NON-REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 6439 OF 2021

Sudha & Ors. **...Appellants**

v.

Jaiprakash Associates Limited **...Respondent**

J U D G M E N T

ABHAY S. OKA, J.

FACTUAL MATRIX

1. This is a statutory appeal under Section 23 of the Consumer Protection Act, 1986. This appeal takes exception to the final judgment and order dated 29th April 2021 of the National Consumer Disputes Redressal Commission, New Delhi (for short, 'the National Commission'). The appellants are the complainants before the National Commission. By the impugned judgment and order, the National Commission has dismissed their complaint.

2. It is necessary to set out relevant factual aspects which are necessary for the disposal of the appeal.

3. The third appellant is a member of the Bar. On 27th January 2013, the third appellant booked a two-bedroom flat in the project of the respondent-Company, called Garden Isles. According to the case of the appellants, the construction of the flat was inordinately delayed. When the appellants visited the office of the respondent-Company in January 2015, the officials of the respondent-Company suggested to the appellants that the booking of the said flat can be cancelled and the appellants can book an apartment in Imperial Court – Tower-1 in the project known as Jaypee Greens, NOIDA. The officials of the respondent-Company suggested to the appellants that the amount of consideration paid by the third appellant while booking the earlier flat can be adjusted towards the consideration of a flat in Jaypee Greens. The appellants accepted the suggestion. Accordingly, an allotment letter dated 11th July 2015 was issued by the respondent-Company in the name of the appellants in respect of Unit Reference No.IMP0128A4, having an approximate covered area of 3072.48 sq. ft. (for short, 'the said apartment'). The agreed consideration was Rs.2,77,91,313/- (Rupees two crore seventy-seven lakh ninety-one thousand

three hundred and thirteen). According to the case of the appellants, the possession of the said apartment was agreed to be handed over to them within a period of 24 months from the date of the allotment letter.

4. The case of the appellants is that they were granted a loan by ICICI Bank (for short, 'the said Bank'). Apart from the other documents, the said Bank executed Quadripartite Agreement dated 9th December 2016. The appellants, the respondent-Company, Jaypee Infratech Limited (as the confirming party), and the said Bank were parties to the said agreement. The agreement records that the loan amount shall be disbursed by the said Bank directly to the respondent-Company, which will be adjusted towards the consideration payable in respect of the said apartment. Accordingly, the consideration earlier paid by the third appellant in respect of the apartment booked in the Garden Isles project was transferred towards the consideration payable in respect of the said apartment to the respondent-Company. The respondent-Company addressed a letter to the appellants on 24th October 2016 stating therein that the said apartment

was ready for pre-possession formalities and for handing over the possession to the appellants. In the said letter, the respondent-Company mentioned that the completion certificate dated 20th July 2016 has been issued by the concerned authority. The letter recorded that though the area of the apartment mentioned in the allotment letter was 3724.67 sq. ft of super area, in fact, the area of the said apartment has been increased by 3.98 sq. ft of super area. By the said letter, the appellants were called upon to deposit a sum of Rs.1,82,26,309.30. The respondent-Company, by the said letter, called upon the appellants to make the payment of the said amount on or before 23rd November 2016 and complete all the pre-possession formalities, which would enable the respondent-Company to carry out final finishing work and to handover possession of the said apartment within a period of 45 days from the date of making the payment. Annexure-A to the said letter incorporated details of the pre-possession formalities required to be completed by the appellants for the execution of the sub-lease deed in respect of the said apartment. Annexure-B to the said letter contained the description of four car parking slots reserved

for the appellants. Annexure-B also recorded that certain work involving final finishing has not been done to avoid any damage to the flat before the possession thereof was handed over to the appellants. According to the case of the appellants, though the said letter offered possession of the said apartment to the appellants, in fact, a lot of work was incomplete. According to the case of the appellants, on 31st December 2016, they paid a balance consideration of approximately Rs.1.80 crores to the respondent-Company. Out of the said amount, a sum of Rs.89,20,000/- was paid by the appellants by taking a loan from the said Bank. The appellants have claimed that to expedite the process of completion, they accepted the suggestion of the respondent-Company of taking a discount of Rs.4,72,900/- against giving up facilities of air-conditioners, wardrobes, modular kitchen and jacuzzi agreed to be provided in the said apartment. The appellants have relied upon correspondence made by them with the respondent-Company from time to time for informing that the condition of the said apartment was pathetic. The appellants called upon the respondent-Company to specify the date and time at which, the possession of the said

