

(2017) 07 NCDRC CK 0019

In the National Consumer Disputes Redressal Commission

Case No : 457 of 2016

LEELAVATI W/O. SH. DHARAMVIR GAUR

APPELLANT

Vs

M/S. VSR INTRATECH PVT. LTD.

RESPONDENT

Date of Decision : 26-07-2017

Acts Referred:

[Consumer Protection Act, 1986](#), [Section 19](#), [Section 2\(d\)](#), [Section 2\(d\)\(2\)](#), [Section 21\(a\)\(2\)](#) - Appeals - Definitions - Jurisdiction of the Natio

Citation : (2017) 07 NCDRC CK 0019

Hon'ble Judges : B.C. Gupta, S.M. Kantikar

Advocate : Himanshu Upadhyay, Sagar Sharma

Judgement

1. These two first appeals have been filed under section 19 read with section 21(a)(ii) of the Consumer Protection Act, 1986 against the impugned orders dated 01.04.2016, passed by the Delhi State Consumer Disputes Redressal Commission (hereinafter referred to as "the State Commission") in consumer complaints No. 128/2016, filed by Leelavati (appellant in FA/457/2016) and No. 130/2016, filed by Mukul Sharma (appellant in FA/458/2016). Vide these orders dated 01.04.2016, the State Commission dismissed the complaints on the ground that both the complainants had booked the property with the respondent/OP Builders for commercial purpose and hence, the consumer complaints were not maintainable.

2. The facts involved in these cases as stated by the complainant Leelavati in her consumer complaint No. 128/2016 are that she entered into an agreement with the respondent/OP builder/developer M/s VSR Infratech Private Limited for purchase of land costing 55 lakh and under the agreement, an initial payment of 4,08,160/- was made. The total payment made by her to the OP Builder was 41 lakhs. The OP was supposed to hand over the physical possession under the agreement mentioned as commercial Unit No. SA-4-27 in sector 68 Gurgaon after about three years. It was stated in the complaint that the agreement for

the said purchase was entered for the purpose of earning her livelihood. However, on the failure of the OP Builder to handover the property in accordance with the terms of the agreement, the complainant got a legal notice issued to them, but to no avail. The complainant filed the consumer complaint in question, seeking direction to the OP to give physical possession of the said apartment to the complainant within 30 days or to refund the amount deposited of 41 lakhs alongwith interest @24% p.a. and also to pay a compensation of 20 lakh for mental agony etc. and 5 lakhs as cost of litigation.

3. In the second consumer complaint No. 130/2016, the complainant Ms. Mukul Sharma stated that there was an oral agreement between the complainant and the OP on 25.05.2011, as per which an initial payment of 9,80,561/- was made against the total value of the land/plot as 55-lakh. In total, a sum of 25 lakh had been paid under the agreement mentioned for the commercial unit 7A-07 in Sector 114, Gurgaon. However, the OP Builder failed to provide the property in accordance with the terms of the agreement, failing which the consumer complaint was filed, seeking directions to the OP to hand over the physical possession of the said apartment within 30 days, or to give refund of the amount deposited, i.e., 25 lakhs alongwith interest @24% p.a. and a compensation of 25 lakhs for mental agony and a further sum of 5 lakh as litigation charges.

4. The State Commission heard both the complaints but rejected them at the admission stage itself, saying that the property in question had been booked for commercial purpose. In CC No. 128/2016, the State Commission observed as follows:-

"6. A person purchasing unit for Rs. 55,00,000/- cannot be said to be a bonafide user for self employment. The things could have been understood, had the investment been reasonable say Rs. 5,00,000/- to 7,00,000/-.

7. The premises booked for ATM cannot be said to be source of livelihood by self employment. A unit booked for BPO cannot be said to be booked for earning livelihood by self employment as number of employees are likely to be deployed. Area of about 100 sq. ft. can be said to be of personal office but not office with the area of 567 sq. ft."

5. The State Commission further observed as under:-

"13.....In Para 7 it has been held that complainants were trying to seek shelter of bald plea in the complaint that they had booked commercial spaces in the tower for earning their livelihood by means of self employment. Merely, taking of plea will not entitle the complainants to get the benefit of explanation which carves out exception for the person who has hired the services exclusively for earning his livelihood by means of self employment."

6. In CC No. 130/2016, similar observations have been made by the State Commission while passing the impugned order.

7. Notice of the two appeals was sent to the OP Builder. However, they did not

enter appearance despite the service of the said notice. On 18.07.2016, notice was ordered to be issued again at the second address mentioned in the memo of parties in the interest of justice. On the next date of hearing, i.e., 16.08.2016, notice was ordered to be issued on both the addresses given in the complaint. However, despite service of notice on one of the addresses, the OPs did not put in appearance. Dasti notice for the service of the respondents were given to the learned counsel for the appellant in both the cases. As per affidavit filed by Mr. Ravi Shukla Advocate, personal service of the said notice was affected on the respondents and their office seal had also been obtained. However, despite all these efforts, the respondents did not put in appearance before this Commission.

