

(1999) 08 NCDRC CK 0026

In the National Consumer Disputes Redressal Commission

OSCAR D'SA

APPELLANT

Vs

PANDURANG D. KAMAT

RESPONDENT

Date of Decision : 24-08-1999

Acts Referred:

Citation : 2000 2 CPJ 16 : 2001 1 CLT 1 : 2001 1 CPR 404

Hon'ble Judges : E.S.Da Silva , Y.V.Rao , Mangala Sanes J.

Final Decision : Complaint dismissed

Judgement

1. THE complainant who alleges to be the owner in possession of property bearing Survey No. 33, Sub. Div. No. 1, at Revora, Bardez, Goa, entered into an agreement, dated 29.11.1990, with the opposite party, a Civil Contractor, to construct for him a bungalow, admeasuring 164 sq. mtrs. THE construction contract was taken by the opposite party for a consideration of Rs. 4,00,000/-. In terms of the said agreement possession of the building, completed in all respects, should have been given to him within a period of 12 months. According to the complainant, the opposite party started the construction work by laying foundation on 3.12.1990. However, the work was being carried out by the opposite party at a very slow pace and for that reason he had to pull him up time and again. It is the complainant's further case that, inspite of the work done by the opposite party being of poor quality, the complainant continued paying the consideration in terms of the Schedule of the agreement in the hope that the opposite party would remedy the defects by June, 1991. THE opposite party had completed only a part of the work without having done the work of pillars of the front veranda, and neither the plastering nor the painting of the bungalow was carried out. When the opposite party was warned that he should complete the remaining work, he deserted the construction. THEREafter, the complainant completed the construction on his own by erecting the pillars of the veranda and also carried out the plastering and painting of the bungalow as he intended to move into the house during the rainy season of 1991. On completion of the house on his own and at his own cost, he moved his furniture therein in July, 1991. However, during the monsoon the walls of the bungalow were damaged

and soaked due to seepage of water through the walls and leakage through the roof which completely destroyed/spoiled the painting and the furniture. THE complainant contacted an Engineer Shri Prasad Prabhu Dessai, to verify the work who, alongwith the Architect Julian D'Souza, inspected the construction and gave a Report dated 22.9.1991. As per this Report, the construction was found defective and not in accordance with the approved plans and, therefore, damages were caused. THE detailed Report, besides enumerating the defects, has also assessed the cost of its repairs which, according to the complainant, were worked out and quantified by him at Rs. 2,00,000/-. THE complainant, therefore, asked that he should be granted the cost of these repairs to that extend as well as the amount of Rs. 50,000/-, in addition, towards compensation for the loss suffered by him. Accordingly a specific prayer was made in the complaint that the opposite party be ordered to pay Rs. 2,50,000/- by way of damages and compensation with interest at 25% per annum.

2. IN reply, the opposite party has contended that he constructed the bungalow admeasuring 196 sq. mtrs. and, as per the terms of the Agreement, the complainant was bound to pay him towards the extra work done. It was further stated that the construction work was carried out under the supervision and instructions of the Architect of the complainant and that the said Architect used to visit the site regularly. The opposite party has used materials of first class quality but the complainant did not make the payment as per the agreed terms. It was also contended that, as per the terms of the contract, the complainant had a right to get the defects remedied or replaced free of cost but had no right to claim compensation. The complainant never raised any objection regarding the quality of the construction or of the materials while the work was in progress, neither the Architect who was regularly visiting the site raised any objection regarding the quality of materials or workmanship. The construction was completed in June, 1991 and the complainant put in possession in the same month. It was only when he received the Notice from the complainant's Advocate that he came to know about the alleged defects in the construction. The opposite party challenged the report of the Engineer and stated that the construction could not be done as per the plans because extensions and extra works were suggested by the complainant from time to time. The opposite party alongwith Engineer Shri Sanjiv Kamat of the complainant contacted the Architect before casting the slab to bring to his notice that the said casting as per his instructions might lead to leakage. However, the Architect insisted that the slab should be casted as per his instructions which he did. Hence, if the slab was not casted with proper slope, the blame should go on the Architect and not on him. He, therefore, submitted that all the defects mentioned by the complainant were due to the Architect's fault and it could not amount to any defective workmanship on his part. He also refused to accept the Report of Shri Prabhu Dessai which, according to him, was prepared to suit the conveniences of the complainant. Thereupon both the complainant and the opposite party filed their affidavits in evidence and, on the day of the final hearing, Mr. Braganza learned

Counsel for the complainant and Mr. Sawant learned Counsel for the opposite party, argued at length.