apartment will be handed over to them after rectifying all the defects. The appellants have stated that though the said apartment was not ready in July 2017, they obtained e-stamp paper by depositing stamp duty of Rs.13,67,700/-. According to the case of the appellants, even thereafter, the work in the said apartment was not completed, notwithstanding the assurance given in writing by the respondent-Company to keep the flat ready by the second week of August 2017. The third appellant addressed a letter through e-mail dated 21st September 2017 to the respondent-Company stating that a consumer complaint has already been filed by them against the respondent-Company before the National Commission. By the said e-mail, the appellants called upon the respondent-Company to refund the entire amount paid by them towards consideration of the said apartment. During the pendency of the complaint filed by the appellants, by the letter dated 23rd November 2017 addressed to the third appellant, the respondent-Company informed that the said apartment was ready for the delivery of possession and that the possession will be handed over on the date and time as intimated by the appellants.

5. It is necessary to make a brief reference to the complaint filed by the appellants before the National Commission on which, the impugned judgment has been passed. The basic contention raised by the appellants was that the possession was to be handed over to them within 24 months from 11th July 2015 and though the entire consideration was paid by the appellants to the respondent-Company in December 2016, even by September 2017, the said apartment was not at all ready for possession. As the entire payment was made on 31st December 2016, within 45 days from the said date, the possession of the said apartment ought to have been handed over to the appellants. But, the work inside the apartment was not completed even till September 2017. The complaint was filed by the appellants alleging deficiency in service rendered by the respondent-Company. The condition of the said apartment as of 6th September 2017 was also set out in the complaint which, according to the appellants, showed that a lot of work was still not carried out. The first prayer in the complaint was for refund of the entire consideration amount paid by the appellants in respect of the said apartment as well as the other miscellaneous charges

with interest thereon at the rate of 18% per annum on the entire amount till the date of payment of refund. Another prayer was made to refund the sum of Rs.15 lakhs paid by the appellants by way of late payment charges to the respondent-Company as well as the monthly installments paid by the appellants to the said Bank. The appellants prayed for grant of compensation on account of the mental agony caused to them due to the failure of the respondent-Company in rendering service.

6. The respondent-Company contested the complaint. The respondent-Company pointed out that immediately after obtaining the completion certificate, on 24th October 2016, the appellants were called upon to complete pre-possession formalities and to pay the entire balance amount. The contention raised by the respondent-Company was that the entire consideration was not paid by the appellants within 45 days of the receipt of the letter dated 24th October 2016 and the payment of the entire amount of the balance consideration was made only in May 2017. One of the contentions raised is that as per Clause 9 of the general

terms and conditions referred to in the allotment letter and signed and executed by the appellants, the appellants could claim a refund only if the possession was not handed over within three months from the completion of the period of 24 months from the date of the allotment letter. It is contended that even before the expiry of the said grace period of three months, the complaint was filed claiming the refund.

7. The National Commission by the impugned judgment and order held that refund could have been sought by the appellants only if possession was not handed over on or before 11th October 2017, but the appellants rushed to the National Commission and filed the complaint on 21st September 2017. The National Commission referred to its interim order dated 17th October 2017 by which the appellants were called upon to file a report of a qualified architect specifying defects/ deficiencies on account of which, they were not willing to take possession of the said apartment. The National Commission observed that compliance with the said directions was not made by the appellants. The National Commission observed that there was

no valid reason for the appellants not to accept the possession of the said apartment and therefore, there was no merit in the complaint filed by the appellants.

