

When a builder fails to deliver on agreement

COURTS DECIDE In a disputed agreement between a builder and landowner, the latter can appeal for justice as a consumer

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Building construction arrangements are common in India, allowing a builder to construct a structure on the land owned by another party. The property is normally shared between the builder and the landowner. The builder can also make cash payment to the landowner and hand over to him the built-up area.

Courts in India when handling such building arrangements have often had to decide if the owner of the land could make a complaint under the Consumer Protection Act, 1986. Could owners be considered as consumers and builders as service providers?

In many cases, the courts have held that the landowner is not a consumer under section 2(1)(d) of the Act as his or her objective was to enter into an agreement with the builder to get the construction completed for selling or renting it to earn a profit. As the landowner had a profit motive, he or she could not be considered a consumer and therefore could not maintain a complaint under the Act.

A similar question arose in the matter of Bungea Daniel Babu versus Sri Vasudeva Constructions and Others. The Supreme Court (SC) set aside the order passed by the National Consumer Dispute

Redressal Commission (NCDRC) and State Consumer Dispute Redressal Commission (SCDRC) that the complainant landowner was not a consumer under the Act. NCDRC and SCDRC based their judgment on the assumption that the landowner had made an arrangement with a builder with commercial purpose in mind and thus fell out of the purview of consumer as per the Act.

The landowner and the builder signed a memorandum of understanding (MoU) in which the builder was responsible for construction, timely delivery, obtaining approvals and sanctions. Non-compliance of the same attracted penalty. The builder failed to comply with the timelines as per the MoU and also defaulted/ made deviations/ omissions in the sanction plan.

When the landowner approached the district forum, it said the transaction between him and the builder could not be termed as joint venture as the landowner came within the definition of consumer under section 2(1)(d) of the Act. Aggrieved by the order, the builder appealed to the SCDRC, which reversed the district forum's order. SCDRC held that the transaction was meant for a commercial purpose, as the landowner had the intention to get it constructed, sell, let it on rent and earn profits. The NCDRC concurred with the view of SCDRC.

The complainant filed a special leave before the SC, which had to decide whether the complainant was within the defi-



JOINT AGREEMENTS

In case of a true joint venture agreement between a landowner and builder, the former is a true partner or co-adventurer, having a say or control in the construction, participation in business or management of the venture and a share in profit/loss.

In such agreements, the landowner provides the land and the builder constructs a building. Then, the landowner and builder share the constructed area.

The landowner who gets some apartments can retain the same or dispose of his share of apartments with corresponding undivided shares to others.

■ A landowner is a consumer and the builder a service provider. In case of deficiency in regard to construction, it is a consumer-related dispute. ISTOCK

inition of consumer read with explanation of the Act.

The SC said in a true joint venture agreement between a landowner and builder, the former was a true partner or co-adventurer, having a say or control in the construction, participation in business or management of the venture and a share in profit/loss. Such an agreement is rare. Normally in such agreements, the landowner provides the land and the builder constructs a building. Thereafter, the landowner and builder share the constructed area. The landowner who has some apartments can retain the same or dispose of his share of apartments with

corresponding undivided shares to others. The usual feature of such an agreement is that the landowner would have no control or say in the construction or management of the business.

Except for ensuring the landowner, a certain constructed area and/or certain cash consideration, the builder would ensure absolute control in himself, only assuring quality of construction, compliance with the local, municipal laws and timely delivery of constructed area/building to the landowner.

The SC also stated that the title/caption/nomenclature of the instrument/document was not determinative of its nature

or character. Mere use of the words "joint venture" or "collaboration" in the title or body of the agreement did not make the transaction a joint venture, until and unless there were provisions of shared control of interest, management, profits and losses.

After scrutiny of the provisions of the MoU, the SC held that the landowner was neither a partner nor a co-adventurer. He had no say or control over the construction, nor did he participate in the business. The only thing he was entitled to was a certain constructed area. Thus, the agreement could not be termed as a joint

venture. SC said availing of services of the builder by the landowner for construction, for a consideration was an important aspect and going by the same the landowner was a consumer and the builder a service provider and if there was deficiency in regard to construction, the dispute raised by the landowner would be a consumer dispute.

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I am an NRI living in New York. I have given my property in Delhi on lease for a period of three years. However, I don't have time to go back to India and get the lease deed registered. I have relatives in India willing to help me. Can my relatives register the sale deed on my behalf?

- Nawaz R Ali

Yes, you can get the lease deed registered through your relatives by executing a power of attorney in favour of your relative and authorising them to register the lease deed on your behalf.

I have taken a shop/store on lease in a shopping complex in Delhi. As per the lease deed, I have been given a rent free period of three months to complete fitouts in the shop and commence store operations. I have been unable to complete the fit outs. Am I still liable to pay rent?

- Mihir Tandon

This depends on the terms of lease deed. If it is provided that despite non-completion of fitouts and non-commencement of store operations within the rent-free period, rent shall commence on expiry of the rent-free period, then you shall be liable to pay rent after expiry of rent free period irrespective of non-completion of fitouts and non-commencement of store operations.

I stay in a cooperative group housing society in Delhi. There is seepage in my apartment. The plumber identified the reason as leakage in a pipe in my neighbour's apartment. Despite requesting my neighbour to rectify the leakage, no action has been taken by him. What remedy do I have?

- Om Prakash

As per the applicable law, you may approach the management committee of the group housing society representing the problem of water seepage in your society. The management committee is obliged to carry out inspection of the flat within 15 days. If it comes to the conclusion that the representation is correct, the committee will advise your neighbour to take corrective steps immediately and if no action is taken within seven days, the committee is obliged to initiate action for getting the defects removed if necessary by taking police assistance for it.

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Will homebuyers who have under-construction properties benefit with the provisions of the Real Estate (Regulatory) Act or RERA once the Act is implemented by the different state governments?

- Rajeev Sharma

This will depend on the provisions of RERA as implemented in the concerned

state. So far it is yet to be implemented in any state or union territory.

I have booked an apartment with a builder and hope to get possession by the end of this year. My apartment is on the seventh floor and a person I know has an apartment on the third floor in the same build-

ing. What do we have to do if we mutually agree to interchange the apartments booked by us due to location priorities? What is the procedure to follow for this? How can we do this and are there any charges we have to pay?

- Yogesh Bhasin

An exchange of apartments is nothing but sale of apartments by one person to another. It will attract stamp duty based on the market value of the property of greater value. Capital gains tax will be payable by both parties on the sale value minus the cost of

the original apartment. The builder may also charge an amount for a no-objection certificate for this exchange if it's allowed under your purchase agreement.

I got divorced in April 2015 and the present house where I live is in my and my former husband's names. In the divorce decree it is mentioned that the property is solely mine and I can dispose it whenever I want and my ex-husband will have to sign or give me the power of attorney. Is this fine or should I get the property transferred in my name solely from a

legal point of view?

- Pooja Sharma

Consult a lawyer and get a proper transfer deed signed in your name and get it duly registered with the registrar. Talk to a local lawyer regarding stamp duty implications on such a deed. This will ensure that you have a proper title to the property.

I own a 1 BHK flat and my mother a 1 room kitchen and another unit for which possession has not been received. The home loans have been closed. Can I now buy a 2BHK

flat and get tax benefits? Kindly advice.

- Shantaram Chavan

I am assuming you are currently staying in your own 1 BHK flat. If you purchase another 2 BHK flat, the interest payable on the home loan taken to acquire that flat is deductible. The limit for deduction will be ₹2 lakh per annum if you are staying in that new flat.

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