

(2011) 12 DEL CK 0096

In the Delhi High Court

Case No : Regular First Appeal (OS) 67 of 1998

Agrasen Co-operative Group Housing Society Limited

APPELLANT

Vs

Delhi Development Authority

RESPONDENT

Date of Decision : 16-12-2011

Acts Referred:

Citation : (2012) 127 DRJ 137

Hon'ble Judges : S.P. Garg, J; Pradeep Nandrajog, J

Bench : Division Bench

Advocate : N.K. Khetarpal, for the Appellant; Anusuyu Salwan, for the Respondent

Final Decision : Allowed

Judgement

S.P. Garg, J.—Present appeal has been preferred by the appellant society against the judgment and decree dated 23.01.1998 passed by learned Single Judge whereby the suit filed by the appellant society for recovery of Rs. 11,81,350/- with pendent lite and future interest as well as costs was dismissed.

2. Briefly facts of the case are that the appellant society was allotted land measuring 4.383 acres at plot No. 66, Patparganj, Delhi by respondent vide letter dated 14.05.1983. Possession of the land in question was handed over to the representative of the appellant society on 03.06.1983. As per appellant society, on inspection, the allotted land was found having a "pond" covering 1/3rd of the total land allotted to it and the depth of the pond was about 6 feet. The appellant took possession of the land under protest.

3. Subsequently, appellant wrote number of letters from time to time on various dates requesting the respondent to fill the pond to enable it to commence construction over the land. Despite giving repeated assurances, the respondent failed to carry out necessary job of filling of the pond in question. The appellant society served a legal notice upon the respondent requesting it to make the land smooth/even or else it would be forced to do itself at the costs of the respondent.

4. When the respondent failed to respond, the appellant society itself started the work of filling up of the pond after inviting tenders in the newspaper on 24.02.1986. As per the appellant, it had to spend a sum of Rs. 11,75,000/-on account of cost of filling up the pond. It further claimed Rs. 5,000/-as the cost of can tour plan expenses and Rs. 1,350/-as the cost of advertisement inviting tenders. In all, appellant society filed suit for recovery of Rs. 11,81,350/-in the Court.

5. In the written statement, the respondent pleaded that the land in question was allotted on highly concessional rates to the society. There was no promise to develop the land. The appellant could not start construction over the land in question as it could get sanction of loan only in the year 1985.

86. Offer was made to the society for allotment of only "semi developed land" and at the time of handing over possession of the land, the representative of the appellant raised no objection and took it without demur. The respondent was under no legal obligation to reimburse the alleged actual expenses incurred by the appellant in filling the earth.

6. After settlement of issues, the appellant examined three witnesses, namely PW-1 Sh. Vinod Srivastava, Honorary Secretary of the appellant society, PW-2 Mr. Rakesh Kumar, LDC in DDA and PW-3 Mr. D.P.Gupta to prove its case. The respondent examined three witnesses, DW-1 Mr. Kumar Anand, Joint Director (Group Housing Society Cell), DDA, DW-2 Sh. S.N. Sharma, Asstt. Engineer, HUPW, DDA and DW-3 Sh. B.P. Srivastava, Ex. Engineer, ED-8, DDA in his defence.

7. On appraisal of the evidence adduced on record, the learned Single Judge dismissed the suit filed by the appellant holding that having taken possession of the land without demur the appellant could not question the same. Aggrieved by the said order, the appellant has come up in appeal.

8. Learned counsel for the appellant has vehemently argued that the respondent was under legal obligation to fill the pond/ditch which was in existence on the land in question prior to its allotment. The land in question was taken under protest and the respondent was requested time and again to perform its duty to make the land habitable. The respondent at one stage had assured the appellant society that tenders were being invited for filling up the earth on the land in question. Subsequently the respondent changed its stand and pleaded that due to non-availability of financial approval, it could not carry out the filling up of the earth. It is further argued that the appellant had to spend more than Rs. 12,00,000/-in filling up the earth to make the land even/smooth.

