When the complainants objected, they either didn't respond or offered refund with 15% cancellation charges on total

cost of the flat. *Many were also told that they could sell their flats later, on super build area, so why protest.*

- Later the Opposite Parties asked buyers to sign one-sided Agreements, did not allow any changes to highly objectionable clauses and threatened that we take it as it is or cancel with 15% cancellation charges of total cost of the flat. This Agreement also had a revised delivery possession date of 5 years 9 months.
- The Opposite Parties have subsumed car parking charges within the per unit rate of the flats, which is illegal. There are also specific promises made by the Sales persons & Customer Service Executives while selling the flat, but disowned later, when complainants went to sign the Agreement

b) Payment & Financing related problems

1. The Opposite Parties were quick to levy interest charges & penalties on the slightest delay in payment, despite not communicating payment demands on time.

2. *In the specific case of Mr. Sangram Choudhury (Complainant # 36), he was allotted Flat N-2204 in December 2010. He received a letter dated 13.12.201 that the construction has started and demanded payment of 1st instalment. Having booked under ADF, a tripartite agreement was signed with Indiabulls finance with the flat number N2204. Subsequently, they unilaterally changed the entire master plan & layout with no communication to the buyers. They gave him limited options to choose a new flat and threatened to forfeit his advance, if he cancelled the booking. He was penalised with interest despite the delay being on account of the Opposite Parties.*

3. Prior to every demand for payment, they were providing Architect certificates to prove status of construction, originally from Mr. Hafeez Contractor (an architect reputed for professionalism and accuracy). With constant delays at their own end, they shifted to issuing certificates from an internal architect

and started raising demands. When the Complainants protested, they ignored and coerced to accept the new arrangement.

4. All liabilities of the interest on loans, loss of IT rebate on loans and financing charges (particularly related to their sister company) are to the Complainants account despite delays in communicating, construction schedules not being met and pending approvals for possession being from Opposite Parties end.

c) Delay in Delivery of Completed flats

i) For flats booked over the last 7 years, *for many complainants there is no clarity from the Opposite Parties as to when the possession of the flats will be given.* The Opposite Parties' customer service executives keep on giving new dates for every query on delivery date. This has become an endless & meaningless exercise. Their regular plea, when they do respond, is of clearances not being available and construction delays. The complainants have no control over this matter and have to face the consequences of shabby, unreliable and arrogant service from the OP's executives.

ii) The OP had promised various facilities & amenities through advertisements, hoardings, brochures and direct selling. They promised world class construction and quality of life. The current project is a highly diluted version of these advertisements, with little or no resemblance to earlier promises made. *Site visits made by many complainants reveal severe compromises on all facilities & amenities, congested layout, poor quality of construction and fittings.* The complainants are of the unanimous view that, if they knew of these deficiencies and unlivable layout, they would not have booked flats in Indiabulls Greens. Panvel and would have exercised alternative options. However, the Opposite Parties are preventing the Complainants from cancelling the booking by means of unfair trade practices of demanding heavy cancellation charges equal to 15% of the total cost of the flat.

iii) The experience with OP's executives and their failure to deliver on their various promises is causing severe mental trauma, anxiety and harassment as some complainants were depending on completion and peaceful possession of flats in this project, for occupation post retirement or other-wise. The opportunity cost of the delay, unkept promises and fight for the rights of the complainants is Incalculable.

17. *Some of the Complainants took permission to visit their flat and were shocked to see the quality of the work which are much inferior to what had been promised.* Most of the amenities are missing. No club house, no school. No Hospital, No Mall. Nothing of what they had told at the time of booking. So the innocent people are cheated by the Opposite Party No.1. The hard earned money spent for booking of the flat is blocked with Opposite Party No.1 and the Complainants are trapped as they are not allowed to exit from the project by way of demanding 15% of the total cost of the flat as cancellation charges.

18. The Complainants state that in view of enormous delay in completion of the project and uncertainty in the date for handing over possession of the flats some of the complainants approached the Opposite Party no.1 for cancellation of their booking. However, the Opposite Parties demanded cancellation charges equal to 15% of the total cost of the flats, which is a significant disincentive to exercise this option & thereby preventing the Complainants from exiting from the said project. It is therefore, evident that the Opposite Parties have deceived the Complainants by not honouring their commitments and not carrying out the construction as promised by them. The Opposite Parties have collected crores of rupees from innocent consumers, by selling only dreams of owning a flat. It is a clear case of deficiency in service and unfair trade practices adopted by the Opposite Parties.

19. The Complainants have also got the Building and the flats inspected by Mr.Hitendra Mehta, Architect and Govt. Approved valuer who after obtaining permission from the Opposite Parties visited the building and inspected the construction along with the approved plans and had submitted his detailed report with his Affidavit. It has been observed in

his report apart from inferior quality of construction there are deficiency in carpet area of the flats as compared to the area sold by the OPs to the Complainants. He has also given the present prevailing market value for calculation of compensation for shortfall in carpet area of the flat and for not providing various amenities promised but not provided at all at the site. Hereto annexed and marked as”

3. These alleged indiscretions of the petitioners, according to para 20 of the complaint, amounted to deficiency in service and unfair trade practices within the meaning of Sections 2, 3 and 4 of the MOFA and were actionable under the 1986 Act. Para 20 of the complaint, therefore, exhorted the learned NCDRC to exercise the powers vested in it by the 1986 Act and to direct the petitioners to complete the construction and hand over the possession of their respective flats with the requisite occupancy and building completion certificates along with all amenities, or, in the alternative, to pay compensation to the respondents equal to the market value of the flats in the area in question along with interest and costs.

4. Para 22 of the complaint sought to justify the filing of the complaint as a class action, thus:

“22. That the Opposite Parties Builders have also not carried out the construction of the Buildings as promised in the Brochure and or the Allotment Letters. The cause of action triggered due to enormous delay in handing over the physical possession of the allotted flats to the complainants with complete development as per the agreed terms and conditions of the allotment in a habitable condition with all promised/assured amenities already mentioned which is seriously lacking till date. The immediate cause of action for institution of the instant complaint by the complainants as a class action petition as they are having common interest and

grievances against the Opposite Parties. The Complainants are also involved together as a class having common interest, aggrieved against the Opposite Parties under various heads as stated above. Therefore, the cause of action is continuing and the complaint as filed is not barred by limitation”

5. Para 27 of the complaint, therefore, prayed thus:

“27. The Complainants, therefore, pray that in view of the foregoing paragraphs It would be just and proper and further in the interest of justice that this Hon'ble Commission be pleased to grant the following reliefs:

- a. To hold and declare the Opposite Parties jointly and severally to be guilty of deficiency in service and unfair trade practice as per the provisions of the Consumer Protection Act, 1986 (as amended).
- b. To grant permission under section 12(1)(c) of the Consumer Protection Act, 1986 to file a common complaint on behalf of and for the benefit of all the flat allottees / purchasers /buyers having, similar grievance against the Opposite Parties and in the Interest of justice;
- c. To order issue of Public Notice by advertisement in the News Papers viz. "THE FREE PRESS JOURNAL" English Daily and "NAVASHAKTI" Marathi daily at the cost of the Complainants under Order I, Rule 8 (2) of the Code Civil Procedure, 1908 for which a separate application has been filed.
- d. To direct the Opposite parties to complete the construction with all promised amenities and to hand over vacant and peaceful possession of their respective flats with occupancy and building completion certificates issued by the competent authority to the complainants as well as all other allottees / purchasers / buyers within the stipulated time as may be decided by this Hon'ble Commission failing which to pay penalty of Rs.5,000/- per day to each flat purchaser after the

expiry of the said period till handing over possession of the flats.

