
(1993) 08 NCDRC CK 0054

In the National Consumer Disputes Redressal Commission

UNNI KODERY MENON

APPELLANT

Vs

CYMA EXPORTS PVT. LTD.

RESPONDENT

Date of Decision : 19-08-1993

Acts Referred:

Citation : 1993 3 CPJ 1588

Hon'ble Judges : D.R.Vithal Rao , K.R.Ramaswamy Iyengar , Susheela Cheluvaraju J.

Final Decision : Complaint allowed

Judgement

1. IN this complaint, the complainants have sought the following reliefs : "We request your honour to kindly get us immediate relief for the following : (a) stop the promoters from canceling the agreement and selling the said flat to any one else; (b) ask the promoters to complete the construction of the flat/building as per the specifications and agreement as early as possible; (c) complete all common utility areas and provide club house, swimming pool etc. as stipulated in the original specification; (d) the construction of all building/utilities to be done strictly as per original Bangalore Municipal Corporation approved plans and get occupation certificate complying all requirements including electricity, water and sewerage connections; (e) convey the title of the property by extending necessary conveyances; (f) A compensation of Rs. 4,00,000/- (Rupees Four lakhs only) towards our losses and damages mentioned in Clause 17 above."

2. THE Opposite Party is a builder. THE complainants applied for a flat and the opposite party allotted flat No. 8 on the 5th floor in the building to be known as RAJANIGANDHA in Garden apartments, including the un-divided interest in property No. 21, Grant Road, Civil Station, Bangalore, which was to be constructed by the opposite party entered into an agreement for the sale of the said flat with the complainants on 24.6.1980, as per Ex. C-1. The complainants paid a sum of Rs. 5,000/- to the opposite Party on 24.6.1980, by way of agreement, Ex. C-1 and agreed to pay the balance consideration amount of Rs. 2,60,000/- as per the terms specified under Clause 4 of the agreement for sale,

Ex. C-1, in instalments on various stages of construction.

The opposite party was to complete the construction of the apartment and deliver the same to the complainants on or before 31.12.1980.

3. THE complainants, thereafter, paid a further sum of Rs. 1,20,000/- on 9.7.80, as per Ex. C-2 (a), Rs. 10,000/- on 4-8-80, as per Ex. C-2 (b), Rs. 50,000/- on 22-8-80, as per Ex. C-2 (c), Rs. 30,000/- on 3-11-80, as per Ex. C-2 (d), Rs. 15,000/- on 2-3-82, as per Ex. C-2 (e), Rs. 10,000/- on 15-7-82, as per Ex. C-2 (f) in all a sum of Rs. 2,40,000/-.

As per the terms of the agreement, the complainants were to pay the 7th instalment of Rs. 25,000/- only one week before the said building was ready and fit for occupation upon notice being given by the builders to the complainants. But the opposite party did not commence the work of construction even by 15.7.1982.

4. IT is the further case of the complainants that the various flat owners who had thus made the payment to the opposite party, constituted an Association called "GARDERN APARTMENT OWNERS" ASSOCIATION" and though that Association began to put pressure upon the builder-the opposite party to commence the construction of the apartment building at an early date. A meeting was held between the opposite party and the office-bearers of the Garden Apartment Owners Association, on 18.4.1986, as per Ex. C-4, wherein the opposite party agreed to commence the work of construction on 1.5.1986 and complete the construction of the flats in RAJANIGANDHA apartment by 1.1.1987. The opposite party had even agreed, as per Clause 4 in Ex. C-4, in the said minutes of the meeting that he would not claim any cost escalation from the complainants and others. The opposite party even thereafter did not commence the work of construction. The complainants further averred that the opposite party even upto this time has not completed the construction and in consequence of which the complainants suffered heavy loss and mental agony.

5. THE complainants nextly averred that when the apartment-holders including the complainants began to put pressure upto the opposite party to complete the construction immediately, the opposite party began to demand cost escalation, the opposite party claimed cost escalation of Rs. 1,03,500/- by its letter dated 18.6.1990 as per Ex. C-6. THE opposite party by its letter dated 31.8.1990, as per Ex.C-8, again demanded cost escalation from the complainants.

