

(2011) 09 NCDRC CK 0060

In the National Consumer Disputes Redressal Commission

Atlanta Limited

APPELLANT

Vs

Anlanta Arcade Premises Co. Op. Society Ltd.

RESPONDENT

Date of Decision : 15-09-2011

Acts Referred:

Citation : 2011 0 NCDRC 621

Hon'ble Judges : V.B.Gupta , Suresh Chandra J.

Advocate : A.N.Haskar , Chirag M.Shroff , C.V.Singh , Arif , Sonal Doshi , Surekha Raman

Judgement

1. THIS revision petition has been filed under Section 21 (b) of the Consumer Protection Act, 1986 (for short as Act) challenging order dated 19.10.2010, passed by State Consumer Disputes Redressal Commission, Mumbai (for short as State Commission) vide which appeal of the petitioners (who were the opposite party nos.1 to 7 before District Forum, Mumbai) was dismissed.

2. BRIEF facts are that respondent is a registered co-operative Society and petitioner No. 1 is a Private Limited Company incorporated under the Companies Act, 1956. Petitioners No. 2 to 6 with petitioner No. 1, were the original owners of property situated at Survey No. 143, Hissa No. 6(P), 9(part) 10 and 13 (part) and city survey Nos. 1397 and 1398 of Village Marol Tanka, Andheri in registration district of Bombay City and sub-urban having 7447 sq. yrs. Petitioners developed the said property and constructed a building thereon, known as Atlanta Arcade, consisting of five floors. The premises were sold to various parties being the members of the respondent Society. It is alleged by the respondent Society, that it was for petitioners to complete all formalities in respect of executing conveyance in favour of respondent. However, petitioners failed to do so. They also failed and neglected to pay property taxes to the Municipal Corporation of Greater Mumbai from time to time till 31.3.2000, despite repeated request/reminders from the respondent, though the same were collected from the purchasers of the premises from time to time. Respondent through their Advocates letter dated 5.2.2006, called upon petitioners to execute

the deed of Conveyance in favour of the Society, to which petitioner No. 1 through its Advocate letter dated 1.4.2006, replied that petitioner No. 1 is taking steps to execute the deed of conveyance in respect of the said property in favour of the respondent. But petitioner failed and neglected to execute the deed of conveyance in favour of the respondent.

It is also alleged that petitioners converted the basement in the building which was meant for car parking for the purchasers, into godown. Due to failure on the part of petitioners to pay arrears of property taxes upto March, 2000, water connection of respondent has been cut off and respondent is incurring expenditure of Rs.1,500/- per day, to give water supply through tankers and mineral water bottles. Accordingly, respondent filed the complaint before District Forum, seeking directions to the petitioners, to execute the conveyance deed and to pay Rs. 5,00,000/- towards damages with further interest thereon @ 18% p.a., from the date of filing of the complaint, till payment.

3. AS per order of the District Forum, Petitioners did not appear before it nor did they file their written statement. Respondent produced the proof of service of OP nos. 1, 5, 6 and 7, before the District Forum. Respondent also filed an application for substituted service of opposite party nos.2, 3 and 4, which was allowed and they were served by publication in two newspapers. Accordingly, opposite parties were proceeded ex-parte on 31.5.2007. District Forum, vide order dated 12.6.2007, held that allegations on the part of respondent remain unchallenged and passed the following directions ; 1. Opponents are directed, jointly or severally, to execute the deed of conveyance in respect of the said property in favour of the complainant society, within three months from the date of receipt of copy of this order. 2. Opponents are directed, jointly or severally to pay compensation of Rs.1,00,000/- towards damages and Rs.5,000/- towards costs to the complainant Society.

