

(2014) 11 NCDRC CK 0075

In the National Consumer Disputes Redressal Commission

Ajit Rawetkar And Company

APPELLANT

Vs

Girish Meghraj Jain

RESPONDENT

Date of Decision : 17-11-2014

Acts Referred:

Citation : 2014 4 CPJ 779

Hon'ble Judges : V.B.GUPTA J.

Final Decision : Petition dismissed

Judgement

1. PETITIONER /Opposite Party being aggrieved by order dated 22.10.2007 passed by Consumer Disputes Redressal Commission, Maharashtra, Mumbai (for short, "State Commission") has filed this petition under Section 21(b) of the Consumer Protection Act, 1986 (for short, "Act").

2. RESPONDENT /complainant had filed a consumer complaint before District Consumer Disputes Redressal Forum, Pune (for short, "District Forum") on the ground that he is in business of supplying of building material, whereas Petitioner is a Builder. It is stated that respondent agreed to purchase flat No. 402 admeasuring 680 Sq. Ft. on third floor Building No. B -2 for consideration of Rs. 1,90,400/- which was to be paid in the form of supply of cement worth consideration price and the agreement for sale was executed in favour of the respondent by the petitioner on 19.07.1988 which was registered on 28.07.1988. Respondent supplied from time to time cement worth Rs. 1,10,226/- . Thus, respondent has paid around 60% of the consideration amount to the petitioner. However, till date, petitioner failed to deliver the possession of the flat. Accordingly, respondent filed a consumer complaint before the District Forum seeking following reliefs; "a. To order the respondent to accept the remaining payment as consideration for the flat and put the complainant in possession of the same and execute the sale deed.

b. The respondent as has not put the complainant in the possession of the flat he be directed to pay sum of Rs. 2,00,000/- as compensation for the loss incurred due to his inability to give the flat on rent.

c. The respondent be directed to compensate the complainant with Rs. 1,00,000/- for mental pain and agony suffered by him since 1988."

Petitioner appeared before the District Forum on 14.5.2003 and sought time to file the written version, but did not file the same. However, the District Forum vide order dated 09.06.2006, dismissed the complaint of the respondent.

3. FEELING aggrieved by the dismissal order, respondent filed (First Appeal No. 1093 of 2006) before the State Commission, which allowed the same vide order dated 15.01.2007. The matter was remanded to the District Forum for fresh consideration.

4. AFTER remand, the District Forum again dismissed the complaint, vide order dated 20.03.2007. Respondent again challenged the order of the District Forum and filed (First Appeal No. 374 of 2007). The State Commission, partly allowed the same, vide the impugned order and passed the following directions; "1. Appeal is partly allowed. The impugned dismissal order is quashed and set aside. Complaint is partly allowed.

2. Respondent/org. O.P. is directed to refund Rs. 1,11,226/- to the appellant/org. complainant with interest @ 9% p.a. from the respective dates of payments till realization.

3. Respondent/org. O.P. is further directed to pay Rs. 10 Lakhs to the appellant/org. complainant by way of compensation.

4. Respondent/org. O.P. is directed to pay Rs. 5,000/- to the appellant/org. complainant by way of cost of this appeal."

5. NOW aggrieved by the order of the State Commission, petitioner has filed this petition.

6. WE have heard the learned counsel for the petitioner and gone through the record. The case of petitioner is, that the remedy sought by the respondent is in the form of specific performance of agreement dated 28.07.1988. Hence, Consumer Fora has no jurisdiction and the Civil Court is proper forum to decide such dispute. Further, it has been submitted, that since amount claimed for refund is only Rs. 1,11,226/-, the State Commission was not justified in awarding compensation of Rs. 10 lacs.

7. STATE Commission in impugned order observed; "The Forum below dismissed the complaint mainly on the grounds: - (1) Identity of the flat to be delivered to the complainant is not established for grant of relief of possession of the flat, (2) Owner of the property and subsequent developers are not joined, (3) There was no payment of consideration, and (4) Civil Court is the competent Forum for deciding issues involved in the complaint.

Copy of registered Agreement dated 28/07/1988 is placed on record. We are inclined to reproduce clause No. 2 of the agreement of sale: -

"2. The flat holder hereby agrees to pay for acquiring the said flat a total price of Rs. 1,90,400/- (Rs. One Lac Ninety Thousand Four Hundred only) being the package deal lump sum price as under to the builder developer out of which Rs. 1001/- (Rs. One Thousand One only) have been paid in cash at the time of this agreement and the balance price is to be adjusted by the flat holder by supplying cement bags at prevailing market rate to the builder developer. The supply is to be made as per the demand and requirement of the builder developer and as and when called upon by the builder developer to make the supply."

