

R. Raghunath Urappakkam Kancheepuram ... vs M/S Columbia Pacific Communities Pvt ... on 16 March, 2023

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IN THE TAMIL NADU STATE CONSUMER DISPUTES
REDRESSAL COMMISSION, CHENNAI.

Present: Hon'ble Thiru. Justice R.SUBBIAH ... PRESIDENT
Thiru.R VENKATESAPERUMAL ... MEMBER

F.A. No.381 of 2022
(Against the Order, dated 01.07.2022, in C.C. SR.No.507
of 2021, on the file of the DCDRC, Kancheepuram @
Chengalpattu)

Orders pronounced on: 16.03.2023

1. R.Raghunath,
S/o.Rajagopal.

2.Vijaya Raghunath,
W/o.R.Raghunath,
Both residing at
A-36, Desh Apartments,
No.239, GST Road,
Urapakkam 603 210.
Kancheepuram District. .. Appellants / Complainants.
vs.

M/s.Columbia Pacific Communities
Pvt. Ltd., (Formerly Known as
Serene Senior Care Pvt. Ltd.),
Rep. by its Chief Executive
Officer - Mohit Nirula,
Serene Adinath,
283/1, Ramakrishna Street,
Chettiyar Thottam, Vandaloor,
Chennai 600 048. ... Respondent / Opposite party.

For Appellants / Complainants : M/s.Ralph V.Manohar
For Respondent/Opposite party : M/s.Sivakami Shanmugampillai
Amicus Curiae : M/s.V.Balaji & M/s. K.Kumaran

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This First Appeal came up for final hearing on 10.01.2023
and, after hearing the arguments of the respective counsels
and perusing the materials on record and having stood over
for consideration till this day, this Commission passes the
following:-

ORDER

R.Subbiah, J. - President.

The present First Appeal is preferred against the order, dated 01.07.2022, passed by the DCDRC, Kancheepuram District @ Chengalpattu, in C.C. SR.No.507 of 2021, declining to take on file the complaint filed by the appellants herein/complainants on the ground of maintainability.

2. Briefly, it is the case of the appellants/complainants that the OP/respondent herein, which renders services related to senior citizens, had developed a project called "Project Serene Pelican"

specifically meant for senior citizens; that Villa No.233 in the said Project was purchased through a sale deed, dated 19.08.2013, by one Hema Sampath & two others, who later on sold it to the complainants by executing a sale deed, dated 11.12.2019; that thereafter, the OP started making unreasonable demands from the complainants claiming 2% commission on the sale consideration paid by them for the purchase of the Villa, besides 18% tax; that, in February, 2020, the OP demanded the complainant's signature in the service agreement that did not even mention the transfer of corpus fund deposit of Rs.3,49,000/- which was originally paid by the erstwhile owners and, only after a lot of pressure, they came up with a revised agreement incorporating the factum of corpus fund transfer; that the service agreement contains one-sided clauses which deprive the right of the owners of the villa and the same cannot bind the owners/complainants; that the Developer and the Service Provider had colluded and unlawfully transferred the common amenities and infrastructure in the project so that the service provider will be retained as the sole service provider for the project in perpetuity; that there is no clause in the agreement, enabling the purchasers to question any inferior service on the part of the service provider; that, even before execution of the service agreement between the complainants and the service provider, the latter has started to raise invoices towards maintenance charges from 11.12.2019; and that the service agreement, emailed to the complainants on 16.05.2020, contains one-sided and biased clauses and, since the OP failed to modify the Service Agreement, the complainants approached the District Commission, seeking -

i) to direct the OP to discontinue the unfair trade practice of raising invoices and imposing maintenance charges till the service agreement is duly executed with the complainants and consequently to direct the OP to withdraw all the invoices raised claiming maintenance charges from February, 2020.

ii) to direct the OP to remove the deficiencies and restrictive trade practice in the Service Agreement, ie., the clause in page No.7 of the Services Agreement under the head "Property Management Services"

clauses (ii), (iii) and (iv) on the ground that the same is in violation of the free will of the complainants to deal with his property as per his discretion.

