

*** THE HON'BLE SRI JUSTICE SUJOY PAUL**
AND
THE HON'BLE SRI JUSTICE NAMAVARAPU RAJESHWAR RAO
+ W.P.No.9783 OF 2024

% 13—08—2024

Kishore Verma Pothuri and another

...Petitioners

\$ The State of Telangana and others.

... Respondents

! Counsel for the Petitioners : Sri Koppula Gopal

^Counsel for Respondents : Learned Government Pleader for Civil
Supplies for respondent Nos.1 to 3
Sri Mahadev Anyarambhatla,
for respondent Nos.4 and 5.

<Gist :

>Head Note :

? Cases referred

1. (2008) 10 SCC 345
2. (2015) 11 SCC 661

**IN THE HIGH COURT FOR THE STATE OF TELANGANA
HYDERABAD**

* * * *

W.P.No.9783 OF 2024

Between:

Kishore Verma Pothuri and another

...Petitioner

The State of Telangana and others.

...

Respondents

JUDGMENT PRONOUNCED ON: 13.08.2024

THE HON'BLE SRI JUSTICE NAMAVARAPU RAJESHWAR RAO

1. Whether Reporters of Local newspapers
may be allowed to see the Judgments? :
yes
2. Whether the copies of judgment may be
Marked to Law Reporters/Journals? :
yes
3. Whether His Lordship wishes to
see the fair copy of the Judgment? :
yes

SUJOY PAUL, J

NAMAVARAPU RAJESHWAR RAO, J

THE HON'BLE SRI JUSTICE SUJOY PAUL
AND
THE HON'BLE SRI JUSTICE NAMAVARAPU RAJESHWAR RAO

WRIT PETITION No.9783 of 2024

ORDER: *(per Hon'ble Sri Justice Namavarapu Rajeshwar Rao)*

This writ petition is filed seeking the following relief:

“.....to issue a writ, order or direction more particularly one in the nature of Writ of Certiorari calling for records pertaining the order dt.17-11-2023 passed in C.C.No.69 of 2019 on the file of Hon'ble State Consumer Disputes Redressal Commission, State of Telangana at Hyderabad, respondent No.2, which was confirmed in First Appeal No.97 of 2024 dated.18-03-2024 on the file of the National Consumer Disputes Redressal Commission, New Delhi is being illegal, arbitrary, and violation of Articles 14 and 300 of Constitution of India and consequently set aside the same by declaring respondent No.2 has no jurisdiction.....”.

2. Heard Sri.Koppula Gopal, learned counsel appearing for the petitioners, the learned Government Pleader for Civil Supplies appearing for respondents 1 to 3, and Sri Mahadev Anyarambhatla, learned counsel for respondents 4 and 5.

3. The brief facts of the case are as follows:

(i) The 1st petitioner is the absolute owner and possessor of house bearing No.2-107/2/1, Plot No.28, admeasuring 256 sq. yards in Sy.Nos.305 and 309/B situated at Sreeramnagar Colony, Gangaram, Chandanagar Village, Serlingampally, GHMC, Ranga Reddy District. The 2nd petitioner is the father of the 1st petitioner, who is a resident of the USA and issued a GPA in favour of the 2nd petitioner. The 2nd petitioner obtained residential building permission from GHMC by mortgaging 10% of the built up area as per GHMC norms in 2017.

(ii) While the construction work was in progress, the 4th respondent approached the 2nd petitioner to purchase a flat. After due negotiations, the 2nd petitioner agreed to sell one flat for an amount of Rs.35,00,000/- to the 4th respondent on 28.12.2017. In token thereof, an amount of Rs.14,80,000/- was paid towards advance sale consideration. However, respondent No.4 failed to arrange the balance amount. Later, he requested the return of the advance amount, and it was returned to him on

20.09.2018 before the witnesses namely, Smt. K.Padma W/o. Gopala Krishna Raju and Sri V. Nageswara Rao, S/o.Venkatarao.

