

K C Shah Vs Indu T Patil

Court: NATIONAL CONSUMER DISPUTES REDRESSAL COMMISSION

Date of Decision: May 5, 2015

Citation: 2015 2 CPJ 676

Hon'ble Judges: D.K.JAIN , VINAY KUMAR , M.SHREESHA J.

Advocate: K.P.S.RAO , A.SUBHASHINI , VINAY NAVARE , SATYAJEET KUMAR

Judgement

1. FOR reasons cited in the affidavit seeking condonation of delay of 77 days, the same is hereby condoned.

2. IN this first Appeal under Section 19 of the Consumer Protection Act (for short the ""Act""), the Appellants question the correctness and legality

of the order dated 14.5.2009 passed by the Maharashtra State Consumer Disputes Redressal Commission, Mumbai (for short ""State

Commission"" in Complaint No. 442 of 2002. By the impugned order, the State Commission partly allowed the complaint directing the Appellants

jointly and severally to pay to the Complainant a sum of Rs.6,33,000/- with interest at the rate of 9% per annum from the respective dates of

payments, compensation of Rs. 50,000/- and costs of Rs.10,000/-.

3. BRIEFLY stated, the material facts are that the Complainant booked a flat with the Opposite Parties in "NIKUNJ" Project, Borivali (E),

Mumbai and made the payments in the following manner:

a) Rs. 5,13,000/- Paid at the time of Execution of the agreement of Sale dated 13.7.1994

b) Rs. 20,000/- Vide Cheque No. 39615 dated 21.3.96 towards Stamp duty.

c) Rs. 1,00,000/- Vide Cheque No. 316479 dated 2.7.96

d) Rs. 50,000/- By cash

Rs. 6,83,000/-

An agreement dated 13.7.1994 was entered into for flat No. 504 admeasuring 440 sq. ft. for a total consideration of Rs.6,60,000/- . Even after

six years of persistent requests, the Opposite Party did not deliver possession of the said flat and therefore, the Complainant issued a legal notice

on 5.2.2001 requesting for cancellation of the flat and refund of the money paid together with interest. The Complainant pleaded that the Opposite

Parties have also collected maintenance charges of the un-delivered flat which amounts to unfair trade practice. The basic prayer of the

Complainant is for the refund of the entire amount paid with interest, compensation and costs.

4. THE first Opposite Party, the proprietor of M/s. K.C. Developers, did not file his written version before the State Commission.

5. THE second Opposite Party, who is the Chartered Accountant of the first Opposite Party, filed his written version before the State

Commission. He pleaded that the subject property bearing CTS No. 2132, 2132(I) to 2132(6) admeasuring about 721.3 sq. mts. of village

Dahisar, Taluka Borivali, MSD(hereinafter referred to as the said Property) was owned by Manik Marya Kharpade and was sold to M/s. Datta

Developers under Agreement for sale dated 16.10.1990 and further Agreement dated 04.05.1991. The said Datta Developers under Agreement

for Development dated 16.11.1992, entrusted the development rights to M/s. K.C. Developers Sole Proprietor firm through Mr. Kirti Kumar

Shah (the first Opposite Party), in respect of the Said Property. The original owner Datta Developers executed Irrevocable Power of Attorney to

the nominees of K.C. Developers. The said K.C. Developers executed Irrevocable Power of Attorney by substituting Mr. Praful K. Patel (the

second Opposite Party) in their place as mutually agreed upon between Mr. K.C. Shah and Mr. Praful K. Patel, with full right to receive payments

for sale of flats and other premises to be constructed on the said Property in the building to be known as NIKUNJ (hereinafter referred to as the

said Building) as per the building plans sanctioned and approved by the concerned authorities.

6. THE second Opposite Party averred that he had taken a loan of Rs.2,00,000/- @ 24% from the Complainant for completion of his projects.

Accordingly, the second Opposite Party paid interest upto December 1997 and thereafter the interest rate was reduced to 12% per annum by

mutual consent. During this transaction, at the Complainant's request, the second Opposite Party signed a blank agreement for Rs.6,60,000/- and

showed Rs.5,13,000/- as received. The second Opposite Party pleaded that this agreement was signed purely for security purpose only. An

amount of Rs.3,70,000/- was paid out of the total amount of Rs.4,20,000/- and, therefore, only a balance of Rs.50,000/- is due and payable by

him towards the said loan Account.

7. DUE to financial crisis the second Opposite Party could not pay the principal and interest amounts and, therefore, the Complainant is demanding

flat No. 504, which was sold recently to a third party with the Complainant's consent. The second Opposite Party averred that the Complainant

ought to have given the breakup of the alleged payment of Rs.5,13,000/- and should have given reasons for paying Rs.6,83,000/-, if the total sale

consideration of the subject flat is only Rs.6,60,000/-. The Complainant should also justify the payment of Rs.1,00,000/- by cheque dated

2.7.1996 which was paid towards the loan Account and not the Builder's account. The alleged agreement for sale was also not registered. There

are also no reasons given by the Complainant for not having paid the stamp duty. The second Opposite Party reiterated that the flat was never sold

to the Complainant, but that the blank agreement was given only for security purpose. Hence, the Complainant at the most can file suit for recovery

of amount before the Civil Court and pleaded that this Commission does not have jurisdiction to entertain this complaint.

