

# Parixit Pai Fondekar vs Gera Development Private Ltd. on 17 March, 2017

1

BEFORE THE STATE CONSUMER DISPUTES  
REDRESSAL COMMISSION  
PANAJI - GOA

C. C. No. 26/2015

1. Mr. Parixit Pai Fondekar  
aged 35 years, s/o Shri. Prasad Pai  
Fondekar, businessman,  
and his wife
2. Smt. Sapna Pai Fondekar alias  
Sapna Mordekar,  
Aged 34 years, Lawyer  
both r/o Hira Kunj, Near Power House  
Aquem, Margao, Salcete-Goa.

... Complainants

V/s.

Gera Development Private Ltd.  
Through its managing Director,  
Mr. Rohit Gera  
having its registered office at  
200 Gera Plaza, Boat Club Road,  
Pune - 4000.

....Opponents

Complainant present in person.  
O.P. represented by Adv. Shri. J. Reis.

Coram: Shri. Jagdish G. Prabhudessai, Member  
Smt. Vidhya R. Gurav, Member

Dated: - 17/03/2017

ORDER

[Per Smt. Vidhya R. Gurav, Member] By the present order we shall dispose of the following Complaint No. 26/2015. To dispose of the present Complaint some facts are required to be stated which are as under:-

2. The Complainants as a joint co-owners and purchasers had entered in an agreement of sale of a flat No. 817 with OPs in the building named "Gera Astoria" on 28th August 2009, which flat was of 123 sq. mtrs. of size. The said agreement was registered before the Sub-Registrar of Panaji. Complainants had paid all dues and

payments towards the said flat at the time of agreement of sale and thereafter on 26/02/2014 they entered into sale deed with the OPs.

Though the agreement was executed in August 2009 the possession of the said unit was to be handed over on or before 28/08/2011 i.e. within 24 months from the date of the execution of agreement for sale. But the same was handed over on 25/05/2012. Hence there is a delay in handing over possession. The delay resulted in a haphazard construction of the complex, which has given rise to a various grievances which remain unattended till date. Also Complainants suffered huge financial losses and mental torture. They are also deprived of enjoying the premises and had to pay huge sum due to increase in taxes payable on account of delay. The possession was handed over on 25/05/2012 as per the complaint. But due to the various defects in the flat so also since the parking allotted was useless due to leakage, the Complainants could not relocate in Panjim.

3. Also as per Clause 7 (m) of the agreement of sale the OPs have reserved a unilateral discretion to maintain the building for a maximum period of 5 years. OPs further had given a warranty for a period of 5 years against any defects or adverse effect on account of any infirmities in construction. The said warranty also reflects in Clause 8 of the sale deed dated 26/02/2014 and warranty is still in force. The complainants' further case is that there is a leakage in their flat due to low quality construction and lack of adequate water proofing of the terrace. The water from the adjacent flat is gushing in the flat of the Complainant thereby collapsing the ceiling of flat. Also large crack developed due to the machinery used by the OPs. OPs tried to rectify the problems thereby trying to re-do the terrace flooring. But still the defects are existing and OPs failed to rectify the defects.

4. Also even though the Complainants have made all the payments on the date of execution of the sale deed, the OPs have withheld the sale deed of the Complainants. Secondly, the Complainant had paid for covered parking space and had purchased under the agreement of sale which is also mentioned in the sale deed. But since due to the leakage in the parking lot from past 3 years, which is not repaired till date, Complainant had to park the vehicle at a distance of more than 700 mtrs. to the entry of the lift. Since the open parking is small and most of the time it is full. Also the elevators in the monsoon seasons remain un-operational due to water logging in the basement which the OPs have not resolved. Since the complainant No. 2 stays in her In-laws house she occasionally visit the premises for which she has to climb eight floors as the lifts are not functional for more than two months.

