SUPREME COURT OF INDIA

Fortune Infrastructure (Now Known As M/S. Hicon Infrastructure)

Vs.

Trevor D'lima

C.A.No.3533-3534 of 2017

(N.V.Ramana and S.Abdul Nazeer,JJ.,)

12.03.2018

JUDGMENT

N.V.Ramana, J.,

1. These appeals are filed against the impugned orders, dated 08.09.2016 and 03.11.2016, passed by the National Consumer Disputes Redressal Commission [hereinafter NCDRC for brevity], in Consumer Complaint No. 636 of 2015 and Review Application No. 273 of 2016 in the Consumer Complaint No. 636 of 2015.

2. A few facts which are necessary for the disposal of this matter are that the appellants, in the year 2011, launched a residential housing project by name 'Hicons Onyx', renamed as Fortune Residency, which was a re-development of Mohammadi House. The respondents booked a flat bearing no. 202, 2nd Floor in 'A' wing, admeasuring 828.40 Sq. Ft. with one unit of parking-space. The total consideration for the flat was Rs. 1,93,0, 000/-. It is alleged by the appellants, that due to increase in the cost beyond what was expected, they transferred the project to another company being M/s. Zoy Shelcon Pvt. Ltd. It is to be noted that the respondents have paid a sale consideration of Rs. 1,87,00,000/-.

3. In 2015, aggrieved by the fact that appellants were not willing to deliver the flat to them, the respondents approached NCDRC through a consumer complaint, being CC No. 636 of 2015, with following prayers-

> "a. To hold and declare the Opposite Parties to be guilty of deficiency in service and unfair trade practices as per the provisions of the Consumer Protection Act, 1986
>
> b. To direct the Opposite Parties 1 to 4 to comply with their statutory obligations and to execute and register the Agreement for Sale with the complainants in respect of flat No. 202 on the 2nd floor admeasuring 828.40 Sq. Ft. with one car parking in the building known as Hicon Onyx and since re-named as Fortune residency situated at

plot no. F/1116-A, Village Bandra, St. Martins Road Bandra (West), Mumbai 400 050 (Maharashtra).

c. To direct the Opposite Parties no. 1 to 4 to complete the construction of the building known as 'Hicons Onyx' since renamed as 'Fortune residency' and to hand over to the complainants vacant and peaceful possession of the Flat No. 202 on the 2nd floor admeasuring 828.40 Sq. Ft. with one car parking in the building known as Hicons Onyx and since renamed as Fortune residency situated at plot no. F/1116-A, Village Bandra, St. Martins road Bandra (West), Mumbai 400 050 (Maharashtra) on receiving the balance consideration amount of Rs. 6,00,000/-from the complainants
Alternatively In the event of the Opposite Parties no. 1 to 4 having created third party interests in favour of the Opposite Party no. 5, to direct the Opposite parties no. 1 to 4 to hand over to the complainants any other flat of the same size quality and specifications with one car parking in the same building 'Hicons Onyx' since re-named as 'Fortune Residency' or any flat of the same size, quality and specifications with one car parking in the same locality of the present building Hicons Onyx or Fortune Residency.

f. To direct the Opposite Parties No. 1 to 4 jointly and severally pay to the complainants Rs.5,00,000/- (Rupees Five lakhs only) towards compensation for the inconvenience and mental agony suffered by the complainants due to the enormous delay in construction of the building, negligence and deficiency in service of the Opposite Parties No. 1 to 4.

g. To direct the opposite Parties No. 1 to 4 jointly and severally to pay to the complainants the sum of Rs. 1,00,000/- (Rupees One Lakh only) being the Legal and other incidental expenses incurred by the complainants.

h. For such other and further relief as this Hon'ble Commission may deem fit and proper in the nature and circumstances of the above numbered complaint.

4. The NCDRC has allowed the complaint and directed the appellants: 1. To refund the amount of Rs. 1,87,0,000/- which they have received from the complainants, within six weeks from the day of the impugned judgment; 2. The appellants were further directed to pay a sum of Rs. 3,65,46,000/- as compensation and Rs. 10,000/- as cost of litigation to the complainants within six weeks from the day of the impugned judgment; 3. The aforesaid amount was ordered to be paid at 10% per annum from the date of the order till the actual date of payment. It may be noted that even the review against the aforesaid order was dismissed by the NCDRC vide order dated 03.11.2016.

