

**NATIONAL CONSUMER DISPUTES REDRESSAL COMMISSION
NEW DELHI**

CONSUMER CASE NO. 2121 OF 2016

1. DR. HEMANT & ANR.

R/o A-2/54, MAHINDRA GARDENS, S.V. ROAD,
GOREGAON(WEST) MUMBAI-400062

2. MRS. MITA

R/o A-2/54, MAHINDRA GARDENS, S.V. ROAD,
GOREGAON(WEST) MUMBAI-400062

.....Complainant(s)

Versus

1. M/S. ZENAL CONSTRUCTION PRIVATE LIMITED &
ANR.

SHOP NO-6, SAURAV APARTMENT, SHAHAJI RAJE
MARG, VILEPARLE(EAST) MUMBAI

2. MR. PRAKASH J. BAROT-DIR

R/O 702, SHREEJI KIRAN, PLOT NO-107, L.T. ROAD,
GOREGAON(WEST)MUMBAI-400062

.....Opp.Party(s)

BEFORE:

**HON'BLE MR. JUSTICE RAM SURAT RAM MAURYA, PRESIDING
MEMBER**

FOR THE COMPLAINANT : MR. JAY SAVLA, SR. ADVOCATE
: MR. AKSHAY SHARMA, ADVOCATE

FOR THE OPP. PARTY : MR. SAMEER KUMAR, ADVOCATE
: MR. SAHRUKH AHMAD, ADVOCATE
: MR. MANDEEP BAISALA, ADVOCATE

Dated : 28 June 2023

ORDER

1. Heard Mr. Jay Savla, Sr. Advocate, assisted by Mr. Akshay Sharma, Advocate, for the complainants and Mr. Sameer Kumar, Advocate, for the opposite parties.
2. Dr. Hemant Shah and Mrs. Mita have filed above complaint, for directing the opposite parties to (i) undertake construction of the second plot as described in the second schedule of the property in the agreement to sale dated 05.11.2007, in a time bound manner and handover possession of the premises to the complainants forthwith; or in alternate (ii) refund Rs.87996796/- with interest @24% per annum from the date of respective deposit till the date of refund; (iii) pay damages for deficiency in service; and (iv) any other relief which is deemed fit and proper in the facts and circumstances of the case.
3. The complainants stated that Dr. Hemant Shah (complainant-1) obtained M.D. (Radiology) degree, in 1989 and set up a diagnostic clinic in the year 1994, in an accommodation of 850 sq.ft. at 112-113, Ashoka Super Market, Junction of S.V. Road and Aarey Road, above Bata Showroom, Goregaon (West), Mumbai, from where he used to provides diagnostic services of Digital X-ray, Digital Sonography, Whole Body Colour

Doppler Sonography, 2D Colour Eco Cardiography, Digital OPG, Digital Lateral Cephalogram, 3D & 4D Sonography and various other pathology services, with the help of staff of 10 persons. There was no C.T. Scan and M.R.I. services in Goregaon (West) area, till the year 2003. Complainant-1 saw this an opportunity to establish a State of Art Radiology Centre in Goregaon (West). For the said purpose, the existing clinic of complainant-1 was insufficient, as C.T. Scan set up requires at least 500 sq.ft area and M.R.I. set up requires at least 800 sq.ft area. Complainant-1 has earned good-will and reputation in the locality as such he was searching an alternate accommodation in the locality of S.V. Road. M/s. Zenal Construction Private Limited (opposite party-1) was a company, registered under the Companies Act, 1956 and Mr. Prakash J. Barot was its director. The opposite parties were engaged in the business of development and construction of multi-storey residential and commercial buildings. The opposite parties launched a project in the name of "Krishna Ambika Arcade" at S.V. Road, Goregaon (West), under redevelopment agreement dated 12.02.2001 and 21.03.2003 which was at a distance of 25 mtrs. from the clinic of complainant-1, across the road. The complainants decided to purchase ground floor and first floor, interconnected by internal staircase in the said building "Krishna Ambika Arcade". The complainants negotiated with the opposite parties, who agreed to sell 1245 sq.ft at ground floor and 1275 sq.ft. on the first floor with interconnected by internal staircase in Wing-C of the said building for Rs.20700000/-. As at that time, necessary sanction/NOC for construction of building were not issued, the opposite parties issued allotment letter dated 16.10.2003, in respect of above accommodation. The opposite parties informed that building plan would be obtained till December, 2003. The complainants deposited Rs.2500000/- on 31.10.2003 and Rs.2500000/- on 10.12.2003. In February, 2005, the opposite parties informed that the building plan has undergone certain changes due to which carpet area of the shop at ground floor was increased to 1255 sq.ft and first floor to 1990 sq.ft. Therefore an additional amount of Rs.12000000/- was payable and issued additional allotment letter dated 28.02.2005 and the complainants deposited Rs.2000000/- on 26.02.2005. The construction was not started even at that time. The opposite parties executed two Agreements for Sale dated 05.11.2007 in respect of two shops, in which carpet area of the shop at ground floor was mentioned as 1205 sq.ft and first floor was mentioned as 2275 sq.ft. For increase of 235 sq.ft. area, Rs.3200000/- was charged. At the time of agreement, the complainants paid Rs.8000000/- in cash and Rs.6500000/- through cheque on 05.11.2007, Rs.2000000/- on 23.11.2007, Rs.1000000/- on 17.12.2007 and Rs.1000000/- on 17.12.2007 to the opposite parties. The opposite parties did not start construction. On persistent inquiry, the opposite parties informed that the owners of the flats of premises Wing-A and Wing-B have filed Special Civil Suit No.89 of 2007. In this suit a notice of motion No.95 of 2007 was moved by the plaintiffs for interim injunction, which was rejected by trial court, vide order dated 05.08.2008. The plaintiffs filed an appeal registered as A.O. No.884 of 2008, which was allowed on 21.01.2009. Special Civil Suit No.89 of 2007 has been filed on the ground that without taking consent of the plaintiffs, the opposite parties have amalgamated adjoining land in their land and constructing Wing-C and Wing-D. The order dated 21.01.2009 of Bombay High Court was a bolt from the blue to the complainants. The opposite parties were assuring to resolve the issue with the flat owners. Complainant-1 suffered a heart attack on 05.07.2016. On 06.07.2016, he underwent an angiography. On 08.07.2016, he was diagnosed with acute calculus cholecystitis. On 15.07.2016, he was operated for removal of gall bladder. In C.T. scan a large lesion in the left iliac bone was found. In MRI multiple lesions in the spine as well were found. The biopsy report showed that complainant-1 had multiple