4. THEREAFTER, both parties filed various applications/petitions before different Judicial Forums. Gist of those proceedings as mentioned in the synopsis and list of dates filed by petitioners is given hereunder ; 12.10.2007 Respondent society made an application, being execution application 121/2007 before the District Forum u/s 25 and 27 of the Consumer Protection Act. 20.12.2007 Petitioner preferred an application No.52/2007 in case No.297 of 2007 before the District Forum seeking to set aside the ex-parte order dated 12.6.2007 along with application seeking condonation of delay. 18.1.2008 The District Forum issued SCN u/s 25 & 27 of C.P.Act, 1986 for 15.2.2008. 27.1.2008 Petitioner/OP No.5 filed detailed written submission before the District Forum. 14.2.2008 The petitioner preferred appeal being FA No.249/2008 before State Commission with application for condonation of delay in filing appeal as there was delay of 182 days as the petitioner was not aware of the said ex-parte order dated 12.6.2007. 3.5.2008 Notice issued by State Commission in petitioners appeal and made returnable on 11.11.2008, impugned order stayed on deposit of Rs.25,000/-. 24.7.2008 Respondent moved an application in FA No.249/2008 seeking

clarification regarding the order of District Forum dated 12.6.2007. 31.7.2008 State Commission passed an order in application MA/1468/2008 holding that District Forum could execute the order in respect of direction to execute Conveyance Deed and that no clarification was required in MA no.383/2008 dated 3.5.2008 (for stay). 8.10.2008 Petitioners replied to respondents letter dated 23.9.2008 and asked them to send a draft of lease deed to petitioner instead of conveyance deed. 17.10.2008 The respondents once again called upon the petitioners to execute conveyance deed. 23.10.2008 District Forum issued bailable warrants of arrest of Rs.25,000/- each against opponents 5 & 7 u/s 27 of the Act returnable on 26.11.2008. 23.10.2008 Petitioners moved MA No. 1975/2008 before the State Commission seeking stay of execution of bailable warrants. 23.10.2008 Petitioner moved MA No.1974/2008 in FA/249/2008 before State Commission seeking amendment in FA to permit them to substitute the word Conveyance Deed with Lease Deed & Lease Deed for the area admeasuring 1455.83 sq.mtrs. i.e. utilizing FSI of 15670.44 sq.ft. incl. Staircase and balcony. 27.10.2008 State Commission rejected MA No.1975 of 2008 and refused to stay execution of warrants. Nov., 2008 Draft lease deed submitted by the petitioners to respondents. 18.11.2008 The petitioners preferred revision petition no.4445 of 2008 before National Commission against State Commissions order dated 27.10.2008. 21.11.2008 This Honble Commission dismissed the said revision petition as this Commission was of the view that these pleas had bearing on merits of the matter and the petitioner had challenged in interim order of State Commission and it should have placed all these facts before fora below. 2.1.2009 Petitioner moved application before District Forum for stay of execution/ adjournment. 2.1.2009 The District Forum rejected the application of petitioner for stay of execution proceedings/ adjournment. 5.1.2009 Petitioner moved WP (L) No.22/2009 before High Court of judicature at Bombay challenging orders of the fora below. 7.1.2009 High Court passed order disposing the WP with certain directions. Jan. 2009 Petitioner moved an application before State Commission in FA/249/2008 for expedited hearing and amendment of appeal memo as per the schedule. 19.1.2009 The petitioners moved application before District Forum for bail in terms of High Court order. 19.1.2009 The petitioners also moved another application before the District Forum seeking setting aside of order dated 12.6.2009 and stay of execution. 19.1.2009 The District Forum passed an interim order on bail. 3.2.2009 District Forum passed order in RA/121/2007 rejecting prayers 6 (b) & (c) and deferred orders on execution petition till 10.2.2009. 4.2.2009 The petitioner preferred FA/144/2009 before State Commission against District Forums order dated 3.2.2009. 6.2.2009 State Commission issued notice returnable on 25.2.2009 and stayed the order dated 3.2.2009 till then. 14.5.2010 The respondent society moved application before State Commission seeking directions against petitioners to execute conveyance deed. 14.5.2010 Application by respondent society for again seeking execution of the deed of conveyance by the petitioners. 15.7.2010 Petitioners filed reply to said application opposing the same on the ground that as the appeals were still pending, execution could not proceed further and no further orders could be

passed by the Forum. 19.10.2010 Order passed by the State Commission allowing FA/144/2009 and setting aside order dated 3.2.2009 and remanding the matter to District Forum.

