

(2011) 10 NCDRC CK 0029

In the National Consumer Disputes Redressal Commission

B.Venu Madhav

APPELLANT

Vs

Ch.Mohana Rao

RESPONDENT

Date of Decision : 14-10-2011

Acts Referred:

Citation : 2011 0 NCDRC 758 : 2011 4 CPJ 343

Hon'ble Judges : V.B.Gupta , Suresh Chandra J.

Final Decision : petition dismissed

Judgement

1. PETITIONER/O.P. No. 1 has filed this revision petition under Section 21 of the Consumer Protection Act, 1986(for short as ? Act?)challenging order dated 05.01.2007, passed by Andhra Pradesh State Consumer Disputes Redressal Commission, Hyderabad (for short as ?State Commission?) vide which appeal of respondent/complainant was allowed.

2. BRIEF facts are that respondent along with his wife purchased flat No. 208 in 1996 and occupied the same. He became a member of the Association and paid the monthly maintenance charges. Respondent?s case is that all the flat owners who had cars i.e. 10 to 15, parked their cars in the parking area without any problems upto 19.7.2003. On 19.7.2003, Secretary of the Association called a meeting for allotment of car parking and the allotment will be made on lottery basis. It is the case of respondent that notice was issued to 22 persons out of 39 flat owners and other 15 members did not attend the meeting and 23 car parking places were allotted. Out of 23 car parking placed allotted, 8 flat owners had cars and 6 flat owners who were not having cars were also allotted car parking. It is alleged that reservation of common areas including car parking is illegal. Allotment of car parking spaces to the people who did not have cars, was illegal. Respondent?s case is that he was having car parking right from 1996 to 20.7.2003, but as the association made irregular allotment of car parking to 23 members, he lost his physical right of car parking. As per sanction plan, the parking area is 547 sq. m (excluding passages) and if the same is divided amongst 39 flat owners, each flat owner would get 14 sq. m which is not

sufficient for movement of the vehicle while parking the car, which is deficiency in service. Thus, it was prayed that car parking area be declared as belonging to all the flat owners and every flat owner including the tenant has a right to park his car in the parking areas and to grant compensation of Rs. 10,000/- for mental agony suffered by respondent. Petitioner in its reply stated that there is no agreement or condition for providing the car parking space free of cost to the flat purchasers. Car parking space was sold to the purchasers at Rs. 25,000/-. The scooter parking space was allotted free of cost and the flat owners who paid Rs. 25,000/- were allowed to park their cars. Since, respondent had not purchased the car parking space therefore, he is not entitled to car parking space and also not entitled to seek relief for division of car parking. It is further stated that petitioner has exclusive right to sell and allot car parking to the flat owners and there is no violation of A. P. Apartment Rules, 1987. Thus, there is no deficiency of service. The complaint is barred by limitation and the same be dismissed.

District Forum, vide its order dated 2.2.2006 dismissed the complaint being time barred.

3. VIDE impugned order, appeal filed by the respondent was allowed and petitioner was directed to provide car parking to respondent. We have heard arguments advanced by learned counsel for petitioner. Respondent himself has argued his matter and has also filed written arguments.

4. IT is contended by learned counsel for the petitioner that respondent has only purchased the flat on the second floor and not the garage, as per sale deed dated 17.8.1996. Other flat owners have purchased the car parking slots for Rs. 25,000/- each. No common garage for car parking can be allotted to the respondent without making the payment for same especially when agreement for sale does not provide for the same. Another contention is that the complaint filed before the District Forum is barred by limitation, since respondent had purchased the flat in August, 1996 but he did not raise any objection to provide free car parking till 22.2.2003. Moreover, petitioner did not issue any notice till 16.03.2005 (i.e. within two years from 22.2.2003). District Forum has rightly held that complaint is hopelessly time barred. The State Commission has committed an error in law and facts in passing the impugned judgment. On the other hand, it is contended by the respondent that present complaint is not barred by limitation, since there is a continuous cause of action. As per Sale Deed, the purchaser has the right to enjoy and use along with other co-owners the open land, roadways, approaches and other common amenities provided in the Schedule Property. Car parking facility is thus a common amenity available for the flat owners. The respondent is having right to have car parking as per the sale deed, since petitioner has already constructed a common facility and for which respondent has paid the amount through sale deed. There is no necessity to pay separately for the car parking facility and as such there is no illegality or infirmity in the impugned order passed by State Commission.

