(2018) 03 NCDRC CK 0103

In the National Consumer Disputes Redressal Commission

Case No : First Appeal No. 109 Of 2015

M/S. Treaty Constructions & Anr — APPELLANT

Vs

M/S. Ruby Tower Co-Op. Hsg. Society Ltd. & 12 Ors — RESPONDENT

Date of Decision : 07-03-2018

Acts Referred:

Maharashtra Ownership Flats (Regulations of the Promotion of Construction, Sale, Management and Transfer) Act, 1964 — Section 3

Citation : (2018) 03 NCDRC CK 0103

Hon'ble Judges : Prem Narain, J

Bench : Single Bench

Advocate : Zaid Ansari, Uday B. Wavikar, Vikas Nautiyal,

Final Decision : Disposed Off

Judgement

1. This first appeal has been filed by the appellants, M/s. Treaty Constructions & Anr. against the order dated 17.12.2014 passed by the State

Consumer Disputes Redressal Commission, Maharashtra, Mumbai (for short, â?? State Commissionâ??) in C.C. No.05/120 which was filed by the

complainant /respondent no.1 herein.

2. Brief facts of the case are that the members of Respondent no.1 Society purchased flats having been constructed by appellants who completed the

project on their land. The members purchased flats by executing sale deeds from 1994 to 2002. The possession was given to the members even

though interior of the flats were not complete. The society took up the matter with the OPs as Appellant no.1 did not complete the works and could

not get the completion certificate as well as occupancy certificate. The Society collected amounts from members and spent about Rupees one crore in

completing the left over works of the flats. The society was demanding the reimbursement of the spent money from appellant no.1. In a meeting held

on 17.3.2003 the appellant no.1/OP-1 agreed to reimburse Rs.25 lakhs to the society. However, this promise did not materialize. The occupancy

certificate was not obtained by OP-1/appellant, even after a decade of construction of the building. Therefore, the complainant society/respondent

no.1 herein filed a consumer complaint before the State Commission.

3. The complaint was resisted by the OP-1/appellant. However, the State Commission partly accepted the complaint and allowed the same vide its

order dated 17.12.2014, which reads as under:

ORDER

1. Complaint is partly allowed.

2. Opponents, jointly and severally, are directed execute Deed of Conveyance, by obtaining completion certificate and occupation certificate for

transferring rights, interest and title of building and piece of land bearing Survey No.22, Hissa No.7, and bearing C.T.S.Nos.99, (1 to 16) and assessed

by Municipal Corporation of Greater Bombay in Ward No.KN 150512-00 No.K-5125 (1-2) 89A, 90, K-5125 (3) 898, K-5126 (1), 88 and K-5126 (3)

8890, in favour of complainant society within period of 90 days from date of the this order, failing which opponent shall pay Rs.1,000/- per day to the

complainant society from the date of this order till compliance.

3. Opponents, jointly and severally, are directed to pay Rs.26,25,000/- [amount illegally collected for handing over the possession of the flats] along

with interest @ 9%p.a. effective from the date of filing of complaint i.e. 04/10/2005 within period of 90 days from the date of this order, failing which

the rate of interest shall be payable @12% p.a. from 04/10/2005 till its realization.

4. Opponents shall bear their own costs and pay costs of Rs.50,000/- to the complainant society within period of 90 days from the date of this order.

5. Certified copies of this order be furnished to the parties.

4 . Hence, the present appeal.

5. Heard the learned counsel for the appellants as well as of the respondent no.1 and perused the record. Respondents No.2 to 12 did not appear

despite service of notice and they were proceeded ex parte vide order dated 18.10.2016 of this Commission. Similarly respondent No.13 was proceeded ex-parte vide order dated 3.3.2016.

6 . The learned counsel for the appellant no.1 stated that the State Commission has ordered for refund of Rs.26,25,000/- treating it as loan taken from

the members of the society, whereas the fact is that no money was received by the appellant builder. All the receipts are signed by the President of

the society. The learned counsel further mentioned that Mohd. Hanif Latif Menon, President of the society was made a party i.e. OP-17 in the

complaint case, however, his name was deleted on the request of the complainant. The complainant has alleged that the President was hand-in-gloves

with the builder. If this was the case, the name of the President from the array of parties should not have been deleted by the complainant. It clearly

means that the presence of the President could have clarified all the issues and the false nature of the complaint could have come on the surface. As

no money has been received by the appellant and all the money was received by the President of the society and no proof has been filed by the

complainant that this money was transferred to the appellant, in these circumstances, appellant cannot be found deficient and the order of refund of

Rs.26,25,000/- is totally illegal.