myeloma (cancer). Complainant-1 underwent 10 sessions of radiation at Hinduja hospital. On 22.08.2016, chemotherapy was administered and he was advised 4-6 cycles of chemotherapy. If the opposite parties are not in position to construct the building and handover possession, they are liable to refund entire amount deposited by the complainants with interest @24% per annum, Then this complaint was filed on 16.12.2016, alleging deficiency in service.

4. The opposite parties filed its written reply on 26.04.2018, in which, they raised preliminary objections relating to maintainability of the complaint that the complainants are not consumers inasmuch as they had booked the shops in dispute for commercial purpose. The complaint is time barred as cause of action arose in the year 2009. Performance of Agreements for Sale dated 05.11.2007 has become impossible due to interim injunction order dated 21.01.2009, and final decree dated 18.10.2011 and the agreements are void under Section 56 of Contract Act, 1872. CTS No.322 and CTS No.323 were amalgamated under the orders of Additional Collector dated 23.06.2003. Looking prime location of the building, the complainants showed immense interest in the shops and paid Rs.200000/- through cheque on 26.02.2005. After issue of “commencement certificate”, agreements for sale dated 05.11.2007 were executed. The opposite parties received total Rs.1.22 crores and not Rs.26413182/- as alleged. The opposite parties denied cash deposits and issuance of allotment letter dated 16.10.2003. Allegations relating to change of layout plan have been denied. City Civil Court decreed Special Civil Suit No.89 of 2007 on 18.10.2011. The opposite parties have filed First Appeal No.188 of 2012, before Bombay High Court, which is pending. The complaint is liable to be dismissed.

5. The complainants filed Rejoinder Reply, Affidavits of Evidence of Dr. Hemant Shal Anmol Mathur and documentary evidence. The opposite parties filed Affidavit of Evidence of Prakash J. Barot. Both the parties have filed their written submissions.

6. This Commission, after hearing the parties, by order dated 23.02.2017 held that the complainants had booked the shops for commercial purpose and the complaint was not maintainable. The complainants challenged order dated 23.02.2017 in Civil Appeal No.10740 of 2017. Supreme Court by judgment dated 23.10.2017, held that the Commission had not examined as to whether “transaction in question was exclusively for the purposes of earning livelihood by way of self employment” as such, the matter was remanded.

7. I have considered the argument of the counsel for the parties and examined the record. The word “consumer” has been defined under Section 2(1)(d) and word “service” has been defined under Section 2(1)(o) of the Consumer Protection Act, 1986, (hereinafter referred to as the Act) which are quoted below:-

Section-2 (1) (d).- “consumer” mean 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 and partly promised, or under any system of deferred payment, when such use is made with 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 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 such services for any commercial purpose;

Explanation.- For the purpose 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 livelihood by means of self employment.”

Section 2(1) (o):- “service” means service of any description which is made available to potential users and includes, but not limited to, the provision of facilities in connection with banking, financing, insurance, transport, processing, supply of electrical or other energy, board or lodging or both, housing construction, entertainment, amusement or the purveying of news or other information, but does not include the rendering of any service free of charge or under a contract of personal service;”

8. The term “housing construction” was added by Act No.50 of 1993, under Section-2(1) (o) of the Act. Earlier the Explanation was added by Act No. 50 of 1993 w.e.f. 18.06.1993 under Section-2(1)(d)(i) of the Act. By Act No. 62 of 2002, w.e.f. 15.03.2003, Section-2(1)(d) (ii) was also amended and the term “but does not include a person who avails such service for any commercial purpose” was added in it and the Explanation was placed in last.

