

(2013) 04 NCDRC CK 0099

In the National Consumer Disputes Redressal Commission

Twin Tower Co-Op. Hsg. Society Ltd

APPELLANT

Vs

M/S. Manish Vijay Enterprise , Jyoti Construction And Co.
Having Their Office At Behind Manish Park

RESPONDENT

Date of Decision : 09-04-2013

Acts Referred:

Citation : 2013 0 NCDRC 241 : 2013 3 CPJ 281

Hon'ble Judges : J.M.MALIK , VINAY KUMAR J.

Final Decision : complaint is partially allowed

Judgement

1. THIS original petition was filed on 21.8.2000. On two occasions i.e. 24.5.2001 and 24.3.2011, it was dismissed for non-prosecution. On the later date, the counsel for the complainant also sought and was permitted discharge from the case. On 15.7.2011, it was restored and thereafter finally heard in October 2012, on day to day basis. In the meanwhile, on 1.10.2003 this Commission had decided to proceed against OP-2, ex parte. Advocates, Ms Rashmi B Singh for the complainant and Mr Mohinder Kumar Madan, for the OP-1, have been heard.

2. THE complainant, Twin Tower Co-operative Housing Society (hereinafter referred to as the Society) has filed this common complaint on behalf of all 145 owners of flats, in a representative capacity. The Society was registered of 24.3.1999. However, the flat owners have admittedly been in possession/ occupation of their flats since 1989. As stated in the Complaint petition - "The Complainant states that the respondents vide their agreement of sale to each flat purchaser promised various services. The complainant took possession of their flats in the year 1989. The complainant states that respondents have stated in the agreement of sale that they would be constructing and completing the building as per the sanctioned plans and that the respondents would comply with all the necessary formalities to get the Occupation certificate issued by B.M.C. The Complainant states that till today respondents have failed to obtain Occupation Certificate for the complainant 's building thereby providing deficient service. The Complainant states that due to non-obtaining of Occupation

Certificate, the Complainant members are forced to pay one fourth more property taxes which amounts to Rs.22,98,906/- from 1.10.92 till 31.3.2000. The Complainant members also have to pay excess water taxes which are double of normal water taxes. Therefore, they are entitled to claim an amount of Rs.6,08,620/- from 1.10.1992 till 31.3.2000. The Complainant "s also have to pay non refundable water deposit which amounts to Rs.1,76,000/-. The Complainant have to pay non-agricultural charges to the Collector which amounts to Rs.50,390/- from 1.10.1992 to 31.3.2000. "

Therefore, the following relief is sought against the opposite parties - "The Complainant therefore prays that: (a) Be pleased to give conveyance of the property to the registered Co-operative Housing Society of the Complainant. (b) A total sum of Rs.31,33,916/- towards excess property tax, water tax, non refundable deposit and non agricultural charges and further amount of excess taxes paid from the date of filing of complainant till payment; (c) Be pleased to direct the respondents to pay complainant an amount of Rs.1,27,570/- towards registration of Co-operative Housing Society; (d) Be pleased to direct the respondents to pay a total sum of Rs.1,65,007/- collected by way of advance tax; in individual agreement of sale. (e) Be pleased to direct the respondents to pay a total sum of Rs.2,45,625/- towards estimated costs of compound wall and garages; (f) Be pleased to order respondents to pay jointly and severally an interest at the rate of 18% p.a. on the total amount of Rs.34,26,493/- arrived at by adding prayer (b) (c) (d) from the date of filing complaint till payment; (g) A sum of Rs.10,00,000/- be awarded towards the mental agony and inconvenience cause due to deficiency of service by the respondents; (h) Costs be awarded (i) Any other reliefs as this Hon "ble Commission deems fit and proper; "