iii) to direct the OP to incorporate relevant clauses with regard to the right of the Association of allottees/residents to terminate the service agreement;

iv) to direct the OP to deposit the Refundable Deposits collected from the complainant as well as from the other residents in the project, in a Nationalized Bank and to utilize the interest received out of such deposits in consultation with the Association of the allottees, for the benefit of the residents at large;

v) to direct the OP to transfer ownership of the common areas, common infrastructure and the amenities to the Association of the allottees namely "Serene Pelican Villa Owners Association" within a time to be stipulated by the Commission;

vi) to direct the OP to pay to the complainants a sum of Rs.10 lakh towards punitive damages for the deficiency in service, etc.; and

vii) to pay a sum of Rs.1 lakh as costs of the proceedings.

3. The District Commission has declined to admit the complaint by passing the impugned order, dated 01.07.2022, which is re-produced below:-

"Complainant called absent.

Sufficient opportunity has been provided.

The complainant originally sought a declaration against opposite party and other consequential prayers.

Then, corrected the complaint by replacing the declaratory relief by another declaration to declare the acts of opposite party as unfair and other consequential reliefs. The prayer sought for in para 29 (a)

(b) (c) (d) (e) (f) and (g) are not maintainable before this Commission. Hence, the complaint cannot be taken on file. "

4. Learned counsel for the appellant submits that, in terms of Section 14(1) (f) of the Old CP Act of the year 1986, which says, "14. Finding of the District Forum.-- (1) If, after the proceeding conducted under section 13, the District Forum is satisfied that the goods complained against suffer from any of the defects specified in the complaint or that any of the allegations contained in the complaint about the services are proved, it shall issue an order to the opposite party directing him to 1[do] one or more of the following things, namely:--

(a) to (e)

(f) to discontinue the unfair trade practice or the restrictive trade practice or not to repeat them;

the District Commission was conferred with the powers to declare a contract to be unfair or one-sided and the new Act of the year 2019 as well, by virtue of what is provided in Section 39 (g) thereof, that runs to the following effect, Section 39 Consumer Protection Act 2019 : (1) Where the District Commission is satisfied that the goods complained against suffer from any of the defects specified in the complaint or that any of the allegations contained in the complaint about the services or any unfair trade practices, or claims for compensation under product liability are proved, it shall issue an order to the opposite party directing him to do one or more of the following, namely:--

(a) to (f)

(g) to discontinue the unfair trade practice or restrictive trade practice and not to repeat them;

also confers such powers upon the District Commission and the said aspect was also confirmed by the Apex Court in IREO Grace Realtech (P) Ltd. Vs. Abhishek Khanna (CDJ 2021 SC 20) in the following terms, " 19.6. Section 14 of the 1986 Act empowers the Consumer Fora to redress the deficiency of service by issuing directions to the Builder, and compensate the consumer for the loss or injury caused by the opposite party, or discontinue the unfair or restrictive trade practices."

However, now, by virtue of Section 49(2) and 59(2) of the CP Act, 2019, only the State Commissions and the National Commission alone are empowered to declare any terms of a contract, which is unfair to a consumer, as null or void. In this regard, in its recent judgment rendered in M/s.Texco Marketing Pvt. Ltd., vs. Tata AIG General Insurance Company Ltd., & Others (CDJ 2022 SC 1243), the Apex Court emphatically held as follows:-

"32.Section 47 and 58 of the 2019 Act have been introduced to facilitate the State Commission and the National Commission to exercise jurisdiction over a contract which is unfair. As stated, the power is not only with respect to identifying a contract as unfair or not, but also to grant the consequential relief.

33.Under sub-section (2) of Section 49 and 59 of the 2019 Act, the State Commission and the National Commission, respectively, may declare any terms of the contract being unfair to any consumer to be null and void. The principle governing the doctrine of civil remedy of a contract is well enshrined in this provision.

34.In these provisions, there exists ample power to declare any terms of the contract as unfair by the State Commission and the National Commission. The words "any terms of the contract" would empower the State Commission and the National

Commission to exercise unrestricted jurisdiction over any particular term of a contract, if in its opinion, its introduction by the insurer has certain elements of unfairness. The consequence of the declaration of that term as unfair, would make the contract active and executable to the benefit of the consumer. Therefore, this provision takes care of a possible mischief by the insurer as against the consumer."