5. IN support, respondent has relied upon a decision of Apex Court in NahalChand LalooChand Pvt. Ltd. Vs. Panchali Co-Operative Housing Society Ltd. (2010) (9) SCC Page, 536.

6. IT is an admitted fact that sale deed dated 17.8.1996 was executed between the parties. So, the question which arises for consideration as to whether respondent is entitled for allotment of car parking space free of charge or not? Statecommission while allowing the appeal of respondent has held; "It is not in dispute that respondent/opposite party No. 1 had constructed the complex in question consisting of four floors in the year 1996 and sold to all the flat owners and the appellant/complainant purchased flat No. 208 through registered sale deed dated 17.8.1996 under Ex. A9 and he occupied the flat in the year 1996. The question that falls for consideration is whether the appellant/ complainant is entitled for allotment of car parking space free of charge as contended by him. Ex. A9 is the Sale Deed dated 17.8.1996 executed by the respondent/opposite party No. 1, clause 4 of the sale deed read as follows: "The purchaser shall have the right to enjoy and use along with other co owners the open land, roadways, approaches and other common amenities provided in the schedule property as per the sanctioned plan. For this purpose co-owners means all persons having any right, title or interest in any construction, building, floor area, flat or garage or any portion of the schedule property". This clause clearly establishes that the appellant/complainant is entitled to have the garage in schedule property. It is also envisages that the appellant/complainant has a right to enjoy and use along with other co-owners and other common amenities provided in the schedule property as per the sanctioned plan. The sale deed No. 4554 of 1996 clearly indicates that the appellant/complainant is entitled to car parking space. Another important document which has bearing in this complaint is Ex. BI dated 22.2.2003, which is a letter addressed by the Association to all the flat owners including the appellant/complainant who is the owner of flat no. 208 asking them to given their willingness to possess car parking space. On the basis of Ex. BI dated 22.2.2003, the finding of the District Forum that the complaint is barred by limitation is unsustainable. Ex. B2 dated 19.7.2003 clearly indicates that a meeting has been convened of the persons who are possessing car parking area. It is also brought to our notice that opposite party has constructed 3 flats illegally in an area earmarked for parking space. It is further submitted that the builder has kept 3 flats and three car parking spaces with him. It is also brought to our notice that 23 car parking allotments were made on 23 July, 2003 till that time everybody was parking their car in the joint area therefore, the appellant/complainant request for a separate car parking area. It is not denied that Flat No. 302 is having two care parking areas".

12.Statecommission further observed; "Taking into consideration the facts and circumstances of the case, we are of the considered opinion that the complaint is not barred by limitation since there is continuous cause of action and direct the respondent/ opposite party no. 1 to provide a car parking space to the appellant/complainant, who is the owner of flat no. 208. It is also open to the appellant/

complainant, to approach the Municipal Corporation for demolition of any illegal constructions made by the opposite party No. 1 builder. The appeal against respondent no. 2 is dismissed. In the result the appeal is allowed and the respondent/opposite party No. 1 is directed to provide a car parking space to the appellant/complainant, who is the owner of flat No. 208. It is also open to the appellant/complainant to approach the Municipal Corporation for demolition of any illegal constructions made by the opposite party No. 1 builder. The appeal against respondent No. 2 is dismissed".

Clause 4 of the Sale Deed which has been reproduced by the State Commission in its impugned order clearly states that; " The purchaser shall have the right to enjoy and use along with other

