

**STATE CONSUMER DISPUTES REDRESSAL COMMISSION
WEST BENGAL
11A, Mirza Ghalib Street, Kolkata - 700087**

**First Appeal No. A/691/2017
(Date of Filing : 22 Jun 2017)
(Arisen out of Order Dated 24/05/2017 in Case No. Complaint Case No. CC/445/2016 of
District Kolkata-III(South))**

1. M/s. A. G. Construction

Prop., Sri Soumen Chakraborty, 2, James Long Sarani,
P.S. - Thakurpukur, Kolkata - 700 008, W.B.

.....Appellant(s)

Versus

1. Smt. Saraswati Das

W/o Sri Dilip Das, 63, Natun Pally, Barisha, P.S. -
Haridevpur, Kolkata -700 008.

2. Smt. Karan Bala Bera

W/o Lt. Murari Mohan Bera, 238/A, Vidya Sagar Sarani,
Purba Barisha, P.S. - Haridevpur, Kolkata - 700 008.

3. Smt. Anju Bera

W/o Lt. Dilip Bera, 26/2, Kailash Ghosh Road, P.S. -
Thakurpukur, Kolkata - 700 008.

4. Smt. Bula Adhikary

W/o Ashim Adhikary, 26/2, Kailash Ghosh Road, P.S. -
Thakurpukur, Kolkata - 700 008.

5. Smt. Sikha Bakshi

W/o Sri Jahar Bakshi, 26/2, Kailash Ghosh Road, P.S. -
Thakurpukur, Kolkata - 700 008.

6. The Assistant Director, Consumer Affairs & Fair
Business Practice Department

103/A, Kulpi Road, Kachari Bazar, 4th Floor, Baruipur,
Kolkata - 700 144.

.....Respondent(s)

BEFORE:

HON'BLE MR. SAMARESH PRASAD CHOWDHURY PRESIDING MEMBER

**For the Mr. Ashok Kumar Singh, Advocate
Appellant:**

**For the Sasanka Kumar Mandal, Advocate
Respondent:**

Dated : 18 May 2018

Final Order / Judgement

The instant appeal under Section 15 of the Consumer Protection Act, 1986 (for brevity, 'the Act') is at the behest of Opposite Party No. 1 to impeach the final order/judgment dated 24.05.2017 passed by the District Consumer Disputes Redressal Forum, Kolkata, and Unit – III (for short, 'Ld. District Forum') in Consumer Complaint No. 445/2016. By the impugned order, the Ld. District Forum allowed the complaint lodged by Respondent No. 1 Smt Saraswati Das under Section 12 of the Act with direction upon O.P. No. 1/appellant to deliver possession and to execute and register the Sale Deed of the shop room situated at Premises No. 985, Vidyasagar Sarani, P.S.- Haridebpur, Kolkata – 700063, Dist – South 24 Parganas, within the local limits of Ward No. 124 of Kolkata Municipal Corporation on receipt of Rs. 50,000/- as balance consideration amount, to pay Rs. 50,000/- towards compensation and Rs. 10,000/- towards cost of litigation.

Respondent No. 1 herein being complainant lodged the complaint before the Ld. District Forum asserting that she is an unemployed lady and in order to start a small business she entered into an Agreement for Sale with the Opposite Party No. 1/appellant to purchase of a shop room measuring about 80 sq. ft. on the ground floor at Premises No. 985, Vidyasagar Sarani, P.S.- Haridebpur, Kolkata – 700063, Dist – South 24 Parganas, within the local limits of Ward No. 124 of Kolkata Municipal Corporation at a consideration of Rs. 2,00,000/-. Out of the total consideration amount she has already paid Rs. 1,50,000/-. As per terms of the agreement the opposite parties were under obligation to hand over the possession on or before two months from the date of the agreement. The complainant alleged that despite receipt of the said amount the O.P. No. 1 is neither responded nor handed over the possession of the shop room and in this regard all her requests and persuasions including legal notice dated 01.12.2015 turned a deaf ear.

The appellant being O.P. No. 1 by filing a written version has stated that the present dispute is not a consumer dispute and the complaint does not come under the purview of the Consumer Protection Act.

After assessing the materials on record, Ld. District Forum by the impugned order allowed the complaint with costs of Rs. 10,000/- against the O.P. No. 1 with certain directions as indicated above. To assail the said order, the O.P. No. 1 has come up in this Commission with the present appeal.

Mr. Ashok Kumar Singh, Ld. Advocate for the appellant has assailed the impugned order on the ground that the Ld. District Forum has failed to appreciate the proposition of law that the respondent no. 1 cannot be categorised as 'consumer' within the meaning of Section 2(1)(d) of the Act. Expanding his submission, Ld. Advocate for the appellant has submitted that nowhere in the petition of complaint the respondent no. 1 has articulated that she intended to purchase the shop room for the purpose of earning her livelihood by means of self-employment and as such it may so happen that the respondent no. 1 may run the business by deploying others and as such the respondent no. 1 cannot be termed as 'consumer' and therefore, the impugned order should be set aside.

Per contra, Mr. Sasanka Kumar Mondal, Ld. Advocate being assisted by Mr. Amal Mukhopadhyaya, Ld. Advocate has contended that in her petition of complaint the respondent no. 1 has mentioned that being an unemployed lady to start a small business she booked a shop room and in fact, the respondent no. 1 wanted the said shop room for running small business and as such

the respondent no. 1 does fall within the ambit of explanation to Section 2(1)(d)(ii) of the Act. To fortify his submission Ld. Advocate for respondent no. 1 has drawn my attention to a decision dated 02.08.2016 passed by the Hon'ble National Commission in FA/620/2016 (Vimal Mehra – vs. – Manager/Managing Director, Bhasin Infotech and Infrastructure Pvt. Ltd.).

