

(2014) 10 NCDRC CK 0014

In the National Consumer Disputes Redressal Commission

G.G. Associates

APPELLANT

Vs

Commodore Ravindra Kumar Narad

RESPONDENT

Date of Decision : 16-10-2014

Acts Referred:

Citation : 2014 4 CPJ 716

Hon'ble Judges : SURESH CHANDRA J.

Final Decision : Petition dismissed

Judgement

1. COMMODORE Ravindra Kumar Narad and his wife Mrs. Usha Narad filed a consumer complaint against the three petitioners who were OP Nos. 1, 2 and 3 respectively before the District Forum alleging deficiency in service on account of violation of the provisions of Maharashtra Ownership of Flats Act, 1964 by revising the plan without the consent of the complainants and by merging the common passage in the flats belonging to the adjacent flat owners. As per the allegations in the complaint, the complainant had purchased Flat No. 501 in Building "A" Ganga Melrose, situated on the 5th floor of the building. Adjacent Flat Nos. 503 and 504 were purchased by some other persons. The complainants were shocked to see on 10.6.2010 that landing space (common lobby) on the 5th floor was reduced to approximately 2/3rd and 1/3rd of its portion merged with Flat Nos. 503 and 504. According to the OP builder, petitioners herein, this was done after obtaining necessary approval from the Municipal Corporation for which the builder seems to have applied to the Corporation for sanctioning the revised plan on 18.9.2010 and the Corporation sanctioned the proposal with rather unusual speed on 23.9.2010, i.e., within 5 days As per the approval of the revised plan, the common lobby on the 5th floor of the building was merged with the Flat Nos. 503 and 504. According to the petitioners, they as builder under Clause 7(a) and (b) of the agreement had absolute right to reduce the area of the lobby. Clause 7(a) and (b) maybe reproduced as under: "7(a) The Developer/ promoter shall at all times before or after the transfer and vesting of the said property i.e. land and/or part/s thereof with the building/s thereon to the Ultimate Body have the absolute right to make or cause to be made additions,

alterations, raise additional storeys or structures on the said building/s at any time or construct new structures on the said land by consuming the balance FSI or by consuming enhanced FSI or by consuming TDR rights obtained from elsewhere and such additions, alterations and/or additional structures or storeys, shall be the sole and exclusive property of the Owner/Promoter who shall be entitled to deal with or dispose of the same in any way they choose and the Purchasers hereby consent to the same.

7(b) The Purchasers hereby agree that the Promoter shall have the right and absolute authority to construct or erect any additional floor or floors on the common terrace/s and/or common area/s. Furthermore the Purchasers or the Ultimate Body shall never object and shall always co-operate in this regard. It is likely that additional Floor Space Index may be available in the property and the Floor Space Index, if any, available in future shall belong to the promoter alone, but shall be purchasable by the flat Purchasers in terms specifically contained in this agreement. Such Floor Space Index may be utilized in the said property by constructing additional floor/s or by means of Transfer of Development Rights (TDR) to be utilized elsewhere."

2. BOTH the parties filed evidence in support of their contentions and on appreciation of the evidence adduced before it and after hearing the parties, the District Forum partly allowed the complaint by passing the following order on 29.6.2013: "1. Complaint is partly allowed.

2. It is hereby declared that Opponents have caused deficiency in service by violating the provisions of Section 7 of the Maharashtra Ownership of Flats Act and by revising the plan without consent of the complainants and by merging the common passage in the flats belonging to the adjacent flat holders. Opponents are jointly and severally directed to restore the open space which is available on the fifth floor of the building "Ganga Melrose" within six weeks from the date of receipt of copy of order.

3. OPPONENTS are jointly and severally directed to pay compensation of Rs. 2,00,000 for deficiency in service and for mental and physical torture within six weeks from the date of receipt of copy of order.

4. OPPONENTS are jointly and severally directed to pay Rs. 1,000 to the complainants towards costs of complaint."

3. AGGRIEVED by the aforesaid order of the District Forum, the OPs/Petitioners challenged the same by filing an appeal bearing No. A/13/261 before the State Consumer Disputes Redressal Commission, Maharashtra, Mumbai which was dismissed by the State Commission by its impugned order passed on 15.2.2014 thereby confirming the order of the District Forum. In the circumstances, the OPs aggrieved of the impugned order have now challenged the same before us by filing the present revision petition. The main contention raised by learned Mr. Sunil Kumar Verma, Counsel for the petitioners was that the revised plan had been duly submitted to the Municipal Corporation and approved by it. He also

submitted that the agreement signed by the parties specifically contained a clause which authorized the builder to carry out such alteration in case of need. In view of this, learned Counsel submitted that no fault could be found with the revision of the plan carried out by the petitioners and the Fora below have gravely erred in non -suing the defence of the petitioners while returning their finding in favour of the complainants/respondents. The impugned order, therefore, is liable to be set aside and hence the revision petition be allowed.

4. PER contra, learned Counsel for the respondents, Mr. Sukhjinder Singh, Advocate supported the impugned order and submitted that the Fora below have carefully examined all the related aspects and have returned their finding in favour of the respondents keeping in view the violation of the provisions of Maharashtra Ownership of Flats Act, 1964, which make it obligatory on the part of the builder to take consent of the complainants before revising the plan. In view of this, the deficiency in service on the part of the OPs was proved beyond doubt and as such the orders of the Fora below could not be faulted with. In order to appreciate the controversy, it would be appropriate to consider the relevant provisions of the Maharashtra Ownership of Flats Act, 1964 relied upon by the respondents. Section 7 of the Act provides as under: "(1) After the plans and specifications of the buildings, as approved by the local authority as aforesaid, are disclosed or furnished to the person who agree to take one or more flats, the promoter shall not make - -

(i) any alteration in the structures described therein in respect of the flat or flats which are agreed to be taken, without the previous consent of that person; or

(ii) any other alterations or additions in the structure of the building without the previous consent of all the persons who have agreed to take flats in such building."