5. Till the date the OP has not rectified the defects and hence the complaint for the prayers prayed. Based on the warranty agreement dated 23/05/2012, OPs filed written submissions taking preliminary objection that the complaint is beyond the period of limitation. The flat was purchased for commercial purpose and hence the Complainant is not a 'Consumer' under C. P. Act 1986. The subject matter of the complaint involves disputed questions of technical nature which cannot be dealt with summary manner and hence the remedy is before the Civil Court. The subject matter is beyond the pecuniary jurisdiction of this Commission and hence no power to entertain the complaint. The subject matter of the warranty agreement dated 23/05/12 on which the complaint is founded is required to be placed before an arbitrator in case of its breach or unenforceability for any reason and hence dispute raised in the complaint can be adjudicated by arbitral tribunal. It is

contended by OP that since the execution of Articles of agreement dated 28/08/2009, the OP has performed all its obligation thereunder and it is the Complainant who has been defending making payment in terms of agreement dated 28/8/2009 and warranty agreement dated 23/05/12. The agreement dated 28/08/2009 also makes provision for extension of period to complete the project for reasons and due to circumstances beyond the control of OP. The OP contended telephonically and via email to assume possession of the suit flat as early as March 2012, but it is the Complainant who delayed in assuming possession which was taken on 23rd May 2013 vide possession letter dated 23/05/12. OP contended that suit flat was purchased as an investment and for commercial purpose. The Complainant took possession of the suit flat only being satisfied with the condition of the suit flat and allotted car park. The OP contended that Complainant No. 2 chose to travel by car for her own convenience. The OP states that they always provide an instant and immediate response to grievances of the customer and they even have created a mobile app through which customer can log in their queries/complaints. As on filing of the written version the Complainants have never taken recourse to the said App. The warranty agreement dated 23/05/12 was executed between the Complainants and OP was to provide a certain facilities of preventative maintenance and repairs. The warranty agreement records that in event any monies are payable by the customer to developer, the developer shall refrain from providing facilities listed in the said agreement dated 23/5/12. The OP denies any leakage so also collapsing of ceiling in the suit flat. The Complainant have tempered with the roof structure and hence makes the warranty void. Clause 7 (c ) of the Deed of sale dated 26/2/2014 records that once purchasers take delivery of the unit, they shall have no claim against the developer in respect of any item of work in the said unit which may be alleged not to have been carried out or completed. Complainants have failed to make good payment towards common area maintenance and other changes under the agreement dated 28/08/2009 and agreement dated 23/05/12. Complainant assured to the OPs on registration of Deed of Sale dated 26/2/14 that they would make full payment and in a good faith the OP completed all registration formalities. The Complainant assured OP that they will collect sale deed dated 26/02/14 only after making payment of all dues and arrears but till date failed to make payment and collect sale deed dated 26/2/14. The OP contends that the amount for maintenance was as per schedule 2E r/w Clause 7 (1) of agreement of sale and Clause 7 of the warranty agreement and denies that monies towards maintenance amounts to extortion. Also the complaint vide email dated 13/7/15 was acted upon and duly redressed by the OP. It is also contended by OP that lack of maintenance and cleanliness can lead to the presence of cockroaches, insects and spider in the unit. The OPs contends that Complainants have not purchased the car parking space but have been allotted the exclusive right to use the same. The grievance pertaining to the leakage was brought to the notice of the OPs recently vide (email/letters). Complainants have defaulted in making payments towards maintenance and sinking fund under article of agreement dated 28/08/2009 to the tune of Rs. 1,35,444/- for a period commencing from 1/4/13 till the date and also under warranty agreement dated 23/5/12. The leakage in the parking was due to the work done in the toilet of unit No. 118 by the owners thereof and this was brought to the notice of the OP in June 2015.

6. Since the Complainant has not paid the amount of maintenance under warranty agreement cannot demand any services from OP. The OP denies the water logging problem in the basement and it is stated that OP has rectified the drainage issue at Gera's Astoria under protection order granted by Hon'ble High Court. There are 8 elevators in the building and Complainants refused to

use these elevators is unfathomable and mischievous and the complaint is filed to harass the OP.

