

**NATIONAL CONSUMER DISPUTES REDRESSAL COMMISSION
NEW DELHI**

FIRST APPEAL NO. 396 OF 2011

(Against the Order dated 18/08/2011 in Complaint No. 41/2009 of the State Commission
Rajasthan)

1. TELCO CONSTRUCTION EQUIPMENT CO. LTD. &
ORS.

Registered Office, Jubilee Building, 45, Museum Road,
through General Manager (Sales and Service)

BANGLORE -56025

2. TELCO CONSTRUCTION EQUIPMENT COMPANY
LTD.,

Regional Sales Office, Village Baleecha,

UDAIPUR

(RAJASTHAN) THROUGH MANAGER

3. TELCO CONSTRUCTION EQUIPMENT COMPANY
LTD.,

201, Shyam Anukampa, Opposite HDFC Bank, Ashok Marg, C-
Scheme,

JAIPUR

RAJASTHAN (THROUGH MANAGER)

.....Appellant(s)

Versus

1. STONE INTERNATIONAL PVT. LTD. & ORS.

Dargha Raod Kota, Chechat Ramgganj Mandi, through General
Manager (Mines)

2. CUMMINS INDIA LTD.

35, 1/2, Irandavara, (through General Manager Sales)

PUNE - 400038

MAHARASTRA

3. USHA EARTH MOVERS

Plot No. 64, Behind Modrn Petrol Pump, Jahalawar Raod,
through Proprietor

KOTA

RAJASTHAN

.....Respondent(s)

FIRST APPEAL NO. 459 OF 2011

(Against the Order dated 18/08/2011 in Complaint No. 41/2009 of the State Commission
Rajasthan)

1. STONE INTERNATIONAL PVT. LTD.

Dargha Road, Chechat, Ramgganj Mandi, through General
Manager, Mines

KOTA

.....Appellant(s)

Versus

1. TELCO CONSTRUCTION EQUIPMENT CO. LTD. &
ORS.

.....Respondent(s)

Registered office, Jubilee Building 45, Musium Road, through
General Manager (Sale & Service)

BANGALORE-560025

2. TELCO CONSTRUCTION EQUIPMENT COMPANY LTD.

Regional Sales Officer, Village Valich, Through Manager

UDAIPUR

RAJASTHAN

3. TELCO CONSTRUCTION EQUIPMENT COMPANY LTD.,

201, Shayam Anukampa Opp. HDFC Bank Ashok Marg, C-Scheme, through Manager

JAIPUR

RAJASTHAN

4. CUMMINS DIESEL SALES & SERVICES (INDIA) LTD.

35 1/2, Erandawara (THROUGH MANAGER SALES)

PUNE-400038

MAHARASTRA

5. USHA EARTH MOVERS,

Plot No. 64, behind Modern Petrol Pump Jhalawar Road, through Owner

KOTA

RAJASTHAN

BEFORE:

HON'BLE MR. SUBHASH CHANDRA, PRESIDING MEMBER

HON'BLE DR. SADHNA SHANKER, MEMBER

FOR THE APPELLANT :

Dated : 10 May 2024

ORDER

In FA no.396 of 2011

For the Appellants

Ms Surekha Raman, Advocate

Mr Shreyash Kumar, Advocate

For Respondent no.1

Mr Sabyasachi Mishra, Advocate

For Respondent no.2

Mr Siddharth Kumar, Advocate with

Authority Letter

For Respondent no.3

Ex parte – vide order dated 04.04.2012

In FA no.459 of 2011

For the Appellants Mr Sabyasachi Mishra, Advocate

For Respondent nos.1 to 3 Ms Surekha Raman, Advocate

Mr Shreyash Kumar, Advocate

For Respondent no.4 Mr Siddharth Kumar, Advocate with

Authority Letter

For Respondent no.5 *Ex parte* – vide order dated 04.04.2012

ORDER**PER SUBHASH CHANDRA**

1. This appeal under section 19 of the Consumer Protection Act, 1986 (in short, the 'Act') challenges the order dated 18.08.2011 of the State Disputes Redressal Commission, Rajasthan, Jaipur (in short, the 'State Commission') in Complaint No. 41/2009 partly allowing the complaint against Appellants 1 to 3 and 5 jointly and severally directing them to pay the Respondent Rs 15 lakhs towards repair charges, Rs 10 lakhs towards mental and financial tension and Rs 20,000/- for litigation expenses within 30 days failing which the payments would be with interest @ 9%.
2. This order will also dispose of FA No. 459 of 2011 filed by the Respondent herein against the Appellant which also emanates from the same order. As the facts of the case are similar, FA 396 of 2011 is taken as the lead case.
3. For the reasons stated in the application to condone the delay of 4 days in the filing of this appeal, the same is condoned in the interest of justice.

