Bangalore Development Authority vs Syndicate Bank on 17 May, 2007

Equivalent citations: AIR 2007 SUPREME COURT 2198, 2007 (6) SCC 711, 2007 AIR SCW 3859, 2007 (4) ALL LJ 580, 2007 (3) ALL LJ NOC 439, (2008) 3 BOM CR 808, (2008) 1 GUJ LR 624, (2007) 2 WLC(SC)CVL 613, (2007) 6 MAD LJ 975, (2007) 3 UC 1839, 2007 CORLA(BL SUPP) 220 SC, (2007) 57 ALLINDCAS 194 (SC), 2007 (57) ALLINDCAS 194, 2007 (8) SCALE 200, (2007) 1 CPR 462, (2007) 2 ALL WC 4(79), (2007) 3 ALL WC 2974, (2007) 5 KANT LJ 145, (2007) 8 SCALE 200, (2007) 68 ALL LR 800, (2007) 2 CPJ 17, (2007) 3 CPJ 123

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Bench: P. K. Balasubramanyan, R. V. Raveendran

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           CASE NO.:
Appeal (civil)  5462 of 2002

PETITIONER:
Bangalore Development Authority

RESPONDENT:
Syndicate Bank

DATE OF JUDGMENT: 17/05/2007

BENCH:
P. K. Balasubramanyan & R. V. Raveendran

JUDGMENT:
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J U D G M E N T R. V. RAVEENDRAN J.

This appeal by Special Leave is filed against the order dated 11.04.2002, passed by the National Consumer Dispute Redressal Commission ('Commission' for short) in O.P.No. 21 of 1995.

The Facts

2. The Banglore Development Authority (Appellant herein, 'BDA' for short) introduced a "Self Financing Housing Scheme" for construction of flats/houses in Banglore in the year 1982. The said Scheme contemplated construction of three types of flats/houses categorized as Higher Income Group, Middle Income Group, and Low Income Group ('HIG', 'MIG', and 'LIG' for short). Under the said scheme an applicant for allotment was required to make an initial deposit of 15% of the cost of

the unit and pay the balance in eight quarterly instalments of 10% and the last instalment of 5%.

3. Syndicate Bank ('Respondent' herein) made an application dated 17.7.1982 for allotment of 250 flats/houses under the said scheme, that is, 15 'HIG' Houses, 110 'MIG' units and 125 'LIG' units. BDA registered the request for allotment of 15 HIG Houses, vide confirmation letter dated 20.8.1984. This appeal relates to delay in delivery of 11 HIG houses at R.M.V. Extension, Bangalore.

4. BDA had initially fixed the tentative price of a HIG house as Rs.2,85,000/-. The price was revised to Rs.4.75 lakhs per unit (Rs.5.5 lakhs in respect of corner units). By letter dated 22.08.1985, BDA informed the respondent about the revision of price of HIG Houses from Rs.2.85 lakhs to 4.75 lakhs per unit. BDA also indicated the total amount due in respect of 15 HIG Houses and required the Respondent to pay the said amount in installments as shown in the Annexure thereto. BDA also informed the Respondent that the units would be ready for occupation in December, 1986. As respondent did not pay the instalments, BDA sent a letter dated 20.10.1986 demanding payment. By letter dated 27.5.1987, BDA informed Respondent that 15 Houses (including three corner houses) had been allotted to Respondent on 16.1.1987 and furnished the numbers of the houses allotted.

5. A sum of Rs.98,85,210/- paid by the Respondent towards the cost of LIG units became refundable to respondent, on account of surrender of allotment of the 125 LIG units. The cost of 15 HIG houses was Rs.73.5 lakhs (that is, three corner units at the rate of Rs.5.5 lakhs each and 12 other units at the rate of Rs.4.75 lakhs each). The respondent had paid a sum of Rs.19,33,925/- in advance towards the cost of the 15 H.I.G. houses and the balance due was Rs.54,16,075/-. By letter dated 15.5.1989, BDA adjusted and appropriated the said sum of Rs.54,16,075/- (due in respect of 15 HIG Houses) and a sum of Rs.21,66,250/- (due in respect of MIG Units), from out of Rs.98,85,210/- paid towards LIG units, and refunded the balance of Rs.23,02,885/- to the Respondent. Thus it would be seen that the cost of H.I.G. units was received by BDA only on 15.05.1989.