7. The demanding of money towards maintenance was under

article of agreements and under warranty agreement to which the Complainants are signatories. Clause 12 of the agreement dated 28/08/09 contemplates execution of transfer deeds in favor of society/Association/body only after all the units in building have been sold and disposed of. The maintenance claimed by the OP is towards facilities/amenities provided and which continue to be provided by the OPs in the projects. The OPs have executed a several individual sale deeds till date. Till date neither Complainant have paid maintenance nor approached the OP to collect the sale deed. The OP have not committed any unfair trade practice. The present complaint is filed to extract money from the OP. Since the Complaint is devoid of any merits it is required to be saddled with compensatory costs. When the matter was being finally argued the Complainant filed amendment application to amend prayer clauses in the complaint which was allowed by this Commission by its order dated 23/12/16. Accordingly the amendment was carried out and Lr. Advocate for the OP filed a memo dated 31/01/17 to file application form dated 20/7/2007 on record. Para 8 of the condition of the application states that the exchange or change in allotment of premises/parking spaces or change in name of applicants shall not be considered which is signed by the Complainant and agreed for the same.

8. Both the Complainant No. 2 and OP filed affidavit in evidence whose contents are same as that of the Complaint and written version. Written arguments were filed by both Complainants and OP. Heard oral arguments. Heard Ld. Counsel Adv. Sapna Pai Fondekar in person and for Complainant No. 1.

9. It is submitted by Ld. Counsel that agreement of sale was executed in 28/8/2009 and the warranty agreement is of 23/5/2012, which is for a period of five years and is still in force and based on warranty agreement the present complaint lies before this Commission. The certain defects claimed by the Complainants against OP, OP have failed and neglected to maintain the premises so also the car parking as per agreement of sale and sale deed. Also there is leakage in the car parking lot. Elevators are not functional, most of the time in monsoon season due to the water logging in the basement. Also a water logging problem in the Complainants' bathroom which is not rectified till the date. There are cracks developed in the main door and walls on account of sub-standard material used. Also OP have fraudulently withhold the original sale deed of the Complainant. The OP inspite of notice sent not rectified the defects. Due to this the Complainants has suffered a tremendous loss, mental agony and torture and same continues till the date and hence the continuous cause of action. Complainant has relied upon M/s. Narne Construction P. Ltd., v/s. Union of India &Ors. in Civil Appeal Nos. 4432-4450 of 2012 (Arising out of S.L.P. (C) Nos. 3499- 3517 of 2011) it was held that an action of any builder, statutory or private, involving offer of plots for sale to its customers/members with an assurance of development of infrastructure/amenities, lay- out approvals etc. is a 'service' and the consumers would be entitled to compensation in case of deficiency.

10. It is submitted by Complainant that they have purchase the premises for residential purpose and the opponent is only trying to put up a false case of the commercial nature only with a view to avoid their liability. Not a single statement on oath nor evidence to that effect that Complainant had even let out premises on rent and hence premises has not used for commercial purpose.

11. The Complainant had availed the services from the OP which come within the purview of C. P. Act and hence this Court has jurisdiction. Complainant has relied upon the judgment of Hon'ble Supreme Court in Faqir Chand Gulati v/s. Uppal Agencies Pvt. Ltd. &Anr. 2008 (5) Supreme 76, Hon'ble Apex Court held that any defect in Construction activity would be denial of comfort and service to a consumer. When possession of property is not delivered within stipulated period the delay so caused is denial of service. Such disputes or claims are not in respect of immoveable property but deficiency in rendering of service of particular standard, quality or grade. The OP is only with the view to harass the Complainants trying to take a frivolous plea that this Forum does not have the jurisdiction and that the Complainants to approach the Civil Court.

12. It is submitted by Ld. Counsel that the Complainant were never intimated nor called upon to take the possession of the flat in the month of March 2012 or thereafter and hence the false statement without any document or evidence. It is also submitted by the Ld. Counsel that OP has taken a defense that the matter is to be adjudicated by the arbitral tribunal is incorrect. Further submitted that Complainants have not altered the premises in any manner after taking the delivery of the said premises. It was the flat adjacent to that of the Complainant wherein the false ceiling had collapsed. OP admit in para 9 that there being a leakage in the flat of the Complainant.