7. THUS, as per Clause 4 of the Sale Deed, it is manifestly clear that respondent has the right to enjoy and use the car parking facility, without any extra charges. In *NahalChand* (supra) which was a case under Maharashtra Ownership Flats (Regulation of the Promotion of Construction, Sale, Management and Transfer) Act, 1963 as ? MOFA?, Apex Court observed; " 38. It was argued that under MOFA it is for the promoter to prescribe and define at the outset the ?common areas? and unless it is so done by the promoter, the parking area cannot be termed as part of ?common areas?. We are quite unable to accept this submission. Can a promoter take common passage/lobbies or say stair case or RG area out of purview of ?common areas and facilities? by not prescribing or defining the same in the ?common areas?? If the answer to this question is in negative, which it has to be, this argument must fail. It was also submitted that by treating open/stilt parking space as part of ?common areas?, every flat purchaser will have to bear proportionate cost for the same although he may not be interested in such parking space at all. We do not think such consideration is relevant for the consideration of term ?common areas and facilities? in MOFA. It is not necessary that all flat purchasers must actually use ?common areas and facilities? in its entirety. The relevant test is whether such part of the building is normally in common use. Then it was submitted that if a parking space is sold to a flat purchaser, it is to the exclusion of other flat purchasers and, therefore, logically also it cannot be part of ?common areas. This submission is founded on assumption that parking space(open/covered) is a ?garage? and sellable along with the flat. We have, however, held in our discussion above that open to the sky parking area or stilted portion usable as parking space is not ?garage? within the meaning of Section 2(a-I) and, therefore, not sellable independently as a flat or along with a flat. As a matter of fact, insofar as the promoter is concerned, he is not put to any prejudice financially by treating open parking space/stilt parking space as part of ?common areas? since he is entitled to charge price for the common areas and facilities from each flat purchaser in proportion to the carpet area of the flat. MOFA mandates the promoter to describe ?common areas and facilities? in the advertisement as well as the ?agreement? with the flat purchaser and the promoter is also required to indicate the price of the flat including the proportionate price of the ?common area and facilities?. If a

promoter does not fully disclose the common areas and facilities he does so at his own peril. Stilt parking spaces would not cease to be part of common areas and facilities merely because the promoter has not described the same as such in the advertisement and agreement with the flat purchaser. Although there is some merit in the contention of the appellant that High Court erred in placing reliance on the two aspects—namely, that the area of stilt parking space is not included in the FSI and such area is not assessable to the corporation taxes— in reaching the conclusion that stilt parking space is part of ‘common areas’ but in our view even if these two aspects are excluded, in what we have discussed above stilt parking space/open parking space of a building regulated by MOFA is nothing but a part of ‘common areas’ and, accordingly, we answer question no. (iii) in the affirmative.

Re: question No. (iv)- what are the rights of a promoter vis-vis society in respect of stilt parking spaces? 39. We have now come to the last question namely-what are the rights of a promoter vis-vis society (of flat purchasers) in respect of stilt parking space/s. It was argued that the right of the promoter to dispose of the stilt parking space is a matter falling within the domain of the promoter’s contractual, legal and fundamental right and such right is not affected. This argument is founded on the premise, firstly, that stilt parking space is a ‘flat’ by itself within the meaning of Section 2(a-I) and in the alternative that it is not part of ‘common areas’. But we have already held that ‘stilt parking space’ is not covered by the term ‘garage’ much less a ‘flat’ and that is part of ‘common areas’. As a necessary corollary to the answers given by us to question nos.(i) to (iii), it must be held that stilt parking space/s being part of ‘common areas’ of the building developed by the promoter, the only right that the promoter has, is to charge the cost thereof in proportion to the carpet area of the flat from each flat purchaser. Such stilt parking space being neither ‘flat’ under Section 2(a-I) nor ‘garage’ within the meaning of that provision is not sellable at all. 40. MOFA was enacted by the Maharashtra Legislature as it was found that builders/ developers /promoters were indulging in malpractices in the sale and transfer of flats and the flat purchasers were being exploited. The effect of MOFA may be summarized as follows. First, every promoter who constructs or intends to construct block or building of flats in the area to which MOFA applies has to strictly adhere to the provisions contained therein, i.e., inter alia, he has to make full and true disclosure of the nature of his title to the land on which the flats are constructed and also make disclosure in respect of the extent of the carpet area of the flat and the nature, extent and description of the common areas and facilities when the flats are advertised for sale. Secondly, the particulars which are set out in Section 4(1A) (a) (i) to (x) have to be incorporated in the agreement with the flat purchaser. Thirdly, the promoter has to apply to the Registrar for registration of the organization (co-operative society or company or condominium) as soon as minimum number of persons required to form such organization have taken flats. As regards unsold flats, the promoter has to join such organization although his right to dispose of unsold flats remains