7 . Learned counsel for the appellant further stated that the State Commission has recorded in its order that appellant has not taken any action to

remove the objections raised by letter dated 9.7.1993 given by the Municipal Authorities. The learned counsel for the appellant argued that when the

agreement was signed and the construction commenced, the following was stipulated in the condition no.42 of the Agreement itself:

â??The vendors have informed the purchaser and the purchaser is aware that at any future time prior to or even after the execution of Conveyance,

the vendors are allowed to consume remaining F.S.I. the in such event the vendors will be entitled to construct additional wings and/or floor in the said

building or separate building by utilizing the remaining or additional FSI on account of TDR or due to increase in FSI as maybe available under the

other provisions of the said Regulations without any rebate to the purchaser. It is further stated that the vendors will therefore from time to time

amend and/or alter the building plans. The purchaser hereby/irrevocably agrees and gives his/her consent to the Vendors carrying out amendments,

alterations, modifications and/or variations in the said building plans and carrying out such additional construction in respect of the said building. The

purchaser has hereby given his/her consent to the vendors for the same and shall not raise any objections provided, however, the area of the units

hereby agreed to be sold does not decrease.â??

8 . It is further stated by learned counsel for appellant that since there have been illegal changes/alterations and additions in the building and shops,

therefore, the Municipal Corporation has refused to give the occupancy certificate and conveyance deed could not be executed. Unless and until these

illegal changes/alterations and additions are removed by the members of the respondent no.1 society, occupancy certificate could not be obtained from

the Municipal Corporation, Mumbai. It is further stated that the complaint was not maintainable before the State Commission as the total value of the

flats was more than Rupees one crore. In this regard, the learned counsel also relied upon recent judgement dated 7.10.2016 passed by the larger

Bench of this Commission in the case of Ambrish Kumar Shukla & Ors. vs. Ferrous Infrastructure Pvt. Ltd., Consumer Complaint No.97 of 2016.

The learned counsel stated that the claim prayed by the respondent no.1 society was for more than Rupees one crore, therefore, impugned order of

the State Commission is without jurisdiction and needs to be set aside.

9. On the other hand, the learned counsel for respondent no.1/complainant stated that the appellant herein had received a loan amount and the same

was not re-paid. The legal notice dated 7.7.2004 was sent by the complainant. The learned counsel further stated that the appellant has admitted the

same in its written statement. The learned counsel further stated that as per Section 3 of the Maharashtra Ownership Flats (Regulations of the

Promotion of Construction, Sale, Management and Transfer) Act, 1964 (MOFA), the completion certificate has to be obtained by the builder and the

same has not been obtained even after lapse of more than a decade. Learned counsel for respondent no.1 stated that the complete FSI has already

been utilized which was available at the time of construction of the building. The agreement referred to the FSI as prevalent on the date of agreement.

If there is any increase in the FSI in future date, that should not be covered under the agreement. The complainant society and the members of the

society cannot wait indefinitely for conveyance deed to be executed. Learned counsel for the respondent no.1 society relied upon the judgment passed by this Commission in Vaibhav Development Corporation and others Vs. Suryodaya Cooperative Housing Society, First Appeal No.594 of 2013

decided on 4.4.2016 , wherein this Commission observed as under:

â??As regard the validity of the direction by the State Commission to the Appellants to obtain full Occupancy Certificate and execute Conveyance

Deed in favour of the Complainant Society, having carefully perused the afore-noted Provisions of MOFA read with Rule 9 of the Maharashtra

Ownership Flats (Regulations of the Promotion of Construction, Sale, Management and Transfer) Act, 1964, we are of the opinion that it is obligatory

upon the Appellants to obtain a full Occupancy Certificate, without which a Conveyance Deed in favour of the Complainant Society, cannot be

executed and thereafter execute the Conveyance Deed, within a reasonable time, which according to the said Rule has to be within four months, if no

period of conveying the title to the Society is mentioned in the Sale Agreement. In the light of the said Statutory provisions, we do not find any illegality

in the impugned direction.â??

10 . I have carefully considered the arguments of both the learned counsel and have examined the material on record. Basically I agree with the

contention of the learned counsel for the appellant that all the receipts were issued by the President of the Society and he has been deleted from the

array of the parties on the request of the complainant and therefore, there is no proof that the money has been paid to the appellant. The State

Commission has ordered only on presumption. Thus, the OP/appellant herein cannot be saddled with the responsibility to refund the amount of

Rs.26,25,000/- to the complainant as loan repayment. However, this is also true that the appellant has admitted that he had agreed in the meeting dated

17.3.2003 to pay Rs.25 lakhs to the complainant for the deficiency in service. Clearly this amount has not been paid by the OP to the complainant and

therefore, the appellant No.1 is liable to pay Rs.25 lakhs to the complainant as per his own admission in the list of dates filed along with the present

appeal.

