A SUMAN JINDAL & ANR.

v.

M/S ADARSH DEVELOPERS

(Civil Appeal No. 4284 of 2019)

B APRIL 25, 2019

[DR. DHANANJAYA Y CHANDRACHUD AND

HEMANT GUPTA, JJ.]

Consumer Disputes:

C *Cancellation of allotment of housing apartment – By developer of the property – On the ground that the allottee had failed to pay 25% of the total cost of the flat – Complaint before State Consumer Commission – Dismissed – Order affirmed by National Consumer Commission – On appeal, held: It is evident* D *from the records that the booking amount was reduced to 15% from 25% of the agreed sale consideration – The allottee had paid the amount which was in excess of 15% of the booking amount – Hence the termination of allotment was misconceived – Section 4 of Karnataka Ownership Flats Act also casts an obligation on the developer, while receiving advance payment, to enter into a written* E *agreement for sale – Karnataka Ownership Flats (Regulation of the Promotion of Construction, Sale, Management and Transfer) Act, 1972 – s. 4.*

Allowing the appeal, the Court

F **HELD : 1. Though initially the booking amount was to be 25% of the agreed sale consideration, the correspondence between the parties indicates that there was an agreement to reduce this to 15%. This is reflected in the email addressed by the appellant following a personal meeting on 21 February 2008 and the categoric acceptance of this position in response, by the** G **developer on 22 February 2008. That apart, the subsequent email of the developer dated 26 May 2008 clearly indicates that 15% represented the booking amount payable for the flat. It is not in dispute that if the booking amount is computed at the rate of 15% of the agreed sale consideration, what was paid by the**

H

appellant (Rs 6,50,000) was in fact in excess of the booking amount. Hence the entire basis on which the termination of the allotment took place was misconceived. [Para 15] [160-B-C]

2. That apart, the appellants had all along been insisting on the execution of the agreement to sell so as to facilitate the disbursement of the loan which had been sanctioned by the bank. Section 4 of the Karnataka Ownership Flats (Regulation of the Promotion of Construction, Sale, Management and Transfer) Act, 1972 casts an obligation on the developer, while receiving advance payment, to enter into a written agreement for sale. The insistence of the appellants on the developer doing so was, therefore, consistent with the statutory obligation cast on the respondent. This cannot be regarded as unreasonable or as a breach of the contractual obligations. In this background, the SCDRC and the NCDRC were not justified in rejecting the primary relief which was sought by the appellants in terms of the fulfillment of the agreement. [Paras 16 and 17] [160-D-E; H; 161-A-B]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 4284 of 2019.

From the Judgment and Order dated 18.01.2013 of the National Consumer Disputes Redressal Commission in Appeal No. 86 of 2010.

Rajesh Mahale, Adv. for the Appellants.

Balaji Srinivasan, Ms. Garima Jain, Ms. Pallavi Sengupta, Siddhant Kohli, Mrs. Lakshmi Rao, Advs. for the Respondent.

The Judgment of the Court was delivered by

DR. DHANANJAYA Y. CHANDRACHUD, J.

1. Leave granted.

2. This appeal arises from a decision of the National Consumer Disputes Redressal Commission[1] dated 18 January 2013.

3. The dispute in the present case relates to a residential apartment which the appellants booked with the respondent who is the developer. The respondent had launched a construction project called "Adarsh Palm Retreat" situated at Bhoganhalli Village, Varthur Hobli, Bangalore East Taluk, Bangalore. The appellants booked an apartment which was split

[1] "NCDRC"

into two, bearing no. X 903 (a) and (b). Though the dispute between the parties relates to the above flat, it is necessary to advert to the fact that on 2 November 2004 the appellants had also booked flat F 703 for which the respondent had issued a letter of allotment. The price of that flat was Rs 32.28 lakhs. An agreement to sell was entered into on 1 February 2005.

4. The dispute in the present case arises out of two letters of allotment issued by the respondent to the appellants in respect of flat X 903 (a) and (b). The agreed sale consideration was Rs 40,95,801. The letter of allotment stipulated that the allotment would be confirmed on the payment of 25% of the value of the flat as the booking amount. The appellants initially paid an amount of Rs 1 lakh to the developer on or about 12 February 2005 which was followed by a second payment of Rs 3 lakhs on 24 March 2005. On 21 February 2008 a personal meeting took place between the appellants and the representatives of the developer, the gist of which was recorded in an email dated 21 February 2008. The e-mail, in so far as is material records, what was discussed upon and agreed at the meeting:

> "1. I have paid Rs. 4 lakhs towards the booking of my flat X-903 in Tower-I I, with a commitment to Mr. Dheemanth that my financial institution would be making the subsequent payments on my behalf (since I am eligible for a loan upto 92% of the property value).
>
> 2. My financial institution needs the required documents (Agreement of Sale/Agreement of Construction) for releasing payment on my behalf. The same is pending from Adarsh, for want of necessary approvals.
>
> 3. Going by my discussions with Mr. Hari today, I need to make the payment of 15% of the agreement value, including Rs 4 lakhs that I have already paid.
>
> 4. Subsequent payment, in full, shall be made by my financial Sale/Agreement of Construction) from Adarsh Developers.
>
> 5. Agreement value for my apartment X-903 in TI, comes to Rs 42.2 lakhs 15% of this value amounts to Rs 6.33 lakhs. Reducing Rs 4 lakhs that I have already paid, I need to pay a balance of Rs 2.33 lakhs.