FAILED ATTEMPT TO SETTLE THE DISPUTE

8. We may note here that we had called upon the parties to explore a possibility of amicable settlement. The parties could not arrive at an amicable settlement. However, during the course of submissions, it was accepted that the appellants had brought a purchaser who was willing to purchase the said apartment at the cost of Rs.2.85 crores. The learned senior counsel appearing for the respondent-Company stated that considering the fact that the third appellant is a member of the Bar, the respondent-Company is prepared to give up a sum of approximately Rs.30 lakhs still payable by the appellants and transfer the said apartment to the purchaser brought by the appellants. In the alternative, the learned senior counsel appearing for the respondent-Company stated that by giving up the claim to receive the amount of approximately Rs.30 lakhs payable by the appellants, the

respondent-Company is willing to put the appellants in possession of the said apartment which is ready for possession. However, this offer was not accepted by the appellants who are still insisting on getting refund of the amount paid by them with interest. Therefore, the parties could not arrive at an amicable settlement.

SUBMISSIONS ON BEHALF OF THE APPELLANTS

9. The third appellant who is an Advocate, has made submissions on behalf of the appellants. He submitted that as there was a gross delay on the part of the respondent-Company in completing the construction of the apartment earlier booked by the third appellant, the appellants had no choice but to accept the offer given by the respondent-Company in respect of the allotment of the said apartment. Relying upon the correspondence made from time to time and photographs placed on record, the third appellant submitted that the entire balance consideration in respect of the said apartment was paid by the appellants by 31st December 2016, and therefore, the respondent-Company was under an obligation to complete the said apartment in all respects

within 45 days from 31st December 2016 and put the appellants in possession thereof. He pointed out that though the appellants repeatedly protested by addressing communications to the respondent-Company that the construction of the apartment was incomplete, no steps were taken by the respondent-Company to complete the work. Moreover, the appellants were forced to pay certain amounts towards social club subscription and the maintenance advance, though no facilities were in existence. He pointed out that after granting enough opportunities to the respondent-Company to complete the work in the apartment, on 21st September 2017, the complaint was filed by the appellants. The third appellant also pointed out that the entire consideration amount paid by the appellants towards the booking of the apartment in Garden Isles was not transferred by the respondent-Company towards the consideration of the said apartment.

10. The third appellant appearing in person pointed out that the conduct of the respondent-Company is fraudulent as without furnishing even a copy of the standard terms and

conditions of the allotment, signatures of the appellants were taken on the last page of the terms and conditions. He submitted that therefore, Clause 9.5(a) in the standard terms and conditions will not be binding on the appellants. Hence, the argument of the respondent-Company that the grace period of three months was available to it after the expiry of 24 months from the date of the letter of allotment, is without any foundation and ought not to have been accepted by the National Commission. The third appellant also pointed out the terms and conditions of the Quadripartite Agreement dated 9th December 2016 to which the appellants, the said Bank and the respondent-Company were parties. He pointed out that as per Clause 17(d), the respondent-Company agreed that in the event of termination of provisional allotment for any reason, the said company was under an obligation to pay the consideration received by it directly to the said Bank after retaining an amount up to 10% of the total sale consideration. He would, therefore, submit that once termination is made by the appellants by demanding a refund of the consideration, the respondent-Company is bound by its obligation to immediately refund at least 90% of the

consideration amount received from the appellants. The third appellant appearing in person, pointed out certain documents placed on record to show that the first appellant is suffering from liver disease and the first appellant's husband, who is also a member of the Bar, is suffering from chronic liver disease and has been recently operated upon for removal of a cancerous tumor from his liver. The third appellant pointed out that the appellants are entitled to the refund of the entire consideration and other charges paid in respect of the said apartment as well as in respect of the apartment earlier agreed to be allotted to the third appellant with interest at the rate of 12% per annum till the date of realisation. The third appellant relied upon a decision of this Court in the case of ***Bangalore Development Authority v. Syndicate Bank*[1]*.** The third appellant also relied upon another decision of this Court in the case of ***United India Insurance Company Limited v. Antique Art Exports Private Limited*[2]*.**