Or Alternatively

In the event the Opposite Parties are not in a position to hand over possession of their allotted flats to the Complainants as well as all other allottees / purchasers / buyers, they may be directed to give alternate flats of the similar standards & carpet area stated in the agreement of each complainants in the same Panvel locality within the stipulated time of 2 months from the date of the order

Or alternatively

To direct the Opposite Parties to pay to the Complainants the proportionate current prevailing market value by way of compensation for the inordinate delay and to refund the amount of Rs.22.84,15,731/- (Rupees Twenty Two Crores, Eighty Four Lakhs, Fifteen Thousand Seven Hundred and Thirty one) paid by the Complainants/flat purchasers as shown in the Statement annexed and marked as Annexure "C-4" along with interest at 18% per annum from the promised date of possession i.e., 01/10/2011 till realization with compensation and costs.

e. To direct the Opposite Parties jointly and severally to pay damages and compensation to the complainants amounting to Rs.8,31,88,466/- (Rupees Eight Crores, Thirty One Lakhs, Eighty Eight Thousand Four Hundred and Sixty Six) at the rate of Rs.15,99,778.20 (Rupees Fifteen Lakhs, Ninety Nine Thousand Seven Hundred Seventy Eight and paise twenty) to each of the complainants towards non provision of Club House, Sports, Gardens & Landscaping, Commercial facilities, education facilities, healthcare. Management & security facilities as per valuation given by the Architect in his report (Annexure "C-6").

f. To direct the Opposite Parties to pay Rs. 15,60,000/- (Rupees Fifteen Lakhs Sixty Thousand) at

the rate of Rs.30,000/- (Rupees Thirty Thousand) to each of the complainant towards compensation for mental agony and incient harassment suffered by the Complainants due to inordinate delay in handing over possession of the flat.

g. To direct the opposite parties to pay a sum of Rs.13,00,000/- (Rupees Thirteen Lakhs) at the rate of Rs.25,000/- (Rupees Twenty Five Thousand) to each complainant towards cost of litigations & Incidental expenses such as professional fees of Advocate and Architect travelling, Xeroxing, filing, etc.

h. To grant such other and further relief as this Hon'ble Commission may deem fit and proper in the nature and Circumstances of the above numbered complaint.”

6. The complaint was accompanied by an application under Section 2(1)(b)(iv)⁷ read with Section 12(1)(c) of the 1986 Act, for permission to file a consolidated consumer complaint.

7. Para 1 of the application stated that the complaint was being filed by the respondents on behalf of all allottees of the project, who were consumers having the same interest as a class action, as the dispute/controversy involved was common and the deficiency in service and unfair trade practices allegedly imputed to the petitioners were also common vis-à-vis all the allottees of flats in the project. Para 7 of the complaint reads thus:

“7. That the Complainants have filed the aforesaid consumer complaint as a class action petition against the

⁷ (b) “complainant” means –

(iv) one or more consumers, where there are numerous consumers *having the same interest*”

Opposite Parties being aggrieved with the illegal activities of the Opposite Parties by promising to give possession of the flats within 2 years and collecting huge amounts before obtaining , requisite approvals for construction of the promised flats. The Complainants as a class is also aggrieved with the enormous delay in construction of the project and to deliver possession of the allotted flats in a habitable condition by the Opposite Parties. Besides the Complainants as a class have also suffered huge monetary loss in the form of income tax benefit, due to staying in rented houses, paying EMI to the Bank on loan, etc.”

It was also pointed out, in the application, that the claim of the respondents themselves aggregated to over ₹ 1 crore, as a result of which the jurisdiction, to entertain the complaint, vested in the learned NCDRC. In view thereof, the application prayed for grant of permission to the respondents under Section 12(1)(c) of the 1986 Act to file a common complaint on behalf of all flat purchasers/buyers/complainants having similar grievances and, for the said purpose, to issue public notice by way of advertisement in the newspapers.

8. The petitioners filed a reply to the aforesaid application of the respondents under Section 12(1)(c) of the 1986 Act. Apart from traversing the allegations levelled by the respondents in the complaint on merits, it was alleged that several of the complainants, who were residing elsewhere in the country as well as abroad, had failed to disclose as to how the premises booked by them were not intended to be put to commercial use, in which case they were not “consumers” within the meaning of Section 2(1)(d) of the 1986 Act. It was submitted that the construction of the flats was complete and that the petitioners were willing to hand over possession subject to issuance of

occupation certificate. It was further submitted, in paras 25 and 26 of the reply, thus:

“25. It is most respectfully submitted that a complaint under Section 12(1)(c) of the Consumer Protection Act read with Order I Rule 8 of the Code of Civil Procedure can be filed where there are numerous consumers having the "same interest" i.e. a common grievance against the same person and the complaint is filed on behalf of or for the benefit of all such numerous consumers, and seeking same relief for all of them. It is submitted that the all the buyers of the flat cannot be treated at par with each other as such most of the Complainants are investors whereas some of them may be genuine consumers. Thus in absence of the element of "same interest" the present Complaint in the representative capacity deserves to be dismissed. The Complainants thus ought to approach a civil court to address its grievance. On this ground alone the present application under 12(1)(c) deserves to be dismissed.

26. Admittedly, the Complainants herein have sought to file the present Complaint for and on behalf of all customers of the Answering Opposite Party/Respondent who have made a booking for a flat in Indiabulls Greens, Village Kon, Panvel. As admitted by the Complainants in the Complaint the facts and circumstances pertaining to each booking differs from case to case as different customers have purchased different flats from the Answering Opposite Party/Respondent at different points of time ranging over the past decade, at different rates and have made pro rata payments to different extents with or without defaults therein. It is, therefore, submitted that by no stretch of imagination it can be said that the numerous customers of the Answering Opposite Party/Respondent stand on a similar footing with respect to each other. It is therefore submitted that the present Complaint is not maintainable as the cause of action has not arisen till date. It is further submitted that the Complainants have approached this Hon'ble Commission with mala fide intentions of making unlawful gains and therefore no permission shall be given to file the present Complaint on this short ground alone and the present application ought to be dismissed.”

9. By order dated 16th May, 2018, the learned NCDRC proceeded to allow the respondents' application under Section 12(1)(c) of the 1986 Act and, consequently, to direct publication of public notice regarding the complaint in the media, under Order I Rule 8 of the Code of Civil Procedure, 1908 (CPC). The reasoning of the learned NCDRC is contained in the following passages from the impugned order:

“5. I have heard the submissions made on behalf of the opposite parties. Section 12(1)(c) of the Act is reproduced as under:

“12. Manner in which complaint shall be made. –

(1) A complaint in relation to any goods sold or delivered or agreed to be sold or delivered or any service provided or agreed to be provided may be filed with a District Forum by –

(c) *one or more consumers, where there are numerous consumers having the same interest, with the permission of the District Forum, on behalf of, or for the benefit of, all consumers so interested”*

6. On bare perusal of the above, it is clear that one or more consumers with the permission of Consumer Fora can pursue the complaint on their behalf as also on behalf of other numerous consumers *having the same interest* but not arrayed as complainants provided the complaint is filed for the benefit of the complainants as also for the benefit of consumers *having same interest* in the outcome of the complaint but not arrayed as complainants.

