STATE CONSUMER DISPUTES REDRESSAL COMMISSION

WEST BENGAL

CONSUMER COMPLAINT NO. SC/19/CC/314/2017

Sri Saibal Kumar Bose .....Complainant(s)
PRESENT ADDRESS - S/o Lt. Sarat Kumar Bose, Swarnatara Apartment, Flat no. A, P-62, Parnasree Pally, P.O. & P.S. - Parnasree, Kolkata -700 060.,WEST BENGAL.

Versus

Sri Tapas Ghosh .....Opposite Party(s)
PRESENT ADDRESS - S/o Sri Gopal Chandra Ghosh, Swarnatara Apartment, Flat no. D, P-62, Parnasree Pally, P.O. & P.S. - Parnasree, Kolkata -700 060, Prop., M/s. T.G. Enterprise.,WEST BENGAL.

BEFORE:

HON'BLE MRS. SAMIKSHA BHATTACHARYA , PRESIDING MEMBER

HON'BLE MR. ANANDA KUMAR TIWARI , JUDICIAL MEMBER

FOR THE COMPLAINANT: Mr. Suvendu Das (Advocate)

FOR THE OPPOSITE PARTY: Trambak Ghosh, Jamin Ranjan Ghosh (Advocate)

DATED: 07/10/2026

ORDER

FINAL ORDER/JUDGMENT

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Date of Filing	Date of Admission	Date of Judgment
28/04/2017	16/05/2017	07/10/2026

HON'BLE ANANDA KUMAR TIWARI

(JUDICIAL MEMBER)

The complainant Saibal Kumar Bose filed this complaint against Tapas Ghosh, the Opposite party herein being the proprietor of M/s. T.G. Enterprise, a proprietorship firm stating that the

complainant is one of the co-owners of the land measuring about 2 Cottah 12 Chittaks in respect of half share at premises no. 23 Sarat Chatterjee Road, P.O. and P.S. Parnasree, Kolkata-700060 and the OP is the developer. It is stated that the complainant and his brother Sanjay Kumar Bose being co-owner of the said land executed a registered power of attorney in favour of the OP and by virtue of said power of attorney the OP obtained sanction of building plan from KMC bearing plan no. 2012140682 dt. 19/02/2013 and a development agreement was also entered and executed in between the complainant, his brother and the OP.

According to the complainant in the development agreement it was agreed that the OP shall deliver owner's allocation of the proposed building within 18 months from the date of sanction of the building plan and it was also agreed that the complainant will get one residential self contained flat measuring about 625 sq. ft. of super built up area consisting of 2 bed rooms, one dining, one kitchen, one toilet and one balcony on the 1st floor south east facing and another flat on the ground floor having super built up area of 375 sq. ft. consisting of one bed room, one dining, one kitchen, and one toilet and also one open car parking space in the ground floor as well as Rs. 4,00,000/- as premium.

It is stated that the OP did not construct the building in accordance with the plan sanctioned by the KMC. It is further stated that the OP handed over the physical possession of the portion of the allotted area of the said building to the complainant on 03/02/2015 and also handed over the letter of possession dt. 20/02/2015 to the son of the complainant on 28/02/2016, which bears no signature of the OP/developer. Upon receipt of the said possession letter the complainant wrote letters to the OP and lastly on 31/08/2016 the complainant forwarded one demand notice to the OP but the OP failed to issue any valid possession letter to the complainant.

According to the complainant after obtaining delivery of physical possession ofowner's allocation, the complainant engaged one firm having authority for taking measurement and Mr Jayanta Nath Chowdhury, LBS after taking measurement of the flat and the car parking area certified that the ground floor flat is of 260 sq.ft super built area and 1st floor flat is 592 sq. ft. Super built up area. It is further stated that the OP also delivered watchman room and toilet to the complainant of the area, which is the common portion of all the flat owners of the building and the OP is also guilty of unfair trade practice. It is further case of the complainant that the OP delivered less area and also neglected to obtain completion certificate from the KMC and failed to issue valid possession certificate to the complainant and as such is also guilty of deficiency of service.