6. BDA delivered 4 HIG houses in December, 1989 and May, 1990. The completion of construction and delivery of remaining 11 H.I.G. houses (in RMV Extension, Bangalore) was delayed. By letters dated 29.11.1989, 17.01.1990, 9.7.1993 and 11.1.1994, the Respondent pointed out the delay in delivery of the HIG houses and requested for early delivery of possession of the houses. Respondent also demanded interest on the price paid, at the bank rate from 01.01.1986 till date the delivery of the houses apart from reimbursement of the losses incurred on account of the non-delivery. When the officers of the respondent met the officers of BDA personally to enquire about the 11 Houses, they were informed that the delay was on account of the contractor (M/s. Khoday Engineering) raising a dispute and stopping the work in respect of part of the project, and assured that possession will be delivered immediately after completion. The Respondent issued a final notice dated 11.07.1994 through counsel demanding performance within one month. When BDA failed, the respondent filed a complaint before the Commission under section 21 of Consumer Protection Act, 1986 ('Act' for short).

Claim, defence and the decision

7. The Respondent sought the following reliefs against BDA, in its complaint :

a) Completion and due delivery of the remaining 11 HIG houses;

b) Payment of Rs.1,98,40,930/73 by way of interest on the sum of Rs.53 lakhs being the price of the said 11 houses from 01.01.1986 to 31.12.1994 (the interest claimed at the bank rate varying from 16.5% to 24.25% P.A. compounded quarterly);

c) Payment of Rs. 16.5 lakhs as reimbursement of the rent paid by the Respondent for 11 houses at the rate of Rs.3,000/- per house per month from 01.01.1987 to 31.12.1994 (Note : Though for 96 months the amount works out Rs.31,68,000/-, claim was restricted to Rs.16.5 lakhs which is the rent for 11 houses for 50 months);

d) Payment of Rs.25,00,000/- as compensation for mental agony and harassment;

e) Payment of future interest at 19.5% P.A. on Rs. 53,00,000/- plus Rs.33,000/- per month by way of reimbursement of the rent, from 01.01.1995 till delivery of possession

8. BDA resisted the claim both on the question of maintainability, as also merits. In brief, the contentions were :

a) It was not a service provider nor a seller of goods and the respondent was not a 'consumer' and therefore the complaint under the Act was not maintainable.

b) The contract did not stipulate any period for completion and delivery. Being a building contract, time was not the essence of the contract. The project related to construction of 558 HIG Houses. 490 houses were completed during 1989. The contractor - M/s. Khoday Engineering, raised a dispute and delayed the work relating to the remaining 68 houses (including 11 houses to be delivered to the respondent). After making all possible efforts to persuade the contractor to take up and complete the work, it rescinded the contract with the contractor by Resolution dated 15.2.1995 and took steps to get the work completed through an alternative agency. The delay was thus for reasons wholly beyond its control and unintentional, and there was no breach.

c) It would complete and deliver the 11 houses within a short time at the agreed price, though price of the houses had risen by 10 times.

d) As it was executing the self financing housing scheme on 'no profit no loss' basis, it should not be burdened with any financial liability for any delay.

e) Even if it was treated as a service provider and the complaint was held to be maintainable, as there was no negligence or deficiency in service on its part, it was not liable to pay any interest or compensation.

