

(2012) 04 NCDRC CK 0055

In the National Consumer Disputes Redressal Commission

Vasant Shankar Toraskar And Others

APPELLANT

Vs

Shreeji Builders, Thro? Partner Mr. Purshottam Odhavji
Solanki

RESPONDENT

Date of Decision : 23-04-2012

Acts Referred:

Citation : 2012 0 NCDRC 124 : 2012 2 CPJ 473 : 2012 2 CPR 299

Hon'ble Judges : V.B.Gupta , Vinay Kumar J.

Advocate : Anand Patwardan

Judgement

1. THIS appeal has been filed against the order of the Maharashtra State Consumer Disputes Redressal Commission in Complaint No.207 of 2003. The facts of the case, as seen from the record, are that there was an agreement between the Complainants on the one side and M/s. Virendra Tiwari and Chandershekhar Rane, on the other. In this agreement, executed on 26.11.1987, the first party i.e. the Toraskars, are described as the ?vendors? and second party, M/s. Tiwari and Rane were described as ?purchasers?. Under the agreement, the plot in question was to be transferred to the purchasers free from all encumbrances for a price of Rs.1 lakh to be paid in the manner detailed in the agreement. The agreement also required the purchasers to provide the vendors free of cost three flats and a shop to be built on the site. All approvals required for the construction, as well as occupation certificate on completion, were required to be obtained by the purchasers. The agreement required the vendors to deliver all title deeds to the purchasers and to assist the purchasers in obtaining no objection certification from the competent authorities.

2. THE builders (purchasers in the above mentioned agreement) took possession of the property and assigned the development rights to their sister concern M/s. Krishna Developers. THE latter, in turn assigned the development rights in favour of the OP/Shreeji Builders. THE three flats were not delivered to the original Complainants as per the agreement and hence, the consumer complaint. The State Commission examined the contents of the agreement of 26.11.1987 in

detail and came to the conclusion that the Complainants cannot be said to be ? consumer? within the meaning of Section 2 (1) (d) of Consumer Protection Act, 1986. It also held that the agreement between the parties is a fully commercial joint venture agreement with no element of hiring of service. The collaboration between the two parties required land to be provided by the Complainants for being commercially developed by the other party, at his own costs and investment. The State Commission held that there was no hiring of service involved in this transaction and accordingly dismissed the complaint. The Commission also reserved the liberty to the complainants to approach the proper Court for relief.

Aggrieved by the above decision of the State Commission, the Complainants have filed the present appeal. The delay of 22 days in filing the same has been condoned, considering the explanation for the delay tendered by the appellants. At one stage, the appeal had been dismissed in default, but was subsequently restored on 17.1.2007. The respondent/OP has remained unrepresented. On one occasion, the notice sent to the respondent/OP had come back with postal endorsement ?not known? and on another with ?refused?. Notices were eventually served on the respondent in February 2011 and January 2012 but he remained unrepresented. The respondent was therefore, declared ex-parte by this Commission on 3.1.2012. Similarly, we find from the proceedings of the State Commission that the respondent/OP had not filed their written response and had to be considered ex-parte by the State Commission as well.

3. WE have perused the records and heard Shri Anand Patwardhan, Advocate for the appellants/Complainants. Learned counsel argued that it is not the case of a joint venture for commercial purpose and that it is a case where the consideration to the vendor for the concerned plot of land was to come in kind i.e. in the form of three flats and a shop. The case of the Complainant as seen from the Complaint petition filed before the State Commission was that subsequent to the agreement of 27.11.1991 between the OP and the Complainant the terms and conditions of all the previous agreements bind the OP. The OP was accordingly required to provide to the Complainants three residential flats on the second floor of the building and one shop for running a flourmill, on the ground floor. As per this agreement, the construction was to be completed within 18 months including the time required for obtaining the occupation certificate.

4. AS against the agreement to provide three flats and one shop, the Complainants received only one flat. It is therefore, alleged in the complaint petition that due to this reason cause of action has continued to remain alive. The Complainants therefore prayed before the State Commission to direct the OP to hand over possession of two flats and one shop as agreed and pay a compensation of Rs.1,25,000/- to each Complainants. In the alternative, the Complainants sought a direction to the OP to pay Rs.53.96 lakhs as the cost of the flats and the shop together with 18% interest from the date of the complaint.