9. Learned counsel for the respondent controverting the arguments has contended that there was no promise of the respondent to "develop" the land after handing over its possession to the appellant. The land allotted to the appellant was on highly concessional rates. The land allotted was "semi developed land" and no further action was required by the respondent. The claim

raised by the appellant in the suit is highly exaggerated.

10. Scanning the documents on record, it stands established that the land measuring 4.383 acres at plot No. 66, Patparganj, Delhi was allotted to the appellant Agrasen Coop.Group Housing Society Ltd. by DDA respondent. The appellant had taken the possession of the land in question and had not raised any objection at that time. However, the appellant wrote a letter Ex. P/2 to the respondent on the same day wherein it was categorically stated that there was a big "pond" covering about 1/3rd area of the land allotted and the possession of the land was taken under protest. Undisputably subsequent to that, a number of representations were made by the appellant society writing various letters from time to time to fill the pond. Admittedly at one stage, the respondent had assured the appellant society that tenders were being invited for filling up the "pond" and necessary approval was being sought from the Competent Authority. There was policy decision vide letter No. F.2(67)/84/GH/DDA dated March, 1984 by DDA whereby it had decided to fill earth on the plot if the level of land allotted was more than 1'-6" below the road level. Subsequently, the policy was changed and the respondent DDA expressed its inability to carry out all these activities due to financial constraints.

11. It is not in controversy that the land allotted to the appellant society was to be "semi developed land". The respondent was thus under legal obligation to allot "semi developed land" to the appellant society to enable it to use it for raising construction of houses thereon. There was no assurance/consent of the appellant to get allotment and possession of land having a pond/ditch of about 6 feet deep in the area covering 1/3rd of the total land allotted to it. There is nothing on record if the respondent DDA had intimated the appellant prior to allotment of land that there was any such pond on the land in question which would be required to be filled by the appellant society. The assurance given to the society was that the land allotted to it would be a "semi developed land".

12. Mr. S.N. Sharma, Assistant Engineer appearing as DW-2, in the cross-examination, admitted that there were certain societies which did not accept possession on the ground that development of land was not according to their satisfaction. He clarified that the land having facilities of roads, sewer, water and electricity was termed as "developed land", whereas the land lacking in these facilities was termed as "semi developed land". This explanation shows that barring roads, sewer, water and electricity on the plot in question, the respondent was required to make available habitable or useable land to the society. Respondent was definitely under contract to make available "semi developed land". The land allotted to the appellant having big pit/pond covering almost 1/3rd area of the land can't be termed "as semi developed land". There is nothing on record in the deposition of the witness if after acquiring the land in question, DDA had carried out any activities over it to make it a "semi developed land". During the course of arguments, the learned counsel for the respondent fairly disclosed that the land in question was being used earlier by the of brick

kilns owners. Use of earth for making bricks by brick kilns owners seems to have caused a deep pit over the land and in our view the respondent was legally bound to fill it before handing over the possession of the land to the appellant society to enable it to start its construction on a habitable/useable land.

13. Number of representations/letters on record proved futile attempts of appellant society to awake the respondent to perform its duty. The respondent assured the appellant society time and again that necessary official formalities were being performed and tenders had been received for filling up the pond but nothing was done by the respondent. Inviting of tenders to fill the pond lends credence to the grievance of the appellant that the respondent was legally bound to make the land "habitable". The appellant society had legitimate expectations that plot allotted it would be having attributes of "land" free from all such pitfalls.

14. Since the respondent was in a position to dominate the will of the appellant society, it had no choice but to take possession of the land having big pond, to avoid forfeiture of allotment. That can't be termed free consent of the appellant to accept the possession of the plot of land in question without protest. Before handing over the possession, it was incumbent upon the respondent DDA to make the land useable for the purpose for which it was allotted. Since the respondent had not fulfilled its duty, the appellant society was within its right to do the needful itself and for that purpose, it had served a legal notice upon the respondent. The appellant society could not have waited for the respondent to fulfill its duty in infinity.

