

(2014) 11 CAL CK 0100

Calcutta High Court

Case No: C.O. 2986 of 2013

Krishna Abason Pvt. Ltd.

APPELLANT

Vs

Krishna Sarkar

RESPONDENT

Date of Decision: Nov. 7, 2014**Acts Referred:**

- Constitution of India, 1950 - Article 227
- Consumer Protection Act, 1986 - Section 12, 2(d), 3
- West Bengal Building (Regulation of Promotion of Construction and Transfer by Promoters) Act, 1993 - Section 10, 12(A), 12A, 2(h), 5

Citation: (2015) 2 CHN 82 : (2015) 1 WBLR 943**Hon'ble Judges:** Subrata Talukdar, J**Bench:** Single Bench**Advocate:** Akman Khan, Advocate for the Appellant; Siva Prasad Ghosh, Advocate for the Respondent

Judgement

Subrata Talukdar, J.

In this application under Article 227 of Constitution of India the order dated 19th July, 2013 passed by the Ld. Consumer Disputes Redressal Forum, Dist. North 24 Parganas (for short Ld. CDF) in CC Case No. 24 of 2013 is under challenge. By the said impugned order the Ld. CDF was pleased to direct the present petitioner to pay cost of the sum of Rs. 10,000/- against the contesting Opposite Parties (for short OPs) along with ex-parte costs of Rs. 10000 against the non-contesting OPs.

2. The Ld. CDF also directed the petitioner to refund a sum of Rs. 50000 as also a sum of Rs. 1 lakh as compensation and for adopting unfair trade practise. The said sums were directed to be paid within 1 month from the date of the order failing which for each day" delay interest was assessed at Rs. 500/-.

3. The brief facts of this case are as follows:-

a) That the OP 1/complainant filed a complaint under Section 12 of the Consumer Protection Act, 1986 (for short CP Act) against the present petitioner and the OP 2 before the Ld. CDF, Barasat praying, inter alia for a direction jointly or severally on the petitioner and the OP 2 to register the Deed of conveyance in respect of the flat mentioned in the schedule of the complaint in favour of the complainant. It was also prayed that the petitioner and OP 2 should bear the registration costs of the flat and deliver peaceful, vacant possession to the complainant. Prayer was also made for compensation and litigation cost as well as interim relief directing the petitioner and the OP 2 to maintain status quo in respect of the said flat.

b) According to the complainant, the present petitioner is a Developer and the OP 2 is the authorized person of the present petitioner. Both the petitioner and the OP 2 invited the intending Purchaser to purchase the flat at Krishna Abasan. The complainant being desirous of purchasing the flat agreed to the proposal of the Developer and his authorized representative and advanced sums of money towards booking of the flat. Several other details with regard to the purchase of the flat were agreed upon between the Developer and the complainant.

c) The complainant alleges that the Developer failed to keep the promise to enter into an agreement with the complainant within the specified period and, no agreement was executed in spite of substantial delay. Thereafter upon waiting for a considerable period the complainant, who had paid Rs. 50,000/- towards application money found that the Developer was unwilling to perform his part of the agreement. The complainant alleges that during his visits to the Developer on 21st January, 2013, she was told that the complainant has to wait further if she is interested in purchasing the flat.

d) Being frustrated at the inaction on the part of the Developer and his authorised representative to execute the agreement the complainant filed the complaint before the Ld. CDF with the prayers as noted above.

4. The Ld. CDF was pleased to decide the complaint being CC Case No. 24 of 2013 by order dated 19th July, 2013. The Ld. CDF, after noticing the relevant facts came to the following findings:-

i) That it is an admitted position that the sum of Rs. 50,000/- in cash was received by the present OP2 as the authorized representative on behalf of the petitioner, i.e. the Developer. On receipt of the said sum of money it was assured by the Developer that the sale agreement shall be executed subject to payment of additional 20%, that is Rs. 75000 towards extra charges. However, it was not denied by the Developer that the valuation of the flat was Rs. 2151 per sq. ft. and, the date was fixed on 10th August, 2011 for executing the said agreement.