The State Commission has observed that it was revealed during the arguments that the builder/OP had sold the flats and not constructed the shop. After examining the agreement between the parties, State Commission has observed that in terms of Clause 3 thereof, it was an agreement permitting the builder to develop the property and in return give the landowners free of cost three flats and a shop. All the costs, charges and expenses involved, were to be borne by the builder. No consideration had been paid by the Complainants for the flats and for the shop claimed by them. As per the agreement, the Complainants have received Rs.1 lakh from the builder and handed over the land for development by him. The Commission held that the cumulative effect of Clauses 1, 3 and 5 in the agreement indicates that the agreement between the parties was one of a collaboration/joint venture wherein the land was provided by the Complainants for being commercially developed by the respondent. In lieu of the land, the Complainants were entitled to receive three flats and one shop. The State Commission therefore, held that it was an agreement for a commercial joint venture and not for hiring of service. Therefore, the Commission held that Complainants were not 'consumer' under the definition in Section 2(1) (d) of the Consumer Protection Act, 1986. In arriving at the above conclusion, the State Commission had relied upon the stipulations Clauses 1, 3 and 5 of the agreement. For better appreciation relevant Clauses of the agreement are reproduced below:-

Clause:1 The Vendors shall sell to the Purchasers or their nominee or nominees and the purchasers shall purchase from the Vendors the said property free from all encumbrances at or for the total price of Rs.100,000/- (Rupees One Lakh only) to be paid as follows: a) Rs.5,151/- (Rupees Five Thousand One Hundred Fifty One only) paid as Earnest money and/or an advance before the execution of the Agreement, as stated above; AND Rs. 84,849/- (Rupees Eighty Four Thousand Eight Hundred and Forty Nine only) paid at the time of execution hereof as hereunder mentioned the payment and receipt whereof the Vendors do and each of them DOTH hereby admit and acknowledge; b) Rs.10,000/- (Rupees Ten Thousand only) on the execution of the conveyance by the Vendors in favour of the Purchasers and/or the proposed co-operative Society and/or nominee of the Purchasers as the case may be.

Clause:3 The Purchasers shall in addition to the amount of the said consideration money provide to the Vendors free of cost Two flats each admeasuring about 500 Sq. feet admeasuring and one flat admeasuring about 230 sq. feet, built up area. All the three flats shall be on the Second Floor of the proposed building to be constructed by the purchasers on the said property and as per the plans sanctioned by the Bombay Municipal Corporation. In each of the said flat the Purchasers shall provide free of cost for the Vendors (1) one wash basin with white glazed tiles above it, covering length of basin and of one and half feet height affixed on the wall to which the basin is attached (2) One geyser in bath-room (3) Kitchen Platform of three feet height (4) White glazed tiles inside the bath-rooms on all the walls covering five feet height of each wall (5) White glazed tiles in W.C. on all walls covering three feet height of each wall. The Purchasers shall intimate to the Vendors about the sanctioned plan in writing

within one week from the date of sanction. The Purchasers shall complete the construction of the proposed building in all respects and obtain the necessary occupation certificates in respect thereof within 24 months from the date of obtaining IOD and commencement certificate for construction from B.M.C. by the purchasers. Clause:5 The Vendors shall allow the Purchasers on execution of this agreement, pending the completion of the sale, to start development of the said property, subject to the condition that the Vendors shall collect the rent or compensations from the said existing tenants and occupants in the said property till the building is demolished. However if any repairs are to be carried out, minor or otherwise to the existing structures, the same shall be done by the Purchasers at their own exclusive costs and expenses and similarly if any amenities are required to be provided to the said Tenants the same shall be provided by the Purchasers to the said tenants/occupants.?

5. THE impugned order cites the decision of the Supreme Court of India in Lucknow Development Authority Vs. M.K.Gupta (1994) 1 SCC 243 and has noted that the entire purpose of widening the definition of service under Section 2 (1) (d) of the Consumer Protection Act, 1986 was to include not only day to day buying of goods by a common man, but even to include such activities, which are otherwise not commercial but professional or service orientated in nature.