15. Damage, which a party alleges to have suffered must be affirmatively proved. Proof of damage is necessary to enable recoverability of damages. It is essential that a person who claims damages/compensation for breach of a promise must prove the loss suffered by it. Damages/compensation are awarded to place the injured party in the same position in which he could have been, had he not sustained the injury complained. The damages must be commensurate with the injury sustained. Damages/compensation are compensatory and not retributive. The appellant is entitled to receive compensation for any loss which naturally arose in the usual course of things from such breach.

16. The appellant society was allotted land measuring 4.383 acres @ Rs. 110 per sq. ft. The society had paid Rs. 19,51,328.30 in all to the respondent as cost of the land. The "pond" in question was covering only about 1/3rd area of the total land allotted to the society. Appellant society was thus required to claim only those expenses which were necessary to fill the "pond" in question to make the land useable. Under the garb of filling the "pond" the appellant society was not expected to develop the entire land allotted to it for the purpose of raising construction thereon. Undoubtedly, the appellant society was to incur only such expenses which were absolutely necessary to make the land as "semi developed land".

17. In the plaint, the appellant did not disclose as to what was the total cost incurred by it in filling the "pond". PW-3 D.P. Gupta testified that advertisement calling tenders for getting the land leveled was issued vide advertisement Ex. PW-3/1. The work was awarded to M/s. R.C. Bansal & Co. @ Rs. 35 per sq. mt. The original work order, the photocopy of which is Ex. PW-3/2, was signed by him. Rs. 6,67,176/- were paid to M/s. R.C. Bansal & Co. and the final bill raised by it was Ex. PW-3/3. Since the work was left by M/s. R.C. Bansal & Co., it was awarded to M/s. Faculty Engineers and an agreement Ex. PW-3/4 was executed. Ex. PW-3/6 was the receipt of cheques paid by the plaintiff society to M/s. Faculty Engineers. About Rs. 12,00,000/- were spent by the society on leveling the land allotted to it by DDA.

18. In advertisement Ex. PW-3/1 that there is no mention that the appellant society had invited tenders to fill only the pond or some pits on the land in question. Rather it invited tenders for earth filling for the entire plot No. 66 Patparganj, Delhi. None of the witnesses examined by the appellant society testified as to what was the cost of filling up the pond in question for which they had written time and again to the respondent society to do the needful. The appellant, thus, can't be permitted to ask for reimbursement of entire expenses incurred in filling the earth on the entire land/plot.

19. In the written statement, the respondent categorically asserted that a meeting was held in the chamber of Vice Chairman on 06.06.1988 and as per the policy decision in the meeting in question, the amount of earth filling came to be 11,230 cubic meter and this quantity was to be reduced considering the foundation and the position of the basement, if any. In the replication, the appellant society did not deny this fact and merely stated that the respondent was stopped from disputing the measurement.

20. It has further come on record that a calculation was carried out by the DDA on a piece of paper referred by the parties during arguments. As per this document, the net area requiring earth filling was determined as 11230.32 cubic meter. After making some deductions of earth available from basement, water tank and septic tank, net earth required was calculated as 10093.14 cubic meter.

21. The plea of the appellant to allow it the suit amount of about Rs. 11,75,000/- can't be sustained as the total cost of land for the entire plot measuring 4.383 acres was only Rs. 19,51,328.30 and if this heavy amount of Rs. 11,75,000/- is permitted to be reimbursed to the appellant, it will be getting the huge land almost at no cost.

22. In the absence of positive evidence on record as to what actual expenses were incurred by the appellant society in filling the pond in question, calculations made by the respondent DDA can safely be taken to assess the expenses incurred by the appellant society to be reimbursed.

23. The total earth required was calculated as 10093.14 cubic meter. The cost paid by the appellant society for the earth was Rs. 35 per sq. cubic meter. The

appellant society had thus incurred approximately Rs. 3,50,500/-and in our view, interest of justice would be served if the respondent is directed to pay this amount to the appellant to put him in the same position in which he would have been, had "semi developed land" been made available to it.

24. In view of the above discussion appeal filed by the appellant is partly allowed and the judgment and decree dated 23.01.1998 passed by the learned Single Judge is set aside and a decree for a sum of Rs. 3,50,500/- is passed with proportional costs in favour of the appellant against the respondent.