NATIONAL CONSUMER DISPUTES REDRESSAL COMMISSION

NEW DELHI

FIRST APPEAL NO. NC/FA/2275/2019

(Against the Order dated 17th October 2019 in Complaint No. 413/2015 of the State Consumer Disputes Redressal Commission West bengal)

WITH

NC/IA/1386/2020 (CONDONATION OF DELAY)

SUBHANKAR BHATTACHARJEE & ANR. .....Appellant(s)
PRESENT ADDRESS - S/O. LATE H.N. BHATTACHARJEE, 15A/33,
KHANPUR ROAD , KOLKATA 700 047
MRS SUTANUKA BHATTACHARYAJEE
PRESENT ADDRESS - W/O. SRI SUBHANKAR BHATTACHARYA
15A/33, KHANPUR ROAD , KOLKATA 700 047

Versus

M/S. PROGRESSIVE DEVELOPERS & 2 ORS. .....Respondent(s)
PRESENT ADDRESS - REP BY ITS PARTNERS, 235B/3, NSC BOSE
ROAD POLICE STAQTION NETAJI NAGAR , KOLKATA 700 047
SMT. PRITI SAHA
PRESENT ADDRESS - S/O. SRI DIPAK SAHA 2/1, KHANPUR ROAD
POLICE STATION NETAJI NAGAR , KOLKATA 700 047
SMT. SHIBANI DUTTA
PRESENT ADDRESS - D13, NABAPALLI RAJDANGA , POLICE STATION
KASBA , KOLKATA 700 107

BEFORE:

HON'BLE MR. JUSTICE SUDIP AHLUWALIA , PRESIDING MEMBER

HON'BLE DR. SADHNA SHANKER , MEMBER

FOR THE APPELLANT: --

FOR THE RESPONDENT: -

DATED: 08/09/2026

ORDER

For the Appellants **Mr Sanjay Kumar Ghosh and Ms Rupali S Ghosh, Advocates**

For the Respondents **Ms Narmada, Advocate for R 1 & 2 (VC)**

ORDER

PER JUSTICE SUDIP AHLUWALIA

1. This Appeal has been filed against the Impugned Order dated 17.10.2019 passed by the Ld. State Consumer Disputes Redressal Commission, West Bengal in Complaint Case No. 413 of 2015, vide which, the Complaint filed by the Complainant/Appellant was disposed off with a direction upon the Respondents/Opposite Parties to refund an amount of Rs. 3,80,000/- to the Complainants alongwith interest, as the balance amount of the consideration price for an Apartment earlier agreed to be sole to the Complainants, which could however not be delivered to them.

2. The factual background, in brief, is that the Appellants/Complainants, being in need of a residential accommodation, entered into an Agreement for Sale dated 30.05.2010 with the Respondents for purchase of a self-contained Flat bearing No. 1B on First Floor South-West side in a G+3 storied building, measuring about 1100 sq. ft. super built-up area, along with one car parking space and other common amenities together with undivided impartiable proportionate right over the land lying and situated at premises No. 1/27, Khanpur Road, Distt- South 24 Parganas, Kolkata- 700047, for a total consideration of Rs. 24,40,000/-. It is an admitted position that the Appellants paid a sum of Rs. 9,80,000/- towards part consideration of the said Flat on different dates against proper receipts. As per Clause 4 of the Agreement, the Respondents were under an obligation to complete construction as to fit for occupation on or before 01.02.2011.

3. According to the Appellants, despite repeated requests and readiness on their part to pay the balance consideration of Rs. 14,60,000/-, the Respondents failed and neglected to complete the transaction. It has been stated that the Respondents avoided acceptance of the balance consideration and delayed construction for reasons best known to them. Finding no alternative, the Appellants issued a Legal Notice dated 01.04.2015 calling upon the Respondents to accept the balance consideration and execute the Deed of Conveyance along with delivery of possession. In response, the Respondents, by their letter dated 22.04.2015, expressed their inability to perform the contract on the ground of an injunction Order passed by a Civil Court in respect of the property in question. The Respondents also claimed that they had already refunded a sum of Rs. 6,00,000/- to the Appellants through two cheques of Rs. 3,00,000/- each, and therefore, the Agreement for Sale stood cancelled. The Appellants, by their reply dated 19.05.2015, denied and disputed the contents of the said reply and specifically refuted the allegation of refund. It was asserted that no money was received in connection with the said Agreement for Sale in respect of the said Flat.