With the above pronouncement of the Apex Court, the law is well settled now that the power to declare the terms of a contract as unfair or null & void is given only to the State Commissions and the National Commission; thereby, there is no doubt that the District Commissions have no such power of declaration. In this instance, the cause of action for filing the complaint commenced on 16.05.2020 when the Service Agreement in question was circulated to the appellant by email and the complaint was filed before the District Commission within the period of limitation, during October, 2021. In view of the position that the complaint, seeking declaratory reliefs against unfair contract, cannot be maintained before the District Commission; or in other words, with regard to such matters, the jurisdictional forum being this State Commission alone, and of the factum that the complainant had been prosecuting the complaint in good faith and with due diligence before the District Commission and that now, the limitation had also expired pending prosecution of the appeal, this Commission may show indulgence by excluding the period of prosecution to overcome the limitation point and consequently, to grant liberty to the appellants to withdraw the proceedings before the District Commission so as to file the same here; else, the appellants will be put to great prejudice and hardship, learned counsel pleaded fervently.

5. Per contra, learned counsel for the respondent submits that, since Sections-35 and 39 of the CP Act, 2019 do not expressly empower/authorize the District Commission to grant any kind of declaratory relief, no fault can be found with the impugned order, declining to entertain the complaint that was filed for declaratory reliefs. Secondly, while exercising the appellate jurisdiction, this Commission can scrutinize the impugned order passed by the District Commission only on the allowed grounds, as set out in Section 47(1)(b) of the Act, where-under, what is to be examined is as to whether the District Commission has exercised a jurisdiction not vested in it by law or has failed to exercise a jurisdiction so vested or has acted in exercise of its jurisdiction illegally or with material irregularity. All those elements are apparently absent in this instance; hence, the course open is only to affirm the impugned order. Thirdly, the plea of the appellants for entertaining their complaint by this Commission may have to be rejected out-rightly and their devious endeavor to identify the original jurisdiction of this Commission for addressing the relief of declaration under Section 49, by way of tagging the appellate and original jurisdictions together, has to be repelled. Further, as per Section 47 (1)(a)(i) of the 2019 Act, for entertaining a complaint by this Commission, the value of the claim should exceed one crore rupees but does not exceed 10 crore, whereas, the value of the present complaint is Rs.8,86,500/- and hence, for that reason as well, the case cannot be laid before this Commission. Even otherwise, in a case where declaratory reliefs are sought in respect of a contract, all parties to the deeds and documents should be impleaded, before any decision is taken on the legality of the document sought to be declared as void. Here, the complainants are transferees and they would have only the same extent of rights and obligations over the subject property as that of their predecessors-in-title viz., Hema Sampath and others; as such, they are necessary parties to speak about the actual background regarding the OP's performance of services, their alleged

perpetual interest as service provider over the amenities and facilities, etc. Also, when the complainants equally level allegations against the Developer/Covai Property Centre (India) P. Ltd., they are bound to implead them as well, as parties to the litigation, for a proper adjudication, but, they had failed to do so. All other grievances of the complainants in questioning the legality and correctness of the sale and construction agreement and their claim that service has to be rendered by the OP/Developer without any payment towards maintenance, can be addressed only before appropriate forum and the same cannot be canvassed in the consumer proceedings where the scope is limited to the aspect of deficiency in service for the service charges received. By stressing the points that neither all necessary parties viz., the vendors of the complainants as well as the developer, were impleaded to the litigation nor proper challenge was made against the sale-cum-construction agreement, dated 19.08.2013, within a period of three years as mandated under Article 59 of the Limitation Act, thereby, the scope to invoke the original jurisdiction of this Commission for grant of declaratory relief concerning the clauses in the contract is closed forever; learned counsel urged to dismiss the appeal by confirming the impugned order of the District Commission.