We have gone through the records and considered the submissions of the learned Counsel.

3. IT is an admitted position that, by agreement dated 29.11.1990, the complainant entrusted to the opposite party the work of construction of a bungalow, admeasuring about 164 sq. mtrs. in a plot belonging to him and situated at Revora, Bardez Taluka, for a consideration of Rs. 4,00,000/-. No fixed time period for its completion and delivery of possession to the complainant was provided in the contract but a clause was included whereby the opposite party would guarantee the construction, covering defects on material and workmanship to be remedied or replaced free of cost by the said opposite party, for a period of 12 months from the date of the handing over possession of the building to its owner. IT is, therefore, evident that the agreement dated 29.11.1990, being the only source of the rights and obligations available to the parties, the merits of the complainant's claim, its nature and admissibility can be assessed or adjudicated only after taking into consideration the relevant clauses of the same agreement. In this regard and upon its bare perusal the following striking notes are to be borne in mind : (a) Throughout the recitals of the agreement, the opposite party has been referred to, merely, as a Contractor (and not as a Builder) for the purpose of the execution of the construction of the complainant's bungalow, as per the drawings prepared by the Architect chosen and appointed by the complainant, ostensibly to keep a thorough check on the work performance of his plans and drawings and secure quality standards with regard to its workmanship. (b) Sub-clause (c) to Clause 2, dealing with the "Scope of Contract", specifically provides that the Contractor's work, shall not deviate from the drawings/specifications prepared by the Architect, under recital 3, and the Architect's interpretation of these documents shall be final and without appeal. (c) Similarly Clause 3, regarding "Extent", clearly speaks to the fact that the Contractor shall carry out and complete the work in every respect (emphasis supplied) in accordance with the directions of and to the reasonable satisfaction of the Architect who may, in his absolute discretion and from time to time, issue further drawings, instructions, written directions and written explanations to be strictly complied with by the Contractor. (d) Further, as per Sub-clause (d) to Clause 2, figured dimensions on the scale drawings and large size details shall govern. Large size details shall take precedence over small scale drawings. Any work done before receipt of such details, if not in accordance with the same, shall be replaced or adjusted as directed by the Architect without expenses to the Owner. (e) Incidentally Sub-clause (a) to Clause 2 stipulates that the Owner reserves the right to increase or decrease any of the quantities or to totally omit any of the items of work and the Contractor (opposite party) shall not claim any extras or damages on these grounds.

It follows, therefore, that in this whole agreement executed by the complainant

with the opposite party, which is identified and expressly represented therein just as a Contractor, the real and key figure appears to be the Architect, as its undisputable Planner and main Executor through and with the help of the opposite party as a Contractor and the only guarantee of its effective performance and strict compliance in terms of the agreement, being the role of the opposite party relegated to the second place as a mere instrument of its actual execution. Indeed no other inference is able to be drawn in this respect from the abovementioned exclusive Clause 2(a), reserving to the complainant the right to increase or to decrease any of the quantities as per the agreement's Schedule or totally omit any of the items of work without vesting on the opposite party a countervailing right to claim extras or damages on this ground.

4. THIS being the position, we are inclined to share the opposite party's view that the actual work of the construction was required to be undertaken to him only as per the directions of the complainant's Architect and to his entire satisfaction so much so the same Architect used to supervise the work regularly and give him instructions on the job. In our opinion this would mean that once the Architect was acting on the complainant's behalf and also as his personal representative to oversee the structural and technical implications of his plans, no blame could be casted on the opposite party nor was he able to be held liable for any defects or deficiencies in the implementation of the work. We are, therefore, in agreement with the opposite party's learned Counsel in his attempt to distinguish the job of a Builder from the one expected to be performed by a Contractor, under a direct and strict guidance or supervision of the Architect, as his helper and assistant, to conclude that, in the circumstances, the contract entered into by the opposite party with the complainant is a mere contract of service and not instead, a contract for service which apparently seems to have been entrusted to the Architect. In the instant case we are also satisfied that, apart from the factual and legal position arising out from a plain and constructive reading of the agreement's Clauses, the evidence on record is far from establishing the case sought to be made by the complainant with regard to the alleged deficiency in service claimed against the opposite party. Indeed the basic pieces of evidence which the complainant seems to rely are the letter of the Architect Julian D'Souza, dated 27.2.1990, and the so called Report of Engineer Prasad Prabhu Dessai which both, for obvious reasons, have to be discarded since the same are not fitting within the parameters of legal evidence. We say so because the substance of its contents has not been affirmed by them through competent affidavits inspite of the same having been specifically denied by the opposite party who contends, more particularly in respect of the Engineer's Report, that there exists no registered Engineer with the name of Prasad Prabhu Dessai bearing also in mind that only a plain xerox copy of this so called Report was produced by the complainant without a proper identification of the personal or professional qualifications of its signatory.

