

**NATIONAL CONSUMER DISPUTES REDRESSAL COMMISSION
NEW DELHI**

FIRST APPEAL NO. 469 OF 2011

(Against the Order dated 26/08/2011 in Complaint No. 194/2001 of the State Commission
Maharashtra)

1. SHAILENDRA KUMAR

S/o Shri Sakharam P. Ghaste through his C.A. Shri
Sakharam P. Ghaste, Residing at 601, Villa Flaviana,
Govindrao Patwardhan Road, Off. Gokhale Road (North),
Dadar (West),
Mumbai-400028

.....Appellant(s)

Versus

1. JAGDISH A. DIALANI & ANR.

Sole Prop. of M/s. Dialani Developers, R/o at 77, Dharmi
Niwas, R.K. Mission Road, Khar (West)
Mumbai-400052

2. MR. ISHWAR KAKKAD,

Yogi Kripa Estate Consultants, Office at Shop No. 2,
Mamta Building, 'D' Wing, Opp. Maratha Udyog,
Appasaheb Marathe Marg, Worli,
Mumbai-400025

.....Respondent(s)

BEFORE:

HON'BLE MR. JUSTICE V.K. JAIN, PRESIDING MEMBER

For the Appellant : Mr. Nagraj Hoskeri, Advocate
Mr. Nihant Pankcker, Advocate

For the Respondent : Mr. Subodh Gokhale, Advocate
Mr. Viraj Kadam, Advocate

Dated : 24 Jul 2018

ORDER

JUSTICE V.K. JAIN, PRESIDING MEMBER (ORAL)

The complainant / appellant along with his mother Smt. Suman Sakharam Ghaste entered into an agreement with Respondent No.1 for purchase of a residential flat for a consideration of Rs.25.00 lacs. As per Clause 2 of the said agreement, the carpet area of the flat was admeasuring about 760 sq. ft. inclusive of the area of balcony shown on the plan annexed and marked as Annexure-D. The agreement was executed on 1.6.1999 and the possession of the flat was

delivered to the complainant / respondent on 26.9.1999. The grievance of the complainant is that the actual carpet area of the flat delivered to him by respondent No.1 was only 659 sq. ft. The complainant therefore approached the concerned State Commission way of a consumer complaint, seeking the balance additional area or in the alternative price of the deficient area, along with compensation. Since the flat was purchased by the complainant through respondent No.2 he was also impleaded as a party to the consumer complaint and compensation was sought from him as well to the extent of Rs.2,50,000/-. The complainant also sought a sum of Rs.1,10,789/- which he claimed to have paid as excess stamp duty, on account of the carpet area of the flat having been recorded as 760 sq. ft. in the agreement for sale.

2. The complaint was resisted by the respondents. Respondent No.,1 inter-alia alleged in its written version to the consumer complaint that the actual carpet area of the flat was 760 sq. ft. The State Commission vide its impugned order dated 26.8.2011, dismissed the consumer complaint. Being aggrieved the complainant / appellatant is before this Commission by way of this appeal.

3. When this appeal came up for hearing on 4.6.2008, respondent No.1 was directed to file a report of a qualified Architect detailing therein the carpet area of each and every portion shown in Annexure D, which was the plan annexed to the sale agreement as well as the total carpet area of the flat as per the aforesaid plan. In compliance of the aforesaid direction, respondent No.1 has filed a report of a qualified Architect namely Mr. Hemat J. Sharma, supported by an affidavit. As per his report, the total carpet area of the flat was 674.74 sq. ft. whereas the carpet area of the servant toilet was of 51.25 sq. ft. The area of the internal wall is stated to be 19.50 sq.ft., whereas the area of the external wall is stated to be 57.49 sq. ft.

