A LATA CONSTRUCTION AND ORS.

v.

DR. RAMESHCHANDRA RAMNIKLAL SHAH AND ANR.

AUGUST 12, 1999

B [S. SAGHIR AHMAD AND R.P. SETHI, JJ.]

Consumer Protection Act, 1986—Section 24A—Respondents entered into an Agreement with Appellant No. 1 in 1987 for purchase of a flat to be built by the appellants afterwards—Part payment made by the respondents—
C *Appellants failed to deliver possession of the flat—Later the flat found to be in possession of some other person—Appellants entered into a fresh Agreement with the Respondents in 1991—Agreed to pay compensation to the Respondents in lieu of the flat on or before 30-05-1991—New Agreement stipulated that the 1987 Agreement would remain unaffected—1987 Agreement*
D *was to be treated as terminated only on full payment of compensation—Appellants neither delivered possession of the flat nor paid the said amount—Complaint filed before the National Commission in July, 1993—Claim decreed for the compensation amount in lieu of flat—Order of the National Commission appealed on ground of limitation—Held, as 1991 Agreement not complied with, the 1987 Agreement remained in force—Appellants were under a*
E *constant obligation to provide a flat to the Respondents under the previous Agreement—Appellants failing to provide a flat, cause of action continued to exist—Claim was not beyond time.*

Contract Act, 1872—Section 62—Agreement between Appellant No. 1 and the Respondents in 1987—Respondents to purchase flat from Appellants
F *to be built later—Appellants failed to deliver possession of the flat—Appellants entered into a fresh Agreement with the respondents in 1991—Agreed to pay compensation to the respondents in lieu of the flat on or before 30-05-1991—New Agreement stipulated that the 1987 Agreement would remain unaffected—1987 Agreement was to be treated as terminated only on full payment of*
G *compensation—Appellants neither delivered possession of the flat nor paid the said amount—Complaint filed before the National Commission for the amount of compensation—Claim decreed for compensation amount—Order of the National Commission appealed against—Contended that after 1991 Agreement, the rights under the 1987 Agreement could not be claimed—No remedy available to the respondents before the National Commission—*
H

Respondents could approach civil court for recovery of the compensation amount—Held, as 1991 Agreement not complied with, the terms of 1987 Agreement remained in force—Respondents could legally claim enforcement of right under the 1987 Agreement—Entitled to file a complaint before the National Commission for compensation on account of deficiency in service.

The respondents who were in Libya had entered into an agreement dated 27-01-1987 with Appellant No. 1 according to which the appellants were to develop, construct and hand over possession of flat No. AG-2 on the ground floor with an area of 670 sq. ft. situated in a building named "Madhusudan" in Ville Parle, Bombay. On 27th of January, 1987, the respondents paid a sum of Rs. 3,38,000 to the appellants in cash but without any receipt and a sum of Rs. 32,000 by cheque against receipt. The respondents also paid a further sum of Rs. 2,00,000 to the appellants on various dates as demanded by them. In June, 1988 when the appellants returned from Libya, they requested the appellants to deliver, on payment of balance amount of sale consideration, possession of the flat to them as the construction of the building was complete. However, the appellants refused to accept the payment and deliver the possession on the plea that the building was still under construction particularly as the electricity, plumbing etc. work was in progress. The appellants assured the respondents that as and when the building would be completed in all respects, they would deliver the possession by accepting the balance amount. In April, 1990, when the respondents again came back from Libya and visited the building, they found the flat locked, with a name plate of some other person on the main door. In January, 1991 after returning from Libya, the respondents demanded the possession of the flat, but the appellants expressed their inability to give possession of the flat to the respondents in compliance of the agreement dated 27-01-1987. The appellants, however, entered into a fresh agreement with the respondents on 23-02-1991 agreeing to pay to the respondents a sum of Rs. 9,51,000 in lieu of the flat in three instalments on or before 30-05-1991. The said agreement was without prejudice to their right under the 1987 agreement. Since the appellants failed to honour the commitments under both the agreements, the respondents approached the National Consumer Disputes Redressal Commission. The Commission decreed the claim of the respondents for a sum of Rs. 9,51,000 together with costs and interest at the rate of 18% per annum with effect from 23-02-1991. A further sum of Rs. 1,00,000 was allowed as compensation whereas a sum of Rs. 10,000 was allowed as costs of the proceedings. Hence this appeal.

