**(2017) 06 NCDRC CK 0017**

**In the National Consumer Disputes Redressal Commission**

**Case No :** 2235 of 2010

DAMODARAN SHANMUGHAM MADALIAR — APPELLANT

Vs

SANGITA R. VERMA & ORS. — RESPONDENT

**Date of Decision :** 15-06-2017

**Acts Referred:**

<a href=3999>Consumer Protection Act, 1986</a>, <a href=3999-21>Section 21(b)</a> - Jurisdiction of the National Commission

**Citation :** 2017 3 CPR 184

**Hon'ble Judges :** B.C. Gupta

**Advocate :** Sukumar Pattjoshi, Uday B. Wavikar, Vikas Nautiyal, Anand Patwardhan, Ashutosh Marathe

## Judgement

1. This revision petition has been filed under section 21(b) of the Consumer Protection Act, 1986 against the order dated 16.01.2010, passed by the Maharashtra State Consumer Disputes Redressal Commission (hereinafter referred to as ''the State Commission'') in First Appeal No. 1028/1999, "Damodar Shanmugham Madaliar versus Sangita R. Verma & Ors." vide which, while partly allowing the appeal, the order dated 12.01.1999, passed by the Mumbai Suburban District Consumer Disputes Redressal Forum in CC No. DF/MSG/74/96/265, allowing the said complaint, was modified.

2. Briefly stated, the facts of the case are that the complainant Sangita R. Verma and other three complainants as detailed in the heading, entered into an agreement dated 13.03.1991 with the opposite party-1(OP-1)/ Respondent No. 5 Vaibhav Builders and OP-2/Respondent No. 6 Laxmi Krupa Builders for purchase of residential flats in the proposed building to be constructed by them on the land bearing CDS No. 395 (1 to 14), survey No. 69, Hissa No. 6 (Part) of Village Valani, Malad, Maharashtra State. The details of specific flats booked by each complainant and the amounts paid have been detailed in the consumer complaint filed by the complainants. It is stated that full price was paid to the OPs and in return, the complainants were assured that the delivery of possession of the flats shall be made within three years of agreement. It is stated that on 20.10.1993,

 

the OP-2/Respondent No. 6 entered into an agreement with the petitioner/OP-3, wherein the liability for construction, completion and delivery of the flats was transferred to OP-3 without the knowledge and consent of the complainants. It is alleged that when the complainants approached the petitioner/OP-3 for the possession of their flats, he demanded an additional payment from them, which was over and above the full price already paid by them. The complainants filed the consumer complaint in question, seeking directions to OP-1, 2 & 3 to deliver possession of their respective flats and also to pay them interest @18% p.a. on the amount deposited by them till the delivery of the possession. They also demanded compensation of 25,000/- to each of the complainants for mental harassment/agony etc.

3. The complaint was resisted by the petitioner/OP-3 by filing written statement before the District Forum in which they denied the averments made in the complaint, saying that the complainants had given the amount in question as loan to OP-1 & 2/ Respondent No. 5 & 6, and there was no commitment to provide any flats to them. The Petitioner/OP-3 stated that as per the agreement dated 20.10.1993 entered by him with OP-2/Respondent No. 6, they were required to construct the flats and to give certain flats to OP-1/ Respondent No.5 and OP-2/ Respondent No.6 for their business. The Petitioner/OP-3 stated categorically that they were not required to deliver the possession of flats to the complainants.

4. The District Forum allowed the consumer complaint vide their order dated 12.01.99 and directed the petitioner/OP-3 to deliver the possession of the flats to the complainants in accordance with agreement dated 13.03.1991 entered by them with OP-1 & 2. However, the District Forum discharged OP-1 & 2 from the complaint. Being aggrieved against the order of the District Forum, the petitioner/ OP-3 challenged the same by way of appeal before the State Commission. The State Commission vide impugned order partly allowed the appeal and modified the award given by the District Forum and directed as follows:-

"1. Appeal is partly allowed. The impugned order and award is modified and in place of giving flats to the respondents/complainants, we direct appellant shall pay amount equivalent to market value of the flats which respondents will be required to purchase in Malad area and as per our knowledge, flat having area of 575 sq. ft. can be obtained at Malad for 40 lakhs. Therefore, respondent Nos. 1 & 2 would be entitled for 40 lakh each. Respondent No. 3 would be entitled to get 25 lakhs and respondent No. 4 would be entitled to get 50 lakhs.