(iii) While things stood thus, respondents 4 and 5 filed C.C.No.69 of 2019 before the 2nd respondent-State Commission under Section 17(1)(a)(i) of the Consumer Protection Act, 1986 (for short 'the Act') against the petitioners seeking a direction to the petitioners to execute the registered sale deed with regard to the scheduled flat in favour of respondents 4 and 5 and further sought a sum of Rs.20,000/- per month as house rent to respondent Nos. 4 and 5 from October 2018 till the date of execution of the registered sale deed and the delivery of vacant physical possession of the scheduled flat.

(iv) The 2nd respondent, while allowing C.C.No.69 of 2019 on 17.11.2023, observed as follows:-

“Based on the foregoing discussion, we are of the emphatic view that opposite parties 1 and 2 have been deficient in their services, thereby depriving the complainants from owning a flat inspite of paying a substantial amount, therefore, the opposite parties 1 and 2 are liable not only to execute the Sale Deed but also to pay compensation for making the

complainant wait for around 5 years, which might have caused severe hardship and mental agony to the complainant.

10) In the result, complaint is allowed in part with following directions:

i). the complaint no.1 is directed to deposit the balance sale consideration in this Commission within 15 days from the date of receipt of this order, upon which the opposite parties 1 and 2 are directed to execute the Sale Deed in favour of the complainant No.1 as per the terms and conditions of Agreement (Ex.A1) for Flat No.101, 1st floor, admeasuring 975 sq.ft in Sree Nilayam, within one month of such deposit of amount by the complainant;

ii). Opposite parties 1 and 2 are directed to pay compensation of Rs.25,000/- for the hardship and mental agony caused to the complainants;

iii). Opposite parties 1 and 2 are directed to pay costs of Rs.25,000/-;

iv. Further, the complainants are bound to bear the registration charges and applicable taxes.

v. Complaint against opposite party no.3 is dismissed.”

(v) Challenging the said order, the petitioners have filed F.A.No.97 of 2024 before the 3rd respondent-National Commission. The 3rd respondent, after appreciation of evidence available on record, dismissed F.A.No.97 of 2024 vide judgment dated 18.03.2024, confirming the order

passed by the 2nd respondent in C.C.No.69 of 2019, dated 17.11.2023 by observing as follows:-

“We have considered the arguments of the counsel for the appellants. The appellants were served in the complaint and filed Vakalatnama on 24-06-2019. However, they did not appear before the State Commission either on 26-06-2019 or on 07-08-2019. On 07-08-2019 their right to file written version was closed. The pandemic and consequent lockdown was imposed on 22-03-2020. In the meantime, there were several dates but the appellants did not appear before the State Commission nor they have given any reason for their non appearance on 26-06-2019 or on subsequent dates although their right to file written version was closed on 07-08-2019. In the application they have merely stated that due to misunderstanding between us and previous counsel, the previous counsel could not appear before the State Commission and they engaged a new counsel. It may be mentioned that this application was filed on 29-08-2023. There is more than four years delay in filing this application. In such circumstances, the State Commission has not committed any illegality in rejecting the application of the appellants for recalling the order dated.03-03-2021.

9. *So far as the case of the appellants that the complainants have taken back their consideration and got the agreement cancelled is concerned, according to the appellants Rs.15.80 lacs have been returned in cash but no proof relating to receiving of this heavy amount has been filed. It is also not liable to be believed that the builder will return this heavy amount in cash. In normal circumstances,*

the builder used to refund money through cheque, which is also requirement of Income Tax Act, 1961. It is an afterthought and in absence of any written reply in this respect and evidence it is not liable to be believed. Order of the State Commission does not find any illegality or infirmity so as to interfere in the appellate jurisdiction and the appeal deserves to be dismissed.

Aggrieved thereby, the petitioners have filed the present writ petition.