A The appellants contended that the claim of the respondents before the National Commission was barred by limitation as it was filed beyond the period of two years prescribed under Section 24-A of the Consumer Protection Act, 1986. According to the appellants, since the respondents had entered into a fresh agreement with the appellants under which the entire amount of Rs. 9,51,000 had to be paid on or before 30th May, 1991, the respondents, B if the amount was not paid, could have instituted a claim petition before the National Commission before 30-05-1993, and since the claim was filed in July, 1993, it was clearly beyond time. This plea had been rejected by the National Commission on the ground that as the right under the 1987 agreement had not been given up by the respondents, there was a continuing C cause of action running against the appellants and, therefore, the claim was not beyond time. It was further contended that in view of the substitution of the 1987 agreement by a fresh 1991 agreement wherein the respondents themselves had agreed to receive Rs. 9,51,000 as compensation for flat having not been provided to them under the earlier agreement, they could only approach the civil court for recovery of that amount and could not D legally institute the claim petition before the National Commission for compensation on ground of "deficiency in service". This plea had also been rejected by the National Commission. In addition to the above, the appellants also contended that the amount of compensation allowed by the National Commission was unjustified.

E Dismissing the appeal, this Court

HELD : 1.1. In the agreement dated 23-02-1991 it was specifically stipulated that the rights under the agreement dated 27-01-1987 would remain unaffected. It was for this reason that in the claim petition filed F before the Commission, it was clearly mentioned that their right under the agreement dated 27-01-1987 as also those under the agreement dated 23-02-1991 may be enforced. It was also specifically mentioned in the second agreement that the first agreement of 1987 would be treated as terminated only on full payment of the stipulated amount of Rs. 9,51,000 to the respondents. Since the rights under the agreement of 1987 had not been G given up and the appellants were constantly under an obligation to provide a flat to the respondents and deliver possession thereof to them, the Commission rightly treated "cause of action" to be a "continuing cause of action" and came to the right conclusion that the claim was not beyond time. [418-C-D-E]

H 1.2. Under the terms of the agreement dated 23-02-1991, it was

stipulated that if the entire amount of Rs. 9,51,000 was not paid by 30-05-1991, the whole of the amount would become payable at once and it would be open to the respondents to claim payment of full amount together with interest after giving seven days' notice to the appellants. It was further stipulated that in case of default, the amount already paid by the appellants shall stand forfeited. Since the whole of the amount had not been paid to the respondents who could recover the whole of the amount together with interest from the appellant on giving seven days' notice, the rights under the old agreement did not come to an end and they could legally claim specific performance of that agreement for a flat being provided to them. Their claim was, therefore, not barred by time. [418-E-F-G]

2. One of the essential requirements of 'Novation', as contemplated by Section 62 of the Indian Contract Act, 1872, is that there should be complete substitution of a new contract in place of the old. It is in that situation that the original contract need not be performed. Substitution of a new contract in place of the old contract which would have the effect of rescinding or completely altering the terms of the original contract, has to be by agreement between the parties. A substituted contract should rescind, alter or extinguish the previous contract. But if the terms of the two contracts are inconsistent and they cannot stand together, the subsequent contract cannot be said to be in substitution of the earlier contract. In the instant case, the rights under the original contract were not given up as it was specifically provided that the rights under the old contract shall stand extinguished only on payment of the entire amount of Rs. 9,51,000. Since the amount was not paid by the appellants as stipulated by the subsequent contract, the rights under the original contract were still available to the respondents and they could legally claim enforcement of those rights. Obviously, under the original contract, the appellants were under an obligation to provide a flat to the respondents. This right would come to an end only when the appellants had, in pursuance of the subsequent contract, paid the entire amount of Rs. 9,51,000 to the respondents. Since they had not done so, the respondents could legally invoke the provisions of the earlier contract and claim before the Commission that there was "deficiency in service" on the part of the appellants. [419-E-F-G-H; 420-A]

3. In terms of the judgment passed by the Commission, the entire amount due from the appellants has already been paid to the respondents including interest at the rate of 18% per annum on the principal of Rs. 9, 51,000. That being so, the plea of the appellant that the decree passed by the

Commission in respect of Rs. 1 lakh as compensation on the account of the pain and suffering undergone by the respondents may be reversed cannot be entertained. [420-D]

Lucknow Development Authority v. *M.M. Gupta,* [1994] 1 SCC 243, relied on.

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 2418 of 1996.

