

**BUNGA DANIEL BABU -Vs- M/S SHRI VASUDEVA CONSTRUCTIONS AND OTHERS, CIVIL APPEAL NO. 944 OF 2016
DIPAK MISRA, J.&N.V.RAMANA, J.**

Brief facts:

- The Appellant- owner of three plots situated at Butchirajupalem within the limits of Visakhapatnam Municipal Corporation.
- The Appellant entered into a Memorandum of Understanding (for short “the MOU”) with the Respondents, on 18.07.2004 for development of his land by construction of a multi-storied building comprising of five floors, with elevator facility and parking space.
 - Apartments constructed - shared - 40% and 60% between the Appellant and the Respondent No. 1.
 - Construction to be completed within 19 months from the date of approval of the plans by the Municipal Corporation.
 - In case of non-completion within the said time, a rent of Rs. 2000/- per month for each flat was to be paid to the appellant.
- The plans approved on 18.05.2004 and accordingly should have been completed by 18.12.2005.
- The occupancy certificates for 12 flats - on 30.03.2009. Delay of about three years and three months. In addition, the appellant had certain other grievances pertaining to deviations from sanction plans and non-completion of various other works and other omissions for which he claimed a sum of Rs.19, 33,193/- through notices dated 6.6.2009 and 27.6.2009. These claims were repudiated by the respondents vide communications dated 17.07.2009 and 16.08.2009.
- The appellant approached the *District Consumer Forum*
- The *District Forum*:
 - Analyzed clauses of the MOU and the addendum.
 - Relied on *Faqir Chand Gulati V. Uppal Agencies Pvt. Ltd, and Anr. (2008) 10 SCC 345*
 - Transaction between the parties - not a joint venture.
 - Not excluded from the Act.
 - Complainant – a ‘Consumer’ under Section 2(1)(d)(ii) of the Act.
- The Respondents preferred an appeal before the *State Consumer Disputes Redressal Commission, Hyderabad*:
 - Complainant - not a “Consumer” under the Act.
- The Appellant-Complainant invoked the revisional jurisdiction of the *National Consumer Disputes Redressal Commission, New Delhi*:
 - Upheld the findings of State Commission.
 - State Commission rightly distinguished *Faqir Chand Gulati’s case* on facts because the flats were not for personal use and the complainant had already sold four of the twelve flats.

Issues before the Supreme Court:

- Whether the Appellant-Complainant falls within the definition of “Consumer” u/s 2(1)(d) read with the Explanation thereto of the Consumer Protection Act, 1986?
- Whether the National Commission has rightly distinguished the authority in *Faqir Chand Gulati’s case*?

Findings of Court on Law:

- The original definition of “Consumer” under the Consumer Protection Act, excluded without exception, a person who obtained goods for resale or for any “commercial purpose”. The Hon’ble Supreme Court however mentioned the Case of *Morgan Stanley Mutual Fund v. Kartick Das*(1994) 4 SCC 225 and *Lucknow Development Authority v. M.K. Gupta* (1994) 1 SCC 243 in Para 8 and 9 of the Judgment respectively, to bring home the point that even the original definition was wide enough to include any potential user of goods or beneficiary of services.
- By the Consumer Protection (Amendment) Act, 1993 (50 of 1993) an Explanation was added to Section 2(1)(d) to the effect that “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*. In Para 12 and 13 of the Judgment, the Hon’ble Supreme Court has cited with approval, the following excerpt from the case of *Laxmi Engineering Works v. P.S. G. Industrial Institute* (1995) 3 SCC 583, wherein the Court ruled that the said Explanation is clarificatory in nature and applied 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 uses them himself, exclusively for the purpose of earning his livelihood, by means of self-employment is within the definition of the expression ‘consumer’.

.....

It is not the value of the goods that matters but the purpose to which the goods bought are put to”

- By the Consumer Protection (Amendment) Act, 2002 (62 of 2002) the definition of “Consumer” was amended to the effect that it excluded a person who availed services for any “commercial purpose”. The Explanation appended to Section 2(1)(d) was amended to provide an exception 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 purpose of earning his livelihood by means of self-employment*.

