

DR. NAREN P. SHETH & ANR. Vs M/S. LODHA GROUP & ANR.

Court: NATIONAL CONSUMER DISPUTES REDRESSAL COMMISSION

Date of Decision: May 5, 2016

Acts Referred: [Consumer Protection Act, 1986](#), [Section 2\(1\)\(d\)](#) - Definitions

Citation: 2016 2 CPR 791

Hon'ble Judges: J.M. Malik, Dr. S.M. Kantikar

Advocate: Ranjan Kumar, Sanjay Kumar, Somiran Sharma

Judgement

1. The builders/promoters adopt a Fabian policy (a dilatory policy) and harass the consumers no end. The consumers are exasperated by

senseless delays. Hopefully, the new changes made recently, would go a long way to pull the consumers chestnuts out of the fire (rescue from

difficulties)

2. Dr. Naren P. Sheth and Dr. Sudha N. Sheth, the complainants, are senior citizens and M/s. Lodha Group and M/s. Sri Sainath Enterprises,

OPs 1 & 2, transacts the business of constructing buildings, both commercial and residential. The complainants came across the proposal of the

OP Nos. 1 & 2 of constructing a residential complex named, "Lodha Luxuria" in Thane, Mumbai. The complainants paid a sum of

Rs.1,02,13,803/- out of the total consideration of Rs. 1,04,75,694/-, by way of installments from 27.09.2010 to 02.11.2010. It was agreed that

they would get the flat bearing No.0203 on 2 nd floor, measuring 1118 sq.ft., (carpet area) in the building named, "Fairfield" in the above said

project of the OPs. A copy of the cost details / proposal given by the OPs to the complainants, has been annexed herewith as Annexure C-I. The

reminder amount of Rs.2,61,891/- was to be paid at the time of taking the possession. The complainants had to withdraw their Fixed Deposit

Receipts for the above said payment and it caused a loss of Rs.3,00,000/- towards interest and other charges. The OPs also avoided to execute

the agreement with the complainants. The requests made by the complainants in this context, did not ring the bell. The complainants have proved

emails, dated 09.12.2010, 13.12.2010, 20.12.2010, in this context, copies of the same have been placed on record as Annexure C-3 (Colly).

3. On 22.12.2010, the OPs further demanded a sum of Rs.3,96,000/- towards car parking. First two floors from the ground were reserved for

car parking for which the OPs illegally demanded additional amount from the complainants. The complainants questioned this demand, vide email

dated 22.12.2010 (copy Annexure C-4). Ultimately, legal notice dated 23.12.2010 was sent, copy of which has been placed on record as

Annexure C-5.

4. The complainants were informed by the OPs through one of their office bearer"s that they should make the payments for car parking charges as

demanded, otherwise, they will have to execute an indemnity bond to the effect that they shall not be availing the car parking facility and they will

not allow to park their car there. The agreement clearly stipulates that no further charges would be demanded. A protest was made vide email

dated 05.11.2011, but there was no response.

5. On 17.01.2011, the OPs forwarded the allotment letter to the complainants which is completely arbitrary. The OPs also made a reference of

executing interim agreement, the concept of which, is completely illegal and unacceptable. In the Annexure to the allotment letter, the schedule of

payment was given, but there was no reference of amount to be paid towards the car parking. On the contrary, the agreement makes it clear that

the complainants are entitled for car parking for two vehicles, but very conveniently, the OPs, in the agreement, have marked the car parking as

"Nil", instead of filing the details of the parking slots earmarked for the complainants. No extra demand has been made therein. Copy of the email

dated 17.01.2011 and allotment letter dated 17.01.2011 is annexed as Annexure C-6 (Colly).

6. The OPs thereafter forwarded agreement dated 18.01.2011 which is arbitrary and most of the clauses of the said agreement are contrary to the

interest of the complainants. The OPs did not mention the time limit for executing deed of conveyance and the period of completing the project.

