

**NATIONAL CONSUMER DISPUTES REDRESSAL COMMISSION
NEW DELHI**

CONSUMER CASE NO. 740 OF 2016

1. PARTH M. SONEJI & ANR.

FLAT NO. 10, 2ND FLOOR, SION SITA SADAN, PLOT NO.
130, JAIN SOCIETY, SOCIETY(WEST),

MUMBAI-400022, MAHARASHTRA

.....Complainant(s)

Versus

1. SHREE SAINATH ENTERPRISES CONSTRUCTION AND
DEVELOPERS PVT. LTD.

(ERSTWHILE SHREE SIANATH ENTERPRISES(LODHA),
LODHA PAVILION, APOLLO MILLS COMP, N M JOSHI
MARG,

MAHALAXMI, MUMBAI-400011

2. MR. ABHINANDAN LODHA, PARTNER

SHREE SAINATH ENTERPRISES(LODHA, AND JOIN MD,
SHREE SAINATH ENTERPRISES CONSTRUCTION AND
DEVELOPERS PVT. LTD., LODHA PAVILION, APOLLO
MILLS COMP. N.M. JOSHI MARG,

MAHALAXMI, MUMBAI-400011.

.....Opp.Party(s)

BEFORE:

**HON'BLE MR. JUSTICE RAM SURAT RAM MAURYA,PRESIDING
MEMBER**

HON'BLE BHARATKUMAR PANDYA,MEMBER

FOR THE COMPLAINANT : MS. RASHI BANSAL, ADVOCATE
MS. KRITI DANG, ADVOCATE
MS. TESU GUPTA, ADVOCATE

FOR THE OPP. PARTY : MR. SUKUMAR PATTJOSHI, SR. ADVOCATE
WITH MR. VINIT TREHAN, ADVOCATE
MR. NITIN WAGHMARE, ADVOCATE
MR. RAM KRISHNA RAO, ADVOCATE

Dated : 20 May 2024

ORDER

1. Heard Ms. Rashi Bansal, Advocate, for the complainants and Mr. Sukumar Pattjoshi, Senior Advocate, assisted by Mr. Vinit Trehan, Advocate, for the opposite parties.
2. Mr. Parth M. Soneji and Mr. Mahesh L. Soneji have filed above complaint, for directing the opposite parties to (1) handover lawful, vacant and peaceful possession of the property in accordance with clause 4 (r) and clauses 34 & 35 of the agreement alongwith documents confirming membership of club and relevant cards in the names of the family members in pursuance of the order dated 20.07.2015 passed by this Commission in FA/227/2014; (2) pay compensation @ 12% per annum on the amounts paid by the complainants from the date of expiry of grace period of six months till possession and also

pay penal interest @ 6% p.a. from the date of payment on 9th April, 2015 till realization; (3) justify the reasons beyond the control of the opposite party to avail grace period of six months and if not, direct the opposite party to pay interest @ 12% p.a. on identical basis as sought above; (4) pay interest @ 12% p.a. on the compensation amount payable on demand failing which to honour its commitment to pay compensation as stated in the agreement from 01.11.2013 till the date of possession; (5) refund the excess amount paid by the complainants with interest @ 12% p.a. from the date of payment till the date of payment, refund the amount of interest charged by the opposite party with interest @ 12% p.a. from the date of payment till the date of payment, refund the statutory amount (service tax, MVAT etc.), if any, with interest @ 12% from the date of the payment till date of payment and pay penalty/compensation for mental agony, stress and harassment caused to the complainants; (6) provide payment receipts and the details of payment made head-wise by the complainants, provide details of computation disclosing the option chosen as per provisions of the MVAT related law/scheme, provide documentary proof for remitting the amount of MVAT, provide share certificate and Xerox copy of the registration of the Society and provide any other statutory certificate in relation to the property; (7) file an affidavit before this Commission to provide piped gas connection without any charges before the date to be specified by this Commission or deposit Rs.2/- lacs with this Commission, which shall be receivable by the complainants within 5 working days from the date of installing the piped gas connection; (8) file an affidavit with this Commission to pay Rs.2/- lacs as compensation for not providing two car parkings as per agreement; (9) an ad-interim relief in terms of the prayers made above; (10) any other relief in the facts and circumstances of the case.

3. The complainants stated that on 29.10.2009 they entered into an agreement with the opposite party-1 for purchase of flat No.1701 in the building Claremont 'A', Lodha Luxuria, Majewadi, Thane West with two car parking spaces, for a consideration of Rs.9202716/- which was to be paid in instalments. The complainants availed housing loan facility from State Bank of India and paid full consideration amount and other payments. The opposite party even charged excess amount from the complainants. As per clause-22 of the agreement, possession was to be handed over on or before January, 2011 with a grace period of six months due to reasons beyond the control of the opposite party. In the event of failure to give possession within the stipulated period, the opposite party was to pay compensation in the form of interest @ 12% p.a. on the amount paid by the complainants from the date of expiry of six months till the date of possession. On 12.06.2011, when the complainants made payment of Rs.65215/- towards service tax, they also sought progress of the work and the expected date of possession. ON 07.01.2012 while making payment of Rs.24456/- towards service tax, the complainants also sought compensation for delay in handing over the possession, which was replied by the opposite parties vide letter dated 09.02.2012 stating that they had raised a query with the concerned department and the revised possession date would be intimated to the complainants as soon as same was received. Regarding possession, it was replied that they would be abide by the terms and conditions of the agreement and the interest liability, if any, would be calculated in the month of possession. The complainants, vide letter dated 02.09.2012 sought details of the payment sought to be made. Then the opposite party recalculated the amount and reduced it to Rs.234945/-. On 08.10.2012, the complainants sought clarification of the recalculation and deposited the amount of Rs.234945/- on 25.10.2012 under protest. In the meantime, the opposite party sent another demand letter dated 05.11.2013 without considering the request of the complainants

