

Shree Constructions and Developers Vs. Kamal Oswal and Another

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Court : Maharashtra State Consumer Disputes Redressal Commission SCDRC
Mumbai

Decided On : Apr-17-2012

Judge : The Honourable Mr. S.R. Khanzode, Presiding Member & the Honourable Mr. Narendra Kawde, Member

Appeal No. : First Appeal No. A/01/939 (Arisen out of Order Dated 16/05/2001 in Case No. 289/2000 of District Kolhapur)

Appellant : Shree Constructions and Developers

Respondent : Kamal Oswal and Another

Judgement :

S.R. Khanzode, Presiding Judicial Member

1. This appeal takes an exception to an order dated 16.05.2001 passed in Consumer Complaint No.289/2000, (Mrs.Kamal Rikhabdas Oswal and Anr. V/s. Shree Constructors and Developers, a partnership firm through its partner Shri Mahaveer Dadaso Gaat) by the Consumer Disputes Redressal Forum, District Kolhapur (the Forum in short).
2. The consumer complaint pertains to deficiency in service on the part of the builder to execute conveyance on receiving the balance consideration and to provide the bore well or well. The consumer complaint was allowed directing the builder to execute conveyance in the form of sale deed or deed of declaration,

Association of apartment and also the builder was further directed to provide a bore well or well. Feeling aggrieved thereby the Opponent builder has preferred this appeal.

3. Heard both sides.

4. It is the contention of the Respondent/original Complainant Mrs.Kamal Rikhabdas Oswal and her son Dilip (hereinafter referred to as the Complainants) that Appellant/original opponent Shree Constructors and Developers (referred to as the builder) agreed to sell them flat nos. 8 and 9 having total salable area of 1170 sq.ft. situated in the south part of A wing on the second floor in a building constructed at City Survey No.3143 and 3144/B of A Ward, Kanekar Bol, Kolhapur for a total consideration of Rs.3,80,250/- as per agreement dated 01.05.1988. The possession was to be received in the year 1990. Out of total consideration agreed, Rs.1,31,750/- is remained to be paid which is payable at the time of executing the conveyance. Since the conveyance is yet to be executed as well as since the bore well is not provided, the consumer complaint was filed on or about 28.04.2000. Admittedly the Complainants are put in possession of flat nos.8 and 9 of A wing and not Flat no.2 from the B wing.

5. The consumer complaint was opposed by the builder stating that there was a novation of contract by agreement dated 08.10.1988. It did not deny execution of the conveyance subject to Complainant paying amount of the dues recoverable from it to the extent of Rs.1,95,150/- along with interest @18% per annum w.e.f. 01.04.1990 for delayed payment. Thus, alleging no deficiency in service on its part the builder further asked to dismiss the consumer complaint.

6. By an amendment carried out on 13.04.2000, the subsequent developments about notice received from land Acquisition Officer for widening the road whereby, as pleaded, from the existing portion of the building some portion may be required to be demolished as a result of said acquisition and it will affect the total F.S.I. and therefore, it is the development which would ultimately get affected and also the property rights which in turn would be affecting the conveyance to be executed and thus, it would affect the rights of the flat purchasers.

7. There is a dispute about the total amount payable from the Complainants. Complainants admit that they have to pay the amount of Rs.1,31,750/- which according to them was payable at the time of execution of the conveyance and showed their willingness to pay the same accordingly. However, according to builder there being novation of contract witnesses by an agreement on 08.10.1988, an amount of Rs.1,95,250/- along with interest over it, supra, is due from the Complainants. The builder also brought on record subsequent developments about intended land acquisition for road widening and the possible effect thereof on the description of the property or conveying the property rights and also indicated that the every flat purchaser needs to be taken into confidence accordingly. The Complainant tried to submit that on 02.05.1990 there was a settlement of the account between them and builder and accordingly the amount of Rs.2,48,400/- was paid by them to the builder. They even tried to file one sheet of paper of such account, however, the builder denied any such settlement and Complainants failed to establish their such contention. No evidence is at all led to establish the same.

8. As to the case of the builder that there was novation of agreement and by an agreement dated 08.10.1988, previous agreements were cancelled; the Forum surprisingly observed that they did not want to go into the said dispute. Since the deficiency in service on the part of the builder is to be assessed on the basis of the contractual obligation (as relevant in the instant case), while settling the dispute between the flat purchasers and the builder; in the background of the present dispute, it is necessary to decide the evidence led on behalf of both the parties on the issue and the Forum ought to have come to the conclusion as to which of the agreements i.e. dated 01.05.1988 (as alleged by the Complainant) or the novation agreement dated 08.10.1988, the parties are governed (to assess alleged deficiency in service).