The Hon’ble Supreme Court like the District Forum, placed heavy reliance on the case of *Faqir Chand Gulati V. Uppal Agencies Pvt. Ltd, and anr.* (2008) 10 SCC 345 in Para 17 of the Judgment opining that the principles laid down therein apply to the present facts although the case pertains to a time before the 2002 Amendment. In the said case, the Court held that the title or caption or nomenclature of the instrument/document is not determinative of the nature and character of the instrument/document, though the name usually gives some indication of the nature of the document and, therefore, the use of the words ‘joint venture’ or ‘collaboration’ in the title of an agreement or even in the body of the agreement will not make the transaction a joint venture, if there are no provisions for shared control of interest or enterprise and shared liability for losses. It was also stated that while the builder commits breach of his obligations, the owner has two options; he has the right to enforce specific performance and/or claim damages by approaching civil court or can approach consumer forum under the Act. The Hon’ble Supreme Court reproduced the following excerpt from the case:

“But the important aspect is the avilment of services of the builder by the landowner for a house construction (construction of the owner’s share of the building) for a consideration. To that extent, the landowner is a consumer, the builder is a service provider and if there is deficiency in service in regard to construction, the dispute raised by the landowner will be a consumer dispute. We may mention that it makes no difference for this purpose whether the collaboration agreement is for construction and delivery of one apartment or one floor to the owner or whether it is for construction and delivery of multiple apartments or more than one floor to the owner. The principle would be the same and the contract will be considered as one for house construction for consideration....”

- The Supreme Court concurred with the judgment in the case of *Punjab University v. Unit Trust of India and others* (2015) 2 SCC 669 (Para 19) wherein reliance was placed on the *Laxmi Engineering Works* case (Supra).
- The Hon’ble Supreme Court concluded that the approach of the National Commission was incorrect. What is required to be scrutinized is whether there is any joint venture agreement between the Appellant and the Respondent. The MOU clauses clearly show that the Appellant had no say or control over the construction. The

extent of area, as has been held in *Faqir Chand Gulati* (supra) does not make a difference. Therefore, the appellant is a consumer under the Act.

Held: The Supreme Court allowed the appeal, and the judgments and orders passed by the National Commission, and the State Commission were set aside. The matter has been remitted to the State Commission to re-adjudicate the matter treating the Appellant as a consumer.

Ratio: Where a Land owner avails the Builder's services exclusively for the purposes of earning his livelihood by means of self-employment, under an arrangement which is *not* in the nature of a joint venture, such Land owner is 'Consumer' within the meaning of Section 2(1) (d)(ii) r/w the Explanation thereto of the Consumer Protection Act, 1986.

Analysis: Taking a cue from the Court's decision in *Laxmi Engineering Works case* and the *Faqir Chand Gulati case*, the Supreme Court in its latest judgment proceeded to analyze whether or not, in the *facts and circumstances* of the instant case, the services were being availed for "*commercial purposes*".

Whether or not there is "Commercial Purpose" is a factual question. A Land owner may be getting his Land developed under an agreement in order to re-sell the final product (flat(s), etc). Such intent to re-sell should not however, be the sole determining factor. The question is, whether in order to achieve the final product, the Landowner *availed the services of the Builder*, or whether he participated in a business venture with the Builder to construct the flats, etc. In the latter scenario, he can only sue for breach of Contract and Specific Performance as he would not be a "Consumer" but a co-adventurer. But in the former case, he has an additional option. Having availed the builder's services *for the purpose of earning livelihood by means of self-employment*, he is a "Consumer" within the meaning of Section 2(1)(d)(ii) of the Consumer Protection Act, 1986 r/w the Explanation thereto, irrespective of the fact that there is an agreement between the parties or that the flats being constructed are to be further sold or that there are a number of flats or that the area of Land in question, owned by the Land owner is huge.

The purpose of the Consumer Protection Act is that where a person pays for a good or service, he must get what was promised to him. The 2002 Amendment to Section 2(1)(d) was a step towards that purpose and this judgment has brought it towards its logical end. The Supreme Court has thus rightly excepted services availed by the Appellant Land-owner "*exclusively for the purposes of earning livelihood by means of self-employment*" (business), from the purview of "Commercial Purpose" and treated him as "Consumer" within the meaning of the Consumer Protection Act, 1986. Nature of Agreement, whether joint venture or otherwise, and availment of services is a primary consideration in such cases.