3. CHALLENGING the above position of the complainants, the response of OP-1/ Manish Vijay Enterprises raises some preliminary issues, in addition to responding to the main ones. We deem it appropriate to take up the preliminary issues, before going into the others - a. The first objection is on the ground of limitation. It is alleged that the possession of the flats was given in 1989, while the complaint was filed eleven years later in 2000. Hence, the complaint is alleged to be barred by Section 24 A of the Consumer Protection Act, 1986. As replied in the rejoinder of the complainant, the occupation certificate is not issued and the conveyance of the property is not admittedly executed still. Therefore, the question of limitation does not arise. We agree with this position. If the cause of action arose in 1989 with the handing over of physical possession, it has continued to exist due to non-execution of the conveyance deeds in favour of the flat purchasers. b. An issue is also raised about the locus standi of the Society to file the consumer complaint, alleging that there is no privity of contract with the OPs. On this point, the complaint itself clarifies that it is filed on behalf of individual flat owners as well as to represent their common issues. The affidavit accompanying the complaint is signed by individual flat owners as well as authorised representatives of the Society. It is also clarified in the rejoinder that the complaint is filed in the representative capacity, as per the provision in

Section 2(1)(b)(iv) of the Act. We therefore, find no merit in the objection that the complainant Society has no locus. c. It is further contended that the complaint is filed seeking the same relief which was sought in the earlier Writ Petition. In this context, the rejoinder of the complainant clarifies that the relief sought in the WP related to issue of occupation certificate from the Municipal Corporation. In the consumer complaint, the relief sought is the conveyance of the property by the OPs. We therefore, reject the above preliminary objections and proceed to consider the substantive issues arising in this complaint.

4. EXHIBIT A-1 is a copy of the agreement entered into by OP-1 in 1989 with individual complainants for purchase of flats. It gives a good idea of the factual background of the case. As per this agreement, the building plan was approved by Bombay Municipal Corporation on 23.1.1981(Clause 8). The agreement also authorised the builder (OP-1) to seek additional floor space from the Bombay Municipal Corporation, utilise and sell it (Clause 14). Possession of these flats was to be given only after the purchaser had made "all payments required to be made under this agreement " to the builders (Clause 17). Non-agricultural assessment for the previous three years was paid by the builder and was required to be paid by the purchasers from the date of grant of occupation certificate to the project (Clause 22). The individual purchasers of flat were not to be given any separate deed of conveyance or any other title. The same were required to be executed by the builders in favour of the Cooperative Society/ Association (Clause 43). Coming to the problem of a part of the project land being in occupation of slum dwellers, Clause 45 cast the following obligation on the builders: "The Builders hereby declare that at present there are many authorised as also unauthorised small structures on the said land and the same have been occupied by authorised and/or unauthorised persons. The Builders shall endeavour to get the portion or portions of the said land with such structures duly sub-divided from the land on which the Builders have been constructing the buildings. In case at any time of such sub-division is not approved by the Municipal Corporation of Greater Bombay the Builders shall have the said land or any part thereof conveyed in favour of a co-operative society, limited company or the association of apartment owners subject to such encroachments and tenancies. "

5. IN the affidavit filed by Shri B. Dinkar on behalf of the Complainant society, it is further stated that as per Clause 16 of the agreement the builder was to notify the building as completed and hand over possession after receipt of entire amount of consideration. But, till the date of the complaint, the builder /OP had failed to get the occupation certificate issued for the building. The members of the Complainant Society have therefore, had to pay 1/4th higher property taxes and double of water tax. The affidavit further states that under Section 11 of the Maharashtra Ownership Flats Act, 1963, it is mandatory obligation of the builder to convey the property to the Complainant within four weeks of registration of Cooperative Housing Society.