The OPs have arbitrarily, informed the complainants over telephone, that if the complainants do not execute the agreement, they would proceed to

cancel the allotment. It is also alleged that the OPs arbitrarily, in clause 28(3) have retained their rights and interest in respect of the first podium

level, second podium level which is basement and stilt podium top one level garden apartment with swimming pool and club house. All these facts

fall within the common use of the complainants. The OPs have demanded advance maintenance charges for two years which shows that it is not

going to form the society as per the provisions laid down under the Maharashtra Flat Ownership Act, 1963. It is silent about the Conveyance

Deed, it states that the complainants cannot claim common amenities. There is no mention of parking space and club house. The complainants

were asked to sign the agreement, without their consent. The present complaint (amended), was filed before this Commission, on 03.08.2015 with

the following prayers :-

a. to hold and declare the Opposite Parties to be guilty of deficiency of service and unfair trade practice as per the provision of the Consumer

Protection Act.

a. to direct the Opposite party to delete all the arbitrary clauses from the Agreement as mentioned in paragraph no. 4(H) above and also to add

clause in the Agreement that the Complainants shall be allowed to use car parking space in the said complex.

a. to direct the Opposite Parties to execute Agreement by registering the same and handover possession of flat bearing No. 0203, on second floor,

area admeasuring to 1118 sq. ft. (carpet area) in the building named Fairfield in the project named ""LodhaLuxuria"" situated at Balkum, District and

Tal Thane, to the Complainants.

a. to direct the Opposite Parties not to demand any additional amount for parking space and provide the reserved parking for two vehicles in terms

of the agreement and allow the Complainant to use the parking space without any obstacles and hindrances.

a. to direct the Opposite Parties to comply with the statutory and contractual obligation of obtaining occupation certificate, completion certificate

and also form and register the co-operative housing society and also to execute conveyance deed in favour of the registered co-operative society.

a. to direct the Opposite Parties to pay compensation of Rs. 2,00,000/- for incessant mental harassment caused to the complainant.

a. to direct the Opposite Parties to pay the legal charges of Rs. 50,000/-.

a. such other reliefs as this Hon"ble Commission may deem fit and proper in the facts and circumstances of the case.

7. The matter was put up before Hon"ble Mr. Suresh Chandra, ex-Member of this Commission on 21.11.2011, which reveals that the complaint

was filed before the District Forum, initially, but the complainants were granted liberty to file the same before the appropriate forum and hence the

present complaint before this Commission was filed. After the dismissal of the complaint with liberty, as aforesaid, granted by the District Forum,

the OPs cancelled the allotment of the flat in question, vide its letter dated 02.06.2011 maliciously in spite of having received the amount of

Rs.1,02,13,803/-, out of the total consideration of Rs.1,04,75,694/-. In the meantime, this Commission ordered that the OPs 1 & 2 are directed

not to create third-party interest in the suit property. Ms.Bindu K. Nair, Advocate, accepted the notice on behalf of the OP2. It appears that on

17.04.2012, the case was admitted and Ms. Bindu K. Nair, Advocate, was given one week's time to file the written version on behalf of OP-2.

The matter was listed on 03.09.2012. Although the complaint was admitted on 17.04.2012, yet, Mr.H.D. Nautiyal, the then Registrar of this

Commission, wrongly mentioned that it was fixed for admission. OP1 did not appear, time and again. Accordingly, OP1 is deemed to have been

proceeded against ex-parte. Fresh opposite parties, i.e., OP3 & OP4 were summoned subsequently.

Defence by OP 2.

8. The OP2 has listed the following defences in its written statement. The prayer made in the interim application had become infructuous, as on

30.08.2011, the flat No. 0203 in the "A" Wing of "Fairfields" in "Lodha Luxuria" was agreed to be sold to third-party, namely, Sh. Monish Jain.

The said agreement was registered with Sub-Registrar, on 26.07.2011. The complaint was put up before this Commission, much later, i.e., on

21.11.2011. This is admitted that no agreement for sale was executed by the complainants. Again, there is failure on the part of the complainants

to comply with the terms and conditions of the application form. There is no concluded contract between the complainants and the OP2.