2. Appellant is directed to pay 50,000/- to each respondents/org. complainants as compensation for mental harassment.

3. Appellant is also directed to pay 25,000/- to each of the respondents/org. complainants towards cost of the proceedings.

4. Nothing is payable by M/s. Vaibhav Builders and M/s. Laxmi Krupa Builders, who were added as party in this appeal.

 

5. This order shall be complied with within one month from the date of receipt of the order by the parties."

5. Being aggrieved against the order of the State Commission, the petitioner/ OP-3 is before this Commission by way of the present revision petition.

6. During arguments before this Commission, the learned counsel for the petitioner contended that the petitioner/OP-3 had no privity of contract with the complainants and hence, the complaint against them was not maintainable. The learned counsel further stated that the petitioner had transferred the property to Mr. Bimal M. Gunderia vide agreement dated 03.05.1997 and hence, the said flats were no longer available. Referring to the agreement dated 20.10.93 between the petitioner and the OP-2, the learned counsel stated that the OP-2 Laxmi Krupa Builders had not paid cost of construction of Rs.3500/- per sq. ft. worth of premises to OP-3 and hence, the question of handing over the possession of flats to their nominees did not arise. The full consideration alleged to have been paid by the complainants to OP-1 did not cover even the basic cost of construction of the flats mentioned in the agreement. The learned counsel argued that unless the liability was discharged by OP-1 and OP-2 towards the petitioner, there was no question of any liability on the part of the petitioner. The learned counsel, however, referred to list of 7 flat purchasers as mentioned in the agreement, i.e., 28.10.93 to whom the flats were to be given, which included three of the present complainants as well. Referring to the consumer complaint, the learned counsel stated that the complainants had sought relief against OP-1 & OP-2 as well as the OP-3 and hence, the consumer fora below should have made it a joint liability on the part of all the OPs. The learned counsel has placed on record a copy of the order passed by Hon''ble Supreme Court of India in "Dr. Shehla Burney & Ors. vs Syed Ali Moosa Raja (dead) by LRs'' & ors." [Civil Appeal No. 6409/2002 decided on 21.04.2011] .

7. On the other hand, the learned counsel for the OP-1 & OP-2/respondent No. 5 & 6 stated that the District Forum had discharged them from the complainant vide their order dated 12.10.99. In the present revision petition, no liability could be imposed upon them, as the order of the District Forum had not been challenged in appeal. The learned counsel, however, stated that in respect of seven flats, their liability had been transferred to the petitioner/OP-3. It had also been stated that the lump-sum price of Rs.8.5 lakhs shall remain the same, regardless of the changes in the FSI. Referring to the averments in the agreement dated 28.10.1993 regarding the payment of cost of construction for 3500 sq. ft. area to the petitioner/OP-3, the learned counsel stated that this aspect had not been pleaded earlier in the present proceedings. In the reply filed before the District Forum as well, the petitioners had not taken such plea. The learned counsel vehemently argued that new facts could not be agitated at the time of proceedings in the revision petition. In support of his arguments, the learned counsel has drawn attention to an order passed by the Hon''ble Supreme Court of India in the case, "M/s. Modern Insulators Ltd. vs Oriental Insurance Co.

 

Ltd." [I (2000) CPJ 1 (SC)] . The learned counsel has also drawn attention to orders passed by this Commission in " Hotel Nyay Mandir vs Ishwar Lal Jinabhai Desai" [I (2011) CPJ 13 (NC)] and "Ponnamma K.K. vs. Lucknow Development Authority" [III (2013) CPJ 416 (NC)] .