unaffected. Fourthly, and more importantly, the promoter has to take all necessary steps to complete his title and convey to the organization his right, title and interest in the land and building and execute all relevant documents accordingly. It was argued by Mr. Tanmaya Mehta, learned counsel for the promoter that in view of the provisions of MOFA, Section 6 of T.P. Act and Article 300A of the Constitution, the right of the promoter to transfer parking spaces is not at all restricted. Relying upon the decisions of this Court in *ICICI Bank Ltd. v. SIDCO Leathers Ltd. & Ors.* (2006) 10 SCC 452, *Karnataka State Financial Corporation v. N. Narasimahaiah & Ors.* (2008) 5 SCC 176 and *Bhikhubhai Vithlabhai Patel & Ors., v. State of Gujarat & Anr.* (2008) 4 SCC 144, he submitted that the provisions contained in MOFA must be construed strictly and there is no provision either express or by necessary implication in MOFA restricting the sale of stilt or open parking spaces. Mr. Sunil Gupta also argued that promoter continues to have contractual, legal and fundamental right to dispose of the stilt/open parking space in the manner in which he proposes and his consumers accept. We think this argument does not bear detailed examination. Suffice it to say that if the argument of learned senior counsel and counsel for promoter is accepted, the mischief with which MOFA is obviously intended to deal with would remain unabated and flat purchasers would continue to be exploited indirectly by the promoters. In our opinion, MOFA does restrict the rights of the promoter in the block or building constructed for flats or to be constructed for flats to which that Act applies. The promoter has no right to sell any portion of such building which is not 'flat' within the meaning of Section 2(a-1) and the entire land and building has to be conveyed to the organisation; the only right remains with the promoter is to sell unsold flats. It is, thus, clear that the promoter has no right to sell 'stilt parking spaces' as these are neither 'flat' nor appurtenant or attachment to a 'flat'.

8. THIS judgment of the apex court is fully applicable to the facts of present case. Here, as per terms of the Sale Deed, the respondent being purchaser of the flat is entitled for free parking space. The present case filed by the respondent cannot be said to be barred by limitation, since petitioner has not provided free parking space to the respondent. Thus, respondent is having continuous cause of action. We fully concur with the findings and reasoning given by the State Commission. Present revision petition has been filed under Section 21(b) of the Act. It is well settled that the powers of this Commission as a Revisional Court are very limited and have to be exercised only, if there is some prima facie jurisdictional error in the impugned order.

9. RECENTLY, Hon'ble Supreme Court in *Mrs. Rubi (Chandra) Dutta Vs. M/s United India Insurance Co. Ltd.* 2011 (3) Scale 654 has observed ; "Also, it is to be noted that the revisional powers of the National Commission are derived from Section 21 (b) of the Act, under which the said power can be exercised only if there is some prima facie jurisdictional error appearing in the impugned order, and only then, may the same be set aside. In our considered opinion there was no jurisdictional error or miscarriage of justice, which could have warranted the

National Commission to have taken a different view than what was taken by the two Forums. The decision of the National Commission rests not on the basis of some legal principle that was ignored by the Courts below, but on a different (and in our opinion, an erroneous) interpretation of the same set of facts. This is not the manner in which revisional powers should be invoked. In this view of the matter, we are of the considered opinion that the jurisdiction conferred on the National Commission under Section 21 (b) of the Act has been transgressed. It was not a case where such a view could have been taken by setting aside the concurrent findings of two fora."

10. THUS, no jurisdiction or legal error has been shown to us to call for interference in the exercise of power under section 21 (b) of the Act, since, State Commission has given cogent reasons in its order, which does not call for any interference nor it suffer from any infirmity or revisional exercise of jurisdiction. In *Ravinder Kaur Vs. Ashok Kumar*, AIR 2004 SC 904, Apex Court observed ; "Courts of law should be careful enough to see through such diabolical plans of the judgment debtor to deny the decree holders the fruits of the decree obtained by them. These type of errors on the part of the judicial forum only encourage frivolous and cantankerous litigations causing law?s delay and bringing bad name to the judicial system."

It is well settled that no leniency should be shown to such type of litigants who in order to cover up their own fault and negligence, goes on filing meritless petitions in different foras. Equity demands that such unscrupulous litigants whose only aim and object is to deprive the opposite party of the fruits of the decree must be dealt with heavy hands. Unscrupulous builders like petitioner should not be spared who after taking entire costs of the building do not perform their part of obligations. A strong message is required to be sent to such type of builders that this Commission is not helpless in these type of matters.