On 19th October, 2010, State Commission vide impugned order dismissed the appeal of the petitioners. Petitioners have filed the present revision petition challenging the impugned order.

5. AT the time of admission, execution of impugned order was stayed subject to deposit of certain amount. Respondent has filed an application for vacation of ex-parte stay granted by this Commission.

6. WE have heard learned counsel for the parties at length who have also filed written submission in support of their respective contentions. It is contended by learned counsel for the petitioners that respondent has deliberately not served the petitioners and taking undue advantage has obtained an ex-parte judgment from the District Forum.

Further, vital documents like agreement entered into between petitioners and respondent was not produced before the Forum nor there is any averment in the complaint with regard to this agreement. The agreement laid down the terms and conditions between the parties and the obligations of the petitioners-builder. The flat purchasers were clearly indicated that petitioners will execute the lease deed since it was provided in the agreement that only lease deed will be executed and sale deed will not be executed. Petitioners right from the beginning were ready and willing to perform their part of the agreement. Therefore, demand of respondent to grant them sale deed of the land which was not contemplated by the parties, is therefore illegal and grant of this by the Foras below is therefore, bad in law and liable to be set aside. Statutory requirements under Maharashtra Ownership Flats (Regulation of the Promotion of Construction, Sale Management and Transfer) Act, 1963 have been fully complied with by the petitioners.

7. IT is also contended that notice issued to OP-6 is bad in law as said petitioner died nearly 15 years ago. In support, learned counsel cited State of Maharashtra & Others Vs. M.S. Builders (Private) Limited & another, 1992 (1) Bom.C.R. 568 and C.I.T., Andhra Pradesh Vs. M/s Taj Mahal Hotel Secundrabad, 1971 (3) Supreme Court Case 550.

8. ON the other hand, it is contended by learned counsel for the respondent that petitioners have willfully and deliberately resorted to making false statements on oath in an attempt to mis-lead this Commission by alleging that service of the complaint was affected on an old/wrong address and alleging that petitioners were not duly served. Petitioners in their affidavit dated 28.3.2011, filed in the revision petition have stated that there was no such building, that is, B-22, V.M. Road, J.V.P.D. Scheme, Juhu, Bombay in 2006. The address of petitioner no.5 is the same as referred to above. Moreover, in appeal filed before the State Commission in the verification clause, petitioners have given the same address.

Thus, it is evident that petitioners are playing ducks and drake with this Commission. It is further contended that petitioners did not appear before the District Forum inspite of publication. Thus, they were rightly proceeded ex-parte by the District Forum. Another contention is that petitioners are blowing hot and cold, as in appeal petitioners took the plea that they are ready to execute the deed of conveyance in respect of the property in question.

9. AS far as death of OP-6 (Ambalal Prahladji Barot) is concerned, petitioner no.5 in the verification clause of appeal filed before State Commission, has acted as constituted attorney of the original OP-6. How a person can act constituted attorney on behalf of a dead person? It were the petitioners (particularly petitioner no.5) who has at all time willfully and deliberately acted on behalf of a dead person. Lastly, it is contended that in any event, petitioners are bound and liable to execute a deed of conveyance in favour of the respondent society.

10. COUNSEL for respondent in support cited the following judgments :- (i) Vrindavan Society Ltd. Vs. Karmarkar Brothers, 1982, MhLJ 607 ; (ii) S.Irani Vs. M/s Dinshaw & Dinshaw, 1999 CRL, L.J. 240; (iii) Jayantilal Investments Vs. Madhuvihar Co-operative Society & others (2007) 9 SCC 220 and (iv) Nahalchand Laloochand Private Limited Vs. Panchal Co-operative Housing Society Ltd. (2010) 9 SCC 536.