I have heard the submission made by the Ld. Advocates appearing for the parties and scrutinised the materials available on the record.

From the averment in the petition of complaint, it would reveal that the respondent no. 1 had entered into an agreement with the appellant to purchase of a shop room measuring about 80 sq. ft. super built-up area on the ground floor at at Premises No. 985, Vidyasagar Sarani, P.S.- Haridebpur, Kolkata – 700063, Dist – South 24 Parganas, within the local limits of Ward No. 124 of Kolkata Municipal Corporation in a project constructed by O.P. No. 1/appellant. It also remains undisputed that out of total consideration of Rs. 2,00,000/-, the respondent no. 1 has already paid Rs. 1,50,000/- and a sum of Rs. 50,000/- is due and payable by her. In any case, due to non-delivery of the said shop room and non-execution of Deed of Conveyance after expiry of stipulated period of two months from the date of agreement, the respondent no. 1 compelled to lodge the complaint before the Ld. District Forum.

However, from the contents of the petition of complaint it reveals that in Paragraph-2 of the petition of complaint the respondent no. 1 has stated that being an unemployed lady to start a small business she booked the shop room. In Paragraph-12 of the complaint the respondent no.1 has further stated that she had entered into an agreement to purchase of a shop room for starting a small business but nowhere she stated that she intended to purchase the said shop room for earning her livelihood by means of self-employment. The respondent no. 1/complainant also did not state what kind of business she intended to start and whether it will be run by her alone or she intend to run the said shop room in a supervising capacity.

For appreciation of the dispute, it would be worthwhile to reproduce the definition of Section 2(1)(d) of the Act which is set out below:

“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; or*
- ii. hires or avails of any services 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 beneficiary of such services other than the person who hires or avails of the services for consideration paid or promised, or partly paid and partly promised, or under any system of deferred payment, when such services are availed of with the approval of the first mentioned person (but does not include a person who avails of such services for any commercial purpose”.*

Explanation:- for the purposes of this clause, “commercial purpose” does not include use by a person of goods bought and used by him and services availed by him exclusively for the purposes of earning his livelihood by means of self-employment”.

The foregoing provision provides that the ‘consumer’ is a person who buys any goods for a consideration which has been paid or promised or partly paid and partly promised or avails of any services for a consideration which has been paid or promised or partly paid and partly promised but it does not include a person who avails of services for commercial purposes. Explanation to the Section creates an exception and states that clause ‘commercial purpose’ does not include used by a person of goods brought and used by him and services available by him exclusively for the purposes of earning his livelihood by means of self-employment.

In the case of Laxmi Engineering Works –Vs.- P.S.G. Industrial Institute reported in (1995) 3 SCC 583 the Hon’ble Supreme Court has observed that what is a ‘commercial purpose’ is a question of fact to be decided in the facts of each case. It is not the value of the goods that matter but the purpose to which the goods bought are put to. The Hon’ble Apex Court further proceeded to observe – ‘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 a decision reported in I (2005) CPJ 27 (NC) (M/s. Harsolia Motors – Vs. – National Insurance Co. Ltd.) the Hon’ble National Consumer Commission has observed that if the goods are purchased for resale or for commercial purpose, then such consumer would be excluded from the coverage of the Act.

The Hon’ble Supreme Court in a decision reported in (1997) 1 SCC 131 (Cheema Engineering Services – Vs. – Rajan Singh) has explained the term self-employment by observing thus:

“Self-employment connotes altogether a different concept, namely, he alone uses the machinery purchase 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”.

The Hon’ble National Consumer Commission in a decision reported in 2000 (3) CPJ 13 (Shakti Engineering Works –Vs.- Sree Krishna Coir Rope Industries) has held that in order to have protection of explanation to Section 2(1)(d)(ii) of the Act, one must establish that he himself was engaged in the activity which generates livelihood. Acting in supervising capacity would not satisfy the requirement of explanation.

In the case before hand, the respondent no. 1/appellant did not mention whether she intended to purchase the shop room for earning her livelihood by means of self-employment. In order to avail shelter to explanation to Section 2(1)(d)(ii) of the Act it is required to be established that she availed of the services exclusively for earning her livelihood by way of self-employment. A bald statement to start a small business is not sufficient unless it is stated that such service exclusively was done for earning livelihood by way of self-employment. Therefore, the decision referred by the Ld. Advocate for respondent no. 1 in the case of Vimal Mehra (supra) has no manner of application in our case.

In view of the above, I am of the view that the Ld. District Forum has misdirected itself in passing the order impugned because the respondent no. 1/complainant cannot be categorised as 'consumer' within the meaning of Section 2(1)(d) of the Act and therefore, the dispute being not amenable before a Fora constituted under the Act should have been dismissed. Therefore, the impugned judgment/final order is liable to be set aside.

For the reasons aforesaid, the appeal is allowed on contest. However, there will be no order as to costs.

The impugned final order/judgment dated 24.05.2017 passed by Ld. District Forum in CC/445/2016 is hereby set aside.

Consequently, CC/445/2016 stands dismissed.

However, this order will not debar the respondent no. 1/complainant to approach the appropriate Court/Forum in accordance with law and to overcome the hurdle of limitation, she may seek assistance of the decision of Hon'ble Supreme Court reported in (1995) 3 SCC 583 [Laxmi Engineer Works – vs. – PSG Industrial Institute].

The Registrar of the Commission is directed to send a copy of the order to the Ld. District Consumer Disputes Redressal Forum, Kolkata, Unit – III for information.

[HON'BLE MR. SAMARESH PRASAD CHOWDHURY]
PRESIDING MEMBER