

KERALA STATE CONSUMER DISPUTES REDRESSAL COMMISSION
VAZHUTHACAUD, THIRUVANANTHAPURAM
C.C. No.168/2016
JUDGEMENT DATED: 18/04/2023

PRESENT:

HON'BLE JUSTICE SRI. K. SURENDRA MOHAN : PRESIDENT

SRI. RANJIT R. : MEMBER

SMT. BEENA KUMARI A. : MEMBER

SRI. K.R. RADHAKRISHNAN : MEMBER

COMPLAINANT:

Thomas George,
T.C. 11/332, Panavila, Nalanchira. P.O,
Thiruvananthapuram.

(By Adv. S. Reghukumar)

Vs.

OPPOSITE PARTIES:

1. Samson and Sons Builders & Developers (P) Ltd., T.C.3/679, Kaliveena Building, Muttada P.O., Thiruvananthapuram represented by its Managing Director, John Jacob, Thiruvananthapuram – 695 025
2. John Jacob, S/o Jacob Samson, Managing Director, Samson and sons Builders and developers Pvt. Ltd, T.C.3/679, Kaliveena Building, Muttada, Thiruvananthapuram – 695 025.
3. Samuel Jacob, S/o Jacob Samson Director, Samson and sons Builders and developers Pvt.Ltd, T.C.3/679, Kaliveena Building, Muttada P.O.,

Thiruvananthapuram – 695 025.

4. Dhannya Mary John , Director, Samson and sons Builders and developers Pvt. Ltd, T.C.3/679, Kaliveena Building, Muttada P.O., Thiruvananthapuram – 695 025.

(By Adv. Douglas Linsby N . R)

JUDGEMENT

SRI. K.R. RADHAKRISHNAN: MEMBER

This is a complaint filed under Section 17 of the Consumer Protection Act, 1986 (hereinafter referred to as the Act for short) claiming compensation for alleged deficiency in service and unfair trade practice of the opposite parties. The 1st opposite party is a Private Limited Company engaged in the business of land development, construction and sale of apartments, villas and other residential structures. The 2nd opposite party is the Managing Director of the Company while the other opposite parties are the Directors of the 1st opposite party.

2. The opposite parties were in the process of executing an apartment project in a property admeasuring 17.20 cents comprised in Survey Nos: 1451/1/1/1,1451/1, 1451/1/1 of Kowdiar Village Thiruvananthapuram District . The complainant was a co-owner of this property. As per an agreement dated 28-12-2012 he agreed to sell his rights in the property to the opposite parties for demolishing the existing building and constructing a new apartment complex and sale consideration was fixed as Rs. 60,00,000/-. The project was

named "Samson & Sons Merry Land Flats ". The property is described more particularly in 'A' Schedule appended to the agreement . Opposite parties 2 to 4 persuaded the complainant to purchase an apartment in the project and a separate agreement for sale and construction of the apartment was executed. According to them, it was a luxurious apartment having a built up area of 1500sq.ft. He was also offered undivided interest in the land. The total cost of the apartment was represented to be Rs.60,00,000/-(Rupees sixty Lakhs). The apartment is more particularly described in Schedule 'B' appended to the complaint. On the basis of the representations made by opposite parties 2 to 4, the complainant agreed to purchase an apartment in the proposed project. Accordingly, an agreement was executed between the complainant and the 1st opposite party on 28.12.2012. Subsequently the opposite parties agreed to enhance the area of the apartment by 122 sq.ft (making the total built up area to 1622 sq.ft) for which an additional amount of Rs. 15,00,000/- was paid through bank transfer.

3. In accordance with the terms of the agreement dated 28-12-2012 sale consideration of the new apartment is Rs. 60,00,000/- . Consideration for the sale of the rights of the complainant in the property as co-owner, was adjusted towards the consideration of the new apartment. Accordingly payment ofRs. 60,00,000/- was acknowledged vide receipt No.1423 dated 28-12-2012 . Receipt evidencing payment of the said amount, totalling Rs.60,00,000/-(Rupees Sixty Lakhs) is produced along with the complaint. Subsequently they paid an amount ofRs. 15,00,000/- vide receipt no. 2363

dated 16-02-2015 for an additional area of 122 sq. ft, making the total area to 1622 sq.ft. Copy of the said receipt, email dated 16-02-2015 and the bank statement are also produced by the complainant .

4. The opposite party had promised to hand over possession of the fully constructed apartment to the complainant on or before December 2014. But they have not made any progress in the construction, so far. Moreover, they have fraudulently alienated the properties to strangers. Though the complainant has requested the opposite parties to settle their claim, they have not cared to do so.