It is an admitted fact that petitioners did not appear before the District Forum and as such were proceeded ex-parte. As per record on 20.12.2007, petitioners filed an application before District Forum, for setting aside of the ex-parte order dated 12.6.2007. Along with it, an application seeking condonation of delay of 65 days was also filed. Relevant paras of application for setting aside ex-parte order read as under ; 3. The opponent further says that service of summons on opponent No.6 is also invalid as the said opponent No.6 is dead past 15 years. So how a dead man can put his acknowledgement. 4. The opponent further humbly submits that all the acknowledgements on 1, 5 and 7 are bearing one and the same signature. The opponent denies that these signature belong to any of his family members. Also the opponent no.6 signing the documents clearly creates apprehension that the service made to the above opponents 1, 5, 6 and 7 is not proper, frivolous and the ex-parte filed against the same should be set aside. 5. In reference to the opponents nos. 2 to 4, the opponent begs to state that the public notice mentions these three offices which have shifted and been transferred since 15 years and now are having their registered office at 601, Shree Amba Shanti Chambers, Opp. Leela Hotel , Andheri Kurla Road, Andheri (E), Mumbai 400059. Whereas, the above complainant has served them at their previous address at Grant Road. 6. The opponents humbly say that the said complainant society named Atlanta Arcade Premises Co-op Society is just next to the opponents but yet they have served at Grant Road which shows that the complainants have done with malafide intentions. 7. The opponents find that they have a good case on merits. The opponents say that if given an opportunity then the opponents can file a detailed reply and contest the matter on merits.

As per above quoted paras, petitioners have nowhere mentioned in the entire application as to how all of a sudden on 20.12.2007, they came to know about passing of the ex-parte order dated 12.6.2007, when their own case as per application for setting aside the ex-parte order is ; Complainant has not properly served them the copy of summons/notice and copy of complaint which has caused the matter of the opponents to go ex-parte.

11. TAKING above averments as correct, we simply fail to understand then how, through what source and on which date knowledge of passing of ex-parte order dated 12.6.2007, came to the petitioners. It is well settled law that before an ex-parte order is set aside, the party has to satisfy as to on which date and how it came to know about passing of the ex-parte order.

12. IN application for setting aside ex-parte order, there is no whisper as to on which date or how petitioners came to know about passing of the ex-parte order. Moreover, in the entire application, petitioners nowhere took this plea that they have not been served with summons/notice. Throughout in the application, their plea is that ; (i) Complainant has not properly served them the copy of summons/notice. (i) That with regard to service of summons/notice to 1,5 and 7, the service made by the complainant on the address in cause title is not valid, as the opponents have temporarily shifted. (ii) Service of summons on opponent no.6 is also invalid as the said opponent is dead past 15 years.

When petitioners in their application have not mentioned as to when knowledge came to them about passing of the ex-parte order, then how the date of knowledge is to be reckoned. Application for setting aside of the ex-parte order dated 12.6.2007, was filed on 20.12.2007. Thus, as per petitioners case, on 20.12.2007 they got the knowledge of ex-parte order having been passed against them.

13. INTERESTINGLY, while challenging order dated 12.6.2007 in Appeal (No. 249 of 2008) filed before the State Commission, Mumbai on 14.2.2008, petitioners took a somersault and have introduced an altogether new story about knowledge of the ex-parte order.