6. THE complainants, further averred that the opposite party had no right to demand cost escalation when there was no provision under the terms of agreement of sale, as per Ex. C-1, and the opposite party had specifically agreed, as per Ex. C-4, that he would not demand any cost escalation. The complainants nextly averred that they got legal notices issued to the opposite party on 18.6.1990, as per Ex.C-9 and on 12.12.1990, as per Ex. C-11, demanding the opposite party to immediately complete the construction and hand-over the possession of the completed building flat without insisting upon

payment of any cost escalation. But the opposite party, by its letters dated 26.11.1990, as per Ex.C-10 and dated 15.3.1991, as per Ex. C-12, insisting upon the payment of cost escalation.

The complainants, on the basis of these averments, sought the reliefs, as narrated above.

7. THE opposite party filed its version and admitted the fact that the complainants were allotted a flat, as claimed by the complainants in the complaint. THE opposite party also admitted the fact of receipt of a sum of Rs. 2,40,000/- from the complainants. THE opposite party has specifically admitted this fact at para 3(iv) of its version. The opposite party further averred that it could not complete the construction of the apartment due to various reasons beyond their control. The opposite party, has in this regard, at para 4 of its version, averred thus: "4.Without prejudice to the foregoing contentions this respondent states that this Hon"ble Commission may also consider the following factors:- Between 1.11.1979 to 28.3.1983 the cement was not available through the control. The Government had taken a decision to allot only 1000 bags of cement per quarter to each high rise complex irrespective of the total requirements, for Garden Apartments their total requirements amounted to 1,50,000 bags; The construction was also delayed due to the work stopped by the Municipal Corporation because of cancellation of all high rise building plans in 1980 till they were resanctioned in 1981; Between September, 1983 to Dec, 1984 the construction of high rise building was stopped by the Government by a public notice immediately after the collapse of Gangaram Complex on or about 19.9.1983 which caused stoppage and delay in the construction; Between Jan. 1985 and Sept. 1989, the construction was delayed due to the refusal of the Municipal Corporation to grant occupation certificates due to the State Government Circular of 1984, questioning the validity of plans in respect of buildings having a height of more than 55 feet; Thereafter, non-availability of construction material as well as non-payment of cost of escalation have been the main cause of the respondents being unable to complete the said project."

8. THE opposite party, further averred, that it was justified in demanding cost escalation from the complainants considering steep rise in steel prices, building materials and the cost of labour. THE opposite party further averred that he was justified in cancelling the agreement itself due to non-payment of cost escalation by the complainants. The opposite party, further averred that this Commission has no jurisdiction to entertain the complaint as the complainant cannot be classified as a "consumer" and the complaint would not amount to "complaint" under the provisions of the Consumer Protection Act. The opposite party, on the basis of these averments, sought the complaint to be dismissed.

9. DURING enquiry, the complainants filed the affidavit of the first complainant in evidence and got Ex.C-1 to C-12 marked in evidence. These documents were marked with the consent of the learned Counsel for the opposite party. The order sheet, dated 8.2.1993, reads as under: "Original documents filed by the

complainant as per the list are marked in evidence as Ex. C-1 to C-12 with the consent of the learned Counsel for the opposite party. The duplicate documents are marked as Exs. C-1(a) to C-12(a) with the consent of the learned Counsel for the opposite party. Call on 20.3.1993."

10. THE opposite party did not lead any evidence nor filed the affidavit in evidence nor got any documents marked on its part. The opposite party and learned Counsel for the opposite party remained absent, so the learned Counsel for the complainants was heard.

We have perused the pleadings of the parties and the documents filed by the complainants and heard the learned Counsel for the complainants.

11. HAVING regard to the pleadings of the parties and submissions made by the complainants, the only point that arises for our consideration is, "whether there was any deficiency in service rendered by the opposite party and in consequence of which did the complainants suffer any loss or injury and if so to what compensation the complainants are entitled to ?" Before considering the evidence, it is necessary to notice the preliminary objection raised by the opposite party. The objection raised was that the complainants cannot be classified as "consumer", nor the allegations contained in the complaint would amount to "complaint" as defined under Sections 2(1)(d) and 2(1)(c) of the Consumer Protection Act, 1986, so this Commission has no jurisdiction to entertain the complaint.

