(2007) 12 NCDRC CK 0033

In the National Consumer Disputes Redressal Commission

N M JAYARAM APPELLANT

Vs

ASHED PROPERTIES AND INVESTMENT PVT LTD RESPONDENT

Date of Decision : 12-12-2007

Acts Referred:

Citation : 2008 4 CPJ 397

Hon'ble Judges : Chandrashekhar , Rama Ananth , M.Shama Bhats J.

Advocate : M.Shivaprakash

Judgement

1. WE could not have come across a better case of a Builder adopting dubious methods to deprive the complainants of apartments, taking advantage of a clause in the letter of allotment, than the case on hand.

2. THE facts involved in both the complaints are similar and identical. Hence, they were heard together and are disposed of by this common order. The facts in these cases are as follows: the opposite party (for short, "o. P. ") is a Company registered under the Companies Act having its office at No. 807, 8th Floor, Barton Centre, No. 84, M. G. Road, Bangalore. The object of the O. P. is to acquire urband properties and to develop the same for sale to the prospective purchasers at competitive commercial rates. The O. P. entered into a Joint Development Agreement with M/s. Mahajabeen Nazri dated 5. 2. 2004 and pursuant to the said Agreement, the O. P. offered for sale of Residential Apartments to be constructed on the property bearing Nos. 14 and 15 (old Nos. 9 and 9a), Alexander Street, Richmond Town, Bangalore, which is more fully described in the Joint Development Agreement (hereinafter called as the "schedule Apartments").

The O. P. through their Authorized Agent Mr. Nicky Sawhney made an offer to the complainants to sell the Schedule Apartments each approximately measuring 2800 to 3000 square feet at the rate of Rs. 3,900 per square feet and shown the relevant documents to them in proof of the title in respect of the Schedule Apartments. The complainants after having satisfied with the title in respect of the Schedule Apartments agreed to purchase the Schedule Apartments and, accordingly, as per the demand made by the O. P. each of the complainants paid a sum of Rs. 25,00,000 through cheque as a part of the sale consideration out of the sale consideration payable at the rate of Rs. 3,900 per square feet. The O. P. on receipt of the said amount of Rs. 25,00,000 from each of the complainants issued letters of allotment dated 13. 7. 2006 and the receipt acknowledging the payment. As per the terms of the letters of allotment of the Schedule Apartments, the complainants were given to understand that the owner of the land has let out a small dwelling house to a tenant and the O. P. has undertaken to get the vacant possession within a period of six months and thereafter the schedule of payment will be as per the terms of the formal agreement of sale/ construction which would be executed after the tenant vacates the house.

3. THE further case of the complainants is that the agent of the O. P. Mr. Nicky Sawhney representing the O. P. made a false representation that the tenant in the house did not vacate and, therefore, the O. P. has terminated the project and refunded the amount by way of cheques. The further case of the complainants is that the Agent compelled the complainants to realize the amounts immediately. It is further stated that the O. P. by adopting a dubious method coerced the complainants to present the cheques for realization and because of that the complainants have presented the cheques and realized the amounts. Later on, the complainants came to know that the O. P. has misled the complainants with the sole intention to sell the Schedule Apartments at a higher price to earn more profit. This, according to the complainants, is a "deficiency in Service" on the part of the O. P. and the O. P. avoided sale of the Schedule Apartments in favour of the complainants with a view to make huge profit. Hence, the complainants have filed these two complaints for a direction to the O. P. to allot the Schedule Apartments as per the letters of allotment by receiving the total consideration as agreed upon. This Commission ordered notice of the complaints to the O. P. The O. P. entered appearance and filed its version. The sum and substance of the defence of the O. P. is that there is no "concluded contract" and even assuming that there is such a concluded contract, the proper remedy for the complainants is to file a civil suit for specific performance and declaration and, therefore, the complaints filed by the complainants are not maintainable and are liable to be dismissed.