The complainant stated that complainant is legally entitled to get the flat as per the terms of the agreement and the cause of action for this case first arose on 03/02/2015 when the possession of the owners allocation was handed over to the complainant and it is continuing. Contending the above and other facts as stated in the petition of complaint, the complainant prayed for an order directing the OPs to construct flat measuring 375 sq. ft. of super built area in the ground floor of the said building apart from the watchman room and toilet after obtaining revised sanctioned plan from KMC, to obtain completion certificate from the KMC, return all papers and documents original lying with the OP being certificate of probate, death certificate of the parents of the complainant, original building plan

etc. as well as compensation for delivery of less area of the flat on the 1st floor on the said building and litigation cost.

After filing of the complaint notice was issued to the OP, who appeared and filed W.V and subsequently the complainant filed evidence as well as replied to the questionnaire raised by the OP. The OP also filed evidence and replied to the questionnaire filed by the complainant and both the parties filed BNA.

Subsequently, it appears that the complainant filed an interlocutory application praying for appointment of an engineer commissioner and after hearing both sides the application was allowed by this commission and Mr. K.S. Bhatia,Ld. Engineer Commissioner was appointed to submit his report after commission work. The record further reflects that the original complainant expired and as such in his place his legal heirs and successors being his wife Smt. Bijoli Bose, his son Tanajit Bose and daughter Smt. Jayati Bose were substituted.

In the written version filed by OP it is stated that the complaint is not maintainable in law and the complainant is not a consumer. It is stated that the developer agreement was executed in between the complainant, his brother and OP. It is further stated that the possession letter which was handed over to the son of the complainant was only for verification and at any point of time the OP can provide the possession letter to the complainant. It is stated that the subject flat was built in super built up area and the sq. ft of the stair case and varandah are also included with the flat. According to the OP there is not deficiency of service or unfair trade practice as alleged and prayed that the complaint be dismissed.

The complainant filed evidence and stated the facts as stated by him in the petition of complaint.

We have also gone through question and answers of the OP and complainant. The complainant stated that he was not delivered the possession of the flats in terms of the development agreement. In reply to the question of the OP that whether there is any document to show that the building was not constructed as per sanctioned plan by KMC, the complainant replied that it is revealed that construction of the building was done by deviation of building plan. The complainant also stated that the sanctioned plan of the building will speak whether KMC building sanction plan was complied or not.

The OP also filed evidence on affidavit as stated above and narrated facts as stated by him in his written version. In his reply to the questionnaire by the complainant the OP stated that he allotted one 700 sq. ft. (approximately)flat on 1st floor, one 280 sq. ft. (approximately) Flat on the ground floor and one garage along with Rs. 4,30,000/- as consideration. In reply to the questionnaire of the complainant regarding possession letter, the OP stated that the said letter was for verification only but the complainant did not return said letter to him and at any time a possession letter can be given. However, we find that in reply to the question of the complainant regarding obtaining of the completion certificate from KMC, the OP stated that “it is absurd question”, though in reply to another

question of the complainant that whether the Opposite party is denying his liability to obtain completion certificate in respect of the said building, the Opposite party replied that the complainant did not co-operate with him and as such he was unable to obtain completion certificate.

We have also gone through the copies of revocation of power of attorneyand development agreement and also gone through the Engineer Commissioner's report.In the development agreement entered and executed in between Sri Saibal Kumar Bose, Sri Sanjay Kumar Bose and opposite party it was agreed in between the parties that the owner no. 1 namely Saibal Kumar Bose shall get one residential flat measuring 625 sq. ft. Super built up area more or less consisting of 2 bedroom, one dining, one toilet, one kitchen and one balcony on the 1st floor South East facing and one flat on the ground floor having super built up area of 375 sq. ft. consisting of one bedroom, one kitchen, one dinning and one toilet and one open car parking space in the ground floor and cash Rs. 4,00,000/-.

It was also agreed in between the parties that the developer shall deliver the owner's allocation within 18 months from the date of sanction of building plan. We have also gone through the schedule B of the development agreement, which describes the portion to be allotted to the complainant. We have also gone through the copy of deed of revocation of the General Power of Attorney executed on 27/02/2013 by way of which the complainant and his brother revoked the General Power of Attorney executed in favour of Tapas Ghosh and one Sukomal Bhattacharya on the grounds contained in said deed and as it appears, on the same day i.e. 27/02/2013 the complainant and his brother executed a development agreement with Tapas Ghosh being the proprietor of T. G. Enterprises for development of the land i.e. opposite party herein.

