

**NATIONAL CONSUMER DISPUTES REDRESSAL COMMISSION
NEW DELHI**

FIRST APPEAL NO. 95 OF 2017

(Against the Order dated 18/11/2016 in Complaint No. 214/2014 of the State Commission
Karnataka)

1. M/S. NANDI BUILDERS & DEVELOPERS & ANR.
NO. 177/A, 22ND CROSS, 7TH B MAIN, 3RD BLOCK,
JAYANAGAR, OPP: NMKRV COLLEGE,
BNAGALORE-560011
KARNATAKA

2. K.S. MURALI
S/O. K.M. SATYANARAYANA SHETTY, PROPRIETOR,
M/S. NANDI BUILDER & DEVELOPERS, NO. 177/A, 22ND
CROSS, 7TH 'B' MAIN, 3RD BLOK, JAYANAGAR, OPP:
NMKRV COLLEGE,
BANGALORE-560011
KARNATAKA

.....Appellant(s)

Versus

1. SARASWATHAMMA
W/O. LATE A SURYA NARAYANASETTY, R/A NO. 227,
WEST OF CHORD ROAD, 2ND STAGE, 12TH 'A' CROSS,
MAHALAKSHMIPURAM,
BANGALORE-560086
KARNATAKA

.....Respondent(s)

FIRST APPEAL NO. 2031 OF 2018

(Against the Order dated 18/11/2016 in Complaint No. 214/2014 of the State Commission
Karnataka)

1. SARASWATHAMMA
W/O. LATE A. SURYA NARAYANASETTY R/O. NO 227,
WEST OF CHORD ROAD 2 STAGE 12 A-CROSS,
MAHALAKSHMIPURAM
BANGALORE 560 086
KARNATAKA

.....Appellant(s)

Versus

1. M/S. NANDI BUILDERS & DEVELOPERS & ANR.
THROUGH ITS PROPRIETOR K.S MURLI NO 177/A, 22
CROSS, 7 B-MAIN, 3 BLOCK JAYANAGAR OPP. NMKRV
COLLEGE
BANGALORE
KARNATAKA 560 011

2. SRI K.S. MURLI
S/. K.M. STYANARAYANA SHETTY, PROPRIETOR OF
M/S. NANDI BUILDERS & DEVELOPERS NO 177/A, 22
CROSS 7 B-MAIN, 3 BLOCK JAYANAGAR OPP NMKRV
COLLEGE
BANGALORE
KARNATAKA 560 011

.....Respondent(s)

BEFORE:

**HON'BLE AVM J. RAJENDRA, AVSM VSM (Retd.), PRESIDING
MEMBER**

FOR THE APPELLANT : FOR M/S. NANDI BUILDER
& DEVELOPERS & ANR. : MR. SHARANAGOUDA PATIL,
ADVOCATE

FOR THE RESPONDENT : FOR SARASWATHAMMA : MR. B. S. SHARMA, ADVOCATE

Dated : 27 May 2024

ORDER

1. This Order shall decide both appeals stemming from the impugned Judgment /Order dated 18.11.2016 passed by the Karnataka State Consumer Disputes Redressal Commission, Bangalore (“State Commission”) in Consumer Complaint No. 214 of 2014, in which the learned State Commission partly allowed the complaint.

2. FA No. 95 of 2017 was filed with 12 days delay and based on the reasons stated in IA No. 627 of 2017, the delay is condoned. Also, FA No. 2031 of 2018 was filed with 217 days delay. Based on the reasons stated in IA No. 21132 of 2018 the delay is condoned.

3. For convenience, the parties will be referred to as mentioned in the complaint before the State Commission. Smt Saraswathamma (the Appellant/Complainant) is associated with First Appeal No. 2031 of 2018. Meanwhile, M/s. Nandi Builder & Developers and Ors (Opposite Parties/OPs/Builder) are linked with FA No. 95 of 2017.