5. Having dissatisfied with the impugned orders passed by the NCDRC, appellants approached this Court through these civil appeals.

6. At the threshold it was brought to our notice that on 08.09.2016, when the matter was argued, on most of the other dates the appellants remained unrepresented before NCDRC.

Further the counsels representing the appellants stated that their counsel appointed for the forum below did not file necessary pleadings except for a proforma reply. Keeping in view of the above, they argued that this case should be remanded back to the NCDRC for fresh consideration. However, on careful consideration of facts of this case, we are of the opinion that a remand may not be required at this stage. To put a quietus to the litigation, the controversy can be adjudicated by this Court.

7. Learned counsel for the appellants, primarily submitted that the present appellants have transferred the project to a different company thereby they should be discharged from any liability for not handing over the disputed property to the answering respondents (Complainants). He further argued that, the present circle rate of the disputed property is pegged at approximately half the price awarded by the NCDRC. Lastly, he urged before this Court to consider the downward trends shown in the real estate market which mandates a lesser compensation, compared to the one awarded by the NCDRC.

8. Per Contra, the learned counsel appearing on behalf of the answering respondents (Complainants) fully supported the reasoning of the NCDRC in coming to a conclusion that, the appellants herein provided deficient service by delaying the handing over of the flat to the complainants. In all fairness, learned counsel for answering respondents have admitted that prices as contemplated under the impugned order of NCDRC are not reflective of the true market rates for similar flats available in the near vicinity of the disputed flats.

9. It would not be out of context to mention that during the hearing of this case, many attempts were made by both parties to amicably settle the issue concerning the quantum of compensation which could not fructify. Further we requested Shri. Raju Ramachandran, learned senior advocate, to use his good office to persuade parties to settle the matter. Such an endeavour also could not impress upon the parties and therefore this court was called upon to adjudicate the matter.

10. Having heard learned counsels on either side and perusing the materials available on record, the issue that fall for consideration is whether there is deficiency of service on the part of the appellants? If so, what is just and reasonable compensation?

11. It is now well established that the contractual damages are usually awarded to compensate an injured party to a breach of contract for the loss of his bargain. In the case of *Johnson and Anr. V. Agnew*[1], the aforesaid case has clearly held as under-

The general principle for the assessment of damages is compensatory, i.e. that the innocent party is to be placed, so far as money can do so, in the same position as if the contract had been performed.

12. The aforesaid proposition remains to hold the field and has been applied consistently. This rule is more qualified when it comes to the real estate sector. If the seller wants to limit their liability for breach of contract under the aforesaid rule, they have to portray that they have performed their obligation in a prudent manner. It may be noted that the onus is on the

seller to show his best efforts and bona fides in discharging the obligation. It may be noted that even in the absence of fraud, mere unwillingness to carry out the duty could constitute bad faith sufficient for the purchaser to claim damages.

13. To decide whether the respondent ought to be awarded compensation because of deficiency of service, it is important to consider the meaning of deficiency as provided under Section 2(1)(g) of the Consumer Protection Act, 1986. (g) "deficiency" means any fault, imperfection, shortcoming or inadequacy in the quality, nature and manner of performance which is required to be maintained by or under any law for the time being in force or has been undertaken to be performed by a person in pursuance of a contract or otherwise in relation to any service; In light of the above definition, we have to examine whether there is any deficiency in service, which entitles the complainant to damages/compensation.

14. In the present case, the appellants did not give any valid reasons as to why they transferred the property to a third party, despite their contractual obligation to the respondents (complainants). The obligation was on the appellants to show that he was unable to transfer the property to the respondent.