6. ALLEGEDLY , the complainants have paid full agreed price as per the agreement of sale with individual purchasers of flats. The respondents have put them in physical possession but have not executed the conveyance deeds in their favour. In this behalf the affidavit of evidence, filed on behalf of the complainants, states that - "3. I say that as per clause 16 of the Agreement of sale the respondent notified that they would be constructing and completing the building as per the sanctioned plans and that the respondents could comply with all the necessary formalities to get the Occupation Certificate issued by the Bombay Municipal Corporation. I say that clause 19 (a) of the Agreement of sale states that date of delivery would be the date on which the Occupation Certificate is granted by Bombay Municipal Corporation. " 4. I say that Writ Petition No.1827 of 2000 was filed with the High Court at Bombay against Bombay Municipal Corporation and Respondent No.1 for issuance of Occupation Certificate to the Complainant 's Building. I say that the said Writ Petition came to be disposed off in favour of the Complainant by Lordship Justice A.P. Shah and Lordship Justice S.A. Bobde vide their order dated 19.6.2001. I say that the said order directed the Bombay Municipal Corporation to issue Occupation Certificate within two months. I say that the order was not complied with therefore after issuing a legal notice dated 7.3.2002 a Contempt Petition No.2 of 2003 came to be filed in the Hon 'ble High Court of Bombay wherein show cause notice has been issued against respondents and the matter is pending for final hearing. Annexed and marked at Exhibit "C8 is the copy of the order dated 19.6.2001. Annexed and marked Exhibit "D " is the copy of the Contempt Petition No.2 of 2003. " The complainants have also placed on record a copy of the order of the High Court of Bombay, passed on 19.6.2001 in W.P. No. 1827 of 2000. It reads - "1. Heard parties. 2. Respondent nos.1 and 2 are directed to consider the petitioner 's request for grant of occupation certificate in the light of circular No.7188 dated 18th February, 2000 and pass suitable orders within a period of two months from today. Needless to say that the concerned authority shall grant personal hearing to the petitioner and its architect before passing final orders. Petition is disposed of. "

Evidently, till the filing of the present complaint before this Commission, the High Court direction had not resulted in grant of the Occupation certificate by the Municipal Corporation of Greater Bombay (hereinafter referred to as MCGB). Nor had the conveyance in favour of the flat purchasers been executed by the OPs. In the Written Response of OP-1, it is claimed that the occupation certificate has not issued from MCGB, though the building has been constructed as per the sanctioned plan. But, the same Written Response also admits that the problem arose as a slum, existing on a part of this land, was declared and notified as Slum Area in 1985. Due to this, slum dwellers could not be evicted and the plot size was effectively reduced. It is therefore, clear that the builder was fully aware of this effective reduction in the project area for about four years, when he handed over possession of individual flats in 1989 and undertook to obtain the Occupation Certificate from the BMC. The rejoinder affidavit of the complainant

also points out that OP-1 did not take any steps to remove the encroachment on the property, thereby reducing the area to be conveyed to the complainants. This has an obvious reference to the period between 1981 since the building plan was sanctioned and 1985 when the slum was notified.

7. THE case of the Complainant is that for want of occupation certificate, they have had to pay property tax and water charge at substantially higher rates. As per the rejoinder affidavit of the Complainant, during the period 1992 to 2004 Rs.43,28,876 lakhs was paid towards the property tax and Rs.12,29,291/- towards water tax. In this behalf, a refund of Rs.31,33,916/- has been sought by the Complainant. We have perused Exhibits B and C which are receipts filed by the complainant to substantiate this claim. With the affidavit of evidence, the complainant has filed a large number of these receipts of these charges paid to the BMC till 2003. The water charge receipts show the details of consumption, rate per unit and total bill amount. But, by themselves, these receipts do not show that this is levied at rates higher than normal. Per contra, the written response of OP-1 carries only a bland denial of the contention of the Complainants that due to non-obtaining of Occupation Certificate from the Municipal Corporation, the Members/Flat purchasers are forced to pay property tax and water tax at higher rate. No documents in support of the denial are filed by OP-1.

8. SIGNIFICANTLY , in the course of the proceedings on 21.4.2005, the Commission gave the following direction: "The Opposite Party is directed to file affidavit clarifying the part of the bills which do not relate to the flats of the members of Complainant 's society. They shall also specify whether any of the bills in respect of property tax, water tax etc. has been paid by any person other than the members of the Complainant society. The Opposite Party shall further clarify as to why despite the order passed by the High Court the occupancy certificate has not been given and why they could not comply with the directions of the BMC. "

No such affidavit was filed, as observed by the Commission on 8.9.2005. However, subsequently on 23.1.2006 an affidavit was filed by Mr Ajay Pravichandra Kamdar for OP-1 responding to the directions of 21.4.2005. The affidavit accepts that the entire bills relate to the members of the complainant society and are paid by no one other than the members. More importantly, this affidavit does not question the claim of the complainant that they have to pay property charge and water charge at higher rates. It merely states that the flat purchasers had taken possession on their own risk, knowing that there was no occupation certificate.