6. Mr.V.Balaji, appearing as amicus curiae, after taking us through the definition given under Section 2 (46) of the CP Act, 2019, for the term 'Unfair Contract' and also the decision of the Apex Court in Texco (cited supra) where the scope of unfair contract and jurisdiction of the State Commissions and that of the National Commission to declare such a contract as unfair has been elaborated, submits that, in the light of Sections 49(2) and 59 (2) of the Act as well as the above case-law, the position is well settled that the State Commissions and the National Commission alone have the power to declare any terms of the contract being unfair to any consumer to be null and void; as such, implicitly, the District Commissions have no such power. He adds that, from a conjoint reading of Section 47(1) (a) (ii) and 49 of the Act, it is apparent that, where the value of goods or services paid as consideration is below ten crore rupees, the State Commission has pecuniary jurisdiction to entertain and determine the issue of unfair contract and declare any term or clause of the contract, which is unfair, as null and void. He ultimately points out that, though the value of the goods/services paid in this case is Rs.3,49,425, in terms of Section 47 (1) (ii) of the Act, where-under, no minimum value has been fixed regarding the consideration for the goods/services except stating 'where the value of goods or services paid as consideration does not exceed ten crore rupees', there is no bar for this Commission to entertain the complaint for the given value.

6-A. Mr.K.Kumaran, appearing as amicus curiae, by referring to various definition clauses in the Act mainly in respect of 'consumer rights', 'unfair contract', 'restrictive trade practice', 'unfair trade practice', etc. and to the scope of the relevant Sections including Sec.35, 39, 47, 49, 59, etc. and also to a couple of case-laws including IREO Grace (cited supra), submits that what is an 'unfair contract' has been defined under the 2019 Act and powers have been conferred only on the State Commissions and the National Commission to declare the contractual terms that are unfair as null & void. According to him, some of the reliefs claimed are maintainable before the District Commission while the rest relating to unfair contract can be raised only before the State Commission.

7. In the light of the broad and extensive submissions made by the respective counsels, the following questions emerge for consideration:-

- i) Whether the District Commission is conferred with powers by the Statute to declare the terms of a contract, which are unfair, as null and void?
- ii) Whether the objection of the respondent, by citing Section 47 (1)(a)(i) of the Act and stating that the usual pecuniary value shall apply to this case as well, is sustainable?
- iii) In the given circumstances, to what relief, the appellants are entitled to?

8. Coming to the 1st question, it is relevant to point out here that, unlike the Old Act of the year 1986, where there was no provision governing the 'unfair contracts', the New Act of the year 2019 brings within its realm the concept of 'unfair contract' by defining that term under Section 2(46) thereof to the following effect:-

"2.Definitions: In this Act, unless the context otherwise requires,--

(46) "unfair contract" means a contract between a manufacturer or trader or service provider on one hand, and a consumer on the other, having such terms which cause significant change in the rights of such consumer, including the following, namely:--

(i) requiring manifestly excessive security deposits to be given by a consumer for the performance of contractual obligations; or

(ii) imposing any penalty on the consumer, for the breach of contract thereof which is wholly disproportionate to the loss occurred due to such breach to the other party to the contract; or

(iii) refusing to accept early repayment of debts on payment of applicable penalty; or

(iv) entitling a party to the contract to terminate such contract unilaterally, without reasonable cause;

or

(v) permitting or has the effect of permitting one party to assign the contract to the detriment of the other party who is a consumer, without his consent; or

(vi) imposing on the consumer any unreasonable charge, obligation or condition which puts such consumer to disadvantage;

As the definition, by itself, provides 6 contract terms as unfair, any aggrieved consumer can raise a dispute if the contract is affected by the terms outlined therein. Now, the point is which Authority in

the hierarchy is conferred with the original jurisdiction to entertain a complaint against unfair contracts and, before delving into that, for academic interest, it is necessary to deal with the primary argument of the learned counsel for the appellants, who referred to Section 14 in the Old Act and Section 39 in the New Act, relied upon the case-law in IREO Grace (cited supra) and stated that the jurisdiction of the District Commission is "always" available to declare the terms of an unfair contract as one-sided. The said argument is wholly untenable for the simple reason that the concept of "unfair contract" was not at all present in the Old Act and further, the case law cited also does not deal with the said concept. On the contrary, the said provisions as well as the case-law only deal with the issues of unfair trade practice as well as restrictive trade practice, in respect of which, there is no doubt, the District Commission always has jurisdiction. Since the issue of unfair contract came to be introduced only in the new Act, the governing provisions therein alone would throw light on the surrounding issues as to which authority in the hierarchy is empowered to deal with the complaints relating to unfair contracts and what is the procedure involved. Although Sections-49 (2) and 59(2) of the New Act, which run to the following effect:-