15. Moreover, a person cannot be made to wait indefinitely for the possession of the flats allotted to them and they are entitled to seek the refund of the amount paid by them, along with compensation. Although we are aware of the fact that when there was no delivery period stipulated in the agreement, a reasonable time has to be taken into consideration. In the facts and circumstances of this case, a time period of 3 years would have been reasonable for completion of the contract i.e., the possession was required to be given by last quarter of 2014. Further there is no dispute as to the fact that until now there is no redevelopment of the property. Hence, in view of the above discussion, which draw us to an irresistible conclusion that there is deficiency of service on the part of the appellants and accordingly the issue is answered. When once this Court comes to the conclusion that, there is deficiency of services, then the question is what compensation the respondents/complainants is entitled to ?

16. Before we come to the aspect of quantum of compensation, it would be appropriate to look at the settled legal position concerning the same. At the outset, we may note that even under the Consumer Protection Act, 1986, the damages for commercial contracts need to be determined as per the Indian Contract Act.

17. It would be pertinent to note that in common law, claim for damages is the rule and specific performance is an exception, while in civil law front, specific performance has traditionally been a prime remedy for the breach of contract.

18. This Court in *Ghaziabad Development Authority v. Balbir Singh*[2], has observed that there is no fixed formula for fixing damages in the following manner- 8. However, the power and duty to award compensation does not mean that irrespective of facts of the case compensation can be awarded in all matters at a uniform rate of 18% per annum. As seen above, what is being awarded is compensation i.e. a recompense for the loss or injury. It therefore necessarily has to be based on a finding of loss or injury and has to correlate with

the amount of loss or injury. Thus, the Forum or the Commission must determine that there has been deficiency in service and/or misfeasance in public office which has resulted in loss or injury. No hard-and-fast rule can be laid down, however, a few examples would be where an allotment is made, price is received/paid but possession is not given within the period set out in the brochure. The Commission/Forum would then need to determine the loss. Loss could be determined on basis of loss of rent which could have been earned if possession was given and the premises let out or if the consumer has had to stay in rented premises then on basis of rent actually paid by him. Along with recompensing the loss the Commission /Forum may also compensate for harassment/injury, both mental and physical. Similarly, compensation can be given if after allotment is made there has been cancellation of scheme without any justifiable cause.

9. That compensation cannot be uniform and can best be illustrated by considering cases where possession is being directed to be delivered and cases where only monies are directed to be returned. In cases where possession is being directed to be delivered the compensation for harassment will necessarily have to be less because in a way that party is being compensated by increase in the value of the property he is getting. But in cases where monies are being simply returned then the party is suffering a loss inasmuch as he had deposited the money in the hope of getting a flat/plot. He is being deprived of that flat/plot. He has been deprived of the benefit of escalation of the price of that flat/plot. Therefore, the compensation in such cases would necessarily have to be higher. ... We clarify that the above are mere examples. They are not exhaustive. The above shows that compensation cannot be the same in all cases irrespective of the type of loss or injury suffered by the consumer.

(emphasis supplied)

19. It must be noted that the law is well settled in this regard. Whenever the builder has refused to perform the contract without valid justification, the buyer is entitled for compensation as he has been deprived of price escalation of the flat. Every breach of contract gives rise to an action for damages. Such amount of damages must be proved with reasonable certainty.

20. Before we assess the damages, another important issue to be delved upon is the reckoning date for the purpose of the assessing the damages. Whether should it be from the date on which the breach took place or should it be from the date of judgment?

21. Learned counsel for the appellants, with some vehemence, argued that the rates of the property have considerably slumped due to downfall in the real-estate market. Such submissions are to be tested as per the established principles of law. As per the settled law, the damages become due on the date when the breach of contract takes place, and are normally assessed by the reference to the time of breach. The aforesaid rule is based on the principle that the injured party is presumed to be in knowledge of the breach as soon as it is committed and at that time he can take appropriate measures of mitigation to control the loss flowing from the breach. The courts may deviate from the aforesaid rule and fix appropriate date in facts and circumstance of a case if aforesaid presumptions could not be established or

it would not be reasonable to follow the rule. It may be noted that where there is non-delivery of the flat/house, and the developer has refused to provide alternative and equivalent accommodation, and the buyer lacks means to purchase a substitute from the market, then in such circumstances, damages would not be reasonable to be assessed on the breach date.

