RESERVED

STATE CONSUMER DISPUTES REDRESSAL COMMISSION, UTTAR PRADESH, LUCKNOW

APPEAL NO.744 OF 2008

(Against the judgment/order dated 18-03-2008 in Complaint Case No.283/2005 of the District Consumer Forum, Gautam Buddh Nagar, Noida)

Sri S G M Rizvi
S/o Late Sri S F H Rizvi
R/o Mansarovar Apartments
Sector-61, Noida.

.....Appellant

Vs.

New Okhla Industrial Development Authority
Chief Administrative Building, Sector-6,
Noida.

.....Respondent

AND

APPEAL NO.745 OF 2008

(Against the judgment/order dated 18-03-2008 in Complaint Case No.284/2005 of the District Consumer Forum, Gautam Buddh Nagar, Noida)

Smt. Anshul Agrawal
W/o Sri Anish Agrawal
R/o 26-C, Mansarovar Apartments
Sector-61, Noida.

.....Appellant

Vs.

New Okhla Industrial Development Authority
Chief Administrative Building, Sector-6,
Noida.

.....Respondent

BEFORE:

HON'BLE MR. JUSTICE BHANWAR SINGH, PRESIDENT
HON'BLE MRS. RACHNA, MEMBER

For the Appellant : Sri T H Naqvi, Advocate.

For the Respondent : Sri Rajnish Kumar, Advocate.

Dated : 02-03-2010

JUDGMENT

PER MR. JUSTICE BHANWAR SINGH, PRESIDENT

These two appeals no. 744/2008 and 745/2008 have arisen out of

the same judgment of March 18, 2008 whereby three complaints of Sri S G M Rizvi, Sri Rajiv Raina and Smt. Anshul Agarwal were dismissed. All the three complainants had pleaded that in the matter of allotment of houses to them the New Okhla Industrial Development Authority had played unfair trade practice by realizing excessive price of the flats allotted to them. Sri S G M Rizvi was the allottee of Flat No. 26-D, Mansarovar Apartments, Sector-61 while Sri Rajiv Raina was the allottee of Flat No. 25-C and the third allottee Smt. Anshul Agrawal had in her favour allotment of Flat No. 26-C. The tentative cost of each flat was Rs.15,71,000/-. The complainants deposited the entire price by way of instalments and obtained possession of their respective houses on 29-03-2000. According to the terms and conditions of the brochure the allottees were to be inducted into possession of the flats upto October, 1999 but there was about six months delay in handing over possession to them. Subsequently the Development Authority informed the allottees vide its letter of March, 2004 that the final cost of the flats had been determined as Rs.16,82,000/-. The complainants deposited the difference of the tentative and finally determined cost, however, under protest. They filed their complaints agitating against delay in delivery of possession, enhancement of the cost and unfair trade practice of realizing a substantial amount which was earmarked for lower income group of the society and included in the final cost of the flats. On the face of these pleadings the complainants stated that the Development Authority had committed deficiency in service.

The New Okhla Industrial Development Authority contested all the complaints and asserted its right to enhance the tentative cost of the flats depending upon various factors. The Authority had conceded that there was some delay in handing over possession of the flats. The Authority determined the final cost on 31-03-2004 and realized the additional cost in accordance with the terms and conditions of the brochure.

The District Consumer Forum, Gautam Budha Nagar, having scrutinized the pleadings of the parties and the documentary evidence

filed by them recorded a finding that there was no deficiency in rendering service of providing flats to the three complainants. The delay in handing over possession being not unprecedented was held to be justified and likewise it was concluded that the Authority had a right to determine the final cost of the flats. The District Consumer Forum also did not find any cogent ground to award interest to the complainants and since there was no evidence of the substandard material having been used in construction of the flats, request for compensation on account of the defects in the flats was also rejected. On the basis of these findings, all the three complaints were dismissed.

Feeling aggrieved of the said judgment Smt. Anshul Agrawal filed Appeal No. 745/2008 while Sri S G M Rizvi preferred the other Appeal No. 744/2008. In this way only two complainants preferred the two appeals in hand.