9. The Complainants altogether denied having executed subsequent agreement dated 08.10.1988 as alleged by the builder. According to the Complainants using the stamp paper provided by them for getting executed the original agreement the builder instead of using the said stamp paper used stamp paper with him and executed an agreement dated 01.05.1988. Said agreement, as presented, is not in

dispute. Referring to it, it corroborates the case of the Complainants that they agreed to purchase flat nos.8 and 9 situated in A Wing, supra, from the builder. Referring to clause 3 of the said agreement it does not specify any installment of the consideration since said place is left blank. However, it is not in dispute that total consideration was agreed at Rs.3,80,250/-. Said agreement further provides that the building would have water tap connection from the water supply department as well as additional facility of water supply through bore well. It also provides that flat purchaser has to pay the charges for taking the tap connection as well as electric connection.

10. The builder comes with a case of novation of contract as per agreement dated 08.10.1988, copy of the said agreement is also placed on record. The builder also filed an affidavit of one of the attesting witnesses of the agreement dated 08.10.1988 viz. Vijay Pygonda to prove the agreement, for which a secondary evidence is led. Before leading secondary evidence, a notice to produce the original document as well as to admit the said document was also given to the Complainants. Complainants denied having in possession of the original documents and also did not admit the said agreement, supra. Complainant No.2 - Dileep Rikhabdas Oswal in his affidavit which is filed as counter affidavit to the affidavit of attesting witness Vijay Pygonda, categorically denied having executed any such agreement.

11. In the notice dated 15.04.1994 which is addressed by the builder to the flat purchasers including the Complainants the builder categorically stated that the Complainants had agreed to purchase the flat nos. 8 and 9 from A wing situated on the second floor of the building and accordingly, the Complainants were placed in possession of those flats. In the said notice it is also mentioned that Rs.2,85,250/- as on that date were due from the Complainants. Since in the said notice the builder referred to flat nos. 8 and 9, such statement/reference stand in conformity with the agreement dated 01.05.1988 on which the Complainants placed reliance and not to the description of the property agreed to be sold in the alleged agreement dated 08.10.1988 (wherein flat no.2 in wing B situated on the second floor is shown as a flat agreed to be sold). We find the preponderance of probability, speaks in favour of the Complainants when they come with a case of

non-execution of the agreement dated 08.10.1988. Hence, we accept the case of the Complainants in this respect.

12. The agreement dated 01.05.1988 does not refer to the nature of conveyance to be executed. It also does not refer whether any association of the flat purchasers/Society as per the Maharashtra Ownership of Flats Act 1963 or any deed of apartment as per the Maharashtra Apartment Ownership Act 1970 is to be executed. There is no declaration made as per Section 2 of the Maharashtra Apartment Ownership Act, 1970. Similarly the agreement though expected to mention the particulars as referred under section 4(1A)(a)(v) of the Maharashtra Ownership of Flats Act 1963, are missing whereby the nature of the organization to be constituted and the names of the persons who have taken or are to take flats are to be mentioned. In the circumstances, any direction in respect of particular nature of the conveyance to be executed cannot be given. Furthermore, in either of the cases whether Society or apartment, the opinions of other flat purchasers or the shop purchasers from the building and their association to the nature of organization needs to be formed are to be taken into consideration and these aspects are quite important before giving any directions as to the nature of conveyance is to be executed. Furthermore, in case of the flat purchasers under the Maharashtra Ownership of Flats Act, conveyance is to be executed in favour of the Society and not in favour of any individual flat purchaser. Therefore, from this point of view, failure to execute any conveyance; no deficiency in service on the part of the builder could be inferred. Apart from that there is a legitimate dispute which still remained to be resolved or to be settled between the parties is about the payment due. Consumer disputes cannot be for settlement of the account and as per the agreement dated 01.05.1988, since the amount was payable, obviously before taking possession, no liability on the part of the builder would arise to execute conveyance unless and until he receives full payment. Certainly, in the light of agreement dated 01.05.1988, it does not support the case of the Complainants that the balance consideration was payable at the time of execution of the conveyance.

13. As far as making provisions for water supply through bore well is concerned, it falls under category of the amenities. Therefore, if deficiency in service in that

respect on the part of builder is to be alleged or assumed the cause of action would arise on receiving the possession of the flats by the Complainants i.e. in the year 1990. Therefore, as far as that part of the consumer complaint is concerned, it being time barred in view of section 24-A of the Consumer Protection Act 1986, no reliefs could be granted.

14. For the reasons stated above, we hold accordingly and pass the following order:

ORDER

1. Appeal is allowed.

2. Impugned order dated 16/05/2001 is set aside. In the result, Consumer complaint stands dismissed. However, it is clarified that the Complainant can follow the any other legal remedy available to it as per the law.

3. In the given circumstances, both parties to bear their own costs.

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