4. Learned counsel for the petitioners submits that the order of the 2nd respondent-State Commission is contrary to law and facts on record. The 2nd respondent grossly erred in not examining the validity of Ex.A1-photostat copy of the Agreement of Sale-cum-receipt and the other documents, viz., Exs.A-2 to A-7. The complainant in C.C.No.69 of 2019 is not a consumer as per Section 5(1)(a) of the Act, and the petitioners also do not come under the term 'establishment', as defined under Section 2(19) of the Act.

5. Learned counsel appearing for the petitioners further submits that the sale agreement executed by the

petitioners does not come under the definition of 'service' as contemplated under Section 2(42) of the Act, since the petitioners are not a registered partnership/private limited company, which is involved in the activity of construction of apartments, and that the 1st petitioner is merely the owner of the land admeasuring 256 sq. yards at Sreeram Colony, Gangaram, Chandanagar Village, Serilingampally Mandal, Rangareddy District. The 2nd petitioner obtained permission to construct a multi-storied building and offered to sell one of the flats to the respondents 4 and 5, for want of funds. The petitioners are not involved in the regular trading of construction activity, and therefore, the complaint itself is defective, and the State Commission ought to have rejected the complaint filed by respondents 4 and 5.

6. Learned counsel appearing for the petitioners further submits that the petitioners filed an application on 28.09.2023 in C.C.No.69 of 2019 for recalling the ex-parte order dated 03.03.2021 and the said recall application was dismissed on 30.08.2023. The complaint was allowed on

07.11.2023 after hearing only the complainant's arguments, which is illegal and arbitrary. Further, the petitioners suffered an ex-parte order only due to the negligence of the counsel on record. The 2nd Respondent-State Commission ought to have allowed their recall petition and given an opportunity to the petitioners to be heard, and the same would not have caused any prejudice to respondents 4 and 5.

7. Learned counsel for the petitioners further submits that respondents 4 and 5 have not disclosed to the State Commission the fact that the amount of Rs.15,00,000/- was returned by the petitioners by cancelling the sale agreement, and they obtained the order behind the back of the petitioners, which is malicious and untenable. Further, even the appeal in F.A.No.97 of 2024 which was preferred by the petitioners before the 3rd respondent, was erroneously dismissed without considering the petitioners' grievance. Therefore, appropriate orders be passed by allowing the writ petition and setting aside the impugned orders.

8. On 24.04.2024, this Court granted stay of the order dated 17.11.2023 in C.C.No.69 of 2019 passed by the 2nd respondent.

9. Respondents 4 and 5 filed a counter-affidavit along with an application in I.A.No.2 of 2024 seeking to vacate the interim order passed by this Court on 24.04.2024.

10. Learned counsel for respondents 4 and 5 contended that the petitioners' application for setting aside the *ex-parte* order dated 03.03.2021 was rejected on 30.08.2023 on the ground that the said I.A. was not maintainable since the State Consumer Disputes Redressal Commission does not have the power to set-aside or to review its own orders. Against the said order, an appeal was filed by the petitioners before the 3rd respondent, and the 3rd respondent has rightly considered the fact that a counsel had put in his appearance on behalf of the petitioners on 24.06.2019. However, as nobody was present, the State Commission proceeded *ex-parte* on the next date of hearing i.e., on 07.08.2019. Since nobody appeared on behalf of the petitioners and no written response was filed despite the

expiry of 45 days from the date of service of notice, the State Commission forfeited the right of the petitioners to file a reply. The evidence of respondents 4 and 5 was filed on 27.11.2019, and because of the Covid-19 pandemic, the case was adjourned. In fact, the petitioners were given an opportunity to file evidence in rebuttal to the evidence of respondents 4 and 5. However, the petitioners failed to file their evidence, and therefore, their right to file evidence was also forfeited by the order dated 03.03.2021. The National Consumer Disputes Redressal Commission, in its judgment dated 18.03.2024, has categorically held that despite the petitioners being given an opportunity to file their evidence, they never availed the opportunity. The National Commission has further categorically stated in its judgment that the application was filed on 29.08.2023 and there is a delay of more than four years. Therefore, there is no illegality or irregularity in the orders passed by the State Commission.

