
(2007) 10 NCDRC CK 0023

In the National Consumer Disputes Redressal Commission

GIRISH MEGHRAJ JAIN

APPELLANT

Vs

AJIT RAWETKAR AND COMPANY

RESPONDENT

Date of Decision : 22-10-2007

Acts Referred:

Citation : 2008 3 CPJ 108

Hon'ble Judges : B.B.Vagyani , P.N.Kashalkar , S.P.Lale J.

Final Decision : Appeal partly allowed

Judgement

1. -THIS appeal filed by org. complainant in Consumer Complaint No. 437/2002 is directed against the dismissal order dated 20. 3. 2007 passed by District Consumer Forum, Pune.

2. WE heard Mr. A. V. Londhe, Counsel for the appellant/org. complainant and Mr. Amol Deshpande, Advocate for the respondents/org. O. Ps. This litigation has chequered history. The complainant who is appellant before us had booked a flat. The org. O. Ps. who are respondents herein executed Agreement of Sale in favour of the complainant on 19. 7. 1988. The Agreement of Sale was however registered on 28. 7. 1988. The total price of the flat was fixed at Rs. 1,90,400. The complainant paid Rs. 1,000 by way of booking price. The complainant booked a flat in building No. B-2. The complainant carries on business in cement. The O. Ps. required cement for construction. An understanding was arrived at between them. As per understanding the complainant supplied cement to the O. Ps. worth Rs. 1,10,226 during the period July, September, October and November of 1988. The O. Ps. on 23. 2. 1989 issued a certificate in favour of the complainant confirming booking of flat No. 402 in building No. B-2 at Survey No. 133/b/i, Parvati, Pune. In the said certificate carpet area of the flat is shown as 680 sq. ft. approximately. The complainant thus paid around 60% of total price of the flat to the O. Ps. However, O. Ps. did not deliver possession of the flat. Therefore, the complainant approached the Forum below by Complaint No. 437/2002.

The complaint filed by the flat purchaser was decided ex parte. The Forum below

dismissed the complaint by order dated 9. 6. 2006. Feeling aggrieved by the dismissal order, the complainant filed Appeal No. 1093/2006. The said appeal was allowed by the State Commission by order dated 15. 1. 2007. The matter was remanded to the Forum below for consideration afresh. After remand, the Forum below again dismissed the complaint by order dated 20. 3. 2007. Feeling aggrieved by the dismissal order dated 20. 3. 2007 the complainant has filed this appeal.

3. 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. 7. 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 lakh ninety thousand four hundred only) being the package deal lump sum price or under to the builder/developer out of which Rs. 1,001 (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. "

4. 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/i, 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 v. State of U. P. and Ors.*, AIR 1981 SC 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. 1. 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 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.

5. 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 *M/s. India Photographic Co. Ltd. v. H. D. Shourie*, II (1999) CPJ 36 (SC)=vii (1999) SLT 86=air 1999 SC 2453.

6. 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 Pvt. Ltd. and Anr. v. N. K. Modi, reported in III (1996) CPJ 1 (SC)= (1996) 6 SCC 385, wherein the Supreme Court has observed that the Consumer Fora functioning under Consumer Protection Act, 1986, a 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.

The prayer of complainant for possession of the flat however cannot be considered. The first promoter and developer of the property with whom the complainant had entered into the agreement for sale transferred development rights to another developer. Written agreement was executed between O. P. and Samarth Matoshree Pvt. Ltd. The project was not completed by the O. P. The subsequent promoter/developer is not joined to the consumer complaint. The earlier sanctioned plan was also materially changed subsequently. The complainant withdrew the application for addition of parties. Under the circumstance, the relief with regard to possession of the flat cannot be granted in favour of the complainant having regards to the subsequent events.

7. HOWEVER, the Consumer Fora under Section 14 of the Consumer Protection Act, 1986, can direct the O. P. to return the price and to pay such amount as may be awarded by way of compensation to the consumer for any loss or injury suffered by the consumer because of deficiency in service. Proviso is also made in Section 14 of Consumer Protection Act, 1986 to award damages to the consumer in fit cases. The Forum below, however, failed to exercise its legitimate jurisdiction under Section 14 of Consumer Protection Act, 1986 and dismissed the complaint on flimsy grounds. The learned Advocate Mr. Deshpande on behalf

of O. Ps. argued that the complaint is time-barred. The argument is without any substance. In the initial agreement for sale, the O. Ps. have agreed to deliver possession of the flat to the complainant. No specific date for delivery of possession is however shown in the agreement for sale. Therefore, cause filing consumer complaint is continuing one. Moreover, subsequent development agreement is executed in September 2003. Under the circumstance, it cannot be said that consumer complaint is barred by limitation.

8. THE learned Counsel Mr. A. V. Londhe for the appellant submits in the alternative that heavy compensation be awarded to the complainant taking into consideration the fraud committed by the respondents/org. O. Ps. In this behalf, he drew our attention to the decision of the National Commission in the case of *Veena Khanna v. Ansal Properties and Industries Ltd. and Ors.*, III (2007) CPJ 185 (NC). We are inclined to reproduce paragraphs 14 and 15 of the judgment of the National Commission: "14. In such circumstances, it was the duty of the State Commission to direct the opposite parties to deliver the possession of the same flat or flat of similar size to the complainant with compensation for delay in delivering the possession. Or, in any circumstances, adequate compensation ought to have been given so that the complainant could purchase a new flat of the same size at the prevailing market rate. Payment of interest is not any compensation because the complainant has taken the loan and he was required to pay the same to Bank. That means the amount paid by the complainant is directed to be refunded by the impugned order.

However, if the builder considers that compensation of Rs. 7,50,000 (Rupees seven lakh and fifty thousand) is more or excessive, it would be open to the builder to provide an alternative flat of the size and price agreed, in the same locality or nearabout, to the complainant for which an appropriate allotment letter will be issued by them in favour of the complainant within a period of eight weeks from the date of the order. If the same is not issued, it shall pay compensation of Rs. 7,50,000 to the complainant, as directed. 17. 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. 1. 2004 informed the Forum below that they would reserve one flat out of 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. In the result, we pass the following order: ORDER 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 lakh 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. I. R. No. 25/2007 stands disposed of. 6. Copies of the order be furnished to the parties.

Appeal partly allowed.