# NATIONAL CONSUMER DISPUTES REDRESSAL COMMISSION
# NEW DELHI

## FIRST APPEAL NO. 1784 OF 2018

(Against the Order dated 05/09/2018 in Complaint No. 398/2015 of the State Commission West Bengal)

1. CANON PROPERTIES PVT. LTD.
THROUGH ITS AUTHORISED SIGNATORY, MR. SUKDEV SAHA, 5/1A, HUNGARFORD STREET,
KOLKATA
WEST BENGAL 700 017 ...........Appellant(s)

Versus

1. DUM DUM CLUB TOWN RESIDENTS ASSOCIATION
87, DUM DUM ROAD, NEAR HANUMAN MANDIR
KOLKATA 700 074 ...........Respondent(s)

**BEFORE:**

**HON'BLE AVM J. RAJENDRA, AVSM VSM (Retd.),PRESIDING MEMBER**

FOR THE APPELLANT : FOR THE APPELLANT : MR. AMOL CHITALE, MS. SHWETA SINGH PARIHAR AND MR. SARTHAK, ADVOCATES

FOR THE RESPONDENT : FOR THE RESPONDENT : MR. MANOHAR PRATAP, ADVOCATE

**Dated : 07 May 2024**

## ORDER

1. The present First Appeal has been filed under Section 19 of the Consumer Protection Act, 1986 (“the Act”) against the Order dated 05.09.2018 passed by the learned West Bengal State Consumer Disputes Redressal Commission, Kolkata (“the State Commission”), in Consumer Complaint No.398 of 2015 wherein the State Commission partly allowed the complaint.

2. For convenience, the parties will be referred to as per their position in the original complaint before the State Commission. Dum Dum Club Town Residents Associates Club Town Estates will be denoted as the "Complainant’s Association" ("Respondent"), and Cannon Properties Pvt. Ltd., the Promotor Developer of Dum Dum Club Town Estates, will be referred to as the "Opposite Party (OP)" or "Developer" ("Appellant").

3. Brief facts, as per the Complainant’s Association, are that during the development and sale of the property, the Opposite Party (OP) executed agreements for sale with the flat owners, stipulating that buyers must deposit a sinking fund towards the management, maintenance, repairs, and upkeep of the residential building and other necessary contingencies related to the housing complex, Dum Dum Club Town Estates. This sinking fund was set @ Rs. 30/- per Sq Ft. Upon completion of the buildings/flats, the OP handed

over the flats to the owners, and subsequently, the management was transferred to Dum Dum Club Town Residents' Association in October 2012. However, after handing over of the flats, OP failed to transfer the sinking fund of Rs.78,05,510/- and ignored several communications. Aggrieved, they filed Consumer Complaint No. CC 398 of 2015, seeking a directive to OP to pay Rs. 78,05,510/-, along with interest, and compensation of Rs. 1,50,000/

4. In reply, the OPs raised a preliminary objection, contending that the complaint is time-barred as vide letter dated 04.06.2010 the Complainant Society informed the OPs that the newly elected committee Association had taken over management and maintenance responsibilities from 07.03.2010. However, the complaint was filed in 14.10.2015. On merits, they asserted that the accounts for Rs.78,65,000/- were withheld because the Complainant allegedly occupied certain properties of the OP forcefully and illegally. These properties included a flat measuring about 1000 Sq Ft on the ground floor adjacent to the Community Hall, one small room under Block-4, a 350 sq. ft. space with a toilet beneath Block-5, and an open car park behind Block-1. The OPs emphasized that they would provide an account of the sum once the Complainant returned the properties they were allegedly holding unlawfully.

5. The learned State Commission vide impugned Order dated 05.09.2018, partly allowed the Complaint as under: -

> ***"On evaluation of materials on record, I am of the view that the Complainant Association has been able to substantiate their case. As a result, they are entitled to some reliefs. Considering the facts and circumstances and the sufferance of the Complainant Association, I think the Complainant Association is entitled to get the amount of sinking fund to the tune of Rs. 78,05,510/- and compensation in the form of interest @ 9% p.a. from the date of registration i.e. 10.10.2012 till its realisation. As the situation compelled the Complainant Association to lodge the complaint for which they have to incur expenses, they are entitled to litigation cost which I quantify at Rs.25,000/-.***
>
> ***With the above discussion, I dispose of the complaint with the following directions:***
>
> i. ***The Opposite Party is directed to handover the amount of sinking fund to the tune of Rs. 78,05,510/- to the Complainant Association.***
> ii. ***The Opposite Party is directed to pay compensation in the form of simple interest @9% p.a. over the amount of Rs.78,05,510/- from 10.10.2012 till its realisation.***
> iii. ***The Opposite Party is directed to pay Rs. 25,000/- to the Complainant Association as costs of litigation.***
> iv. ***The above payments must be made within 60 days from date positively."***

6. Aggrieved by the Impugned Order, the Appellants/OPs Builder filed the present Appeal with the following prayers:

***"i) Set aside the final order and judgment dated 05.09.2018 passed by the Hon'ble State Consumer Disputes Redressal Commission, West Bengal arising out of Consumer Complaint No. CC/398/2015.***

***ii) Pass any appropriate order as may be deemed just and necessary in the facts and circumstances of the case.."***

7. In the Appeal, the Appellant mainly raised the following issues:

(a) The State Commission failed to note that the complaint is barred by limitation under Section 24A of the Act and failed to appreciate that there was no deficiency in service within the meaning of Section 2(1)(g) read with Section 2(1)(o) of the Act.