14. IN application seeking condonation of delay filed alongwith appeal, case of petitioners is that it was only in the month of July, 2007, they became aware of such an order having been passed. Relevant paras of the application states ; 2. The appellants state that it was only in the month of July, 2007 they became aware of such an order having being passed by the Honble District Forum when their erstwhile legal Manager Shri Abdul Latif Patel came to know about it through his acquaintance who informed him of the said fact having being published in the Free Press Journal and in Navshakti a Newspaper on 01.05.2007. 3. The appellant states that, there after immediately the appellant through its legal Manager Shri Abdul Latif Patel started taking steps and immediately applied for certified copy of the said order which was obtained on 16.07.2007. 4. The appellants thereafter passed a resolution entitling Mr. Abdul

Latif Patel their Legal Manager to adopt necessary proceeding and take necessary steps in view of the order passed by the Honble Forum dated 12.6.2007. 5. The appellants state that, in view of the fact that their Legal Manager was assigned the task to taking all the necessary steps, the appellant, were under bonafide belief that the said order must have been impugned by preferring the necessary/ appeal application before this Honble Court. 6. The appellants state that said Legal Manager resigned from this service on January, 2008. 7. The appellants state that thereafter in his place the appellant appointed one Mr. Rajesh Mane. It is submitted that, when Mr. Rajesh Mane went through the file maintained by Mr. Patel he found out that Mr. Patel had not taken necessary steps which he was bound to being a Legal Manager and authorized in that behalf. The appellants state that said Mr. Mane personally took search of all the proceeding before the Honble District Forum and found out that a Show Cause Notice dated 18.1.2008 under Section 25 & 27 of Consumer Protection Act, was issued in the names of the appellant, however, it was carrying the old address of the appellant Annexure-B. 8. The appellant therefore submit that on account of the aforesaid facts and more particularly on account of the conduct of their erstwhile employee Mr.Patel there has been a delay of 182 days in preferring the present appeal.

Thus, it is apparent from petitioners own case that they are taking contradictory pleas with regard to the knowledge of passing of the ex-parte order passed by the District Forum. In application dated 20.12.2007 for setting aside ex-parte order filed before District Forum, stand of petitioners is that Complainant has not properly served them the copy of summon/notice, whereas in application seeking condonation of delay filed along with appeal, the case of petitioners is that it was only in the month of July 2007, they became aware of such an order having been passed.

Hence, it stands established from petitioners own case that they have filed false and contradictory affidavits with regard to the knowledge of the passing of ex-parte order by the District Forum. Accordingly, District Forum rightly proceeded ex-parte against petitioners after they were duly served by publication.

15. AS far as service on OP No.6 (purported to have died on 23rd December, 1990) is concerned, as per documents placed on record by the petitioners themselves, it shows that OP No.6 was alive even after that day. For that purpose, reference be made to the following documents filed by petitioners along with the revision petition ; (i) Agreement dated 1st September, 1994 executed between petitioners namely Atlanta Construction Co. (India) Limited and 6 others and the purchaser of the premises in Atlanta Building (Annexure P-1 at page 36 of the paper book) and (ii) Verification clause of First Appeal No.249 of 2008 filed before State Commission, where petitioner no.5 has acted as constituted Attorney of original opposite party no.6 on 14th February, 2008 (page 119-120 of paper book).

Thus, petitioners themselves at all the times willfully and deliberately acted on behalf of a dead man and fraudulently and dishonestly concealed the fact of

death of OP No.6. Now petitioners cannot take advantage of their own wrong and falsehood, which are the basis of present revision petition as well as litigation before the foras below.

