

**NATIONAL CONSUMER DISPUTES REDRESSAL COMMISSION
NEW DELHI**

FIRST APPEAL NO. 157 OF 2020

(Against the Order dated 18/11/2019 in Complaint No. 189/2017 of the State Commission
Uttar Pradesh)

1. ABHIMANYU CHIB

S/O. MR. BALWANT SINGH CHIB, R/O. JAYPEE
WISHTOWN KLASSIC, FLAT NO. 201, BLOCK-A, TOWER-
7,
NOIDA-201301
UTTAR PRADESH

.....Appellant(s)

Versus

1. VIPUL IT INFRA SOFT PRIVATE LIMITED & 2 ORS.
THROUGH ITS DIRECTORS, CORPORATE OFFICE AT: A-4
& A-5, SECTOR-16,
NOIDA-UP-201301

2. C.M.D. LOGIX GROUP
OFFICE AT : A-4 & A-5, SECTOR-16,
NOIDA-UTTAR PRADESH

3. VIPUL IT INFRA SOFT PRIVATE LIMITED,
THROUGH ITS DIRECTORS, REGD. OFFICE AT: 85,
GROUND FLOOR, WORLD TRADE CENTRE,
BARAKHAMBALANE,
NEW DELHI-110001

.....Respondent(s)

BEFORE:

HON'BLE DR. INDER JIT SINGH, PRESIDING MEMBER

FOR THE APPELLANT : MR. PRANJAL MISHRA, ADVOCATE

FOR THE RESPONDENT : MR. NITISH KANT SHARMA, ADVOCATE

Dated : 11 July 2024

ORDER

1. The present First Appeal (FA) has been filed by the Appellant against Respondent as detailed above, under section 19 of Consumer Protection Act, 1986, against the order dated 26.12.2019 of the State Consumer Disputes Redressal Commission, U.P. (hereinafter referred to as the 'State Commission'), in Consumer Complaint (CC) No. 189/2017 *inter alia* praying for :

(a) setting aside the impugned order dated 26.12.2019 passed by the State Commission in CC/189/2017.

(b) directing the Respondents to complete the Office No. A-445 in all respects and to hand over the possession within stipulated time frame.

(c) directing the Respondents to pay interest @18% p.a on the amount of Rs.40,21,600/- against the office w.e.f. 01.09.2012.

(d) directing the Respondents to pay Rs.5,00,000/- towards compensation for mental agony and Rs.6,80,960/- for the delayed possession as per agreement and Rs.1,00,000/- towards expenses incurred in pursuing the matter.

2. While the Appellant was Complainant and the Respondents were Respondents in the said CC-/189/2017 before the State Commission.
3. Notice was issued to the Respondent on 13.12.2021. Parties filed their Written Arguments/Synopsis on 26.07.2022 (Appellant) and 20.02.2024 (Respondents) respectively.
4. Brief facts of the case, as emerged from the FA, Order of the State Commission and other case records are that: -

On 27.03.2012, the Appellant booked an Office space (Unit) worth Rs.40,21,600/ in the project "Logix Technova" of OP situated at Sector 132, Express Way Noida, Gautam Budh Nagar, U.P. Vide Allotment letter dated 27.04.2012, the OP allotted Unit No. A-445, Tower A, 4th Floor, admeasuring super area 1216 sq.ft. at a basic sale price (BSP) of Rs.3000/- per sq.ft. An Agreement to Sub-lease was executed by the OP in favour of the Appellant. As per clause 6.1 of the said agreement, the Appellant was to get delivery of the possession by 30.06.2012 with a grace period of two months, i.e. by 30.08.2012. Vide letter dated 07.11.2012, after the delay of almost 3 months, the Respondent informed the Appellate that the unit was ready for the fit out, however the completion certificate was awaited. On 21.06.2013, after more than one year, the Respondents vide letter dated 12.06.2013 demanded for payment towards final instalment along with interest on delayed instalment from the Appellant. The Respondents sent a layout plan of the Unit to the Appellant vide email dated 06.03.2014. The Appellant was requested to visit the project site for the