9. Scope of the expressions “commercial purpose” and “exclusively for the purposes of earning livelihood by means of self-employment” came up for consideration before Supreme Court in relation to purchase of goods in **Laxmi Engineering Works Vs. P.S.G. Industries Institute, (1995) 3 SCC 583**. In which, it has been held that the Explanation was an exception to an exception. Expression “commercial purpose” has not been defined, as such, its dictionary meaning has to be taken into consideration. “Commerce” means financial transaction, especially buying and selling of merchandise on large scale. In view of the Explanation the term “large scale” has no significance. As the Explanation excludes the transaction which was done for “exclusively for the purposes of earning livelihood by means of self-employment”, from the purview of commercial purpose as such purchase of commercial goods for earning livelihood by means of self-employment, will not exclude such a buyer from the purview of the “consumer” so long as it is used by the buyer or his family members or with the help of one or two other persons. It is question of fact and has to be decided in each case independently.

10. The interpretation of the phrase “commercial purpose” again came up for consideration In **Kalpavruksha Charitable Trust Vs. Toshniwal Brothers (Bombay) Pvt. Ltd., (2000) 1 SCC 512**, in which hospital purchased CT Scan machine and it was held that it was for “commercial purpose”. In **Lilavati Kirtilal Mehta Medical Trust Vs. Unique Shanti Developers and others, (2020) 2 SCC 265**, Supreme Court has given various guidelines for deciding the commercial purposes i.e (i) manufacturing/industrial activities or business-to-business transactions between the commercial entities. (ii) the purchase of the good or service should have close and direct nexus with a profit-generating activity then it would be terms as “commercial purpose”. This phrase was again examined in **Shrikant G. Mantri Vs.**

Punjab National Bank, (2022) 5 SCC 42, in which Supreme Court held that it is the purpose to which the goods so bought or put is material for deciding as to whether it was for commercial purpose or not. The legislative intent is to keep the commercial transactions out of the purview of the said Act. In **National Insurance Company Limited Vs. Harsolia Motors, 2023 SCC OnLine SC 409**, Supreme Court held that the goods purchased or services availed should be used in any activity directly intended to generate profit, which is main aim of commercial purpose, in order to apply exception.

11. In the light of aforesaid principles, the present case has to be examined. The complainants stated that Dr. Hemant Shah (complainant-1) obtained M.D. (Radiology) degree, in 1989 and set up a diagnostic clinic in the year 1994, in an accommodation of 850 sq.ft. at 112-113, Ashoka Super Market, Junction of S.V. Road and Aarey Road, above Bata Showroom, Goregaon (West), Mumbai, from where he used to provides diagnostic services of Digital X-ray, Digital Sonography, Whole Body Colour Doppler Sonography, 2D Colour Eco Cardiography, Digital OPG, Digital Lateral Cephalogram, 3D & 4D Sonography and various other pathology services, with the help of staff of 10 persons. There was no C.T. Scan and M.R.I. services in Goregaon (West) area, till the year 2003. Complainant-1 saw this an opportunity to establish a State of Art Radiology Centre in Goregaon (West). For the said purpose, the existing clinic of complainant-1 was insufficient, as C.T. Scan set up requires at least 500 sq.ft area and M.R.I. set up requires at least 800 sq.ft area. Complainant-1 has earned good-will and reputation in the locality as such he was searching an alternate accommodation in the locality of S.V. Road. From above admissions, it proved that the complainants were earning their livelihood from diagnostic clinic at Ashoka Super Market since 1994. They booked the shops, availing the services of opposite parties for “commercial purpose”, as dominant purpose was for expanding their business on large scale and generating profit and not exclusively for earning livelihood by way of self-employment. A such explanation of Section 2(1)(d) is not attracted in this case and the complainants are not “consumer” and the complaint is not maintainable.

12. A four Members Bench of this Commission in **Synco Textiles Pvt. Ltd. Vs. Greaves Colton & Company Ltd., 1990 SCC OnLine NCDRC 3**, held that the expression “for any commercial purpose” are wide enough to take in all cases, where goods are purchased for being used in any activity directly intended to generate profit. Going to the plain dictionary meaning of the words used in the definition section, the intension of the Parliament must be understood to be to exclude from the scope of the expression ‘consumer’ any person who buys goods for the purposes of their being used in any activity engaged on a large scale for the purposes of making profit. The Parliament wanted to exclude from the scope of the definition not merely persons who obtains goods for resale but also those who purchase goods with a view of using such goods for carrying on any activity on a large scale for the purposes of earning profit. This judgement has been approved in **Laxmi Engineering’s** case (supra). This view has again affirmed in **Shrikant G. Mantri’s** case (supra).

ORDER

In view of aforesaid discussions, the complaint is dismissed as not maintainable with liberty to the complainants to approach appropriate forum for required relief.

.....J
RAM SURAT RAM MAURYA
PRESIDING MEMBER

