

Supreme Court - Daily Orders

Sunil Kohli vs M/S Purearth Infrastructure Ltd. on 1 October, 2019

NON-REPORT

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NOS.9004-9005/2018

SUNIL KOHLI & ANR.

Appellants

VERSUS

M/s. PUREARTH INFRASTRUCTURE LTD.

Respondent

J U D G M E N T

UDAY UMESH LALIT, J.

These appeals under Section 23 of the Consumer Protection Act, 1986 (hereinafter referred to as the Act) challenge the judgment and final order dated 03.04.2018 passed by the National Consumer Disputes Redressal Commission (for short the National Commission) in Consumer Complaint No.62 of 2013 and also against the order dated 01.05.2018 passed by the National Commission dismissing Review Application No.129 of 2018 preferred by the appellants herein.

The facts leading to the filing of the aforesaid Consumer Complaint were set out by the National Commission in para nos.2, 3, Signature Not Verified Digitally signed by MUKESH KUMAR 4 and 5 of its order dated 03.04.2018 as under: Date: 2019.10.05 10:24:37 IST Reason:

2. It is alleged that the complainants are non-resident Indians presently residing in Denmark. They intend to shift to India. Thus with the intention to earn their livelihood they booked shop No.P-3-115 having super area 1095 sq. ft. @ 9900 per sq. ft. Total consideration payable for the shop was Rs.1,08,40,500/-. As per the terms and conditions of the agreement the opposite party had assured to give possession of the shop to the complainants within two years from the date of commencement of construction. The consideration amount was payable in following manner:-

- i. At Booking 20% of the basic sale price
- ii. Within 30 days of booking 20% of the basic sale price

iii. Within 60 days of booking 20% of the basic sale price iv. Within 90 days of booking 12.5 of the basic sale price.

- v. On completion of common Area Flooring 7.5% of the basic sale price
- vi. On completion of Façade 7.5% of the basic sale price

vii. On completion of Services 7.5% of the basic sale price viii. On offer of possession 5% of the basic sale price

3. It is alleged by the complainants that they paid installments of Rs.21,61,100/- on 10th August, 2007, 10th September, 2007 and 4th October, 2007. They also paid installments amounting to Rs.13,55,063/- on 2.11.2007 and Rs.8,13,038/- on 6th December, 2007. The opposite party thus on receiving 80% of the consideration amount sent two sets of agreement for signatures of the complainants which were signed and returned back to the opposite party on 10th March, 2008.

4. On 18.6.2009 the complainant by way of e-mail sought information about the status of the project as also the date by which the opposite party proposed to deliver possession of the subject unit. The opposite party vide e- mail dated 29.6.2009 informed that the plaza was ready for possession except that completion certificate was awaited. Thereafter, on 9th July, 2009 the opposite party demanded last installment of Rs.5,42,025/- against the sale consideration which was also paid. It is alleged that despite having received 100% payment of the consideration amount the opposite party has failed to deliver possession of the subject unit even years after the expiry of the stipulated date of deliver of possession. Claiming this to be unfair trade practice and deficiency in service on the part of the opposite party, the complainants have raised the consumer dispute seeking following prayer:-

- i) Direct the OP to pay Rs.1,11,30,501/- (Rupees one crore eleven lakhs thirty thousand five hundred and one) towards compensation which has become due as on today;
- ii) Direct the OP to give possession and title of the said shop to the complainants;
- iii) Direct the OP to account for or refund Rs.2,85,131/- with interest of 18% in case the said money has not been accounted for or not paid for construction of fly over;
- iv) Pay compensation of Rs.20,00,000/- for the financial loss, mental and physical agony;
- v) Pay Rs.3 lacs towards litigation cost.

5. The opposite party in its written statement has raised preliminary objection as to locus standi of the complainants to file the complaints on the plea that the subject shop was booked by the complainants for commercial purpose. Therefore, they cannot be termed consumers as envisaged under section 2 (1) (d) of the Consumer Protection Act, 1986. So far as merits of the case are concerned, the booking of the shop by the complainants, the agreed consideration amount as also the payment made by the complainants against the consideration amount in instalments have not been denied. According to the opposite party, there is no deficiency on its part. It is alleged that the agreement for sale of the subject unit was entered into between the parties in March 2008 and the completion certificate for the project i.e. Plaza-3 was applied in November 2008. Had the opposite party received completion certificate in the year 2008, the possession would have been given to the