From the Judgment and Order dated 22.11.1995 of the National Consumer Disputes Redressal Commission, New Delhi in O.C. No. 202 of 1993.

Shekhar B. Prabhavatkar, Nikhil Sakhardande and A. M. Khanwilkar for the Appellants.

Sandeep Narain for the Respondents.

The Judgment of the Court was delivered by

S. SAGHIR AHMAD, J. This appeal is directed against the judgment and order dated 22nd November, 1995 passed by the National Consumer Disputes Redressal Commission, New Delhi (for short, 'the National Commission').

The respondents had approached the Commission with the complaint that the appellants who were developers and had promised, under a written agreement dated 27.1.1987, to provide a flat to them, had failed to do so and, therefore, they were guilty of "deficiency in service." It was indicated in the complaint that the respondents who were, at that time, in Libya and wanted to settle in India, had entered into an agreement dated 27.1.1987 with M/s. Lata Construction, the appellant No. 1, which stipulated that the appellants would develop, construct and hand over possession of flat No. AG-2 on the ground floor with an area of 670 sq. ft. situated in a building named "Madhusudan", on Plot No. 138, T.P.S. 11 and C.T.S. No. 1166 and 1166(1) in Vile Parle, Bombay 400057. It was indicated that the appellants had earlier entered into a development agreement on 9.12.1985 with the owners in respect of the said property to develop, construct and to sell flats in the proposed building which was to be constructed on ownership basis. On 27th of January, 1987, the respondents had paid a sum of Rs. 3,38,000 to the appellants in cash but without any receipt and a sum of Rs. 32,000 by cheque against receipt.

The respondents also paid to the appellants on various dates, as and when demanded by them, a further sum of Rs. 2,00,000 against receipt. In June, 1988 when the respondents returned from Libya, they requested the appellants to deliver, on payment of balance amount of sale consideration, possession of the flat to them as the construction of the building was complete but the appellants refused to accept the payment and deliver possession on the plea that the building was still under construction particularly as the electricity, plumbing, tiling and fencing work was in progress. The appellants, however, assured the respondents that as and when the building would be completed in all respects, they would accept the balance amount of sale consideration and deliver possession to them. In April, 1990, when the respondents again came back from Libya on a short visit to India and visited the building, they found that the flat was locked and outside the main door of the flat, a name plate of "Indira Joshi" had been put up. The respondents returned from Libya in January, 1991 and when they demanded the possession of the flat, the appellants expressed their inability to give possession of the flat to the respondents in compliance of the agreement dated 27.1.1987. The appellants, however, entered into a fresh agreement with the respondents on 23.2.1991 agreeing to pay to the respondents a sum of Rs. 9,51,000 in lieu of the flat in three instalments on or before 30.5.1991 as under:-

1.	Rs. 3,00,000	-	on or before 20.3.1991
2.	Rs. 3,00,000	-	on or before 20.4.1991
3.	Rs. 3,51,000	-	on or before 30.5.1991

The respondents had entered into a fresh agreement with the appellants without prejudice to their rights under the earlier agreement dated 27.1.1987. Since the appellants did not honour the commitments under both the agreements, the respondents approached the National Commission which, decreed the claim of the respondents for a sum of Rs. 9,51,000 together with interest at the rate of 18% per annum with effect from 23.2.1991 till the date of payment. Another sum of Rs. 1,00,000 was allowed as compensation for pain and suffering undergone by the respondents. The Commission also allowed a sum of Rs. 10,000 to the respondents as costs of the proceedings.

Learned counsel appearing on behalf of the appellants has contended that the claim instituted by the respondents before the Commission was beyond time inasmuch as it was filed beyond the period of two years prescribed under Section 24-A of the Consumer Protection Act, 1986 (for short, 'the Act'). It is contended that since the respondents had entered into a fresh

A agreement with the appellants under which the entire amount of Rs. 9,51,000 had to be paid on or before 30th of May, 1991, the respondents, if the amount was not paid, could have instituted the claim petition before the Commission within the period of limitation starting from 31.5.1991, and since the claim was filed in July, 1993, it was clearly beyond time. This plea has been negatived by the Commission on the ground that since the right under the agreement B of 1987 had not been given up by the respondents, there was a continuing cause of action running against the appellants and the claim was, therefore, not beyond time.