8. THE State Commission, based on the material on record and the evidence adduced concluded that there was deficiency of service on behalf of

the Appellants herein and allowed the complaint partly directing the Appellants to pay Rs.6,33,000/- with interest at the rate of 9% per annum;

Rs.50,000/- compensation and costs of Rs.10,000/-.

9. AGGRIEVED by this order, Opposite Parties 1,2 and 3 preferred this Appeal.

10. IT is the main case of the Appellants herein that the said agreement dated 13.07.1994 was entered into only as a security for refund of the

principle amount and was meant for a loan transaction and not meant for the purpose of purchase of flat No. 504. The learned counsel for the

Appellants submitted that the Respondent/Complainant did not give any details of the mode of payment of Rs.5,13,000/-. The Appellants denied

that they had assured the Complainant of giving possession of flat No. 504 on or before 13.12.1994. The learned counsel submitted that since the

first and third Appellants are not parties to the alleged agreement, they are not bound by it and that the Complainant is not entitled to any relief

sought for in the Complaint. The learned counsel for the second Appellant contended that the loan was given by the Complainant to the second

Appellant in cash and by cheque from time to time and that the second Appellant paid the Complainant interest on these loan amounts from time to

time and only the last instalment in the settlement of loan repayment was returned, for which the Respondent filed a Criminal Complaint on

8.3.2001 u/s 138 of the Negotiable Instruments Act, 1881. It is contended that the dishonoured cheque was issued towards refund of the loan

given by the Respondent to the second Appellant.

11. WE observe from the record that the Respondent/Complainant had paid Rs.5,13,000/- at the time of execution of agreement for sale on

13.7.1994 and Rs.20,000/- by cheque towards stamp duty on 2.7.1996, but was not given the possession of the flat which is in violation of

clause 13 of the said agreement. The initial amount of Rs.5,30,000/- is mentioned in the agreement of sale and amounts of Rs.20,000/- and

Rs.1,00,000/- have been paid by cheque. Therefore, it can be safely concluded that an amount of Rs.6,33,000/- was paid by the Complainant to

the Appellants herein towards consideration of flat which she had booked in NIKUNJ Building.

12. THE acknowledgment receipt dated 7.3.2005, which the Appellants are relying on states as under:

Received from M/s. K.C. Developers a Pay Order being No. 640596 dated 4th March 2005 for Rs. 50,000/- drawn on State Bank of

Hyderabad towards full and final payment against the dishonoured cheque bearing No. 002557 dated 10.11.2000 for Rs. 50,000/- drawn on the

State Bank of Hyderabad, Andheri (W) Branch. The above cheque was given on A/c of full and final payment for the flat No. 504 in NIKUNJ

Building at Borivali (E), Mumbai 400 066".

13. THE learned counsel for the Appellants contended that in view of the afore -mentioned receipt given in full and final payment towards the flat in

question, the transaction is completed and that there is no deficiency of service on their behalf. The learned counsel for the

Respondent/Complainant vehemently contended that the last two lines "the above cheque was given on account of full and final payment for flat

No. 504 in NIKUNJ Building at Borivali (East) Mumbai -400 066" has been inserted by the Appellants herein.

14. A brief perusal of the said receipt shows that it is for full and final payment against the dishonoured cheque of Rs. 50,000/- . If the Appellants

herein had truly completed the transaction and the amount of Rs. 50,000/- was given in full and final payment for flat No. 504, on 7.3.2005, there

are no substantial and cogent reasons given by the Appellants herein, for not having brought this "full and final payment" to the notice of the State

Commission when the complaint was still pending before the Commission and was disposed of only on 14.5.2009, around four years subsequent

to the passing of the receipt.

15. IT is also pertinent to note that the Appellants herein sold the flat to a third party and submitted that it was done on the request of the

Complainant, but the Appellants have not filed any evidence to substantiate that the Complainant has given her consent for the sale of the subject

flat. When it is the Appellants' case that the agreement was not meant for purchase of a flat, there are no reasons given as to why they had pleaded

that the Complainant's consent was taken prior to the sale of the subject flat. The onus is on the Appellants to prove that the said agreement dated

13.7.1994 was executed as security for a loan transaction, which they have failed to establish by adducing any evidence on their behalf. It is

pertinent to note that the first and third Appellants did not file their written version before the State Commission. Having executed an agreement of

sale and having accepted an amount of Rs.6,33,000/-, it is the contractual duty of the Appellants herein to deliver the subject flat. Failing to do so,

amounts to deficiency of service, and therefore, we see no reason to interfere with the well -considered order of the State Commission. Hence, this

Appeal must fail. It is dismissed accordingly. The statutory deposit of Rs.35,000/- shall be transferred to the Consumer Welfare Fund. No order

as to costs.