4. Thereafter, the Appellants filed their Complaint before the Ld. State Commission seeking, inter alia, a direction upon the Respondents to execute and register the Deed of Conveyance in respect of the Flat in question, deliver possession thereof, hand over Completion Certificate and pay compensation for mental agony, litigation cost and other consequential reliefs.

5. Upon notice, the Respondents entered appearance before the Ld. State Commission and filed their Written Version-cum-Objections. While admitting the execution of the Agreement for Sale and receipt of Rs.9,80,000/- as part consideration, the Respondents contended that due to an injunction Order passed by a competent Civil Court in respect of the property, the construction work had been stalled. It was further contended by the Respondents that sometime in the year 2012, the Appellants expressed their intention not to proceed with the Agreement and

requested for refund of the amount paid. According to the Respondents, in response to such request, a sum of Rs. 6,00,000/- was refunded to the Appellants through two cheques of Rs. 3,00,000/- each. The said cheques were issued from the account of another Company named M/s. United Construction, which were duly encashed by the Appellants. It was thus contended that the Agreement stood cancelled and the Appellants ceased to be 'Consumers'.

6. It is relevant to note that the Complaint was initially dismissed by the State Commission on the ground of maintainability. However, in Appeal, this Commission, vide Order dated 27.03.2019 passed in FA/1291/2016, set aside the said Order and remanded the matter to the State Commission for decision on merits after giving opportunity to both parties to adduce evidence.

7. Pursuant to the remand, both parties led Evidence by way of Affidavits, documents and responses to questionnaires. After hearing the parties, the Ld. State Commission passed the Impugned Order dated 17.10.2019. By the said Order, the Ld. State Commission directed the Respondents to refund a sum of Rs. 3,80,000/- along with simple interest @ 8% p.a. from 28.10.2015 till realisation and also to pay Rs. 10,000/- towards litigation costs. The Ld. State Commission held that the Appellants had received Rs.6,00,000/- through two cheques issued by M/s. United Construction and encashed the same, and that upon receipt of such amount, the Appellants ceased to be 'Consumers' within the meaning of the Act. The Ld. State Commission further observed that the Appellants failed to establish that the said transaction with M/s. United Construction was separate and unrelated to the Agreement for Sale. It was also observed that both parties had contributed to the delay and negligence; however, the Respondents were held liable to refund the balance amount of Rs.3,80,000/- to the Appellants.

8. Aggrieved by the Impugned Order dated 17.10.2019, the Appellants have preferred the present First Appeal before this Commission. The Appellants have

challenged the Impugned Order on various grounds, *inter alia*, contending that the Ld. State Commission erred in law and on facts in treating the alleged payment of Rs.6,00,000/- by M/s. United Construction as refund towards the Agreement for Sale without any documentary evidence or legal basis.

9. Ld. Counsel for the Appellants has contended that the Ld. State Commission has wrongly shifted the burden of proof upon the Appellants, whereas it was incumbent upon the Respondents, who had taken the plea of refund, to prove the same by cogent and reliable evidence. The Appellants have further contended that the Ld. State Commission failed to consider material evidence on record, including the admission of the Respondents during cross-examination regarding the existence of separate financial transactions between the Appellants and M/s. United Construction. The Appellants have also contended that M/s. United Construction was neither a party to the Agreement for Sale nor to the proceedings and no evidence was adduced by the Respondents to establish that it was acting on their behalf. It has been further contended that the Ld. State Commission failed to appreciate that the alleged payment by a third party, without any proof of authorization or linkage, cannot be treated as refund of consideration under the Agreement.

