

Consumer Protection & RERA: Best Recourse to Allottees

Adv. Mithil Vinod Sampat

B.L.S., LL.B. (Advocate High Court)

mithilvinodsampat@gmail.com

Introduction

- Real Estate (Regulation and Development) Act, 2016
- Insolvency and Bankruptcy Code, 2016
- Consumer Protection Act, 2019

Introduction

- “Allottee” : Section 2(d) of Real Estate (Regulation and Development) Act, 2016
- “Consumer” : Section 2(7) of the Consumer Protection Act, 2019
- Builders are not allowed to file a consumer complaint
- Builders can only defend, appeal and execute

‘Commercial Purpose’

- Section 2(7) of the Consumer Protection Act, 2019:
 - “consumer means any person who ... but does not include a person who obtains goods / avails service or any commercial purpose, or for resale”
- Explanation (a) of Section 2(7) of the Consumer Protection Act, 2019:
 - “the expression "commercial purpose" does not include use by a person of goods bought and used by him exclusively for the purpose of earning his livelihood, by means of self-employment”
- Bona fide change of intention:
 - Communication, pleadings, affidavits

Issues faced

- Possession / Completion delayed
- Selling parking unlawfully
- Alterations in plans / amenities
- Not selling on carpet area / selling lesser carpet area than advertised
- Misleading information
- Project or agent not registered
- Inadequate permissions
- Not disclosing encumbrances
- Non formation of society
- One-sided agreements
- Conveyance not being issued
- Misleading or false advertisements
- Transparency in accounts
- Not entering into agreement
- Title is defective
- Selling open parking

Jurisdiction of Consumer Commissions

- Pecuniary Jurisdiction:
 - District: Below Rs. 1 Crore
 - State: Rs. 1 Crore to Rs. 10 Crore
 - National: Above Rs. 10 Crore
 - Consideration **paid**
- Territorial Jurisdiction:
 - Residential or office address of the Complainant

General Procedure (Consumer Commissions)

- Limitation:
 - Within 2 years from date of cause of action
 - Limitation put on hold by Supreme Court because of Coronavirus
- Deemed admission after 21 days of filing
- Written Statement:
 - 45 days for Opposite Party to Reply, cannot be extended
 - 45 days time limit put on hold by Supreme Court because of Coronavirus
- Affidavit of Evidence
- Written and Oral Arguments
- Decree

Offences under Consumer Protection Act

- deficiency u/s. 2(11) in service u/s. 2(42):
 - any fault, imperfection, shortcoming or inadequacy in the quality, nature and manner of performance
 - required to be maintained by or under any law, or undertaken to be performed
 - negligence, omission, deliberate withholding of relevant information
- restrictive trade practises u/s. 2(41):
 - bring about manipulation of price or its conditions of delivery
 - delay beyond the period which has led or is likely to lead to rise in the price
 - delay in construction, society formation, conveyance led to cost escalation in price and stamp-duty

Offences under Consumer Protection Act

- unfair contract u/s. 2(46):
 - contract having terms which cause significant change in the rights of the consumers
 - 'Unfair terms' are declared as null and void
 - any clause of any agreement, allotment letter, possession letter, etc. which is declared as 'unfair contract'
 - all the allottees of building or project can avail 'unfair contract' from even one Consumer Court Order

Offences under Consumer Protection Act

- unfair contract u/s. 2(46):
 - manifestly excessive security deposits to be given by a consumer for the performance of contractual obligations
 - unreasonable money or obligations imposed which puts the consumer at a disadvantage
 - unilateral termination without reasonable cause
 - disproportionate penalty for breach of contract
 - refusal to accept early repayment of debts
 - permitting assignment of contract to a third-party without consent

Offences under Consumer Protection Act

- misleading advertisement u/s. 2(28):
 - falsely describes such product or service
 - misleads or gives a false guarantee to the nature, substance, quantity or quality of such product or service
 - express or implied representation constituting an unfair trade practice
 - deliberately conceals important information
 - Section 89:
 - Fine as well as imprisonment
 - Rs. 10 Lakhs, and 2 years
 - Rs. 50, Lakhs, and 5 years for repeat offender
- Definitions of 'advertisement' under both, Section 2(28) of the Consumer Protection Act, 2019 as well as Section 2(b) of the Real Estate (Regulation and Development) Act, 2016 can be invoked, and even 'prospectus' under Section 2(zl) of the Real Estate (Regulation and Development) Act, 2016

