

(2016) 11 NCDRC CK 0050

In the National Consumer Disputes Redressal Commission

Case No : 1039 of 2014

KRISHNAMOORTHY NARAYANAN S/O. SH. V.
KRISHNAMOORTHY, & ORS.

APPELLANT

Vs

M/S. BRIGADE ENTERPRISES LIMITED AND ANR

RESPONDENT

Date of Decision : 21-11-2016

Acts Referred:

[Karnataka Ownership Flats \(Regulation Of The Promotion Of Construction, Sale, Management And Transfer\) Act, 1972](#), [Section 4](#) - Promoter before accepting advance payment or deposit to enter into agreement and agreemen

Citation : (2016) 11 NCDRC CK 0050

Hon'ble Judges : K.S. Chaudhari

Advocate : Saurabh Prakash, Nagesh, Joy Basu, Abhinav Pandey, Lomesh K. N., Mohit Chadha, Pankhuri Bhardwaj, Trisha Ray Choudhuri

Final Decision : Appeal Dismissed

Judgement

1. All these appeals arise out of common order of State Commission involving identical questions; hence, decided by common order.
2. These appeals have been filed by the appellants against order dated 23.4.2014 and 16.6.2014 by which complaints were partly allowed.
3. Brief facts of the case are that the complainants/appellants have entered into an agreement to sell and agreement to build with the OPs for purchasing the apartments in Brigade Gateway, Municipal No. 26/1, situated in Industrial Suburb, Subramanya Nagar, Ward No. 9A, Rajajinagar Extension, Bangalore, the project promoted by the OPs/Respondent. The complainants have paid the entire amount under the agreement of sale and construction agreement on the assurances and promise given by the OPs, for the purpose of construction and delivery of apartments, with the host facilities and amenities. Since the OPs prepared standard formal voluminous agreements, with clauses to be signed by the complainants who happen to be the consumers and the OPs have given

verbal assurances and promotional materials, the complainants paid the initial advance and signed the standard agreements. But the OPs failed to deliver the possession of the flats in spite of several requests made by the complainants. The OPs have not kept their promise and the assurance given and the promotional materials used to convince the complainants to buy the apartments and the oral representations made for canvassing sales for the project to form the basis of the contract and the OPs cannot wriggle out of those assurances and promises, which amounts to unfair trade practice. As per the terms of the construction agreement, OPs were expected to complete the construction by 31.3.2008. Letters were sent by the complainants seeking clarification on the progress of construction on 20 th December, 2008, 20 th March, 2009, 29 th June, 2009 and 29 th August, 2009 and several e-mails were also sent. Several meetings were held in between the purchasers i.e., the customers and the OPs, despite the assurances the residential section, the apartment blocks and the apartment cannot be termed as complete in all respects by the OPs. Even after 23 months after the agreed date of delivery, considerable works remains pending. Therefore, on 27.01.2010, complainants visited the site and noticed many deficiencies as shown in paragraph 7 (ii) of the complaint. To that effect, complainants have submitted the report dated 27.01.2010 to the OPs as per Document No. 3. Likewise the copies of photographs taken by the complainants during their site visit dated 27.01.2008 and 10.02.2008 were produced as per Document No. 4. It is further case of the complainants that, OPs were well aware of the irreparable hardship and injury that has been caused to the complainants due to delay in completing the project. But however, it is shocking to note that instead of mitigating this hardship, the tone and tenor of the OPs response is one of denial and the OPs are expected to act in all fairness to at least mitigate the extensive financial loss and mental agony suffered by the complainants. For the last two years, complainants have been pro-actively organizing the meetings with the OPs to try and assess the correct state of the project and ascertain the likelihood of completion of the project by furnishing correct date but each and every time OPs have given misleading information. The attempt made by the complainants in all these complaints failed and they came to know that even while indicating a particular delivery date to existing customers, OPs have been simultaneously giving different and farther delivery dates to new customers by dodging the issues and till date not given a committed date for a comprehensive completion of the full project with all the promised amenities and facilities. In fact, the OPs have even gone to the extent of suggesting that the customers are to blame for not coming forward to take possession of his/her apartment and that several basic facilities will be arranged and several basic tasks completed, once the complainants start to live in the apartments. To that effect the OPs have written a letter dated 30.09.2009 as per Document No. 5. The OPs are aware of the fact that many of the complainants were residing in rented houses and have taken loan to buy the apartments in Brigade Gateway at a price much higher than the then prevailing market prices in and around the same locality consequently, they have been burdened to pay monthly rent and heavy monthly