10. It has also been argued that the Complaint was for specific performance of an Agreement, and the Ld. State Commission exceeded its jurisdiction in granting a different relief without assigning any cogent reasons. It has been submitted that the Ld. State Commission committed a grave error in granting refund instead of directing execution of Conveyance and delivery of possession, thereby granting relief beyond the pleadings and contrary to settled principles of law. The Appellants have thus prayed for setting aside of the Impugned Order. Ld. Counsel appearing for the Appellants has reiterated that the Agreement for Sale and payment of Rs. 9,80,000/- are admitted facts and that the Respondents have failed to perform their contractual obligations within the stipulated time. It has been submitted that the alleged payment of Rs. 6,00,000/- was made by a third party, namely M/s. United Construction, which

has no privity of contract with the Appellants in relation to the transaction of the said Flat.

11. It has been further submitted that there is no documentary evidence to establish that M/s. United Construction was acting as an agent or sister concern of the Respondents or that it was authorized to make payment on their behalf. Ld. Counsel has emphasized that the Respondents themselves admitted during cross-examination that there were separate financial transactions between the Appellants and M/s. United Construction, which clearly indicates that the said transaction was independent and unrelated to the Agreement for Sale. It has been contended that the burden of proving refund lies entirely upon the Respondents and, in the absence of any documentary evidence linking the alleged payment to the Agreement, the plea of refund cannot be sustained. It has also been argued that mere encashment of cheques does not amount to cancellation of contract in the absence of any agreement or acknowledgment to that effect.

12. *Per contra*, the contention of the Respondents is that the Appellants did not approach the State Commission with clean hands and had suppressed the material fact of receipt of Rs.6,00,000/- through two cheques of Rs.3,00,000/- each. It has been argued that the Appellants encashed the said cheques, which clearly demonstrates their acceptance of refund and intention to terminate the Agreement.

13. It has also been argued that the relationship between the Respondents and M/s. United Construction is evident from the fact that the proprietor of M/s. United Construction, Mr. Dipak Saha is the husband of the Respondent No. 2, one of the Partners of the Respondent Firm, thereby establishing a nexus between the entities. It has been further contended that the delay of several years in asserting their rights indicates that the Appellants had accepted the refund and abandoned the Agreement. Ld. Counsel has thus submitted that the Ld. State Commission has correctly

appreciated the evidence and passed a well-reasoned Order, which does not call for interference by this Commission.

14. Having carefully perused the entire material on record and the submissions/contentions on behalf of both sides, we now proceed on to put the following observations on record in deciding this Appal.

15. The Appellant No. 1-Mr. Subhankar Bhattacharjee in his detailed Affidavit filed on 1.12.2020 has clearly stated that he had a trustworthy relationship with Mr. Dipak Saha of M/s. United Constructions, who happens to be husband of Mr. Priti Saha, the Partner in Opposite Party No. 1- M/s. Progressive Developers, and Opposite Party/Respondent No. 2 herself. According to the Appellants, on various occasions, they gave financial assistance to Mr. Dipak Saha for his business, against proper receipts and even on 30.5.2024, he alongwith his wife had lent an amount of Rs.4.00 lakhs by cheque in favour of M/s. United Constructions, and that an amount of Rs. 6.00 lakhs returned to him by Mr. Dipak Saha of M/s. United Constructions in the year 2012 was towards refund of a separate financial assistance of that amount given to him by the Appellants in cash. The receipt obtained by the Appellants for the aforesaid loan amount of Rs. 6.00 lakhs was returned to Mr. Dipak Saha when such amount was refunded by him by two cheques, but the separate amount of Rs. 4.00 lakhs paid on 30.5.2010 still remains to be returned, and is not in any manner a part of the consideration money towards price of the disputed Flat, nor has any nexus whatsoever with the independent transaction with M/s. Progressive Developers. The relevant extracts from the statement of the Appellant No. 1 in this regard are set out as below –

> ***"6. I say that I and my wife used to withdraw cash from our accounts for the aforesaid purpose. That the amounts so withdrawn were our hard earned money.***
>
> ***7. That at that point of time I was having trustworthy relation with Mr. Deepak Saha of M/s. United Construction. That out of the aforesaid cash***

in hand that I and my wife withdrew from our bank account over a period of time and was lying with us unused, out of the said amount, I gave, financial assistance amounting to Rs. 6,00,000/- by way of cash to Mr. Deepak Saha of M/s. United Construction for his business on different occasions, against proper receipt. That further I, along with my wife Smt. Sutanuka Bhattacharya, lent an amount of Rs.4,00,000/- by cheque number- 917762 dated 30/05/2004 of United Commercial Bank, Purnodas Road branch to M/s. United Construction, on proper receipt.