Offences under Consumer Protection Act

- violation of consumer rights u/s. 2(9):
 - right to be protected against the marketing of services which are hazardous to life and property
 - right to be informed about the quality, quantity, potency, purity, standard and price to protect the consumer against unfair trade practices
 - right to be assured, wherever possible, access to a variety of goods, products or services at competitive prices
 - right to consumer awareness

Offences under Consumer Protection Act

- unfair trade practise u/s. 2(47):
 - very vast definition
 - false representations about traits / quality, need, repair, price, offers
 - not issuing cash memo / receipt in the format prescribed:
 - Description
 - Total price with breakup and tax

Offences under Consumer Protection Act

- Can take recourse to substantive provisions of Real Estate (Regulation and Development) Act, 2016
- Disclosures on MahaRERA website and quarterly updates
- False advertisement
- Possession
- Refund
- Alteration of plans
- Withdrawal from bank account
- Conveyance

Mediation in Consumer Commissions

- Cases involving serious and specific allegations of impersonation, fraud, fabrication of documents, forgery, and coercion, and cases which involve public interest or interest of numerous persons who are not parties before the Court are not permitted to be mediated
- Parties shall not initiate any arbitral or judicial proceedings in respect of a matter which is the subject-matter of mediation
- Settlement agreement shall not be discharged by death of any party and shall be enforceable against the legal representative of the deceased party

Powers of the Consumer Commissions

- Interim Orders
- Testing of goods through appropriate laboratory
- Summons for testimony or information
- Raid, search and seizure to protect evidence
- 'Electronic Service Provider' for electronic data

Powers of the Consumer Commissions

- Decrees:
 - to remove defect pointed out by the laboratory
 - refund with interest
 - compensation for loss or injury, including punitive damages
 - remove deficiency in service
 - discontinue unfair and restrictive trade practises, and not to repeat them
 - to issue corrective advertisement, and to cease and desist misleading advertisement
 - to provide costs to the parties

Execution of Consumer Court Orders

- Civil Execution:
 - Attachment and sale to pay debts
 - Execution of Deeds by Court
- Criminal Execution:
 - Imprisonment: 1 month to 3 years, Fine: Rs. 25,000 to Rs. 1 Lakh, or both
 - Repeat offender in other allottees' cases

Appeals in Consumer Commissions

- Review own Orders within 30 days, even suo-motu
- DCDRC CC appeal within 45 days to SCDRC, and subsequent appeal from SCDRC to NCDRC only on point of law, else SLP to Supreme Court
- Other appeals (SCDRC to NCDRC, CCPA to NCDRC) within 30 days
- Deposit 50% decretal amount
- Condonation of delay where applicable

Scope for Chartered Accounts

- ‘voluntary consumer associations’, and ‘recognised consumer associations’
- NGO’s like Mumbai Grahak Panchayat
- Application to be made to Bureau of Indian Standards pursuant to Bureau of Indian Standards (Recognition of Consumers’ Associations) Rules, 1991

Central Consumer Protection Authority

- CCPA a Regulator for Consumer industry to protect 'class' of consumers against:
 - violation of consumer rights
 - unfair trade practises
 - false or misleading advertisements
- Can file Consumer Complaints in Consumer Commissions
- Can issue Circulars like RERA for consumer rights, safeguards for consumer protection

Powers of CCPA

- Inquiry, investigation by Investigation Wing:
 - Raid, search and seizure
 - Summons to produce evidence or information
 - Engage experts
 - Testing at appropriate laboratory

Powers of CCPA

- Penalties:
 - Section 20 Orders:
 - Such Order as it deems fit
 - Mass-recall, reimbursement and discontinuation of unfair practises
 - Section 21 Orders:
 - Monetary and 'stop advertisement' penalties for false or misleading advertisement
 - Can be levied pending investigation
 - Contravention penalties (upto Rs. 50 Lakhs, and stop advertising project for 3 years)
 - Factors to be considered while passing CCPA Orders:
 - Population or area impacted
 - Frequency and duration
 - Vulnerability of people affected
 - Gross revenue earned