The complainant paid part of consideration of Rs. 1,000/- to the O.Ps. at the time of execution of agreement. There is reference of payment of partial consideration in the clause No. 2 of the Agreement of Sale. In the very clause No. 2 reference is made with regard to mode of subsequent payment of consideration. As per clause No. 2 of the agreement for sale, balance consideration was to be adjusted by supplying cement bags at prevailing market rate to the builder/developer. The supply was to be made as per the demand and requirement made by the builder/developer. The complainant has placed on record all the documentary evidence to show supply of cement bags to the O.Ps. On careful perusal of documentary evidence, it is seen that price of the cement bags supplied to the O.Ps. is shown as part consideration received by the O.Ps. by way of adjustment of supply of cement as per clause No. 2 of the agreement. The amount shown in the various receipts is clearly shown as payment towards flat No. B -2/402 at Survey No. 133/B/1 Parvati, Pune. In spite of voluminous documentary evidence, the Forum below observed in Para 16 of the order that there is no convincing corroborative evidence to arrive at price of material supplied by the complainant to the O.Ps. on the date of supply. The unimpeachable documentary evidence is completely ignored by the Forum below. The Forum below should have taken pains to consider the definition of consumer. Under the Consumer Law, buyer need not pay entire consideration at the time of purchase of goods, even promise is sufficient under the Consumer Law. Part payment is held to be legal consideration. Part promise to pay consideration is also legal consideration under the Consumer Law. The parties to the agreement have arrived at Memorandum of Understanding between them with regard to consideration in kind. The consideration in kind, which is arrived at on the basis of consensus of both the parties is not therefore bad in law. We fail to understand why such type of mode of payment of consideration, which is outcome of written agreement between the parties, is bad in law. The Forum below has failed to elaborate this aspect. The personal views about consideration carry no weight.

The consideration is defined in Section 2(d) of the Indian Contract Act, 1872. The Hon"ble Apex Court in case of Ku. Sonia Bhatia, Appellant vs. State of U.P. and others, Respondents, : AIR 1981 Supreme Court 1274 has observed as under: -

"Consideration" means a reasonable equivalent or other valuable benefit passed on by the promisor to the promisee or by the transferor to the transferee.

The issue of consideration should have been decided in the light of Section 2(1) (d) of Consumer Protection Act, 1986. The observations made by the Forum below in this respect are not only erroneous but perverse. One should always bear in mind that rights and liabilities spring from written agreement.

On perusal of the record including receipts executed by the O.P. for having received supply of cement bags would clearly go to show that flat No. B -2/402 was booked by the complainant. Survey number is also disclosed. It is material to note that during pendency of the main complaint, an undertaking was given by O.Ps. by application dated 14/01/2004. The O.Ps. have stated in the said application that they are ready and willing to reserve one flat out of 112 flats for the complainant. The Forum below could have directed the O.Ps. to deliver possession of one of the flat out of 112 flats to be constructed. Failure to deliver possession of the flat is something different than the deliberate attempt to frustrate the terms and conditions of the contract. A particular flat was booked. Property was also described. However, there was no genuine attempt on the part of the O.Ps. to construct the flat and to deliver the booked flat to the complainant. The Forum below ought to have dealt with the O.Ps. for having committed breach of undertaking. It is well known that at the time of execution of agreement, flat never exists. It exists only on paper.

The Forum below has completely lost sight of the aim of the Consumer Protection Act, 1986. The variety of rights are given to the consumers under the Consumer Protection Act, 1986. There is assurance of promotion and protection of consumer rights by the Consumer Protection Act, 1986. Instead of protecting and promoting consumer rights, the Forum below adopted obstructive attitude and dismissed the complaint on flimsy and technical grounds. The Consumer Protection Act, 1986 was enacted as a result of widespread consumer protection movement. Provision has been made in the Act with object of interpreting the relevant law in a rational manner and for achieving the objective set forth in the Act. A rational approach and not a technical approach is the mandate of Law (Reference be made to India Photographic Co. Ltd. vs. H.D. Shourie, : (1999) 6 SCC -428 : AIR 1999 SC -2453).

The Forum below has come to a wrong conclusion that the issue involved in the complaint is liable to be decided by the Civil Court only. In our view the dispute involved in the complaint can be effectively adjudicated by the Consumer Forum. The Forum below failed to take into consideration the basic structure of the Consumer Protection Act, 1986. The Consumer Fora is an alternative Forum established under Consumer Protection Act, 1986 to discharge the functions of Civil Court. The Forum below did not take pains to look into sub -clause 4 of Section 13 of Consumer Protection Act, 1986. The Legislature has conferred same powers as vested in the Civil Court under the Code of Civil Procedure while trying a suit. The Consumer Fora is empowered to issue summons and to enforce attendance of witnesses. The Forum is competent to examine the witness on oath. The Consumer Fora can direct discovery and production of documents as

evidence. The Consumer Fora has power to receive evidence on affidavits. The Consumer Fora is competent to ask for report from the Laboratory or from any other relevant source. The Consumer Fora has power to issue any commission for examination of any witness. The Consumer Fora is expected to use these tools for disposal of the consumer complaint promptly. But the Forum below instead of making use of these tools referred above, refused to exercise its legitimate jurisdiction. Nothing complicated is involved in the consumer complaint under consideration. Advice to approach the Civil Court is ill advice, which is not called for.