ii) It is not denied by the Developer that on 10th August, 2011 the complainant did attend his office. However, on behalf of the Developer it has been submitted that the company was dissolved due to financial problems among its Directors with

effect from 31st December, 2012. However, the Ld. CDF noticed that no documents in support of such dissolution were produced.

iii) The Ld. CDF was therefore pleased to notice that the Developer had adopted unfair trade practices by not completing the housing project and thereby cheated the intending Purchaser, including the present OP 1. Noticing the evidence of one Sankar Saha, being the Director of the petitioner/Developer the Ld. CDF was pleased to further observe that the Developer was willing to refund the application money advanced by the OP 1/Purchaser.

iv) The Ld. CDF further held that in view of the substantial length of time which had lapsed since the deposit of the application money, it is difficult for the OP 1/Purchaser to purchase the flat at current prices. Hence, the very purpose for which the complainant had put in the application money has been frustrated for which the complainant/OP 1/Purchaser is entitled to receive adequate compensation. The Ld. CDF also found that the Developer and his authorized representative are guilty of adopting unfair trade practices. It accordingly ordered payment of compensation and damages as indicated above.

5. Shri A Khan, Ld. Counsel appearing for the present petitioner/Developer has argued as follows:-

1. That the complainant/OP 1 filed the instant complaint before the Ld. CDF on 22nd January, 2013. The last date for executing the sale agreement was 10th August, 2011. There is no written notice to the effect that the complainant is desirous of executing the sale agreement. It is not evident from the complaint that the complainant was ready with the remaining part of the consideration money. Hence, according to Shri Khan, the complainant failed to perform her part of the agreement.

2. Under the provisions of the West Bengal Building (Regulation of Promotion of Construction and Transfer by Promoters) Act, 1993 (for short the 1993 Act) and, particularly Section 6 thereof, in the event of any dispute between a Developer and a Purchaser, the Purchaser is required under law to file an application before an officer appointed by the State Government. Section 12(A) of the 1993 Act, inter alia provides that no Civil Court shall have the jurisdiction to adjudicate any issue pertaining to the provisions of the 1993 Act.

3. Relying on the judgment of this Hon'ble Court reported in [Rita Das Vs. Jayashri Ghosh](#), Shri Khan has argued that the CDF has been held to be a Civil Court and therefore is not competent to decide the dispute falling within the jurisdiction of the 1993 Act.

Shri Khan has pointed out that even this Court exercising jurisdiction under Article 227 of the Constitution of India is not competent to do so in view of the available alternative remedy under the 1993 Act.

4. Shri Khan has further argued that it is an admitted position that the parties have not entered into any agreement. In the absence of any agreement the complainant cannot have the locus to file the present complaint. He points out that merely on payment of the application money the complainant cannot claim the status of a Purchaser without entering into any agreement with the Developer. At best the complainant is entitled to refund of the application money.

5. Shri Khan concludes by submitting that the Ld. CDF had acted beyond jurisdiction by treading on the issues which are governed by the provisions of the 1993 Act. Such perverse and illegal exercise of jurisdiction is liable to be corrected by this Court in exercise of its supervisory jurisdiction under Article 227 of the Constitution of India. In support of the above proposition Shri Khan relies on the following judgments:-

[Waryam Singh and Another Vs. Amarnath and Another,](#)

[Puran Ram Vs. Bhaguram and Another,](#)

1983 Cal 1 CHN Page 159

2009 Vol 13 SC Page 444

6. Per contra Shri SP Ghosh, Ld. Counsel appearing for OP 1/Purchaser has argued as follows:-

a) That the written objection filed by the Developer before the Ld. CDF states that the Developer/Company has been dissolved due to financial problems of its Directors. The Developer/company reserved the right to reject/cancel application forms. The application form shall automatically stand cancelled in the event the sale agreement is not executed.