Section 20 and 21 Orders of CCPA

- Are like a Public Interest Litigation
- Can be imposed even suo-motu
- Express safeguards to prevent abuse:
 - Right to be heard
 - Express defences
 - Vexatious search provision
- Challenge to NCDRC within 30 days
- CCPA can file criminal Complaint to Magistrate (punishable with upto 6 months imprisonment or fine upto Rs. 20 Lakhs or both) for non-compliance of Orders

Defences Taken By Builders

- Approvals and permissions took time
- Illegal alterations and unauthorised construction be builder himself or by residents
- Force majeure hindering construction
- Market scenario

Against Co-operative Society

- It is well-settled that a member of a co-operative housing society is a 'consumer' of and against the society
- Member of a Society can file a consumer complaint against the society in respect of issues like:
 - Managing Committee or majority of members are hand-in-glove with the builder
 - not allotting parking as per bye-laws
 - not giving NOC's on time
 - rejecting membership applications and other applications for enjoying the property
 - not acting on unauthorised construction
 - not doing elections as per norms and on time
- not doing financial audits
- not doing structural audits and repairs
- not following redevelopment procedures
- not complying with the time to time directives of the government, and with the Co-operative Society Act, Rules and bye-laws
- not taking action against defaulters
- arbitrary behaviour and discrimination by the Managing Committee in the functioning of the affairs of the Society
- nuisance deliberately being caused in society

Consumer Cases In Co-operative Grievances

- Orders of the Registrars of Co-operative Societies do not provide for compensation, and the allottees can approach the Consumer Commissions against the Society for compensation to be paid
- Orders of the Registrar of Co-operative Societies are sometimes not complied with by the Society, and the allottees can approach the Consumer Commissions against the Society for compliance of Orders under unfair trade practise, restrictive trade practise and deficiency in service
- To avoid multiplicity of proceedings against builders and Society, allottees (as members of societies) as well as Societies themselves can approach Consumer Courts. The disputes can be fought in same Court in a single case including compensation

Analysis of Strengths of Consumer Protection Act, 2019

- Inclusive definitions, and inclusion of substantive provisions of RERA
- Local territorial jurisdiction
- “Restrictive trade practise” against price and stamp duty escalation
- “Unfair contract” provisions:
 - ensure accountability, transparency and relief in case of joint-ventures / partnerships and obligations
 - ensure relief against arbitrary and one-sided clauses, and manipulative tactics like rejecting disputed payments
 - can be invoked to set-off a chain-reaction of reliefs for the whole project or against several projects
- “Misleading advertisement” tackles wide range of marketing gimmicks

Analysis of Strengths of Consumer Protection Act, 2019

- CCPA and Consumer Commissions can summon persons to give evidence, and can also raid and seize electronic as well as non-electronic evidence
- Enforcement of Orders:
 - Attachment and sale of builder's property to meet debts under decree
 - Executability of Deeds by Court
 - Numerous and stringent penal provisions risk builder becoming habitual offender:
 - Punishment in criminal execution of Consumer Court Orders
 - Punishment through CCPA Orders
 - Punishment for non-compliance (execution) of CCPA Orders
 - Section 89 compulsory fine and imprisonment for misleading advertisement
- Monetary penalties are also very high

Analysis of Strengths of Consumer Protection Act, 2019

- Orders like “fix the title”, and “pay stamp duty escalation”
- Percentage of interest, and compensation
- Prescribed format for bill and receipt
- Grievances by or against Co-operative Societies
- Mediation settlement not discharged by death of parties
- Mediation prohibited in cases of fraud, etc.
- Persons in a project are a class of consumers protected by CCPA, and CCPA proceedings are like a Public Interest Litigation

Thanking You

Adv. Mithil Vinod Sampat

B.L.S., LL.B. (Advocate High Court)

mithilvinodsampat@gmail.com