4. The contention of the learned counsel for the complainant is that the carpet area of servant toilet cannot be considered to be a part of the carpet area of the flat since the said area is regarded as a common area under the provisions of Maharashtra Ownership of Flats Act, 1963. I have perused the agreement executed between the parties. It is evident from a perusal of the agreement that the carpet area of the flat was to be as per the plan Annexure-D to the said agreement. Servant toilet was shown as a part of the flat in Annexure-D. Therefore, irrespective of the provision of MoFA, the aforesaid area has to be taken into consideration for the purpose of deciding whether the respondent No.1 has honoured his contractual obligations or not. Therefore the carpet area admeasuring 51.25 sq. ft. has to be added to the carpet area of the bed rooms, hall etc.

There is a minor dispute with respect to the area under the main door jam, bed room door jam, toilet door jam and door dam, which comes to an aggregate of 12.62 sq. ft. In my view, since a door comes over the floor of the room, the area under the door cannot be counted again, the same having been already counted as carpet area of the room / hall. Therefore, the area under the jam admeasuring 12.62 sq. ft. has to be excluded while deciding as to what is the total carpet area of the flat delivered to the complainant.

5. After deducting the carpet area under the jams and including the carpet area of servant toilet, the total carpet area of the flat comes to 713.39 sq. ft. As far as the area under the internal wall and external wall is concerned, the same, in my opinion cannot be said to be a carpet area and therefore cannot be included for the purpose of arriving at the total carpet area of the flat.

6. The total carpet area of the flat, computed in the above referred manner comes to 713.39 sq. ft. The deficient area therefore comes to 46.61 sq. ft.

7. The complainant had paid Rs.25.00 lacs for 760 sq. ft. of carpet area. The value of the deficient carpet area therefore comes to Rs.1,53,388/-. Since the complainant paid stamp duty on the entire sale consideration of Rs.25.00 lacs, he is also liable to recover the excess stamp duty, which he had to pay. The excess stamp duty paid by the complainant @ 5% of the excess sale consideration would come to Rs.7,669/-. The total amount, which the complainant is entitled to recover from the respondent No.1 thus comes to Rs.1,61,057/-.

8. As far as respondent No.2 is concerned, he cannot be in any manner held responsible for the deficiency in carpet area and therefore, no ground for awarding any compensation or refund of the professional fee paid to him is made out.

9. For the reasons stated hereinabove, the appeal is disposed of with the following directions:

- (i) The Respondent No.1 shall pay a sum of Rs.1,61,057/- to the appellant / complainant, along with interest on that amount @ 9% per annum from the date of the complaint till the date of payment.
- (ii) The complaint against respondent No.2 remains dismissed.
- (iii) There shall be no order as to costs.

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V.K. JAIN
PRESIDING MEMBER

**BEFORE THE HON'BLE STATE CONSUMER DISPUTES REDRESSAL
COMMISSION, MAHARASHTRA, MUMBAI**

Complaint Case No. CC/01/194

1. Mr. Shailendra Kumar, Son of Shri.
Sakharam P. Ghate, through his
Constituted Attoryne Shri. Sakharam P.
Ghaste
Residing at 601, Villa Flaviana, Road No.
86, Off. Gokhale Road (North), Dadat (W),
Mumbai - 400 28.
Mumbai
Maharashtra

.....Complainant(s)

Versus

1. Mr. Jagdish A. Dialani, Sole Prop. of
M/s. Dialani Developers
Res. at 77, Dharmi Niwas, R. K. Mission
Road, Khar (W), Mumbai - 400 052
Mumbai
Maharashtra

2. Mr. Ishwar Kakkad, Yogi Kripa Estate
Consultants
Off. at Shop No. 26, Mamta Bldg., 'D'
Wing, Opp. Maratha Udyog, Appasaheb
Maratha Marg, Worli, Mumbai 400 025.
Mumbai
Maharashtra

3. Mr. Iswar Kakkad, Yogi Kripa Estate
Consultants
Off. at Shop No. 26, Mamta Bldg., 'D'
Wing, Opp. Maratha Udhyog, Appasaheb
Maratha Marg, Worli, Mumbai 400 025.
Mumbai
Maharashtra