" 49. Procedure applicable to State Commission. (1) The provisions relating to complaints under sections 35, 36, 37, 38 and 39 shall, with such modifications as may be necessary, be applicable to the disposal of complaints by the State Commission.

(2) Without prejudice to the provisions of sub-section (1), the State Commission may also declare any terms of contract, which is unfair to any consumer, to be null and void."

" 59. Procedure applicable to National Commission: (1) The provisions relating to complaints under sections 35, 36, 37, 38 and 39 shall, with such modifications as may be considered necessary, be applicable to the disposal of complaints by the National Commission.

(2) Without prejudice to sub-section (1), the National Commission may also declare any terms of contract, which is unfair to any consumer to be null and void.", were much highlighted to make a point that those two provisions confer the power to declare any term of a contract, which is unfair to any consumer, as null and void, only upon the State Commissions and the National Commission, we desire to point out that those provisions speak only about the procedure applicable to the respective Commissions; on the contrary, the relevant provisions that actually confer the original jurisdiction to entertain the complaints against unfair contract are Sections-47(1)(a)(ii) and 58(1)(a)(ii), which not only spell out the jurisdiction but also speak about the pecuniary value of the cases relating to unfair contract. The said provisions are quoted below for a ready reference:-

" 47. (1) Subject to the other provisions of this Act, the State Commission shall have jurisdiction--

(a) to entertain-- (i)

(ii) complaints against unfair contracts, where the value of goods or services paid as consideration does not exceed ten crore rupees;"

"58. (1) Subject to the other provisions of this Act, the National Commission shall have jurisdiction-- (a) to entertain--

(i)

(ii) complaints against unfair contracts, where the value of goods or services paid as consideration exceeds ten crore rupees ;"

A bare reading of the above provisions in the light of the definition clause under Section-2(46) makes it succinctly clear that the new Act, which has introduced and brought within its ambit the concept of unfair contracts, has expressly given the original jurisdiction to deal with the complaints relating to unfair contracts only to the State Commissions and the National Commission and, as such, the said Commissions alone can deal with the same as per the applicable procedure outlined in Sections-49 and 59. The resultant position is, the District Commissions have no authority or jurisdiction to exercise any power relating to the complaints against unfair contracts. Accordingly, we answer the first question.

9. Coming to the second question, it is the argument on behalf of the respondent that, by virtue of Section 47(1)(a)(i), the State Commission has jurisdiction to entertain complaints where the value of the goods or services paid as consideration 'exceeds rupees one crore, but does not exceed rupees ten crore'; while so, the value of the present complaint being less than Rs.10 lakh, the same cannot be entertained. Further, the pecuniary jurisdiction of the State Commission under Section 47(1)(a)(i) has already been revised by the Consumer Protection (Jurisdiction of the District Commission, the State Commission and the National Commission) Rules, 2021, as "above 50 lakh but does not exceed two crore rupees" with effect from 30.12.2021. Be that as it may, the said argument cannot be correct for the reason that Section 47(1)(a)(i) is not the relevant provision dealing with unfair contracts, but, the very next provision viz, Section 47 (1) (a)

