SUPREME COURT OF INDIA

DLF Universal Ltd.

Vs

Ekta Seth

Civil Appeal No. of 2008(Arising out of S.L.P. (Civil) No. 18834 of 2006)

(S.B. Sinha and Dr. Mukundakam Sharma)

15/07/2008

JUDGMENT

Dr. MUKUNDAKAM SHARMA, J.

1. Leave granted.

2. This appeal is filed by the appellant challenging the legality of the judgment and order dated 3rd July, 2006 passed by the Monopolies and Restrictive Trade Practices Commission, New Delhi (for short "the Commission"). By the aforesaid judgment and order the learned Commission made certain observations and recorded findings against the appellant herein, which are under challenge in this appeal. The Commission recorded a finding that the action of the appellant in increasing the cost which forced the respondent from making further payments resulting in the cancellation referred to by the appellant was unfair trade practice and the appellant had no right to forfeit the earnest money. Consequently a direction was issued that the appellant should return the earnest money with interest thereon @ 9% per annum from the date of withholding the earnest money till the date of repayment in respect of the main flat as well as the parking space in respect of the letters

dated 26th/27th May, 1999.

3. We may briefly state the facts leading to the aforesaid direction of the Commission. The respondent herein booked a flat along with parking space in the appellant's DLF Regency Park, Gurgaon by entering into an Apartment Buyer's Agreement on 17th June, 1993. The sale price fixed by both the parties was at Rs.16,37,448/- payable in 42 installments spread over a period of ten years commencing from 9th March, ending on 9th March, 2003. The respondent, herein admittedly paid all the installments due upto September 1998 which came to a sum of Rs.9,94,836/-. But thereafter he did not make any payment of installment and therefor was considered to be a defaulter by the appellant. In the meantime by letter date 19th February, 1998 the appellant demanded an additional amount of Rs. 4,21, 474.06 from respondent on account of cost of escalation, increase in area, external electrification, fire fighting system and stand-by generators. The said amount was to be paid in four equal bi-monthly installment of Rs.1,05,368.52/- commencing from 15th March, 1998. The respondent did not honor the said demand. Consequently, the appellant cancelled the allotment of the flat vide its letter dated 26th May, 1999 and forfeited the earnest money and returned the balance amount due.

4. The respondent sent a legal notice dated 23rd May, 2001 to the appellant contending that the cancellation of the allotment of the flat was illegal and arbitrary. The appellant sent a reply to the legal notice on 25th June, 2001 stating that the deductions mad were lawful and in accordance with the terms of the agreement.

5. The respondent, however, was not satisfied with the reply sent by the appellant and instead filed an application under Section 12-B of the Monopolies and Restrictive Trade Practices Act, 1969 before the Commission for payment of compensation on the ground of unfair trade practice. It was contended inter alia, by the respondent that the appellant was not entitled to forfeit the earnest money as they themselves were unable to give delivery of the flat within the stipulated time and more particularly, when the appellant has re-sold the said flat at a good price, therefore, as the appellant did not incur any loss, they could not and were not, entitled to forfeit the earnest money. The aforesaid submission of the respondent found favour with the Commission and it recorded the aforesaid finding and allowed the application filed by the respondent, consequent to which the impugned directions were issued which are under challenge in this appeal.

6. The issue which was raised and urged before us, therefore, clearly revolves around the power and jurisdiction of the appellant in forfeiting the earnest money which was to the tune of Rs.1,80,470/-. On going through the record we, however, found that out Rs.1,80,470/- an amount of Rs.1,69,012/- was forfeited as earnest money, out of which an amount of Rs. 1,62,412/- was for the flat and an amount of Rs. 6600/- was for the parking allotted to the respondent. The balance amount i.e Rs.9,571/- was forfeited by the appellant on account of interest on the delayed payment.

7. On behalf of the learned counsel for the appellant a specific contention was raised before us that the appellant was entitled to forfeit the earnest money in terms of the stipulations in the agreement arrived at between the parties with mutual consent. Learned counsel appearing for the appellant has drawn our attention to the various clauses of the said agreement which empowered the appellant to deduct the aforesaid earnest money. In this connection, reference was made to the provisions contained in clause 8 and 9 of the said agreement which read as follows:

"8. That the Company and the Apartment Allottee hereby agree that the amounts paid on registration to the extent of 10% of the sale price of the said premises and on allotment or in instalments as the case may be, will collectively constitute the earnest money. Non-fulfillment by the Apartment Allottee of the terms and conditions of application for allotment, terms and conditions of sale and those of this Agreement as also in the event of failure to sign this Agreement by Apartment Allottee within the time allowed may entail the forfeiture of the earnest money.

