

(2004) 07 NCDRC CK 0037

In the National Consumer Disputes Redressal Commission

RICHARD PINHEIRO

APPELLANT

Vs

UNITED INDIA WATER PROOFING SERVICES

RESPONDENT

Date of Decision : 22-07-2004

Acts Referred:

Citation : 2004 3 CPR 188 : 2005 1 CLT 27 : 2005 1 CPJ 564

Hon'ble Judges : J.N.Prabhudessai , Sandra Vaz E.Correia J.

Final Decision : Appeal partly allowed

Judgement

1. THE appellant has challenged the order dated 6.1.2003 made by the District Forum, North Goa in Complaint No. 149/99 whereby his complaint against the respondent was dismissed.

2. FOR convenience, the parties to this appeal shall be referred as arrayed before the District FORum. Briefly stated, it is the complainant's case that he is the owner of two residential flats situated on 1st floor of Mira Apartments, Miramar, Panaji, Goa, wherein he resides with his family. A portion of the said flat is covered by a flat terrace and the remaining portion by a sloping roof slap i.e., covered with Mangalore tiles.

Some time in the year 1997, the complainant approached the opposite party for carrying out waterproofing works to the roof of the said two flats, for which a quotation accompanied by "Terms of Business" and specifications was also furnished.

3. THE complainant paid an amount of Rs. 20,000/- to the opposite party, and thereafter the opposite party commenced with the work some time in end November 1997. THE complainant paid a further amount of Rs. 10,000/- in December 1997. THEreafter, on completion of the work, the opposite party presented the final bill for Rs. 36,451.20 dated 3.1.1998. THE complainant paid a further amount of Rs. 10,000/- within a week's time in full and final settlement of the said bill. Some plumbing work was also undertaken alongside the waterproofing work costing Rs. 3,000/-, for which an amount of Rs. 4,000/- was

agreed to be paid. Upon completion of the works and receipt of full payment, the opposite party issued a guarantee that the work would remain entirely watertight and that due to any unforeseen defects any leakage should come about within a period of ten years from the date of completion, such defect would be rectified without any extra cost.

4. DURING the progress of the said waterproofing works of the flat roof slab, the complainant asked for a quotation from the opposite party for removing the tiles on the sloping roof and replacing the wooden battens with cement battens and for also carrying out waterproofing treatment on the said sloping slab. The opposite party gave a quotation dated 6.12.1997 for a total cost of Rs. 21,500/-, subject to actual measurements. This quotation was also accompanied by printed sheet containing "Terms of Business". This price was negotiated and was reduced to Rs. 20,000/-; which amount was paid by the complainant to the opposite party in three instalments. The complainant noticed that several damp spots and areas had developed all over the flat roof which had been waterproofed, in the first seven to eight weeks of the monsoon season of the year 1998. The complainant thereafter issued a letter dated 1.8.1998 to the opposite party informing about the said fact and asking for an inspection of the premises. The opposite party visited the said flats but did not do anything in the matter. Accordingly, the complainant sent a reminder letter dated 1.10.1998. This was followed up by the third letter dated 25.11.1998 sent by registered A.D. The complainant got the said flats inspected by Shri R.J. Shenaj, Civil Engineer, who prepared a report dated 13.10.1998 giving his findings thereon. The complainant thereafter issued a legal notice to the opposite party on 19.1.1999, which was replied by the opposite party through Advocate on 19.2.1999.

5. THE complainant prayed for a direction to the opposite party to re-do the entire water-proofing on the flat roof slab of the flats free of cost or alternatively to pay to the complainant a sum of Rs. 1,00,000/-, to enable him to carry out the said works. THE complainant further prayed for a sum of Rs. 15,000/- towards cost of painting damaged and further sum of Rs. 50,000/- as damages.

6. PER contra, the opposite party filed his written version and contended that the complainant had come with unclear hands and had suppressed material facts. It was submitted that as per "Terms of Business", the guarantee issued by the opposite party would be enforceable only after payment of the entire dues. It was alleged that a sum of Rs. 6,888.10 and plumbing charges of Rs. 1,450/- had not been paid by the complainant in terms of the contract and, therefore, the guarantee became unenforceable. On means, it was admitted that a discount of Rs. 1,500/- was given for the water-proofing work of the sloping slab. It was submitted that, at the time of inspection of the flats, the opposite party pointed out that the damp spots and arrears was not the cause of poor quality waterproofing, but the same was due to percolation of water through the window frames of the adjoining upper floor flats which passed through the proof slab of the complainant's flat. It was also pointed out that during the rainy season,

water from the upper slab where no waterproofing treatment was carried out, entered into the walls of the said upper floor kitchen as well as through the services of external walls which were not plastered thereby creating dampness on the roof slab. The complainant was advised to get the said works done himself in conjunction with the owner of the upper floor flat.