joint measurement of the unit. During the visit on 10.03.2014, the Appellant noticed that the location of the entrance door was contrary to the layout plan sent by the Respondents as well as the Agreement. The said defect was brought to the notice of the Respondents vide email dated 11.03.2014, the Appellant requested for the change in the placement of the entrance door as per the original layout plan. The Respondents failed to cure the defects despite the efforts of the Appellant. Due to the indifferent attitude of the Respondents and loss caused to the Appellant due to the inordinate delay in completion of the Unit, the Appellant filed complaint before the State Commission on 25.05.2017.

5. Vide Order dated 26.12.2019, the State Commission has dismissed the complaint being not maintainable under Consumer Protection Act, 1986.

6. Appellant has challenged the Order dated 26.12.2019 of the State Commission mainly on following grounds:

(i) The State Commission passed the impugned order in a mechanical manner and without taking into account the facts and circumstances of the case, thus the order passed is erroneous.

(ii) The State Commission has misinterpreted the word “Businessman” to mean that the Appellant was having a business at the time of booking the Unit and did not require the Unit for his livelihood, whereas, the Appellant is a Real Estate Professional and was unemployed at the time of booking the Unit and was in need of the Unit to earn his livelihood.

(iii) The State Commission failed to appreciate the fact that the Appellant had in his pleadings (para 14 of the complaint) mentioned that the complainant has lost opportunity for many years to use and draw the benefit of having his own office. The State Commission has erroneously overlooked the submission of the Appellant in para 2 of the Rejoinder, wherein it was stated that “the complainant is a businessman and he has purchased the office for his own personal use and profession”.

(iv) The State Commission has wrongly recorded that the Appellant has to state that he was unemployed at the time of booking the Unit as there are several judgements to support that even a Professional can use an office for earning his livelihood.

(v)The State Commission has wrongly relied on the judgment pronounced in the case of **Nilabh Jain & Anr. V. Emaar MGF Ltd.**, FA No. 19 of 2015 decided on 08.06.2018 as the facts and circumstances of the above mentioned case are distinct from the facts and circumstances in question. The State has failed to appreciate the settled law as laid down by the Hon'ble Supreme Court in the cases of **Laxmi Engineering Works v. P.S.G. Industrial Institute** (1995) 3 SCC 583, in the case of **M/s Cheema Engineering Services Vs. Rajan Singh**, (1997) 1 SCC 131, decided on 01.11.1996, in the case of **M/s National Seeds Corpn. Ltd. Vs. M. Madhudhan Reddy & Anr.** Civil Appeal No. 7543 of 2004 and **Paramount Digital Colour Lab & Ors. Vs. Agfa India Private Limited & Ors.** (2018) 14 SCC 81 and the law laid down by the Hon'ble Supreme Court in the case of **Sunil Kohli & Anr. Vs. M/s Purearth Infrastructure Pvt. Ltd.** Civil Appeal No. 9004-9005 of 2018, decided on 01.10.2019.

7. Heard counsels of both sides. Contentions/pleas of the parties, on various issues raised in the FA, based on their FA/Reply, Written Arguments, and Oral Arguments advanced during the hearing, are summed up below.