5. THE District Forum while dealing with the issues raised by the parties has made the following observations in its order: "The crux of the matter in the present proceeding is that whether the builder and promoter can revise the plan without consent of the flat owner. It reveals from the evidence which is produced on behalf of the complainants that initially the plan of the building known as "Ganga Melrose" was sanctioned on 23.3.2007 by the P.M.C. The complainant has purchased flat No. 501 -A on the fifth floor and the possession of the said flat was delivered to him as per the possession letter dated 24.4.2010. Thereafter in absence of complainants and without their consent the opponent i.e. builder developer applied to the Corporation on 18.9.2010 for revision of the plan. The revised plan was sanctioned within 5 days i.e. on 23.9.2010. As per the said plan the common area on the fifth floor of the building was merged in the flat Nos. 503 and 504. This fact is categorically admitted by the opponents in the written statement. It is significant to note that admittedly the Opponents have violated the provisions of Section 7 of the MOFA Act as there is no iota of evidence before the Forum to show that the consent of the complainants was obtained before revising the said plan. It is significant to note that as per the agreement between

the complainants and the opponents the opponents have charged 25% cost per sq. ft for the common area. The Opponents have merged near about 28 sq. ft area in the flat Nos. 503 and 504. It is surprising to note that the said plan was revised only as regards fifth floor. This indicates that the Opponents have joined with the authorities of P.M.C. and grabbed the common area which is available for the complainants. According to the Opponents as the P.M.C. has sanctioned revised plan then complainants have no authority to challenge before this Forum. But it is crystal clear from the record that the Opponents and the Corporation have joined hands and altered and changed the plan for their own benefit without consent of complainants by contravening provisions of Section 7 of MOFA. Then it is not necessary to obtain declaration that the revised plan is illegal, null and void. When the plan itself is void ab initio as it contravene the provisions of Section 7 of MOFA Act, 1963 then the said plan is no plan in the eyes of law. Expert opinion is not necessary to infer what has been cooked between builder and P.M.C. Authorities.

In the ruling *Kalpita Enclave Co -op. Housing Society Ltd. v. Kiran Builder of the Hon"ble Bombay High Court* it is observed that if the original plans and specifications on the basis of which the persons were persuaded to purchase the flats discloses that certain areas will be kept open it would be clear contravention of the agreement as well as of the law if the promoter proceeds to construct additional structure on those places even with the sanction of the Municipal Corporation. It is observed by the Apex Court in various rulings that the Corporation has no power to regularize any construction by violating the provisions of law and the present complaint is the best example of violation of law at the hands of builder and the Corporation.

The complainants have asked relief of restoration of the building as per the original plan as his right to enjoy the common passage is taken away by the Opponent with the help of P.M.C. This is clear cut case of deficiency in service and he is entitled for restoration of the construction as per the original plan of the said building. It reveals from the record that the Corporation authorities have hastily sanctioned revised plan within 5 days in order to support the builder and developer. It is astonishing to note that the plan of the fifth floor only revised. All these facts are suspicious and indicating that the hands in gloves of builder and Corporation, in these circumstances it is necessary to send copy of this complaint to the Commissioner of P.M.C. for taking appropriate action against the defaulter.

Alternatively the complainants have asked compensation for the area which is merged by the Opponents in adjoining flats but as this is a fit case of grant the first relief i.e. restoration of the building, the alternate relief is not granted. The prices of the flats are rising from day to day and the builders are exploiting this situation by violating the provision of law. Even though the Opponents have accepted consideration for the open space from the flat owners that space is not allowed to the complainants to enjoy. Hence the complainants were required to knock the doors of this Forum. After considering the facts and circumstances I

held that the complainants are entitled for compensation for deficiency in service and compensation for physical and mental torture to the tune of Rs. 2,00,000 and the cost of litigation to the tune of Rs. 1000."

5. THE State Commission while confirming the order of the District Forum and dismissing the appeal of the petitioners has made the following observations: "We do not see as to how these clauses entitling the builder to use additional floor space or use the balance of FSI could be invoked to reduce the common lobby area without obtaining the consent of the other flats owners, who are using the said common passage. Therefore, we see absolutely no error in the order passed by the Forum holding that there is deficiency in service and no reason for setting aside the order passed by the District Forum 5. Learned Counsel for the Appellant submits that the Forum should not have entertained the complaint since there is an arbitration clause and there is another Forum available for filing such type of complaints. We may observe that remedy available to the Complainant under the Consumer Protection Act is in addition to remedies under any other law and, therefore, the Forum was justified in entertaining the complaint. We see absolutely no reason to interfere with the order passed by the Forum and dismiss the appeal."

In view of the above, we do not find any merit in this revision petition which could justify our interference with the impugned order. Perusal of the record shows that both the Foras below have returned their concurrent findings of fact holding the petitioner deficient in rendering service to the respondent/complainant. We may note that the powers vested in this Commission under Section 21(b) while exercising our revisional jurisdiction are rather limited and unless there is some jurisdictional error, it is not appropriate to interfere with the concurrent finding of the Fora below. Hon"ble Supreme Court while dealing with this question in the case of Mrs. Ruby (Chandra) Dutta v. M/s United India Insurance Co. Ltd., : II (2011) CPJ 19 (SC) : IV (2011) SLT 303 : (JT) 2011 (3) SC 586, has observed thus: "23. 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."

In view of the discussion above, the revision petition is dismissed but with no order as to costs.