6. As informed to your goodself, Mr. Hari/Ms. Vijaya, I shall making this payment of Rs 2.33 lakhs on or before 29 February 2008.

Request you to confirm if my understanding is correct."

5. To this email the Vice-President of the developer responded with the following communication on 22 February 2008:

"Dear Parikshit,

Noted the contents of your msg. U may do so, as per your msg. Further Ms. Vijaya will be in touch with you in this regard.

Thanks & Regards

P.B.Hari
Vice President BD,
Adarsh Group
Contact No. 91 80 4134 3400."

6. The case of the appellants is that by this exchange, the booking amount which was initially 25% of the agreed sale consideration was reduced to 15%. On 28 February 2008, the appellants paid an amount of Rs 2,50,000 to the developer towards flat X 903 making up a total payment of Rs 6,50,000 which was marginally in excess of an amount representing 15% of the agreed sale consideration. Following this payment, the developer by an email dated 12 March 2008 stated that the agreement for flat X 903 would be ready by the first week of March. On 20 March 2008, the developer demanded the balance of the sale consideration failing which, it was stated, that the delay will attract penal interest.

7. By an email dated 31 March 2008, the appellants recorded that further payments would be arranged through a financial institution which had agreed to grant a loan. However, it was stated that necessary documentation would be required in terms of a sale/construction agreement, among other documents.

8. On 2 April 2008 the appellants confirmed receipt of the email and sought the tentative dates by which the agreement and other documents required for the loan disbursal would be ready. In the meantime, the Assistant Manager- Marketing of the developer stated in an email that they were in the process of executing the agreement and required the appellants to fill up a data sheet. This was done by the

A appellants. On 26 May 2008 the developer's representative addressed an email to the appellants which is extracted below:

> "Sir,
>
> Kindly be informed your file has been reviewed by our Financial Department and noted that 15% of the booking amount of the flat is not paid and hence we cannot proceed with the agreements. You can come and meet our VP BD Mr. P.B.Hari for further clarifications.
>
> Thanks & Regards
>
> Vijaya G.
> Asst. Manager-Marketing
> Adarsh Developers
> #10, VittalMallya Road,
> Bangalore-560 001
> Ph: 41343304."

D 9. On 27 May 2008 the developer refused to execute the agreement on the ground that payments were delayed. The appellants addressed a communication to the Managing Director of the developer stating that the loan had already been sanctioned and the bank was willing to release the payment upon the execution of necessary E documentation. Thereafter, by communications dated 4 June 2008, 12 July 2008, 27 July 2008, 1 September 2008 and 3 October 2008 the appellants called upon the developer to execute the agreement to sell. The respondent, however, cancelled the allotment on 30 November 2008 on the ground that the appellants had failed to pay 25% of the total cost of the flat required as the booking amount. The amount of Rs 2,50,000 F which had been paid by the appellants on 28 February 2008 was adjusted to the cost of flat F 703.

10. Upon protesting against the cancellation, the appellants filed a consumer complaint before the Karnataka State Consumer Disputes Redressal Commission[2].

G 11. The SCDRC dismissed the complaint holding that : (i) the appellants are not 'consumers' within the meaning of Consumer Protection Act 1986; (ii) the appellants had not paid the booking amount; and (iii) it was open to the appellants to yet pay the entire sale

H [2] "SCDRC"

consideration and to seek an allotment from the builder failing which a refund could be sought. A

12. In appeal, this order has been substantially affirmed by the NCDRC. The view taken by the NCDRC is that the appellants failed to make payment for the flat and hence, there was no deficiency of service.

13. The submission which has been canvassed on behalf of the appellants by Mr. Rajesh Mahale, learned counsel is that as the sequence of events would indicate, there was a novatio under which the booking amount which was originally fixed at 25% was reduced to 15%. Learned counsel submitted that the email addressed by the appellants to the developer regarding this on 21 February 2008, following a personal meeting was agreed upon in the response dated 22 February 2008. It was submitted that in pursuance of this agreement the appellants paid a total sum of Rs 6,50,000 to the respondent by 28 February 2008 as evidenced by the receipt executed by the developer. Moreover, it was urged that the respondent in its email 26 May 2008 had specifically accepted the position that the booking amount was 15% of the total sale consideration. Learned counsel submitted that under Section 4 of the Karnataka Ownership Flats (Regulation of the Promotion of Construction, Sale, Management and Transfer) Act, 1972, the promoter is obliged to enter into an agreement to sell before accepting any advance payment. Hence it was urged that consistent with the obligation cast on the developer, the appellants had repeatedly called upon the developer to enter into necessary documentation so that the balance payment could be made by utilising the loan amount which was sanctioned by a bank in favour of the appellants. In this context it has been submitted that the cancellation of the agreement was clearly a deficiency of service. B C D E F