13. Further submitted by the Counsel that even presuming without admitting that if the Complainant have not paid the maintenance amount that does not entitle the OP to withhold the sale deed which is the property of the Complainant also not carry out the repair works to the Complainant premises. The OP does not have authority to withhold the sale deed under agreement to sale nor sale deed. Also Clause 1.7 of the agreement of sale provide remedy to the OP if dues are not paid. Complainant relied upon the case of Veenus& S. V. Projects Vs. A. Saida Reddy [2013] 2 CPR (NC) 240, wherein the Hon'ble National Commission dismissed the Revision Petition challenging the order directing the return of the original sale deeds and order directing withdrawal of amount.

14. It is submitted that there is a leakage in the parking lot and the water is dripping like a stream during monsoon, which defect is not rectified till date. Complainant has paid for the parking lot which is denied by the OP. Further the water logging drainage issue was so grave that the Hon'ble High Court had to interfere to rectify the same. Due to water logging all the 8 elevators were jammed during monsoon.

15. It is also submitted that Complainant had sent a notice to demand sale deed from the OP which is on record which is not denied by OP in reply to the said notice.

16. Complainant further placed reliance on Pawandeep Singh Bawa V. Emaar MGF Ltd (2015) 1 CPR 50, it was held that OP failed to produce on record any evidence that Complainant were property

dealers or they intended to purchase the unit for commercial shop/space by way of investment with a view to sell the same/rent out the same - They very much fell within definition of consumers as defined under Section 2(1)(d)(ii).

17. In Narne Construction Pvt. Ltd. vs. Union of India 2010, Supreme (AP) 752, the Complainants had filed a consumer complaint seeking reliefs which included to direct the registration of respective plots and in some case to release the sale deeds as the Complainants had made full payments as per terms and conditions and waited for registration. OP kept dodging the registration of plots and demanded additional amount which were not part of the agreement and was also collecting maintenance charges and threatened to withhold registration documents in case the maintenance amounts were not paid. The Hon'ble Andhra Pradesh High Court was pleased to hold that complaint are maintainable and amenable to the jurisdiction of the Consumer Forum.

18. While replying the counter arguments advanced by Ld. Counsel for the OP. Complainant submitted that she does not have the copy of the warranty agreement dated 23/5/12, hence no question of suppressing the said document. Further Ld. Counsel submitted that email at page 108 and 109 of the complaint are addressed to the OP dated 13/7/15 and 15/05/15 mentioning the defects in the unit to the opposite parties. It is further stated that Complainants are before the Court based on warranty agreement dated 23/5/12 which is for the period of 5 years and hence the cause of action is continuous one and are within the period of limitation.

19. Hence complaint be allowed as per the prayers in the Clauses/amended clauses in the Complaint.

Heard Adv. Tavora so also perused the written submission.

1) It is submitted by Ld. Counsel that Complaint appears to be hit by the prohibition contained in Section 2(1)(d)(ii) of C. P. Act 1986. Since the Complainants in the instant case have purchased flat unit No. 817 as an investment only to be rented out for accrual of income, the Complainants case does not come within the purview of the definition of 'consumer' under the Act and hence required to be dismissed at the threshold and ab initio since purpose of availing services of the OP is clearly commercial and hence remedy is before the Civil Court. Further the subject matter of the complaints involves disputed questions of technical nature and concepts unique and peculiar to the science of Engineering and Construction which cannot be dealt with in a summary manner and hence the parties are required to be relegated to the remedy before the Civil Court.

2) It is further submitted by the Ld. Counsel for OP that the complaint is filed beyond the period of limitation prescribed U/S 24A of C. P. Act 1986 viz. two years from the date of cause of action arises. In the instant case, the relief sought is to rectify/repair the alleged defects/deficiencies in the said unit No. 817 and also compensation therein till such alleged defects/deficiencies are rectified. Hence cause of action accrued from the date the possession is handed over to the party of the said Unit No.