22. We have already noted that the appellants were to perform the contract within a reasonable period of three years from the date of the agreement i.e., by the last quarter of 2014. Aggrieved by the delay in handing over the possession, the respondents (complainants) approached the NCDRC for conveyance and in alternative prayed for damages. It is now settled that where a party sustains loss by reason of a breach of contract, the damages are to be granted so as to place the suffering party in the same position as if the contract had been performed. In light of the above, the damages other than consequential loss have to be measured at the time of the breach. However, the aforesaid rule is flexible which needs to be assessed in facts and circumstances of individual case. In this case at hand the respondents tried to execute the agreement and sought for conveyance of the property through the NCDRC. In these circumstances we may note that, even in the first appeal, offers were being made on behalf of appellants to convey alternative properties, which were refused as being insufficient. Therefore, in facts and circumstances of this case, the damage need not be determined from the date of breach of contract.

23. Even though the appellants raised a factual issue concerning the non-payment of part-consideration, we do not think it is necessary to go into this aspect, as the NCDRC has given a categorical finding that Rs. 1,87,00,000/- has been paid by the respondents (complainants).

24. Appellants have produced circle rates of properties in the vicinity of the disputed flats. These rates vary from Rs. 18,655 per Sq. Ft. to Rs. 25,787/- per Sq. Ft. Whereas the respondents have produced executed sale deeds in the nearby vicinity, which was Rs. 65,000 per Sq. ft., Rs. 69,342/- per Sq. ft., Rs. 75,000/- per Sq. Ft. and Rs. 88,050/¬per Sq. Ft. NCDRC has taken the minimum available market price as the reference point for awarding compensation at the rate of Rs. 65,000/¬per Sq. Ft. We are of the opinion that excessive reliance on the aforesaid sale deed may not be appropriate as the present property is a redevelopment of an earlier property. Our attention has been drawn to the fact that usually the real estate rates for re-developed properties are on the lower side instead of green-field projects.

25. In light of the above, we consider that the claim of the respondents (complainants) as granted by the NCDRC seems to surpass the actual-loss based damages and enter the domain of gain-based remedy. Although we do not recognize any a priopri limitations on such claim, but we do not think that it would be appropriate to grant such damages in the case at hand. There is no dispute about the fact that damages for the contractual breach is generally compensatory arising out of the breach. Therefore, the damages awarded should not be excessive and a court/tribunal needs to take a balanced approach so as to ensure right compensation.

26. Taking into consideration of factual aspects involved in the matter and on consideration of the submissions of the counsels on either side, we deem it appropriate, just and reasonable that the market rate be fixed at Rs. 50,000/- per Sq. Ft. (Rupees Fifty Thousand per square feet) as the reference rate for determination of market price prevailing in the vicinity of the disputed property. Hence, the estimated market price would be Rs.4,14,20,000/- instead of Rs.5,38,46,000/- as granted by the NCDRC. However, we do not see any reason to interfere in respect of the compensation granted for the parking space.

27. Therefore, the appellants are directed as under-

a. To refund the amount of Rs. 1,87,00,000/- which they have received from the complainants.

b. To pay a sum of Rs. 2,27,20,000/- as compensation to the complainants.

c. To pay a sum of Rs. 20,00,000/- as compensation for one unit of parking lot.

d. The appellants shall also pay Rs. 10,000/- as the cost of litigation to the complainants.

e.The aforesaid amount is required to be paid within six weeks from the day of this order. If the payment in terms of this order is not made within the time stipulated herein, it shall carry interest of 9 % per annum from the date of this order.

28. It is to be noted that this Court vide order dated 23.02.2017, while issuing notice, directed the appellants to deposit Rs. 2,50,00,000/- before NCDRC as a condition precedent for hearing this case. Later it was represented to us that the appellants as on 31.05.2017, had deposited the aforesaid amount before NCDRC. In view of the above, we allow the respondents (complainants) to withdraw the aforesaid amount with accrued interest, if any and the same be adjusted to the appellants' liability as indicated above.

29. In light of the above discussions, we allow the appeals in part to the extent indicated above. There shall be no order as to the costs.

Judgment Referred.

[1]*(1979) 1 All ER 0883*
[2]*(2004) 5 SCC 0065*