5. As there was violation in the terms of the agreement, the complainants approached the opposite parties on many occasions and demanded return of the amount paid by him, together with compensation for the loss and mental agony suffered by him. The complainant has every right to recover the amount of Rs.75,00,000/-(Rupees Seventy Five Lakhs) from the opposite parties with interest from 28-12-2012 together with compensation for the loss and mental agony caused to him. According to the complainant, he is a consumer under the Act. There is deficiency in service and unfair trade practice on the part of the opposite parties, who are the service providers.

6. The complaint was admitted and notice was issued to the opposite parties by this Commission. On receipt of notice the opposite parties entered appearance through counsel and contested the complaint. According to the common written version filed by the opposite parties, the complaint itself was not maintainable. According to them, the dispute falls outside the jurisdiction

and powers of the Redressal Authorities constituted under the Act. The dispute in this case comes within the scope of the Real Estate (Regulation and Development) Act 2016, a specific enactment made for the purpose of resolving the disputes between a builder and an allottee. The Real Estate Regulatory Authority (RERA for short) is specially constituted to look into the complaints as in the present case. Section 79 of the said Act specifically bars the jurisdiction of all other Courts and Tribunals over matters that come within the adjudicatory powers of the Regulatory Authority or its Appellate Tribunal. Therefore, it is submitted that this Commission has no jurisdiction to entertain this complaint.

7. It is further contended that the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act 2016 (Commercial Courts Act for short) also enacts a specific bar of jurisdiction over commercial disputes including issues relating to construction and infrastructure contracts. Chapter II of the Act deals with Commercial Courts and Chapter V specifically require transfer of all claims pending before other Courts and Tribunals to the Special Courts. Therefore, according to the opposite parties this complaint is not maintainable in view of the provisions of the Real Estate (Regulation & Development) Act, 2016 and the Commercial Courts Act.

8. Apart from the above, the complaint is barred by limitation. All the transactions took place in the year 2013. But, this complaint has been filed only in 2016. The averments in the complaint are also in the nature of

settlement of accounts and refund of money. In view of all the above objections, it is contended that the complaint is not maintainable.

9. On the merits, it is contended that the 1st opposite party is a reputed and professionally managed builder at Thiruvananthapuram. The Company has pioneered a number of high- rise constructions and apartments built to its exacting standards with a continually improving Quality Control System to ensure uniform quality in every aspect of its construction. It is admitted that, the complainant had entered into an agreement with the 1st opposite party for development of the land and construction of an apartment. As per the agreement, it was expected that the construction would be completed within the extended periods subject to force majeure conditions. The terms of the agreement would reveal that time was never the essence of the contract. The complainant was informed by the opposite parties that the finishing date of the work was extended up to June 2018 due to unforeseen circumstances. There has been no wilful delay on the part of the opposite parties in completing the construction. The work was not delayed due to any laches on the part of the opposite parties. The delay was on account of labour issues, escalation of price of construction materials due to global recession, changes in building rules and statutes, etc. The said intervening factors were unforeseen circumstances beyond the control of opposite parties. The construction agreement provides for such circumstances and such periods have to be specifically excluded while calculating the time for completion.

10. It was further contended that there were no regular enquiries by the complainant as required. But, the opposite parties used to keep the complainant abreast of all the happenings at the site. The complainant was also not regular in making timely payments to the opposite parties and that too affected the pace of construction. As per the agreement executed between the parties, the date of completion was subject to the complainant fulfilling his obligations as per the agreement and the other terms and conditions therein. The complainant has wilfully hidden the above aspects and is making allegations without any bonafides. The complainant has come to this Commission with unclean hands. The original of the agreement is not produced. The date of completion of the project was extended to June 2018.

11. The complainant has not produced the original agreement before this Commission. He has also not produced any original documents. The documents produced along with the complaint are not genuine and cannot be admitted in evidence without testing the veracity of the document. Several Police cases were registered against the opposite parties at the instance of some complainants. Almost all documents were taken away by the Police in connection with the investigation. The opposite parties were also in judicial custody for more than 21 days. During this period most of the office records were taken away by some interested persons. It is apprehended that some forged documents might have been created to raise false claims against the opposite parties. Therefore, the documents relied upon by the complainant are disputed documents and cannot be admitted in evidence.