Going through the Engineer Commissioner's report, we find that the Engineer Commissioner K.S. Bhatia stated that the super built up area depends upon facilities provided for use like community hall, club, gym, lift etc. etc. but in this case none of such facilities were provided except common use of all the occupants in the stair case for going up and down and as such 20% area added to the built up area/covered area to arrive at super built area may be adopted. Considering the same the built up area as per engineer Commissioner is 470 sq. ft. and super built up area is 470+94 = 564 sq. ft.

Engineer Commissioner further stated that the flat has not been constructed in accordance with sanction building plan no. 2012140682 dt. 19/02/2013. Considering the location and size of kitchen, dining/living room/toilet/Verandah has been changed inside the flat. It is further stated that as per sanctioned building plan there is only one covered car parking space in ground floor but 3 covered car parking space has been constructed including additional open area shown in the building plan as well as covered spaces for two wheelers to independent additional two numbers of covered car parking spaces.

As per Engineer Commissioner report it further appears that as per sanctioned building plan no residential flat is to be constructed at ground floor (except one watchman booth and one toilet)however one self-contained flat measuring built up area of 200 sq ft. was constructed on North West corner of the building having one room, one kitchen and one toilet which has been handed over to the complainant. It is further stated that watchman booth and toilet on south west corner of the building

was found locked and it was reported by the residents that this has been converted to one independent residential unit and allotted to one of the flat owners on upper floor but the name of person is not mentioned in the report of Engineer Commissioner.

While dealing with the question that whether the flat constructed on ground floor is in accordance with sanction building plan, the engineer commissioner stated that said flat was constructed beyond the sanction building plan having an area of 200 sq. ft. of built up area much less than 375 sq. ft.Engineer Commissioner in his report stated that the building was not constructed as per sanctioned building plan and major external deviation were absorbed including internal deviations.

Summing up the case, we find that the complainant entered into a development agreement with the opposite party, who after obtaining sanction plan constructed the building but deviations were made in respect of the sanction plan. The complainant was given possession of flats of area lesser then as agreed in first floor and the ground floor. We also find that the opposite party did not give valid possession letter to the complainant and the complainant is entitled to the same.

It appears that the original complainant died on 14/04/2021 and vide order No 20 dated 18/02/2022, the legal heirs and successors of the original complainant being his wife Smt Bijoli Bose, Son Tanajit Bose and daughter Smt Jayati Bose were substituted as complainants and they also filed amended complaint petition.

At the time of argument, Ld Advocate for the Complainants submitted that as the opposite party failed to give possession of the flats of area as per agreement, the opposite party is liable to compensate the complainants by paying valuation of lesser area as provided. It is submitted that in the ground floor of the building possession of 200 Sq Ft is given, which as per engineers commissioner report with 20% super built up area is 240 Sq Ft and as such there is deficit of 135 Sq Ft and in the first floor of flat as per the engineer commissioners report, 470 Sq Ft covered area flat is handed over, which again with 20% super built up area is 564 Sq Ft and as such there is deficit of 111 Sq ft. It is further submitted that the opposite party did not challenge the Engineer Commissioner report.

At the time of hearing of the argument, Ld Advocate for the Opposite party attracted our attention towards the Order No 10 dated 29/04/2019. We find that the opposite party preferred an Interlocutory application vide IA/352/2019 challenging the pecuniary jurisdiction of this Commission. Said IA Application was disposed of with the observation that the point of pecuniary jurisdiction of the case will be considered at the time final hearing of the case.

In view of the same, we have heard Ld Advocates of both parties at length to decide the point rose regarding the pecuniary jurisdiction of this Commission. At the time of hearing Ld Advocate for the opposite party submitted that the annexure A attached with the IA/352/2019 reflects that the market value of the property is Rs 1,92,68,000/- and considering the share of the complainant being 50%, it comes to Rs 96,34,000/- and adding the claim of compensation of Rs 15,00,000/-, it comes to Rs 1,11,34,000/- which exceeds the pecuniary jurisdiction of this Commission. We have perused the valuation report annexed. The valuation of the property is calculated in view of schedule of the

number of apartment, total five in numbers and considering their market value in total, the valuation is assessed as Rs 1,92,68,000/-.