9. During the pendency of the complaint before the commission, BDA delivered one HIG house on 21.1.1997 and remaining 10 HIG houses on 12.3.1997. The Respondent thus secured the main relief sought in the complaint. What remained was the claim for interest and compensation. Parties led evidence by way of affidavits. Neither party sought leave to cross-examine the witness (deponent) of the other party. The Commission by order dated 11.04.2002 allowed the complaint. It held :

> a) BDA had promised to deliver the houses to the Respondent by December, 1986.
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> b) In spite of respondent having made full payment and making repeated demands, 11 houses were not delivered till the complaint was filed in 1995. Thus there was deficiency of service on the part of BDA.
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> c) BDA had not placed any material on record to show why the houses could not be completed and delivered between 1985 to 1991. The complainant was in no way concerned with the dispute between BDA and its contractor and the consequential delay. Even though the 11 houses were delivered in 1997 after the complaint, BDA was guilty of deficiency in rendering service.

In view of the said findings, following its decision in HUDA Vs. Darsh Kumar [Revision Petition No. 1197/1998 dated 31.8.2001], it directed the appellant to pay interest at 18% per annum on Rs.53,00,000/- (the approximate price of 11 HIG Houses) commencing from the expiry of two years after the deposit of last instalment of Rs.53 lakhs up to date of handing over the possession. The said order is challenged in this appeal.

The principles

10. Where a Development Authority forms layouts and allots plots/flats (or houses) by inviting applications, the following general principles regulate the granting of relief to a consumer (applicant for allotment) who complains of delay in delivery or non-delivery and seeks redressal under the Consumer Protection Act, 1986 ('Act' for short) - [vide : Lucknow Development Authority vs. M. K. Gupta - 1994 (1) SCC 243, Ghaziabad Development Authority vs. Balbir Singh - 2004 (5) SCC 65, and Haryana Development Authority vs. Darsh Kumar - 2005 (9) SCC 449, as also Ghaziabad Development Authority vs. Union of India - 2000 (6) SCC 113]:

> (a) Where the development authority having received the full price, does not deliver possession of the allotted plot/flat/house within the time stipulated or within a reasonable time, or where the allotment is cancelled or possession is refused without any justifiable cause, the allottee is entitled for refund of the amount paid, with reasonable interest thereon from the date of payment to date of refund. In addition, the allottee may also be entitled to compensation, as may be decided with reference to the facts of each case.
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> (b) Where no time is stipulated for performance of the contract (that is for delivery), or where time is not the essence of the contract and the buyer does not issue a notice

making time the essence by fixing a reasonable time for performance, if the buyer, instead of rescinding the contract on the ground of non-performance, accepts the belated performance in terms of the contract, there is no question of any breach or payment of damages under the general law governing contracts. However, if some statute steps in and creates any statutory obligations on the part of the development authority in the contractual field, the matter will be governed by the provisions of that statute.

(c) Where an alternative site is offered or delivered (at the agreed price) in view of its inability to deliver the earlier allotted plot/flat/house, or where the delay in delivering possession of the allotted plot/flat/house is for justifiable reasons, ordinarily the allottee will not be entitled to any interest or compensation. This is because the buyer has the benefit of appreciation in value.

(d) Though the relationship between Development Authority and an applicant for allotment is that of a seller and buyer, and therefore governed by law of contracts, (which does not recognise mental agony and suffering as a head of damages for breach), compensation can be awarded to the consumer under the head of mental agony and suffering, by applying the principle of Administrative Law, where the seller being a statutory authority acts negligently, arbitrarily or capriciously.

(e) Where an alternative plot/flat/house is allotted and delivered, not at the original agreed price, but by charging current market rate which is much higher, the allottee will be entitled to interest at a reasonable rate on the amount paid towards the earlier allotment, from the date of deposit to date of delivery of the alternative plot/flat/house. In addition, he may be entitled to compensation also, determined with reference to the facts of the case, if there are no justifiable reasons for non-delivery of the first allotted plot/flat/house.