regarding possession. Since opposite party has not disclosed anything about the possession even after expiry of 30 months from the due date of possession, the complainants sent a letter dated 08.11.2013 seeking compensation of Rs.1823222.78 from the due date of possession till October, 2013. The opposite party, vide letter dated 13.12.2013 again demanded the amount with interest @ 18% p.a. and threatened the complainants to pay the amount within 15 days failing which allotment would be cancelled. Thereafter, the opposite party sent letter dated 20.03.2015 demanding various payments including the charges payable on possession, totalling to Rs.1278680/-. In this letter also there was no mention about the expected date of delivery. The said demand was in excess and against the terms and conditions of the agreement. However, the complainants paid an amount of Rs.1293200/- against the demand of Rs.1278680/- on 09.04.2015. On 30.06.2015, the opposite party replied to the letter dated 09.04.2015 giving details of the amount paid and also supplied the copy of the occupancy certificate dated 09.06.2015 issued by Thane Municipal Corporation Authority but denied to pay delay compensation. The complainants sent a letter dated 30.07.2015 to the complainants regarding possession of the flat in question. The opposite party, vide letter dated 03.08.2015 informed that the six cheques amounting to Rs.680453/- issued by the complainants were lapsed and not encashed by them and intimated the complainants to deposit new cheques amounting to Rs.677294/- citing the reason of change in the tax regime and without giving break-up of the amount. It was also mentioned that the opposite parties are ready and willing to handover the possession of the flat subject to balance payment. The complainants sent six fresh cheques with reply dated 04.08.2015 requesting the opposite parties to arrange a site visit and also handover the possession with two car parking spaces on 07.08.2015. The opposite party sent a letter dated 06.08.2015 acknowledging the receipt of the cheques and demanded further amount of Rs.50000/- towards building protection deposit but refused to arrange the site visit on the ground that intimation was given in last minute and a meeting was fixed for 07.08.2015 for settlement of dispute. On 07.08.2015, a meeting was held between the complainants and the opposite parties but the issues could not be finally resolved. On 12.08.2015, the complainants sent an email requesting the opposite parties to depute an officer to keep ready all the documents for completing the formalities to handover the possession on 14.08.2015, which they failed to do. On 10.09.2015 the complainant sent a letter to the opposite parties requesting them to give details of all payments to be made and also give a proposal in writing so that the matter can be sorted out. The opposite parties, vide email 11.09.2015 forwarded soft copies of the documents to be signed by the complainants. On 19.09.2015, complainants requested the opposite parties to handover the possession as per agreement and also requested to make some modifications in the documents to be signed by the parties, which was not done by the opposite parties. Then, the complainants sent a legal notice dated 26.02.2016 to the opposite parties seeking delivery of possession as well as compensation in terms of the flat buyer agreement.

4. It is relevant to mention that earlier the complainants have filed a complaint on the same cause of action before the State Commission. However, the complainants have not filed the copy of the complaint or copy of the order passed by the State Commission. The complainants have challenged the order passed by the State Commission by filing FA/227/2014 before this Commission. The complainants have filed the copy of the order dated 11.02.2016 passed by this Commission, whereby the appeal was partly allowed with liberty to the appellants (complainants) to file another complaint on the same cause of action

before the appropriate forum. Then, the complainants have filed the above complaint on 03.05.2016.