4. The relevant facts of the case, in brief, are that Respondent No. 1/Complainant which is a private limited company engaged in the business of excavation, purchased from the Appellant a S-K Engine Tata Hitachi Model EX200 LC Hydraulic Excavator (in short, 'Excavator') on 29.01.2008 for Rs 44 lakhs including 4% VAT. The Excavator was commissioned on 01.02.2008. The Respondent reported operational problems in the Excavator commencing within 2 days which were attended to under the terms of the warranty which covered a period of 1 year or 2000 hours of operation, whichever was earlier. On 02.11.2008 the Appellants replaced the engine of the Excavator with a new engine which is working satisfactorily although other parts of the Excavator continued to give trouble. Alleging manufacturing defects, the Respondent sought replacement of the Excavator and/or compensation through a legal notice issued on 15.11.2008 for losses suffered. Thereafter, Respondent filed a Consumer Complaint seeking refund of Rs 44 lakhs along with compensation of Rs 22,30,000/- with Rs 1 lakh as litigation expenses. The complaint was allowed on contest partly by way of the impugned order which is impugned before us with the prayer to set aside the order dated 18.08.2011 in CC No. 41/2009 and to pass any such order(s) as deemed fit and proper in the facts and circumstances of the case.

5. The Appellant has challenged the impugned order on the grounds that (i) the State Commission erred in not considering the fact that the Excavator was admittedly purchased for a commercial purpose and held that Respondent No. 1 was a 'consumer' under the Act on the sole ground that the Appellants had provided a warranty for the Excavator which was contrary to this Commission's judgment in *Sanjay D. Ghodawat Vs. RRB Energy Ltd.*, 2010 CPJ 178 (NC); (ii) the State Consumer had erroneously concluded that Respondent No. 1 was a 'consumer' under Section 2(1)(d) of the Act since the amendment to the Act in 2003 excluded availing of services for a commercial purpose from the definition of 'consumer'; (iii) the State Commission failed to appreciate that Respondent had failed to bring on record any material to arrive at the conclusion that there was either a manufacturing defect or deficiency in service as alleged except that parts worth Rs 15 lakhs were found to have been replaced; (iv) the State Commission erroneously relied upon the unsubstantiated statements of the Respondent No. 1 and failed to consider the remarks on the various job cards by service engineers; (v) the State Commission failed to appreciate that the Excavator had not been operated by Respondent No. 1 as per the operation manual and procedures and had thus been used contrary to the terms and conditions in the warranty; and (vi) there was no deficiency in service since the job cards were evidence that Appellants had provided services as and when required.

6. *Per contra*, respondent submitted that the Excavator had reported operational problems since a few days of commissioning which required frequent visits to the workshop and the replacement of the engine on 02.11.2008 and the filing of the Consumer Complaint No. 41 of 2009 which came to be partly allowed in his favour. However, he was aggrieved by the quantum of relief provided and was therefore before this Commission by way of FA No. 459 of 2009. It was contended that Respondent No. 1 was a 'consumer' under Section 2(1)(d) of the Act and reliance was placed upon this Commission's judgment in *Meera & Co. Vs Chinar Syntex Ltd.*, II (2004) CPJ 24 (NC) and *East India Construction Company & Ors. Vs. Modern Consultancy Services & Ors.*, decided on 9th May 2006 by NCDRC. It was contended that despite commitments/assurances by the Appellants, the Excavator failed to operate efficiently and without breakdowns which was evidence of gross manufacturing

defects requiring extensive repairs during the warranty period. Reports of three experts, Deewan Singh Jadon, Mahaveer Prasad Sharma and Bhairu Lal had been brought on record to establish manufacturing defect in the Excavator which had not been countered by the Appellants. It is argued that the State Commission failed to consider this evidence to return a finding of manufacturing defect. It is also submitted that the State Commission failed to consider the documents filed by the Respondents in support of the contention that the Excavator suffered from inherent manufacturing defects, such as the frequent job cards generated during the warranty period.

