[Non-Reportable]

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NOS. 2109-2110 OF 2018
[Arising out of SLP (Civil) Nos. 23104-23105 of 2015]

M/s. Paramount Digital Color Lab & Ors. Etc. ... Appellants

Versus

M/s. Agfa India Pvt. Ltd. & Ors. Etc. ... Respondents

J U D G M E N T

Mohan M. Shantanagoudar, J.

Leave granted.

2. These appeals are directed against the final Judgment and Order dated 09.02.2015 passed by the National Consumer Disputes Redressal Commission, Circuit Bench at Lucknow (hereinafter referred as 'the National Commission') in First Appeal No. 194 of 2011 and First Appeal No. 222 of 2011, whereby the National Commission, by a

common order, has dismissed the complaint filed by the appellants and allowed the first appeal filed by the respondents.

3. Brief facts leading to these appeals are as follows:

In the year 2004, the appellants being unemployed graduates decided to start a business of photography in partnership for self-employment and for their livelihood, for which they needed an advanced photo processing, developing and printing machine. The appellants contacted respondent No. 2 and enquired about the salient features and performance of "Agfa Minilab D-Lab. 1 Allrounder" machine. Respondent no. 3 was the then Managing Director and respondent No. 4 was the then General Manager, Marketing and Sales Consumer Imaging Division, Agfa India Pvt. Ltd. Both of them narrated several special features of the machine and apprised that the machine delivers excellent quality with negative and the digital technology with high productivity; they also assured that it is reliable open system supported by Agfa's unsurpassed service and supported network and fully equipped. They also proposed several schemes like prompt service and free supply of paper and chemicals etc. They suggested the purchase of the machine and sent a proposal by way of quotation. Being impressed by the advice and suggestion of the respondents, the appellants borrowed a loan from the Union Bank of India on 12.07.2004 and placed an order for the purchase of the said machine

for which the appellants paid a sum of Rs.62,00,000/- towards the cost of the machine and other collateral charges in advance. It is the case of the appellants that respondent Nos. 1 to 4, despite having the knowledge that the machine which contains a pre-loaded software does not work properly and is unworthy of acceptance, had unfairly and carelessly sold the machine to the appellants on 05.08.2004 for their financial gain, causing financial loss to the appellants. It did not give satisfactory performance up to the marked standard, as narrated and assured by the respondents. Various technical, mechanical and software problems were detected in the machine. As per the contract, the machine was under warranty for one year commencing from 05.08.2004. Since the performance of the machine was not up to the marked standard and as the appellants found number of defects in the product, such as existence of grains in the print etc., they made complaints to the respondents for the removal of defects; but even after several visits by the engineers of Agfa India Pvt. Ltd., as well as the engineers of the developer and designer mother company, the machine was never made to run to its marked standard. Ultimately, the engineers of the company vide their report dated 30.11.2004 admitted that the pre-loaded software in the machine was still under research and development and that the problems would be resolved by the new software which was expected to be released in January, 2005.

Thereafter also, the appellants repeatedly requested respondent No. 1 for the replacement of machine with another piece of machine, but the respondents unfairly did not pay heed to the request of the appellants. Though the warranty had expired on 05.08.2005 after a period of one year, the defects in the machine could not be cured.

4. On 01.12.2005, respondent No. 1, through respondent Nos. 2 and 4, informed the appellants about the transfer of the Consumer Imaging Division to a newly created group of companies under the name and style of "Agfa Photo India Pvt. Ltd.", informed about the insolvency of the Consumer Imaging Division of the mother Company, and required advance payment for the requisite chemical as they had to import the same, even after receiving and releasing the full cost of "Agfa Minilab D-Lab.1 Allrounder" machine for which the entire amount was already paid to the respondents on 05.08.2004 as per the package. Neither was it mentioned to the appellants that they would have to pay extra amount for the license key (password), nor was it printed in the general conditions of sale and delivery or in the terms and conditions provided to the appellants.

5. Having no other option, the appellants issued notice on 12.04.2006 calling upon respondent Nos. 1 to 4 to pay compensation for the loss and damages incurred and sustained by the appellants. A reply was issued by respondent Nos. 1 and 3. However, respondent

Nos. 2 and 4 did not reply. Even in the reply sent by respondent Nos. 1 and 3, they did not give a proper explanation inasmuch as the business of the Consumer Imaging Division was transferred to respondent No. 3. Thereafter, the appellants approached the State Consumer Disputes Redressal Commission, U.P. at Lucknow (hereinafter referred to as 'the State Commission') by filing Complaint Petition No. 7 of 2007, which came to be allowed in part on 21.02.2011. The State Commission held respondent Nos. 2 and 4 responsible for unfair trade practice and directed payment of compensation on account of loss, mental and physical torture and expenses of the complainants.