12. According to the version, the delay in completing the construction of the apartment is attributable to several factors including lorry labour strike, hike in the price of sand, shortage of construction materials like sand, scarcity of stone etc. In the year 2012, there was stone quarry strike which continued for days together. Scarcity of cement also resulted in stopping of construction activities. The opposite parties did not opt for purchase of low quality sand or low grade cement and did not wish to compromise on the structural strength and durability of the building. In the year 2013, sand labourer's strike had become violent. Again in the year 2014, construction industry had gone into stagnancy as a result of rising cement price. There was complete restriction for quarrying and excavations at environmentally fragile places. These factors were beyond the control of the opposite parties. The true state of affairs had been communicated to the complainant at all relevant times. The complainant is trying to wriggle out of the consequences provided for such situations. There was no unfair trade practice, deficiency in service or undue delay on the part of the opposite parties. Therefore the complainant is not entitled to any compensation as claimed. The opposite parties are taking all necessary steps to complete the construction of the apartment in a time bound manner.

13. The 1st opposite party is a Private Limited Company with only three Directors. The entire dealings of the company are managed by the Managing Director, the Chairman and the Director. But, other persons having no interest are also made opposite parties. Therefore the complaint is liable to be dismissed for misjoinder of parties. The complainant has no cause of action

to institute the present complaint. None of the reliefs sought for can be allowed or granted. The interest claimed is exorbitant. Therefore, the complaint is liable to be dismissed with costs.

14. On the above pleadings, both sides went to trial. Both sides have not adduced any oral evidence. The complainant filed affidavit in lieu of chief examination. Exhibits A1 to A5 documents are marked by the complainant in his affidavit. Though the counsel for the opposite parties wanted to cross examine the complainant, the attempt was later on given up. Therefore complainant's evidence was closed. A proof affidavit has been filed on behalf of all the opposite parties producing one document marked as Exhibit B1. After close of evidence both the parties were heard.

15. According to the counsel for the complainant, entire amounts had been handed over to the opposite parties under Exhibit A1 agreement with the object of satisfying the cherished dream of the complainant to acquire a residential apartment of his own. However, after having received the amount, the opposite parties have neither completed the construction nor handed over the apartment that was agreed to be delivered possession of December 2014. As evidenced by Exbt. A5 Encumbrance Certificate, they have alienated the property to strangers. It is clear that they have no intention of completing the construction. Therefore, it is only appropriate that the complainant is permitted to recover the amounts paid by him from the opposite party. The counsel prays that a decree may be granted as prayed for in the complaint.

16. According to the counsel for the opposite parties, as per orders of the National Company Law Tribunal, proceedings before all Courts and Tribunals have been stayed and for the said reason, this Commission also lacks jurisdiction to pass orders against them. It is contended that the opposite parties have been divested of their authority in respect of the company and they are no longer in management thereof. Therefore, passing of any orders against them would serve no purpose. On the above grounds, the counsel seeks dismissal of the complaint.

The following points arise for consideration in this complaint:

- (1) Is the complaint maintainable?
- (2) Is there any deficiency in service or unfair trade practice on the part of the opposite parties as alleged in the complaint?
- (3) Reliefs and costs?

Point No.1

17. The question of maintainability was raised by the opposite parties by filing I.A.No.1154/2017. The same was considered as a preliminary issue and it was held that the complaint was maintainable. Accordingly, as per order dated 13.06.2019 the petition filed by the opposite party has been dismissed. The said order, not having been challenged before any higher Forum, has become final. Therefore, it is not necessary for us to consider the question of maintainability here again.

Point Nos. 2 & 3

18. Both the above points are considered together for the sake of convenience.

19. The case of the complainant is that, as per an agreement dated 28.12.2012, marked as Exhibit A1 in these proceedings, entered into between the 1st opposite party and the complainant, the opposite parties had agreed to construct and hand over possession of an apartment in the project by name "**SAMSON & SONS, Merry Land Flats**". The apartment agreed to be purchased by the complainant has been described in the agreement Exbt. A1 . The apartment after completion of construction was to be registered and conveyed to the complainant along with undivided interest in 17.20 cents of land, along with the apartment. The total sale consideration agreed to be paid by the complainant was Rs.60,00,000/-(Rupees sixty Lakhs). This consideration was adjusted towards the sale consideration payable to the complainant as the co-owner of the property agreed to be sold to the opposite parties as per agreement dated 28-12-2012 (Exbt. A2) . An additional amount of Rs. 15,00,000/- was paid on 16-02-2015 for enhancing the built up area by 122 sq.ft. Exbt. A4 is the relevant bank statement. The immovable property is described in detail in A schedule to the agreement . The apartment is described in B schedule to the agreement. Though the complainant has paid the entire sale consideration to the opposite parties, they have not completed the construction or conveyed the apartment to the complainant as agreed. It is also alleged that the opposite parties alienated the property to strangers as evidenced by the encumbrance certificate (Exbt. A5) .