6. It was further pleaded by the Developer before the Ld. CDF that the complainant did not turn up within the specified time for executing the sale agreement. Hence the Developer reserved the right to reject the application form of the complainant.

b) Distinguishing the judgment relied upon by the petitioner in Rita Das's Case (supra) Shri Ghosh points out that every judgment must be read as an authority on the facts which the judgment actually decides. He argues that Rita Das's Case (supra) is not applicable to the factual matrix of the present case.

c) In the present case the Ld. CDF has exercised jurisdiction correctly by directing payment of compensation along with other reliefs which have a nexus with the deficiency of service, pain and harassment suffered by the OP 1. The Ld. CDF, according to Shri Ghosh, has not intruded into the jurisdiction covered by the 1993 Act.

Drawing the attention of this Court to several provisions of the 1993 Act Shri Ghosh points out that in terms of Section 3 thereof the Developer is required to file an

application before an authorized officer to register its name for permission to construct buildings/flats/apartments etc. In the present case the Developer did not invoke the provisions of the 1993 Act and additionally did not execute any sale agreement. In such view of the matter the provisions of Section 12A of the 1993 Act cannot apply.

Relying on a decision reported in 2003 Vol 2 WBLR (Cal) Page 861, Shri Ghosh has argued that this Hon''ble Court has held that registration of the Developer is the sine qua non for constructing any building. However, in the present case such registration is conspicuously absent.

d) In the present proceeding in the absence of the registration of the Developer and further in the absence of the any sale agreement, there is no issue requiring adjudication under the 1993 Act. Being a consumer under the CP Act, 1986, the OP1 is entitled to claim the particular reliefs which are available to a consumer complaining of deficiency in service, harassment and unethical trade practice. According to Shri Ghosh, the said reliefs can only flow from the CP Act, 1986 and not from the 1993 Act. Therefore, the issue of jurisdiction raised by Shri Khan is of little impact on the facts of this case.

7. Shri Ghosh submits that assuming but not admitting the rigours of the provisions of the special Act such as the 1993 Act, the CP Act must be construed to be an Act providing reliefs in addition to other statutory reliefs. In support of such proposition he relies upon the following decisions:-

[Kishore Lal Vs. Chairman, Employees State Insurance Corporation,](#)

[National Seeds Corporation Ltd. Vs. M. Madhusudhan Reddy and Another,](#)

2013 4 SCC 354

8. Relying upon the decision of [Lucknow Development Authority Vs. M.K. Gupta,](#) and [Ghaziabad Development Authority Vs. Balbir Singh,](#), Shri Ghosh has argued that the Hon''ble Apex Court has held that the delay in delivering a flat/immovable property amounts to a denial of service. Such delay shall be also classified as a deficiency or omission defined as unfair trade practice. Shri Ghosh points out that in the event there is denial of service, the consumer is entitled to compensation.

9. Shri Ghosh submits that a line of decisions of the Hon''ble Apex Court on the above noted point have not been considered in Rita Das''s Case.

e) Emphatically submitting that it is within the domain of the forum specified under the CP Act, 1986 to interfere in cases of deficiency of service pertaining to development activity, Shri Ghosh has argued that under the CP Act, 1986 there is an alternative remedy of appeal available to the Ld. State Consumer Dispute Redressal Commission. Thereafter, further challenge lies before the Ld. National Consumer Commission.

f) Shri Ghosh therefore, points out that the present petition under Article 227 is not maintainable in view of the availability of such alternative remedy. On this point he relies upon the decision reported in 2012 Vol 2 WBLR (Cal) Page 276. He prays that the present application be dismissed as not maintainable.

10. Heard the parties. Considered the materials on record.

11. At the very outset this Court notices the judgment of the Hon"ble Division Bench in [Narayan Chandra Ghosh and Another Vs. Biswajit Lahiri](#), . The Hon"ble Division Bench was pleased to examine the scope of application of Section 6 of the 1993 Act qua being a bar to a suit for specific performance of a contract. The Hon"ble Division Bench also considered the extent of applicability of Section 12A of the 1993 Act.

12. At Paras 11, 12, 13, 14, 15 & 16 the Hon"ble Division Bench held as follows:-

"11. To appreciate the aforesaid contention raised by the learned Counsel for the parties it will be profitable to refer to the provision contained in section 12A which is quoted below:

12A. Bar on jurisdiction of Court. - 1) No civil Court shall have any jurisdiction to entertain or decide any question relating to matters arising under any provision of this Act or the rules made thereunder.