9. LITTLE later, on 27.1.2006, the Commission directed the Complainant to file complete records of the property tax and water charges paid by them and also produce a certificate from MCGB that 25% excess property tax was being levied as in this case Occupation Certificate has not been issued. In compliance, an affidavit was filed by the Complainant in April 2006. With this affidavit, a copy of

the letter addressed by the counsel for the Complainant to the BMC on 30.1.2006 and the response dated 23.2.2006 received from the BMC have been enclosed, together with a copy of the circular No. HE/3625/IS dated 12.3.2001. The letter does not contain any specific response to the Complainant 's query, but does state in so many words that, "the percentage of property tax depends on the status of the property as to whether the subject property is connected with the supply of Municipal Water by W X M System. " Similarly, on the question of water charge, the Circular states that, "Arising out of revision of Water Charges and Sewerage and Waste Removal Rule, Standing Committee has sanctioned to levy either Water Charges and Sewerage Charges or Water Tax and Sewerage Tax where the property feeds by the water connection granted under Section 92 of M.M.C. Act. Similarly, the Water connections granted to land under construction, wherein extra water charges and extra sewerage charges are recovered in such cases, no Water Tax and Sewerage Tax to be levied to the property under reference. (Emphasis supplied) Thus, the benefits of deletion of Water Tax and Sewerage Tax from the property bills are also extended to the property which feeds by the connections granted under Section 92 of M.M.C. Act. The connection granted under Section 92 of M.M.Act as per Water Charges Rule No.6.0 now only pay water Charges/Sewerage Charges and not Water Tax and Sewerage Tax. "

10. IT is clear from the above that the case before us would fall in the category of "land under construction " as admittedly, the occupancy certificate has not been issued yet. The water connection would consequently be with extra charge. Resultantly, the property tax too would be higher, as under section 140 of the Mumbai Municipal Corporation Act, 1888, property tax includes water tax, sewerage tax, General Tax and Education Cess. We therefore do not agree with OP-1 (in its unsubstantiated comment in the affidavit of Mr Ajay Pravinchandra Kamdar) that the compliance affidavit of the complainant is vague. In our view, the complainant could not have done more than enclosing copies of the response received from the BMC. Conveyance of the property in favour of the complainant society is one of the prayers made in this complaint. But, conveyance itself is directly dependent on grant of occupation certificate by the GBMC. Detailed evidence considered in this order clearly brings out the fact that occupation certificate has not issued due to conscious violation of the FSI norm by OP-1. Thus, in an earlier affidavit filed by Mr. Ajay Pravinchandra Kamdar, partner of OP-1, detailed narration of the events as seen by OP-1, is given with a concluding claim that there was no deficiency of service on the part of OP-1. However, we find that the affidavit in itself carries the following admissions which would go to show additional construction was taken up by the builder/OP-1 with full knowledge that the slum notification of 1985 had already reduced the available FSI:- a) The plan was originally sanctioned by the GBMC for seven floors but later the idea to build ten floors was persused by OP-1, under the impression that the civil aviation authority may not have any objection. b) In March, 1984 an application was made to the GBMC seeking work commencement certificate for height of 75 feet. But, by then the building had already come up to

a height of 87 feet ! c) Agreements for sale of flats on the 8th ,9th and 10th floors were entered into by OP-1 with the prospective buyers "in the hope that NOCs from the Defence Department and Fire Fighting Department were just a formality which the Respondent No.1 were confident that they would get it as in the surrounding area, buildings with similar height were already constructed. " But, on 23.6.1988, GBMC issued notice to stop the construction works. In the above background, we are unable to accept the claim of OP-1 that there was no deficiency of service.