7. We have heard the learned counsel for the parties and perused the records.

8. During oral submissions, learned counsel for the Appellants argued that the impugned order was flawed on the ground that the Respondent No. 1 was not a 'consumer' under Section 2(1)(d) since the amendment dated 15.03.2003 to the Consumer Protection Act, 1986 excluded goods and services used for a 'commercial purpose'. It was contended that the reliance of the Respondents on *Meera & Co.* (supra) was not relevant to the instant case since it preceded the said amendment. The Consumer Complaint was admittedly dated 2009 and was therefore clearly filed *after* the amendment came into force. Accordingly, the complaint was not maintainable under the Act and the State Commission had committed a jurisdictional error in entertaining it. It was also argued that the mere fact that the Excavator had required frequent repairs during the warranty period did not establish that there was an inherent manufacturing defect that entitled a replacement or refund of the consideration paid with compensation. Learned Counsel for Respondent No. 1 relied upon this Commission's judgment in *M/s Pressweld Engineers Vs Jayaram Reddy & Anr.*, First Appeal No. 281 of 2006 dated 06.01.2015 arising out of order dated 09.12.2005 in Complaint No. 34 of 1999 of the State Commission, Karnataka to argue that the Respondent was covered under the ambit of the Act as a consumer even though the Excavator was acquired for commercial purposes.

9. From the foregoing, it is evident that the moot issue which falls for consideration in this case is whether Respondent No. 1 is a 'consumer' under the Act or is excluded from its ambit since the Excavator was admittedly used for commercial purpose.

9. The State Commission's order reads as under:

"It has been stated on behalf of the opposite party that the machine was sold for commercial use in connection with which *Meera and Co Ltd Vs. Chinar Syntex Ltd.* and other two rulings were produced wherein it has been said under Section 2(1)(d), if the machine had been purchased for commercial use but warranty of which had been given, then that complainant will come under the definition of 'consumer'. On the basis of these rulings the objection of the opposite parties that the complainant is not a 'consumer' is disallowed."

10. It is apposite to refer to Section 2(1)(d) of the Consumer Protection Act, 1986 as it stood in 2009:

(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; or

(ii) 1[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 1[hires or avails of] the services for consideration paid or promised, or partly paid and partly promised, or under any system of deferred payments, when such services are availed of with the approval of the first-mentioned person;

2[Explanation: -- For the purposes of sub-clause (i), "commercial purpose" does not include use by a consumer of goods bought and used by him exclusively for the purpose of earning his livelihood, by means of self-employment;]

1: Subs. By Act 62 of 2002, sec. 2, for sub-clause (v) (w.e.f 15.03.2003). Earlier sub clause (v) was inserted by Act 50 of 993, sec. 2 (w.e.f 18.06.1993)

2: Sub-clause (vi) along with sub-clauses (iv) and (v) subs., for clauses (iv) and (v) by Act 62 of 2002, sec.2 (w.e.f.15.03.2003)

The amendments inserted through Act 62 of 2002 with effect from 15.03.2003 categorically provide for exclusion of consumers who have obtained goods for any commercial purpose. In the instant case, the Excavator was admittedly purchased by the Respondent No. 1 which is a private limited company for a commercial purpose thereby excluding it from the purview of the Consumer Protection Act, 1986 as amended in 2003. In addition, the requirement under Section 13 (1) (c) of the Act with regard to an expert opinion from an appropriate laboratory in order to establish a claim for the rectification of the deficiency under Section 14 has also not been discharged by the Respondent. The three opinions relied upon by him are of no avail as they do not meet the requirements under the Act. The contentions of Respondent No. 1 with regard to manufacturing defect and deficiency in service therefore cannot be sustained.

11. In view of the discussion above, and the facts and circumstances of this case, the appeal is found to have merits and is accordingly allowed. Order of the State Commission is set aside. FA No. 459 of 2011 filed by the Respondent No. 1 is accordingly dismissed as without merits. There shall be no order as to costs.

12. Pending IAs, if any, stand disposed of with this order.

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SUBHASH CHANDRA

PRESIDING MEMBER

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DR. SADHNA SHANKER
MEMBER