6. THIS decision in the above mentioned case has been examined at length and relied upon by the Apex Court in FakhirChand Gulati Vs. Uppal Agencies Pvt. Ltd. (2008) 10 SCC 345. In this decision, Hon'ble Supreme Court has considered the subject of building construction agreement between landowner and the builder at great length, with reference to the issue whether such an agreement is a joint venture where there is no hiring/availing of services of a builder or whether it could be one between the consumer i.e. land owner and a service provider i.e. the builder. The Apex Court examined different definitions of 'joint venture' and observed that:- 'A joint venture is frequently defined as an association of two or more persons formed to carry out a single business enterprise for profit. More specifically, it is in association of persons with intent, by way of contract, express or implied, to engage in and carry out a single business venture for joint profit, for which purpose such persons combine their property, money, effects, skill, and knowledge, without creating a partnership, a corporation or other business entity, pursuant to an agreement that there shall be a community of interest among the parties as to the purpose of the undertaking, and that each joint venturer must stand in the relation of principal, as well as agent, as to each of the other coventurers within the general scope of the enterprise. Joint venturers are, in general, governed by the same rules as partnerships. The relations of the parties to a joint venture and the nature of their association are so similar and closely akin to a partnership that their rights, duties, and liabilities are generally tested by rules which are closely analogous to and substantially the same, if not exactly the same as those which govern partnerships. Since the legal consequences of a joint venture are equivalent to those of a partnership, the courts freely apply partnership law to joint ventures when appropriate. In fact, it

has been said that the trend in the law has been to blur the distinctions between a partnership and a joint venture, very little law being found applicable to one that does not apply to the other. Thus, the liability for torts of parties to a joint venture agreement is governed by the law applicable to partnerships. A joint venture is to be distinguished from a relationship of independent contractor, the latter being one who, exercising an independent employment, contracts to do work according to his own methods and without being subject to the control of his employer except as to the result of the work, while a joint venture is a special combination of two or more persons where, in some specific venture, a profit is jointly sought without any actual partnership or corporate designation. [para 22] Joint venture.- A business undertaking by two or more persons engaged in a single defined project. The necessary elements are: (1) an express or implied agreement; (2) a common purpose that the group intends to carry out; (3) shared profits and losses; and (4) each member's equal voice in controlling the project. [para 24] An illustration of joint venture may be of some assistance. An agreement between the owner of a land and a builder, for construction of apartments and sale of those apartments so as to share the profits in a particular ratio may be a joint venture, if the agreement discloses an intent that both parties shall exercise joint control over the construction/ development and be accountable to each other for their respective acts with reference to the project. [para 25] After examining the terms and stipulations in the agreement between the parties before them, Hon'ble Supreme Court observed:- 'The basic underlying purpose of the agreement is the construction of a house or an apartment (ground floor) in accordance with the specifications, by the builder for the owner, the consideration for such construction being the transfer of undivided share in land to the builder and grant of permission to the builder to construct two floors. Such agreement whether called as a 'Collaboration agreement' or a 'Joint venture agreement', is not, however, a 'joint venture'. There is a contract for construction of an apartment or house for the appellant, in accordance with the specifications and in terms of the contract. There is a consideration for such construction, flowing from the landowner to the builder (in the form of sale of an undivided share in the land and permission to construct and own the upper floors). To adjust the value of the extent of land to be transferred, there is also payment of cash consideration by the builder. But the important aspect is the availing of services of the builder by the landowner for a house construction (construction of the owner's share of the building) for a consideration. To that extent, the landowner is a consumer, the builder is a service provider and if there is deficiency in service in regard to construction, the dispute raised by the landowner will be a consumer dispute. We may mention that it makes no difference for this purpose whether the collaboration agreement is for construction and delivery of one apartment or one floor to the owner or whether it is for construction and delivery of multiple apartments or more than one floor to the owner. The principle would be the same and the contract will be considered as one for house construction for consideration. The deciding factor is not the number of apartments deliverable to the landowner, but whether the