7. In order to find out whether or not the instant complaint fits into the requirements of Section 12(1)(c) of the Act, I have carefully perused the complaint, *in particular, the prayer clause. On reading of the complaint as also the prayer*

clause, it is clear that instant complaint has been filed in respect of a booking of development project involving numerous consumers and the complainants have filed the instant complaint against the opposite parties as a class action on their behalf and also on behalf of and for the benefit of all other consumers similarly placed and having same interest in the outcome of the complaint. Merely because, some of the complainants are NRIs, will not make them persons of a different class. If the claims of some of the existing complainants have already been satisfied, they will not get any relief subject to the evidence. Thus, in my view, requirements of Section 12(1)(c) of the Act are fulfilled in this case and accordingly, I allow the application under section 12(1)(c) of the Act and permit the complainants to proceed with the complaint as a class action.”

(Emphasis supplied)

10. Aggrieved by the aforesaid order dated 16th May, 2018, the petitioners have approached this Court under Article 227 of the Constitution of India by means of the present petition.

11. The respondent, during the course of these proceedings, challenged the maintainability of the present petition under Article 227 of the Constitution of India, citing, for the purpose, the judgment of the Supreme Court in ***Cicily Kallarackal v. Vehicle Factory***⁸ especially emphasising para 9 of the said decision, which reads thus:

“9. While declining to interfere in the present Special Leave Petition preferred against the order passed by the High Court in exercise of its extraordinary jurisdiction Under Article 226 of the Constitution of India, we hereby make it clear that the order of the Commission are incapable of being questioned under the writ jurisdiction of the High Court, as a statutory appeal in terms of Section 27A(1)(c) lies to this Court. Therefore, we have no hesitation in issuing a direction of caution that it will not be proper exercise of jurisdiction by the High Courts to entertain writ petitions against such orders of

⁸ (2012) 8 SCC 524

the Commission.”

12. As against this, learned Counsel for the petitioners, relying on the following passages from the report in *State of Karnataka v. Vishwabharathi House Building Coop. Society*⁹, sought to contend that the petition was maintainable:

“51. It may be true that there does not exist any provision for transfer of case from one forum to the other or there does not exist any provision to grant injunction. Absence of such provisions in our opinion would not render the statute ultra vires the Constitution or unworkable.

52. The very fact that in a given case a party under the said Act may approach upto this Court and/or may otherwise take recourse to the remedy of judicial review, the interests of the parties must be held to have been sufficiently safeguarded.

53. *The provisions relating to power to approach appellate court by a party aggrieved by a decision of the forums/State Commissions as also the power of High Court and this Court under Article 226/227 of the Constitution of India and Article 32 of this Court apart from Section 23 of the Act provide for adequate safeguards.* Furthermore, primarily the jurisdiction of the forum/ commissions is to grant damages. In the event, a complainant feels that he will have a better and effective remedy in a civil court as he may have to seek for an order of injunction, he indisputably may file a suit in an appropriate civil court or may take recourse to some other remedies as provided for in other statutes.”

(Emphasis supplied)

13. Substantive arguments were advanced by the learned Counsel for both parties on the maintainability of the present petition under Article 227 of the Constitution of India as well as on the merits of the impugned order dated 16th May, 2018 passed by the learned NCDRC.

Submissions and analysis

Re. Maintainability

14. Mr. Piyush Singh, learned Counsel for the allottees, submitted that the present petition was not maintainable under Article 227 of Constitution of India, in view of the availability of an alternate remedy by way of an appeal to the Supreme Court under Section 23¹⁰ of the 1986 Act, which provides for a right of appeal against every order passed by the learned NCDRC under Section 21(a)(i) of the 1986 Act.

15. This position, contends Mr. Piyush Singh, also stands underscored in para 9 of the judgment in *Cicily Kallarackal*⁸ reproduced *supra*.

16. Ms. Agnihotri, learned Counsel for the petitioners, contends, *per contra*, that *Cicily Kallaracka*⁸ was rendered in the context of the right conferred by Article 226 of the Constitution of India, whereas the present petition has been filed under Article 227. Para 53 of the report in *Vishwabharathi House Building Coop. Society*⁹, she submits, clearly indicates that the right to file a petition under Article 227 of the Constitution of India is independently available, apart from the right conferred by Section 23 of the 1986 Act. This position, she submits, stands expressly recognised in the opening sentence of para 53 of the

⁹ (2003) 2 SCC 412

¹⁰ 23. **Appeal.** – Any person, aggrieved by an order made by the National Commission in exercise of its powers conferred by sub-clause (i) of clause (a) of section 21, may prefer an appeal against such order of the Supreme Court within a period of thirty days from the date of the order:

Provided that the Supreme Court may entertain an appeal after the expiry of the said period of thirty days if it is satisfied that there was sufficient cause for not filing it within that period.

report in *Vishwabharathi House Building Coop. Society*⁹, which reads thus:

“53. The provisions relating to power to approach appellate court by a party aggrieved by a decision of the forums/State Commissions as also the power of High Court and this Court under Article 226/227 of the Constitution of India and Article 32 of this Court apart from Section 23 of the Act provide for adequate safeguards.”

As such, submits Ms. Agnihotri, the right available under Section 23 of the 1986 Act cannot derogate from the right to invoke the jurisdiction of this Court under Article 227 of the Constitution of India.

17. Having heard learned Counsel and perused the aforesaid decision, it is clear that *Cicily Kallarackal*⁸ addressed the issue of availability of the right to file a writ petition under Article 226 of the Constitution of India and was not rendered under the context of Article 227 of the Constitution of India. No doubt, the right to approach the writ court under Articles 226 and 227 of the Constitution of India are, in a way of speaking, interlinked and cognate. That said, however, there is a subtle difference between the two provisions inasmuch as the jurisdiction exercised by a court under Article 226 of the Constitution of India is in the nature of judicial review by issuance of, *inter alia*, the high prerogative writs of *habeas corpus*, *certiorari*, *mandamus*, prohibition and *quo warranto*, envisaged by the said Article, whereas the jurisdiction exercised under Article 227 of the

Constitution of India is supervisory in nature.

18. There is a fundamental jurisprudential difference between judicial review jurisdiction and supervisory jurisdiction. The nature of the power exercised by a court in each case is also essentially different. The exercise of powers under Article 227, in a sense, more constricted than the exercise of powers under Article 226, inasmuch as the scope of examination of the merits of the decision under challenge is, under Article 226, more expansive than under Article 227. While exercising jurisdiction under Article 227, what the court is essentially concerned with is ensuring that the courts and tribunals subject to its supervisory jurisdiction exercise their powers appropriately.

19. The Article 227 court does not sit in appeal over the decisions of the court or tribunal below. It is not expected to scrutinize the merits of the said decision with a view to correct the said decision on merits. If, however, the decision is one which involves erroneous exercise of jurisdiction or assumption of power where no power exists, then the court, under Article 227, would be justified in interfering. Equally, if the decision demonstrates discharge, of the Court or Tribunal below, of its functions otherwise than the manner in which the law requires the Court of Tribunal to so discharge, the decision can be corrected in exercise of the supervisory jurisdiction vested in the High Court. Else, the position in law is trite, as enunciated in *Estralla Rubber v Dass Estate*¹¹, *Garment Craft v. Prakash Chand Goel*¹² and *Puri Investment v. Young India*¹³ that a writ court, under Article 227,

¹¹ (2001) 8 SCC 97

¹² 2022 SCC OnLine SC 29

¹³ 2022 SCC OnLine SC 283

is not even empowered to correct errors in the orders passed by the courts below. The distinction is as explicit as it is nuanced.