7.1 In addition to the averments made under the grounds (para 6), the Appellant contended that before the State Commission, the Respondent failed to appear before the State Commission. The state Commission directed the Complaint No. 189/2017 to proceed ex parte vide order dated 27.03.2018. The Respondents filed application for amendment of the order dated 27.03.2018, the State Commission vide its order dated 01.10.2018 dismissed the said application and adjourned the matter to 05.02.2019 for final hearing. On 19.02.2019 the Respondent -1 filed First No. 303 of 2019 before this Commission against the order dated 01.10.2019. Vide order dated 27.09.2019, the matter was remanded back to the State Commission with permission to Respondent-1 to file evidence and written arguments subject to cost of Rs.30,000/- to the Appellant. The State Commission recalled the order dated 01.10.2018 passed by the state Commission to be listed for final arguments before the State Commission on 10.10.2019. Then the final order was passed by the State Commission on 26.12.2019. It is further contended that the Appellant made timely payments as and when demanded by the Respondents and having been shocked and surprised by such a conduct of the Respondents wrote an email dated 21.06.2013 bringing it to the notice of the Respondents that the delay interest demanded by the Respondents vide Demand Letter dated 12.06.2013 was incorrect as all payments were made on or before the due date. On the request of Appellant to the Respondents to provide a revised demand note, the Respondents sent a layout plan of the Unit to the Appellant vide email dated 06.03.2014. Vide said email the Appellant was requested to visit the Project Site for the joint measurement of the Unit. The Appellant visited the Project site on 10.03.2014 for conducting the joint measurement of the office area.

At the time of visit, the Appellant noticed that the location of the Entrance door was contrary to the layout plan sent by the Respondents as well as the Agreement. Vide email dated 11.03.2014, the Appellant requested the Respondents for the change in the placement of the entrance door as per the original layout plan, but no response was advanced by the Respondents. This attitude of the Respondents caused the Appellants severe losses due to the inordinate delay in completion of the Unit.

7.2 On the other hand it is contended by the Respondents that the Appeal filed by the Appellants is based on false, frivolous, vague and un-sustained allegations for unlawful financial/monetary gains and does not disclose any cause of action either on facts or in law thereby warranting grant of any relief as prayed for in the complaint. The Appellant is not a consumer and has booked the Unit for investment purpose. The Appellant is a Real Estate Professional, who booked a Lockable Office Unit in the Project of OP on 27.03.2012 by paying a booking amount of Rs.7,48,387/-. Agreement to Sub-lease in favour of the Appellant was executed on 30.05.2012. As per Agreement, the Unit was to be offered for possession by 30.06.2012 along with the grace period of two months i.e. 30.08.2012. On 07.11.2012, Respondents informed the Appellant that the said Office was ready for fit outs however, the Completion Certificate was awaited. The possession was offered on 12.06.2013 and the Appellant was requested to visit the said office for joint measurements, but the Appellant delayed by visiting on 10.03.2014 and started complaining about the location of the entrance door of the said Office as it was not at proper place as per the layout plan. It is further contended by the Respondents that vide email dated 15.10.2014 and 16.10.2014, the Respondents informed the Appellant that the permission for the relocation as granted to the tune of Rs.5000/- as a security deposit which was duly agreed and paid by the Appellant alongwith it was informed to the Appellant that the expenses of shifting the door would be borne by the Appellant. Following which the Respondents offered the possession but till date the Appellant has failed to take over possession from the Respondents despite offer by the Respondents. In the complaint bearing No. 189 of 2017 the complainant addressed himself as a Real Estate Professional whereas nowhere in the complaint the Appellant has referred to the said Office being used for the purpose of self-use. It is also contended that in the said Appeal the Appellant with the malafide and ulterior motive came up with a new ground that the Appellant was unemployed and wanted to start a business venture on its own at the time of purchase of the said Office. In support of their contentions, the Respondents have relied upon the following judgments:

(i) **Lilavati Kirtilal Mehta Medical Trust v. Unique Shanti**

Developers, (2020) 2 SCC 265.

(ii) **SGS India Ltd. v. Dolphin International Ltd.** 2021 SCC

OnLine SC 879.

(iii) **Ravneet Singh Bagga v. KLM Royal Dutch Airlines & Anr.**

(2000) 1 SCC 66.

8. The main issue for consideration in the present case is whether the office space booked by the Complainant (Appellant herein) was for commercial purpose or for earning his livelihood by self-employment and whether Complainant is a Consumer under the provisions of Consumer Protection Act, 1986. OPs (Respondents herein) have contended that the office space in question was booked by the Complainant for commercial purpose, while the Complainant contends that it was for his livelihood by self-employment. The State Commission has held that Complainant is not a consumer under Section 2(1)(d) of the Act, hence the complaint was dismissed as not maintainable.

