
(1998) 05 NCDRC CK 0011

In the National Consumer Disputes Redressal Commission

JANATA AUTO SALES

APPELLANT

Vs

MADHAVI INVESTMENT And TRADING PVT. LTD.

RESPONDENT

Date of Decision : 17-05-1998

Acts Referred:

Citation : 1998 3 CPJ 248 : 1999 1 CLT 231 : 1999 1 CPC 302 : 1999 1 CPR 190

Hon'ble Judges : B.N.Krishnan , Y.V.Rao , Mangala Sanes J.

Final Decision : Complaint disposed of

Judgement

1. THIS complaint has been filed seeking for a direction to the opposite party to forthwith deliver the possession of premises agreed to be sold to it duly completed in all respects and for recovery of compensation of Rs. 10,00,000/- from the opposite party for the loss sustained by the complainant on account of delay in delivery of possession.

2. THE case put forward by the complainant in brief is as follows : It is a partnership firm and it entered into an agreement with the opposite party for purchase of shops bearing Nos. 44, 46, 47, 48, 49 and flats bearing Nos. F1 and F2 totally measuring 245 sq.mtrs. in Block F on the ground floor of Madhuban Shopping and Residential Complex which was being constructed by the opposite party in the property known as MASCONDA bearing Chalta No. 1 of P.T. Sheet No. 112 of City Survey of Panaji, and situated at Santa Inez, Panaji for the price of Rs. 26,53,000/- and parties entered into written agreement on 11.4.1996 and schedule of payments agreed to between the parties is an hereunder : (i) Rs. 11,53,000/- to be paid at the time of execution of the agreement. (ii) Rs. 11,50,000/- to be paid on or before 30th June, 1996 and delivery of possession should be completed before 30th September, 1996 and at that time Rs. 3,50,000/- should be paid. As the complainant is the authorised dealer of "LML Vespa Scooter" and he was in urgent need of accommodation to set up a show room, it agreed for aforesaid payment schedule though ordinarily the payments would have spread over a longer period.

The complainant paid Rs. 11,53,000/- on 11th April, 1996 by two cheques for a

sum of Rs. 6,00,000/- and another Rs. 5,53,000/-. The second instalment of Rs. 11,50,000/- was paid by the complainant by three cheques, that is on 12.7.1996 Rs. 1,50,000/- and by two cheques for Rs. 8,50,000/- and Rs. 1,50,000/- on 18.7.1996. At the time of execution of agreement itself the parties agreed that the complainant was entitled to any addition or alteration in the flats and shops on payment of extra amount which had to be agreed between the parties. The further case of the complainant is that in the meeting of the concerned both parties held on 12.8.1996, it was agreed that in respect of alterations/additions, the complainant should pay a sum of Rs. 69,804/- and on 3.9.1996 payment of Rs. 69,800/- was made in that regard. The further case of the complainant is that though as per the terms of the agreement, the opposite party was required to provide grey mosaic flooring in the premises, it wanted the opposite parties to provide Kota stone flooring in the premises in place of grey mosaic flooring and though there were some differences between the parties in respect of rates, it was later agreed that the complainant should pay to the opposite parties a sum of Rs. 1,02,500/- for providing Kota stone flooring in the premises and on 26.9.1996, 50% of the total cost of Kota stone flooring namely Rs. 51,250/- was paid by the complainant to the opposite party and it was agreed that the balance amount of Rs. 51,250/- should be paid after taking measurement within 3/4 weeks from that date. It is also his case that on 4.12.1996, he had paid the balance amount of Rs. 51,250/-. According to the complainant, it had paid the following amounts:

3. AT this stage, itself it may be noted that in relation to the flat construction there was agreement between the parties as adverted to already and schedule of payment referred to above and agreement to that effect in relation to additions and alterations of rates to be agreed upon between the parties and that they agreed on payment of Rs.69,800/- for certain additions and alterations and for Rs. 1,02,500/- for providing Kota stone flooring instead of grey mosaic flooring as mentioned above have not been disputed by the opposite party in its version or in the affidavit filed and the learned Advocate for the opposite party conceded the correctness of these aspects in the course of his arguments. In relation to the payments made as adverted to already, that total payment of Rs. 24,78,300/- has been made by the complainant to the opposite parties has not been disputed by the opposite party in the course of his affidavit or version filed by it and the correctness of this figure was also conceded by the learned Advocate for the opposite party in the course of his arguments.