11. Learned counsel appearing for respondent Nos.4 and 5 further submits that the petitioners, for the very first

time, took a plea before the National Consumer Commission that an amount of Rs.15.8 lakhs was returned by the petitioners to respondents 4 and 5. However, no proof to such effect is filed. Hence, the National Commission rightly held that such a plea could not be believed since a builder would not return such a huge amount in cash.

12. Learned counsel for respondents 4 and 5 further submits that it is well settled that in any litigation, it is the party's duty to be in contact with his counsel and pursue the matter. Hence, it is no defence to state that the right to file their evidence was closed because of some misunderstanding between the petitioners and their counsel.

13. Learned counsel for respondents 4 and 5 further submits that respondents 4 and 5 are covered by the definition of 'Consumer' under Section 2(d)(ii) of the Consumer Protection Act, 1986. The word 'Service' is defined under Section 2(o) of the Consumer Protection Act, 1986, including the facilities in connection with banking, financing, insurance, transport, house construction, etc. In

the present case, while the flat in question is under construction, the petitioners agreed to sell the same in favour of respondents 4 and 5. Admittedly, there is no dispute that respondents 4 and 5 paid the major amount of the sale consideration on the date of agreement itself and the balance was also sanctioned by way of bank loan. Respondents 4 and 5 were willing to pay the balance sale consideration. Thus, despite the readiness and willingness of respondents 4 and 5, the petitioners failed to comply with their obligation by not executing the registered sale deed in favour of respondents 4 and 5 and not delivering possession of the flat to them, which is a clear case of deficiency in service.

14. Learned counsel appearing for respondent Nos.4 and 5 further submits that the State Commission is competent to pass the impugned order, which is binding on the petitioners. Having been negligent for over a period of four years, and in fact, being bound by the agreement, it is not open for the petitioners to contend that they are not bound to execute the registered sale deed and deliver

possession of the flat. Thus, even on merits, the petitioners do not have any case, but they only intend to prolong and delay the proceedings unnecessarily without any justification. Therefore, there are no merits in the writ petition and the same is liable to be dismissed.

15. *Per contra*, learned counsel for the petitioners contended that the matter is purely civil in nature. The complainant is not a “consumer” within the meaning of Section 5(1)(a) of the Act, and the petitioners are also not an “establishment”, as defined under Section 2(19) of the new Act. Therefore, the complaint itself is not maintainable. The petitioners are not involved in the construction of apartments on a regular basis. Therefore, appropriate orders be passed by allowing the writ petition and by setting aside the impugned orders.

16. On the other hand, learned counsel for respondents 4 and 5 submits that both the State Commission as well as the National Commission have rightly passed the impugned orders and hence, there are no merits in the writ petition and the same is liable to be dismissed.

17. In support of his contentions, learned counsel for respondents 4 and 5 relied upon the judgment of the Hon'ble Apex Court in **FAQIR CHAND GULATI Vs. UPPAL AGENCIES PRIVATE LIMITED AND ANOTHER**¹ to contend that the present case comes under the ambit of the Consumer Protection Act, 1986 and that the Act gives shelter to a claim of this nature. In the head note of the above said judgment, it is stated as follows:-

"A. Consumer Protection - Services Housing Building construction agreement between landowner and builder - Agreement requiring builder to construct an apartment building on owner's land and share the constructed area with owner in consideration of entire cost incurred and services rendered by him - Deficiencies/defects in constructed share of landowner Consumer complaint by landowner against builder on basis of Maintainability of Issue whether the said agreement/ activity was a joint venture and consequently there was no hiring/availment of services of builder and therefore the landowner and the builder could not be said to be a "consumer" and a "service provider" respectively Considering the terms of the agreement in question and the usual features of such agreements [i.e. bar against landowner in relation to interference with construction activity in any manner, lack of control or participation of landowner in management of said activity, absence of sharing of profits and losses by landowner, etc.], held, the agreement in question was not a