9. We have carefully gone through the order of the State Commission, other relevant records, case laws relied upon and rival contentions of the parties.

10. In **National Insurance Company Vs. Harsolia Motors & Ors.** 2023 (5) Scale 793, the Hon'ble Supreme Court held as follows:

*“31. The exposition of law on the subject was further considered by this Court in [Lilavati Kirtilal Mehta Medical Trust v. Unique Shanti Developers and Others](#)⁴ in which one of us (Rastogi, J.) was a member and the question arose for consideration was whether the purchase of flats for the purpose of providing accommodation to nurses employed by the Lilavati Kirtilal Mehta Medical Trust hospital qualifies a purchase of services for commercial purpose and whether the Hospital Trust was excluded from the definition of “consumer” under Section 2(1)(d) of the Act, 1986, this Court after revisiting the scheme of the Act, 1986 and taking note of the law of precedence in *Laxmi Engineering Works* of which a reference has been made and placing reliance on the judgment of this Court in [Paramount Digital Colour Lab and Others v. AGFA India \(P\) Limited](#) held that a person whether or not a consumer or other activities meant for commercial purpose will always depend upon the facts and circumstances of each case.*

*32. It may be a case that a person who is engaged in commercial activities has purchased goods or availed of service for his personal use or consumption or for the personal use of a beneficiary and such purchase is not linked to their ordinary profits generating activities or for creation of self-employment, such a person may still claim to be a consumer and after discussion of various illustrations summarized the discussion after taking note of the broad principles that were culled out for determination whether the activity or transaction is for a commercial purpose, held as under: (**Lilavati Kirtilal Mehra Medical Trust case**, SCC p. 277, para 19)*

19. To summarise from the above discussion, though a strait jacket formula cannot be adopted in every case, the following broad principles can be culled out for determining whether an activity or transaction is “for a commercial purpose”:

19.1. The question of whether a transaction is for a commercial purpose would depend upon the facts and circumstances of each case. However, ordinarily, “commercial purpose” is understood to include manufacturing/industrial activity or business to business transactions between commercial entities.

19.2. The purchase of the good or service should have a close and direct nexus with a profit-generating activity.

19.3. The identity of the person making the purchase or the value of the transaction is not conclusive to the question of whether it is for a commercial purpose. It has to be seen whether the dominant intention or dominant purpose for the transaction was to facilitate some kind of profit generation for the purchaser and/or their beneficiary.

19.4. If it is found that the dominant purpose behind purchasing the good or service was for the personal use and consumption of the purchaser and/or their beneficiary, or is otherwise not linked to any commercial activity, the question of whether such a purchase was for the purpose of “generating livelihood by means of self-employment” need not be looked into.”

11. In *Shriram Chits (India) Private Limited (Earlier known as Shriram Chits (K) Pvt. Ltd.) Versus Raghachand Associates SPL* (Civil) No. 15290 of 2021, the Hon’ble Supreme Court observed:

“20. As we have shown above, the definition of consumer has three parts. The significance of deconstructing the definition into three parts was for the purpose of explaining on whom lies the onus to prove each of the different parts. There can hardly be any dispute that the onus of proving the first part i.e. that the person had bought goods/availed services for a consideration, rests on the complainant himself. The carve out clause, in the second part, is invoked by the service providers to exclude the complainants from availing benefits under the Act. The onus of proving that the person falls within the carve out must necessarily rest on the service provider and not the complainant. This is in sync with the general principle embodied in Section 101 and 102 of the Evidence Act that ‘one who pleads must prove’. Since it is always the service provider who pleads that the service was obtained for a commercial purpose, the onus of proving the same would have to be borne by it. Further, it cannot be forgotten that the Consumer Protection Act is a consumer-friendly and beneficial legislation intended to address grievances of consumers. Moreover, a negative burden cannot be placed on the complainant to show that the service available was not for a commercial purpose.