4. THE parties had agreed that the delivery of possession of premises shall be given on 30.9.1996 as per the agreement but it could not be delivered uptill now has also been undisputed. THE defence of the opposite parties in relation to non-delivery of possession is as hereunder. It was only in September, 1996, the complainant mentioned sudden changes of flooring and it had thrown whole programme for construction out of gear and delay in completion of building is due to delayed payments made by the complainant and last minute instructions given regarding the change of flooring. We shall advert to disputed question later

after referring to one more preliminary objection to the jurisdiction of this Commission to entertain the complaint. It has been stated that the subject matter of the claim made by the complainant is not within the jurisdiction of this Commission and therefore, the complaint is not tenable in law. On these pleadings, the short points that arise for consideration are as hereunder : 1. Whether the subject matter of the claim made in this complaint is not within the jurisdiction of this Commission? 2. Whether the payments were not adhered to as per the schedule by the complainant and whether the last minute instructions regarding change of flooring given by the complainant had thrown the whole programme out of gear and they are responsible for the delay in completion of construction before the agreed date? 3. Whether the complainant is entitled to recover possession of premises? 4. Whether the complainant is entitled for compensation of Rs. 10,00,000/- as claimed by it?

5. THE contention of the opposite parties that the subject matter concerned in this complaint is not within the jurisdiction of this Commission is based upon the fact that the agreement relates to residential and non residential premises and in relation to non residential premises, it would be beyond the jurisdiction of this Commission under provisions of Consumer Protection Act, 1986 (for short Act). THE learned Advocate for the opposite parties tried to substantiate the contention in this regard by inviting our attention to the decision of National Commission in *Ranbaxy Laboratories Ltd. v. Smt. Mamta Sarkar & Ors.*, reported in 1997 (1) CPR 1.

6. THE consumer has been defined in Section 2(d) of the Act as hereunder: "Consumer means any person who- (i) buys any goods for a consideration which has been paid or promised or partly paid and partly promised, or under any system of deferred payment and includes any user of such goods other than the person who buys such goods for consideration paid or promised or partly paid or partly promised or under any system of deferred payment when such use is made with the approval of such person, but does not include a person who obtains such goods for resale or for any commercial purpose; or (ii) hires or avails of any services for a consideration which has been paid or promised or partly paid and partly promised or under any system of deferred payment and includes any beneficiary of such services other than the person who hires or avails of the services for consideration paid or promised or partly paid and partly promised or under any system of deferred payments when such services are availed of with the approval of the first mentioned person.

Explanation: For the purposes of Sub- clause (i) commercial purpose does not include use by a consumer of goods bought and used by him exclusively for the purpose of earning his livelihood, by means of self-employment".

Service has been defined by Section 2(o) of the Act as hereunder : "Service" means services of any description which is made available to potential users and includes the provision of facilities in connection with banking, financing, insurance, transport, processing, supply of electrical or other energy, board or

lodging or both, housing construction, entertainment, amusement or the purveying a news or other information, but does not include the rendering of any service free of charge or under a contract of personal service".

7. IT may be noticed that the words "housing construction" was included in the definition of service with effect from 18.6.1993 by Act of 1993. It may be noticed that the words commercial purpose occur only in Sub-section(i) of Section 2(1)(d) of the Act. The same do not find a place in Sub-section (ii). Again the explanation to Sub-section 2(i) of the Act is only for purpose of Sub-clause (i) of Section 2(1)(d) of the Act and it has nothing to do with Sub-section 2(1)(d)(ii) of the Act. Obviously, it could not have related to 2(1)(d)(ii) of the Act because in that sub-section commercial purpose has not been used. There is no ban anywhere in the Act which shows that if a person hires or avails the services for construction for commercial purpose, he would not be a consumer within the meaning of the Act and if we look at the decision cited by the learned Advocate for the opposite parties in this background, it is clear that this decision would have application only to a case where the consumer wants to come under the purview of Section 2(1)(d)(i) of the Act and not when he comes under Section 2(1)(d)(ii) of the Act. In mat case, the person had purchased from me opposite party Diagnostic Kit for use in clinical laboratory and because the Kit belonged to time expired batch and wrong results were obtained, the complainant contended that there was serious damage caused to the reputation of laboratory and claimed Rs. 18,75,000/- as compensation. National Commission held that the purchase of Kit was made by the complainant for commercial purpose and therefore the complainant could not be a consumer within the meaning of the Act. This decision therefore has no application to the present case. The matter is covered directly by decision of National Commission in the decision in Skipper Bhawan v. Skipper Sales, reported in I (1995) CPJ 210 (NC). At page 210 in paragraph 6, it has been laid down as under. "6. A preliminary objection has been taken by the opposite party No, 2 to the effect that the sale of commercial flat or space does not fall within the purview of Consumer Protection Act. We need not discuss this point in detail because it has been decided by the majority view by this Commission in Jaina Properties Pvt. Ltd. v. Mrs. Kavita Kataria, II (1994) CPJ CP NCDRC. It was remarked.