(f) Where the plot/flat/house has been allotted at a tentative or provisional price, subject to final determination of price on completion of the project (that is acquisition proceedings and development activities), the Development Authority will be entitled to revise or increase the price. But where the allotment is at a fixed price, and a higher price or extra payments are illegally or unjustifiably demanded and collected, the allottee will be entitled to refund of such excess with such interest, as may be determined with reference to the facts of the case.

(g) Where full payment is made and possession is delivered, but title deed is not executed without any justifiable cause, the allottee may be awarded compensation, for harassment and mental agony, in addition to appropriate direction for execution and delivery of title deed.

(h) Where the allotment relates to a flat/house and construction is incomplete or not in accordance with the agreed specifications, when it is delivered, the allottee will be

entitled to compensation equivalent to the cost of completing the building or rectifying the defects.

(i) The quantum of compensation to be awarded, if it is to be awarded, will depend on the facts of each case, nature of harassment, the period of harassment and the nature of arbitrary or capricious or negligent action of the authority which led to such harassment.

(j) While deciding whether the allottee is entitled to any relief and in moulding the relief, the following among other relevant factors should be considered : (i) whether the layout is developed on 'no profit no loss' basis, or with commercial or profit motive; (ii) whether there is any assurance or commitment in regard to date of delivery of possession; (iii) whether there were any justifiable reasons for the delay or failure to deliver possession;

(iv) whether the complainant has alleged and proved that there has been any negligence, shortcoming or inadequacy on the part of the developing authority or its officials in the performance of the functions or obligations in regard to delivery; and (v) whether the allottee has been subjected to avoidable harassment and mental agony.

Whether Respondent is entitled to interest?

11. At the outset, we may notice that there is some vagueness in the order of the Commission, in regard to the period for which interest is awarded. The Commission has awarded interest at the rate of 18% per annum commencing from the expiry of two years after the deposit of 'last instalment' of Rs.53 lakhs. The sum of Rs.53 lakhs was not paid in instalments as assumed by the Commission. BDA recovered Rs.54,16,075/- due towards the cost of 15 HIG Houses by adjustment and appropriation from the amount which had became refundable to the Respondent on account of surrender of allotment in regard to LIG units. Such adjustment was made on 15.5.1989 and for all purposes, that is the date of payment of price of the HIG Houses. As the houses were delivered in January/March, 1997, the direction issued by the Commission would mean that BDA had to pay interest at the rate of 18% per annum from 15.5.1991 to January/March, 1997 which works out to about Rs.55 lakhs. Because of the vagueness in the direction regarding date of commencement of interest, the Respondent contended that interest should be calculated from the expiry of two years from the date of payment of last instalment, which was in December, 1985 (which was in respect of LIG units). Respondent contends that if interest is so calculated the amount due as interest would be Rs.87.89 lakhs. Be that as it may.

12. The Commission has neither referred to the relevant facts nor drawn proper inferences. There is no basis for the finding that BDA had agreed to deliver the houses by December, 1986 or the finding that no reason was shown for the delay in delivery. The allotment of 15 HIG Houses identified by House numbers was only by resolution dated 16.1.1987 and communicated to Respondent on 27.5.1987. The payment was only on 15.5.1989. Delivery could not, therefore, obviously be by the

end of December, 1986. If reasonable period for construction is to be reckoned as two years (as assumed by the Commission), then the question of delay would arise only after 15.5.1991. The Commission also assumed that mere delay automatically meant deficiency in service and in all such cases, the allottee will be entitled to interest at 18% per annum from the date of payment till date of delivery by relying on its decision in HUDA vs. Darsh Kumar. The decision of the Commission in HUDA vs. Darsh Kumar was held to be unsustainable by this Court, on appeal in HUDA vs. Darsh Kumar [2005 (9) SCC 449]. This Court held that there cannot be uniform award of interest at 18% per annum in all cases and that in cases of complaints of deficiency in service by a development authority relating to allotment of plots/flats, the principles laid down in Balbir Singh (Supra) should be applied. Therefore, the decision of the Commission under appeal, based on its earlier decision in Darsh Kumar, cannot be sustained.