20. *Vishwabharathi House Building Coop. Society*⁹ refers to “Articles 226/227 of the Constitution of India”. The opening sentence in para 53 of the report in the said case holds that adequate safeguards, against orders passed by the learned NCDRC, are available to an aggrieved party by way of writ to a High Court under Article 226/227 or to the Supreme Court of India under Article 32 of the India or by way of an appeal under Section 23 of the 1986 Act. It does not, however, provide any further guidance as to the circumstances in which these remedies would, individually, be available against the decision of the learned NCDRC. Even so, the view canvassed by Mr Piyush Singh, if accepted, would amount to holding that, where the appellate remedy under Section 23 of the 1986 Act is available, the remedy under Article 227 of the Constitution of India stands irrevocably foreclosed, which would militate against the tenor of the view expressed in *Vishwabharathi House Building Coop. Society*⁹.

21. The issue, however, stands largely answered, in principle, by the judgment of the Supreme Court in *Virudhunagar Hindu Nadargal Dharma Paribalana Sabai v. Tuticorin Educational Society*¹⁴ (“*Virudhunagar*”, hereinafter), though the said decision did not examine the issue in the backdrop of the 1986 Act. In that case, the Supreme Court was concerned with the aspect of availability of a remedy to the High Court, seeking exercise of its supervisory

¹⁴ (2019) 9 SCC 538

jurisdiction over the courts below, where a remedy of appeal against the decision of courts below was available under the CPC. Paras 11 to 13 of the report read thus:

“11. Secondly, the High Court ought to have seen that when a remedy of appeal under section 104 (1)(i) read with Order XLIII, Rule 1 (r) of the Code of Civil Procedure, 1908, was directly available, the respondents 1 and 2 ought to have taken recourse to the same. It is true that the availability of a remedy of appeal may not always be a bar for the exercise of supervisory jurisdiction of the High Court. In **A. Venkatasubbiah Naidu v. S. Chellappan & Ors**¹⁵, this Court held that "though no hurdle can be put against the exercise of the Constitutional powers of the High Court, it is a well recognized principle which gained judicial recognition that the High Court should direct the party to avail himself of such remedies before he resorts to a Constitutional remedy".

12. But courts should always bear in mind a distinction between (i) cases where such alternative remedy is available before Civil Courts in terms of the provisions of Code of Civil procedure and (ii) cases where such alternative remedy is available under special enactments and/or statutory rules and the fora provided therein happen to be quasi judicial authorities and tribunals. In respect of cases falling under the first category, which may involve suits and other proceedings before civil courts, the availability of an appellate remedy in terms of the provisions of CPC, may have to be construed as a near total bar. Otherwise, there is a danger that someone may challenge in a revision under Article 227, even a decree passed in a suit, on the same grounds on which the respondents 1 and 2 invoked the jurisdiction of the High court. This is why, a 3 member Bench of this court, while overruling the decision in **Surya Dev Rai vs. Ram Chander Rai**¹⁶, pointed out in **Radhey Shyam Vs. Chhabi Nath**¹⁷ that “orders of civil court stand on different footing from the orders of authorities or Tribunals or courts other than judicial/civil courts”.

¹⁵ (2000) 7 SCC 695

¹⁶ (2003) 6 SCC 675

¹⁷ (2015) 5 SCC 423

13. *Therefore wherever the proceedings are under the code of Civil Procedure and the forum is the Civil Court, the availability of a remedy under the CPC, will deter the High Court, not merely as a measure of self imposed restriction, but as a matter of discipline and prudence, from exercising its power of superintendence under the Constitution. Hence, the High Court ought not to have entertained the revision under Article 227 especially in a case where a specific remedy of appeal is provided under the Code of Civil Procedure itself.”*

(Emphasis supplied)

22. The afore-extracted passages from ***Virudhunagar***¹⁴ distinguish between the situation where the order under challenge is passed by a civil court and a remedy of appeal lies to another civil court, *vis-à-vis* a situation in which the order under challenge is not passed by a civil court, but by a quasi-judicial authority or tribunal, or where the remedy of appeal does not lie to a civil court. In the former case, i.e. where it is a CPC-to-CPC appeal, the Supreme Court held that the remedy of appeal would operate as a “near total bar” to the availability of supervisory jurisdiction under Article 227 of the Constitution of India. Where, however, the order under challenge is not passed by a civil court, no appeal against the said order is available under the CPC, or the appeal that is available is not to another civil court, the remedy under Article 227 does not appear to be foreclosed.

23. In this context, the extracted words from the earlier decision of the Supreme Court in ***A. Venkatasubbiah Naidu***¹⁵ are of some significance. In the said decision, the Supreme Court has held that, while there cannot be any hurdle to the exercise of constitutional powers of the High Courts, where other alternate remedies are available, the High Court should direct the party to avail such

remedies “*before he resorts to a constitutional remedy*”. **A. Venkatasubbiah Naidu**¹⁵, therefore, expressed the view that, *before seeking recourse to the constitutional remedy of writ before the High Court*, other alternative remedies available to the litigant ought to be directed to be exhausted.

24. This option is, obviously, not available where the other alternate remedy is to the Supreme Court, as in the case of Section 23 of the 1986 Act. The principle in **A. Venkatasubbiah Naidu**¹⁵, which has been followed in **Virudhunagar**¹⁴ has no application, therefore, in a case where the remedy of appeal is to the Supreme Court, as under Section 23 of the 1986 Act, as there can be no question of the party availing such remedy before resorting to a writ remedy available under the Constitution to the High Court. A party cannot be directed to exhaust the alternate remedy available before the Supreme Court before approaching the High Courts under Article 226. There can be no appeal from Caesar to Mark Antony.

25. Relegating the party to the remedy of appeal under Section 23 of the 1986 Act would, therefore, operate to foreclose, once and for all, the right to seek recourse to writ jurisdiction of the High Court under Articles 226/227 of the Constitution of India. This, in my considered opinion, can never be the intent of the Supreme Court in **Virudhunaga**¹⁴ and would also militate against the opening sentence in para 53 of the **Vishwabharathi House Building Coop. Society**⁹.

26. For all these reasons, I am of the opinion that the right of the petitioners, to approach this Court under Article 227 of the

Constitution of India cannot be affected by the remedy of appeal to the Supreme Court available under Section 23 of the Consumer Protection Act.

27. Having said that, it is also clear that any party which seeks to invoke the jurisdiction of the High Court under Article 227 subjects itself to the rigours of the provision and to the restrictions inbuilt in it. The High Court, under Article 227, cannot examine the matter with the same latitude as would be available to a Court which exercises appellate jurisdiction.

28. The contention of Mr Piyush Singh that Article 227 of the Constitution of India ought not to be invoked by the petitioner as a remedy of appeal, against the impugned order of the learned NCDRC, lay to the Supreme Court under Section 23 of the 1986 Act, is fallacious on another count as well, which somewhat pre-empts the discussion that is to follow hereinafter. Section 23 provides for an appeal against a decision of the NCDRC *in exercise of the powers conferred on it by Section 21(a)(i)*. Section 21 deals with the jurisdiction of the learned NCDRC. Sub-section (a)(i) of Section 21 vests jurisdiction in the learned NCDRC to entertain complaints where the value of the goods or services and compensation, if any, exceeds ₹ 1 crore. The respondents have valued their complaint in excess of ₹ 1 crore on the premise that the complaint is maintainable as a class action proceeding on behalf of all the allottees of units in the project. As I proceed to hold hereinafter, however, the pleadings in the Complaint do not make out a case for justified institution of the Complaint as a class action proceeding for all the allottees in the

project, or even for the 51 complainants before the learned NCDRC. Unless the number of consumers having “sameness of interest” is manifest from the pleadings in the Complaint, in the manner envisaged by law and as stipulated by the Supreme Court in **Brigade Enterprises Ltd. v. Anil Kumar Virmani**¹⁸, it is not possible to hold that the cumulative value of the goods or services, or the compensation claimed, by all such consumers having sameness of interest, would exceed ₹ 1 crore. The very maintainability of the Complaint before the learned NCDRC, under Section 21(a)(i) is, therefore, questionable. If Section 21(a)(i) is not applicable, neither is Section 23.