"We are not impressed with the contention advanced by the learned Advocate Mr. Sachdev appearing for the revision petitioner that the expression housing construction occurring in the inclusive part of the definition of service contained in Section 2(1)(o) of the Act will not take in non residential buildings. We are clearly of the view that the expression is wide enough to cover buildings of any type which provide shelter or a roof. Hence, it will include both residential as well as non residential structures and the activity of construction of residential as well as non residential structures fall within the purview of the Act".

Hence, me preliminary objection is rejected.

8. IN view of the authoritative pronouncement of the National Commission and

also having regard to the facts that we are considering the case of hiring or availing services by the complainant within the meaning of Section 2(1)(d)(ii) of the Act coupled with the fact that housing construction has been included in the definition of services occurring in Section 2(1)(o) of the Act. Consequent upon Act 50 of 93 with effect from 18.6.1993 and the further fact that the construction of non residential premises is not taken out of purview of the Act, we find that there is no substance in the contention of the learned Advocate for opposite party that the subject matter of the claim made by the complainant in this case is not within the jurisdiction of this Commission. Hence, we overrule the preliminary objection taken by the learned Advocate for the opposite party. In respect of adherence of schedule regarding payments, there is no dispute that the 1st instalment of Rs. 11,53,000/- was paid on the date of agreement as agreed to between the parties. In respect of 3rd instalment of Rs. 3,50,000/- as per the agreement, has to be paid at the time of delivery of possession and if delivery of possession has not been effected then there could be no scope to contend that there has been non adherence in respect of agreed schedule of payment of third instalment. Only in relation to 2nd instalment as per the agreement of Rs. 11,50,000/- it had to be paid on or before 30.6.1996 and as pointed out already the same has been paid on two dates that is 12.7.1996 and 18.7.1996 and therefore there is delay of 18 days in making the payment of Rs. 10,00,000/- out of Rs. 11,50,000/- and 12 days in relation to payment of Rs. 1,50,000/- in relation to 2nd instalment. The opposite parties had agreed to deliver the premises to the complainant on or before 30th September, 1996 is not in dispute. That the construction of premises was not completed on that date is again not in dispute and who was responsible for the same and what criteria to be followed thereon is a different matter to be considered later on.

9. THERE is 18 days and 12 days delay in making payment of 2nd instalment. Opposite parties have written to the complainant on 14.3.1997 that the construction was completed and that it should take delivery of possession. Even in the course of its version and affidavit, no contention has been taken that the complainant is not entitled to delivery of possession in question on this ground. Further, no argument was advanced by the opposite party that on account of delayed payment of 2nd instalment as referred to already the complainant is not entitled to delivery of possession.

10. AT this stage, we could also advert to one development during the proceedings of this complaint. The complainant filed his application on 13.5.1998 to call upon the opposite party to deliver possession of premises and that it was also prepared to deposit a sum payable to it namely Rs. 3,50,000/-. This application was resisted by opposite party. The learned Advocate for the complainant stated during the course of his argument that he would also deposit a sum of Rs. 21,520/- mentioned in Clause 11 of the agreement and take delivery of flats and shops pending further investigation. In reply, the opposite party stated he was prepared to accept the said amount and gave up interest @ 21% claimed by him only in full settlement but his client was not prepared to

give delivery of possession otherwise. Therefore, though the opposite party expressed his willingness to deliver the possession as far as back on 14.3.1997 and though no ground has been taken up to resist the prayer for delivery of possession, the opposite party has refused to deliver the possession of premises during the pendency of proceedings and this attitude on part of the opposite party not to deliver the possession of premises is to say the least unreasonable.

Having regard to the aspect that nothing has been said by the opposite party to resist the prayer for possession of flats, we are of the considered view that the complainant is entitled to get possession of premises as agreed to.

11. IT may be noticed that the complainant has paid all the three instalments as agreed to and it has also paid in respect of additions and alterations. The complainant has to pay a sum of Rs. 21,520/- as per Clause 11 of the agreement. The learned Advocate for complainant is prepared to make deposit of this amount at the time of delivery of possession alongwith last instalment of Rs. 3,50,000/- (3rd instalment). Before we go to question, whether the complainant has to recover the compensation from opposite party, we have to sort out one more contention taken by the opposite party that its entire schedule of construction activities was thrown out of gear on account of delayed payment of 2nd instalment and also last minute instructions regarding change of flooring given by the complainant.