13. As already noticed, where the grievance is one of delay in delivery of possession, and the Development Authority delivers the house during the pendency of the complaint at the agreed price, and such delivery is accepted by the allottee-complainant, the question of awarding any interest on the price paid by him from the date of deposit to date of delivery of possession, does not arise. The allottee who had the benefit of appreciation of price of the house, is not entitled to interest on the price paid. In this case, the 11 houses were delivered in 1997 at the agreed prices (Rs. 5.5 lacs per corner HIG House and Rs.4.75 lacs per other HIG Houses). In view of it, the order of the Commission awarding interest at 18% per annum on the price of the houses is unsustainable and liable to be set aside.

Whether respondent is entitled to any compensation?

14. This leads us to the next question as to whether the Respondent is entitled to any compensation, to make good the loss caused to him on account of the delay in delivery. The loss is the rental income which the houses would have fetched if they had been delivered earlier from the agreed due date to date of actual delivery of possession. Alternatively, it is the rent paid by the Respondent for the houses taken on lease due to non-availability of the allotted houses. The Respondent contends that it is entitled to reimbursement of the rents paid by it in respect of 11 houses, on account of the delay on the part of BDA in delivering the houses. It was submitted that even if a reasonable time of two years is provided for construction from the deemed date of payment (15.5.1989), BDA would be liable to compensate the Respondent for the rent paid by it for 11 houses from 15.5.1991 till January/March, 1997. Respondent alleged that it had to pay a rent of Rs.3000/- per house or Rs.33000/- for 11 Houses, per month, due to the non- delivery of 11 HIG Houses. The Respondent submitted that the compensation payable would therefore be around Rs.23 lakhs; and that as it had restricted its claim to Rs.16,50,000/- in the complaint under this head, the said amount may be awarded as compensation.

15. The Respondent did not produce any document to show that it paid Rs.3,000/- per month per house for similar houses between 1991 and 1997. Nor did it produce any evidence to show that Rs.3000/- was the prevailing rent for similar houses. It is not the case of the Respondent that documentary evidence for payment of rent was not available. Where documentary evidence was available, but not produced, obviously a mere statement in the affidavit cannot be the basis for

award of damages.

16. The more serious issue is whether the facts and circumstances warrant a finding of negligence and deficiency in service on the part of BDA necessitating award of compensation. The brochure relating to the BDA scheme did not mention any specific date for delivery of possession of the houses. No agreement was entered into between the parties stipulating any time for performance or delivery of houses. The only document on which reliance is placed by the respondent is a letter dated 22.8.1985 wherein BDA makes a reference to the expected date of completion of construction while intimating the revised cost of the HIG houses on account of escalation etc. The said letter stated that the total cost of 15 HIG houses would be Rs.7125000/- and after adjustment of Rs.1068750/-, the balance of Rs.6036250/- was payable in seven bi-monthly instalments from November, 1985 to December, 1986, (the first six instalments being Rs.862327/- and the last instalment being Rs.862288/-). It also incidentally stated that the houses would be ready for occupation in December, 1986. The instalments were not paid and respondent itself was the defaulter. Nevertheless, BDA allotted 15 houses as per intimation dated 27.5.1987. In a self financing scheme, the instalments paid by the allottees are used for construction. If an allottee does not pay the instalments, he cannot obviously expect completion of construction. In this case, the payment was received by BDA (without charging any interest) by way of adjustment on 15.5.1989. Even if the reasonable period for construction is taken as two years, BDA had to explain the 'delay' only from 15.5.1991 and not from 1985 as assumed by the Commission. BDA delivered four houses in time, that is in 1989 and 1990. It did not deliver the remaining 11 houses, as its contractor delayed execution of the work. It may be mentioned that the project contemplated construction of 558 HIG houses and the work got stuck only in regard to 68 houses (including the 11 houses to be delivered to the Respondent). When the respondent wrote letters in 1989, 1990, 1993 and 1994 and also got in touch with BDA officers, seeking possession, BDA explained that the delay was on account of its contractor (M/s Khoday Engineering) stopping work and raising a dispute. BDA took necessary steps, and even sought government intervention, to persuade the contractor to proceed with the work. Having failed in its effort, it ultimately cancelled the contract with the contractor and got the work completed through an alternative agency and immediately after completion, delivered the houses in January/March, 1997.

