

**(2024) 11 NCDRC CK 0093****National Consumer Disputes Redressal Commission****Case No:** First Appeal No. 126 Of 2016

M/s Dheeraj Associates

APPELLANT

Vs

Dr. Deepak Sitaram Desai

RESPONDENT

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**Date of Decision:** Nov. 26, 2024**Acts Referred:**

- Consumer Protection Act, 1986 - Section 19
- Limitation Act, 1963 - Section 14

**Hon'ble Judges:** Avm J. Rajendra, Avsm Vsm (Retd.), Presiding Member**Bench:** Single Bench**Advocate:** Ankur Khandelwal, Himanshu Handa, Dnyanaraj G. Sant**Final Decision:** Allowed

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**Judgement**

Avm J. Rajendra, Avsm Vsm (Retd.), Presiding Member

1. This Appeal has been filed under Section 19 of the Consumer Protection Act, 1986, (the Act"), against the Order dated 28.10.2015 passed by the State Consumer Disputes Redressal Commission, Maharashtra ("State Commission") in CC No. 91/2012, wherein the State Commission partly allowed the Complaint directing the Appellant/ OP to pay Rs. 11,02,794/- along with simple interest @ 9% per annum from date of filing of the complaint till actual realization.
2. As per report of the Registry, there is 43 days delay in filing this Appeal. For reasons stated in IA/1662/2016, the delay is condoned.
3. For convenience, the parties in the case are hereinafter being referred to as per position held in the Consumer Complaint.

4. Brief facts of the case, as per the Complainant, are that in 2009, he booked a flat measuring 1280 Sq Ft (118.95 Sq Mts) with the OP, paying the entire consideration of Rs. 53 Lakhs. An agreement was executed. Subsequently, the OP revised the sanctioned plan for the building, resulting in a change in the area of the flat. In August 2010, OP handed him over possession of the flat. Upon taking possession, with the assistance of an architect, he measured the area and found it to be significantly less than the agreed 118.95 Sq Mts. He issued a notice to the OP regarding the reduced area, but the OP denied the claim. The Complainant then filed a consumer complaint, seeking an order directing the OP to transfer an adjoining area of any premises in the building to compensate for the deficit or, alternatively, to pay the current market price of Rs. 6,000 per Sq Ft. for the shortfall. He also claimed refund of extra stamp duty, execution of a correction deed reflecting the changes in the area and flat number, along with compensation for mental agony and litigation costs.

5. As per the impugned order, the OP had appeared but failed to file its written version. Hence, the matter was proceeded without a written version of OP.

6. The learned State Commission vide order dated 28.10.2015 partly allowed the complaint with the following observations:

**“ORDER:-**

**1. Complaint is partly allowed.**

**2. Opponent is directed to pay Rs.11,02,794/- to the complainant together with interest @ 9% p.a. from the date of filing of complaint i.e. 13/04/2012 till realization.**

**3. Opponent is also directed to execute Correction Deed in respect of document executed by the opponent in favour of the complainant by mentioning correct area and correct number of flat.**

**4. Opponent shall bear its own costs and pay cost of Rs.5,000/- to the complainant.**

**5. Upon retaining original set of complaint compilation, other sets of complaint compilation shall be returned to the complainant forthwith.**

**6. Copies of the order be furnished to the parties.”**

7. Being aggrieved by the impugned order dated 28.10.2015 passed by the Ld. State Commission, OP has filed this present Appeal no. 126 of 2016 praying as below:

**“(a) set aside the impugned order dated 28 October 2015 passed by the State Consumer Disputes Redressal Commission Maharashtra, Circuit Bench, Pune in**

**Complaint Case No. CC/12/91; and**

**(b) pass such other Order or Orders as may be deemed fit and proper in the facts and circumstances of the present case."**

8. In the Appeal, the OP has mainly contended the following:

A. The complainant concealed material facts to mislead and gain unfair advantage. The property was purchased for commercial use, including resale and operating a clinic, rather than for own use. Thus complainant is not a consumer under the Act.

B. The State Commission erred in not considering the Agreement terms dated 07.09.2009, under which the he took possession expressly waiving right to raise objections to defects. Also, he is barred by Clause 13 of the Agreement, which limited claims for defects to a period of one year from the date of possession.

C. He breached Clause 15 of the Agreement, by commercial use of the property, contrary to Pune Municipal Corporation approval. The Complainant misrepresented its intended use, thereby rendering the Agreement voidable at the discretion of the OP.

D. The State Commission failed to notify OP of the case transfer from State Commission, Mumbai, to the Bench at Pune vide order dated 05.06.2012. By not affording an opportunity to OP to be heard, the principles of natural justice were violated. There was also failure to take into account the written submissions filed by OP, which were recorded vide order dated 16.10.2012.

9. Upon notice of memo of appeal, the Respondent/Complainant filed their reply to the present appeal. While appreciating the order of the learned State Commission, they prayed to dismiss the appeal as being devoid of merit.