12. AS pointed out already the delay in respect of payment of Rs. 10,00,000/- pertaining to the 2nd instalment was only 12 days and delay in respect of payment of Rs. 1,50,000/- relating to the 2nd instalment was 18 days. There is no reference by the opposite parties at any earlier stage complaining about these delays or said delays have thrown his entire programme out of gear. No basis has been laid by the opposite party to say upto what stage it had come by due date of the 2nd instalment namely 3.6.1996 and as to how delay of 12 days and 18 days referred to above has thrown out of gear regarding the construction activities. No serious contention could also be advanced by the Advocate for opposite party to substantiate its contention in this regard. We hold that there is no substance that the delayed payment of 2nd instalment has in any way affected the building activities by the opposite party. In relation to the instructions regarding change in flooring, again it has to be seen upto what stage the construction had come. On 26.9.1996, 50%, of Rs. 1,02,500/- regarding change of flooring was paid by the complainant to the opposite party. If it had practically reached that stage and if it could not carry out other building activities, there would be substance in the contention in this regard taken up by the opposite party. No material has been provided by the opposite party in this regard. It is after all a company and not just an individual. Therefore, there must have been records maintained by the opposite party in relation to the activities carried out. These records are not made available for the reasons best known to the opposite party. Therefore, we are of the considered view that the instruction given regarding the change of flooring and payment of 50% in that regard on

26.9.1996 has not in any way affected the building activities of opposite party and there is no substance in its contention it has thrown its activities out of gear. Therefore, the contention taken by the opposite party in relation to non completion of premises earlier than the date 14.3.1997 is not acceptable. Though no material as such has been placed by both the parties to show by what time the entire building activities could have been completed taking note of payment of Rs. 51,250/- made on 26.9.1996, it was fairly admitted by the learned Advocate by the complainant having regard to the fact that the entire building activities was expected to be completed and even delivery of possession was expected to be given on or before 30.9.1996 when the agreement itself was on 11.4.1996 having regard to the payment of Rs. 51,250/- made on 26.9.1996 delivery of premises ought to have been on or before 31.12.1996. The learned Advocate for the opposite party could not urge anything to say that the building could not have been completed before 31.12.1996. Having regard to the material placed in this case, we are of the view that the opposite party ought to have completed the entire construction on or before 31st December, 1996.

13. IT was pointed out by the learned Advocate for the complainant that the photographs produced by his client relates to the construction taken on 2.7.1997 and that relate this building activities have not been disputed. The photo Nos. 6 and 7 showing the temporary wall in respect of shops agreed to be to the parties was in existence even on 2.8.1997 is not disputed. That is required to be demolished was not disputed by the learned Advocate for the opposite party. Therefore, even as on 2.8.1997, this wall has not been demolished for effecting the delivery of premises is not in dispute. The photographs also show electrical wiring work had not been completed.

14. HAVING regard to our findings that as per the agreement and payment made, the opposite party ought to have completed the construction and delivered the possession of premises maximum by 1.1.1997. It is not necessary to advert to other contentions taken by the parties in relation to several matters. Though the complainant has put forward his claim of Rs. 10,00,000/- by way of compensation its learned Advocate urged that whatever reasonable compensation is ordered to be paid by this Commission from 1.1.1997 to the date it delivers the possession shall be acceptable. Having regard to the payment schedule and payments amount made the learned Advocate for the complainant was right in not insisting on payment of compensation by way of interest from the date of payment of instalment. The National Commission in such cases has awarded simple interest @ 18% per annum. In fact in the decision adverted to already namely I (1995) CPJ 210 (NC), the rate of interest awarded is 18%.

The learned Advocate for the complainant contended that even in the agreement entered into between the parties there is Clause No. 5 which enables the opposite party to recover the interest @ 21% on delayed payment of instalment and that should be taken as yard stick for giving compensation to his client on the amount paid from 1.1.1997. It may be noticed that this rate of interest

agreed between the parties in respect of delay payments made to the opposite party.

15. IT appears to us interest @ 21% mentioned in the said clause cannot assist us in quantifying compensation. Having regard to the rate, the National Commission has been awarding, we find interest @ 18% would be adequate compensation and we hold that the complainant is entitled to recovery of compensation by way of simple interest @ 18% per annum from 1.1.1997 till the delivery of possession of the premises to it. The complainant has to pay a sum of Rs. 3,50,000/- by way of 3rd instalment and further sum of Rs. 21,520/- as per Clause 11 of the agreement is not disputed by its learned Advocate. The compensation payable to the complainant at the rate of 18% per annum as awarded by us will work out at much more than Rs. 3,71,520/-. When that is so, there is no necessity to give any direction to the complainant to deposit any amount. In the result, we pass the following order: ORDER We direct the opposite party to deliver the possession of premises to the complainant within 10 days from this date i.e. . Then within one week from that date namely on or before 3rd June, 1988, the opposite party shall deposit in the Commission or pay to the complainant, the compensation that we have ordered namely 18% simple interest from 1.1.1997 till the date of delivery of possession minus Rs. 3,71,520/-. In the circumstances, we direct the parties to bear their own costs. Complaint disposed of.