

(2014) 01 NCDRC CK 0021

In the National Consumer Disputes Redressal Commission

Jay Grih Nirman Pvt. Ltd.

APPELLANT

Vs

Arunoday Apartment Owners Association

RESPONDENT

Date of Decision : 13-01-2014

Acts Referred:

Citation : 2014 0 NCDRC 57 : 2014 1 CPJ 307

Hon'ble Judges : D.K.JAIN , VINEETA RAI , VINAY KUMAR J.

Advocate : RAKESH MISHRA , KRISHNENDU DATTA , Abhinav Hansaria ,
Dibyadyuti Banerjee , ABHIJIT SENGUPTA

Judgement

1. THIS revision petition under Section 21(b) of the Consumer Protection Act, 1986 (for short ""the Act """) has been preferred by the opposite party in the Consumer Complaint (D.F. Case No. 180 of 2006) against order dated Sept.9, 2008 passed by the State Consumer Disputes Redressal Commission, West Bengal (for short ""the State Commission """) in first appeal (SC Case No. FA/08/237), whereby the order passed by the District Consumer Disputes Redressal Forum, Alipore (for short ""the District Forum """) dismissing the aforesaid complaint has been reversed and the complaint has been allowed with consequential reliefs.

2. BRIEFLY stated, the facts giving rise to this petition are as follows: In August 1981, by three separate registered Deeds of Conveyance, the three original owners of the subject land transferred their undivided 1/3rd share each to one Jupiter Drug Company, which in turn, entered into an agreement dated Aug.23, 1988 with the petitioner, for development of the land by constructing flats, etc.. Flats with car parking area in the basement, one assembly hall on one side and one maintenance area on the other side of the ground floor of the building were constructed by the petitioner. According to the petitioner, sale deeds in respect of the flats were executed in the year 1990 and possession of the flats/car parking spaces were also delivered to the respective buyers immediately thereafter. Upon purchase of the flats and car parking, the flat owners formed a co -operative society, named as Arunoday Apartment Owners Association, which was

registered on June 12, 2003. Mrs. Monika Sen was a party to the tripartite agreement, dated April 17, 1990, between the owners, developers and herself, as purchaser of one of the flats. She is also one of the members of the association. It seems that there was some dispute relating to the possession of the "assembly hall " and "maintenance area. " The petitioner/developer "s stand was that both the said areas belonged to them and the owner, whereas the association claimed that all the flat buyers had undivided share in the said two areas. However, having failed to get the possession of the said assembly hall and maintenance area, alleging deficiency in service on the part of the petitioner in not handing over the possession of the said spaces, on Oct.30, 2006 a complaint against the petitioner was filed, inter alia, praying for handing over of the possession of the "assembly hall " and the "maintenance area " on the ground floor along with compensation.

3. THE complaint was resisted by the petitioner on several grounds, including the objections that the complaint was barred by limitation; the association had no locus standi to file the complaint and that under the provisions of the WB Building (Regulations of promotion of construction and transfer by promoters) Act, 1993 (for short ""the WB Act """) any dispute between the purchaser of any flat and the promoter had to be resolved by the mechanism stipulated in the Act and not in any other proceedings. The objection of the petitioner relating to limitation was rejected, vide order dated May 28, 2008. Nevertheless, the District Forum dismissed the complaint on merits observing, thus: - ""In the present case the O.P./developer had entered into contract separately with the purchasers of the flats under Arunodaya Apartment, who formed an Association later on known as Arunodaya Apartment Association. A copy of one such contract between the O.P/developer, the land owner and one purchaser of flat viz. Ms. Monika Sen entered on 17/04/1990 has been filed by the petitioner. The entitlement of the purchaser has been mentioned in the Second Schedule of the contract which has been shown as a flat of 1177 sq. ft. together with common areas and facilities, staircases, passages, use of lifts among with a covered car parking space for one car inside the said building. There is no mention of a right to use any Assembly hall or Maintenance area. Rather it becomes clear after going through the terms of the contract at paras IV(m) and IV(g) that the purchaser of flat was not granted any rights in respect of the land left out in the premises beyond the built up area of the flat. The Assembly hall and the Maintenance area are lying at the ground floor and are outside the built up area of the flats. The petitioner association has also claimed that the Assembly hall and the Maintenance area had been built by the developer out of the money realized by the developer from the flat purchasers. But this was not supported by any documents at all and as such we have to reject the claim as baseless. ""

4. BEING dissatisfied with the order passed by the District Forum, the complainant association filed an appeal before the State Commission. The State Commission summarized the rival stands into three points, viz., (i) whether the complainant association was a ""consumer "" under the Act; (ii) whether the

complaint was barred by limitation and (iii) whether the complainant association was entitled to possession of the "assembly hall " and the "maintenance room " in terms of the sale deeds executed with each of the flat owners. All the three points having been decided in favour of the complainant, the opposite party/ developer is before us in this revision petition. Ld. Counsel appearing for the petitioner vehemently submitted that the impugned order suffers from the vice of non -application of mind inasmuch as the State Commission has failed to take into consideration the terms of the purchase agreement and the sale deed, which clearly define the proportionate undivided interest of the flat owners in the common areas, ""such as staircases, lobbies, pump, drainages "" etc. and show that the alleged "assembly hall " and "maintenance hall " did not form part of the common area and they continued to belong to the developer for their own use. It was pleaded that the WB Act clearly bars any civil suit or the like for redressal of a dispute between the purchasers of the flat and the promoters. It was strenuously argued that the possession of the flats having been delivered and sale deeds having been executed in the year 1994 and even the association having been formed and registered as a cooperative society on June 12, 2003, the complaint filed on Oct.30, 2006 was clearly barred by limitation.