.....Opp.Party(s)

BEFORE:

**Hon'ble Mr. S.R. Khanzode PRESIDING MEMBER
Hon'ble Mr. Narendra Kawde MEMBER**

PRESENT:

Mr.S.P.Ghaste-C.A. for the complainantfor the Complainant
Mr.Subodh Gokhale-Advocate for opponent no.1

Mr.Ashutosh Marathe-Advocate for opponent
no.2

.....for the Opp. Party

ORDER

Per Mr.Narendra Kawde, Hon'ble Member

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The complainant purchased residential flat from opponent no.1 by hiring services of opponent no.2 an Estate Agent for the total consideration of ` 25 lakhs and executed an Agreement to Sale (in short 'Agreement') on 1st June 1999 with opponent no.1. Complainant believed opponent no.2 about "ready to buy flat" theory of carpet area 760 sq.feet and other related documents and then jointly approached along with opponent no.2 to opponent no.1 to purchase flat no.601 located at Villa Flavania, situated at Road number 86, Dadar (West), Mumbai 400 028.

2) Complainant received physical possession of the said flat on 26/09/1999. Later on the complainant realized that carpet area of the flat is less than the one 760 sq.ft. mentioned in the Agreement. Therefore he had taken remedial steps to issue legal notice on 01/03/2001 to opponent no.1 and opponent no.2 calling upon them to take remedial steps to remove deficiency in service and take such steps in respect of deficit carpet area of the flat, in addition to payment of excess stamp duty, obtaining OC and formation of cooperative society of flat purchasers. Opponent nos.1 & 2 did not respond. Hence the complainant preferred this complaint through his Constituted Attorney Shri Sakharam P. Ghaste seeking relief under provisions of Consumer Protection Act, 1986 alleging serious deficiency in services on the part of opponent no.1 and opponent no.2.

3) As per the Agreement complainant and one Smt.Suman Sakharam Ghaste have jointly purchased the disputed flat and the complainant has not made Smt.Suman Sakharam Ghaste as party in the complaint. General power of attorney in favour of Shri Sakharam Ghaste -Constituted Attorney is signed only by Shri Shailendra Sakharam Ghaste, co-purchaser of the flat. It amounts to non joinder of necessary parties.

4) Complainant hired the services of opponent no.2 an Estate Agent to facilitate purchase of disputed flat from opponent no.1 who is sole proprietor of M/s.Dialani Developers and averred that the carpet area of 760 sq.feet is mentioned in clause no.2 of Agreement executed by him with opponent no.1. As there was no response to the legal notice dated 01/3/2001 from the opposite parties for clarifying the deficiency and take remedial steps; the complainant got the carpet area measured through the private architect viz MS Sambhare and Co. & later on by BMC Engineer and thereafter proceeded to file criminal case against opponent nos.1 and 2 on charges of cheating.

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5) Admittedly complainant received the possession of flat on 26/09/1999 without any protest except with grievance of seepage of water through walls and kitchen. Thereafter in numerous correspondences with opponent no.1 complainant did not raise the issue of deficit carpet area of

the flat in his possession except obtaining of OC, CC, water leakage etc. and there was no mention about the deficit area of the flat. Complainant and opponent nos.1 & 2 relied on the document-Annexure A as a part of Agreement which is as per the approved development plan of Municipal Corporation of Greater Mumbai (in short 'MCGM') showing typical floor plan of the building. Criminal case was filed by the complainant against opponent nos.1&2 alleging the charges of cheating and opponent nos.1 & 2 were detained and later on released on bail bond by the Court.