repayment of loan installments and thereby they have sustained huge financial loss. The complaints are immeasurable as they cannot decide about when they should shift their children's school nearer to Brigade Gateway. The OPs have taken defense under force majeure clause that the grace period and modifications inside the apartment, which are false and/or no longer tenable in view of the inordinate delay. As per the agreements complainants were entitled to two clearly earmarked covered car parks for sole and exclusive use and the specific car parks are yet to be allotted. Complainants have been driven to desperate situations by the inordinate delay in handing over possession of the apartments. The apartments and the residential section as a whole are unsafe and unsuitable for human habitation. OPs have failed to keep up their promise and assurance and therefore have committed deficiency of service and also trust kept in them by the complainants. As per clause 5.3 of the agreement, the complainants are entitled to a compensation at the rate of Rs.4 per sq. ft., of the apartments super built up area per month for the delay and the said compensation approximately would be around 1% p.a. on the amount invested by them for purchasing of the apartment. The OPs have reserved their rights to charge interest at the rate of 15% p.a. on the delayed payments by the complainants for the period of such delay. OPs have promised that the project will have a range of other facilities as mentioned below:

- a. the lake
- b. the mall
- c. the multiplex
- d. the club
- e. the school
- f. the star hotel
- g. the playground
- h. the office tower
- i. the hospital
- j. the Amphitheater
- k. high quality roads
- l. 9 level car parking
- m. Guest car parking spaces and
- n. Convenience store

OPs had even prepared a miniature of the project which was displayed at the site, showing several of these facilities and in addition OPs have furnished attractive promotional materials with a map/sketch/drawing and pictorial

representations of the project and proposed facilities produced as per Document No. 7. After such an inordinate delay, the OPs have clearly wriggling out of several obligations, taking shelter under various clauses implanted in the voluminous standard format agreements. Many of those facilities that were promised were not provided and even if the OPs are now denying that the complainants access to the playground. The so called "world class club", is now open to outsiders and membership of the complainants. So after having lured customers with such promises, OPs cannot now take a stand that their obligations with respect to delivery to the complainants is completed by merely delivering the apartments, with most of the other facilities as stated by the OPs incomplete and unavailable for the use. Regarding water and electricity, the complainants for the last five years facing difficulties for drinking water and the project is yet to receive the necessary water from BWSSB through connections and there is no permanent water supply to the complainants. Likewise power supply through KPTCL/BESCOM. More particularly the complainants visited the site for the purpose of enquiring about the project, it was represented by them that the project is a lifestyle enclave which is conceived taking into consideration the needs of every family member of a typical family and so also the club facilities are not provided. The assurance given by the OPs that they will provide a fully equipped world class club with high end and exclusive facilities. The OP have curtailed the right of using the club for relaxation purpose and the OPs cannot provide club facilities independently. As per the agreement complainants are to pay to the OPs towards electrification, till recently the OPs have charged a sum of Rs.100/- per sq. ft. of the apartment's built up area towards such charges and they are not allowed to use common area and restricted their access. No proper security facilities were made by the OPs though they have collected money separately for car parking slot. Therefore, non-providing of the facilities and delay in handing over the possession amounts to unfair trade. Alleging deficiency on the part of OPs, complainants filed separate complaints against OPs before State Commission.