complainant either in 2008 or early 2009. The government agencies took very long time to give sanction / approval which was beyond the control of the opposite party. The opposite party received the completion certificate in September 2010 while the opposite party was gearing up for giving possession to the respective allottees, MCD revoked the completion certificate and sealed the Plaza. This led to litigation. Finally with the intervention of Court, Plaza was desealed in May 2012 and completion certificate was restored. Since then opposite party has been delivering possession of the respective units to the purchasers and by the date of filing of written statement, 100 sale deeds have been registered in favour of the allottees in Plaza-1 and Plaza-3. It is alleged that complainants were offered possession of the subject shop in June 2012 but they did not come forward for taking possession and execution and registration of sale deed. The case of the opposite party, therefore, is that it was prevented from delivering possession of the subject shop to the complainants within the stipulated period because of non-availability of completion certificate from the concerned authorities which cannot be termed as deficiency in service. When the matter came up for final disposal after the evidence was led by the parties, the questions that were posed for consideration by the National Commission were: whether or not the complainants were consumers for the purposes of the Act, and, whether the complaint was maintainable? These questions were answered against the appellants and correctness of the decision of the National Commission in that behalf is in issue before us.

Before we deal with these questions, the plea taken up by the appellants in the Complaint as well as the nature of evidence that was led must be adverted to.

In the Complaint, the complainant stated as under:-

5. That the complainant expressed his willingness to purchase the said shop to Mr. Aditya Wadhwa informing him that, to earn his livelihood, he wants to immediately open a store of lingerie by the brand name of Change in the said shop for which he has offer in hand. In his affidavit of evidence, the appellant submitted:

9. I say that on the assurance of the opposite party to hand over the possession of the shop in question within a period of 2 years, I put my house bearing Skovpibervej 13, 2680 Solroed Strand, DENMARK, on sale to come and settle in India and to earn my livelihood by way of self- occupation in the said shop. True Copy of the agreement Dated 10.07.2008 with the broker for the selling the house in Danish language with its English Translation is enclosed herewith.

11. I say that I was working with BONG BJORNBAK A/S w.e.f. 25.10.1999 up to 09.11.2007 when I left the job to come and settle in India. True Copy of Experience letter Dated 09.11.2007 issued by the employer to me in Danish with its English Translation is enclosed herewith.

12. I say that since then I was jobless and recently, I have joined RED CROSS DENMARK and doing voluntary work of helping the refugees in settling them down in DENMARK. According to the National Commission, the material on record did not indicate that the premises in question were booked by the complainants for their self-use and self-employment. The discussion of the National Commission in that behalf was as under:

16. On reading of the above, it appears that this certificate certifies that complainant Sunil Kohli was given rights of distribution of change, chic and charade products in India and the subject right was valid till further notice. The certificate is dated 26.8.2004. There is no evidence on record to show that the complainants after 26.8.2004 undertook the distribution business at any given time before booking the subject premises in August, 2007. This circumstance raises a strong suspicion against the correctness of the certificate.

Under natural course of circumstances no business house would give distribution rights of its products to someone who fails to take any initiative for distribution of the products of the said manufacturer for years together. Had this certificate been genuine, there must have been some written contract between the parties i.e. the Change of Scandinavi Products and the complainant No.1 defining the terms and conditions of the distribution rights. No such agreement has been placed on record. Thus, under the circumstances, we are not inclined to accept the plea of the complainants that they had booked the subject premises with the intention to open a shop for running a distributorship of the aforesaid products with a view to earn livelihood by means of self-employment. Thus, the case of the complainants does not fall within the explanation to the definition of term Consumer. As the complainants had booked the commercial premises, it can be safely concluded that they had hired/availed of the services of the opposite party for commercial purpose, as such they are not the consumers as envisaged under Section 2 (1) (d) of the Act. As the complainants are not consumers, they have no locus standi to file the consumer complaint. Consequently, the complaint is dismissed as not maintainable. We heard Mr. Pallav Shishodia, learned Senior Advocate for the appellants and Mr. Gaurav Mitra, learned Advocate for the respondent.

According to Mr. Shishodia, the fact that the appellants had put their house in DENMARK on sale; the fact that they were garnering resources with an intent to permanently settle down in Delhi and use the premises in question for running a business as well as the assertions in the evidence that they wanted to utilize the premises for self-employment, were sufficient and legal requirements as set out in Section 2(1)(d) of the Act were fully satisfied. According to Mr. Shishodia, the National Commission ought not to have disposed of the matter purely on the issue of maintainability.

On the other hand, Mr. Gaurav Mitra, learned Advocate submitted that a person who obtains goods for re-sale or for commercial purposes is completely excluded from the substantive part of the definition of Section 2(1)(d)(i) of the Act and the issue would get further emphasized by the explanation. He relied upon decisions of this Court in *Laxmi Engineering Works v. P.S.G.*

Industrial Institute, (1995) 3 SCC 583; and, *Cheema Engineering Services v. Rajan Singh*, (1997) 1 SCC 131.