5. LD . Counsel appearing on behalf of the complainant, on the other hand, supported the decision of the State Commission. It was submitted that non - delivery of possession of the assembly hall, etc., by the petitioner/developer was a continuing default and, therefore, the complaint was filed within time.

6. SINCE we are of the view that in the present case, the complaint was not filed by the association within two years from the date on which the ""cause of action "" had arisen, it was barred by limitation and, therefore, it would be unnecessary to deal with the contentions touching upon the merits of the complaint. Section 24A of the Act bars any forum set up under the Act, from admitting a complaint, unless the complaint is filed within two years from the date on which, the ""cause of action "" has arisen. The provision expressly casts a duty upon all the three Fora not to admit a complaint filed beyond the period prescribed in the Section, unless the complainant satisfies the Consumer Forum, that the complainant had sufficient cause for not filing the complaint within the period of two years from the date on which the ""cause of action "" had arisen.

7. IN SBI Vs. B.S. Agriculture Industries (2009) 5 SCC 121, dealing with the same provision, the Supreme Court has opined, thus: ""11 It would be seen from the aforesaid provision that it is peremptory in nature and requires the consumer forum to see before it admits the complaint that it has been filed within two years from the date of accrual of cause of action. The consumer forum, however, for the reasons to be recorded in writing may condone the delay in filing the complaint if sufficient cause is shown. The expression, "shall not admit a complaint " occurring in Section 24 -A is sort of a legislative command to the consumer forum to examine on its own whether the complaint has been filed within the limitation period prescribed thereunder. 12. As a matter of law, the

consumer forum must deal with the complaint on merits only if the complaint has been filed within two years from the date of accrual of cause of action and if beyond the said period, the sufficient cause has been shown and delay condoned for the reasons recorded in writing. In other words, it is the duty of the consumer forum to take notice of Section 24 -A and give effect to it. If the complaint is barred by time and yet, the consumer forum decides the complaint on merits, the forum would be committing an illegality and, therefore, the aggrieved party would be entitled to have such order set aside. "" (Emphasis supplied by us)

8. IT has thus been held by the Supreme Court that Section 24A of the Act mandates that before admitting a complaint, all the Fora constituted under the Act, must examine whether or not the complaint under the Act has been preferred within two years from the date on which the ""cause of action "" has arisen. Explaining the meaning and import of the term ""cause of action "" in *Kandimalla Raghavaiah and Company Vs. National Insurance Company and Another* (2009) 7 Supreme Court Cases 768, the Supreme Court has observed as under: - ""The term ""cause of action "" is neither defined in the Act nor in the Code of Civil Procedure, 1908 but is of wide import. It has different meanings in different contexts, that is when used in the context of territorial jurisdiction or limitation or the accrual or right to sue. Generally, it is described as ""bundle of facts "", which if proved or admitted entitle the plaintiff to the relief prayed for. Pithily stated, ""cause of action "" means the cause of action for which the suit is brought. ""Cause of action "" is cause of action which gives occasion for and forms the foundation of the suit. ""

It has been held that the term ""Cause of action "" is cause of action which gives occasion for and forms the foundation of the suit.

9. TESTED on the touchstone of the afore -noted principle, we are of the opinion that the complaint preferred by the complainant association on Oct.30, 2006 was barred by limitation and in the absence of an application for condonation of delay in filing the same in terms of the Sub -Section 2 of Section 24A of the Act, it could not be admitted by the Fora below for adjudication.

10. IT is not in dispute that on March 2, 1990 an agreement for construction of flat was entered into between the owners of the subject land, the petitioner as developer and one Ms. Monika Sen as the purchaser; on April 17, 1990 sale deed in favour of the said Monika Sen was executed. In both the said documents there is a recital as to the interest of each of the flat buyers would be having in the land comprised in the premises described in the schedules to the deeds but there is no reference to any "assembly hall " or to a separate "maintenance room " possession whereof is being claimed by the association. We find that the averments in the complaint in this behalf are quite vague. Nevertheless, paragraphs 4 to 8 of the complaint do spell out the stand of the complainant and would be useful for deciding the question of limitation. The same are extracted below: ""4. That thereafter the said Jay Grih Nirman (P) Ltd. by procuring the purchases of flats and car parking spaces had constructed the said building on

