

April 4, 2024
Sl. No.A 46
Court No.19
s.biswas

CO 4172 of 2023

Nihar Ranjan Ghosh
vs.
Sk. Majid Ali and another

Mr. Amiya Kumar Dutta
Mr. Swadesh Priya Ghosh

... for the petitioner

1. The revisional application has been filed challenging an order dated September 14, 2023, passed by the learned State Consumer Disputes Redressal Commission, West Bengal, in Revision Petition No.103 of 2023.
2. The commission upheld the order dated May 31, 2023, passed by the learned District Consumer Disputes Redressal Commission, Kolkata Unit-II, in CC/33/2021. According to the District Consumer Disputes Redressal Commission, the complain case was maintainable and not barred by limitation, as there was a continuing cause of action.
3. Both the fora relied on the facts of the case and upon applying decision of the Hon'ble Apex Court in the matter of **Samruddhi Cooperative Housing Society Limited vs. Mumbai Mahalaxmi Construction Private Limited** reported in (2022) 4 SCC 103, arrived at the conclusion that in case of a continuing cause of action, limitation would not start to run, unless

the right of the complainant was denied by the opposite party. The decisions relied upon by the petitioner were not accepted by the commissions.

4. The learned District Consumer Disputes Redressal Commission held as follows:

“During the course of hearing of petition Ld. Advocate of Petitioner/OP-1 stated that the complainant/OP has filed the case under the caption of section 12 read with section 35 of CP Act 2019 and not only that he also filed the case long after 4 years. In response Ld. Advocate for the OP/complainant stated that the petition of complaint is not “per se” barred by time because when after request made by the OP/complainant to the petitioner/OP-1 for handing over the flat in question for which he paid a sum of Rs.12,00,000/- within the time of 24.07.2011 to 31.03.2014 as “earnest money”.

But the OP-1 and 2 did not pay any heed to his request then he served lawyers notice upon the petitioner/OP-1 through his conducting Ld. Advocate Sanjay Das on 29.06.2020 and also informed the matter to Park Street PS on 26.08.2020.

On the basis of this fact, it can be held by this commission that it is well known to all that cause is a continuous process consisting of bundle of facts. The letter dated 29.06.2020 and the complaint filed at Part Street PS dated 26.08.2020 are also the fact which can be considered as continuous process of cause of action and then it can safely be held that when on receipt of letter dated 29.06.2020 by petitioner/OP-1 did not response to the OP/complainant in respect of handing over the flat in question situated at “Aloka Paschim Ltd. Diganta Society” and he paid Rs.12,00,000/- for the same as “earnest money” and admittedly till date the OP-1/petitioner did not hand over the same.

So, under such circumstances on the basis of the document as filed by the parties to this case available in the case record, it is opined that the commission cannot go through out the petition of complaint due to mis-caption as the application filed ‘ U/s 12” read with Section 35 of CP Act, 2019 and from the material on record. It also proved that the OP complainant served the lawyers notice upon the petition/OP-

1 on 29.06.2020 and the instant case be filed by the OP/complainant on 15.01.2021. So, the case has been filed well within the period of limitation and it is not at all barred by limitation and the petitioner/OP-1 and the allegation levelled by the OP-1 has no leg to stand upon regarding the non maintainability of the case.

Thus, the case is well maintainable in eye of law and is filed within the period of limitation. Hence, ordered that the MA being NO.723/2023 is considered and rejected on contest without any cost.”

5. Aggrieved, the petitioner filed a revision. The State Commission did not interfere with the order of the District Commission. The District Commission was of the view that cause of action was a continuous process which consisted of a bundle of facts. The letter dated June 29, 2020 and the complaint filed at Park Street Police Station dated August 26, 2020, should be treated as a continuous process. The opposite parties in the complaint case did not respond to the complainant's claim in respect of the flat in question, situated at “Aloka Paschim Ltd. Diganta Society”. The Commissions held that the application could not be thrown out only because the nomenclature in the application was under Section 12 read with Section 35 of the Consumer Protection Act, 2019. The lawyer's notice was served on June 29, 2020 and the case was filed on January 15, 2021.