12. THE objection of the opposite party has to fail. THE ruling of the National Commission in U.P. Awas Evam Vikas Nigam v. Garima Shukla, reported in I (1991) CPJ 1 (NC), covers this point. This Commission also has in complaint Nos. 13, 67, 82, 107, 115 and 113 of 1991 held as under: "M/s. Cyma Exports (Pvt.) Ltd., is the developer, builder in all these cases. THEy proposed to build and sell flats in three apartment buildings at Bangalore, called as - Silveroaks Suryamukhi Rajanigandha and entered into identical agreements with the complainants. THE considerations were to be paid in instalments during various stages of construction and the learned Counsel for the respondents admitted that each of the complainants has paid the full consideration in respect of the flat agreed to be built for him. THE complainants in all these cases have alleged that even though the apartments were agreed to be completed and delivered during 1986 and 1987, the respondents have not so far done so but on the other hand have stopped the work on the buildings and are demanding escalation charges to recommence the work. THEy have prayed for directions to the Respondents to complete and deliver possession of the flats and also for compensation. THE respondents among other things have contended that the complainants are not consumers and therefore, this Commission has no jurisdiction to try" these complaints. We have heard the learned Counsel on this question. It is argued by the learned Counsel for the respondents that the agreements, in-question, relate to sale of flats which are immovable properties and therefore, this Commission has no jurisdiction to entertain these complaints. He argued that the respondents

had purchased the lands on which the apartments are to be built and even though the consideration is paid in instalments by each of the complainants at a various stages of the construction, what is agreed under each of the agreements is the sale of a particular flat, which is an immovable property, and therefore, the complainants are not consumers within the meaning of the Consumer Protection Act, 1986. THE Complainant's Counsel contended that complainants are consumers as they have hired the services of the respondents to develop land and build flats and to sell the same to them and it is not a mere sale of immovable property. THERE is no dispute that flats are immovable property and if it is the case of mere sale of the constructed flats, this Commission will have no jurisdiction to entertain complaints. But on careful perusal of the agreements, we are convinced that the agreements are not for sale of flats pure and simple. In all agreements, the intention of the respondents is loud and clear. THEir intention is to purchase prime land in the city, develop it, build flats at the cost of the complainants. THE dominant aim is to construct the apartments and make a profit out of the services so rendered. Entire investment for the construction comes from the complainants. Even though in the ultimate analysis there is a sale of the flat involved. THE dominant purpose is rendering of services. If that is so, we have no doubt in our mind that the complainants have hired the services of the respondents and they are all consumers within the meaning of the C.P. Act, 1986. We are fortified in this view by the decision of the National Commission in U.P. Awas Evam Vikas Parishad (Housing and Development Board) v. Garima Shukla and Others in First Appeal No. 5 of 1989, reported in CPJ of Jan., 91" Vol-I. In the said case, the National Commission held that the Housing Development Board engaged in serving the public in the matter of providing housing by acquisition of land, development of sites, construction of house thereon and allotment of plots and houses to the public and, therefore, the persons, who have been allotted house/flat/site. From the Board are consumers falling within the definition of Sec. 2(1)(d)(ii) of Consumer Protection Act, 1986. In this case also the respondents have engaged themselves in acquiring the land, developing it and constructing flats thereon and sale of the flats to the intending purchasers. THE decision of the National Commission applies on all facts of these cases. For the above reasons, we hold that the complainants are consumers within the definition of Sec. 2(1)(d)(ii) of the Consumer Protection Act, 1986 and this Commission has jurisdiction to try these complaints."

It is not disputed that the opposite party the builder allotted flat No. 8 on the 5th floor of RAJNIGANDHA building which was to be constructed by the opposite party at No. 21, Grant Road, Bangalore, in consideration of a sum of Rs. 2,65,000/- to the complainants. Ex.C-1 is the agreement for sale of the said flat entered into between the complainants and the opposite party which gives the details of the amount to be paid by the complainants at different stages of construction of the flat. It is also not disputed that the opposite party had received by 15.7.1982 in all a sum of Rs. 2,40,000/- from the complainants. The payments are evidenced by the receipts, Ex. C-2(a) to C-2(f). The opposite party

has also specifically admitted the receipt of money from the complainants at para 3(iv) of its version.