Before we deal with the rival submissions, the relevant provision, namely, Section 2(1)(d)(i) of the Act may be extracted:

Section 2. Definitions.(1) In this Act, unless the context otherwise requires,

(d) consumer means any person who, (i) buys any goods for a consideration which has been paid or promised or partly paid and partly promised, or under any system of deferred payment and includes any user of such goods other than the person who buys such goods for consideration paid or promised or partly paid or partly promised, or under any system of deferred payment when such use is made with the approval of such person, but does not include a person who obtains such goods for resale or for any commercial purpose; The provision came up for consideration in Laxmi Engineering Works, and the matter was dealt with by this Court as under:

11. Now coming back to the definition of the expression consumer in Section 2(d), a consumer means insofar as is relevant for the purpose of this appeal, (i) a person who buys any goods for consideration; it is immaterial whether the consideration is paid or promised, or partly paid and partly promised, or whether the payment of consideration is deferred; (ii) a person who uses such goods with the approval of the person who buys such goods for consideration; (iii) but does not include a person who buys such goods for resale or for any commercial purpose. The expression resale is clear enough. Controversy has, however, arisen with respect to meaning of the expression commercial purpose. It is also not defined in the Act. In the absence of a definition, we have to go by its ordinary meaning. Commercial denotes pertaining to commerce (Chamber's Twentieth Century Dictionary); it means connected with, or engaged in commerce; mercantile; having profit as the main aim (Collins English Dictionary) whereas the word commerce means financial transactions especially buying and selling of merchandise, on a large scale (Concise Oxford Dictionary). The National Commission appears to have been taking a consistent view that where a person purchases goods with a view to using such goods for carrying on any activity on a large scale for the purpose of earning profit he will not be a consumer within the meaning of Section 2(d)(i) of the Act. Broadly affirming the said view and more particularly with a view to obviate any confusion the expression large scale is not a very precise expression Parliament stepped in and added the explanation to Section 2(d)(i) by Ordinance/Amendment Act, 1993. The explanation excludes certain purposes from the purview of the expression commercial purpose a case of exception to an exception. Let us elaborate: a person who buys a typewriter or a car and uses them for his personal use is certainly a consumer but a person who buys a typewriter or a car for typing others' work for consideration or for plying the car as a taxi can be said to be using the typewriter/car for a commercial purpose. The explanation however clarifies that in certain situations, purchase of goods for commercial purpose would not yet take the purchaser out of the definition of expression consumer. If the commercial use is by the purchaser himself for the purpose of earning his livelihood by means of self-employment, such purchaser of goods is yet a consumer. In the illustration given above, if the purchaser himself works on typewriter or plies the car as a taxi himself, he does not cease to be a consumer. In other words, if the buyer of goods uses them himself, i.e., by self-employment, for earning his livelihood, it would not be treated as a commercial purpose and he does not cease to be a consumer for the purposes of the Act. The explanation reduces the question, what is a commercial purpose, to a question of fact to be decided in the facts of each case. It is not the value of the goods that matters but the purpose to which the goods bought are put to. The several words employed in the explanation, viz., uses them by himself, exclusively for the purpose of earning his livelihood and by means of self-employment make the intention of Parliament abundantly clear, that the goods bought must be used by the buyer himself, by employing himself for earning his livelihood. A few

more illustrations would serve to emphasise what we say. A person who purchases an auto-rickshaw to ply it himself on hire for earning his livelihood would be a consumer. Similarly, a purchaser of a truck who purchases it for plying it as a public carrier by himself would be a consumer. A person who purchases a lathe machine or other machine to operate it himself for earning his livelihood would be a consumer. (In the above illustrations, if such buyer takes the assistance of one or two persons to assist/help him in operating the vehicle or machinery, he does not cease to be a consumer.) As against this a person who purchases an auto-rickshaw, a car or a lathe machine or other machine to be plied or operated exclusively by another person would not be a consumer. This is the necessary limitation flowing from the expressions used by him, and by means of self-employment in the explanation. The ambiguity in the meaning of the words for the purpose of earning his livelihood is explained and clarified by the other two sets of words. As laid down by this Court in *Laxmi Engineering Works*, the explanation to Section 2(1)(d) of the Act clarifies that in certain situations, purchase of goods for commercial purpose would not yet take the purchaser out of the definition of expression consumer. If the commercial use is by the purchaser himself for the purpose of earning his livelihood by means of self-

employment, such purchaser of goods is yet a consumer. This Court went on to observe that what is Commercial Purpose is a question of fact to be decided in the facts of each case.