4. OP resisted all complaints and submitted that the agreement entered into between the complainants and the OPs i.e., the agreement to build and agreement to sell dated 29.08.2006 provide that any dispute between the parties arising in relation to either the agreements or any matters relating thereto shall be referred to a sole arbitrator for adjudication. Therefore, complaints filed before this Commission are liable to be dismissed in limine and therefore, this Commission has no jurisdiction to entertain the complaints. Since the complainants have accepted the terms and conditions of the agreement of sale and construction agreement, they are bound to follow them. There is a no dearth of either property developers or apartments for sale in Bangalore city. Complainants in all the complainants had an option of getting the apartments from any of various builders, if so interested. Because of the inflation and scarcity of the materials OPs could not complete the construction as agreed upon. The prayer sought for by the complainants is without any basis. The prayer

sought for by the complainants is without any basis. The power of attorney executed by the complainants for several persons to represent them is not tenable in the eye of law and there is no deficiency of service on the part of OPs. As per clause 7.1 of the agreement to sell, membership to club is purely optional, and that membership would be also open to outsiders who may specifically acquire the same. Therefore, complainants are not entitled to use the club without becoming the member. The ownership and possession would remain with the OPs and it is the OPs who are entitled to decide admission and denial of new members. The complainants have conspired together to threaten the OPs with multiple litigation against them and proceed to file these baseless complaints against them. Complainants have sought for as many twenty distinct and diverse relief before this Commission including for payment of moneys and for a directions to amend the bye-laws for the membership of a private club, for directions to provide the details of certain charges levied for services for appointment of an auditor to assess the appropriateness of certain collections made towards services to pass directions permitting the complainants to be members of a club owned and operated by the OPs. The prayer sought for by the complainants are not at all maintainable. Denying any deficiency on their parts, prayed for dismissal of complaint.

5. Learned State Commission after hearing parties, allowed complaint partly and directed OP to pay @ Rs.4/- per sq. ft. super built area per month from 1.1.2009 till end of February 2010 wherever there is delay and rest of the prayers were denied against which, these appeals have been filed.

6. Heard learned Counsel for the parties and perused record.

7. Leaned Counsel for the appellants submitted that as OP is allowing Club membership to third persons and restricting Club membership of allottees after a specific period and not allowing complainants use of playground meant for them and committed much delay in handing over flats, providing other amenities as enumerated in Commissioner report and learned State Commission committed error in allowing complaint partly; hence, appeals be allowed and impugned order be modified and all prayers made in the complaints be allowed. Most of the observations made by Commissioner were beyond prayers of complaint and on the other hand, learned Counsel for the respondents submitted that order passed by learned State Commission is in accordance with law; hence, appeals be dismissed.

8. Learned Counsel for appellant submitted that as per agreement to sell, club membership was restricted to the allottees, their family members and ex-allottees and OP has committed deficiency in allowing membership to outsiders, whereas learned Counsel for respondent submitted that agreement to sell permitted membership to outsiders. Perusal of Clause 7 relating to club membership reveals that OP was to provide club in larger property for use and enjoyment of all owners / occupants in larger property and was also open for outsiders who acquire membership as well owners/tenants who opt for

membership of club along with their spouse and children. Thus, it becomes clear that firstly membership of club is optional for purchasers and owners/tenants of apartment and no compulsion to obtain membership of the club. Membership of club is open for owners/tenants for apartments even after sale of their apartments as well to outsiders as mentioned in Clause 7.1 and 7.5 of agreement to sell. Learned Counsel for appellant submitted that reference to outside members in Clause 7.5 is confined to only previous owners of apartments/office space which has been sold by them but still have retained their membership. This argument is devoid of force because perusal of Clause 7.5 makes it crystal clear that facilities of club are available to purchasers/tenants/occupants of apartments/office space/mall/other built up areas and also outside members. Only this fact has been specifically mentioned that transferor of ownership of property can retain his membership unless he specifically surrenders the same. Clause 7.6 further reveals that OP is entitled to permit students from Brigade School to be set up for larger property to make use of the club and facilities available therein. Thus, it becomes clear that right to grant membership rights in club were retained by OP and complainants have no right to restrain OP from granting membership of club to third persons as permitted under agreement to sale and learned State Commission has not committed any error in dismissing complaint to this extent.