(b) The State Commission failed to note that the Complainant has no locus standi to file the present complaint after taking possession on 08.07.2009 and which was confirmed by their letter dated 04.06.2010.

(c) The Complainant admitted that they forcefully occupied a portion owned by the opposite party, yet the complainant was rewarded instead of cautioning them not to do any wrongful act.

(d) The State Commission failed to examine whether the sinking fund to the extent the Complainant's claim needs adjudication by a Chartered Accountant, which has not been addressed.

(e) The State Commission failed to address that the value of the property forcefully occupied by the Complainant.

8. In response, the Respondent/Complainant's Association filed written arguments reiterating the primary issues raised in the original complaint and appreciating the Impugned Order.

9. The learned Counsel for the Appellant/OP Builder reiterated the grounds of the instant appeal and argued that the cause of action arose on 07.03.2010/ 01.10.2012 when the alleged amount became due and payable from the Appellant to the Respondent. However, the Consumer Complaint was filed on 14.10.2015, rendering it hopelessly barred by limitation under Section 24A of the Consumer Protection Act, 1986. The correspondence between the parties from 01.07.2013 to 01.09.2014, as claimed by the Respondents, does not extend the period of limitation. Further, the State Commission erred in allowing the Consumer Complaint filed by the Respondent. He asserted that the Respondent had illegally encroached upon the premises of the Appellant in the suit property, thereby invalidating the dispute's

relevance under the Act. The State Commission failed to direct the Respondent to vacate the premises and decided to allow the complaint without addressing this issue. He also argued that if the Respondent claims to have taken over the maintenance of the suit property since 01.10.2012, then the amount spent on maintenance from the issuance of the completion certificate on 01.10.2008 till 10.10.2012 should be adjusted and deducted from the sinking fund amount. The State Commission failed to determine and deduct this amount before directing the refund. There was inconsistency in the amount claimed by the Respondent, which was not duly considered. The State Commission directed the Appellant to pay interest on the amount without any prayer to that effect by the Respondent in the Consumer Complaint, which is erroneous. He relied on the following judgments in support of the order:

a. ***R. Narsimha Reddy vs. Kuchakula Surender Reddy & Ors., 2012 SCC OnLine NCDRC 1026.***
b. ***M/s. State Bank of India Express (Regd.) vs. M/s. Ranutrol Ltd., 2013 SCC OnLine NCDRC 994.***
c. ***Kandimalla Raghavaiah and Co. vs. National Insurance Company and Ors, (2009) 7 SCC 768***

10. The learned Counsel for the Respondent/Complainant’s Association vehemently argued against the grounds presented in the Appeal and contended that the Appellant has selectively annexed documents and failed to provide all complaint records. Further, he asserted that none of the grounds raised in the appeal are legally tenable. Regarding the issue of limitation under Section 24A of the Act, he argued that the complaint is not barred as the refusal of the Appellant to hand over the amount collected for maintenance constitutes a continuing cause of action. Moreover, they emphasized that the amount collected by the Appellant was for management, maintenance, and repairs of the residential building, and their failure to return this money constitutes a deficiency in service. Addressing the allegation of forcefully occupying premises, the Counsel asserted that the Appellant failed to demonstrate how the Respondent illegally occupied any premises. They argued that there is no evidence to support such claims. In summary, the Respondent's Counsel argued that the appeal lacks merit and that the grounds raised by the Appellant are unsubstantiated and misleading. The learned Counsel for the Respondent/Complainant's Association supported their contentions and arguments by citing the following judgments:

a. ***Samruddhi Coop. Housing Society Ltd. V. Mumbai Mahalaxmi Construction (p) Ltd., 2022(4) SCC 103.***
b. ***Arun Bhartiya V. HDFC Bank & Ors. 2022 SCC OnLine SC 1017.***
c. ***Imperia Structures Limited V Anil Patni & Anr. 2020 (10) SCC 783.***

11. I have examined the pleadings and associated documents placed on record and rendered thoughtful consideration to the arguments advanced by the learned Counsels for both the parties.