To similar effect are the observations of this Court in *Cheema Engineering Services* wherein it was observed in para 6 thus:

6. In other words, the Explanation excludes from the ambit of commercial purpose in sub-clause (i) of Section 2(1)(d), any goods purchased by a consumer and used by him exclusively for the purpose of earning his livelihood by means of self-employment. Such purchase of goods is not a commercial purpose. The question, therefore, is whether the respondent has been using the aforesaid machine for self-employment? The word self-employment is not defined. Therefore, it is a matter of evidence. Unless there is evidence and on consideration thereof it is concluded that the machine was used only for self-employment to earn his livelihood without a sense of commercial purpose by employing on regular basis the employee or workmen for trade in the manufacture and sale of bricks, it would be for self-employment. Manufacture and sale of bricks in a commercial way may also be to earn livelihood, but merely earning livelihood in commercial business, does not mean that it is not for commercial purpose. Self-employment connotes altogether a different concept, namely, he alone uses the machinery purchased for the purpose of manufacture by employing himself in working out or producing the goods for earning his livelihood.

He includes the members of his family. Whether the respondent is using the machine exclusively by himself and the members of his family for preparation, manufacture and sale of bricks or whether he employed any workmen and if so, how many, are matters of evidence. The burden is on the respondent to prove them. Therefore, the Tribunals were not right in concluding that the respondent is using the machine only for self-employment and that, therefore, it is not a commercial

purpose. The orders of all the Tribunals stand set aside. The matter is remitted to the District Forum. The District Forum is directed to record the evidence of the parties and dispose of it in accordance with law within a period of six months from the date of the receipt of this order. The issue therefore is whether the evidence on record is suggestive or indicative of the fact that the premises in question were booked by the complainants with the intention of self-

employment or self-use.

The affidavit of evidence as quoted above clearly points that the complainants wanted to dispose of the property in DENMARK and wanted to come down to Delhi to start a business. It is for this purpose that the premises in question were booked. The evidence also discloses that the Complainant no.1 was not employed any more in DENMARK and as a matter of fact, he was serving RED CROSS, a charitable organization. In the circumstances, it cannot be ruled that the case of the Complainants would not come within the definition of consumer as defined under the provisions of the Act.

We, therefore, set-aside the view taken by the National Commission.

The National Commission had confined itself to questions whether the complainants were consumers or not, and, whether the dispute came within the parameters and provisions of the Act, and other issues, namely, whether the respondents were deficient in rendering services, and if so, whether any compensation would be payable? were not dealt with by the National Commission.

Therefore, while allowing these appeals and holding the Complainants to be consumers and the Complaint to be maintainable under the provisions of the Act, we remit the matter back to the National Commission to consider the other issues. The Complaint No.62 of 2018 stands restored to the file of the National Commission.

Since the proceedings were initiated in the year 2013, we request the National Commission to consider disposing of the matter as early as possible and preferably within six months from today.

The appeals are allowed in aforesaid terms. No costs.

.....J.

[UDAY UMESH LALIT]J.

[INDIRA BANERJEE]J.

[M.R. SHAH] NEW DELHI;

OCTOBER 1, 2019

S U P R E M E C O U R T O F I N D I A
RECORD OF PROCEEDINGS

Civil Appeal Nos.9004-9005/2018

SUNIL KOHLI & ANR.

Appellant(s)

VERSUS

M/s. PUREARTH INFRASTRUCTURE LTD.

Respondent(s)

Date : 01-10-2019 These matters were called on for hearing today.

CORAM :

HON'BLE MR. JUSTICE UDAY UMESH LALIT HON'BLE MS. JUSTICE INDIRA
BANERJEE HON'BLE MR. JUSTICE M.R. SHAH For Appellant(s) Mr. Pallav
Shishodia, Sr. Adv.

Mr. Ravi Mehrotra, Adv.

Mr. Navdeep Singh, Adv.

Mr. R.K. Sinha, Adv.

Mr. Dharmendra Kumar Sinha, AOR

For Respondent(s)

Mr. Gaurav Mitra, Adv.

Mr. Aman Gupta, AOR

Mr. Adit Singh, Adv.

Ms. Divya Gupta, Adv.

UPON hearing the counsel the Court made the following O R D E R The civil appeals
are allowed, in terms of the signed judgment.

Pending application(s), if any, shall stand disposed of.

(MUKESH NASA)
COURT MASTER

(SUMAN JAIN)
BRANCH OFFICER

(Signed Non-Reportable Judgment is placed on the File)