¹ (2008) 10 Supreme Court Cases 345

joint b venture in the legal sense - It was basically an agreement for construction of a house (ground floor) for landowner for consideration in the form of sale of an undivided share in the land to builder and grant of permission to him to construct and own the upper floors Hence, in such a case, the landowner would be a "consumer" and the builder would be a "service provider" - However, where the agreement between the landowner and the builder/fund provider is a true joint venture, the position would be different Thus, the present consumer complaint, held, was maintainable - Matter remitted to District Forum for fresh adjudication on merits Protection Act, 1986-Ss. 2(1)(d), c(iii), (g) & (O), 12 and 14."

"18. *This Court next considered the meaning of the word "service". Thereafter, this Court dealt with the question whether "service" included housing construction, even before the inclusion of "housing construction" in the definition of "service" by Act 50 of 1993 with effect from 18-6-1993. This Court observed : (M.K. Gupta case [(1994) 1 SCC 243] , SCC pp. 254 & 256-57, paras 4 & 6)*

"4. What is the meaning of the word 'service'? Does it extend to deficiency in the building of a house or flat? Can a complaint be filed under the Act against the statutory authority or a builder or contractor for any deficiency in respect of such property. The answer to all this shall depend on understanding of the word 'service'. The term has variety of meanings. It may mean any benefit or any act resulting in promoting interest or happiness. It may be contractual, professional, public, domestic, legal, statutory, etc. The concept of service thus is very wide. How it should be understood and what it means depends on the context in which it has been used in an enactment.

...

6. What remains to be examined is if housing construction or building activity carried on by a private or statutory body was service within meaning of clause (o) of Section 2 of the Act as it stood prior to inclusion of the expression 'housing construction'

in the definition of 'service' by Ordinance No. 24 of 1993. As pointed out earlier the entire purpose of widening the definition is to include in it not only day to day buying and selling activity undertaken by a common man but even such activities which are otherwise not commercial in nature yet they partake of a character in which some benefit is conferred on the consumer. **Construction of a house or flat is for the benefit of person for whom it is constructed. He may do it himself or hire services of a builder or contractor. The latter being for consideration is service as defined in the Act. ... If the service is defective or it is not what was represented then it would be unfair trade practice as defined in the Act. Any defect in construction activity would be denial of comfort and service to a consumer. When possession of property is not delivered within stipulated period the delay so caused is denial of service.** Such disputes or claims are not in respect of immovable property as argued but deficiency in rendering of service of particular standard, quality or grade. Such deficiencies or omissions are defined in sub-clause (ii) of clause (r) of Section 2 as unfair trade practice. If a builder of a house uses substandard material in construction of a building or makes false or misleading representation about the condition of the house then it is denial of the facility or benefit to which a consumer is entitled to claim value under the Act. When the contractor or builder undertakes to erect a house or flat then it is inherent in it that he shall perform his obligation as agreed to. A flat with a leaking roof, or cracking wall or substandard floor is denial of service. ... **A person who applies for allotment of a building site or for a flat constructed by the development authority or enters into an agreement with a builder or a contractor is a potential user and nature of transaction is covered in the expression 'service of any description'. It further indicates that the definition is not exhaustive. The inclusive clause succeeded in widening its scope but not exhausting the services which could be covered in earlier part.** So any service except when it is free of charge or under a constraint of personal service is included in it. Since housing activity is a service it was covered in the clause as it stood before 1993."

It further held:

"20. There is no dispute or doubt that a complaint under the Act will be maintainable in the following circumstances:

(a) Where the owner/holder of a land who has entrusted the construction of a house to a contractor, has a complaint of deficiency of service with reference to the construction.

(b) Where the purchaser or intending purchaser of an apartment/flat/house has a complaint against the builder/developer with reference to construction or delivery or amenities.”