12. The primary issue to be determined is whether the Appellant/ Opposite Party failed to transfer the sinking fund Rs.78,05,510/- to the Complainant Association. It is a matter of record that the Complainant Association, Dum Dum Club Town Residents' Association is an Association of Residents/ Flat Owners constituted under section 25 of the Companies Act, 1956 with Registered Office at No. 87, Dum Dum Road, Kolkata. The OP is the developer who constructed the buildings/flats. After the construction was completion, the developer/promoter handed over the flats to buyers. The buyers formed Dum Dum Club Town Residents Association on 12.10.2012. Thereafter, OP handed over the maintenance responsibility of the buildings to the Association. It is also an admitted position that the OP had not handed over the sinking fund collected from the flat buyers amounting to Rs.78,05,510/-.

13. As regards the contention with respect to lapse of period of limitation, in terms of Section 24A of the Act, a complaint is required to be filed within two years from the date of accrual of cause of action. In the present case, the Complainant Association was Incorporated on 10.10.2012 and therefore, prior to that date of constitution, it had no authority or capacity to claim amount lying with sinking fund. After getting the Association registered, the Complainant Association on several occasions wrote letters, particularly on 01.07.2013, 17.09.2013, 26.09.2013, 01.09.2014, 26.12.2013, 13.11.2013 and 01.09.2014 but these letters yielded no response. Immediately after getting registration, in all fairness, the OP should have transferred the sinking fund amount to the Complainant Association. Its non-payment despite repeated requests and reminders amounts to continuous cause of action and therefore, the complaint cannot be said to be barred by limitation.

14. As a contention against non-handing over of the sinking fund of Rs.78,05,510/- to the Association, the OP argued that the Complainant Association is in forceful occupation of one ground floor flat measuring 1000 Sq Ft adjacent to Community Hall, one small room under Block-4, one 350 Sq Ft space with toilet beneath Block-5 and one open car park behind Block-1. He contended that if these properties are handed over, the amount will be paid to the Association. Such contention of the OP is entirely untenable. When once the Association is due to be transferred the sinking fund contributed by the flat buyers towards their own maintenance, the OP has no authority to retain the same. If the Association is in any illegal possession or occupation of the assets of the OP as claimed, the OP is at liberty to initiate appropriate legal action by instituting a suit before a civil court. In any case, the OP has no authority to keep the amount of sinking fund belonging to the Association and deny the same to the Complainant. Under no circumstances, OP can cite this as a reason and retain Rs.78,05,510/- of sinking fund of the flat owners which they have collected from the flat owners in terms of Clause 5 of Agreement for Sale. Therefore, immediately after obtaining registration on 10.10.2012 the OP ought to have handed over the said amount to the Complainant Association. The non-compliance of OP in handing over the said amount amounts to deficiency in services within the meaning of Section 2(1)(g) read with Section

2(1)(o) of the Act. Therefore, the OP id bound the pay the Complainant Association Rs. 78,05,510/- along with interest @9% p.a. from 10.10.2012 till its complete realisation.

15. As regards the issue of additional charge levied by OPs, this Commission in ***Kamal Kishore & Anr. Versus M/s. Supertech Limited, Consumer Case No. 1009 of 2016*** *has* held as follows:-

"*.......10. It would thus seen that maintenance charges are required to be paid by the allottee from the date of issue of letter of offer of possession. As stated earlier, the possession in my view could not have been offered to the allottee without completing the construction of the villa in all respects and obtaining the requisite occupancy certificate. Offering possession without obtaining occupancy certificate is meaningless since the allottee is not permitted in law to occupy the house which does not have the requisite occupancy certificate.*

> *Therefore, the maintenance charges, in my opinion, would be payable only from the date on which the possession is offered to the complainants after obtaining the requisite occupancy certificate and provided the construction of the villa complete in all respects at that time.....".*

16. Without doubt, and rather admittedly, the OP is withholding the sinking fund amounting to Rs.78,05,510/- contributed by Members of the Association @ Rs.30/- per Sq Ft as per Clause 5 of the Agreement for Sale, towards the maintenance and upkeep of their buildings and infrastructure. After the registration of the Association on 10.10.2012, it was incumbent upon OP to transfer this amount to the Complainant Association. The failure on the part of the OP to do so constitutes a deficiency in service under the Act. Consequently, the Association is rightfully entitled to receive Rs.78,05,510/- along with interest. If there were some expenditures incurred by the OP in this regard, he ought to have established the same in time and transferred the balance forthwith. However, the same has not been done. Therefore, I do not find any infirmity or illegality in the order of learned State Commission.

17. In view of the above, I do not find any reason to interfere with the Order of the learned State Commission dated 05.09.2018. The instant First Appeal No. 1784 of 2018 is, therefore, dismissed.

18. There shall be no order as to costs.

19. All pending Applications, if any, also stand disposed of accordingly.

20. The statutory amount deposited by the Appellant, if any due, may be refunded after due compliance of the order of the learned State Commission by the Appellant.

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**AVM J. RAJENDRA, AVSM VSM (Retd.)**
**PRESIDING MEMBER**