SUBMISSIONS OF THE RESPONDENT

1 2007 (6) SCC 711
2 2019 (5) SCC 362

11. The learned senior counsel appearing for the respondent-Company firstly invited our attention to the interim order of the National Commission dated 17th October 2017 by which, the appellants were directed to file a report of a qualified architect specifying the defects/deficiencies on account of which they were not willing to accept the possession of the said apartment. He stated that till the disposal of the complaint, the appellants never complied with the interim order. The learned senior counsel pointed out that the allotment letter refers to the standard terms and conditions of the allotment. He submitted that the appellants never disputed the terms and conditions referred to in the letter of allotment dated 11th July 2016, which specifically refers to the standard terms and conditions of allotment. He pointed out that though a reference to the said general terms and conditions appears in several documents, the appellants never made any grievance that a copy of the same was not provided to them. He submitted that there is no dispute that the signatures of the appellants appear on the last page of the said standard terms and conditions and that it is not the case pleaded before the National Commission by the appellants

that their signatures on the last page were taken without giving them copies of the original pages. He submitted that Clause 9.5 (a) specifically provides that the allottee shall be entitled to cancel the allotment only on default of the respondent-Company to deliver possession of the said apartment within 27 months from the date of the allotment letter. He submitted that only after completion of 27 months from 11th July 2016, the appellants could have claimed a refund. He submitted that the said period expired on 10th October 2017. However, even before the expiry of the period of 27 months, the appellants demanded a refund of the consideration paid by them and filed the complaint with the National Commission on 21st September 2017. The learned senior counsel also pointed out that by e-mail dated 23rd November 2017, possession of the said apartment was offered to the appellants. He submitted that there is absolutely no deficiency in service rendered by the respondent-Company. He stated that it is only because of the fact that the husband of the first appellant is ill and that he is a member of the Bar, that the offer given by the respondent-Company which is noted in paragraph 8 above, stands, though there is no

settlement. He would, therefore, submit that no fault can be found with the impugned judgment.

CONSIDERATION OF SUBMISSIONS

12. We have carefully considered the submissions and perused the documents placed on record along with additional documents. The question before us is whether there was any deficiency in the service rendered by the respondent-Company. The letter of allotment provides that the possession of the said apartment shall be given to the appellants within 24 months from the date of the allotment letter. The allotment letter of 11th July 2015 specifically refers to the standard terms and conditions. The relevant part of the letter of allotment reads thus.:

> "**The Standard Terms and Conditions including the Undertaking(s) given by you forms part of this allotment.** This allotment letter cancels and supercedes all previous written and oral understandings in respect of the allotment of the said Unit done by this letter."
>
> (emphasis added)

13. We may note here that the appellants have relied upon the terms and conditions of the Quadripartite Agreement to

which the appellants and the respondent-Company are parties. Clause 22 of the said agreement specifically refers to the standard terms and conditions of the allotment. It is pertinent to note that Clause 22 of the said agreement provides that notwithstanding anything contained in the Quadripartite Agreement, the appellants shall continue to be liable for the payment of dues to the respondent-Company under the standard terms and conditions of the allotment. The appellants have made a prolonged correspondence with the respondent-Company. In none of the letters/e-mails addressed by the appellants, a grievance has been made that a copy of the said standard terms and conditions was not provided to the appellants. Moreover, it is not the case made out either in the correspondence or in the complaint that the signatures of the appellants were obtained on the last page of the standard terms and conditions without providing a copy thereof to them. Thus, it is not open for the appellants to urge that the they are not bound by the standard terms and conditions.

14. The letter of allotment dated 11th July 2015 records that possession of the said apartment is expected to be offered to the appellants within a period of 24 months. Clause 9.5 (a) of the standard terms and conditions reads thus.:

> "**9.5(a) The Applicants/Allottee shall be entitled to cancel the Allotment only on default of the Company to deliver possession of the Said Premises within the stipulated period as mentioned hereinabove and within the further period of three months thereafter.** Upon expiry of stipulated period and upon the request of the Applicant/Allottee, the Company shall refund the amount (a) had been received from the Applicant/Allottee along with simple interest of the rate of 12% per annum (subject to deduction of tax as applicable)."
>
> (emphasis added)

Clause 7.1 of the standard terms and conditions provides that the possession will be handed over within the period described in the letter of allotment. The said period is of 24 months from the date of the allotment letter. However, a grace period of three months has been made available to the respondent-Company. If within this grace period of three months, possession is not handed over, the appellants were entitled to seek a refund. Thus, as per Clause 9.5(a), the appellants were

entitled to seek a refund of the consideration paid provided the possession of the said apartment was not offered within the said period of 27 months from the date of the letter of allotment.