6. Aggrieved by the judgment of the State Commission allowing the complaint in part, the appellants preferred First Appeal No. 194 of 2011 before the National Commission at New Delhi. The appellants mainly contended that the State Commission was not justified in holding that only respondent Nos. 2 and 4 were responsible for payment of cost of machine along with ancillary charges etc.

7. Similarly, respondent Nos. 2 and 4 also preferred First Appeal No. 222 of 2011 before the National Commission on 23.05.2011 raising various grounds including the ground that the appellants did not come within the definition of "Consumer" under the Consumer Protection Act, 1986 (hereinafter referred to as the 'Act'), read with the

Consumer Protection (Amendment) Act, 2002. By the impugned judgment dated 09.02.2015, the National Commission dismissed the First Appeal No. 194 of 2011 filed by the appellants and allowed the First Appeal No. 222 of 2011 filed by the respondents.

8. Respondents, though served in these appeals, have chosen to remain absent.

9. Heard learned counsel for the appellants and perused the records. It is relevant to note that no relief has been claimed as against respondent No. 5. Having gone through the judgment of the National Commission, it is clear that though a number of points arose for consideration, it did not choose to decide the same for remanding the matter, since it felt that the complaint itself was not maintainable and that the matter has been pending for long. The State Commission not only held that the complaint was maintainable, but also proceeded on merits and held in favour of the appellants.

10. The National Commission on evaluation of the material on record and after hearing the parties concluded that the complainants are not "consumers" as envisaged under Section 2(1)(d) of the Consumer Protection Act and hence the Act is not applicable. Thus, the only question to be decided before us in this matter is whether the appellants are "consumers" as envisaged under Section 2(1)(d) of the

Act. The relevant provision of the Act defines the word "consumer" as under:

> "2(1)(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 purpose;
>
> *Explanation.*- For the purposes 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 his livelihood by means of self-employment."

11. 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.

“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".

12. In the case of **Madan Kumar Singh (Dead) v. District Magistrate, Sultanpur and Ors., (2009) 9 SCC 79**, the appellant therein had bought a truck in an auction-sale for a consideration which was paid by him. It was bought to be used exclusively for the purposes of earning his livelihood by means of self-employment. However, there was inordinate delay in delivering possession of the truck and relevant documents to the appellant therein and in confirming the auction in his favour. Possession of the truck was ultimately delivered to him during the pendency of his complaint before the District Forum. This Court held that the purchase of the truck by the appellant therein would be covered by the Explanation to Section 2(1)(d) of the Act. In the said matter, the appellant emphatically stated that he had bought the said truck to be used exclusively by him for the purposes of earning his livelihood by means of self-employment. It was categorically observed by this Court that even if he was to employ a driver for running the truck, it would not have changed the matter in any case, as even then the appellant

would have continued to earn his livelihood from it and of course, by means of self-employment.

13. Thus, in our considered opinion, each case ought to be judged based on the peculiar facts and circumstance of that case. Whether the assistance of someone is required to handle the machine, is a question of fact and necessity? Ultimately, if it is purely for a "commercial purpose" and not for "self-employment", the complainant may not get the benefit of the Explanation to Section 2 (1)(d) of the Act. The buyers of the goods or commodities for "self-consumption" in economic activities in which they are engaged would be "consumers" as defined in the Act. Furthermore, there is nothing on record to show that the appellants wanted to use the machine in question for purposes other than "self-employment".

Therefore, the point to be considered is whether the appellants have purchased the machine in question for "commercial purpose" or exclusively for the purposes of earning their livelihood by means of "self-employment". There cannot be any dispute that the initial burden is on the appellants to prove that they fall within the definition of "consumer". It is pertinent to mention that respondent No. 4, who is a contesting party, did not choose to file a counter affidavit before the State Commission. In other words, he did not deny any of the claims made by the appellants. None of the parties have led their

evidence. Based on the material on record before the State Commission, it proceeded to decide on merits. As the litigation is being fought since 2006 in different Forums, we do not wish to remand the matter, particularly, when there is sufficient material available on record for arriving at the conclusion.