11. NOW question arises for consideration is as to what should be the quantum of costs which should be imposed upon the petitioner for dragging the respondent upto this fora. It is not that every order passed by the judicial fora is to be challenged by the litigants even if the same are based on sound reasonings. Apex Court in *Ramrameshwari Devi and Ors. Vs. Nirmala Devi and Ors.*, Civil Appeal Nos.4912-4913 of 2011 decided on July 4, 2011 has observed ; "45. We are clearly of the view that unless we ensure that wrong ?doers are denied profit or undue benefit from the frivolous litigation, it would be difficult to control frivolous and uncalled for litigations. In order to curb uncalled for and frivolous litigation, the Courts have to ensure that there is no incentive or motive for uncalled for litigation. It is a matter of common experience that court?s otherwise scarce and valuable time is consumed or more appropriately wasted in a large number of uncalled for cases. 46. Usually the court should be cautious and extremely careful while granting ex-parte ad interim injunctions. The better course for the court is to give a short notice and in some cases even dasti notice, hear both the parties and then pass suitable biparte orders. Experience reveals

that ex-parte interim injunction orders in some cases can create havoc and getting them vacated or modified in our existing judicial system is a nightmare. Therefore, as a rule, the court should grant interim injunction or stay order only after hearing the defendants or the respondents and in case the court has to grant ex-parte injunction in exceptional cases then while granting injunction it must record in the order that if the suit is eventually dismissed, the plaintiff or the petitioner will have to pay full restitution, actual or realistic costs and mesne profits. 47. If an ex-parte injunction order is granted, then in that case an endeavour should be made to dispose of the application for injunction as expeditiously as may be possible, preferably as soon as the defendant appears in the court. 48. It is also a matter of common experience that once an ad interim injunction is granted, the plaintiff or the petitioner would make all efforts to ensure that injunction continues indefinitely. The other appropriate order can be to limit the life of the ex-parte injunction or stay order for a week or so because in such cases the usual tendency of unnecessarily prolonging the matters by the plaintiffs or the petitioners after obtaining ex-parte injunction orders or stay orders may not find encouragement. We have to dispel the common impression that a party by obtaining an injunction based on even false averments and forged documents will tire out the true owner and ultimately the true owner will have to give up to the wrongdoer his legitimate profit. It is also a matter of common experience that to achieve clandestine objects, false pleas are often taken and forged documents are filed indiscriminately in our courts because they have hardly any apprehension of being prosecuted for perjury by the courts or even pay heavy costs. In *Swaran Singh Vs. State of Punjab* (2000) 5 SCC 668 this court was constrained to observe that perjury has become a way of life in our courts.

49. It is a typical example how a litigation proceeds and continues and in the end there is a profit for the wrongdoers. 50. Learned Amicus articulated common man's general impression about litigation in following words : "Make any false averment, conceal any fact, raise any plea, produce any false document, deny any genuine document, it will successfully stall the litigation, and in any case, delay the matter endlessly. The other party will be coerced into a settlement which will be profitable for me and the probability of the court ordering prosecution for perjury is less than that of meeting with an accident while crossing the road."

12. IN our opinion, the present petition is nothing but a gross abuse of process of law and the revision petition is totally meritless and frivolous, which is required to be dismissed with punitive costs of Rs.1,00,000/-.(One lakh only) Accordingly, we dismiss the present petition with costs of Rs.1,00,000/- (Rupees One lakh only). Out of the costs imposed upon the petitioner, Rs. 50,000/-(Rupees Fifty Thousand only) be paid to the respondent by cheque in his name. Remaining costs of Rs. 50,000/- (Rupees Fifty Thousand only) be deposited by cheque in the name of "Consumer Legal Aid Account" of this Commission, within one month from today. In case, petitioner fails to deposit the aforesaid costs within the

prescribed period, he shall also be liable to pay interest @ 9% p.a., till realization.

13. COSTS awarded to the respondent shall be paid only after expiry of the period of appeal or revision preferred, if any. Pending application also stands disposed of. List for compliance on 25th November, 2011.