4. Brief facts of the case, as per the Complainant, are that she is the absolute owner of her self-earned and self-acquired 72 ft x 45 ft property at No. 227, West of Chord Road, 2nd Stage, 12th 'A' Cross, Mahalakshmpuram, Bangalore. OP-1 is the Builder and OP-2 is the Proprietor of the builder firm. OP-1 approached her on 14.03.2012, promising to develop the property as per the terms outlined in a Memorandum of Understanding (MOU) executed on the same day. As per the MOU, OP-1 was to construct multi-storied residential apartments, offering her 50% of the super built-up area, along with proportionate car parking, common area, terrace, garden space, and 50% of the benefits accruing from the project. In exchange, she was to transfer 50% undivided property share, right title, and interests.

5. A Joint Development Agreement dated 09.05.2012 was executed, incorporating the condition of the share of the constructed property as per the MOU. To facilitate construction by OP-1 under the Joint Development Agreement (JDA), she executed a General Power of Attorney in favor of OP-1. In return, the OPs executed a sharing agreement in favor of the Complainant, entitling her to specific flats and car parking areas. However, OPs failed to fulfill their obligations under the JDA and the sharing agreement. They did not pay the agreed sum of Rs. 40 Lakhs with interest @ 18% p.a. Also, they breached the agreement by selling the property to third parties and selling the apartment earmarked as her share. As a

result of these breaches, the Complainant filed Consumer Complaint No. 214 of 2014 before the State Commission, seeking directions for the OPs to hand over 50% of the super built-up area, car parking area, garden area, and terrace as per the JDA. She also sought rent @ Rs. 20,000/- per month for each apartment, damages and costs.

6. In their response presented to the State Commission, the OPs (Builder) argued that the Complainant suppressed material facts deliberately and made false claims. They contended that she is not a consumer as defined under Section 2(1)(d) of the Act, as there is no dispute regarding her ownership of the property and her entry into the MOU on 14.03.2012. She herself approached them for the contract and any disputes thereto were to be referred to arbitration. The OPs asserted that they agreed to hand over 50% of the super built-up area, along with proportionate car parking space, common area, terrace, and garden space as per the JDA. They cited delays caused by her in producing original documents for obtaining sanctioned plans and licenses, as well as unforeseen events such as a lorry driver strike, as reasons for project delays. Despite facing obstructions during construction, the OPs completed the project and invited her to inspect her share of the property. However, she refused delivery without discussing her concerns with OPs. They denied the allegation of failure to complete construction within the agreed timeframe and disputed the Complainant's assessment of rent at Rs. 20,000/- per month for each flat. Regarding the sharing agreement, the OPs acknowledged their obligation to hand over specific flats and car parking spaces, but asserted that the share of the Complainant was ready for delivery. They blamed her attitude and behavior for the delay in delivery. Further, the OPs denied breaching the contract or selling their share of the property to others. They argued that the complainant had no cause of action to file the complaint and requested its dismissal.

7. The learned State Commission partly allowed the Complaint through its order dated 18.11.2016, with the following directives:-

“ORDER

The Complaint is hereby allowed with cost of Rs.25,000/-

The OPs are hereby directed to complete the project by rectifying the lapses that are narrated in the Commissioner Report and to handover 50% of the super built up area as agreed in the Joint Development Agreement along with 50% of car parking area, 50% of garden area and 50% in terrace as described in the schedule.

The complainant is entitled to recover rent at the rate of Rs.15,000/- per month for each apartment from 09.04.2014, till the date of handing over of the possession of the same by rectifying the mistakes that are pointed out in the Commissioner Report.

The OPs are directed to comply with the order within a period of three months from the date of receipt of the order.”