817 to the Complainant i.e. 23/05/12 as per possession letter signed by the Complainants and as such the complaint would have been filed on or before 23/5/2014. It is further submitted that assuming without admitting that possession is handed over on 25/5/2014 as alleged by the Complainant, still the complaint is beyond the period of limitation and hence ought to be dismissed. It is further submitted that Complainants has stated that the cause of action arose on 04/04/2015 when the time limit to hand over sale deed is concluded as per legal notice dated 27/03/15, however computing limitation period on such promise is clearly erroneous, since relief of handing over of Deed of Sale is not even envisaged as a permissible legitimate relief within the scope of Section 14 of CPA 1986. Reliance is placed on V. N. Shrikhande V/s. Anita SenaFernandes reported in AIR 2011 SC 212 wherein the Apex Court observed as follows:-

" If the complaint is barred by time, consumer forum is bound to dismiss the same unless the consumer makes out a case for condonation of delay under Section 24A(2)".

20. Further reliance is also placed on Apex Court judgment of State Bank of India V/s. B. S. Agricultural Industries reported in AIR 2009 SC 2210 which lays down that the provision of limitation U/S 24-A is peremptory in nature and requires the Consumer Forum not to admit complaint filed beyond limitation. Further reliance is also placed on Apex Court judgment in case of M/s. Kerala Agro Machinery Corporation Ltd., reported in AIR 2002 SC 1210 which provides that order passed by the State Commission can be interfered with at any stage on point of limitation.

21. Ld. Counsel further stated that present complaint cannot be entertained by this Commission to inflation in the value of subject matter to bring it within the fold of pecuniary jurisdiction. Reliance is placed on 2044 (1) BCR 551 in the case of Krishna D. Singh Vs. Pavan T. Punjabi and Anr., where the State Commission held that:

"the jurisdiction of the Forum has to be determined on the basis of the value of the subject matter of the dispute and not by the result of the decree or award..."

22. Further it is argued that Complainants at prayer (b) are seeking relief only to enhance the value of subject matter in order to facilitate filing the complaint before this Commission. Reliance is placed on the judgment of Hon'ble National Commission in T. P. Rajakumar vs. ICICI Bank in O.P. No. 273/1999.

23. Further Ld. Counsel submitted that complaint is founded is based on warranty agreement. Ld. Counsel pointed out the Clause 7 and Clause 8 of the warranty agreement and further stated that as per Clause 10 of the warranty agreement any dispute between the parties to be placed before arbitrator/s in case of its breach or unenforceability. Hence the dispute raised in the present complaint can be adjudicated upon by arbitral tribunal under the provision of the Arbitration and Conciliation Act, 1996.

24. It is further submitted that as per Clause 1.4 of the warranty agreement, warranty period is for five years from the date of possession of the unit. Possession of the unit was handed over on 23/5/12 by signing by both the Complainants. As per letter of possession Complainants has to pay maintenance amount 12 months in advance but the email at page 155 to page 158 particularly email dated 24/10/15 shows that the Complainant has not paid charges towards common area maintenance charges against unit no. 817 at Gera's Astoria. Since the maintenance amount is not paid, the sale deed is withhold by the OP.

25. It is further submitted that as regards contention of Complaints that possession of the unit no. 817 was handed over to them beyond 24 months as per agreement dated 28/8/2009, hence special mention is required to be made to Clause 6.1 of the agreement which is not exercised by the Complainants. Further Ld. Counsel pointed out Clause 7 (l) in respect of maintenance and sinking funds and Clause 7 (n) in respect of becoming members of Gera's Astoria. Clause 8 of the agreement speaks about consequences in case of default by purchaser before or after possession. Also as per Clause 9.1 of the agreement, the Complainant had agreed for the maintenance of common amenities which is not paid till date and OP is not liable for withholding the sale deed.