5. FURTHER the affidavit of the Engineer Agnelo Oliveira which was also sought to be availed of by the complainant in support of his pleadings is also bound to

be outrightly rejected consequent upon the production of a contrary affidavit of the said Agnelo, this time in favour of the opposite party, the reason why this Commission was compelled to order his criminal prosecution for perjury in the competent Forum. Being so, it is manifest that no reliance can be placed on such a character and on his testimony as well. In addition we are also unable to accept the legal sanctity of the Report, dated 24.6.1993, of the Commissioner Tuencar appointed by this Commission which has pointed out to certain defects and deficiencies in the suit construction and prepared an estimate of the amount of expenses required for its rectification. In our estimation, the same appears to be inadmissible in evidence. The opposite party has contested its validity on the ground that the same was prepared after an inspection to the site for which he was not intimated to personally attend although the Commissioner maintains that a notice was sent for the purpose but he expressed his inability to remain present. But, be that as it may, the fact remains that in view of the contradicting stand taken by both the parties involved on this point there is nothing on record to show that any letter or notice addressed by the Commissioner to the opposite party in this regard was timely delivered or served on him. FURTHER, as it was also contended by the opposite party, the same appears to have been drawn not in accordance with the terms of the agreement, which does not even provide for any water proofing of the roof slab of the bungalow besides dealing mainly with the bad planning of the slab and/or its defective casting without maintaining proper levels which by itself suggests an architectural error that could never be attributed to the contractor but, instead, to the Architect alone who was, otherwise, the only responsible for the preparation of the plans and drawings and was also bound to supervise its full and strict implementation during the execution of the work by the opposite party.

6. LASTLY, the complainant's application, dated 29.1.1993, for amending of the plaint and to implead both the Architect Julian D'Souza and Engineer S. Kamat as opposite parties, so as to enable the Commission to pin down the real culprit clearly suggests that the complainant himself has not made up his mind as to who is the real responsible for the defects and deficiencies in the execution of the construction of work of his bungalow. This fact alone and the complainant's allegation that from the facts on record, "it appears" to him that "the Engineer and Architect have got together with the Contractor in order to hookwink this Consumer Commission and deprive the complainant of his rightful relief", seems to clinch the whole issue and indicates that the complainant could not get any benefit by placing undue reliance on that very evidence on which he was purporting to base his claim for compensation against the opposite party. It is a settled position in law that the burden always lies on the complainant alone to make out his case against the opposite party if he seeks a relief against him. However, in the instant case the shifting stand taken by the Complainant is certainly self destructive of his alleged claim and seems to take him nowhere. On the other hand and against all this material produced on record by the complainant we have seen that the opposite party has consistently maintained

throughout the proceedings that he has always executed the construction work, including the casting of the slab, as per the instructions of the Architect and under his direct supervision and, therefore, he could not be held liable for whatever defects or deficiencies which could have arisen on account of his strict compliance of the plans drawn and prepared by the said Architect. In support of this contention, the affidavits of the complainant's Engineer, S. Kamat and that of the Supervisor of the suit construction, Mohan Parab, are on record on his behalf. Both speak to the fact that most of the time not only the complainant in person used to remain present when the work was in progress but also that it was actually the Architect who used to visit the site on every alternate day and give necessary instructions and that the construction work was done as per his instructions. More particularly, they have also mentioned that, at the time of the casting of the sloppy slab the Architect refused to accept the Engineer's suggestion that beams should be put at critical points to avoid leakage.

The Report of the Commissioner Tuencar points out, as the main deficiencies or draw backs of the construction, the improper casting of the roof slab without maintaining the required top levels and the consequent leakage of water through the walls due to the fact that no water proofing was also provided.

7. IN the circumstances and on the basis of the facts on record, we are of the considered view that no relief is available to the complainant under any provision of the Act without prejudice of his approaching, if so advised, the adequate Forum to establish his rights for compensation, if any, against the real responsible for the alleged damages in his bungalow. IN the result, the complaint stands dismissed with costs which we quantify at Rs. 2,000/-. Order accordingly. Complaint dismissed.