11 . So far as the question of obtaining the Occupancy Certificate is concerned, as per the provisions of MOFA the possession should not have been

handed over to the members of the complainant society without obtaining occupancy certificate and this is a clear unfair trade practice. It is being argued on behalf of the OP that there are additions and modifications in the building and therefore, it is difficult to obtain the certificate and the matter

is getting delayed. This argument is not tenable as the situation has been created by the OPs themselves as they offered possession without the

occupancy certificate. Clearly, not obtaining occupancy certificate is the deficiency on the part of the OP/ appellant.

12 . Coming to the question of FSI, though there is a provision in the agreement in condition no.42 that the allottees/purchasers shall not object to OP

utilizing additional FSI, which may be available at the time of agreement or being made available even in a future date. However, this provision goes

against the spirit of MOFA as this Commission in Vaibhav Development Corporation and others(supra) has held that it is obligatory upon the builder to

obtain a full Occupancy Certificate, without which a Conveyance Deed in favour of the complainant society cannot be executed. However, there has

to be a reasonable time for execution of conveyance deed in favour of the Society and this according to the said Rule has to be within four months if

no period of conveying the title to the Society is mentioned in the Sale Agreement.

13. As the OP has given possession to the members of the Society without obtaining Occupancy Certificate, the possession of allottees has become

illegal. As the purchasers have paid full consideration of the flats, they are entitled to have legal possession and legal right and title. It is also seen from

the observation of the State Commission that the appellants/opposite parties have not replied to the queries raised by the Municipal Corporation and

therefore, they themselves were negligent and deficient in taking steps for getting the Occupancy Certificate. As complaint has been filed by the

society, it is essential that the possession of its members is regularized and title of the members as well as of the Society is legalized. This can only be

legalized if OP obtains Occupancy Certificate. Therefore, it is necessary to direct the OP to obtain the Occupancy Certificate in a time bound

manner. In this respect, the order of the State Commission is perfectly valid so far as it relates to directing the OP to obtain Occupancy Certificate

within 90 days. Once the Occupancy Certificate is obtained the title has to be conveyed to the Society within four months.

From this point of view, the condition No.42 is against the provisions of MOFA. Hence, this condition will not be a binding on the other party.

Therefore, the existence of this condition in the agreement shall only be seen as unfair trade practice. As the OP has not obtained the occupancy

certificate and thereby the OP is not able to register the conveyance deed in favour of the complainant Society, the continuing deficiency on the part

of the appellant /OP is evident. Therefore, I do not find any error in the order of the State Commission in respect of the OP obtaining occupancy

certificate and then executing the conveyance deed in favour of the Society. The penalty of Rs.1,000/- per day was effective from 17.3.2015,

however, looking at the difficulties of the appellant in getting the occupancy certificate due to some modifications, additions and alterations in the

building, I deem it appropriate to put a lump sum compensation of Rs.3 lakhs to be paid to the complainant Society by the appellant for not obtaining

occupancy certificate till today. It is further ordered that the order of the State Commission for paying Rs.1,000/- per day shall be applicable now from

the expiry of 60 days from the date of this order. This amount shall be paid regularly at every month to the complainant society till the occupancy

certificate is obtained and conveyance deed is executed in favour of the Society.

14. As regard the objection of the appellants regarding pecuniary jurisdiction of the State Commission, it appears that this objection has not been taken

before the State Commission specifically. As the matter has now been decided by the State Commission on merits, the technical objection of

pecuniary jurisdiction cannot be raised at this stage. This view gets support from the decision of the Honâ??ble Supreme Court in Harshad Chiman

Lal Modi Vs. DLF Universal and Anr., AIR 2005 SC 4446 , wherein the Honâ??ble Apex Court has held as follows:-

â??So far as territorial and pecuniary jurisdictions are concerned, objection to such jurisdiction has to be taken at the earliest possible opportunity and

in any case at or before settlement of issues. The law is well settled on the point that if such objection is not taken at the earliest, it cannot be allowed

to be taken at a subsequent stageâ??.

15. Based on the above discussion, the appellants are directed to pay Rs.28,00,000/- (rupees twenty eight lakhs only) to the respondent No.1 Society

within a period of 45 days, failing which this amount shall carry an interest @8% p.a. from date of this order till actual payment. Appellants are further

directed to pay Rs.1000/- (rupees one thousand) per day after 60 days from date of this order to the Complainant Society till obtaining of the full

Occupancy certificate. It is further directed that appellants shall convey the title of the property as detailed in the order of the State Commission in

favour of the complainant Society by registered deed within a period of four months after obtaining the Occupancy Certificate. The impugned order of

the State Commission stands modified accordingly. The cost of Rs.50,000/- is also upheld. First Appeal No.109 of 2015 stands disposed of

accordingly.