14. The word "purchaser" means and includes members of his family also. The machine in question was purchased by two partners; both were unemployed graduates. They started a firm namely M/s. Paramount Digital Color Lab at Varanasi, U.P. afresh. The appellants have specified that they are unemployed graduates; they planned to start a business of photography for self-employment and for their livelihood, for which they contacted respondent Nos. 2 & 4, which means that they had not planned to start their business of photography till they planned to purchase the machine in question. Having felt the need of the machine in question, they contacted respondent No. 1 and enquired about the salient features and performance of the "Agfa Minilab D-Lab.1 Allrounder" machine. Being impressed by the advice and suggestion made by respondent Nos. 2 & 4, appellants borrowed a loan from the Union Bank of India on 12.07.2004 and placed an order for the purchase of the said machine and paid by draft an amount of Rs.62,00,000/- towards the cost of the machine along with freight and collateral charges. It is the case of the

appellants that they purchased the machine with the fond hope and belief that it would give good results and that they would earn a handsome amount by which their basic needs of livelihood would be fulfilled and that the family of the appellants will survive smoothly. They might have started the business with the help of one operator and helper. Of course, in Paragraph 14 of the complaint, the appellants have used the words “Operators and Helpers”. This portion of the complaint has been highlighted by the National Commission to conclude that the appellants were using the machine with the help of third parties for commercial purposes inasmuch as they themselves were not using the machine personally. Such averment by the appellants in the complaint appears to be an exaggerated version with a view to get more compensation. One such stray sentence will not tilt the balance against the appellants. The material needs to be seen in its entirety and not in isolation. 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.

15. The material discloses that respondent no. 1 company was dissolved in the year 2005. Prior to this dissolution, respondent no. 2 was the Managing Director of respondent No. 1 and respondent no. 4 was the General Manager of respondent No. 1. The respondent Nos. 2 and 4 collectively talked with the appellants and finalised the agreement along with the assurance that the machine is up to the marked standard and that repairs, if any, would be rectified free of cost, apart from other things assured. Respondent No. 3 is the subsequent company which has taken over from respondent No. 1 in

the year 2005. The said company also did not come to the aid of the appellants either by replacing the machine or by rectifying the major defects, consequent upon which the appellants have suffered huge losses. Anybody can visualise the loss sustained by the appellants inasmuch as they had obtained a loan with the promise to pay interest to respondent No. 5 bank for purchasing the machine. Therefore, respondent Nos. 2, 3 and 4 are collectively liable to make good the loss of the appellants.

16. In view of the same, it cannot be said that the appellants do not fall within the definition of the term "consumer", as envisaged under Section 2(1)(d) of the Act. Hence, the impugned judgment and order dated 09.02.2015 passed by the National Commission is liable to be set aside and the judgment dated 21.02.2011 passed by the State Commission is restored, with the clarification that respondent Nos. 2 to 4 are jointly and severally liable to make good the loss, as directed by the State Commission. The appeals are allowed accordingly.

.....J.
[KURIAN JOSEPH]

.....J.
[MOHAN M. SHANTANAGOUDAR]

New Delhi,
February 15, 2018.

ITEM NO.1501 COURT NO.5 SECTION XVII

S U P R E M E C O U R T O F I N D I A
RECORD OF PROCEEDINGS

Petition(s) for Special Leave to Appeal (C) No(s). 23104-23105/2015

M/S. PARAMOUNT DIGITAL COLOR LAB & ORS. ETC. Petitioner(s)

VERSUS

M/S. AGFA INDIA PVT. LTD. & ORS. ETC. Respondent(s)

Date : 15-02-2018 These petitions were called on for Judgment today.

For Petitioner(s) Mr. Rohit Singh, AOR

Mr. Ajay Kumar Srivastava, AOR
Mr. Dhirendra Kumar, Adv.

For Respondent(s)

Hon'ble Mr. Justice Mohan M. Shantanagoudar pronounced the non-reportable Judgment of the Bench comprising Hon'ble Mr. Justice Kurian Joseph and His Lordship.

Leave granted.

The appeals are allowed.

Pending Interlocutory Applications, if any, stand disposed of.

(JAYANT KUMAR ARORA)
COURT MASTER

(RENU DIWAN)
ASSISTANT REGISTRAR

(Signed non-reportable Judgment is placed on the file)