8. Aggrieved by the Order of the State Commission, both the parties i.e., the Opposite Parties /Builder the and the Complainant have filed the present cross Appeals before this Commission with the following prayer:

For FA/95/2017 – filed by the OPs (Builder)- M/s Nandi Builders & Developers -

“a) Call for records from the Karnataka State Consumer Disputes Redressal Commission, Bangalore, in complaint No.214/2014;

b) Set aside the order dated 18-11-2016 passed by the Karnataka State Consumer Disputes Redressal Commission, Bangalore, in complaint No.214/2014 and consequently dismiss the complaint filed by the respondent in Complaint No.214/2014 under Section 12 of the Consumer Protection Act, 1986

c) Pass such other order or orders as it may deem fit and proper in the circumstances of the case and allow the appeal with costs, in the ends of justice and equity.”

For FA/2031/2018 – filed by the Complainant- Smt. Saraswathamma.

A. Call for the record of the case;

B. Allow this appeal against the impugned order dated 18.11.2016 passed by the Karnataka State Consumer Disputes Redressal Commission at Bangalore in Complaint No. 214/2014 to the extent prayed for in this appeal, and accordingly pass an order directing the Respondents to pay the sum of Rs. 40 Lakhs along with interest @ 18% p.a. from date of filing of complaint till date of actual payment, which is balance goodwill amount payable to the Appellant as per Clause 2 of the MOU dated 14.3.2012;

C. Enhance the rental amount awarded by the impugned order from Rs. 15,000/- per month to such rate as this Hon'ble Commission deems fit, Commensurate with the market rates;

D. Pass any such further orders as this Hon'ble Court may deem fit and proper in the facts and circumstances of the case above mentioned.

9. In Appeal No. 95 of 2017, the Appellants/OPs mainly raised the following grounds:

a) The State Commission lacks jurisdiction as the JDA is commercial in nature. As per Section 2(d)(ii) of the Act, a consumer does not include services for commercial purpose.

- b) The State Commission failed to consider Clause 12 of the MOU dated 14.03.2012 mandating disputes out of the MOU be adjudicated under the Arbitration and Conciliation Act, 1996. Also, as per Clause 21 of the JDA, any breach can only be resolved by a suit for specific performance.
- c) The State Commission overlooked various factors for delay in the project, such as delays in plan sanctioning, lorry strikes, sand supply, and obstacles from government bodies and the police.
- d) Clause 17 of the JDA must be read in conjunction with Clause 21. The State Commission erred in not considering both clauses and assumed jurisdiction.
- e) The State Commission assumed a rent rate of Rs. 15,000/- per month based on property's location, without evidence to support this finding.
- f) A single flat constitutes the subject matter, and failure to deliver it amounts to service deficiency, as per precedents set by the National Commission and the Supreme Court. This case involves JDA, with the landowner providing the land and the developer investing in construction.

10. In Appeal No. 2031 of 2018, the primary contention of the Appellant/Complainant is non-payment of the remaining goodwill amount and payment of inadequate rental amount. It was contended that the State Commission erroneously failed to direct the OPs to pay the remaining Rs. 40 Lakhs of the goodwill amount to her along with interest, as per MOU signed between the parties. She asserted that the rental amount of Rs. 15,000/- awarded to her is less.

11. The learned counsel for the Appellants /OPs Builder reiterated the grounds of appeal and argued that the Builder fulfilled all terms and conditions of the JDA dated 09.05.2012. The defects pointed by the Complainant are minor in nature and were rectified, thus there is no justification for the Appellant to pay Rs. 15,000/- as rent for each apartment as ordered. He argued that the State Commission incorrectly assumed that the 17-month time frame for completion of construction would commence from the date of signing of the JDA on 09.05.2012 and expire on 09.10.2013, which is not in the interest of justice. He asserted that the JDA between the parties is a commercial contract and thus does not fall under the provisions of the Consumer Protection Act, 1986. Moreover, Clause 11 of the JDA stipulates that any disputes between the parties shall be resolved through arbitration. He further argued that the Respondent/ Complainant's Appeal No. 2031/2018 was filed belatedly and should be dismissed solely on grounds of delay. Citing the judgment of the Hon'ble Supreme Court in *Anshul Aggarwal vs. New Okhla Industrial Development Authority, IV (2011) CPJ 63 (SC)*, he argues that condoning such an inordinate delay, without sufficient cause would effectively substitute the period of limitation by the Commission in place of the period prescribed by the Legislature for filing the appeal.