the basis of the said sanctioned building plan, which is a G + 5 storied building comprising 15 flats (3 on each floor) with the car parking area in the basement and as per the said building plan the developer has also constructed one assembly hall on the one side of the ground floor and one maintenance area on the other side of the ground floor of the said building by the money of the intending flat purchasers. On such construction of the building the developer has already delivered the possession of the respective flats and car parking spaces to the said intending purchasers who had invested their money to the developer for the purpose of construction of their flats and the developer also executed sale deeds of those flats and car parking spaces to the respective flat purchasers. 5. That on such purchase of the flats and car parking spaces the said purchasers have formed an Apartment Owners " Association in the name and style of ""Arunoday Apartment Owner "s Association "", for the purpose of maintaining and protecting the common interest of the said purchasers. The said association of purchasers has already registered their association in the office of the West Bengal Apartment Owner "s Association vide registration Serial No.13A of 2003. A registration certificate to that effect has been annexed herewith as Annexure C. 6. That since formation of the said Apartment Owner "s Association the petitioner Association through its Management Board has been looking after the common interest of the flat owner "s of that building and found that the developer who had constructed the building with the money of the purchasers of flats and car parking spaces has been committing deficiency in service in preventing the petitioner Association and its members, who are the owners of apartments independently from using the said assembly hall and the maintenance area for their purpose and have been locking up the same and are using the same, to store his junks. 7. In the year 1996 the said developer had tried to convert the said assembly hall and the maintenance room together with the basement car parking area into two flats by making construction therein. But upon the complaints of one of the apartment owners of the said building to the then Chief Minister, Mr. Jyoti Basu, the Mayor and the Commission of K.M.C., etc., such construction was demolished and the petitioner Association recovered the access to the car parking area for its members but the said assembly hall and the maintenance area which are the common property of the apartment owners, have not yet been handed over and the same are still lying under lock and key by the developer and the developer has already started construction on one portion of the said professed areas of assembly hall. 8. That your petitioner and its members on several occasions, requested the developer to hand over the key of the said assembly hall and maintenance area to them, but the developer with a mala fide intention and to make wrongful gain from the said common property of the apartment owners is not handing over possession of the same and as a result the petitioner and its member are suffering huge loss of common maintenance fund to the tune of Rs.20,000/ - per month since long. ""

It is manifestly clear from the above -extracted paragraphs that right from the threshold, when the possession of the flat and parking areas were delivered to

the respective purchasers sometimes in the year 1994, they were never put in possession of the two areas on the ground floor where, according to them, an "assembly hall " on one side of the ground floor and one "maintenance area " on the other side had been constructed by the developer. On their own showing, in the year 1996, the developer tried to convert the said areas into two flats by making construction thereon but upon complaint to the Chief Minister such construction was demolished and since the formation of the association i.e. on June 12, 2003, the developer had prevented them from using the said "assembly hall " and "maintenance area " by locking up and using the same to store their junks. Thus, even assuming for the sake of argument that the buyers sanguinely believed that in the near future they will be permitted the use of the subject areas, at least in the year 1996 when the developer allegedly tried to convert the "assembly hall " and "maintenance area " into two flats, which action was successfully foiled by the flat owners, made the stand of the developer abundantly clear to them that they were not treating these parcels of land as common areas in which all the flat owners had undivided equal share. Hence, if at all there was any deficiency of service on the part of the developer in not handing over the possession of the said areas, the ""cause of action "" to sue the developer definitely arose in the year 1996, if not in 1994, when the possession of the flats was admittedly handed over to them. Furthermore, if the association, which was formed and was registered on June 12, 2003 for looking after the interest of the flat owners jointly, no reason is forthcoming as to why the complaint against the developer, the petitioner herein, was filed only on Oct. 30, 2006.

11. AS regards the plea that since the developer was under an obligation to hand over the possession of the subject areas to the flat owners, the ""cause of action "" has to be treated as a ""continuing cause of action "" and, therefore, the complaint was filed within time, the same is noted to be rejected. We may note at the cost of repetition that there is a clear averment in the complaint that in the year 1996 developer 's attempt to convert the areas in question into two flats was successfully thwarted. This averment, by itself, made the stand of the developer, qua the subject areas, more than clear to the flat buyers to the effect that they were not willing to part with the possession of these two areas in question and knocks the bottom of the Complainant 's case in so far as the question of accrual of ""cause of action "" is concerned. Looked at from any angle, we are convinced that the complaint by the association, alleging deficiency of service, was hopelessly barred by limitation and could not be admitted for adjudication on merits, more so when there was no prayer for condonation of delay in filing the same.

12. FOR the aforesaid reasons, the revision petition is allowed; the orders of the Fora below on the question of limitation are set aside and DF Case No. 180 of 2006 is dismissed as barred by limitation. During the course of hearing, it was pointed out that some civil litigation in respect of the "assembly hall " is pending. If that be so, we clarify that our discussion above is solely for the purpose of

adjudication on the question of limitation under Section 24 -A of the Act, and shall not be construed as an expression of opinion on the merits of the aforesaid complaint or any other proceedings between the parties before us.

13. THE parties are left to bear their own costs.