16. NOW coming to the merits of the case, both the fora below have dealt with the matter in right perspective and there is no infirmity or illegality in the impugned order. Observations made by State Commission in this regard are reproduced as under ; We have carefully gone through the record, interalia including the impugned order and particularly, the agreement with the flat purchasers, which is placed on record. It is submitted that all the flat purchasers agreements are identical. Much stress is given on the fact that the OPs were not properly served and therefore, ex-parte order be set aside. Considering the totality of the circumstances of this case, we are not much impressed by this and particularly, because in a notice reply which was an event prior to filing of the consumer complaint, the builder and developer even showed his willingness to execute conveyance. MOFA also makes it mandatory on the builder and developer once society was registered. Another argument on behalf of the appellants that is advanced before us is that they are willing to execute lease, but not the sale deed. We find this argument is also devoid of any substances, particularly, when the character of title possessed by the builder vis--vis OP is made clear in the agreement with the flat purchasers. Further, intention of proposed construction for a star hotel i.e. commercial purpose, as could be seen from the agreement with the flat purchasers and the complainant-society, clause (h) on internal page 2 of the agreement is indicated and said provision reads as under :- (h) In the first phase of construction the promoters have decided to construct a commercial building consisting of basement, ground and five upper storeys on the part/portion of the said land admeasuring 1455.83 sq.mtrs. more particularly described in the Second Schedule hereunder written and shown flushed with red colour on the plan Annexure I hereto (hereinafter referred to as the said portion) utilizing FSI of 15670.44 sq.ft. including stair case and balcony and to be known as ATLANTA ARCADE (hereinafter referred to as Building No.1). This makes it clear what title is possessed by the builder and developer vis--vis OPs. How much property including the FSI they want to utilize to construct the complainant/society. In view of this, whatever title they possessed is to be conveyed to the complainant/society to the extent mentioned in the flat purchasers agreements. Our attention is also invited to clause (n) on internal page 3 of the agreement, which reads as under :- (n) The Flat Purchaser has demanded from the Promoters and the Promoters have given inspection to the Flat Purchaser of all the documents of title relating to the said land, the plans, designs and specifications prepared by the Promoters Architect SHRI BIPIN S. BAROT, Director, Kalpana Consultants Pvt. Ltd. and of such other documents as are specified under the Maharashtra Ownership Flats (Regulation of the Promotion of Construction, sale, management and Transfer) Act, 1963 (hereinafter referred to as MOF) and the Rules made thereunder. On the basis of this stipulation, it is submitted that only lease is contemplated and not the sale

deed. This clause does not stipulate anything of that kind.

Thus, we find the appeal devoid of any substance. We fully concur with the findings and reasoning given by the State Commission.

17. PRESENT revision petition has been filed under Section 21(b) of the Act. It is well settled that the powers of this Commission as a Revisional Court are very limited and have to be exercised only, if there is some prima facie jurisdictional error in the impugned order.

18. RECENTLY, Honble Supreme Court in Mrs. Rubi (Chandra) Dutta Vs. M/s United India Insurance Co. Ltd. 2011 (3) Scale 654 has observed ; Also, it is to be noted that the revisional powers of the National Commission are derived from Section 21 (b) of the Act, under which the said power can be exercised only if there is some prima facie jurisdictional error appearing in the impugned order, and only then, may the same be set aside. In our considered opinion there was no jurisdictional error or miscarriage of justice, which could have warranted the National Commission to have taken a different view than what was taken by the two Forums. The decision of the National Commission rests not on the basis of some legal principle that was ignored by the Courts below, but on a different (and in our opinion, an erroneous) interpretation of the same set of facts. This is not the manner in which revisional powers should be invoked. In this view of the matter, we are of the considered opinion that the jurisdiction conferred on the National Commission under Section 21 (b) of the Act has been transgressed. It was not a case where such a view could have been taken by setting aside the concurrent findings of two fora. Thus, no jurisdiction or legal error has been shown to us to call for interference in the exercise of power under section 21 (b) of the Act, since, two fora below have given cogent reasons in their orders, which does not call for any interference nor they suffer from any infirmity or revisional exercise of jurisdiction.

In Ravinder Kaur Vs. Ashok Kumar, AIR 2004 SC 904, Apex Court observed ; Courts of law should be careful enough to see through such diabolical plans of the judgment debtor to deny the decree holders the fruits of the decree obtained by them. These type of errors on the part of the judicial forum only encourage frivolous and cantankerous litigations causing laws delay and bringing bad name to the judicial.