(emphasis supplied)

18. Learned counsel for respondents 4 and 5 also relied upon the judgment of the Hon’ble Apex Court in **KAMLESH AGGARWAL Vs. NARAIN SINGH DABBAS AND ANOTHER²**, wherein the Hon’ble Apex Court held as follows :-

“18. Further, it is needless to observe in this order that apart from initiating proceedings under Section 27 of the Act, the alternative right is also available to the appellant to execute the order of the District Forum by invoking the provisions of the Code of Civil Procedure, 1908 under Order 21 read with Rule 32 for seeking direction to the respondents to get sale deed in respect of Plot No. 114, Village Khoda, Ghaziabad executed by Navchetna Sahkari Awas Samiti Ltd. and register the same before the Sub-Registrar and put her in possession of the same in accordance with the aforesaid provisions. The execution of the decree in the aforesaid terms is permissible in law in view of the provisions of Sections 13(4), (6) and (7) of the Act, as the provisions of Order 21 read with Rule 32 of the Code of Civil Procedure are applicable to the District Forum to follow the procedure for execution of the order passed by it.”

² (2015) 11 SCC 661

19. The above judgments very clearly lay down the applicability of the Act in cases where there is a housing construction/sale of flat. In this connection, it is appropriate to extract Section 2(1)(c)(iii) of the Act, which defines a 'complaint'. The same reads as follows:-

*iii) The services hired or availed of or agreed to be hired or availed of by him **suffer from deficiency in any respect;***

(emphasis supplied)

20. The sole criteria mentioned in the aforesaid clause to determine the scope of a 'complaint' is when the services availed by a 'consumer' suffers from deficiency in any respect.

21. Further, Section 2(1)(d) of the Act defines the term 'consumer', and it reads as follows:-

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) [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**}*

(emphasis supplied)

22. Sub-clause (ii) of the foregoing clause (d) has specified the scope of the term 'consumer', and it accommodates any person who has availed of any 'services' for a consideration, either partly or fully paid, or through a deferred payment system. Hence, there is no apparent reason to believe that respondents 4 and 5, who have not availed such services for any commercial purposes, would be excluded from such a wide definition.

23. It is also relevant to extract Section 2(1)(o) of the Act, which reads as follows:-

*‘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 of 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;*

(emphasis supplied)

24. A plain reading of the above clause shows that the term ‘service’ has categorically included the service of “housing construction”. Thus, it is clear that in the present case, the petitioners have rendered a ‘service’ to respondents 4 and 5, who are ‘consumers’, and that there is a ‘deficiency in service’, which has clearly been made out.

25. This Court, having considered the rival submissions made by the learned counsel for the respective parties, and in view of the foregoing discussions, is of the considered view that neither the 2nd respondent State Commission nor the 3rd respondent National Commission suffer from any lack of jurisdiction or *vires* in passing the orders in

C.C.No.69 of 2019 dated 17.11.2023, and consequently in First Appeal No.97 of 2024 dated 18.03.2024. The State Commission and the National Commission have fairly considered and thoroughly examined the maintainability of the complaint under the Act. Learned counsel for respondents 4 and 5 rightly relied upon the aforesaid judgments to contend that the nature of the transaction between the respondents 4 and 5 and the petitioners fall under the ambit of 'service' as defined in Section 2(1)(o) of the Act. Further, it is also clear that the respondents 4 and 5 fall within the definition of a 'consumer' as defined under Section 2(1)(d)(ii) of the Act. Having considered the entire material available on record, rival contentions and the findings recorded by the State Commission and the National Commission, this Court does not find any reason, much less a valid reason warranting interference of this Court with the concurrent findings recorded by both the Commissions. Hence, there are no merits in the writ petition and the same is liable to be dismissed.

26. Accordingly, this writ petition is dismissed. Interim order granted by this Court on 24.04.2024 shall stand vacated. No costs.

Pending miscellaneous petitions, if any, shall stand closed.

SUJOY PAUL, J

NAMAVARAPU RAJESHWAR RAO, J

13th August 2024

Note:

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