6. The Commissions had gone into the merits of issues and the laws applicable. Paragraph 13 of the petition of complaint records that Nihar Ranjan Ghosh, the petitioner herein, introduced Mr. Santanu Bose the opposite party No.2 as his representative with the indication that Mr. Bose would hand over another flat, to the opposite party. In paragraph 14 it has been stated that Mr. Bose issued a letter dated June 27, 2016 to the Secretary, Alaka Paschim Diganta Cooperative Society Ltd. and assigned all rights and liabilities to Sk. Majid Ali. In spite of such letter, the possession of the flat was not handed over. Mr. Bose sent a letter through his learned Advocate to WBHIDCO for transfer of the flat in the name of the complainant. Paragraphs 17 and 18 deal with the advocates' notice to the petitioner and to Mr. Bose with regard to the claim of the complainant/opposite party No.1. Further averments that Mr. Bose through his learned Advocate, by a letter dated September 3, 2020, denied the claim of the opposite party No.1 are available. It was informed by Mr. Bose's Advocate that Nihar Ranjan Ghosh did not fulfil his terms and conditions of the agreement which he had verbally agreed with Mr. Bose, and accordingly it was not possible for Mr. Bose to

act in terms of the letter dated June 27, 2016, and accept the claim of the complainant. Accordingly, the letter dated June 27, 2016 was said to be ineffective. Thus, the last denial to the claim of the petitioner and specific refusal of Mr. Bose to the opposite party's claim was in terms of the September 3, 2020. Thereafter, the petitioner lodged a complaint with the local police station and before the Deputy Commissioner of Police (South). From the facts available on the basis of the complaint case, both the fora were correct in coming to a finding that the complaint case was maintainable.

7. The relevant portions of the complaint case are quoted below:-

"13. That finding no other alternative Nihar ranjan ghosh introduce Mr.shantanu Bose, residing at: Block-HA-223, Sector-III, Salt Lake, Kolkata 700 106 and represent him as his representative and he will give another flat in new town being "Flat No.C-3/T/23, mearing (sic. measuring) about 40.38 Sq.meter, situated on third floor, at building no.C-3, within premises np.01- 0323, Action Area-ID, New Town" instead of the said flat because accused no.1 had invested money in the said flat in the name of accused no.2.

14 That as per the said representation Mr.Shantanu Bose, served intimation/letter dated: 27 June, 2016 to the secretary, "ALAKA PASCHIM DIGANTA COOPERETIVE SOCIETY LTD and assign (sic. assigned) all the rights and liability to Sk. Majit Ali and this has been received by the said secretary of "ALAKA PASCHIM DIGANTA COOPERETIVE SOCIETY LTD"

but till date i did not get the possession of the flat.

The intimation letter is annexed herewith.

15. That after passing 2 months accused no.2 sends a letter through his advocate to WBHIDCO for transfer of flat in the name of the complainant.

Letter is annexed herewith

16. That after passing 4(four) years complainant visited door to door to get "the possession of the said flat but all efforts of complainant went in vain.

17. That the complainant also send notice through advocate to both the accused person i.e Mr.Nihar Ranjun Ghosh and Mr.Santanu Bose and stated all the facts and requested to take immediate action to refund the "earnest money" along with interest @18% from the date of payment of the "earnest money" as per the agreement (page-12,para-6) or hand over the possession of the said flat but accused no.2 through his advocate send a notice to the complainant.

18. That from the letter dated:3.09.2020 of the advocate of the accused no.2 it is crystal clear that accused no.1 requested to accused no.2 to transfer the flat in the name of the complainant situated at New Town, Action Area-1D.

19. That from the inception accused no.1 misrepresents the complainant and induces the complainant to make payment in respect of under' construction flat and syphoned the complainant's money and also accused no.1 personation and connivance with the accused no.2 fooled - the complainant.

20. That the said Nihar Ranjan Ghosh cheat the complainant by making false promises and misrepresentation and connivance with Santanu Bose, and now they are avoiding complainant and harassing complainant, and did not take complainant phone call or want to meet complainant and neither take any step

regarding handover the flat or returning the money.”