6) Opponent nos.1 & 2 admitted that the carpet area of the flat was mentioned as 760 sq.feet in the Agreement instead of built up area which was a bonafide mistake on their part. They relied upon approved typical floor plan of the development of building and shown in annexure 'A' attached and forming part of Agreement which was duly authenticated by complainant himself. There was no malafide intention on their part to deceive the complainant in respect of flat area handed over to the complainant. They have further accepted that the total built up area of the flat is 760 sq.feet equivalent to 658 sq.feet of carpet area excluding 34 sq.feet of servant toilet.

7) Heard the Constituted Attorney for the complainant and Mr.S. Gokhale –Ld.Advocate for the opponent no.1 and Mr.A.Marathe –Ld.Advocate for opponent no.2. Perused evidence and documents produced by the parties and considered the pleadings.

8) On considering the evidences and documents produced by the parties and pleadings, written argument we found that complainant and opponent nos.1 & 2 relied on Agreement and the annexure A forming part of Agreements as to area of the flat approved by MCGM development plan as a typical floor plan. Question of interpretation arise when the two documents forming the part of the one and same contract. In such event interpretation close to reality is required to be taken into account. In this case though the carpet area of flat is mentioned as 760 sq.ft. in the Agreement which ought to have been built up area based on sanctioned building plan by MCGM showing typical floor plan area in Annexure A forming part of agreement is to be relied upon. There was a practice then prevailing to mention built up area in the Agreement to sale as the amendment to MOFA came into existence in 2008 where by builders are required to mention the carpet area of flat in the Sale Deed from the date of amendment.

9) Contention of the complainant that the carpet/built up area of the flat was beyond his knowledge and blindly signed/ attested his signatures to the Agreement without verifying carpet/built up area of the flat is unacceptable, as he has not disputed the approved building plan of the MCGM showing typical floor area of the flat shown in Annexure A forming part of the Agreement.

10) The complainant took over possession of flat on 26/09/1999 without protest. Thereafter he continuously took up with the opponent no.1 by way of his letters dated 23/08/1999, 10/07/2000,

20/10/2000, 12/11/2000, 01/12/2000 about the seepage, obtaining of Occupation Certificate, IOD of the building. However, none of these communications mentioned about deficit/short area of the flat.

11) Complainant realized alleged deficit carpet area almost about more than a year from the date of taking possession and issued legal notice on 01/03/2001 to opponent nos.1 & 2 after privately measuring the flat area on 04/02/2001 by a private Architect ascertaining the carpet area of the flat as 680.96 sq.ft. The complainant again managed to measure the flat area by MCGM Engineer on 20/03/2009 and by way of Court order on 25/03/2002. Each time the carpet area measured was estimated to 659.40 sq.ft. and 658.12 sq.ft.

12) Agreement was for purchase of flat area mentioned as typical floor plan approved by MCGM explained in Annexure A appended to Agreement, forming part of Agreement. Complainant purchased the flat for lump sum consideration of ` 25 lakhs and sale transaction was not based on the rate for per sq.ft. As per Annexure A, built up area of the flat is 760 sq.feet as submitted in the affidavit of opponent nos.1 & 2. This area nearly tallies with the one mentioned in clause no.2 of the Agreement though mentioned inadvertently as carpet instead of built up one. Opponent nos.1 & 2 have admitted bonafide mistake on their part of having mentioned flat area in carpet sq.ft. instead in built up sq.ft . Complainant could not establish malafide intention of opponent nos.1 & 2 by way of leading any evidence to sell the flat area contemplated by the complainant in carpet sq.ft.

13) We therefore hold that no malafide intention of opponent nos.1 & 2 in selling flat area to complainant misrepresenting the fact is proved. Therefore, we do not find deficiency in service rendered by opponent nos.1 and 2 as alleged by the complainant. We hold accordingly and pass the following order:-

ORDER

Complaint stands dismissed.

Parties to bear their own costs.

Copies of the order be furnished to the parties.

Pronounced on 26th August, 2011.

**[Hon'ble Mr. S.R. Khanzode]
PRESIDING MEMBER**

**[Hon'ble Mr. Narendra Kawde]
MEMBER**