A perusal of the agreement dated 23rd of February, 1991 would show that it was specifically stipulated therein that the rights under the agreement C dated 27th of January, 1987 would remain unaffected. It was for this reason that in the claim petition filed before the Commission, it was clearly mentioned that their rights under the agreement dated 27th of January, 1987 as also those under the agreement dated 23rd of February, 1991 may be enforced. It was also specifically mentioned in the second agreement that the first agreement D of 1987 would be treated as terminated only on full payment of the stipulated amount of Rs. 9,51,000 to the respondents. Since the rights under the agreement of 1987 had not been given up and the appellants were constantly under an obligation to provide a flat to the respondents and deliver possession thereof to them, the Commission rightly treated "cause of action" to be a "continuing E cause of action" and came to the right conclusion that the claim was not beyond time.

Moreover, under the terms of the agreement dated 23rd of February, 1991, it was stipulated that if the entire amount of Rs. 9,51,000 was not paid by 30th May, 1991, the whole of the amount would become payable at once F and it would be open to the respondents to claim payment of full amount together with interest after giving seven days' notice to the appellants. It was further stipulated that in case of default, the amount already paid by the appellants shall stand forfeited. Since the whole of the amount had not been paid to the respondents who could recover the whole of the amount together with interest from the appellant on giving seven days' notice, the rights under G the old agreement did not come to an end and they could legally claim specific performance of that agreement for a flat being provided to them. Their claim was, therefore, not barred by time.

It was next contended that the agreement dated 27.1.1987 having been substituted by a fresh agreement dated 23.2.1991, under which the respondents H themselves had agreed to receive Rs. 9,51,000 as compensation for the flat not

having been provided to them under the earlier agreement, they could only approach the civil court for recovery of that amount but could not legally institute the claim petition before the Commission for compensation on the ground of "deficiency in service." A

This plea has been rejected by the National Commission by placing reliance upon the decision of this Court in *Lucknow Development Authority* v. *M.M. Gupta,* [1994] 1 SCC 243. B

We have already held above that the rights under the earlier agreement of 1987 were kept alive even after the second agreement. The rights under the first agreement had not been given up and there was no substitution of the earlier agreement in its entirety by the new agreement. C

We may, at this stage, refer to the provisions of Section 62 of the Indian Contract Act which provides as under :

> "If the parties to a contract agree to substitute a new contract for it, or to rescind or alter it, the original contract need not be performed." D

This provision contains the principle of "Novation" of contract.

One of the essential requirements of 'Novation'; as contemplated by Section 62, is that there should be complete substitution of a new contract E in place of the old. It is in that situation that the original contract need not be performed. Substitution of a new contract in place of the old contract which would have the effect of rescinding or completely altering the terms of the original contract, has to be by agreement between the parties. A substituted contract should rescind or alter or extinguish the previous contract. But if the terms of the two contracts are inconsistent and they cannot stand together, F the subsequent contract cannot be said to be in substitution of the earlier contract.

In the instant case, the rights under the original contract were not given up as it was specifically provided in the subsequent contract that the rights G under the old contract shall stand extinguished only on payment of the entire amount of Rs. 9,51,000. Since the amount was not paid by the appellants as stipulated by the subsequent contract, the rights under the original contract were still available to the respondents and they could legally claim enforcement of those rights. Obviously, under the original contract, the appellants were under an obligation to provide a flat to the respondents. This right would H

A come to an end only when the appellants had, in pursuance of the subsequent contract, paid the entire amount of Rs. 9,51,000 to the respondents. Since they had not done so, the respondents could legally invoke the provisions of the earlier contract and claim before the Commission that there was "deficiency in service" on the part of the appellants.

B We may also point out that the appellants had filed only a written statement before the Commission but had not produced any evidence in support of their pleas. Even an affidavit in support of what they had stated in the written statement was not filed before the Commission. Their case, thus was not supported by any evidence and the Commission, in the facts and C circumstances of the case, was justified in decreeing the claim of the respondents.

Learned counsel for the parties have stated before us that in terms of the judgment passed by the Commission, the entire amount due from the appellants has already been paid to the respondents including interest at the D rate of 18 per cent per annum on the principal amount of Rs.9,51,000. That being so, we are not prepared to entertain the plea of the appellants that the decree passed by the Commission in respect of Rs.1 lakh as compensation on account of the pain and suffering undergone by the respondents may be reversed.

E We find no merit in the appeal and the same is accordingly dismissed with no order as to costs.

R.C.K. Appeal dismissed.