11. WE have earlier referred to the direction issued by this Commission on 21.4.2005. OP-1 was asked to file an affidavit clarifying the position on certain points. One of them was why, despite the orders passed by the High Court, occupancy certificate had not been given and why the OP could not comply with the direction of the BMC. On this point, the affidavit of OP-1 filed on 23.1.2006 states that as BMC did not issue the occupation certificate, the Complainant filed a contempt petition in which the High Court directed to work out the solution for issue of occupation certificate. The affidavit refers to a meeting of 17.1.2004 taken by Executive Engineer (Building Proposal), BMC in which flat purchasers and the OP were asked to share the cost of purchase of Transferable Development Rights (TDR). Apparently, no agreement was reached and therefore the Executive Engineer issued his directions in the letter of 17.1.2004. A copy of this letter brought on record by OP-1, shows that the decision of the Executive Engineer was that: 1) "The occupation of the Twin Towers C.H.S. Ltd. could be considered only if the requisite TDR is purchased and imbalance of FSI on the plot under reference is removed. 2) On compliance of various pending conditions as listed at Sr. Nos.1 to 14 in the letter under No.CE/9568/BSII/AK dated 12/1/2000 addressed to developers, architects and society members. " In this background, we do not consider it appropriate to delve any further into the matter of non-issue of occupation certificate. Consequently, no relief can be awarded to the complainant on the prayer for execution of conveyance of property.

12. COMING to other components of relief sought by the complainant, we may state the obvious that they are direct consequence of non issue of conveyance of property by the vendor i.e. OP-1. In this behalf, builder/OP-1 cannot be permitted to shelter behind non-issue of occupation certificate by GBMC as, in our view, conscious violation of FSI norm by OP-1 was the cause for non-issue of occupation certificate. Evidence led by the two sides has been examined in detail. As already stated, the complainant has established with documentary evidence that property tax and water charge had to be paid at higher rates, as a direct consequence of non-issue of conveyance of property by the vendor/OP-1. The response of OP-1 has not travelled beyond a bland denial of well documented claim of the complainant society. It needs to be mentioned that the Commission even gave OP-1 a clear opportunity to bring evidence to the contrary, if any, by filing an affidavit. The belated affidavit of OP-1, mentioned earlier in this order, admits that the bills brought on record by the other side pertained to the flats of

the members of the complainant society. It also admits that payments towards water tax and property tax were made by the members themselves. However, on the main issue of responsibility of the builder for higher rates of property and water taxes, the affidavit makes a very devious and unconvincing attempt to escape liability by claiming that possession without occupation certificate was given on the insistence of the flat purchasers themselves. It says - "They were ready to arrange themselves for the electricity and water connection. In this circumstances and not to dis-satisfy the flat purchasers, the Opposite Party agreed to give possession of the flats to the purchasers in the building "ABC " and most of the flat purchasers have given Undertaking to the Opposite Party that they were taking the possession without the Occupation Certificate and they will arrange for the water and electricity connection and if any additional charges are required to be paid, the same will be paid by them. "

13. WE have perused a copy of the Undertaking mentioned above. It needs to be considered in the following background - a. Admittedly the entire sale consideration had already been paid to the builder. b. The builder/OP-1 was aware that his construction was in violation of FSI norm. c. GBMC had already ordered stoppage of construction in 1989 and permission to redevelop the slum had been withdrawn in 1991 when individual undertakings were signed by flat purchasers. d. As admitted in para 9(2) of the written Response of OP-1 filed on 6.11.2003, possession of the flats were delivered in 1989 and 1991-92. The undertakings of 1991 would be of no relevance to cases of possession in 1989. Therefore, in our view OP-1 cannot be permitted to take shelter behind the undertakings signed by the flat purchasers.

14. IN view of the details examined above, the complaint is partially allowed. OP-1/M/s. Manish Vijay Enterprise are directed to refund an amount of Rs.30,61,410/- towards excess property tax, water tax etc. to the Complainant. This refund shall carry interest @ 9% with effect from the date of the complaint. OP-1 shall also pay an amount of Rs.one lakhs to the Complainant towards costs. The entire amount shall be paid within a period of three months failing this the period of delay shall carry interest at 12% per annum.