On the other hand Ld Advocate for the complainantssubmitted that the consideration for the development agreement is the land and it is the value of land that should only be taken for deciding the pecuniary jurisdiction of the consumer forum. Ld Advocate for the complainants relied upon decision reported in **2019(2) C.P.J. 47 and 2019 (2) C.P.R 324**. We have gone through the same. In the matter of **Nanda Dulal Mitra and another Vs Ashit Mukherjee @ Keshab Mukherjee, Hon'ble NCDRC** observed that "From the above, it is clear that on the one hand the State Commission has not totally agreed with the valuation given by the opposite party and it has observed that the said report cannot be considered as sacrosanct yet it is profitable to work out an idea as to the valuation in the locality and on the other hand, it has finally decided that on the basis of the arguments of both the learned counsel as well as on the principles laid down by the National Commission in the case of **Ambrish Kumar Shukla and others vs Ferrous Infrastructure Pvt Ltd**(supra), it was not having the required pecuniary jurisdiction. In my view, the State Commission should have clearly calculated the value of the services having been availed by the complainants at the time of signing of the Development agreement either on the basis of the judgment of this Commission in **Ambrish Kumar Shukla and others vs Ferrous Infrastructure Pvt Ltd**(supra)or independently to arrive at some conclusion. However, the same does not seem to have been done. Moreover, the above observation of the State Commission gives an impression that the State Commission has relied upon the answers given by the National Commission in the case of **Ambrish Kumar Shukla and others vs Ferrous Infrastructure Pvt Ltd**(supra)on the issues Nos.2 & 3 which are clearly in respect of the complaints filed under Section 12(1)(c) of the Consumer Protection Act, 1986. Clearly, these answers are not directly relevant in respect of the individual complaints, though the principle remains more or less the same. For individual complaints, the answers given by this Commission for issues No. (iii) and (v) are relevant that the total consideration for purchasing the goods or availing the services is to be considered for deciding the pecuniary jurisdiction. A conjoint reading of all these answers will indicate that the main principle on which these answers are based is that the goods purchased or services availed will be commensurate to the consideration paid or promised to be paid. <u>As it is difficult to find out the value of a Development agreement, it is to be derived from this principle and it will be deemed to be equal to the consideration paid or promised to be paid. In the present case clearly the consideration paid by the complainants was only the value of the land owned by them.</u> Complainants have stated this value along with compensation claimed to be about Rs.63 lacs which is well within the pecuniary jurisdiction of the State Commission".

In view of the submission of both sides with regard to the pecuniary jurisdiction of this Commission, and following the spirit of the judgment relied, we find that this Commission have pecuniary jurisdiction to deal with the case and the case is maintainable.

It is submitted by Ld Advocate for the complainants that as per valuation report obtained, the price of flat per square price comes to Rs 4770/-. We have gone through the valuation report relied by the complainants. It appears that the valuation of 375 Sq Ft Flat as on 17/01/2024 was Rs 17,88,750/-.

If that be so, the valuation of per square feet in the year 2024 comes to Rs 4770/-. The question arose what would be relevant period to calculate the market value of the Flat?

Ld Advocate for the Complainants relied upon a decision of **Hon'ble Supreme Court** reported in **2018 SCC Online SC 292**. In the matter of **M/s. Fortune Infrastructure (Now Known As M/s. Hicon Infrastructure) & Anr, Appellant -Vs- Trevor D'lima & Ors, Respondents, Hon'ble Supreme Court** observed that "It is now well established that the contractual damages are usually awarded to compensate an injured party to a breach of contract for the loss of his bargain. In the case of**Johnsan and Anr. Vs Agnew [1979] 1 All ER 883**, the aforesaid case has clearly held as under-

> *The general principle for the assessment of damages is compensatory, i.e. that the innocent party is to be placed, so far as money can do so, in the same position as if the contract had been performed".*

Hon'ble Supreme Court further observed that "Before we come to the aspect of quantum of compensation, it would be appropriate to look at the settled legal position concerning the same. At the outset, we may note that even under the Consumer Protection Act, 1986, the damages for commercial contracts need to be determined as per the Indian Contract Act.It would be pertinent to note that in common law, claim for damages is the rule and specific performance is an exception, while in civil law front, specific performance has traditionally been a prime remedy for the breach of contract.This Court in **Ghaziabad Development Authority Vs Balbir Singh (2004) 5 SCC 65**has observed that there is no fixed formula for fixing damages in the following manner-