The first issue raised before us relates to the final cost of the flats being Rs.16,82,000/- each as against the initial cost of Rs.15,71,000/-. The difference emerges out as Rs.1,11,000/- only. The third floor accommodation had a lesser increase of Rs.72,000/- only. Indeed the determination of the final cost three and a quarter years after the possession had been delivered appears to be somewhat delayed but since the increase is marginal i.e. less than 10%, it can be said to be justified. Although this Commission time and again has observed in its decisions that final cost should be determined by the Development Authorities/Builders within a reasonable time from the date of possession or from the date of the registration of the sale/lease deed, yet if satisfactory explanation for the delay in such matter has been offered the delay has to be condoned. In the case in hand, the Authority has explained that the delay had taken place on account of certain administrative handicaps and only after all hurdles were removed the cost was finalized. The contention that delay in handing over possession must neutralize the Authority's right to increase the cost is not tenable. Such an argument could have weighed only if there was an inordinate delay but since the delay was a marginal delay of six months, the

contention of the learned Counsel for the appellants is not acceptable. In the matter of construction of large projects several construction agencies are involved to deal with masonry work, electrical fittings, sanitary fittings, wood work and floor tiles etc. Sometimes contractor dealing with one aspect of the above depends upon the completion of the work by others and when such multifarious activities of different agencies have to deal in a harmonious manner marginal delay of six months cannot provide any basis to deprive the Authority of its right to enhance the cost at the time of determining the final price. We are, therefore, of the decisive view that the matter pertaining to the determination of final cost being well within the right of the Authority, the complainants are not entitled to any relief.

An another important aspect of the matter raised before us is about the subsidy under the head of economically backward strata of the society. Learned Counsel for Smt. Anshul Agrawal and the appellant Mr. S M G Rizvi who argued his case himself has raised a very strong protest over the NOIDA's decision to include the subsidy money in the price of the cost. Mr. Rizvi has submitted that loading the burden of subsidy amount upon the allottees without intimation about the fact and amount of subsidy is an unfair trade practice. The contention seems to be devoid of merit for the simple reason that the cost of the individual flat was advertised in the public notice and specifically mentioned in the brochure as well as in the allotment letters. It was not necessary for the Authority to disclose each and every count being charged as price of the flat. Recital/disclosure of the tentative cost with a rider regarding fixation of the final cost subsequently at an appropriate stage was a sufficient notice to all concerned including the allottees. The contention that the allottees came to know about the subsidy amount having been realized from them, subsequent to getting possession will not change the situation nor it will have any adverse bearing upon the Authority's right to fix the cost – tentative as well as final. Inclusion of such subsidy for upliftment of the economically backward persons is the integral part of development of a society and its residential areas. To be specific it may be observed that

when a new residential colony is developed either horizontally or vertically common services such as roads, street lights, public rest rooms etc. are also developed by the Authority and it is quite natural that load of such expenditures is to be borne by the inhabitants of the locality/residential colony. Likewise if economically backward strata of the society is helped by the Development Authorities with a view to serve the larger society better. Such economically backward strata comprises domestic servants, small vendors, washer-man, barbers, drivers, peons, orderlies, sweepers and low paid workers. To help these classes is an integral part of all around social upliftment of the entire society and by no stretch of reasoning if such persons are provided residential quarters at low prices at the cost of the better placed persons of the society inclusion of subsidy in the price of the bigger flats can be termed to be as an unfair trade practice. Sri S. G. M. Rizvi taking shelter of the R.T.I. Act had procured copies of some important papers pertaining to the Mansarovar Residential Scheme and one of such documents relates to the amount of subsidy having been included in the cost of the three kinds of flats i.e. E.W.S., M.I.G. and H.I.G. Sri Rizvi has also pointed out that the rate of the E.W.S. flat was higher than that of H.I.G. and no doubt lower to that of Shivalik but this alone is not enough to uphold his contention that the benefit of subsidy was not extended to the economically backward allottees. Learned Counsel for the NOIDA has argued that the flats for economically backward persons were at a short distance from Mansarovar Colony and the cost of such flats had been calculated as per the expenditures incurred on construction of such houses and acquisition of land. The position could have been different if the subsidy amount has been realized from the Mansarovar allottees but the total sum realized on that count was siphoned to some other project. There is no evidence before us to prove that benefit of subsidy was not extended to the allottees of the small quarters constructed for economically backward persons. It cannot be presumed that the NOIDA Authority committed some irregularity in this respect. The contention of Sri S. G. M. Rizvi that interest could not have been

charged on the amount of subsidy too has no merit as the interest is calculated on the total sum determined as either tentative cost or the final cost and the instalments determined accordingly. If Sri Rizvi and Smt. Anshul Agrawal have paid more than the finally determined cost it is on account of interest and other counts. By no stretch of reasoning the rate of interest can be said to be unreasonable particularly when the rate of interest was disclosed at the very outset and such disclosure and clear terms and conditions of allotment of flats, handing over possession and registration of sale deed provided a clear option to all the applicants whether to accept these terms or not. Once the allotment is accepted with the terms and conditions of the brochure and also those clearly stipulated in the allotment letters, the allottees have no option to resile from them and plead that the rate of interest was unreasonable or the cost was excessive or that some hidden cost like subsidy had been illegally realized.