29. Where the justifiability of the invocation, by the respondents, of the jurisdiction of the learned NCDRC under Section 21(a)(i) is itself in doubt, it is obviously not open to the respondents to cite the availability of an alternate remedy to the petitioners under Section 23 as a ground to non-suit them under Article 227 of the Constitution of India. A plea of alternate appellate remedy, predicated on erroneous invocation of original jurisdiction of the Court or Tribunal below, obviously has to fail.

30. Even on facts, therefore, the assertions in the Complaint filed by the respondents do not make out a case of availability, to the petitioners, of an alternate remedy

31. The objection to maintainability, as advanced by Mr. Piyush Singh, is, therefore, rejected.

¹⁸ 2021 SCC OnLine SC 1283

Re. Merits

32. An authoritative pronouncement, on the maintainability of class action complaints, under Section 35(1)(c)¹⁹ of the Consumer Protection Act, 2019, which is *in pari materia* and *in haec verba* with Section 12(1)(c)² of the 1986 Act, is available in the judgment of the Supreme Court in ***Brigade Enterprises***¹⁸.

33. 91 purchasers of 51 apartments in a residential complex, were, in that case, permitted, by the learned NCDRC to file a class action consumer complaint in a representative capacity under Section 35(1)(c) of the 2019 Act, on behalf of and for the benefit of more than 1000 purchasers. Aggrieved by the said decision, Brigade Enterprises, the builder, appealed to the Supreme Court.

34. The residential complex in question comprised of over 1134 apartments. The 91 complainants before the learned NCDRC had purchased 51 apartments. They contended that they desired to prosecute the complaint not only for themselves but also on behalf of numerous other consumers who had purchased apartments in the same complex, as a class action, and that the learned NCDRC was empowered to grant permission to them to do so, as could be granted

¹⁹ 35. **Manner in which complaint shall be made. –**

(1) A complaint in relation to any goods sold or delivered or agreed to be sold or delivered or any service provided or agreed to be provided may be filed with a District Forum by –

(c) one or more consumers, where there are numerous consumers having the same interest, with the permission of the District Forum on behalf of, or for the benefit of, all consumers so interested;

by a civil court under Order I Rule 8 of the CPC. The learned NCDRC allowed the application relying on the earlier decision of the Supreme Court in ***Chairman, Tamilnadu Housing Board v. T.N.Ganapathy***²⁰ and of the Full Bench of the learned NCDRC itself in ***Ambrish Kumar Shukla v. Ferrous Infrastructure Pvt. Ltd.***²¹. I may note here, that Mr. Piyush Singh also placed extensive reliance on ***Ambrish Kumar Shukla***²¹.

35. Paras 7 to 25 of the report in ***Brigade Enterprises***¹⁸ read thus:

“7. Before we get into an analysis of the rival contentions with specific reference to the statutory provisions, it is necessary to look into the reliefs prayed for, by the respondents in their consumer complaint and the pleadings on the basis of which the reliefs were so sought. The reliefs sought by the respondents in their consumer complaint, for the benefit of and on behalf of the purchasers of all the flats in the entire residential complex reads as follows:—

“That in view of the abovementioned facts and circumstances this Hon'ble Commission may graciously be pleased to pass orders and to direct the OP to:—

i. Direct the OP to pay to each of the Complainants and to each buyer having same interest delay compensation, as stipulated in the Sale and Construction Agreements, for unpaid period out of the “Total Period of Delay” as indicated in Para 46 of the Consumer Complaint;

ii. Direct the OP to pay to each of the Complainants and to each buyer having same interest, compensatory interest @ 12% p.a. on individual consideration amount paid, for abnormal and inordinate delay in construction, till handing over possession of flats to the complainants, computing total

²⁰ 1990 (1) SCC 608

²¹ 2016 SCC OnLine NCDRC 1117

period of delay as indicated in Para 46 of the Consumer Complaint;

iii. Award cost of the Complaint to the Complainants; and/or

iv. Pass any other and/or further relief, which this Hon'ble Commission thinks fit and proper, in the facts and circumstances of the case, in favour of the complainants and against the OP.”

8. The pleadings on the basis of which the respondents sought the aforesaid prayers, in brief, are as follows : (i) that the appellant launched the subject project in the year 2013; (ii) that the project styled as “Brigade Lakefront” was to comprise of about 1100 units in three blocks, namely, Amber block, Blue block and Crimson block; (iii) that Amber block, also called Building No. 1, was to have seven wings, namely, Wings A, B, C, D, E, F and G; Blue block, also called Building No. 2 was to have Wings H, I, J, K, L, M and N and Crimson block, also called Building Nos. 3 and 4 were to have Wings O, P, Q, R, S and T; (iv) that in respect of the flats in Blue block, the promised delivery date was 30.06.2016 with a six months grace period; (v) that though the completion certificate and structural stability certificate were also issued by the Consultant/Architect for the buildings in Blue block on 3.05.2017, the occupancy certificate was issued partially on 28.12.2018 and the occupancy certificate for the balance was issued on 25.06.2019; (vi) that in respect of the buildings in Crimson block, the promised delivery date was 31.01.2018 with a grace period of six months; (vii) that though the completion certificate for the Crimson block was issued by the architect on 10.08.2018, the occupancy certificate was issued partially on 28.12.2018; (viii) that the builder was guilty of unfair trade practice, inasmuch as the terms and conditions of the agreement prescribed a paltry compensation of Rs. 5 per square feet to the purchasers, if there was delay in completion of the project, while penal interest was levied on the buyers at 18% p.a. whenever they committed default or delay in making payment; (ix) that on account of the delay on the part of the appellant in handing over possession, the buyers suffered losses in the form of payment of monthly rent, interest on the loans taken and payment of higher registration charges, as the circle rates had

gone up in the meantime; and (x) that therefore they were constrained to file a complaint.

9. From the aforesaid averments contained in the consumer complaint, it could be seen that the delay on the part of the builder in handing over possession, was the primary ground on which compensation was sought by the respondents. We have already extracted the prayers made in the original complaint. Interestingly the prayer portion of the complaint does not contain the quantification of the total amount of compensation sought by the respondents either individually or collectively for and on behalf of all the purchasers of all the 1134 residential apartments. The prayer portion of the complaint refers to paragraph 46 of the complaint, for the purpose of computation of delay compensation. But paragraph 46 of the complaint does not convey any meaning except if taken into account along with paragraph 45. Therefore, paragraphs 45 and 46 of the complaint are extracted as follows:

“45. Computation of “Total Period of Delay”—The Complainants assert that the Total Period of Delay be calculated as follows : Delay Period Start - Promised Date of Possession, not considering the grace period; and Delay Period End - Either of the following two dates based on facts of individual complainants:

a. Where possession was taken prior to issuance of Occupancy Certificate, the Date of Occupancy Certificate; OR

b. Where possession was taken after the issuance of Occupancy Certificate, then Date of possession Offered;

It would be relevant to state that the meaning and nature of ‘possession’ as stated by the complainants in this para would mean legal possession only where said possession had been given or offered to be given upon confirmation of readiness of the flat for possession, in adherence to Schedule of Construction Agreement.