9. Again, the complainants have advertised for lease of their flat situated at Colaba. It is stated that a flat of about 950 sq.ft. situated in a prime

area like Colaba would fetch a minimum rent of Rs.1.20 lakhs p.m. The project "Lodha Luxuria" is more than 45 kms away from the residence of

the complainants. Their contention that they would pass a peaceful life in this flat is not correct. The complainants have effectively sought

rectification in the Agreement to Sale that is not executed and concluded between the parties. Since those clauses were not suitable to the

complainants, therefore, the OP2 has, after cancelling the booking of the flat in question, sent a cheque dated 07.06.2011, in the sum of

Rs.91,66,234/-, towards refund of the amount. The jurisdiction of this Commission has been called into question on the ground that the

complainants are not consumers. Again, the complaint is bad for mis-joinder of parties. The complainants are aware that the allotment of flat was

done by M/s. Sainath Enterprises, OP2, despite this, OP1 was made a party to these proceedings. OP1 should be dropped from the proceedings.

10. The complainants have suppressed their letters dated 17.01.2011 and 24.05.2011 and emails dated 17.01.2011 and 24.05.2011 wherein the

complainants were called upon to make the payments towards the stamp duty and registration charges payable to statutory authorities. As the

objection was raised by the OP2, Sh. Monish Jain was also joined as a party to this case. Further, clause 3 of the application form stipulates that

subject to the payment of booking amount and application money by the complainants, the company will communicate its decision to the

complainants, within 40 days from the date of the receipt of the application. It was further stipulated that if the application is accepted by the

company, the applicants would be sent a communication to that effect by way of an intimation letter. Again, if the application is not accepted by the

company, the application money shall be returned, without interest as per point No.2, subject to the applicant paying the allotment and/or other

amounts payable as required by the intimation of allotment. The company shall issue to the applicant, a letter of appointment, allotting the residential

premises to the applicant. The complainants are bound by the agreement. The complainants also agreed and undertook to execute and register an

agreement of sale in respect of the residential premises as may be drawn up by the company under the applicable provisions of law. It is contended

that the complainants failed to pay stamp duty and registration charges. Vide letter dated 11.04.2011, the complainants were called to make the

payment towards the stamp duty and registration charges and towards MVAT for the purpose of execution and registration of agreement for sale.

The OP2 sent back the cheque, dated 07.06.2011 in the sum of Rs.91,66,234/-. All other allegations have been denied.

Defence by OPs 3 & 4

11. The OPs 3 & 4 in their written version, submitted that the complainants are not consumers. The OPs 3 & 4 did not provide any service. The

complainants are investors. The complainants are very well to-do and renowned Gynecologist and Surgeon in Mumbai. They are already living in

Cuffe Parade, which is one of the posh areas of Mumbai. They are running a clinic under the name of "Women Care Clinic" at Cooperage, which

is hardly at a distance of 2-3 kilometers from the place of the residence of the complainants. The complainants are residing at Dadar. Further, the

OPs 3 & 4, i.e., Sh. Monish Jain and Smt. Lalita Jain stated that they are the bonafide purchasers and they should not be disturbed.

Submissions and Findings

12. We have heard the arguments and gone through the objections raised by OP2 and OPs 3 & 4, in their written statement.

13. The submission made by learned counsel for the OPs was that the complainants are not the consumers within the meaning of Consumer

Protection Act, 1986. They are living in Cuffee Parade, which is one of the posh colonies of Mumbai. They are also having a house in other

locality. They are investors. They have got a house in Shivala and another at Dadar. Vide order dated 28.03.2016, the following order was

passed:

Heard counsel for the parties and gone through the objections raised by OP2 in its written statement. As per the complaint, the complainants are

residents of Shivala 203, Khatau Road, Mumbai - 400 005 and besides that house, they are residents of Cuffe Parade, another flat and have yet,

another flat at Colaba. In the rejoinder, the complainants have not answered these knotty questions. Consequently, we hereby direct that the

complainants shall file affidavits showing that as to how much property they own in Mumbai or anywhere else in India.