21. Having held that the onus to prove that the service was obtained for a commercial purpose is on the service provider, we may clarify the standard of

proof that has to be met in order to discharge the onus. The standard of proof has to be measured against a 'preponderance of probabilities'. The test to determine whether service obtained qualified as a commercial purpose is no longer res integra in view of this Court's decision in Lilavathi v. Kiritlal (supra). Para 19 sets out the principles on which it must be determined whether the onus of proving 'commercial purpose' has been properly discharged by the service provider.

22. If and only if, the service provider discharges its onus of showing that the service was availed, in fact for a commercial purpose, does the onus shift back to the complainant to bring its case within the third part, i.e. the Explanation (a) to Section 2(7) - to show that the service was obtained exclusively for the purpose of earning its livelihood by means of self-employment.

23. In this background, we must consider the plea of Sri Shailesh Madiyal that the complainant has not pleaded nor proved that the service was obtained for earning his livelihood through the means of self employment. His argument relates to the third part of the definition of consumer. The question of inquiring into the third part will only arise if the service provider succeeds in crossing the second part by discharging its onus and proving that the service obtained was for a commercial purpose. Unless the service provider discharges its onus, the onus does not shift back to the complainant to show that the service obtained was exclusively for earning its livelihood through the means of self-employment. In the facts of this case, the OP has merely pleaded in its version that the service was obtained for a commercial purpose. No evidence has been led to probabilise its case other than merely restating its claim on affidavit. It is now well too settled that a plea without proof and proof without plea is no evidence in the eyes of law.”

12. In **Rohit Chaudhary and Anr. Vs. Vipul Ltd.** (2024) 1 SCC 8, Hon’ble Supreme Court considered at length the scope of Section 2(1) (d) of the Act in the light of earlier judgments of the Hon’ble Supreme Court on the subject. In this case, Hon’ble Supreme Court, inter alia, observed as follows:

- Persons buying goods either for resale or for use in large scale profit making activity will not be a consumer entitled to protection under the Act.
- The expression ‘Commercial purpose’ has not been defined under the Act. In the absence thereof we have to go by its ordinary meaning.....
- The explanation added by Amendment of 1993 excludes certain purposes from the purview of the expression “Commercial Purpose” ---- Explanation clarifies that even purchases in certain situations for ‘Commercial Purposes’ would not take within its sweep the purchaser out of the definition of expression ‘Consumer’ ---- if the Commercial use is by the purposes himself for the purpose of earning his livelihood by

means of self-employment, such purchases or goods would continue to be a ‘Consumer’.

- A straightjacket formula cannot be adopted in every case and the broad principles which cannot be culled out for determining whether an activity or transaction is for commercial purpose would depend on facts and circumstances of each case.
- If the dominant purpose of purchasing the goods or services is for a profit motive and this fact is evident from the records, such purchases would not fall within the four corners of the definition of ‘Consumer’. On the other hand, if the answer is in the negative, namely, if such person purchases the goods or services not for any commercial purpose and for one’s own use, it cannot be gainsaid even in such circumstances the transaction would be for a commercial purpose attributing profit motive and thereby excluding such persons from the definition of ‘Consumer’.
- When there is an assertion in the complaint that such goods are purchased for earning livelihood, such complaint cannot be nipped at the bud and dismissed. Evidence tendered by parties will have to be evaluated on the basis of pleadings and thereafter conclusion arrived at.
- It is not the value of goods that matters but the purpose for which the goods bought are put to.
- The several words employed in the Explanation viz “uses by himself”, “exclusively for the purposes of earning his livelihood” and “by means of self-employment” make the intention of the Parliament abundantly clear, that the goods bought must be used by the buyer himself, by employing himself for earning his livelihood.
- 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(1)(d) of the Act is always a question of fact to be decided in the facts and circumstances of each case.

