STATE CONSUMER DISPUTES REDRESSAL COMMISSION, MAHARASHTRA, MUMBAI

Complaint No.CC/20/150

Mr.Sarbendu Bagchi,
Residing at: Flat No.1504, 'A' Wing,
Hub Town Greenwoods, Pokhran Road No.1,
Opp.Thirani School, Vartak Nagar,
Thane (W) – 400 606. .....Complainant(s)

Versus

HDFC ERGO General Insurance company Limited,
6th Floor, Leela Business Park,
Andheri Kurla Road, Andheri (East),
Mumbai 400 059. .....Opponent(s)

BEFORE:

Justice S.P. Tavade - President
S.T.Barne – Judicial Member

For the Complainant(s): Advocate Prakash Karande

For the Opponent(s): None.

ORDER
(05/04/2023)

Per Hon'ble Justice S.P. Tavade – President:

1) The complainant has filed this complaint under the provisions of Consumer Protection Act.

2) It is contended that the complainant was employee of Raymond India Ltd., in the year 2014. He had booked flat and he wanted

housing loan. Accordingly he approached HDFC Ltd. and applied for loan. The representative of the HDFC Bank checked and verified income credentials of the complainant as well as he carried out the valuation of the booked flat and sanctioned housing loan of Rs.50,91,080/- on 26/12/2014 with condition to repay within 17 years.

3) It is contended that while processing housing loan formalities the various Agents of the HDFC Bank, namely Mr.Nandlal Patil – Sales Executive and Nilesh Dhuri - Sales Manager, explained the complainant about 'Home Suraksha Plus Policy'. Complainant was reluctant to buy the said policy, but, the representative of the HDFC Bank told complainant that if he buys the policy, housing loan will be sanctioned immediately and premium amount will be adjusted in loan amount. The complainant came under pressure and agreed to buy the said policy against the payment of one time single premium of Rs.3,91,080/- covering following risks:

Fire and allied perils, earthquake and terrorism for building / flat Sum insured Rs.50,91,081/-.

Contents in flat – sum insured Rs.12,72,770/-.

Major Medical Illness and procedure – Sum insured Rs.50,91,080/- (which covers: cancer, end stage renal failure, multiple sclerosis, major organ transplant, heart valve replacement, coronary artery bypass, stroke, paralysis and myocardial infarction).

Personal Accident – Sum Insured Rs.50,91,080/-.

4) Accordingly the opponent's representative asked the complainant to write his name on the Home Suraksha Plus Proposal form and put signature at the end of the proposal form. Accordingly, the

complainant signed the form as per the directives of the representative of the opponent.

5) It is contended that HDFC Ltd., directly paid sum of Rs.3,91,080/- to opponent out of loan amount as one time premium of policy, namely 'Home Suraksha Plus Policy'. Accordingly Policy No.091820096157500003 to complainant on 15/01/2015 for the term of five years covering the above categories of risks.

6) It is contended that in the month of May, 2018 the complainant faced problem and elevated creatinine. Hence, he underwent treatment with a nephrologist. In the month of August, 2019, the complainant's creatinine level suddenly shot up and he was admitted in the hospital for check-up and treatment, wherein treating Doctors diagnosed the complainant with acute and chronic renal failure and complainant is undergoing dialysis twice a week. It is contended that the complainant was diagnosed with major medical illness of end stage renal failure. Hence, he preferred claim with the opponent under two policies having same features, viz. 1.Sarva Suraksha Claim No.RRCI19-10733667 for Rs.1,00,000/- and 2: Home Suraksha Plus Policy No.29182009615765000003, Claim No.RR-CI149-10731309 for Rs.50,91,080/-. It is averred that the complainant purchased the said policies from the opponent in the year 2015. The opponent settled the claim under first policy i.e. Sarva Suraksha claim and paid Rs.1,00,000/- but the claim under Home Suraksha Plus Policy was repudiated on vague and irrelevant reasons.

7) It is contended that before taking the policy or at the time of taking the policy the complainant was not aware or was not suffering from

any symptoms or had not undergone treatment of any disease mentioned in opponent's 'Home Suraksha Plus Policy' proposal form or kidney failure or any other serious major illness. The complainant is gainfully employed at Senior Manager Level with an employer of repute and very much punctual in attending his duties and never availed any leave for more than two days on medical grounds. It is contended that the complainant had taken policy on 15/01/2015 for five years. At that time the complainant was not suffering from any kidney/renal disease or any other major illness. The claim arisen under the policy after four years and eight months of the policy which cannot be called in question and there is no ground for repudiation of the same. It is contended that the opponent has played fraud in the transaction and have cheated the complainant. Hence, the complainant has filed complaint claiming Rs.50,91,080/- under the policy along with costs and compensation.

8) Notice of this complaint was issued to the opponent. The opponent was duly served with the notice and failed to appear before this Commission. Hence, this complaint proceeded ex-parte against the opponent. The complainant has filed affidavit of evidence along with documents. The complainant has also filed written notes of arguments.

9) The claim of the complainant is not contested by the opponents by filing written version on record. The complainant has produced on record number of documents, namely policy, terms and conditions of the policy, letter of repudiation dated 29/11/2019 wherein it is mentioned that the claim of the complainant for critical illness does not meet the requirements for its eligibility as per the terms and

conditions. It is also mentioned that, *as per the claim documents, Insured suffered from Chronic Renal Failure in a k/c/o case of Chronic Hypertension since 2003 and Diabetes since 7 years as per discharge card dated 14/08/2019".* The ailment is pre-existing in nature and hence, the claim was repudiated.