8. That an amount of Rs.6,00,000/- was paid back to me by Deepak Saha of M/s United Construction by two cheques of Rs.3,00,000/- each being numbered 830769 dated 09/03/2012 and 830780 dated 11/04/2012, both drawn on Punjab and Sind Bank and the related receipts for the amount of Rs. 6,00,000/- were returned to Mr. Deepak Saha of M/s. United Construction."

16. In view of the aforesaid statement, clearly the Appellants' version of their transactions with the Opposite Parties would appear to be rather straight forward. Their case is that they had paid the partial consideration price of Rs.9,80,000/- to the Opposite Parties in lieu of a Flat which as to be provided to them by the Respondent/Opposite Party No. 1- M/s. Progressive Developers, and that the Flat has still not been provided, even though the Appellants had offered to pay the balance of the consideration price, which was however refused by the Respondents on the pretext that they were unable to do so on account of certain litigation initiated by a Third Party. Further contention of the Appellants is that their dealing with "M/s. United Constructions" was altogether different and had no connection with the Agreement with the Respondent "M/s. Progressive Developers".

17. The same can, however, not be said in relation to the version put forward on behalf of the Respondents. They seek to deny that the payment of Rs.6.00 lakhs to the Appellants by two cheques issued by Mr. Dipak Saha were on account of any independent transactions relating to "M/s. United Constructions" which had never been made a Party in these proceedings. Here, it would be appropriate to consider certain

answers given by the Respondent/Opposite Party No. 2, Mrs. Preeti Saha to certain questions put to her by way of a Questionnaire which was in the nature of her cross examination. The relevant questions and answers in this regard are re-produced as below –

"Ques.17. ***Do you admit that Dipak Saha of United Construction had a separate financial transaction with the Complainants?***

Ans. **Yes**.

Ques.18. ***Do you admit that Dipak Saha on behalf of United Construction received Rs.4,00,000/- by cheque from the Complainants on 30.5.2010…..***
Please peruse the money receipt of Rs. 4,00,000/- dated 30.5.2010 and answer. (copy of receipt enclosed)?

Ans. ***Yes, out of advance amount of Rs. 9,80,000/- the complainant paid Rs. 4,00,000/- on the basis of Money Receipt dated 30/05/2010 issued by United Construction which will prove the United Construction is an ancillary company of Opposite Party No. 1.***

Ques.19. ***It is submitted that Complainants ever approached you for refund of deposited amount of Rs.9,80,000/- paid on different dates by cheque.***

Ans. ***It is false.***

Ques.20. ***Do you have any idea that Complainants have separate financial transaction with one Mr. Dipak Saha amounting to Rs.10,00,000/- paid by Complainants to Dipak Saha?***

Ans. ***No idea.***

Ques.21. ***Do you have any knowledge that for the said financial transaction Mr. Dipak Saha used to issue receipts as to acceptance of the said amount?***

Ans. ***I have no idea.***

Ques.22. ***Do you have any idea that the Complainants are yet to get rest Rs.4,00,000/- for which Complainants have a proper receipt issued by Mr. Dipak Saha in favour of the Complainants dated 30.5.2010?***