14. On the other hand, Mr. Balaji Srinivasan, learned counsel appearing on behalf of the respondent submitted that the original agreement between the parties contemplated that the booking amount should be 25% of the total cost of the flat. It was urged that though the allotment was made in February 2005, until February 2008 the initial booking amount of 25% had not been paid. Hence it is urged that the builder was justified in cancelling the agreement. Moreover, after the dismissal of the appeal by the NCDRC, the developer entered into an agreement to sell with a third party on 16 March 2013. Hence it was urged that at the highest the appellants would be entitled to a refund of the consideration with reasonable interest. G H

15. The clear picture which emerges from the documentary material on the record is that by the letter of allotment dated 28 February 2005, the respondent agreed to allot flat X 903 (a) and (b) to the appellant for an agreed consideration of Rs.40.95 lakhs. Though the booking amount was to be 25% of the agreed sale consideration, the correspondence between the parties indicates that there was an agreement to reduce this to 15%. This is reflected in the email addressed by the appellant following a personal meeting on 21 February 2008 and the categoric acceptance of this position in response, by the developer on 22 February 2008. That apart, the subsequent email of the developer dated 26 May 2008 clearly indicates that 15% represented the booking amount payable for the flat. It is not in dispute that if the booking amount is computed at the rate of 15% of the agreed sale consideration, what was paid by the appellant (Rs 6,50,000) was in fact in excess of the booking amount. Hence the entire basis on which the termination of the allotment took place was misconceived.

16. That apart, we find from the record that the appellants had all along been insisting on the execution of the agreement to sell so as to facilitate the disbursement of the loan which had been sanctioned by the bank. Section 4 of the Karnataka Ownership Flats (Regulation of the Promotion of Construction, Sale, Management and Transfer) Act, 1972 provides as follows:

> "Section 4. Promoter before accepting advance payment or deposit to enter into agreement and agreement to be registered – Notwithstanding anything contained in any other law a promoter who intends to construct or constructs a block or building of flats, all or some of which are to be taken or are taken on ownership basis, shall, before he accepts any sum of money as advance payment or deposit, which shall not be more than twenty per cent of the sale price, enter into a written agreement for sale with each of such persons who are to take or have taken such flats, and the agreement shall be registered under the Registration Act, 1908 and such agreement shall contain the prescribed particulars; and to such agreement there shall be attached, such documents or copies thereof, in respect of such matters, as may be prescribed."

17. Section 4 casts an obligation on the developer, while receiving advance payment, to enter into a written agreement for sale. The

insistence of the appellants on the developer doing so was, therefore, consistent with the statutory obligation cast on the respondent. Evidently, the appellants were seeking the execution of necessary documentation so as to facilitate the disbursal of the loan. This cannot be regarded as unreasonable or as a breach of the contractual obligations. In this background, we are of the view that both the SCDRC and the NCDRC were not justified in rejecting the primary relief which was sought by the appellants in terms of the fulfillment of the agreement. A copy of the subsequent agreement which was entered into between the respondent and the third party has been placed on record. The agreement to sell was entered into on 16 March 2013, after the NCDRC had dismissed the appeal. An agreement to sell with the third party cannot defeat the rights of the appellants under a prior contract in respect of the residential flat in question. The subsequent agreement must necessarily be subordinate to the rights of the appellant.

18. In the circumstances, we are of the view that the appeal would have to be allowed. We accordingly allow the appeal and issue the following directions:

(i) The appellants shall, within a period of four weeks' from today, pay to the developer the balance of the sale consideration computed on the basis of the sale price of Rs 40,95,801 after deduction of the amount of Rs 6,50,000 paid towards the booking amount. The appellants shall pay interest computed at the rate of 9% per annum on the aforesaid sale consideration with effect from 20 April 2008 until the date of payment;

(ii) The appellants shall, apart from the balance of the sale price, also pay (i) BWSSB & BESCOM charges;(ii) Maintenance Deposit; and (iii) Registration and Stamp Duty charges and service tax as applicable under the governing provisions of law;

(iii) The respondent is directed to execute all necessary agreements to complete the title of the appellants and to have the agreements duly registered, simultaneously with the handing over of the payment. In the event the respondent fails to do so, the Registrar of the SCDRC shall execute all required agreements in compliance with the above directions on behalf of the respondent to effectuate the right, title and interest of the appellants. Possession shall be handed over to the appellants in pursuance of the aforesaid directions simultaneously with the completion of registration formalities;

A (iv) Until the aforesaid exercise is carried out the interim order directing status quo passed by this Court during the pendency of these proceedings on 15 July 2013 shall continue to operate.

The appeal is accordingly allowed. There shall be no order as to costs.

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Kalpana K. Tripathy Appeal allowed.