46. It is clearly and unambiguously inferred that the Buyers shall receive possession by executing the Sale

Deed and getting the same registered. Both actual possession and sale deed registration have to be done in unison in accordance with clauses of the agreement for construction. Hence, possession without registering and executing sale deed or vice versa does not together construe to be “possession” for the purpose of calculating the delay suffered by the buyers. If both events are done on separate times, the later date of the two would prevail. It is respectfully submitted that for the given residential project, the date of grant of Occupancy Certificate shall be reckoned as the pivotal event to ascertain delayed possession and calculating compensation based thereon.”

10. Paragraphs 45 and 46 contain a tacit admission that the period of delay in handing over possession of the flats, may vary from buyer to buyer in respect of the purchasers of all the 1134 apartments. This is why the respondents have sought the indulgence of the Commission to compute the delay in respect of each case, on the basis of formulae indicated in paragraph 45.

11. However, paragraph 41 of the consumer complaint contains the valuation of the complaint, at least insofar as the 91 complainants who jointly filed the consumer complaint are concerned. The relevant portion of paragraph 41 of the complaint reads as follows:

“It is submitted that as per the Agreement terms reproduced above, OPs are committed to pay meager delay compensation of Rs. 5/- per sq. ft. of saleable area, per month, which comes to around 0.1% per annum of the sale consideration, or even lesser. On the contrary, the penalty charged by the OPs in case the buyers' default or delay in paying the instalment is 18% per annum. It is clear that the balance of performance is over 180 times against the buyers who have been bearing the brunt of the absolute mismanagement of project by the OPs. The buyer is not only patiently waiting for the possession but also gets a double whammy to keep paying all the instalments without enjoying the property. Of the total number of complainants those who have preferred to approach this Hon'ble Forum in this instant Complaint, the

aggregate value of sale for 51 complainant-buyers alone, is about Rs. 66 Crore whereas the aggregate amount disbursed by the OP so the same buyers, in the name of Delay Compensation is a meager, less than Rs. 10 lakh which is just about 0.1% for the entire of delay of more than 2 years.”

12. Before we proceed further we must record one important fact, namely, that even according to the respondents-complainants, the project comprised of three blocks namely Amber block, Blue block and Crimson block. Amber block was to have seven Wings with 386 apartments. It appears that none of the owners of these 386 apartments in Amber block have joined with the respondents-complainants. This is why the entire discussion about the delay in completion of the project, with reference to the timeline of events found in paragraph 14 of the consumer complaint, refers only to Blue block and Crimson block. The appellant has given a tabulation in their counter to the original complaint, pointing out that Blue block comprises of 412 apartments, out of which the owners of only 47 apartments have joined in the filing of the complaint and that Crimson block has 336 apartments, out of which the owners of only 4 apartments have joined in the complaint.

13. In view of the fact that none of the owners of the apartments in Amber block have joined in the filing of the complaint, coupled with the fact that there is no pleading with respect to the timeline of the project in respect of Amber block, the consumer complaint filed by the respondents cannot be treated as one representing the owners of 386 apartments in Amber block. The respondents ought to have either included as one of the complainants, the owner of one of the apartments in Amber block or at least made necessary averments in the pleading about the timeline for completion of the Amber block, to make the complaint, as one filed in a representative capacity on behalf of the owners of flats in all the three blocks. Let us now see at least whether the complaint was maintainable in a representative capacity on behalf of the owners of the flats in Blue block and Crimson block, in the light of the requirements of Section 35(1)(c) of the Act.

14. Section 35(1)(c) enables one or more consumers, where there are numerous consumers having the same interest, with the permission of the District Commission, to file a complaint, on behalf of or for the benefit of all consumers so interested. It is needless to point out that the sine qua non for invoking Section 35(1)(c) is that all consumers on whose behalf or for whose benefit the provision is invoked, should have the same interest. Interestingly, Section 35(1) (c) uses the disjunction “or” in between two sets of words, namely, (i) “on behalf of”; and (ii) “for the benefit of”. Clause (c) of Sub-Section (1) of Section 35 reads as under:

“one or more consumers, where there are numerous consumers having the same interest, with the permission of the District Commission, on behalf of, or for the benefit of, all consumers so interested.”

15. Therefore, a complaint filed under Section 35(1)(c) could either be “on behalf of” or “for the benefit of” all consumers having the same interest.

16. Section 38(11) of the Consumer Protection Act, 2019 makes the provisions of Order I Rule 8 of the First Schedule to the Civil Procedure Code, 1908 applicable to cases where the complainant is a consumer referred to in Section 2(5)(v), which defines a ‘complainant’ to mean one or more consumers, where there are numerous consumers having the same interest.

17. Order I Rule 8, CPC, unlike Section 35(1)(c) operates both ways and contains provisions for a two-way traffic. It not only permits plaintiffs to sue in a representative capacity but also permits people to be sued and to be defended in an action, in a representative capacity. Order I Rule 8 reads as follows:—

“8. One person may sue or defend on behalf of all in same interest.—(1) Where there are numerous persons having the same interest in one suit,—

(a) one or more of such persons may, with the permission of the Court, sue or be sued, or may defend

such suit, on behalf of, or for the benefit of, all persons so interested;

(b) the Court may direct that one or more of such persons may sue or be sued, or may defend such suit, on behalf of, or for the benefit of, all persons so interested.

(2) The Court shall, in every case where a permission or direction is given under sub-rule (1), at the plaintiff's expense, give notice of the institution of the suit to all persons so interested, either by personal service, or, where, by reason of the number of persons or any other cause, such service is not reasonably practicable, by public advertisement, as the Court in each case may direct.

(3) Any person on whose behalf, or for whose benefit, a suit is instituted, or defended, under sub-rule (1), may apply to the Court to be made a party to such suit.

(4) No part of the claim in any such suit shall be abandoned under sub-rule (1), and no such suit shall be withdrawn under sub-rule (3), of rule 1 of Order XXIII, and no agreement, compromise or satisfaction shall be recorded in any such suit under rule 3 of that Order, unless the Court has given, at the plaintiff's expense, notice to all persons so interested in the manner specified in sub-rule (2).

(5) Where any person suing or defending in any such suit does not proceed with due diligence in the suit or defence, the Court may substitute in his place any other person having the same interest in the suit.

(6) A decree passed in a suit under this rule shall be binding on all persons on whose behalf, or for whose benefit, the suit is instituted, or defended, as the case may be."

18. In simple terms, the salient features of the stipulations contained in Order I Rule 8 CPC can be summed up as follows:

(i) where there are numerous persons having the same interest in one suit, one or more of such persons may, with the permission of the Court, sue on behalf of or for the benefit of all persons so interested;

(ii) where there are numerous persons having the same interest in one suit, one or more of such persons may be sued or one or more such persons may defend such suit, on behalf of or for the benefit of all persons so interested;

(iii) the Court itself may, without the plaintiffs or defendants seeking any permission under Order I Rule 8(1)(a), direct that one or more such persons may sue or be sued or may defend the suit on behalf of and for the benefit of all persons interested;

(iv) notice of the institution of the suit to all persons so interested either by personal service or by public advertisement should be ordered by the Court in both categories of cases, namely, where permission is given by the Court on the application of the individuals or direction is issued by the Court itself;

(v) any person on whose behalf or for whose benefit the suit is instituted or defended may seek to be made a party to the suit;

(vi) abandonment of the whole or part of the claim, withdrawal of the suit or the recording of any agreement, compromise or satisfaction shall not be allowed by the Court unless notice to all persons interested in the matter is issued either by personal service or by public advertisement.