4. THE O. P in its version has stated about the Joint Development Agreement entered into with M/s. Mahajabeen Nazri. According to the O. P. , as per the Joint Development Agreement, the O. P. had to vacate the tenant who is in possession at his own cost with full assistance and co-operation of the owner. Under the said Agreement, it was also agreed between the O. P. and M/s. Mahajabeen Nazri that the O. P. shall commence construction work on the Schedule Property within six months from the date of execution of the Joint Development Agreement or three months from the date of the Tenant vacating the premises and after getting the Plans approved, whichever is later. The allotment of Apartments as per the letter of allotment is only an "invitation to treat" and that the same, not being a concluded agreement, is not capable of being executed, as the terms and

conditions of the same cannot be ascertained. The further case of the O. P. is that the allotment of Schedule Apartments was subject to the conditions referred to in the letters of allotment. It is further stated in the version that since the O. P. was not able to vacate the tenant within six months, i. e. by 13. 12. 2005, as agreed between the complainants and the O. P. , the complainants requested the O. P. to refund the amount paid by them and, accordingly, the O. P. issued two cheques dated 14. 2. 2006 drawn on the Jammu and Kashmir Bank Limited, Infantry Road, Bangalore, each for a sum of Rs. 25,81,370 to the agent of the complainants, payable to the complainants. Thereafter, the complainants got encashed the said cheques. According to the O. P. , the complainants have filed these complaints to force the O. P. to part away with the Schedule Apartments at a throwaway price, in view of the hike in real estate price and in order to bring disrepute to the O. P. in the Society. Both the parties have filed affidavits by way of evidence and also produced certain documents. On the above said pleadings of the parties, the points that arise for consideration in these complaints are as follows: (1) Whether the O. P. proves that the complainants cannot maintain the complaints under the Consumer Protection Act, 1986 (hereinafter called as the "act") as they have a remedy to approach the Civil Court for specific performance of the contract? (2) Whether the O. P. proves that there is no concluded contract between the parties so as to enforce the rights derived by the complainants under the Letters of Allotment of the Schedule Apartments? (3) Whether the complainants prove that the O. P. through its agent misrepresented the facts and coerced the complainants to present the cheques and get them encashed, stating that the O. P. is not in a position to proceed with the construction as it could not get the tenant vacated within six months from the date of Letters of Allotment? (4) Whether the complainants prove that the O. P. has sent the two cheques refunding the amount paid by the complainants with a view to earn higher profit by sale of the Schedule Apartments to some third persons by misrepresenting the fact that the O. P. could not get the tenant vacated within six months from the date of Letters of Allotment? (5) Whether the complainants prove that there is a "deficiency in Service" on the part of the O. P. in order to grant the relief as prayed for in the complaints? (6) To what relief the complainants are entitled? point Nos. 1 and 2 :

5. IT is not in dispute that each of the complainants have paid Rs. 25,00,000 to the O. P. as a part consideration seeking for purchase of the Schedule Apartments to be constructed by the O. P. in the property bearing Nos. 14 and 15 (Old Nos. 9 and 9a), Alexander Street, Ward No. 76, Bangalore. It is also not in dispute that the O. P. has issued letters of allotment dated 13. 7. 2005 to the complainants. A copy of the said letter of allotment which is typed on a stamp paper has been produced by the O. P. itself. It is also not in dispute that the complainants have issued a receipt for having received Rs. 25,00,000 from each of the complainants towards the part consideration. Copies of the Receipts have also been produced by the complainants. The Letter of Allotment reads as follows: "this is to confirm that an Apartment of approximately 2800-3000 sq. ft.

at the rate of Rs. 3,900 per sq. ft. has been allotted to Mr. N. M. Jayaram and Mr. Sanjay Jayaram, both residing at No. 23, Langford Court Apartments, 9, Langford Gardens, Bangalore -25, represented by their GPA Holder Mr. Shricharan Jayaram, aged 35 years, residing at No. 23, Langford Court Apartments, 9, Langford Gardens, Bangalore-560 025, in the proposed construction by M/s. Ashed Properties and Investments (P.) Limited at Nos. 8 and 9, Alexander Street, Richmond Town, Bangalore, against an advance and part payment of Rs. 25,00,000 (Rupees twenty-five lakh only) towards the sale consideration for outright purchase under the following terms and conditions- (1) Confirmation of the exact area and payment schedule to be provided by the developer.

