

KERALA STATE CONSUMER DISPUTES REDRESSAL COMMISSION
VAZHUTHACAUD, THIRUVANANTHAPURAM
C.C. No.175/2016
JUDGMENT 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

COMPLAINANTS:

ShibuJohn Mathew, S/o O. Yohannan, Residing at Nellithara Peedikayil, Thattarambalam P.O, Mavelikkara, Alappuzha District, Pin. 690103 represented through his power of attorney holder Benny George, S/o V M George, Residing at VazhaplethuTharayil, Kattanam, Mavelikkara, Alappuzha.

(By Adv. VijeshKattakkalil)

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, S/o Jacob Samson, T.C.3/678, Kannimattom, TKD Road, Muttada P.O., Thiruvananthapuram – 695 025
2. John Jacob, S/o Jacob Samson, T.C.3/678, Kannimattom, TKD Road, Muttada P.O., Thiruvananthapuram – 695 025
3. Jacob Samson, T.C.3/678, Kannimattom, TKD Road, Muttada P.O., Thiruvananthapuram – 695 025.

(By Adv. DouglasLinsby. N.R)

JUDGMENT

SRI. RADHAKRISHNAN K.R. : MEMBER

This is a complaint filed under Section 17 of the Consumer Protection Act, 1986 (hereinafter referred to as the Act for short) through power of attorney holder of the complainant, 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 third opposite party is the Director of the 1st opposite party.

2. The opposite parties were in the process of executing an apartment project in a property admeasuring 45cents comprised in Survey No.2762 of Kowdiar Village located at TKD Road, Pattom, Thiruvananthapuram. The project was named "Samson & Sons NOVA Castle Apartment". The property is described more particularly in 'A' Schedule appended to the agreement. Opposite parties 2 and 3 persuaded the complainant to purchase an apartment in the project. According to them, it was a luxurious apartment having a built up area of 1700sq.ft. He was also offered 1.153cents of undivided interest in the land. The total cost of the apartment was represented to be Rs.84,00,000/- (Rupees Eighty Four Lakhs). The apartment is more particularly described in Schedule 'B' appended to the agreement. On the basis of the representations

made by opposite parties 2 and 3, the complainant agreed to purchase an apartment on the 12th floor of the building numbered as 12 B (type B) in the proposed project. Accordingly, an agreement was executed between the complainant and the 1st opposite party on 19.11.2013.

3. In accordance with the terms of the agreement the complainant paid an amount of Rs. 74,00,000/- as under :-

1. Rs. 2,00,000/- vide receipt No: 1908 dated 19-11-2013
2. Rs. 24,00,000/- vide receipt No: 1917 dated 30-11-2013
3. Rs. 24,00,000/- vide receipt No: 2048 dated 04-03-2014
4. Rs. 20,00,000/- vide receipt No. 2140 dated 10-06-2014
5. Rs. 4,00,000/- vide receipt No. 2172 dated 08-07-2014.

Five receipts, evidencing payment of the said amounts, totalling Rs. 74,00,000/- (Rupees seventy four lakhs) are produced along with the complaint. As per the agreement the balance amount of Rs. 10 lakhs was payable only at the time of handing over of the key of the apartment.

4. The opposite party had promised to hand over possession of the fully constructed apartment to the complainant on or before 31-12-2014. But they have not made any progress in the construction, so far. Moreover, they have pledged the property to the Kerala Financial Corporation (KFC) and obtained a loan without informing the complainant or the other purchasers. Thus they have obtained a loan from the KFC on the security of the property agreed to be sold to the complainant and has thereby cheated them. Though the

complainant has requested the opposite parties to settle their claim, they have not cared to do so.

5. The complainant therefore caused the issue of a notice dated 09.12.2016 through his lawyer demanding 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.74,00,000/-(Rupees Seventy four Lakhs) from the opposite parties with interest thereon @12% per annum together with an amount of Rs.15,00,000/-(Rupees Fifteen Lakhs) as 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. 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. The complainant filed affidavit in lieu of chief examination. Exhibits A1 to A8 documents are marked on the side of complainants. Through the counsel for the opposite parties wanted to cross examine the complainant the attempt was later given up. Therefore the 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. No oral evidence was adduced by them. After close of evidence both the parties were heard.

15. According to the counsel for the complainant, substantial amounts had been handed over to the opposite parties under Exhibit A2 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 before 31-12-2014. 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.1166/2017 . The same was considered as a preliminary issue and it was held that the complaint was maintainable. Accordingly, as per order dated 21.02.2019 the petition filed by the opposite parties have been dismissed. The said order, not having been challenged before any higher Forum, has become final. Another order dated 12-06-2019 passed by this Commission in IA.No. 1132/17 in CC.No.136/16 and connected cases has also taken the same view. The said order has also become final. We follow the said orders in this case also. 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 19-11-2013, marked as Exhibit A2 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, NOVA Castle Apartment Projects, T.K.D. Road, Pattom”**.Theapartment agreed to be purchased by the complainant was to be

located on the 12th floor of the building complex and has been described as Apartment No 12 B (type B). The apartment after completion of construction was to be registered and conveyed to the complainant along with 1.153 cents of undivided interest in 45 cents of land, along with the apartment. The total sale consideration agreed to be paid by the complainant was Rs.84,00,000/-(Rupees Eighty Four Lakhs). 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 substantial amount of sale consideration, to the opposite parties they have not completed the construction or conveyed the apartment to the complainant as agreed.

20. A common version has been filed by all the opposite parties in which they have admitted the execution of Exhibit A2 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 A2, 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. Exhibits A3 to A7 are receipts 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.74,00,000/-(Rupees Seventy Four Lakhs). Since payment of the said amount of Rs.74,00,000/-(Rupees Seventy Four 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.74,00,000/-(Rupees Seventy four Lakhs), stands proved.

22. It is not in dispute that, the apartment complex has not been constructed yet. As per Exhibit A2 agreement possession of the apartment was to be given before 31.12.2014. 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 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 . 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.74,00,000/-/(Rupees seventy four Lakhs) received from the complainant, with interest thereon @8% per annum from 08.07.2014, the date of Exbt. A-7 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: PRESIDNENT

RANJIT . R : MEMBER

BEENA KUMARI .A : MEMBER

K.R.RADHAKRISHNAN : MEMBER

APPENDIX

I. COMPLAINANT'S WITNESS

Nil

II. COMPLAINANT'S DOCUMENTS

- A1- Power of Attorney
- A2- Copy of agreement dated 19-11-2013 for sale and construction.
- A3- Copy of receipt dated 19-11-2013 issued by the opposite parties.
- A4- Copy of receipt dated 30-11-2013 issued by the opposite parties.
- A5- Copy of receipt dated 04-03-2014 issued by the opposite parties.
- A6- Copy of receipt dated 10-06-2014 issued by the opposite parties.
- A7- Copy of receipt dated 08-07-2014 issued by the opposite parties.
- A8- Notice dated 09-12-2016.

III. OPPOSITE PARTY'S WITNESS

Nil

IV. OPPOSITE PARTY'S DOCUMENTS

B1- Copy of the order of NCLT

JUSTICE SRI. K. SURENDRA MOHAN :
PRESIDENT

RANJIT. R : MEMBER

BEENA KUMARI. A : MEMBER

RADHAKRISHNAN .K.R. : MEMBER

Sh/-

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