(vii) the Court may at any time substitute the person suing or defending in a representative capacity, with any other person, if the former was not prosecuting the suit or defence with due diligence.

(viii) the decree passed in the suit covered by this Rule will be binding on all persons.

19. The Explanation under Order I Rule 8 is of significance. It distinguishes persons having the same interest in one suit from persons having the same cause of action. To establish sameness of interest, it is not necessary to establish sameness of the cause of action.

20. The Explanation under Order I Rule 8, is a necessary concomitant of the provisions of the Rules 1 and 3 of Order I. Order I Rule 1, CPC, allows many persons to join in one suit as plaintiffs. Order I, Rule 3 allows many persons to be joined in one suit as defendants. But to fall under Order I Rule 1 or Order I Rule 3, the right to relief should arise out of or be in respect of the same act or transaction allegedly existing in such persons, jointly, severally or in the alternative. To some extent, Rules 1 and 3 of Order I are founded upon the sameness of the cause of action. This is why the Explanation under Order I Rule 8 distinguishes sameness of interest from the sameness of the cause of action.

21. Since “sameness of interest” is the pre-requisite for an application under Order I Rule 8, CPC read with Section 35(1)(c) of the Consumer Protection Act, 2019, it was necessary for the respondents to include in the consumer complaint, sufficient averments that would show sameness of interest. As we have pointed out earlier the total number of residential apartments constructed in three blocks comprising of about 20 wings (7 wings each in Amber and Blue blocks and 6 wings in Crimson block) were 1134. There are no pleadings insofar as the purchasers of 386 residential apartments in the 7 wings of Amber block are concerned. Even in respect of the owners of the remaining 748 residential apartments in blue block and Crimson block, the complaint does not contain any specific averments regarding sameness of interest. The delay in handing over possession of the residential apartments might have given rise to a cause of action for the individual purchasers of flats to sue the builder. But sameness of the cause of action is not equal to sameness of interest. The existence of sameness of interest, has been questioned by the appellant-builder on the ground that delay compensation as stipulated in the Agreements was offered to the purchasers and that some of them accepted the same without any demur or protest, while a few others have refused to accept. It is not clear from the consumer complaint as to

how (i) those who have accepted the compensation under protest; (ii) those who accepted without protest; and (iii) those who refused to accept the compensation, have the sameness of interest.

22. The period of delay in the completion of the project and the handing over of possession, does not appear to be uniform in all 1134 cases. The respondents-complainants cannot project sameness of interest for the purchasers in whose case the period of delay was negligible and those in whose cases there was a huge delay.

23. We may have to look at the issue also from the point of view of the buyers. The delay in handing over possession need not necessarily be the only deficiency in service on the part of the appellant-builder. Some of the purchasers of flats may also have other complaints and their right to proceed against appellant cannot be stultified by a few individuals invoking Section 35(1)(c). That a few purchasers have chosen to approach the Karnataka State Consumer Disputes Redressal Commission to ventilate their individual grievances shows that all the 1134 buyers do not have the same interest as that of the respondents. At least if the respondents have given the names of purchasers of all flats on whose behalf the present complaint could be entertained, they would have been better off. But they have not done so.

24. Reliance is placed by the learned senior counsel for the respondents, upon the Judgment of this Court in *Chairman, Tamil Nadu Housing Board, Madras v. T.N. Ganapathy* (supra), to drive home the point that the object of Order I Rule 8 is to facilitate the decision of questions in which large number of persons are interested, without recourse to the ordinary procedure and that, therefore, the provision must receive an interpretation which will subserve the object of its enactment. This Court pointed out in the said case that though each of the allottees of plots by the Housing Board may be interested individually in fighting out the demand separately made or likely to be made by the Board, it would not make Order I Rule 8 inapplicable.

25. But the above decision in *Tamil Nadu Housing Board* (supra) cannot be pressed into service by the respondents for two reasons, namely, (i) that what was

questioned in a representative suit in that case, was the additional demand sought to be made by the Housing Board on all the allottees uniformly, for an amount over and above the tentative price originally fixed; and (ii) that in any case this Court restricted the applicability of the decision only to those allottees of the low income group. Therefore, the sameness of interest has to be tested on the basis of the nature of the reliefs claimed and the pleadings that pinpoint the sameness of interest.”

36. Thereafter, relying on its earlier decision in *Rameshwar Prasad Shrivastava v. Dwarkadhis Projects Pvt. Ltd.*²², *Anjum Hussain v. Intellicity Business Park Pvt. Ltd.*²³ and *Vikrant Singh Malik v. Supertech Ltd.*²⁴, the Supreme Court emphasised the fact that a common complaint could be filed by complainants who had “sameness of interest”, *vis-a-vis* the alleged deficiency in service of the service provider.

37. The Supreme Court has, in this context, distinguished between “sameness of interest” and “sameness of cause of action”. In the case before it, the Supreme Court noted that, though there were a number of purchasers of residential units in the project under consideration before it, who had grievances against the builder, their grievances were distinct and different. The judgment is also an authority for the proposition that “sameness of interest” should be manifest from the pleadings in the complaint filed before the Consumer Forum. In other words, from the pleadings in the Complaint, the Consumer Forum should be in a position to hold that the persons whose cause the complainants before it were seeking to espouse had identical

²² (2019) 2 SCC 417

²³ (2019) 6 SCC 519

grievances against the opposite party and that the deficiency in service of the opposite party *vis-a-vis* the said persons were, from the pleadings, manifestly the same. Else, a consolidated consumer complaint as a class action would not be maintainable under Section 35(1)(c) of the 2019 Act – and, therefore, under Section 12(1)(c) of the 1986 Act.

38. Mr. Piyush Singh has sought to submit that, in examining whether the complaint was maintainable as a class action petition, the Court was required to be guided by the prayers in the complaint. If the prayers were identical, he submits that a class action complaint could be maintainable. He points out that, in the present case, the prayers in the complaint filed by his clients sought omnibus reliefs “to complete the construction with all promised amenities and to hand over vacant and peaceful possession of their respective flats with occupancy and building completion certificate issued by the competent authority to the complainants as well as other allottees/purchasers/buyers within the stipulated time as may be decided by” the learned NCDRC, failing which the petitioners ought to be directed to give alternate flats of similar standards and carpet area to each of the complainants, failing which they be directed to compensate the purchasers and to refund the amounts paid by them. Inasmuch as these prayers applied to all the allottees of residential units in the project, Mr. Piyush Singh submits that the learned NCDRC could not be said to have erred in permitting the complaint to be filed as a class action proceeding under Section 12(1)(c) of the

²⁴ (2020) 9 SCC 145

1986 Act.

39. Ms. Agnihotri, learned Counsel for the petitioners submits, *per contra*, that the pleadings in the complaint itself indicate that there is no “sameness of interest” for all the allottees in the project. In fact, she submits that no such sameness of interest is apparent even *qua* the 51 complainants before the learned NCDRC. She submits that, in fact, in respect of flat allottees, the scheduled date for taking of possession of the flats had itself not been reached, so that there could be no question of the allottees being aggrieved by any delay in handing over the flats or by any deficiencies in the flats themselves. With respect to the other allottees, as such, submits Ms. Agnihotri, even on facts, the grievances of the allottees of the individual units in the complex of her client were distinct and different, and no class action proceeding under Section 12(1)(c) could be permitted to have been instituted. The learned NCDRC has, in passing the impugned order dated 16th May, 2018, she submits, proceeded merely on the basis of the prayer in the complaint without examining the aspect of maintainability of the class action proceeding as filed by the respondents with the seriousness it deserves.