12. The learned counsel for Respondent/Complainant reiterated the facts of the case and argued that, as per the Order dated 18.11.2016 passed by the State Commission, the Appellants/ OPs Builder owe the Respondent/Complainant Rs. 29,52,434/- as on the date of delivery of possession of four flats on 26.06.2018. Further, it after the said Order, the

Appellants/OPs Builder made partial payment of Rs.1,00,000/- by cheque No. 76951 dated 26.11.2017 and Rs.2,00,000/- by cheque No. 07967 dated 29.12.2017. Also, they deposited Rs.7,20,000/- before the State Commission in Execution Case No. 30/2017. Subsequently, the Respondent/ Complainant filed an application before this Commission to withdraw the deposited amount, which is pending consideration. Moreover, the counsel emphasized that the Respondent/Complainant, being 82 years old and a widow suffering from age-related ailments, entered into agreements with the Appellants/OPs for the construction of flats, only to endure irreparable losses, injuries, mental agony, and great injustice in her old age. He, therefore, seeks dismissal of the First Appeal with exemplary costs.

13. I have examined the pleadings and associated documents placed on record and rendered thoughtful consideration to the arguments advanced by both the Parties.

14. The objection of the OP as regards jurisdiction and any dispute between the parties shall be referred to Arbitration is devoid of merit. Hon'ble Supreme Court in *M/s Imperia Structures Ltd. v. Anil Patni and Another (2020) 10 SCC 783* decided on 02.11.2020 which held that ***“remedies under the Consumer Protection Act were in addition to the remedies available under special statutes”***, hence this Commission is also competent authority, also, as per section 3 of the act ***“the provisions of this Act shall be in addition to and not in derogation of any other law for the time being in force”***. Further, the Order of this Commission in *Aftab Singh Vs. Emaar MGF Land Limited & Anr., Consumer Case No. 701 of 2015, vide order dated 13.07.2017* was upheld by Hon'ble Supreme court, *wherein it was held that “Arbitration Clause in the Buyer’s Agreement does not bar the jurisdiction of the Consumer Fora.”*

15. The objection of the OPs that the delay was due to force majeure circumstances as the situation was beyond their control for completion of the project within the stipulated period and as such there was no deficiency in services on their part. This Commission in CC 379 of 2013 *Sivarama Sarma Jonnalagadda & Anr vs. M/s Maruthi Corporation Limited & Anr.* decided on 21.09.2021 held:

“We are of the view that that the Complainant cannot be made to wait indefinitely for the delivery of possession and the act of the Opposite Party in relying on force majeure clause while retaining the amounts deposited by the Complainant, is not on only an act of deficiency of service but also amounts to unfair trade practice.”

16. The objection of the OPs that the State Commission lacked jurisdiction to entertain the complaint or pass a final order because the contract between the parties is a JDA, which is commercial in nature. As per Section 2(d)(ii) of the Act, a consumer does not include a person availing services for commercial purposes. The Hon'ble Supreme Court in *Bunga Daniel Babu Vs. M/s. Sri Vasudeva Constructions & Ors., Civil Appeal No. 944 of 2016, decided on 22.07.2016* wherein it was held that:-

“21. On a studied scrutiny of the aforesaid clauses, it is clear as day that the appellant is neither a partner nor a co-adventurer. He has no say or control over the construction. He does not participate in the business. He is only entitled to, as per the MOU, a certain constructed area. The extent of area, as has been held in [Faqir Chand Gulati](#) (supra) does not make a difference. Therefore, the irresistible conclusion is that the appellant is a consumer under the Act.