15. Thus, as per the terms of the letter of allotment, the respondent-Company was under an obligation to complete the construction of the apartment and offer possession thereof, on or before 10th July 2017. In view of Clause 9.5(a) of the standard terms and conditions, the appellants were entitled to seek a refund only if the possession of the said apartment was not handed over within 3 months from 11th July 2017. It is in the context of the standard terms and conditions read with the terms and conditions in the allotment letter that the controversy will have to be resolved.

16. The appellants have not disputed that the competent authority had granted completion certificate to the tower in question on 20th July 2016. A copy of the said document is placed on record by the respondent-Company along with application for filing additional documents. The letter dated 24th October 2016 addressed by the respondent-Company to

the appellants records that the said apartment was ready for pre-possession formalities and for handing over possession. Therefore, the appellants were called upon to complete pre-possession formalities as listed in Annexure-A to the said letter. One of the pre-possession formalities incorporated in Annexure-A was a submission by the appellants of a non-judicial e-stamp paper of the amount equivalent to 5% of the value specified therein. The appellants were also required to pay certain amounts towards the cost of electricity meter, gas pipeline connection, and registration expenses. Annexure-B to the letter dated 24th October 2016 incorporates the description of four car parking slots allotted to the appellants. Annexure-B also records that certain works specified therein, such as final coat of painting/polish, fixing of C.P. fittings and chinaware hardware fittings/ equipment, fixing of wooden flooring, wardrobe, and modular kitchen has been withheld to avoid damage before actual possession is handed over. By the said letter dated 24th October 2016, the appellants were called upon to pay the balance amount of Rs.1,82,26,309.30, the breakup of which was set out in the said letter. The appellants

were called upon to make the payment on or before 23rd November 2016. The said letter records thus:

> "We would request you to make the above payment, within 30 days i.e. before 23.11.2016 (due date), and complete the pre-possession documentation to enable us to complete the final finishing works, if any, and to hand over the above apartment to you within 45 days of the aforesaid payment."

17. Thus, the said letter was essentially addressed to the appellants calling upon them to complete pre-possession formalities by 23rd November 2016 which included payment of the aforesaid amount. According to the case of the appellants, they paid an amount of Rs.1.80 crores on 31st December 2016. Apart from the fact that the appellants failed to pay the entire amount specified in the letter dated 24th October 2016 on or before 23 November 2016, the statement of accounts at Annexure-A-18 to the appeal shows that the last payment was made on 2nd May 2017. Thus, the appellants themselves committed default in payment of the balance amount payable by them. Moreover, as stated in Annexure-A, one of the pre-possession formalities included the procurement of e-stamp duty of Rs.13,67,700/- on or before 23rd November 2016. But,

Annexure A-23, which is the e-mail addressed by the third appellant to the respondent-Company shows that the stamp duty was paid as late as on 3rd July 2017. Though the respondent-Company had time available till 10th October 2017 (including the grace period of 3 months) to complete the said apartment in all respects and offer possession to the appellants, by e-mail dated 17th July 2017, the respondent-Company informed the appellants that the said apartment will be ready by the second week of August 2017. In view of Clause 9.5(a) of the standard terms and conditions, the appellants could have demanded the refund of the amount only if the possession of the said apartment was not handed over to them on or before 10th October 2017. However, without waiting till 10th October 2017, by e-mail communication dated 21st September 2017, the third appellant called upon the respondent-Company to process the refund of the amount. In fact, in the same letter, it was mentioned that the complaint subject matter of this appeal was already filed on the same day before the National Commission. The appellants were not entitled to claim the refund till 10th October 2017. Hence, the complaint was premature. As stated earlier, the appellants did

not complete the pre-possession formalities set out in the letter dated 24th October 2016 and its Annexure-A within the time stipulated. Moreover, during the pendency of the complaint before the National Commission, by e-mail dated 23rd November 2017, the appellants were called upon to take possession of the said apartment on any day between Monday and Saturday, after intimating the time and date.