(ii), which we have extracted above, makes it clear that the State Commission shall have jurisdiction to entertain complaints against unfair contracts, where the value of the goods or services paid as consideration does not exceed ten crore rupees. As such, the original jurisdiction of the State Commission to entertain complaints against unfair contracts is wherever the consideration does not exceed Rs.10 crore and very importantly, there is no minimum value prescribed. Thus, the legislative intent is obvious that any such complaint below the value of Rs.10 crore is entertainable by the State Commission. On the contrary, wherever the consideration exceeds Rs.10 crore, the original jurisdiction against unfair contracts vests with the National Commission. Therefore, when the original jurisdiction to entertain the complaints against unfair contracts is conferred only to the aforesaid two entities and, for that, pecuniary aspect is also specifically demarcated in the provisions concerned, as highlighted above, the argument of the learned counsel for the respondent by citing the usual pecuniary limit does not merit acceptance. However, we find logic in the other point regarding non-joinder of necessary parties. We are able to see from the pleadings that the

complainants have grievance equally against the Developer as well. Further, as rightly pointed out, the vendors of the complainants are also necessary parties to speak about the background regarding the alleged perpetual interest of the OP over the facilities/amenities and in providing service, etc. Accordingly, we answer the question against the respondent, while accepting their point about non-joinder of necessary parties/complainants' predecessors-in-title and the Developer.

10. Coming to the 3rd question, according to Mr.K.Kumaran/Amicus Curiae, since part of the reliefs sought for have reference to unfair/restrictive trade practice, the same could be decided by the District Commission itself, however, it is seen that, even though unfair/restrictive trade practice, which aspect can be very well dealt with by the District Commission, is reflected in the prayer portion, during the course of arguments, it is submitted by the learned counsel for the appellants/complainants that he had originally filed the complaint before the District Commission, seeking declaratory relief only and subsequently, when it was rejected, he modified only the prayer portion to project the aspect of unfair trade practice, but his intention is only to declare the contract as 'unfair'. According to him, although the prayer portion carries the contents of unfair/restrictive trade practice for the purpose of maintainability of the case before the District Commission, the body of the complaint would clearly reflect that they are aggrieved by the unfair contract. In this regard, we intend to state that the District Forum, although pointed out in the impugned order that the complainant originally sought for declaration and later on, corrected it, has miserably failed to give minimum elaborate reasons for reaching a finding as to how the reliefs sought for, obviously after correction, were found to be declaratory in nature, particularly when the prayer reflected the issues of unfair/restrictive trade practice, which can be very well gone into by the District Commission. The said Commission could have taken little more pains to give details about the permission granted by it for carrying out corrections against the original declaratory reliefs sought for and could have pointed out precisely as to how it found it to be a case of 'another declaration', after the permitted correction. As such, the impugned order appears to be cryptic without any clarity. At the same time, we are of the view, when the prayer on record mainly reflects unfair/restrictive trade practice - that are triable by the District Commission, by merely acting upon the statement of the complainants that their actual intention was to seek declaration as unfair contract, no blanket order can be issued for transfer of the proceedings from the file of the District Commission to that of this Commission. However, in order to do substantial justice, we are inclined to grant liberty to the appellants to file a fresh complaint under Section 47(1)(a)(ii) before this Commission, of course by impleading all necessary parties, along with a condone delay petition wherein they can canvass the point regarding the time taken for prosecuting the appeal before this Commission. One more aspect that needs to be stated is that, from the prayer, it is seen that the complainants are seeking relief also on behalf of the Residents' Association, which they cannot do and they can, at best, project only their own grievance against the alleged unfair contract - not anything beyond that. The third question is answered accordingly.

11. In fine, although we have found that the impugned order passed by the District Commission is unclear/cryptic, we dismiss the appeal for the reasons assigned above and consequently, liberty is granted to the appellants to file a fresh complaint under Section 47(1)(a)(ii) of the CP Act, 2019, of course by impleading all necessary parties, along with a condone delay petition, wherein, they can address the limitation point by referring to the time taken for prosecuting the appeal.

R VENKATESAPERUMAL
MEMBER

R.SUBBIAH, J.
PRESIDENT.

ISM/TNSCDRC/Chennai/Orders/FEBRUARY/2023.

Orders, dated 16.03.2023,
pronounced in

In fine, although we have found that the impugned order passed by the District Commission is unclear/cryptic, we dismiss the appeal for the reasons assigned above and consequently, liberty is granted to the appellants to file a fresh complaint under Section 47(1)(a)(ii) of the CP Act, 2019, of course by impleading all necessary parties, along with a condone delay petition, wherein, they can address the limitation point by referring to the time taken for prosecuting the appeal.

MEMBER
(RVP)

PRESIDENT