A reference with profit can be made to the another decision of the Supreme Court in the case of Fair Air Engineers Ltd. and others vs. N.K. Modi reported in : (1999) 6, Supreme Court Cases, page 385, wherein the Supreme Court has observed that the Consumer Fora functioning under Consumer Protection Act, 1986, as such enjoy status of a Court and they have all the tapping of a Civil Court. The Consumer Fora exercise judicial powers and statutory authorities.

It further observed;

The respondents/org. O.Ps. in spite of written agreement failed to deliver possession of the flat to the complainant. Subsequent developer was brought in September 2003. However, O.Ps. by application dated 14/01/2004 informed the Forum below that they would reserve one flat out 112 flats for the complainant. The entire Project was handed over to the subsequent developer in September 2003. The O.Ps. were in fact not in a position to keep their promise, but without minding subsequent developments, false promise was given to the complainant before the Forum below. The original agreement was executed in 1988. It is impossible for the complainant to purchase another flat for consideration of Rs. 1,90,400/- . Therefore, we are inclined to grant exemplary compensation to the complainant."

8. RELEVANT Clauses of the agreement dated 19.07.1988, executed between parties read as under; "1. The builder developer shall get constructed the said flat as per the building plans approved by the Pune Municipal Corporation attached hereto (hereinafter to as "the said plans" for the sake of brevity and convenience) together with fixtures, fittings and amenities and specifications given in the Schedule "C" written hereunder:

2. The flat holder hereby agrees to pay for acquiring the said flat a total price of Rs. 1,90,400/- (Rs. One Lakh Ninety Thousand Four Hundred only) being package deal lump -sum price as under to the builder developer out of which Rs. 1,000/- (Rs. One Thousand only) have been paid in cash at the time of this agreement and the balance price is to be adjusted by the flat holder by supplying cement bags at prevailing market rate to the builder developer. The supply is to be made as per the demand and requirement of the builder developer and as and when called upon by the builder developer to make the supply.

3. In lieu of total consideration of Rs. 1,90,400/- (Rs. One Lakh Ninety Thousand

Four Hundred only) paid by the flat holder by way of supply of cement bags to the builder developer and in lieu of the builder carrying out the construction as stated in the agreement dated 3.4.1984 for the said society and the said society and the builder developer hereby agree to sell on ownership basis the flat to the flat holder....."

It is an admitted fact that petitioner did not file any written statement before the District Forum. Therefore, the petitioner has no defence on merits.

9. AS per above agreement, total price of flat was Rs. 1,90,400/ -. As per case of the respondent, he had paid a sum of Rs. 1,11,227/ - in the year 1988. Till date, petitioner has neither refunded the amount taken from the respondent nor it has completed the flat or offered the same to the respondent.

10. THERE is no rebuttal on behalf of the petitioner to the above case of the respondent as well as to the evidence produced by the respondent. As observed above, the State Commission has categorically held in the impugned order that; "The complainant has placed on record all the documentary evidence to show supply of cement bags to the O.Ps. On careful perusal of documentary evidence, it is seen that price of the cement bags supplied to the O.Ps. is shown as part consideration received by the O.Ps. by way of adjustment of supply of cement as per clause No. 2 of the agreement. The amount shown in the various receipts is clearly shown as payment towards flat No. B -2/402 at Survey No. 133/B/1 Parvati, Pune."

Thus, it is manifestly clear that Petitioner -Builder is sitting over the amount received from the respondent as early, as in the year 1988. The Petitioner had been enjoying the aforesaid amount for more than a quarter century. No flat has been offered by the petitioner to the respondent till date. Therefore, deficiency on the part of the petitioner is writ large in this case.

11. WE entirely agree with the reasoning given by the State Commission in its impugned order. Moreover, the order of the State Commission is well reasoned, which does not call for any interference nor it suffers from any infirmity or erroneous exercise of jurisdiction.

12. ACCORDINGLY, there is no merit in this revision petition and same is hereby dismissed with cost of Rs. 10,000/ - (Rupees Ten Thousand only). Petitioner is directed to deposit the cost by way of demand draft in the name of "Consumer Legal Aid Account" of this Commission, within four weeks from today. In case, petitioner fails to deposit the cost within prescribed period, then it shall be liable to pay interest @ 9% p.a. till its realization.

13. LIST on 19th December, 2014 for compliance.