Mr. Rizvi has also submitted about the "distributive justice" and contended that levying of burden to any extent upon the allottees with a view to confer benefits upon the other strata of the society will tantamount to create inequalities and it will ultimately result in an injustice for the allottees who are required to pay the subsidy amount. The principle of 'distributive justice' is not at all attracted to the facts and circumstances of these cases in hand as not a large number of society is affected by the relevant scheme of the New Okhla Industrial Development Authority. Moreover, the allotees were not forced to come forward and purchase the flats; rather a scheme was notified for general public and everyone who was attracted had the liberty of applying for flat or not. There was no compulsion of any kind and the terms and conditions of the allotment including price of the flats were absolutely clear. We, therefore, do not consider inclusion of subsidy in the cost of the flats to be as unconscionable transaction. Mr. Rizvi's contention, therefore is turned down.

Section-55 of the Indian Contract Act in so far as the delivery time was concerned will not come into play as time was never the essence of

contract. Mr. S. G. M. Rizvi has referred to the admitted plea of delay on the part of the Authority in handing over possession of the flats but since there was plausible justification for the delay in delivery of possession as discussed above and there was no privity of contract in the specific context of the time being essence of the delivery period, his contention to penalize the Authority is not sustainable. The principle for "the essence of contract" is that both the parties to an agreement must specifically agree for the time being essence of the contract and all its implications are also required to be specifically recited in the agreement deed. In other words, the parties must also agree to the resulting failures of the parties if they are not in a position to perform their part of obligation in time. For instance if a Development Authority to an agreement fails to handover possession within the stipulated time, the failure must attain to the penalty as may be agreed. It is the common feature of such contract that if the purchaser fails to take delivery in time or get the registered deed within the time prescribed, the advance money he pays is generally forfeited. On the other hand, if the builder infringes the requisite condition of performance in time, it has to pay a specific penalty. To be explicit it may be observed that the terms and conditions of the agreement regarding time being the essence of contract must be clearly and candidly postulated without there being an ambiguity. Mr. Rizvi has not been able to produce before us any such terms and conditions. He could not even establish his plea of the time being essence of the agreement between the New Okhla Industrial Development Authority and the purchaser of the flats of his category. We, therefore, do not find any merit in what has been contended by Mr. Rizvi.

The next argument pressed into service on behalf of the two appellants is that the double liability of the interest, realized from them, has been imposed upon them by the Authority which is contrary to the norms of the calculating price of a flat. The first limb of this argument pertains to the calculation of interest on the tentative cost of the flat and again the penal interest which is realized from a defaulter. In this context, it may be observed that the price of a flat is assessed on the basis of the

future cost of construction and since all aspects of the matter are kept in mind at that juncture, the Authority borrowing huge amounts as loan for enabling it to raise constructions, inclusion of interest which it pays seems to be justifiable. The allottee if does not pay the amount of instalments or in one lump-sum as might have been agreed between the parties, his liability to pay penal interest is there as recited in the brochure of a particular scheme as also in the allotment letter. If provision for the consequential payment of penal interest is not made, a Development Authority may irreparably suffer as the allottees may commit prolonged default resulting in the increased liability of such Authority for repayment of its own loan. Therefore, there is nothing wrong for calculating and including the reasonable interest in the tentative cost of the flats and also make a provision for penal interest in case of default by the allottees, in payment of their instalments.

The other aspect of the argument regarding realization of interest by the Authority as highlighted by Mr. Rizvi is that the interest should not be charged on the amount of subsidy or other charges except the price of the built structure. This argument too is devoid of merit for the simple reason that the amount of subsidy levied upon the allottees has been included in the total cost of the construction and not that all heads were individually divided so as to keep the subsidy amount apart. The argument seems to be fallacious and not worth consideration.

The appellants in the passing also referred to the poor quality of construction and pointed out certain shortcomings as were noticeable at the time of taking possession of the flats on 29-03-2000. As a matter of fact, the defects were pointed out more than one and half years after the possession had been taken. Such a belated complaint could not be taken notice of. If there were any defects they should have been pointed out at the time of taking possession and also mentioned in the deed of possession and in that eventuality, the allottees must have accepted delivery of possession under protest subject to removal of such defects but neither the defects were pointed out at that juncture; nor the protest was lodged. In the alternative, the allottees had the opportunity to inform

the Authority of such defects within a reasonable time from the date of delivery of possession, under a legal notice. We, therefore, do not consider it worthwhile to attach any significance to the aforesaid plea.

Having regard to all what has been discussed above, we do not find any merit in the instant appeals and accordingly we hold that both deserve to be dismissed, however, with no order as to costs.

In the result both the appeals stand dismissed. The impugned judgment is hereby affirmed.

This judgment shall be placed on the record of Appeal No. 744/2008 with its copy to be laid on the record of Appeal No.745/2008.

(JUSTICE BHANWAR SINGH)
PRESIDENT

(SMT. RACHNA)
MEMBER