(2) If vacant possession of the land not obtained within a period of six (6) months from today''s date (13. 7. 2005), the purchaser will have the option- (a) having his money refunded within fifteen (15) days; (b) being allotted an apartment of any other project of M/s. Ashad Properties and Invest-ments (P) Limited as purchaser so desires on such terms and conditions as may be mutually agreed upon; (c) Waiting for the construction of the existing apartment.

(3) Plans of the above apartments are in the process of being prepared by the Architects and will be forwarded to the purchaser as soon as they are ready.

(4) The purchaser has the option to choose the apartment of front facing of direction North and East except the ground and the third floors.

(5) An advance and part payment of Rs. 25,00,000 (Rupees twenty-five lakh only) has been received by Cheque No. 201286 dated 13. 7. 2005 drawn on Vijaya Bank, Mudigere, Chickmagalur.

(6) The Schedule of Payment will be as per the terms of the formal agreements of Sale/construction, which will be executed after the eviction of the tenant. "

From this it is seen that there is an agreement between the parties under which the O. P. agreed to sell the Schedule Apartments measuring approximately 2800 to 3000 square feet to each of the complainants at the rate of Rs. 3,900 per squre feet. In the letters of allotment, there is also an acknowledgement for having received a sum of Rs. 25,00,000 from each of the complainants towards part sale consideration on outright purchase subject to the terms referred to in the said letters of allotment.

6. FROM the letters of allotment, it is seen that there is a concluded contract between the parties, since under the terms the two Schedule Apartments are agreed to be sold at a specified rate. The said sale of apartments is for a consideration and out of total consideration a part of the sale consideration has already been paid by the complainants. The word "consumer" is defined under Section 2 (d) of the Act. Under Section 2 (d) of the Act, any person who buys any goods for a consideration which has been paid or promised or partly promised, is a consumer. In the instant case, the total consideration payable has

been agreed between the parties. Part of the sale consideration also has been paid and the remaining part has been promised to be paid. Therefore, the complainants are "consumers" as defined under the Act. In the event if the O. P. fails to provide the service as agreed as per the letters of allotment it amounts to a "deficiency in Service" on the part of the O. P. Therefore, when the facts are not so disputed, it is open for the complainants to compel the O. P. to perform its part of the contract and in the even if the services offered and the duty undertaken under the contract as per the letters of allotment are not rendered by the O. P. , it amounts to "deficiency in Service". In such event it is open for the party who alleges deficiency in service to maintain a Complaint under the Act. Further, as per the terms of letters of allotment, it is seen that there is an offer and also an acceptance by virtue of the acceptance of part consideration, which has been paid by the complainants. Hence, the complainants have satisfied all the ingredients of a valid contract so as to enforce them either before the Civil Court or before this Forum, which is a "court of Equity". Therefore, we hold that the complaints filed by the complainants are maintainable in law. Hence, Point Nos. 1 and 2 are answered accordingly. Point Nos. 3 and 4:

The complainants in their complaints have specifically averred that the O. P. through its Agent Mr. Mahajabeen Nazri made the complainants to believe that the O. P. is not in a position to get the tenant vacated and, therefore, the O. P. has refunded the amounts through the cheques. The further case of the complainants is that the O. P. through its Agent has coerced the complainants to present the said cheques and get the same realized with a view to earn more profit. This averment has not been specifically denied by the O. P. in its version. In the absence of such specific denial, whatever averments made by the complainants in their Complaints are deemed to have been admitted by the O. P. It is seen from Clause (2) of the letters of allotment that if the O. P. could not obtain the vacant possession of the premises from the tenant within a period of six months from 30. 7. 2005, the purchaser will have options as narrated at Sub-clauses (a) to (c) of Clause (2) of the Letters of Allotment. According to the O. P. , it could not get the tenant vacated from the premises so as to proceed with the project and, therefore, it has refunded the amount to the complainants through the agent of the O. P. The complainants in their complaint have specifically stated that M/s. Nikey Sawhney is the agent of the O. P. , through whom they approached the O. P. and agreed to purchase the Schedule Apartments. The case of the O. P. is that it has returned the advance amount paid by the complainants through the agent of the complainants, i. e. Mr. Nikey Sawhney. It is not known whether Mr. Nikey Sawhney is the Agent of the complainants or the Agent of the O. P. Neither the complainants nor the O. P. have filed the affidavit of the said Mr. Nikey Sawhney. The fact remains that as per the terms of the Letters of Allotment, the complainants agreed to purchase the Schedule Apartments and the O. P. agreed to sell the Schedule Apartments each approximately measuring 2800 square feet to 3000 square feet to each of the complainants for an agreed rate, i. e. at Rs. 3,900 per square feet. The complainants have produced a copy of the Declaration by way of affidavit, which is on a Stamp Paper and the said document has been notarized. The said Declaration is by M/s. Mahajabeen Nazri and Mr. Inant Sunil Kumar, who are said to be the persons in possession of a portion of the schedule premises. Para 6 of the said Declaration reads as follows: "taking into consideration all the relevant factors Mrs. Mahajabeen Nazri through her General Power of Attorney Holder Mr. Sameer A. Khan has offered us to pay a sum of Rs. 2,00,000 (Rupees two lakh only) as compensation by way of Banker''s Cheque bearing No. 123124 drawn on the Jammu and Kashmir Bank, Infantry Road Branch, Bangalore, dated the 15th December, 2005, which we have consented and agreed to receive out of our own free will and accord and have undertaken to hand over possession of the building on No. 15, Alexander Street, Richmond Town, Bangalore-560025, without any further claims whatsoever. "

The said Declaration is not disputed by the O. P. The Declaration is dated 17. 12. 2005. The Declaration has been got typed on a Stamp Paper purchased by the O. P. on 10. 12. 2005, as found on the document. As per the letters of allotment, if the vacant possession of the premises is not obtained within a period of six months from 13. 7. 2006, the purchaser will have the options as referred to in the said letters of allotment. The period of six months expired on 13. 1. 2006, that is to say the complainants have a right to exercise their option only after the expiry of 13. 1. 2006, whereas the Declaration made by the tenant to vacate and hand over the vacant possession on receipt of Rs. 2,00,000 is on 17. 12. 2005, i. e. even before the expiry of six months. Further, the very fact that the Stamp Paper was purchased on 10. 12. 2005 in order to get the Declaration from the tenant by way of an affidavit discloses the fact that by December, 2005, the tenant who was in occupation of the premises decided to vacate the premises. When such being the case, the O. P. having obtained or sure of getting the vacant possession of the premises within six months from the date of letters of allotment, there was no reason for the O. P. to refund the amount paid by the complainants through the Agent on 14. 2. 2006, i. e. after the expiry of about one month from the date of taking possession of the premises from the tenant. This itself speaks of the fact that the O. P. with a view to earn huge profit, since the value of land in and around Bangalore City has touched the sky, has refunded the money to the complainants. From this it is seen that the conduct of the O. P. is not straight and the O. P. in order to avoid the sale of the Schedule Apartments in favour of the complainants as per the letters of allotment has adopted this dubious method of refunding the amount to the complainants through the agent, making the complainants to believe that the O. P. could not get the vacant possession of the premises within six month from the date of allotment.