5. The opposite party-1 has contested the complaint by filing its written version on 10.11.2016 stating that the flat was ready for possession since March, 2015 and occupation certificate was obtained by opposite party-1 on 09.06.2015. OP-1 also offered possession to the complainants on 20.03.2015 but they refused to accept the same on one pretext or the other. The opposite party also offered rent @ Rs.30000/- per month from April, 2013 onwards or/and alternative accommodation till delivery of possession, but the complainants refused to accept the same. The complainants also refused to accept the compensation offered by the opposite party. In the flat buyer agreement, time is not the essence because as per clause 22 of the agreement force majeure conditions are applicable. Commencement certificates were issued by Thane Municipal Corporation on 14.10.2008 and 11.12.2009. Maharashtra State Electricity department shifted the high tension wire from 22.05.2009 to 07.06.2009. The opposite party has also written letters dated 14.07.2009 and 18.07.2009 to the electricity department that due to its non-cooperation there has been a delay of 15 days. Kisan Waman Bhoir & Ors. filed a civil suit No.186 of 2011 in the Civil Court wherein an injunction order was passed on 13.05.2011 restraining the opposite party from construction and development or creating any third party right in the property in question. The commencement certificates issued by Thane Municipal Corporation obligated the opposite party to demolish the illegal structure on the plots. Such demolition was restricted by the occupants due to which, construction was delayed from October, 2011 to June, 2013. The opposite party was required to install agglomerated marbles and tiles in every flat for which they had given a supply order to M/s Euro Ceramics Ltd., who supplied the defective goods. The opposite party vide email dated 07.1.2011 informed the said company about the defective goods but the defective tiles and marbles were not replaced by it and dragged the issue for one year and on 04.01.2012 a meeting was held between the opposite party and the vendor wherein defects in the marble were admitted and opposite party was given assurance that the matter would be resolved positively but nothing was done. Then the opposite party replaced the defective marble installed in the project for which an amount of Rs.42/- lacs was incurred by the opposite party. There was also non-availability of building material which caused delay in completing the project. As the delay was due to the reasons beyond the control of the opposite party, the complainants are not entitled for any compensation. The complainants have not produced any evidence to prove that due to delay in delivery of possession, they have suffered any loss. It is denied that the complainants have paid any excess amount and the payments made by the complainants included delayed payment interest. In terms of the agreement, the complainants are liable to pay MVAT and other taxes. The opposite party charged MVAT and other taxes as applicable. The allegations made against the opposite party are false and the complaint deserves to be dismissed.

5a. Opposite party-1 also raised the preliminary issue of maintainability stating that the complainants are not consumers as they had booked the flat for commercial purpose as the complainants are already residing in Mumbai and they had booked the flat in district Thane. The complaint is bad for misjoinder of parties. Opposite party-2 has been presented as 'partner' of opposite party-1. In fact, he is neither partner nor Director of OP-1 nor any relief has been claimed against him. The complaint qua OP-2 is liable to be dismissed. The

Consumer Forum has no jurisdiction to entertain the complaint seeking enforcement of an agreement.

6. The complainants filed Rejoinder Reply, Affidavit of Evidence of Mahesh L. Soneji and documentary evidence. The opposite party-1 filed Affidavit of Evidence of Surendran K. Nair. Both the parties have filed written synopsis.

7. We have considered the arguments of the parties and examined the record. It is admitted case of the parties that as per clause-22 of the agreement, possession was to be handed over on or before January, 2011. It is specified under clause-22 of the agreement that in case of force majeure, the opposite parties are entitled for six months extension. Therefore, opposite party-1 is liable to handover the possession by July, 2011. It is admitted by opposite party-1 that the occupation certificate was obtained on 09.06.2015. Therefore, the offer of possession made in March, 2015 is not a valid offer. The opposite parties vide reply notice dated 03.08.2015 expressed its willingness to handover. Therefore, the liability of the opposite parties for delay in handing over the possession terminates on that day. Thus, opposite party-1 is liable to handover possession of the flat complete in all respect within a period of two months. It is also liable to pay delay compensation from July, 2011 till July, 2015. Supreme Court in **Wg.Cdr. Arifur Rahman Khan Vs. DLF Southern Homes Pvt. Ltd., (2020) 16 SCC 512** and **DLF Home Developers Pvt. Ltd. Vs. Capital Greens Flat Buyers Association, (2021) 5 SCC 537**, held that 6% interest on the deposit of home buyers for the delayed period is appropriate delayed compensation. Regarding the issue of excess payment, the opposite parties have stated that cheque Nos.475733, 475732, 672161, 475734, 672160 & 672162 all dated 09.04.2015 for a total amount of Rs.680453/- have been lapsed and could not be encashed. The complainants have not produced any evidence regarding encashment of these cheques. As the complainants have failed to prove the payment of excess amount, there is no question of refund of the excess amount.

8. The complainants have also sought refund of MVAT deposited. Since MVAT is a statutory amount, it cannot be refunded.

9. Regarding maintainability, opposite party-1 made an allegation that the complainants have booked the flat in question for commercial purpose but it has not produced any evidence in support of this allegation. It is also alleged that the complaint seeking enforcement of a contract is not maintainable in the consumer forum and the appropriate forum is the Civil Court. Supreme Court in **CCI Chambers Coop. HSG. Society Ltd. v. Development Credit Bank Ltd., Appeal (Civil) 7228 of 2001** held that merely because recording of evidence is required, or some questions of fact and law arise which would need to be investigated and determined, cannot be a ground for shutting the doors of any Forum under the Act to the person aggrieved.

ORDER

In view of aforesaid discussions, the complaint is partly allowed with cost of Rs.50000/-. The opposite party-1 is directed to handover the possession of the flat to the complainants within a period of two months from the date a certified copy of this order is produced before it. Opposite party-1 shall also pay delay compensation to the complainant in the form of interest

@ 6% p.a. on the consideration amount paid by the complainants, from July, 2011 till March, 2015.

.....J
RAM SURAT RAM MAURYA
PRESIDING MEMBER

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BHARATKUMAR PANDYA
MEMBER