40. Inasmuch as the number of allottees who have “sameness of interest” is not forthcoming or apparent from the pleadings in the complaint, Ms. Agnihotri submits that it cannot be said that the claims of the allottees having sameness of interest, when consolidated, would exceed ₹ 1 crore, so that the question of the jurisdiction of the learned NCDRC to entertain the complaint would also be highly disputable.

41. Having heard learned Counsel and perused the record and in view of the law enunciated in *Brigade Enterprises*¹⁸, I am of the opinion that the submission of Ms. Agnihotri deserves to be accepted and that of Mr. Piyush Singh, correspondingly, rejected.

42. *Brigade Enterprises*¹⁸ is clear and categorical in requiring that, in order to maintain a class action proceeding under Section 35(1)(c) of the 2019 Act – or, correspondingly, under Section 12(1)(c) of the 1986 Act – the pleadings in the complaint had necessarily to unequivocally indicate “sameness of interest” of all the persons whose cause the complainants before the Consumer Forum were seeking to espouse, *vis-à-vis* the opposite party.

43. In the present case, while there is an omnibus recital, in para 4 of the complaint, that the facts relating to the allottees of the project are the same and that common issues disputes and controversies are involved, with the allottees having common interest and having suffered identical deficiency of service, the pleadings that follow thereafter belie this assertion. Para 16 of the complaint sets out, in a bulleted fashion, various alleged complaints relating to the allocation of units to the allottees in the project. The complaint does not, however, identify these various perceived deficiencies in service *vis-a-vis* the allottees aggrieved thereby, by identifying the deficiencies in service by which the individual allottees were aggrieved. Nor is there any assertion, in the complaint, that each and all of the grievances enumerated in para 16 of the complaint applied to every allottee of

units in the complex, whose cause the complainant chose to espouse. Even in respect of the 51 complainants before the learned NCDRC, the complaint does not set out, with clarity, their individual grievances, out of the several grievances enumerated in para 16 of the complaint. Rather, the use of the words “many complainants”, “some complainants”, and the like, which figure in para 16 of the Complaint, indicate, *prima facie*, that the grievances of all allottees were not identical, though, in the ultimate eventuate, their common aim might have been to secure allotment to them, by the petitioners, of serviceable flats.

44. Such a common ultimate aim cannot, however, connote “sameness of interest” within the meaning of Section 12(1)(c), or Section 2(1)(b)(iv), of the 1986 Act. The law enunciated in ***Brigade Enterprises***¹⁸ does not permit filing of a class action complaint under Section 12(1)(c) of the 1986 Act, in such a fashion. The matter is not merely one of the reliefs sought in the complaint. The 1986 Act offers protection to consumers against deficiencies in service or perpetration of unfair trade practices. The relief that follows is merely a sequitur. The sameness of interest has to be with respect to the grievances of the complainants, and not with respect to the reliefs sought. Pared down to brass tacks, hypothetically, if one allottee is aggrieved by water leakage in the flat allotted to him, another by not allotment of adequate parking space, a third by delayed allotment and a fourth by the flat not being of the category assured to him, they cannot maintain a class action against the builder, by invoking Section 12(1)(c), merely on the ground that the ultimate relief sought by all of them is allotment

of flats as originally contracted. Once, as in the present case (*vide* para 16 of the Complaint), the complainants enumerated several individual items of grievance, the Complaint would *either* have to assert that *each* grievance applied to *each* allottee whose cause they were seeking to espouse, *or to identify the allottees*, grievance-wise. Else, the very requirement of “sameness of interest”, in the case of a class action proceeding under the Consumer Protection Act, would be reduced to a redundancy, as, in every case, the consumers could make an omnibus prayer that the units should be allotted to them in good condition and, on that basis, plead sameness of interest. This, in my view, militates against the law laid down in ***Brigade Enterprises***¹⁸. To reiterate what is required is that it must be apparent and forthcoming, from the complaint, that the consumers whose cause the complaint seeks to espouse have sameness of interest, to the extent that the deficiencies in the service provided by the service provider, *qua* each and all of the said complainants, is the same. That requirement, in my considered opinion, is wanting in the complaint filed by the respondents in the present case.

45. With greatest respect to the learned NCDRC, I am of the opinion that paras 5 to 7 of the impugned order dated 16th May, 2018 do not indicate that the learned NCDRC has approached the matter of maintainability of the complaint as a class action in the manner envisaged by ***Brigade Enterprises***¹⁸. In fact, a reading of para 7 indicates that the learned NCDRC appears to have proceeded on the basis of the omnibus prayer clause contained in the complaint.

46. The learned NCDRC has also noted that the complainants had,

“same interest *in the outcome of the complaint*”. Such an approach in my considered and respectful opinion, cannot be accepted, in view of the law laid down in ***Brigade Enterprises***¹⁸. What is required is not sameness of interest *in the outcome of the complaint*, but sameness of interest with respect to the grievances of the complainants and the deficiencies in service that the complaints claimed to have suffered at the instance of the opposite party. It is only then, that the Consumer Protection Forum could assess the correctness of the allegation of deficiency of service on the part of the opposite party *vis-a-vis* the complainants. Unless the consumers who have sameness of interest in respect of their grievances *vis-a-vis* the opposite party were immediately identifiable from the complaint, the complaint cannot be maintained as a class action covering the interest of all such consumers.

47. I am, therefore, unable to subscribe to the view expressed by the learned NCDRC in paras 5 to 7 of the impugned order dated 16th May, 2018.

48. In my view, the complaint, as filed, does not indicate that, even in respect of 51 complainants who were before the learned NCDRC, there is “sameness of interest” as could permit the complaint to be maintained as a class action covering their grievances *vis-a-vis* the petitioners. The pleadings in the compliant, are not sufficient to enable the Court to assess the number of complainants who would have sameness of interest, in their grievances *vis-a-vis* the petitioners. It cannot, therefore, be said that the consolidated claim of such

complainants who would have sameness of interest would be in excess of ₹ 1 crore.

49. The impugned order cannot, therefore, sustain.

50. Per consequence, the complaint filed by the petitioners cannot, applying the law laid down in *Brigade Enterprises*¹⁸, and on the basis of the pleadings contained in the complaint, be maintained as a class action in respect of all the allottees of the Indiabulls Greens, Panvel Project or even in respect of the 51 complainants who approached the learned NCDRC.

51. The complaint would, therefore, necessarily have to be dismissed, as, in the manner in which it is filed, it is not even apparent that the complaint is maintainable before the learned NCDRC.

52. Having said that, however, this order would not preclude the complainants from filing a proper complaint, keeping in mind the observations contained hereinabove, as a class action proceeding under Section 12(1)(c) or otherwise, before the appropriate forum, which might even be the learned NCDRC. Any such complaint, if and when filed, would be decided by the concerned forum in accordance with law and keeping in view the observations contained in the present judgment.

Conclusion

53. In view of the aforesaid, the petition is allowed. The impugned order of the learned NCDRC is quashed and set aside. The complaint filed by the complainants before the learned NCDRC is also dismissed, reserving liberty as recorded in para 52 *supra*.

54. There shall be no orders as to costs.

APRIL 27, 2022
r.bararia/kr/dsn

C. HARI SHANKAR, J.



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