13. In **Paramount Digital Colour Lab & Ors. V. Agfa India Private Limited & Ors.** (2018) 14 SCC 81, the Hon’ble Supreme Court held that:

“12. In this case, since the appellants have purchased the machine, Section 2(1)(d) of the Act is applicable. "Consumer" as defined under Section 2(1)(d) of the Act does not include a person who obtains goods for a "commercial purpose". The Explanation supplied to Section 2(1)(d) clarifies that "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". If both these provisions are read together, it leads to the conclusion that if a person purchased the goods for consideration not for any commercial purpose, but exclusively for the purposes of earning his livelihood by means of "self-employment", such purchaser will come within the definition of "consumer". If a person purchases the goods for a "commercial purpose" and not for the purposes of earning his livelihood by means of "self-employment", such purchaser will not come within the definition of "consumer". It is therefore clear, that despite "commercial activity", whether a person would fall within the definition of "consumer" or not would be a question of fact in every case. Such question of fact ought to be decided in the facts and circumstances of each case.

13. "Self-employment" necessarily includes earning for self. Without earning generally there cannot be "self-employment". Thus, if a person buys and uses the machine exclusively for the purposes of earning his livelihood by means of "self-employment", he definitely comes within the definition of "consumer". In the matter on hand, the quality of ultimate production by the user of the machine would depend upon the skill of the person who uses the machine. In case of exigencies, if a person trains another person to operate the machine so as to produce the final product based on skill and effort in the matter of photography and development, the same cannot take such person out of the definition of "consumer".

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17.Since there is nothing on record to show that they wanted the machine to be installed for a commercial purpose and not exclusively for the purposes of earning their livelihood by means of self-employment, the National Commission was not justified in concluding that the appellants have utilised the services of an operator or a helper to run a commercial venture. One machine does not need many operators or helpers to complete the work entrusted. Since the appellants were two partners, they must have been doing the work on their own, of course, may be with the aid of a helper or an operator. The machine would not have been used in a large-scale profit-making activity but, on the contrary, the appellants purchased the machine for their own utility, personal handling and for their small venture which they had embarked upon to make a livelihood. The same is distinct from large-scale manufacturing or processing activity carried on for huge profits. There is no close nexus between the transaction of purchase of the machine and the alleged large-scale activity carried on for earning profit. Since the appellants had got no employment and they were unemployed graduates, that too without finances, it is but natural for them to raise a loan to start the business of photography on a small scale for earning their livelihood.”

14. In the present case, the Appellant has contended that the State Commission has misinterpreted the word “Businessman” to mean that the Appellant was having a business at the time of booking the Unit and did not require the Unit for his livelihood, whereas, the Appellant is a Real Estate Professional and was unemployed at the time of booking the Unit and was in need of the Unit to earn his livelihood. The complainant has lost opportunity for many years to use and draw the benefit of having his own office. The State Commission has erroneously overlooked the submission of the Appellant in para 2 of the Rejoinder, wherein it was stated that “the complainant is a businessman and he has purchased the office for his own personal use and profession”. Respondent on the other hand contended that Appellant is not a consumer and has booked the Unit for investment purpose.

15. We have carefully gone through the order of the State Commission, other relevant records and rival contentions of the parties in the light of observations of the Hon’ble Supreme Court in various cases cited in the preceding paras and we are in agreement with the contentions of the Appellant herein that he had not purchased the said office space/unit for a commercial purpose but for earning his livelihood by self-employment. The mere fact of his employing few persons will not change the nature of his self-employment to a commercial nature. The State Commission went wrong in holding that the Appellant herein is not a ‘Consumer’ under Section 2(1)(d) of the Consumer Protection Act. Hence, the order of the State Commission cannot be sustained and the same is hereby set aside. The First Appeal is allowed and the matter is remanded back to the State Commission for fresh hearing treating the Appellant herein (Complainant before the State Commission) as ‘Consumer’ under the Consumer Protection Act. The State Commission will issue fresh notice to both the sides and decide the case on merits after hearing both the sides as soon as possible, preferably within three months, after the first date of hearing. Parties to appear before the State Commission on 28.08.2024.

16. The pending IAs in the case, if any, also stand disposed off.

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DR. INDER JIT SINGH
PRESIDING MEMBER