8. Learned advocate for the petitioner relies on the decision of **Samruddhi Cooperative Housing Society Limited** (supra) to substantiate his argument that when a wrong was already done, the injury would not continue. Such act would not constitute a continuing wrong. That the Commissions should have drawn the distinction between the injury caused by the wrongful act and what would be the effect of such injury. The wrong or default which was complete, but whose effect would continue, was not a continuing wrong or default. Thus the failure to handover the flat or return the money were not continuing wrong.
9. I do not agree with the contentions. The complaint petition discloses that Mr. Bose nominated the petitioner who would acquire right, title and interest in a flat and wrote to the Secretary of Alaka Paschim Diganta Cooperative Society Ltd. Mr. Bose was the petitioner’s agent/representative as per the allegations. It further discloses that Mr. Bose retracted from such stand. The letter of Mr. Bose dated September 3, 2020, discloses denial of the claim of the petitioner. It also mentions how the petitioner did not keep his share of the bargain,

which resulted in the denial of the claim of the petitioner by Mr. Bose. Relevant paragraphs of the letter are quoted below:-

“4. That being my clients agents I do hereby informed you that in the year 2016 on being requested and/or approached by one Nihar Ranjan Ghosh of 52, Serpentine Lane, Kolkata-700014, my client was somehow influenced and/ or agreed to nominate the allotment of the said flat on some specific Terms and condition which are verbally agreed upon and accordingly my client sent one letter dated 27/6/2016, to the Secretary, ALAKA PASCHIM DIGANTA COOPERATIVE SOCIETY LIMITED to nominate your client as the nominee of my client. However, it was not accepted by HIDCO due to technical reason. It is pertinent to mention here that the said Nihar Ranjan Ghosh did not fulfill any terms and conditions which he made verbally with my client to transfer the allotment in respect of the said flat and accordingly it is not possible for my client to transfer the allotment in respect of the said flat of my client and accordingly the said letter dated 27/6/2016 does not have any effect right now.

5. That being my client's agent I do hereby inform you that my client has got no liability in respect of his own flat in connection of any transfer to anybody else including your client also.”

10. The complaint case was filed within a year from such denial of the complainant's claim. The complainant/opposite party No.1 has prayed for refund of the amount of Rs.12,00,000/- and compensation The cause of action lastly arose on September 3, 2020 and on September 15, 2020, when the police complaint was filed. The

provision relating to limitation in The Consumer Protection Act, 2019 is quoted below:-

“69. Limitation Period.(1) The District Commission, the State Commission or the National Commission shall not admit a complaint unless it is filed within two years from the date on which the cause of action has arisen.

(2) Notwithstanding anything contained in sub-section (1), a complaint may be entertained after the period specified in sub-section (1), if the complainant satisfies the District Commission, the State Commission or the National Commission, as the case may be, that he had sufficient cause for not filing the complaint within such period:

Provided that no such complaint shall be entertained unless the District Commission or the State Commission or the National Commission, as the case may be, records its reasons for condoning such delay”

11. In my view, both the fact finding fora had arrived at a conclusion that the complaint case was maintainable. Nothing beyond such finding can be gone into by this court under Article 227 of the Constitution of India and this court is not an appellate court. The power of superintendence is to ensure that the fora function with the four corners of the law and not to correct errors. The facts have been discussed by this court and the pleadings have been narrated elaborately to indicate how the cause of action arose in this case.

12. In the matter of ***M/s. Puri Investments vs M/s. Young friends and Co. and Ors*** decided in

Civil Appeal No. 1609 of 2022. The Hon'ble

Apex Court held as follows:-

“10..... The High Court was conscious of the restrictive nature of jurisdiction under Article 227 of the Constitution of India. In the judgment under appeal, it has been recorded that it could not subject the decision of the appellate forum in a manner which would project as if it was sitting in appeal. It proceeded, on such observation being made, to opine that it was the duty of the supervisory Court to interdict if it was found that findings of the appellate forum were perverse. Three situations were spelt out in the judgment under appeal as to when a finding on facts or questions of law would be perverse. These are:-

- (i) Erroneous on account of non-consideration of material evidence, or
- (ii) Being conclusions which are contrary to the evidence, or
- (iii) Based on inferences that are impermissible in law.”

13. Under such circumstances, I do not find any reason to exercise the power of superintendence as both the fora had gone into the merits of the issue and come to a correct decision.

14. The revisional application is dismissed.

15. All the parties are directed to act on the basis of the server copy of the order.

16. Urgent Photostat certified copies of this order, if applied for, be made available to the parties upon compliance with the requisite formalities.

(Shampa Sarkar, J.)