17. We find that both parties - BDA as also the Respondent proceeded on the basis that time was not the essence of the contract. In a contract involving construction, time is not the essence of the contract unless specified. Even when the respondent wrote the letters dated 29.11.1989, 17.1.1990, 9.7.1993 and 11.1.1994, it did not make time for performance the essence of contract, nor fix any reasonable time for performance. The Respondent did not also choose to terminate the contract, obviously in view of the manifold increase in the value of the Houses. For the first time, by notice dated 11.7.1994, it purported to make the time the essence, but demanded delivery within an unreasonable period of one month and filed the complaint on 4.2.1995. Thus, it cannot be said that the Respondent made time the essence of contract, in a manner recognized in law. We also find that the development authority was constructing these houses under a self- financing scheme on 'No-Profit No-Loss basis' by using the instalments/amounts paid by the allottees. The houses were delivered in 1997 at a price agreed in 1986. By 1997, the value had gone up many times (more than 10 times according to BDA). The Respondent had the benefit of such rise in value. The respondent

also failed to prove any negligence on the part of BDA. In this factual background, we find it difficult to hold that there was 'deficiency in service' on the part of BDA entitling the respondent for any compensation by way of interest or otherwise. Consequently, the respondent is not entitled to any compensation.

18. We may also note that the respondent had also written letters dated 27.12.2005 and 25.1.2006 during the pendency of these appeals stating that if the sale deeds were executed in respect of these 11 houses, it will withdraw its claim against BDA. The sale deeds were not executed and the matter is kept pending in view of the pendency of the dispute.

Conclusion

19. Before concluding, it is necessary to refer to one more contention urged by BDA. It contended that when a person enters into a contract for purchasing a house (land with building), from a Development Authority, the allottee does not 'hire or avail of a service' and is not a 'consumer' under the Act. It is contended that where the contract is for sale of a house (land with building) as contrasted from a contract for construction of a house by a contractor with the site-owner, the seller is not a service provider, and the purchaser is not a consumer; and sale of land with a building constructed by a development authority, involves neither sale of goods, nor hiring/availing of any services. BDA had specifically raised this contention before the Commission as a preliminary objection regarding maintainability of the complaint. It appears that this contention was not pressed before the Commission nor raised as a specific ground in the special leave petition, in view of the decision of this Court in Lucknow Development Authority vs. M. K. Gupta (Supra). In that case, a two-Judge Bench of this Court held that where a development authority undertakes to construct buildings or allot houses or building sites either as amenity or as benefit, it amounts to rendering of a service and will be covered by the expression 'service made available to potential users' referred to in section 2(o) of the Act. But this Court did not examine or deal with the question whether a contract for sale of a house premises, (that is site with a constructed house), as contrasted from a contract of construction amounted to 'providing a service of any description to a potential user including housing construction'. Be that as it may. Though there appears to be some logic in the contention of BDA, we do not propose to decide the issue, as we are allowing this appeal on other grounds, and as this contention was not specifically pressed before the Commission. We leave this question open for decision in an appropriate case.

20. In view of the above, we allow this appeal and set aside the order dated 11.4.2002 of the National Consumer Disputes Redressal Commission. As the main prayer for completion and delivery of the houses was complied with during the pendency of the complaint, and as we have held that respondent is not entitled to interest or compensation, the complaint is disposed of with a direction to BDA to complete the process of execution and registration of sale deed/s in respect of the houses without claiming any extra cost, within three months from today. The cost of stamp duty and registration in respect of such sale deeds will be borne by the respondent. Parties to bear their respective costs.