8. During hearing before us, the learned counsel for the appellants argued that the Units in question had been booked for personal use only of the complainants in both the cases. There was no intention to carry out any commercial activity in the said units. The order passed by the State Commission was, therefore, erroneous in the eyes of law because the appellants do fall within the definition of "consumer" under the Consumer Protection Act, 1986. The learned counsel further stated that carrying out legal profession did not come under the definition of commercial activity. In support of his arguments, the learned counsel has drawn attention to an order passed by the Hon"ble Supreme Court in "M.P. Electricity Board & Ors. vs. Shiv Narayan & Anr." [Appeal (Civil) No. 1065/2000 decided on 24/08/2005]. After considering at length, the meaning of the words "commerce" and "profession", the Hon"ble Apex Court observed as follows:-

" A professional activity must be an activity carried on by an individual by his personal skill and intelligence. There is a fundamental distinction, therefore, between a professional activity and an activity of a commercial character. Considering a similar question in the background of Section 2(4) of the Bombay Shops and Establishments Act (79 of 1948), it was held by this Court in Dr. Devendra M. Surti v. The State of Gujarat (AIR 1969 Sc 63) that a doctor's establishment is not covered by the expression "Commercial establishment" ."

9. The learned counsel argued that in the above judgment, distinction between "Commercial and Professional" purpose has been explained, and it has been stated that carrying out a professional activity does not amount to a commercial purpose. The complaints in the present case were maintainable in law, relying upon the above judgment. The learned counsel averred that the legal profession does come under a professional activity and not under the definition of commercial purpose. The learned counsel requested that the matter be remanded to the State Commission and they should be asked to decide both the complaints on merits.

10. We have examined the entire material on record and given a thoughtful consideration to the arguments advanced before us.

11. The main issue that merits consideration in these two cases is whether the appellants / complainants are covered under the definition of "Consumer" as

contained in the Consumer Protection Act, 1986 or not. Section 2(d)(ii) of the Consumer Protection Act states as follows:-

"2(d) "Consumer" means any person who,

(i)

(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 purposes ;

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 ."

12. The "Explanation" says that if goods bought and/or services availed are exclusively for the purpose of earning livelihood by means of self-employment, such an activity shall not fall within the definition of commercial purpose. In the impugned order, the State Commission have rightly observed that merely taking such a plea will not entitle the complainants to get the benefit of the aforesaid "explanation". It was the duty of the appellants/complainants to provide evidence that the booking of the premises made by them was exclusively meant for earning their livelihood by means of self-employment only. They were required to explain to the State Commission whether they had any other source of income and the kind of activity they wished to start on the premises being purchased. During hearing before this Commission, the learned counsel for the appellants/complainants stated at the bar that the premises in question had been booked for opening office of an Advocate and hence, meant for professional purpose and not for commercial purpose. It has also been explained in the memo of appeal that the complainant had booked the unit for their own personal purpose and for their own livelihood and in no manner, they will utilise the units for commercial purpose. It appears necessary, therefore, that the appellants/complainants should be given a chance to lead evidence in support of their assertion that they are covered under the "Explanation" to section 2(d) of the Act.

13. In the impugned order of the State Commission, it has been observed that an area of about 100 q. ft. can be said to be a personal office, but not office with area of 567 sq. ft. It is observed in this regard that a decision with regard to the issue in question is to be taken, considering the facts and circumstances of the case in entirety. This view was expressed by the Hon"ble Supreme Court in their land mark judgment in "Laxmi Engineering Works vs. P.S.G. Industrial Institute" [1195 AIR 1428] , where it has been observed as follows:-

"We must, therefore, hold that

(i) the explanation added by The Consumer Protection (Amendment) Act 50 of 1993 (replacing Ordinance 24 of 1993) with effect from 18.6.1993 is clarificatory in nature and applies to all pending proceedings.

(ii) Whether the purpose for which a person has bought goods is a "commercial purpose" within the meaning of the definition of expression "consumer" in Section 2(d) of the Act is always a question of fact to be decided in the facts and circumstances of each case.

(iii) A person who buys goods and use them himself, exclusively for the purpose of earning his livelihood, by means of self employment is within the definition of the expression "consumer".

25. So far as the present case is concerned we must hold (in agreement with the National Commission), having regard to the nature and character of the machine and the material on record that it is not goods which the appellant purchased for use by himself exclusively for the purpose of earning his livelihood by means of self-employment, as explained hereinabove. "

14. In accordance with the above view taken by the Hon"ble Supreme Court, it is clear that a decision whether the service being availed is for a commercial purpose, is to be taken based on the entire facts and circumstances of the case. We do not have any reason to agree with the view expressed by the State Commission in the impugned order that the extent of area of the premises involved, or the investment required to be made, could be the sole determining factor in deciding whether the service being availed is for a commercial purpose. A unit may have an area of 500 to 600 sq. ft. also, but it may still be covered under the Explanation of section (2)(d) of the Act, if the complainant is able to show that the service was to be availed by him exclusively for the purpose of earning his livelihood by means of self-employment. It is imperative, therefore, that the State Commission is required to weigh the pros and cons of the whole issue in letter and spirit, as laid down by the Hon"ble Supreme Court in "Laxmi Engineering Works vs. P.S.G. Industrial Institute" (supra) and then conclude whether the service sought to be availed is of commercial nature or not.

15. Based on the aforesaid discussion, the matter deserves to be examined afresh by providing a chance to the appellants/complainants to lead evidence in favour of their assertion that the premises in question, were meant exclusively for the purpose of earning their livelihood by means of self-employment and that they propose to set-up an activity which shall not fall within the definition of commercial purpose in terms of the provisions of the Consumer Protection Act, 1986. The present appeals are, therefore, allowed, the orders passed by the State Commission are set aside and the matters are remitted back to the State Commission for hearing the appeals afresh, after providing the appellants a chance to lead evidence in their favour and then decide the cases again. The State Commission shall also give a chance to the opposite party for rebuttal of

such evidence. The appellants have been directed to appear for further proceedings before the State Commission on 17.08.2017.