agreement is in the nature of a joint venture or whether the agreement is basically for construction of certain area for the landowner. [para 28] It is, however, true that where the contract is a true joint venture the scope of which has been pointed out in paras 21 to 25 above, the position will be different. In a true joint venture agreement between the landowner and another (whether a recognized builder or fund provider), the landowner is a true partner or co-adventurer in the venture where the landowner has a say or control in the construction and participates in the business and management of the joint venture, and has a share in the profit/loss of the venture. In such a case, the landowner is not a consumer nor is the other co-adventurer in the joint venture, a service provider. The landowner himself is responsible for the construction as a co-adventurer in the venture. But such true joint ventures are comparatively rare. What is more prevalent are agreements of the nature found in this case, which are a hybrid agreement for construction for consideration and sale and are pseudo joint ventures. Normally a professional builder who develops properties of others is not interested in sharing the control and management of the business or the control over the construction with the landowners. Except assuring the landowner a certain constructed area and/or certain cash consideration, the builder ensures absolute control in himself, only assuring the quality of construction and compliance with the requirements of local and municipal laws, and undertaking to deliver the owners-constructed area of the building with all certificates, clearances and approvals to the landowner. [para 29] Learned counsel for the respondent contended that the agreement was titled as 'collaboration agreement' which shows an intention to collaborate and, therefore, it is a joint venture. It is now well settled that the title or caption or the nomenclature of the instrument/document is not determinative of the nature and character of the instrument/document, though the name may usually give some indication of the nature of the document. The nature and true purpose of a document has to be determined with reference to the terms of the document, which express the intention of the parties. Therefore, the use of the words 'joint venture' or 'collaboration' in the title of an agreement or even in the body of the agreement will not make the transaction a joint venture, if there are no provisions for shared control of interest or enterprise and shared liability for losses. [para 30]

Considering the facts of the case before them, Hon'ble Supreme Court held that the District Forum, State Commission and the National Commission had all proceeded on a wrong assumption that wherever there is an agreement for development of property between the property owner and the builder under which the constructed area is to be divided, it would automatically amount to a joint venture and there is no question of the land holder availing the services of the builder for a consideration. Therefore, their decision that the complainant (land owner) was not a consumer, was set aside and the matter was remanded to the District Forum for decision on merits.

We now proceed to consider the true import of Clauses 1, 3 and 5 in the

agreement, relied upon by the State Commission in the impugned order. Clause-1 is limited to the manner in which cash consideration of Rs.1 lakh is to be paid by the purchaser/respondent to the Vendors/appellants. Clause-3 contemplates additional consideration to be paid in the form of three flats and a shop. Details of the specifications of the flats to be constructed for the Vendors are spelt out. Clause-5 is in the nature of an interim provision, which allows the Vendors to continue to collect rents from the existing structures, till their demolition by the purchaser for construction of the project. In our view, there is nothing in these Clauses which could make the project a joint venture to be operated as business for common profit.

7. THE agreement considered the State Commission in the impugned order does not contain any provisions either in the three Clauses mentioned above or in the rest, which could show that the agreement between the parties was in the nature of a single business operated for joint profit for both the parties. Similarly, there is nothing to show that both parties were meant to exercise equal control over the project. As a matter of fact, what comes out from the agreement is that the Vendors/Complainants are made aware of detailed specifications only of the flats, which were contemplated to be built for them. THE agreement does not even mention how many other flats were proposed to be built and their specifications. THE role of the Vendors in the agreement is limited to ensuring that the land for the project is made available to the purchaser without any impediments in relation to the title or statutory clearances. On the contrary, Clauses 28 and 29 of the agreement amply clarify that the purchaser/respondent has total freedom to construct and sell all flats in the building, except the three flats to be given to the Vendors as per Clause-3. Clause 17 gives the purchaser/respondent unfettered right to develop the property and to receive full benefits therefrom. From the examination above it is clear that this agreement is not one of the type which could make it a joint venture, as per the law laid down by the Apex Court in the decision detailed above. The agreement is and must therefore, be treated as one for construction of three flats and the shop, as per the specifications contained therein. The agreement requires the purchaser/OP to construct and deliver them as per the specifications and within the time frame contained in the agreement. The consideration, in so far as the purchaser/builder is concerned, comes in the form of the land for the project, less the cost of the flats and the shop agreed to be built for the Vendors. We therefore, have no hesitation in holding that the appellants/Complainants are consumers qua the respondent/Shreeji Builders, within the meaning of Section 2(1) (d) of the Consumer Protection Act, 1986.

8. FOR the reasons detailed above, we consider it necessary to set aside the impugned order passed by the Maharashtra State Consumer Disputes Redressal Commission in Consumer Complaint No.207 of 2003 and remand the matter to the State Commission for fresh consideration on merits. Accordingly, the appeal is allowed in these terms with no order as to costs.