Parties filed their affidavits-in-evidence and reiterated the stand taken by them in their pleadings.

7. THE District Forum appointed Shri J.J.S. Rego, Executive Engineer, State P.W.D. as a Commissioner to inspect the said flats and to submit his report on the allegations made by the complainant. THE said Commissioner submitted his report on 25.5.2000. The complainant filed his objections to the said Commissioner's report; however the same was overruled by the District Forum.

8. THE District Forum, after going through the evidence on record and after hearing the parties came to a finding that there was no deficiency in service on the part of the opposite party, and accordingly dismissed the complaint. At the time of hearing, Mr. A. Couto argued on behalf of the appellant and also filed synopsis. None was present on behalf of the respondent. It may be noted that service of summons through Commission's bailiff did not materialise since the respondent was not available at the registered address. Thereafter, the Commission permitted the appellant to carry out substitute service by publication in local newspaper; which was accordingly published in "Herald" dated 25.6.2003. However, the respondent failed to appear for seven consecutive hearings. We, therefore, proceed to dispose this appeal ex parte on merits. The District Forum laid emphasis on the portion of the Commissioner's report which stated that the flat roof had a good slope. This, coupled with absence of any photographs, led the Forum to come to a finding that the dampness was due to extraneous factors such as window of the upper floor flat which did not belong to the complainant.

9. WE do not agree with the findings of the District Forum. At the outset, the District Forum has given undue importance to the Commissioner's report. It is seen from the records that the Chief Engineer, State Public Works Department was asked by the District Forum to appoint Shri J.J.S. Rego to act as Commissioner and to submit his report on the allegation made by the complainant in the enclosed complaint (emphasis is ours). In our opinion, the Commissioner's report is vague and has not at all gone into the merits of the allegations/grievances made by the complainant. The Commissioner has admitted that he had seen "moist formation" in the walls and ceiling of the dining area and master bedroom; however, there is no opinion as to the exact cause of the dampness. The District Forum has pointed out that there was no guarantee issued by the opposite party with regard to the works carried out for the sloping roof, which has been denied by the complainant. Be that as it may, it is an admitted fact that the dampness/seepage occurred in the very first monsoon after the completion of the job. In our opinion, this fact itself is enough

evidence of defective works. It is also evident from the records that the complainant issued three letters to the opposite party informing about the defective works; none of these letters were replied by the opposite party. The defence regarding the adjoining flat's window being the cause for the dampness was raised for the first time in reply to the legal notice issued by the complainant. This defence appears to us to be an afterthought.

10. IN our opinion, the complainant has established the preponderance of probability of his case. The complainant annexed a sketch showing the location of the ceiling/walls of his flat which were affected by dampness. IN fact, the fact of dampness/seepage existing in the said flat has been admitted even by the opposite party. IN these circumstances it was not necessary for the complainant to produce photographs of the dampness/seepage in his flat. The complainant claimed for an amount of Rs. 50,000/- as damages. In our opinion, the transaction between the parties was an ordinary commercial contract and, therefore, the parties cannot claim any compensation for any collateral loss suffered by them.

In view of what is discussed above, we are of the opinion that the works carried out by the opposite party were defective. As such, the impugned order of the District Forum cannot be sustained.

11. THE complainant has prayed for a direction to the opposite party to re-do the entire waterproofing on the flat roof slab of the complainant's flat free of cost or alternatively for an amount of Rs. 1,00,000/- to enable the complainant to carry out the work. In our considered opinion, in the facts and under the circumstances the complainant is entitled for a direction to the opposite party to re-do the entire waterproofing on the flat roof slab of his flat free of costs. Hence, the following order: (i) This appeal is partly allowed. (ii) The impugned order dated 6.1.2003 made by the District Forum, North Goa in Complaint No. 149/99 is quashed and set aside. (iii) The Complaint No. 149/99 on the file of District Forum, North Goa is partly allowed. (iv) The respondent-original opposite party is directed to re-do the entire waterproofing on the flat roof slab of the complainant's flat free of cost within 60 days. (v) The respondent-original opposite party is directed to pay to the appellant-original complainant an amount of Rs. 10,000/- as cost of this litigation. Order accordingly.

Appeal partly allowed.