9. Learned Counsel for the appellants submitted that respondent has framed rules and regulations and restricted membership of appellants upto the year 2050 which is contrary to agreement whereas learned Counsel for the respondent submitted that as per clause 7.2 (iv) respondent was given power to frame rules and regulations regarding usage of the facilities at the Club. When a particular right has been given to respondent, rules and regulations framed by respondent pertaining to aforesaid galaxy club cannot be set aside by this Commission and appellants as well any other person who is member of the club can raise all these issues in the meetings of the club and take appropriate steps for amendment in rules and regulations of the club regarding membership of present allottees upto the year 2050. Learned Counsel for the appellants could not place any document on record to substantiate that membership of appellants could not be restricted by respondents upto the year 2050. Merely because huge amount has been collected by respondent from appellants towards membership of club, appellants did not get perpetual right of membership in the club and membership of club is to be governed by their rules and regulations and I do not find any infirmity in the impugned order for dismissing prayer towards termination of aforesaid clause restricting membership upto the year 2050.

10. Learned Counsel for the appellants further submitted that playground along with floodlit cannot be confined for use of school children only and appellants are also entitled to use aforesaid property. Learned Counsel for appellant has no objection towards wall erected by respondent around the playground, but submitted that appellants may also be given access to playground whereas, learned Counsel for respondent submitted that appellants rights are limited

towards Schedule "A" property and playground forming part of larger property is not property of appellants and further submitted that land of playground has already been sold to Brigade school and Brigade school has not been impleaded as a party in the proceedings; so, order passed by learned State Commission is in accordance with law.

11. Perusal of agreement to sell reveals that appellants who are apartment holders have been given right only in Schedule "A" property whereas playground forms part of larger property in which no right has been given to appellants. Fencing playground by wall has not been objected by learned Counsel for the appellant, but appellant wants access to playground which cannot be permitted as land of playground has already been sold by respondent to Brigade school whose children play in the ground. No right can be given to the appellants for access in playground in the absence of Brigade school as party to the complaint. Merely because floodlit have been installed in the playground it does not connote that playground is meant for apartment allottees in the evening. Many games are played by children in floodlit and merely by putting floodlit it cannot be presumed that this area was kept by respondents for appellant's use.

12. Learned Counsel for appellant has drawn my attention towards Clause 9.6 of agreement to build which provides that allottees were allowed to use and enjoy all common areas and amenities such as roads, parks, open spaces, etc. in larger property in common with other owners and other occupants of larger property. When playground has already been sold by respondent to Brigade school, it does not remain open space for use by appellant in common with other occupants of larger property and learned State Commission has not committed any error in declining this prayer. Learned Counsel for appellant has placed reliance on judgment of Hon'ble Apex Court in (2009) 5 SCC 313 - Bank of India & Anr. Vs. K. Mohandas & Ors. which is not applicable to the facts and circumstances of present case as terms of agreement to sell are clear and there is no ambiguity in the terms.

13. Learned Counsel for appellant submitted that respondent prayed for exclusion of 90 days on ground of force measure while calculating delay in handing over possession, but learned State Commission has committed error in allowing 189 days. Perusal of impugned order reveals that learned State Commission has considered only 3 months' grace period and allowed compensation @ 4% per sq. ft. for delayed delivery of possession and I do not find any infirmity in the impugned order in calculating compensation for delayed period.

14. Local Commissioner appointed by State Commission has given elaborate report regarding many deficiencies which was not called for as no relief was prayed in the complaint pertaining to many of the deficiencies mentioned in the report. Not only this, in cross-examination Commissioner Mr. S. Narasimha Murthy admitted that majority of the work has been completed and fit for occupation except the mall. Thus, it becomes clear that except delay in handing

over possession of plot, respondent has not committed any deficiency and for the period of delay, learned State Commission has already allowed compensation as per terms of agreement as well.

15. Learned Counsel for appellant has also drawn my attention towards violation of Section 4 of the provision of Karnataka Ownership Flats Act, 1972 which has no relevance after possession has been taken by appellants.

16. In the light of aforesaid discussion, I do not find any illegality in the impugned order and all appeals are liable to be dismissed.

17. Consequently, appeals filed by appellants are dismissed with no order as to costs.