20. A common version has been filed by all the opposite parties in which they have admitted the execution of Exhibit A1 agreement. Their case is that, due to unforeseen circumstances the construction could not be completed. According to them the delay was on account of labour issues, escalation of price of construction materials due to global recession, changes in building rules and statutes, all of which according to them, constitute force majeure conditions. They have a further case that omission on the part of the complainant to make timely payments has also contributed to the delay. According to them, the opposite parties are taking all necessary steps to complete the construction of the apartment in a time bound manner.

21. Though the opposite parties have pleaded force majeure conditions as the reason for not completing the construction as agreed in Exhibit A1, absolutely no evidence has been adduced by the opposite parties in support of the said contentions. Though some sweeping allegations have been made disputing the genuineness of the documents produced by the complainant, the contentions have not been pursued during the trial. The complainant has also not been cross examined on any of the disputed aspects. Exhibit A3 is the receipt for Rs. 60,00,000/- and Exbt. A3 (a) is the receipt for Rs. 15,00,000/- issued by the Managing Director of the 1st opposite party. The opposite parties have no case that the said documents were not issued by them. In fact, the said documents were all marked without any objection from their counsel, on consent. The said receipts account for payment of an amount of Rs.75,00,000/- (Rupees Seventy five Lakhs). Since payment of the said amount of

Rs.75,00,000/-(Rupees Seventy five Lakhs) is not in dispute, the statement of the complainant on oath, that the total amount paid by the complainant to the opposite parties is Rs.75,00,000/-(Rupees Seventy five Lakhs), stands proved.

22. It is not in dispute that, the apartment complex has not been constructed yet. As per Exhibit A1 agreement possession of the apartment was to be given before December 2014. Though more than eight years have elapsed the opposite parties have not honoured their commitments. According to their version, they are taking necessary steps to complete the construction in a time bound manner. Therefore it is clear that the construction of the apartment remains incomplete even as on today. In view of the above, we find deficiency in service on the part of the opposite parties. We are of the view that the contention of the complainant that he is entitled to recover the amount paid by him, with interest is fully justified. The complainant is also entitled to interest on the said amount till the date of payment.

23. The desire of a person to own a house of his own is sacred and sacrosanct. It was to satisfy the said desire of the complainant that he had parted with such a huge amount, raising part thereof through a bank loan also. The mental agony at losing his hard earned money and at the same time being unable to acquire his dream house cannot be trivialised. Therefore, the complainant shall be entitled to compensation for his suffering, which is fixed at Rs.7,00,000/-(Rupees Seven Lakhs).

In the result, this complaint is allowed as follows:-

- (a) The opposite parties are directed to pay the complainant the amount of Rs.75,00,000/--(Rupees Seventy five Lakhs) received from the complainant, with interest thereon @8% per annum from 16-02-2015 the date of exhibit A-3 (a) receipt , till the date of realisation;
- (b) The opposite parties are directed to pay Rs.7,00,000/--(Rupees Seven Lakhs) as compensation towards the mental agony and hardships suffered by the complainant, with interest thereon @8% per annum from the date of filing this complaint, till date of payment.
- (c) The opposite parties shall further pay an amount of Rs.50,000/--(Rupees Fifty Thousand) as costs of this litigation.

(d) All the above amounts shall be paid within a period of one month from the date of receipt of a copy of this judgement, failing which all the amounts shall carry interest @9% per annum.

Dictated to my Confidential Assistant, transcribed by him, corrected by me and pronounced in the Open Court, on this the 18th day of April 2023.

JUSTICE SRI. K. SURENDRA MOHAN : PRESIDENT

RANJIT. R : MEMBER

BEENA KUMARI. A : MEMBER

K.R. RADHAKRISHNAN : MEMBER

C.C.No. 168/2016
APPENDIX

COMPLAINANT'S WITNESS

NIL

COMPLAINANT'S DOCUMENTS

- A1- Copy of agreement dated 28-12-2012 for sale and Construction.
- A2- Copy of agreement dated 28-12-2012 for demolishing And reconstruction.
- A3- Copy of the receipt dated 28-12-2012 issued by opposite Parties.
- A3 (a) - Copy of the receipt dated 16-02-2015
- A4- Copy of Bank Statement.
- A5- Encumbrance certificate.

OPPOSITE PARTY'S WITNESS

NIL

OPPOSITE PARTY'S DOCUMENTS

- B1** - Copy of the order of NCLT

JUSTICE K. SURENDRA MOHAN : PRESIDENT

RANJIT. R

: MEMBER

BEENA KUMARI. A

: MEMBER

RADHAKRISHNAN K.R. : MEMBER

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