26. Further as per Clause 7 (j) of the agreement state that purchaser shall pay in advance for 12 months, monthly maintenance charges @ Rs. 18.80 per sq. mtr. and sinking fund charges @ 2.70 per sq.mtr. in favour of "Gera Astoria Maintenance Account" and "Gera's Astoria sinking account" as mentioned in possession letter which is not paid till date.

27. Further as per Clause 8 of Sale Deed on 23/5/12 developer/Vendor has executed a warranty agreement with the purchaser which shall be binding on both the parties until the expiry of the warranty period in terms of agreement dated 28/08/2009.

28. It is further submitted that Complainants were called telephonically or via email to assume possession of the suit flat as early as March 2012, however it is Complainant who delayed in assuming possession of flat and signing the possession letter only on 23/05/12. Further since from the execution of agreement of sale dated 28/08/2009, OP has performed all its obligation but time and again Complainants have defaulted in making payment to OP in terms of agreement of sale dated 28/8/2009 and warranty agreement dated 23/5/12. OP has replied to all the queries of the Complainants via emails and letters hence Complainant cannot attribute deficiency in service provided by the OP. It is further submitted that warranty agreement dated 23/5/12 was executed between Complainant and OP was for providing certain facilities of preventive maintenance and repairs which further clearly records that in event any monies are payable by customer to developer, the developer shall refrain from providing the facilities listed in the said agreement dated 23/5/12. Further reliance is placed on Hon'ble Apex Court case of V. Kasturi vs. Managing Director, State Bank of India reported in AIR 1999 SC 80 that Contract Act applies to all, litigants before the Commission under the Consumer Protection Act included. Further the Complainant assured OP that they would make full payment which is liable to be made by them to OP towards the common area maintenance and other charges under agreement dated 28/8/2009 and warranty agreement dated 23/5/12 and hence based solely on this assurance OP completed the registration formality pertaining to the Deed of sale dated 26/2/14. After registration of sale deed, Complainant defaulted



in making payment of the dues and arrears and failed in collecting the sale deed from the OP.

29. It is further submitted that claiming of money towards maintenance is as per schedule 2E r/w Clause 7(l) of the agreement dated 28/08/2009 and Clause 7 of the warranty agreement dated 23/5/12 between the parties. Hence there is no illegality committed by the OP by demanding money in view of the facilities/amenities provided and which continue to be provided by OP.

30. Further it is submitted that car parking is not purchased by the Complainant but they have been merely allotted with exclusive right to use the same. There was no leakage in car park space for last three years and the grievance pertaining to the leakage was brought to the notice of OP only in June 2015 which has been rectified. It is further submitted that Complainant has defaulted in making payment towards the maintenance fund and sinking fund as stipulated under agreement dated 18/08/2009 to the tune of Rs. 1,35,444/- for the period commencing from 1/4/13 till 31/3/16 and as per the warranty agreement dated 23/5/12. Hence Complainants cannot demand any service from the OP as they have failed to discharge the obligation. Further as far as drainage problem is concerned, the same is rectified under protection order granted by Hon'ble High Court in W. P. No. 414/15. It is further submitted that there are 8 fully functional working elevators in the building which were refused by the Complainants to use.

31. Further it is submitted that Complainants cannot claim the deficiency as violated the Section 73 and 74 of the Contract Act. It is also stated that complaint is to be decided on the basis of the best evidence produced before the Court but here there is no iota of evidence is produced to establish the alleged defects. So also the amended Clause of alternate parking cannot be granted in view of the Clause 8 of condition of application form dated 20/07/2007.

32. We have perused entire complaint, written version, evidence, written arguments and oral arguments and comes to a following finding/conclusion.

1) It is correct that based on warranty agreement dated 23/5/2012, the present complaint is filed. The warranty agreement is for a period of 5 years i.e. valid till the May 2017, and the defects occurs in 2015 i.e. during warranty period, hence redressal of defects were informed to the OP via email dated 15/05/2015 and 13/07/2015. The OP says they acted upon said redressal. The OP says that the date of possession is 23/5/12 and whatever defects to be pointed out were to be within 2 years from the date of possession i.e. in May 2014 and hence present complaint is filed beyond the period of limitation. We do not agree with the submission of the OP since the warranty agreement is in force and subsisting till 2017. The cause of action is continuous one and hence present complaint is filed within the period of limitation and hence in terms of Sub-Section (1) of Section 24-A of the Act.