9. That the time of payment of installments as stated in schedule of payments (Annexure-II) is the essence of this Agreement. It shall be incumbent on the Apartment Allottee to comply with the terms of payment and other terms and conditions of sale, failing which he shall forfeit to the Company the entire amount of earnest money and the Agreement of sale shall stand cancelled and the Apartment Allottee shall have no right, title, interest or claim of whatsoever nature on the said premises. The Company shall thereafter be free to resell and deal with the said premises in any manner, whatsoever, at its sole discretion. The amount(s), if any, paid over and above the earnest money shall be however refunded to the Apartment Allottee by the Company without any interest."

Relying on the said provision it was contended by the learned counsel for the appellant that the action of the appellant in forfeiting the earnest money was legal and justified.

8. Counsel for the respondent, however, refuted the aforesaid position contending, inter alia that the possession was proposed to be given to the respondent on or before June 16, 1996 i.e. within three years from the date of booking, but the said possession was not given even till 1998, therefore, the appellant could and would not have resorted to the power of forfeiture of the earnest money. It was submitted on behalf of the respondent that a sum of Rs. 4, 21,474.06/- demanded towards cost of escalation, increase in area, external electrification, fire fighting system and stand by generators was exorbitant. It was also submitted that it is unfair on the part of the appellant to demand such a huge amount in such a short span of six months.

9. The aforesaid submission of the respondent was also advanced before the Commission and the same found favour with the Commission. The learned Commission observed that substantial portion of the escalation has been attributed towards creating additional facilities and upgrading the flats, thus putting additional and unforeseen burden upon the allottee and that to, to be fulfilled in short span of time. The Commission further held that the contract was one sided and the respondent was

required to sign on the doted lines. While coming to the aforesaid conclusion the Commission has relied upon one of its earlier order dated 2nd May, 2006 in Grahak Shayak Gurgon Voluntary Consumer Association and Ors. v. DLF Universal Ltd. & Anr. wherein in respect to the same complex for which the respondent filled the application for allotment, the escalation made by the appellant has been held to be unfair trade practice.

10. The parties to the contract are governed and bound by the terms and conditions of the agreement entered into. In the case in hand though it cannot be denied that the respondents at the time of signing the Apartment Buyer's Agreement was well aware of the fact that additional amount could be demanded on account of factors enumerated in clause 4, but what would be the maximum enhancement was not prescribed in the agreement. It seem that by inserting the words "the decision of the Company in this regard would be final and binding on the Apartment Allottee" in clause 4 of the agreement the company has vested in itself unrestricted power to increase the cost.

11. Coming to the second aspect as per clause 16 of the agreement it was proposed that the possession could be given within three years from the date of booking i.e by 16th June, 1996 but the same was not done even till September 1998 and it is evident from letter dated 22nd February, 1999 that there was still some time and further work to be done by the appellant to enable it to hand over the possession. As per clause 18 the only option given was that if there is delay in delivering the possession then the allottee would be entitled for refund of entire amount deposited with the appellant but without any interest. In other words as per the terms of the agreement no liability will accrue upon the appellant due to delay in handing the possession.

12. In the present case we find that the installments were duly paid for at least five years and payment was stopped thereafter on the ground that the increase in the cost of the flat was beyond the means of the respondent and also the fact that appellant had failed to deliver the possession of the flat in time. On the other hand as submitted there were bona fide reasons on the part of the appellant for their inability to handover the said possession within the stipulated time and the increase in cost was on account of factors specifically enumerated in clause 2 (b) and clause 4.

13. Considering the entire facts and circumstances of the case, we are of the considered opinion that the interest of justice would be subserved if we, in exercise of our discretionary jurisdiction under Article 142 of the Constitution of India, direct that 50% of the amount which was forfeited be refunded by the appellant to the respondent within three months from the date of this Judgment and the balance 50% would be considered as forfeited in terms of the provisions of the agreement. However, if the appellant fails to pay the said amount within the stipulated period the same will carry an interest @ 8% p.a. which will be calculated from the date when the abovementioned period expires till the date of payment.

14. We also make it clear that this order is passed in the peculiar facts and circumstances of this

case and would not be considered as precedence in any other matter.

15. The appeal stands disposed of in terms of the aforesaid directions. There will be no order as to costs.