14. In response to this order, both the complainants filed respective affidavits. The affidavit of Dr. Sudha N. Sheth mentions that she was living in a

two bed room flat in Shivala. She had to book a bigger apartment as the flat they were staying was a very small flat. It is stated that they have got

three daughters. She is living at Lower Parel (West), which, she purchased after she vacated Cuffee Parade rented business premises. That was a

house on rent. It is further stated that her daughter is living in one room flat in Dadar. She denied having owned any other flat except two flats

situated at separate places having three rooms in all. It was argued that they desire a bigger house to accommodate the entire family at one place.

Consequently, we are satisfied that both the complainants are consumers within the meaning of Section 2(1)(d) of the Consumer Protection Act,

1986.

15. The second question swirls around the controversy whether the OPs have committed contempt of court?

16. Learned counsel for the complainants vehemently argued that the OPs were very much aware that the case was pending before the

Commission and they sold the flat in question during lis pendis. It may be mentioned here that at the initial stage, the case was filed before the

District Forum. It transpired that the District Forum had no jurisdiction to try this case. The complaint was dismissed and liberty was granted to the

complainants to file the same before the appropriate forum. The District Forum dismissed the complaint on 18.03.2011. The record reveals that

copies of the impugned order were sent to both the parties. The OPs acted smartly and cancelled the allotment of the flat in question vide its letter

dated 2.6.2011. The allotment was cancelled before the case was filed before this Commission on 30.08.2011. The said apartment was sold to

Shri Monesh Jain on 26.07.2011. Although, the case under Contempt of Court does not stand established, yet, it is clear that the action of the OP

just borders the Contempt of Court proceedings. It clearly goes to establish the mala fide intention on the part of OPs. They did not desire to allot

a compartment in favour of the complainants for ulterior motives. It is also surprising to note that the OP acted hurriedly and according to the

counsel for the complainants, sold the flat to new purchaser for lesser amount shown in the sale deed. At the same time, OP 3 and OP 4 are bona

fide purchasers and no orders of their eviction at this stage could possibly be passed. The only way left under the circumstances is to compensate

the complainants.

17. The next submission made by learned counsel for the OPs was that no concluded contract was made between the complainants and the OP 2.

It is explained that the complainants had desired effective rectification in the agreement to sell. That was not executed and concluded between the

parties. As those clauses proposed by OP 2 did not suit the complainants, therefore, the booking of their flat was cancelled on 2.6.2011.

18. All these arguments have left no impression upon us. It must be borne in mind that the OPs had already received a sum of Rs.1,02,13,803/-,

out of the total consideration of Rs.1,04,75,694/-. Rest of the amount was to be given at the time of possession of the flat. It is also surprising to

note that the OPs also demanded a sum of Rs.3,96,000/- towards car parking. The OPs went on accepting lion's share towards the construction

and the delivery and possession of the flat but they did not execute the agreement to sell.

19. In case of Samarth Associates Eng. & Builders & Ors. Vs. Ramesh Ramachandra Lokhande, Revision Petition No. 4729 of 2012 decided by

this bench on 10.09.2013, we passed the following order:

7. The following deficiencies are apparent on the face of the record. First of all, it is not understood why the agreement was not executed at or

about the execution of receipt of Rs.25,000/-. In Belaire Owners' Association Vs. DLF Ltd. & Ors., Case No.19/2010, vide supplementary

order dated 03.01.2013, the Competition Commission of India, held :-

1. The terms of the agreement to be entered into with the allottee were never shown to the allottee at the time of booking of the apartment. These

terms and conditions of the agreement were prepared and framed by the company unilaterally without consulting the buyer. Once the company had

already received considerable amount from the applicants/buyers, this agreement was forced upon the allottees and the allottee had no option but

to sign the agreement, as otherwise the agreement provided for heavy penalties and deduction from the money already deposited by the allottees

with the company, which itself was an abuse of dominance. The appropriate procedure would have been that a copy of the agreement which DLF

proposed to enter with the allottee should have been made available to the applicants at the time of inviting applications".