18. Reliance was placed on the obligation of the respondent incorporated in Clause 17(d) of the Quadripartite Agreement to refund 90% of the amount paid by the appellants to the said Bank. However, Clause 22 of the same agreement provides that notwithstanding anything contained in the said Agreement, the appellants shall continue to be liable for payment of their dues to the respondent under the standard terms and conditions.

19. At this stage, we may note the interim order dated 17th October 2017 passed by the Tribunal, which read thus:

> "The learned counsel for the complainants states on instructions that the possession of the flat offered vide letter dated 24.12.2016 was not accepted by the complainants for several reasons including the defects in the flat offered to them.

> The complainants are directed to file report from a qualified architect, specifying the defects/ deficiencies on account of which they are not willing to take possession of the flat offered to them. In the meanwhile, the complaint is admitted, subject to just exceptions. Issue notice in terms of Section 13(1) of the Consumer Protection Act alongwith a copy of the complaint to the OP for 13.02.2018 alongwith notice of IA No.16392 of 2017 directing it to give its version of the case within a period of 30 days from the date of receipt of the notice."

The appellants have not shown compliance with the said order. The failure of the appellants to do so is very relevant in the context of their allegation that the work in the said flat was not completed. Therefore, adverse inference can be drawn against the appellants. Hence, the appellants failed to substantiate the grounds pleaded by them for not taking possession.

20. At this stage, we may consider here whether there was any defect/deficiency in the service rendered by the respondent-Company. Words 'defect' and 'deficiency' have been defined under Clauses (f) and (g) of Section 2 of the Consumer Protection Act, 1986, which read thus.:

> **"2.(f)**"defect" means any fault, imperfection or shortcoming in the quality, quantity,

> potency, purity or standard which is required to be maintained by or under any law for the time being in force or 2[under any contract, express or implied or] as is claimed by the trader in any manner whatsoever in relation to any goods;
>
> **(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;"

21. In this case, we are concerned with the alleged deficiency in service rendered by the respondent-Company. Till the date on which the complaint was filed by the appellants, we do not find that there was any fault, shortcoming or inadequacy in the quality, nature and manner of the performance on the terms and conditions on which allotment of the said apartment was offered to the appellants. Therefore, the appellants were not entitled to claim the refund of the consideration paid by them in respect of the said apartment. Hence, it is not possible to find fault with the reasons recorded by the National Commission in the impugned judgment and

order. Accordingly, there is no merit in this appeal and the same is dismissed.

22. However, in view of the solemn statement made by the learned senior counsel appearing on behalf of the respondent-Company, we grant time of two months to the appellants to bring a prospective buyer interested in acquiring the said apartment along with the right to use four reserved car parking slots as mentioned in the letter dated 24th October 2016. Within the said period of two months, the appellants shall submit to the respondent – Company, the letter of offer signed by the prospective buyer. If such a buyer is brought by the appellants within a period of two months from today, the respondent-Company shall transfer the said apartment to the appellants by completing all formalities within a period of one month from the date of the offer letter. In such an event, the entire amount liable to be paid by the appellants to the said Bank shall be paid over by the respondent-Company immediately on receipt of the consideration amount from the purchaser. The balance amount, if any, shall be paid over by the respondent-Company to the appellants. If the appellants

are not able to procure a buyer for the said apartment within a period of two months from today, it will be open for the appellants to take possession of the said apartment together with the right to use four car parking slots as mentioned in the letter dated 24th October 2016 within a period of three months from today by giving advance intimation of at least seven days to the respondent-Company. Needless to add that as the entire consideration in respect of the said apartment has been paid by the appellants, the respondent-Company shall not be entitled to demand any amount from the appellants as a condition for handing over the possession or for transferring the same to the purchaser brought by the appellants, as the case may be. On failure of the appellants to take possession of the aforesaid apartment within 3 months from today, the appellants will have no claim over the said apartment. In such case, it will be open to the respondent-Company to alienate the said apartment.

……………………….J.
(SURYA KANT)

……………………….J.
(ABHAY S. OKA)

New Delhi;
September 16, 2022.