7. ACCORDING to Section 43 of the Transfer of Property Act, "where a person fraudulently or erroneously represents that he is authorized to transfer certain immovable property and professes to transfer such property for consideration, such transfer shall, at the option of the transferee, operate on any interest which the transferor may acquire in such property at any time during which the

contract of transfer subsists. By the English Law of estoppel, "where a grantor has purported to grant an interest in land which he did not at the time possess, but subsequently acquires, the benefit of his subsequent acquisition goes automatically to the earlier grantee, or as it is usually expressed, "feeds the estoppel". No doubt the said provision has been followed by several High Courts of our country, even though there was no such misrepresentation regarding the title to the property, keeping in view the principle of "equity". This Forum constituted under the Act is a Court of Equity. Even assuming that the O. P. has not got the tenant vacated within the time specified as per the Letters of Allotment and the O. P. got the tenant vacated subsequently that would enure to the benefit of the person who agreed to purchase the property. In the instant case, we are told that the tenant has vacated the premises and the O. P. has started construction of the Schedule Apartments. Therefore, there is no reason for the O. P. to deny the sale of Schedule Apartments in favour of the complainants as per the letters of allotment. Point No. 5 : As per the Letters of Allotment in the event if the O. P. fails to get the tenant vacated within six months, the purchaser will have the option of asking the O. P. to refund the money or he may ask for allotment of an Apartment in any other project of the O. P. or it is open for the purchaser to wait till the construction of the Schedule Apartments. If the O. P. was not able to vacate the tenant within six months, it ought to have issued Notice to the complainants calling upon them to exercise their option as provided in the Letters of Allotment. In the instant case, no such Notice has been issued to the complainants. Further, the contract entered into between the parties as per the letters of allotment has not been terminated or cancelled alleging any breach on the part of the complainants. In the absence of such Notice or termination of the contract, there is no reason for the O. P. to refund the amount unilaterally. From this also it is seen that the conduct of the O. P. is not straight and the refund of the amount by the O. P. through the cheques through the agent of the O. P. is only with a view to earn more profit because of hike in the price of Apartments in Bangalore City. This is a clear case of "deficiency in Service" on the part of the O. P. The O. P. must have used the money collected from the complainants for the purpose of construction of Apartments. After using the said money it was not open for the O. P. to refund the money to the complainants. The O. P. being a Company established for the purpose of acquiring and developing urban properties for sale to the general public ought not to have adopted this dubious method contrary to the agreed terms of contract between the parties. It is unethical on the part of the O. P. to refund the amount without giving an opportunity to the complainants to exercise their option as per the terms and conditions mentioned in the Letters of Allotment. Hence, we are of the view that there is no substance in any of the defence pleaded by the O. P.

8. THE learned Counsel appearing for the O. P. relying upon the decision of the Supreme Court in the case of Synoo Industries v. State Bank of Bikaner and Jaipur and Ors. , reported in I (2002) CPJ 16 (SC)=i (2002) SLT 214= (2002) 2

SCC 1, submitted that the appropriate remedy for the complainants is to approach the Civil Court. In the instant case, as observed above, the facts are not so disputed. Whatever relief that could be granted by the Civil Court could also be granted by the Forums constituted under the Act, if the complainants were to establish that they are "consumers" as defined under the Act and there is "deficiency in Service" on the part of the O. P. , in not discharging the duties which were agreed to be discharged by it as per the terms of the contract. Therefore, in our view, the said decision is of no assistance to the O. P. Hence, we answer Point No. 5 accordingly. Point No. 6 : In the result, we pass the following Order: the complaints are disposed of in the following terms- (1) O. P. is directed to issue Notice to each of the complainants calling upon them to pay the total consideration for the purpose of purchase of the Schedule Apartments as agreed as per the Letters of Allotment, within two months from today. (2) On receipt of such Notice from the O. P. , the complainants shall pay the full consideration to the O. P. within two months after the receipt of the Notice; (3) The O. P. on receipt of the amount as directed above, shall allot and sell the Apartments to each of the complainants, within two months from the date of receipt of the consideration. (4) The O. P. is also directed to pay Rs. 5,000 to each of the complainants as costs of these proceedings.

Complaints disposed of.