8. The learned counsel for the complainants argued that as per the agreement executed between the petitioner and OP-1 & 2, there was a clear understanding that the flats in question were to be transferred to the complainants only. There was no question of selling the flats to any other party on the part of the petitioner/OP-3, therefore. Referring to the operative part of the impugned order of the State Commission, the learned counsel stated that compensation had been ordered to be given to them, based on the market value of the flats as on the date of passing the said order. Since a considerable time had elapsed after the passing of the impugned order, direction should be given to provide compensation to them, based on the current market price of the property. According to the learned counsel for the complainant, the price of the flat which had been indicated as Rs.40 lakhs in impugned order had now gone up to Rs.1 crore at least. In their written arguments, the learned counsel for the complainant stated that the Government Stamp Duty Ready Reckoner for the year 2016 for Malad area should be taken into consideration.

9. In response, the learned counsel for the petitioner stated that since the order of the State Commission had not been challenged by the complainants by way of any appeal/revision petition etc., no extra amount could be given to them. The learned counsel stated that there was no basis for arriving at the market value as indicated in the order of the State Commission and hence, the relief granted to them in the impugned order was not reasonable.

10. I have examined the entire material on record and given a thoughtful consideration to the arguments advanced before me.

11. The main point for consideration before us is whether the petitioner/OP-3 who entered into a formal agreement with the previous builder to take over the property in question are required to discharge their liability towards the complainants by way of providing the required flats to them, in accordance with the terms and conditions of the agreement entered between the complainants and the original builders. The factual matrix of this case and the documentary evidence on record make it very clear that the complainants entered into an agreement with OP-1 & 2/respondent No. 5 & 6 for obtaining the flats in question and the consideration for the same was also paid to them. In case, the said builders, i.e., OP-1 & 2 have transferred their rights/liabilities to the petitioner/ OP-3, the complainants do not lose their rights to get the property in any manner. Moreover, it has been explicitly made clear in the agreement made between the petitioner/OP-3 and the previous builder that certain area shall be reserved and earmarked for discharging the liability towards the previous complainants. The names of 7 such persons have been indicated in the body of the agreement itself, out of which three of them also figure in the complaint. In

 

so far as the plea of the petitioner/OP No. 3 that they had not received certain amount from the previous builder in respect of the construction of the property for the complainants is concerned, the said issue has to be settled by petitioner/ OP-3 with the previous builders. The complainants cannot be made to suffer, if the previous builders have not complied with the terms and conditions of the agreement entered between the two builders.

12. The petitioner/OP-3 have taken the plea that they have sold the said property to some third person and hence, they were not in a position to provide flats to the complainants. In view of the clear assertion made in the agreement between the petitioner/OP-3 and the previous builder, this action on the part of the petitioner is highly unfair and totally uncalled for. It was the duty of the petitioner/OP-3 to take necessary steps to provide the flats to the complainants in terms of the agreement entered by them with the previous builder.

13. As evident from the position on record, it is made out that not providing the flats to the complainants in terms of the agreement between them amounts to a high degree of malpractice towards them on the part of the previous as well as the present builders. It was the duty of the previous builders as well, to have settled the issue with the petitioner/OP-3 and ensured that the property is provided to the complainants in terms of their agreement. The position on record smacks of unfair trade practice on the part of the previous builders as well, and they cannot escape their responsibility on any account. The order passed by the District Forum exonerating them from their liability is perverse in the eyes of law. The direction given by the State Commission in the impugned order that the OP-1 & 2 shall not be liable to pay any amount to the complainants is also perverse in the eyes of law and is ordered to be set aside and it is held that there shall be joint and several liability on the part of the OP-1 & 2 and petitioner/OP-3 towards the complainants in the matter of providing property/compensation to them.

14. The State Commission in the impugned order have provided compensation to the complainants based on the market value of the flats in the area. The said finding of the State Commission has not been challenged by the complainants by way of filing any appeal or revision petition against that order. The plea taken by the complainants that they should be paid compensation at the current market rates cannot be accepted therefore. However, it is ordered that complainants shall be entitled to interest @9% p.a. on the amount of compensation ordered to be given to them as per the impugned order. This revision petition is, therefore, disposed off with the direction that the impugned order of the State Commission shall stand modified to the extent that in addition to the compensation awarded as per the impugned order, the petitioner / OP-3 shall be liable to pay interest @9% p.a. from the date of passing of the order of the State Commission till realisation.