
(2013) 07 NCDRC CK 0011

In the National Consumer Disputes Redressal Commission

M/s. Raviraj Abhinandan Associates, , Ravindra Kumar Sakla
and Abhinandan R. Sakla

APPELLANT

Vs

Mrs. Surekha K. Dang

RESPONDENT

Date of Decision : 26-07-2013

Acts Referred:

Citation : 2013 3 CPJ 572

Hon'ble Judges : AJIT BHARIHOKE J.

Final Decision : Petition dismissed

Judgement

1. THIS revision is directed against the order of the State Consumer Disputes Redressal Commission Maharashtra, Mumbai dated 05.09.2012 whereby the State Commission dismissed the appeal preferred by the petitioner/opposite party passed against the order of the District Forum whereby the District Forum partly allowed the complaint in following terms: 1. The complaint of the complainant is partially allowed

2. AS provided in the agreement, upon payment of the balance amount payable to the respondents, the respondents shall within six weeks of such payment, deliver possession of the said flat no. 105, first floor, building no. A -4, "Raviraj Colorado", Survey No. 44, Kondwa Khurd, Pune 48, with all facilities and amenities to the complainant; The respondents shall pay interest @ 12 % per annum on the said amount of Rs. 6,57,000/- from May 2010 till the possession is delivered to the complainant and further a sum of Rs. 1000/- towards costs of this complaint within six weeks from the receipt of copy of this order. Briefly put relevant facts for the disposal of the revision petition are that respondent Ms. Surekha K. Dang filed a consumer complaint, against the petitioner (s) (builder), alleging deficiency in service on the part of the petitioner for their failure to hand over the possession of residential flat booked by her within the stipulated time.

2. The complaint was contested by the petitioners/opposite party, who in their reply admitted that that complainant/respondent had booked a flat in the scheme floated by them and made certain payments during the period

14.04.2009 to 13.11.2009 adding upto the extent of Rs. 6,57,000/- . Petitioners in their written version claimed that the project could not be completed in time because of genuine reasons and it was not possible to give the exact time frame within which the possession of flat would be given to the complainant. The petitioners further claimed in the written version that because of the hurdles in the completion of project and the delay caused. They did not demand balance consideration of Rs. 8,03,000/- from the complainant. The petitioners, however, admitted having received a sum of Rs. 6,57,000/- from the complainant in terms of the construction linked schedule of payment. The petitioners, however, claimed that as per the agreement they could cancel the contract, however, they were ready to deliver possession of the flat to the complainant within next 18 to 24 months without asking for escalation of price provided the complainant was ready to wait.

3. The District Forum on consideration of the evidence led by the parties allowed the complaint and directed the petitioners/opposite parties to deliver the possession of the flat to the complainant after receiving the balance consideration amount agreed between the parties. The District Forum, also awarded 12% interest on the amount of Rs. 6,57,000/- already paid to the opposite parties till the handing over of the possession alongwith litigation cost of Rs. 1000/- .

3. BEING aggrieved of the order of the District Forum, the petitioners preferred appeal before the State Commission. After service of notice of the appeal on respondent, the petitioners failed to put any appearance on hearing dated 05.09.2012 and the State Commission instead of dismissing the appeal for non - prosecution dismissed it on merits after considering the record.

4. BEING aggrieved of the concurrent finding returned by the State Commission, the petitioners have preferred this revision. Learned Shri Chetan Sharma, Senior Advocate appearing on behalf of the petitioners have firstly contended that the impugned order is not sustainable in law for the reason that it has been passed ex parte without giving an opportunity of being heard to the petitioners. In this regard, he has drawn our attention to the impugned order where it is mentioned that no one was present at the relevant date before the State Commission. We do not find any merit in this submission because the State Commission was compelled to decide the appeal ex -parte because of conduct of the petitioners/ appellant who opted not to appear either in person or through counsel. The State Commission could have dismissed the appeal for non -prosecution but opted to adopt better course in going through the record and deciding the appeal as per grounds taken in Memorandum of Appeal. Thus the procedure adopted by the State Commission cannot be faulted.

5. NEXT contention of learned counsel for the petitioner is that though a plea was taken in the appeal that the complaint filed was pre -mature, it was not decided by the State Commission. This contention is misconceived for the reason that on perusal of the impugned order, we find that the State Commission has dealt with

the aforesaid plea and dismissed the same with the following observations: Furthermore, as per para 7.6 of the written version he further made submission that the possession could be given within next 18 -24 months without asking for any escalation of price. Said period is almost over by this time. Under the circumstances we find that the ground taken in appeal to justify delay in handing over the possession and on that basis to advance a submission that the complaint was premature does not hold good and we find no merit in such submission.

6. THIRDLY , the impugned order is assailed on the ground that both the for a below have failed to appreciate the bonafides of the petitioners who were prevented from delivering the possession of the flat in time because of genuine reasons and who had offered to refund the amount paid by the complainant, if she so desired vide their reply dated 25.10.2010 to the legal notice given by the complainant. We find no merit in the aforesaid contention. Perusal of the notice dated 27.09.2010 sent by the complainant to the partner of the opposite party would show that vide this notice, the complainant had expressed her concerns about no progress of the construction work and called upon the petitioners to intimate the likely date on which the possession would be delivered to her. In response to that notice instead of intimating a firm date or approximate date of delivery of possession, the petitioner had offered to repay the amount deposited by the complainant alongwith interest paid by her on the home loan raised and appropriate interest. This response in our view does not certify the bonafides of the opposite party. It is a well known fact that during the relevant period, the rates of the property have gone high, therefore, the offer of the builder to return the money instead of delivery of flat is no evidence of his bonafides. On the contrary, it reflects on the malafides of the builder who wanted to make profit due to escalation of price of property by offering refund of money.

7. LASTLY , the learned counsel for the petitioner has drawn our attention to clause 11 of the agreement between the parties which provides that the purchaser shall use the unit or any part thereof or permit the same to be used only for residential/commercial purpose. From this, learned counsel has urged us to conclude that the services of the opposite party were availed by the complainant for commercial purpose, therefore, the complainant does not fall within the definition of "consumer" in terms of section 2(1)(d) of the Consumer Protection Act, 1986. There is no merit in this contention. Merely because clause 11 of the agreement provides that the purchaser can use the flat for residential/commercial purpose, it cannot be concluded that the petitioner booked the flat for commercial purpose. Opposite party has led no evidence to provide this fact. Otherwise also, this contention is beyond the pleadings as plea of non maintainability of the complaint has not been taken in the written version filed in response to the complaint. Learned counsel for the petitioner has also tried to emphasise that the complainant is a property dealer and she had entered into the agreement with the opposite party with a motive to earn profit on account of escalation of price with the passage of time. This argument is not acceptable

because it is beyond the pleadings. Otherwise also, there is no evidence on record to this effect. Coming to the impugned order. The State Commission has dismissed the appeal relying upon the written version of the petitioner particularly para 7.6 wherein it was stated that opposite parties feel that they would be able to give possession within 18 to 24 months without asking for any escalation of price provided the complainant was willing to wait. When the appeal was decided the stipulated period of 18 to 24 months was over, therefore, the State Commission took a view not to interfere with the order of the District Forum. We do not find anything wrong in the approach adopted by the State Commission. In our considered view, the petitioner has failed to point out any illegality or material irregularity committed by the State Commission which may call for interference by this Commission in exercise of its revisional jurisdiction. The revision petition is, therefore, dismissed with cost of Rs. 10,000/ -.