10. The learned counsel for OP argued that, by reselling the unit in question and admitting to purchasing it for a commercial purpose (to establish a 2nd clinic), the complainant disqualified himself from being a "Consumer" under the Act, 1986. He suppressed material facts, including details of the sales transactions, and fabricated an Architect's report dated 28.03.2012 purportedly issued after the first sale in 2011 to substantiate a belated and false claim of deficiency in the area. Citing *Ashok Thapar v. Supreme Indo Saigon Associates*, 2015 LawSuit (CO) 2359, the OP argued that his concealment of facts and subsequent claim exemplified fraudulent and unethical conduct. They relied on *A.V. Papayya Sastry v. Govt. of A.P.*, (2007) 4 SCC 221 and *S.P. Chengalvaraya Naidu v. Jagannath*, (1994) 1 SCC 1, and contended that the Impugned Order, obtained through such fraudulent means, was null and void. The Appeal is not barred by limitation, as the transfer of the complaint to Pune Circuit Bench was affected without notice to OP, and the ex-parte Impugned Order was discovered only through a newspaper article. The certified copy of the Impugned Order was obtained

promptly, and the Appeal was filed within 16 days thereafter, well within the prescribed timeline. Thus, he contended that the Impugned Order, being vitiated by fraud, concealment of material facts, and procedural unfairness, was liable to be set aside.

11. Per contra, the learned counsel for the complainant reiterated the facts from the complaint and opposed the appeal on multiple grounds. He asserted that the Appeal suffered from inordinate delay. The OP failed to produce any documentary evidence to support its application for condonation of delay, rendering the application and the Appeal liable for dismissal. He further contended that OP did not file a written version, documents, or evidence before the State Commission, despite being afforded opportunity. The complaint was proceeded ex-parte due to OP's failure to appear. Therefore, OP has no grounds to raise objections which were not addressed in the original proceedings. The impugned order was detailed and well-reasoned with due appreciation of legal and factual aspects, thus, the same should be upheld. The OP had remained silent on the reduced area which was conclusively proved by evidence before the State Commission.

12. I have examined the pleadings and associated documents placed on record and rendered thoughtful consideration to the arguments advanced by learned counsels for both the parties.

13. It is an undisputed fact that the complainant had booked a flat measuring 1280 Sq Ft (118.95 Sq Mts) with OP, for which the entire consideration was paid, and possession was handed over to him vide letter dated 17.02.2009. Subsequently, on 13.04.2012, he filed a complaint, alleging that the area of the said flat was less than what was promised in the allotment letter. The OP denied the allegations, asserting that the promised area had been duly delivered. The State Commission in its findings recorded that no written statement had been filed by the OP. It further relied upon the certificate of an architect and passed the impugned order in favour of the complainant. However, upon examining the record, it became evident that a written statement was filed by the OP before the State Commission on 09.09.2012. However, as it was filed beyond the statutory period of 45 days, it was not taken on record. The counsel for OP has brought to my attention to the Assignment Deed dated 18.08.2011 wherein the complainant assigned the subject Flat to one Mr. Pankaj Ankam and Mrs. Manisha Ankam. Subsequently, by another Assignment Deed dated 19.06.2012, the same flat was re-assigned to Mr. Ashok Ankam and Mrs. Radha Ankam. While it is unclear as to how the same property was assigned twice, it is undisputed that it was assigned to third parties once prior to the filing of the complaint and again during its pendency. Further, both Assignment Deeds explicitly mention the same Flat No. 101 with the area of the property as 1280 Sq Ft, which is incongruent to the complainant's allegation regarding the reduced area, if any. The present complainant, who apparently himself signed the Assignment Deeds, was aware of and acknowledged the area of the flat as specified

therein and there is no clarification of reduced size, if any, by him to the individuals to whom he sold/assigned the unit. These deeds were also registered. In light of these facts, it is apparent that the complainant suppressed material details before the State commission. Since the scope for filing written version for the OP was closed in the case, these material records and details revealing these facts as well as at the complainant has no further interest in the property and that he voluntarily sold/assigned the said unit to third parties were not brought before the State Commission. Further, the order of the learned State Commission dated 28.10.2015 does not also reveal anything with respect to the cross examination of the witnesses and/or arguments advanced on behalf of the OP.

14. For the foregoing reasons, the order of the learned State Commission dated 28.10.2015 is set aside and FA No. 126 of 2016 is allowed.

15. Needless to say, the Complainant has liberty to approach appropriate fora to seek relief in respect of the grievances against the OP. He may also seek benefit of the provisions of Section 14 of the Limitation Act, 1963 in doing so with respect to the time spent in prosecuting this litigation.

16. Keeping in view the facts and circumstances of the case, there shall be no order as to costs.

17. All pending applications, if any, also stand disposed of accordingly.