22. As the impugned orders will show, the District Forum had allowed the claim of the appellant. The State Commission had dismissed the appeal holding that the claim of the appellant was not entertainable under the Act, he being not a consumer and the said order has been given the stamp of approval by the National Commission. Therefore, there has to be appropriate adjudication with regard to all the aspects except the status of the appellant as a consumer by the appellate authority. Consequently, the appeal is allowed, the judgments and orders passed by the National Commission and the State Commission are set aside and the matter is remitted to the State Commission to re-adjudicate the matter treating the appellant as a consumer. We hereby make it clear that we have not expressed any opinion on the merits of the case. In the facts and circumstances of the case, there shall be no order as to costs.”

17. Admittedly, the JDA was dated 09.05.2012 and the complaint was filed on 10.09.2014. From the date of JDA, the OPs ought to have completed the construction by October 2013. Another six months was given as grace period. Thus, on or before 09.04.2014, the OPs ought to have completed the project and handed over the 50% of the share (4 Flats) of the Complainant. Admittedly, there delay in completion and thus dispute between the parties. While the Complainant alleged that the OPs failed to complete the project as per the terms of contract, on the other hand the OPs contended lapses on the Complainant's part and thus there was no deficiency of service. Thus, based on an Interim Application by the OPs and submission of the OPs on 14.07.2016 that they were ready to deliver apartments to the Complainant and sought for appointment of a Court Commissioner to assist the Complainant to take possession of the same, the State Commission appointed Sri Kotrabasappa, Advocate as a Court Commissioner to assist the Complainant to take possession of the schedule properties Accordingly, the Court Commissioner rendered his report. The said uncontested report revealed that he visited the premises on 20.07.2016 in the presence of the parties, inspected the Flats in dispute and brought out the deficiencies in Flats Nos. No.001, 002 and 202 and stated that Flat No 301 could not be inspected as the keys were not available.

18. The learned State Commission considered the delay in handing over the possession of the four Flats after duly concluding the construction and the shortfalls brought out in his report by the Court Commissioner as deficiency in service on the part of the OPs. As the Complainant claimed rent in respect of the four @ Rs.20,000 per Flat per month, the learned State Commission determined the liability of OPs as Rs.15,000 per Flat per month from the stipulated date of handing over on 09.04.2014 till handing over the possession of the same. While the learned State Commission considered the area where the Flats are located to determine the compensation in the form of rent, there is nothing on record to establish that

the that Complainant had incurred any such liability. It is essentially a project of JDA between the parties. While there was delay in handing over the possession pertinently, the deficiencies listed by the learned Court Commissioner are indicative that the Flats are by and large complete by then and only the minor aspects listed thereat were pending. Under these circumstances, in our considered view the liability of the OPs is liable to be reviewed to the extent of payment of compensation in the form of rent.

19. In view of the above deliberations, the order of the learned State Commission in modified as under:

ORDER

- I. The Opposite Parties are directed to complete the project after duly rectifying all deficiencies listed in the Court Commissioner Report and to handover the Complainant 50% of the super built up area as per the Joint Development Agreement along with 50% of car parking area, 50% of garden area and 50% in terrace as described in the schedule, within a period of two months from the date of this order, unless already handed over.**

 - II. The Opposite Parties are directed to pay Complainant compensation in the form of rent @ of Rs.10,000/- per month per each apartment from 09.04.2014 to 17.02.2017. Further rent @ Rs.20,000 per month per apartment from 18.02.2017 till the date of handing over of the possession of the same, after due rectification of the said deficiencies.**

 - III. In the event of the apartments not being handed over till date, the OPs are directed to handover the possession of the property as per (I) above within a period of two months from the date of this order and the rent liability from the date of this order shall be @ Rs.50,000 per apartment per month till the date of handing over.**

 - IV. The OPs are also liable to pay the Complaint Rs.50,000 as costs.**
20. With the above orders both the cross Appeals are disposed of.
21. All the pending Applications, if any, are disposed of accordingly.

22. The Registry is directed to release the Statutory amount deposited by the Appellant/Opposite Party, after due compliance of the above order as per law.

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AVM J. RAJENDRA, AVSM VSM (Retd.)
PRESIDING MEMBER