20. It must also be borne in mind that the OPs cannot demand additional sum of Rs.3,96,000/- towards car parking, as per the law laid down in

21. It depicts the deficiency and unfair trade practices. It is also surprising to note that after receiving almost the entire amount, the OPs chose to

cancel the same, without giving the delivery of possession. The clauses, which, the complainants did not like were never specified. The

complainants were not bound to pay the double amount for car parking. The complainants should have been warned and a notice should have

been sent before cancelling the flat. This shows the arbitrary, high-handedness, arrogance, despotic and capricious character of OP 2. There is

allotment letter as well issued by OP 2 unilaterally. The complainants are not party to it. Clause 17 of the letter runs as follows:

It is clarified and understood that this Letter of Allotment merely records that, subject to the terms hereof, the Parties, hereto intend to enter into

an Agreement for Sale of the Residential Flat. The Letter of Allotment does not confer upon the Allottee any right or title in respect of the

Residential flat or to seek enforcement of the terms hereof. This Letter of Allotment shall cease to be of any effect upon:-

a. Termination of this Letter of Allotment

b. Execution and registration of Agreement for Sale whichever is earlier.

22. The delivery of possession was not given and at the fag end, the flat was sold to some other person. The action on the part of OP 2 is

arbitrary. OP 2 did not mention the time limit for executing the deed of conveyance and/or completing the project. It is also noteworthy that OP 2

sent back the cheque on 7.6.2011 in the sum of Rs.91,66,234/- only whereas it had received a sum of Rs.1,02,13,803/-. The said amount was

sent without any interest. Had the OP been bona fide, they should have paid the money back to the complainants when they appeared before this

Commission in the year 2011. They are illegally withholding the money of the complainants for a period of five years. No inkling about the refund

of money came from OPs side at any time.

23. In K.A. Nagamani Vs. Karnataka Housing Board, Civil Appeal Nos. 6730-31 of 2012, decided on 19.09.2012, the Hon"ble Apex Court,

held as under :-

... But in cases where monies are being simply returned, then the party is suffering a loss inasmuch as he had deposited the money in the hope of

getting a flat/plot. He is being deprived of that flat/plot. He has been deprived of the benefit of escalation of the price of that flat/plot. Therefore, the

compensation in such case would necessarily have to be higher. For the reasons aforesaid, we allow the appeals and pass the following orders :-

i) The respondent is directed to pay the appellant-complainant interest at the rate of 18% per annum on Rs.2,67,750/- from the date of its

respective deposit till the date of realization with further direction to refund the amount of Rs.3,937/- to her, as directed by the Consumer Forum.

ii) The respondent is directed to pay the appellant - complainant further sum of Rs.50,000/- as compensation for deficiency in service on their part.

iii) The respondent is also directed to pay the appellant-complainant a sum of Rs.20,000/- towards cost of the litigation incurred by her".

24. We followed the above-said judgment in case of Dr. N. Y. Kachawalla vs. The Orbit Corporation Limited, C. C. No. 321 of 2013 decided

on 5.8.2014, Subhash Chander Mahajan and Anr. Vs. Parsvnath Developers Ltd., C. C. No. 144 of 2011, decided on 05.05.2014 and Rajesh

Kumar Agrawal vs. Parsvnath Developers Ltd., C. C. No. 457 of 2014 decided on 26.04.2016. Another Bench of this Commission headed by

Hon"ble Mr. Justice V. K. Jain also granted 18% interest in case of Kavita Ahuja vs. Shipra Estate Ltd. & Jai Krishna Estate Developers Pvt. Ltd.

& Ors. I (2016) CPJ 31 (NC). Thus, the action of the OP 2 is below the belt. The OPs have made a vain attempt to feather their nest i.e. to make

profit for one's at the expense of others.

25. We hereby condemn the OPs attempt to pull a fast one to the complainants. We, therefore, accept the complaint and direct the OP 2 to pay a

sum of Rs.1,02,13,803/- with interest @ 18% from the date of its deposit till its realisation. It must be borne in mind that the complainant had to

withdraw their FDs and suffered loss of Rs.3 lakh towards interest and other charges. The OPs have made havoc with the hard earned money of

both the doctors/complainants.

26. Consequently, we hereby direct the OP 2 to pay compensation in the sum of Rs.1 lakh to the complainants within 90 days from the date of

receipt of a copy of this order, otherwise, it will carry interest @ 9% per annum till its realisation.