2) Both Complainant and OP are bound by the warranty agreement. Both parties have signed warranty agreement and Contract Act is binding on both the parties. It appears from the email dated 15/4/2015 which is on record shows that the Complainants has defaulted in making payments towards maintenance fund and

sinking fund as stipulated under agreement of sale dated 28/08/2009 and warranty agreement dated 23/5/2012 for the period commencing from 1/4/2013 till the date. It appears from the documents on record that maintenance charges were claimed as per schedule 2E read with Clause 7 (I) of the agreement dated 28/08/2009 and Clause 7 of warranty agreement dated 23/5/12 and hence it cannot become extortion of money since it was agreed between the parties. Since Complainants has not performed their part of Contract as per agreement dated 23/05/12, hence, there is a breach of promise on the part of Complainants by not paying the amount. The OP was sending email time and again to make the payment of maintenance charges from 2014 onwards but Complainant did not pay attention. Even then the OP executed a deed of sale on 26/2/2014, thereafter also maintenance was not paid and which is continued to be paid till the date. Moreover the Clause 7 of the warranty agreement states that the developer may at his discretion withhold providing facilities under the warranty listed herein in the event there any monies payable to the developer by the customer for any reason whatsoever, however once the amount payable to the developer are paid then the developer shall not withhold providing the facilities as listed herein. Since the maintenance is not paid since from April 2013 till date, OP is not bound to render any services to the Complainant as per warranty agreement. Complainant is based on warranty agreement so also the services are rendered as per warranty agreement. Since the Complainant has failed to pay the payment, OP cannot be held liable for not rendering services. Hence there is no "deficiency of service" on the part of OP.

3) The second objection was taken by Ld. Counsel for OP that the case is to be referred to the arbitrator as per Clause 10 of the warranty agreement. But since there is a judgment passed by this Commission in CC No. 10/2010 dated 15/12/16 i.e. Mr. Rajesh Malhotra vs. Acron Developers Pvt. Ltd., deciding the same issue of Arbitration, Ld. Counsel submitted that he is not pressing the arbitration clause where it has been authentatively held that the protection provided to the consumer under the act is in addition to the remedies available under any other statute, including the consequents arbitration under the Arbitration and Conciliation Act 1996.

4) As far as said defects in the flat No. 817 and parking lot is concern, there are only two email addressed to the OP to rectify the defects. Except this no other iota of evidence to establish the defects. It is also admitted by Complainant that OP tried to rectify the problem by trying to redo the terrace flooring and thereafter whatever defects were remaining are not rectified. As far as parking lot is concern advocate Tavora submitted that OP has rectified the defects in parking lot. But Complainant has not produced any evidence thereafter to show that the defects are still subsisting in the unit and the parking lot.

5) As far as withholding the sale deed in possession of the OP is concern, Complainant has paid maintenance till March 2013 and thereafter the Complainant

has not paid maintenance, even then the OP executed the sale deed on 26/2/2014, but the maintenance as per warranty agreement is not paid and hence failed to collect the sale deed from OP which is rightly submitted by the advocate for OP. In view of the above, prayer "c" is rejected.

33. All the citation produced by the Complainant are not applicable to the facts and circumstances of the present case.

34. As far as amended prayer a(1) is concern of alternate parking, OP has produced an application form dated 20/07/2009 signed by Complainant of which Clause 8 states that the exchange or change in allotment of premises/parking spaces or change in name of applicants shall not be considered which is signed by both the Complainants. In view of above amended prayer Clause is also rejected.

35. After discussing all the points, we pass the following order.

ORDER The Complaint is dismissed with no order as to cost.

[Shri. Jagdish G. Prabhudessai]  
MEMBER  
sp/-

[Smt. Vidhya R. Gurav]  
MEMBER