> *8. However, the power and duty to award compensation does not mean that irrespective of facts of the case compensation can be awarded in all matters at a uniform rate of 18% per annum. As seen above, what is being awarded is compensation i.e. a recompense for the loss or injury. It therefore necessarily has to be based on a finding of loss or injury and has to correlate with the amount of loss or injury. Thus, the Forum or the Commission must determine that there has been deficiency in service and/or misfeasance in public office which has resulted in loss or injury. No hard-and-fast rule can be laid down, however, a few examples would be where an allotment is made, price is received/paid but possession is not given within the period set out in the brochure. The Commission/Forum would then need to determine the loss. Loss could be determined on basis of loss of rent which could have been earned if possession was given and the premises let out or if the consumer has had to stay in rented premises then on basis of rent actually paid by him. Along with recompensing the loss the Commission/Forum may also compensate for harassment/injury, both mental and physical. Similarly, compensation can be given if after allotment is made there has been cancellation of scheme without any justifiable cause.*
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> *9. That compensation cannot be uniform and can best be illustrated by considering cases where possession is being directed to be delivered and cases where only monies are directed to be returned. In cases where possession is being directed to be delivered the compensation for harassment will necessarily have to be less because in a way that party is being compensated by*

increase in the value of the property he is getting. But in cases where monies are being simply returned then the party is suffering a loss inasmuch as he had deposited the money in the hope of getting a flat/plot. He is being deprived of that flat/plot. He has been deprived of the benefit of escalation of the price of that flat/plot. Therefore, the compensation in such cases would necessarily have to be higher. ... We clarify that the above are mere examples. They are not exhaustive. The above shows that compensation cannot be the same in all cases irrespective of the type of loss or injury suffered by the consumer.

(emphasis supplied)

Hon'ble Supreme Court observed that "It must be noted that the law is well settled in this regard. Whenever the builder has refused to perform the contract without valid justification, the buyer is entitled for compensation as he has been deprived of price escalation of the flat. Every breach of contract gives rise to an action for damages. Such amount of damages must be proved with reasonable certainty".

Going through the fact and circumstances of the case, in the light of the decision relied, we find that there is deficiency in service on the part of the Opposite party and the complainantsare entitled to get relief. As discussed above, the original complainant was handed over Flat in the ground floor having a deficit area of 135 Sq Feet and in the first Floor deficit area of 111 Square Feet, total deficit area being 246 Sq Ft. In view of the valuation report dated 17/01/2024, we find that valuation of per Square Feet is Rs 4770/- and as such relying in said valuation, we find that the Complainant is entitled to get 4770 X 246 = Rs 11,73,420/- on account of compensation for the deficit area of the Flats. In addition we find that the Complainantsare also entitled to getRs 25,000/- as litigation cost.

Hence it is

ORDERED

That the Complaint Case being No CC/314/2017 is allowed on contest in part against the Opposite party without any order as to costs. Opposite party is directed to pay Rs 11,73,420/- on account of compensation for the deficit area of the flats to the complainants within 45 days of passing of this order. The Opposite party is further directed to pay Rs 25,000/- as litigation cost to the complainants within 45 days of passing of this order.

In case the opposite party fails to pay the amount as above within 45 days of passing of this order, it shall carry interest @ 9 % per annum from the date of order.

The opposite party is further directed to issue valid possession letter to the complainants within 45 days of passing of this order and also to take necessary steps for obtaining completion certificate with the assistance of the complainants.

Applications pending, if any, stands disposed of in terms of the judgment.

In case the Opposite parties fail to comply with the order as above, the complainants will be at liberty to put the order for execution as per law.

Let a copy of the order be supplied to the parties free of cost and the judgment be uploaded in the website.

Due to heavy pendency of cases the complaint could not be disposed of within statutory period.

Dictated and corrected by me

ANANDA KUMAR TIWARI

(JUDICIAL MEMBER)

Typed by me

Kamalika Ganguly

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SAMIKSHA BHATTACHARYA

PRESIDING MEMBER

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ANANDA KUMAR TIWARI

JUDICIAL MEMBER