Ans. ***I have no idea."***

18. From the aforesaid answers given to the questions raised by the Complainants, we are of the view that their version of the transaction pertaining to two cheques amounting to Rs. 6.00 lakhs paid by Mr. Dipak Saha on behalf of M/s. United Constructions is not entirely credible. This is especially so considering the answer "Yes" given by the Respondent No. 2 to Question No. 17 in which she was asked to

admit that Mr. Dipak Saha of M/s. United Constructions (i.e. her own husband) had separate financial transactions with the Complainants. The answer “Yes” to this question virtually amounts to an admission of the Complainants’ version of the disputed transaction. Even in relation to Question Nos. 20 to 22 as noted above, there was no denial by the Respondent No. 2, who only replied that she had no idea about the relationship and financial transactions which the Complainants had with her own husband Mr. Dipak Saha. Furthermore, in answer to another Question (No. 5) , it was again stated by the said Respondent that in the Sale Agreement executed between the parties, it was not mentioned anywhere that “United Constructions was an ancillary Company” of the Respondent No. 1-M/s. Progressive Developers.

19. In the totality of all the material thus noted by us, we have no hesitation in observing that the version of the Complainants is strongly supported by the balance of probabilities as against the Respondents’ version. Suffice it to say, had the Sale Agreement been actually cancelled as claimed by the Respondents, they would be surely expected to have such development recorded at the relevant stage itself, in returning the amount of Rs.6.00 lakhs by way of two separate cheques, on behalf of M/s. United Constructions, and Mr. Dipak Saha, husband of the Respondent No. 2 ought to have at least delivered such cheques under a forwarding letter to clarify that such payments were not being made by him on behalf of M/s. United Constructions towards discharge of any loans amount from the Complainants, but by way of partial refund of the consideration price paid to Mr. Saha’s wife representing a different legal entity namely Ms. Progressive Developers, which however they failed to do.

20. Interestingly, the Ld. State Commission in the impugned Order had itself observed that it was incumbent upon the Respondents/Opposite Parties to show their *bonafide* by sending the balance amount of Rs. 3,80,000/- to the Complainants once they became aware that an Order of Injunction had been passed by a competent Civil Court in respect of the building in question. We find it strange that in expecting such action from the Opposite Parties which was in any case was not performed by them,

the Ld. State Commission ignored that any person especially a businessman of ordinary prudence would also have been expected to immediately write to the other side about the formal cancellation of the Sale Agreement. To that extent we find the reasoning of the Ld. State Commission in accepting the version of the Opposite Parties over that of the Complainants and by erroneously putting the negative burden of proof upon them to show that the amount of Rs. 6.00 lakhs received by them from a different entity instead of the Opposite Parties was not towards returned of the consideration price. On the contrary, the burden to prove that such amount was actually a partial return of the consideration price made by an entity which was a stranger to the Sale Agreement, lay squarely on the Opposite Parties themselves, which they have failed to discharge.

21. Consequently, the impugned Order of the State Commission is found to be untenable and liable to be set aside since as already noted, the balance of probabilities on the disputed question of facts are overwhelmingly in favour of the Appellants.

22. The Appeal is therefore allowed after setting aside the impugned Order with the following directions –

(i) The Opposite Parties shall deliver lawful possession of the Apartment in question to the Appellants in a period of three months from the date of this Order, after receiving the balance amount of Rs.14,60,000/- from the Appellants;

(ii) If, however, the Apartment in question is not available with the Respondents on account of any civil litigation or any other genuine reason, then they shall deliver lawful possession of an alternative dwelling Unit of similar dimensions in a comparable area of Kolkata;

(iii) In case, even such alternative Apartment is genuinely not available, with the Respondents, then they shall refund the total amount of Rs.9,80,000/- received by them as partial consideration price alongwith interest @ 18%

p.a., which itself was the rate claimed by their side in the Sale Agreement from the Complainants in the event of delay in payment by them. Such interest shall be calculated from each respective date of deposit/payment made by the Appellants to the Respondents;

(iv) Besides, additional litigation costs amounting to Rs. 40,000/- are also awarded to the Appellants.

(v) Compliance of this Order must be completed by the Respondents within 03 months from the date failing which any outstanding dues shall attract interest @ 21% till the date of final realisation.

23. Pending application(s), if any, also stand disposed off as having been rendered infructuous.

.....J
SUDIP AHLUWALIA
PRESIDING MEMBER

.....
DR. SADHNA SHANKER
MEMBER

R SATISH KUMAR/Court-2/A