13. THE recital contained at para 6 of Ex. C-1 the agreement for sale, reads as under: "6. Subject to the availability of cement, steel and other building materials, electrical and/or power connection and drainage connection and subject to force majeure including any act of God, drought, flood and any other natural calamity and/or war, restrictions by the Government, Municipal Corporation or other public authorities or any other acts beyond the control of the Builders, the Builders agree to hand over possession of the said Flat to the Buyer on or before 31st December 1980."

This would go to show that the opposite party was to complete the construction of the building and deliver the possession thereof to the complainants on or before 31st December 1980. That is the averments of the complainant in the affidavit and also the averments in the complaint. THE opposite party failed to complete the construction by that date, and even thereafter upto this date.

14. EX. C-4, is the minutes of the meeting held between the opposite party and the Garden Apartment Owners" Association on 18.4.1986, at Bangalore. At Clause 2 of the said minutes of the meeting, the opposite party had agreed to commence the construction of the building from 1.5.1986 and complete the construction of RAJANIGANDHA Apartments by 1.1.1987. The opposite party even on 8.6.1990-EX. C-6, and on 26.11.1990 EX. C-10, letters to the complainants has stated that it had not yet completed the construction and demanded the cost escalation, that is the same version even in its letter dated 15.3.1991, as per EX. C-12. The opposite party has stated various circumstances, at para 5 of its version, as referred above, which caused delay in completing the construction of the building. The opposite party has stated that there was scarcity of cement, the Municipal Corporation stopped the work, the Government had issued notice stopping the work of construction of high raised building etc. The opposite party has neither produced any material to prove this allegation made by it nor has lead any evidence either oral or documentary. Therefore, the averments made by the opposite party giving various reasons for the delay in construction of the flats, has remained only at the stage of allegations. The opposite party has failed to establish these circumstances to justify in not completing the construction of the flat and hand over the possession of the same to the complainants as stipulated under Ex. C-1 and in the minutes of the meeting under Ex. C-4.

The material on record would further go to show that even in the month of April 1986, the opposite party had agreed to complete the construction of the flat at an early date and deliver the possession of the same without collecting any cost escalation by 1.1.1987. It is evident from the material contained in Ex.C-4.

15. THEREFORE, it is clear that the opposite party has failed to complete the construction and deliver the possession of the flat without any valid reason

whatsoever. From this material it is evident that the services rendered by the opposite party are clearly deficient in nature. It is evident from the material on record, as referred above, that the opposite party failed to complete the construction and deliver the possession of the flat to the complainants, as per its promise made, and in our opinion, this lapse is due to the negligence on the part of the opposite party only.

16. THE complainants, who have made the payment of a sum of Rs. 2,40,000/- by the end of July 1982, and so far have not been able to get the said delivery of the possession of the flat from the opposite party and, therefore, the complainants have been put to lot of suffering and injury and so the complainants are necessarily be compensated for the same. It is material on record, in the month of April 1986, the opposite party had agreed to complete the construction and hand-over the delivery of the possession of the flat without collecting any escalation costs by 1.1.1987. So in our opinion it would be just and proper to award reasonable interest on the amount of Rs. 2,40,000/- paid by the complainants to the opposite party towards compensation from January 1987 till the date of delivery of the possession of the flat to the complainants in a condition fit to occupy the same with all necessary amenities. ORDER In the result, therefore, this complaint is allowed. Opposite Parties land 2 are directed to pay interest at the rate of 18% p.a. on the sum of Rs. 2,40,000/- from 1.1.1987 till the date of delivery of the possession of the flat to the complainants in a condition fit to occupy the same with all necessary amenities. Opposite Parties 1 and 2 shall also pay a sum of Rs. 2,500/- (Rupees two thousand and five hundred only) to the complainants towards costs of the proceedings. The opposite parties shall pay the said sum so awarded to the complainants within a period of 2 months from this day. Complaint allowed.