2) Every order passed by the authorised officer which is subject to appeal or revision, every order passed by the authority referred to in sub-section (10 of section 5, and every order passed by the officer referred to in section 6, which is subject to revision, shall be final and shall not be questioned in any Court of law.

12. After going through the aforesaid provision we find that by enactment of section 12A the jurisdiction of the Civil Court to entertain or decide any question relating to the matter arising under the provision of the Act or rules made thereunder is totally barred.

13. If we read the plaint as a whole, we find that the grievance of the plaintiffs is that in terms of the agreement entered into between the parties they gave full amount of the consideration money to the promoter but the promoter was not complying with the terms of the agreement.

14. In our view, the aforesaid averments clearly bring the matter within the phrase "any question relating to matter arising under the provision of this Act" contained in section 12A of the Act. According to section 6 of the Act, any purchaser may, if he has nay dispute regarding the purchase of nay flat, make an application in such form as may be prescribed to such Officer as the State Government may appoint for adjudication of the dispute in such manner as may be prescribed. Therefore, for the purpose of getting relief against a promoter, the statute has given a right to the purchaser to make application in terms of section 6 in the facts of the present case and as such, the dispute referred to in the plaint is within the ambit of the Act.

15. The object of the Act is to give immediate relief to the persons who have entered into an agreement for purchase of a flat from a promoter instead of prolonged litigation before a Civil Court and for above reason, by enacting section 12A, the legislature has totally taken away the jurisdiction of the Civil Court. Therefore, not only the relief of specific performance of contract, but even the prayer of recovery of money paid pursuant to an agreement for purchase of flat is a dispute within the compass of the Act.

16. We, therefore, find that the learned Trial Judge rightly held that section 12A of the Act has taken away the jurisdiction of the Civil Court to entertain the dispute raised by the plaintiffs in their plaint. The bar created by section 12A of the Act is not an implied one but an explicit bar."

13. The ratio of the judgment of the Hon"ble Division Bench was relied upon by the Hon"ble Single Bench in Rita Das's Case (supra). In Rita Das's Case (supra) the Hon"ble Single Bench was further pleased to notice that following the ratio of the judgment of the Hon"ble Apex Court in [S.B.P. and Co. Vs. Patel Engineering Ltd. and Another](#), it is settled that the District Forum has the trapping of a Civil Court.

14. To mind of this Court the essence of the dispute between the parties as canvassed in the present application being CO 2986 of 2013 falls within the ambit of the 1993 Act. The prayer made by the OP 1/complainant before the Ld. Forum specifically relate to the execution and registration of a proper deed of conveyance in respect of the flat and to deliver peaceful vacant possession of the flat to the complainant. Without entering into the etymology of legal expressions used by the parties in their argument - viz. whether the OP 1/complainant in the absence of an agreement can be considered to be a "purchaser" of a flat within meaning of Section 2(h) of the 1993 Act or, is only a "consumer" within meaning of Section 2(d) of the 1986 Consumer Protection Act - it is sufficient for the present purpose of adjudication that the object of the 1993 Act is to give immediate relief to individuals and therefore the legislature in its wisdom has deprived the Civil Court of its jurisdiction by enacting the provisions of Section 12A of the said 1993 Act. The Hon"ble Division Bench in Narayan Chandra Ghosh Case (supra) makes this position abundantly clear by holding that the bar under Section 12A is not an implied one but an explicit one.

15. For the foregoing reasons this Court, in exercise of its supervisory corrective jurisdiction under Article 227 of the Constitution of India, finds that the judgment of the Ld. Forum impugned in the present application is beyond jurisdiction.

16. Accordingly, the Rule is made absolute by quashing the order impugned dated 19th July, 2013 passed by the Ld. Forum, Barasat in CC Case No. 24 of 2013.

CO 2986 of 2013 is accordingly allowed.

17. There will be, however, no order as to costs.

18. Urgent certified photocopies of this judgment, if applied for, be given to the learned advocates for the parties upon compliance of all formalities.