10) On the basis of the repudiation letter the learned Advocate for the complainant submits that the Complainant had filled up form as per the directions of the Agent of the Opponent. The contents of the same were filled in by the Agent. He also submits that at the time of filling form the complainant was neither suffering from any ailment, hospitalization, or treatment for kidney related disease. Therefore, the complainant did not hide any information from the opponent at the time of filling up of the proposal form.

11) It appears from the repudiation letter that the opponent came to know from the Discharge Card submitted by the complainant that as he was suffering from diabetes and hypertension prior to 2015. It appears that the complainant had submitted his medical papers which include the discharge card wherein there is mention of preexisting disease, namely diabetes and hypertension.

12) The proposer is under a duty to disclose the insurer all material facts as are within his knowledge. The proposer is presumed to know all the facts and circumstances concerning the proposed insurance. Whilst the proposer can only disclose that is known to him, the proposer's duty of discloser is not confined to his actual knowledge, it also extends to those material facts which, in the ordinary course of business, he ought to know. However, the assured is not under a duty to disclose facts which he did not know and which he could not

reasonably be expected to know at the material time. Full disclosure must be made of all relevant facts and matters that have occurred up to the time at which there is a concluded contract. It follows from the principle that the materiality of a particular fact is determined by the circumstances existing at the time when it ought to have been disclosed, and not by the events which may subsequently transpire. The duty to make full disclosure continues to apply throughout negotiations for the contract but it comes to an end when the contract is concluded, therefore, material facts which come to the proposer's knowledge subsequently need not be disclosed. So it appears that at the time of filling the form the complainant was not knowing that he was suffering from diabetes and hypertension which would be resulted in renal failure.

13) One point is also required to be considered that the complainant took policy on 15/01/2015 for a period of five years. At that time he was not aware that he was suffering from any disease of any other major illness. He was diagnosed with total renal failure in the month of August, 2019, which has covered the policy.

14) The learned advocate for the complainant has invited our attention to the provisions of Section 45 of the Insurance Act as amended upto date which is reproduced below for ready reference:

Section 45 in The Insurance Act, 1938

45. Policy not to be called in question on ground of mis-statement after two years.—No policy of life insurance effected before the commencement of this Act shall after the expiry of two years from the date of commencement of this Act and no policy of life insurance

effected after the coming into force of this Act shall after the expiry of two years from the date on which it was effected, be called in question by an insurer on the ground that a statement made in the proposal for insurance or in any report of a medical officer, or referee, or friend of the insured, or in any other document leading to the issue of the policy, was inaccurate or false, unless the insurer shows that such statement 1[was on a material matter or suppressed facts which it was material to disclose and that it was fraudulently made] by the policy-holder and that the policy-holder knew at the time of making it that the statement was false 2[or that it suppressed facts which it was material to disclose]: 2[Provided that nothing in this section shall prevent the insurer from calling for proof of age at any time if he is entitled to do so, and no policy shall be deemed to be called in question merely because the terms of the policy are adjusted on subsequent proof that the age of the life insured was incorrectly stated in the proposal.]

15) We have already observed that, policy was taken on 15/01/2015 for five years. Claim arose in September, 2019, i.e. claim has arisen under the policy after expiry of four years and eight months which cannot be called in question and there is no ground for repudiation of the claim.

16) Learned advocate for the complainant has also submitted that diabetes and hypertension are lifestyle disease which should not be treated as chronic one to disallow the claim. *To substance this point, learned Advocate has relied upon the ratio laid down in the case of Bajaj Allianz General Insurance Co. Ltd. versus Smt. Valsa Jose, First Appeal No.579 of 2007 delivered by the Hon'ble National Consumer Disputes Redressal Commission, New Delhi on*

04/10/2012. In the said case complainant therein had past medical history of hypertension for 4 years and she underwent Angiography and Angioplasty. The claim was repudiated on the ground of suppression of material fact that she had hypertension and since there was a nexus between hypertension and her cardiac problems. It was observed by the Hon'ble National Commission that, "We are unable to agree with the learned Advocate for the appellant that there was suppression of material fact as no credible evidence has been filed by the appellant/ Insurance Company on whom there was onus to do so to prove that the respondent had undergone treatment for any hypertension related cardiac problems or for severe hypertension prior to 13/11/2003. The only document produced is a note addressed to the Claims Manager of the Appellant/Insurance Company from one Dr.Shaibya Saldanha who is Obstetrician & Gynaecologist which states that the Respondent was referred to her for menopausal related 6 (A/21/137) problems and at that time she was taking medication for hypothyroidism and hypertension as prescribed by Dr.Sanjay Mehrotra. No affidavit or credible evidence to support this has been filed by the Dr.Sanjay Mehrotra." Hon'ble National Commission has also relied on the ratio laid down by the Hon'ble Supreme Court of India in the case of Mithoo Lal Nayak versus LIC of India – AIR 1962 SC 814 as also in Satwant Kaur Sandhu versus New India Assurance Co. Ltd. (2009) 8 SCC 316 has held that, "the test to determine as to what is a material fact is whether that fact has any bearing on the risk undertaken by the insurer. If the fact has any bearing, it is a material fact and it not, it is not material. In the instant case, the Discharge Summary from St.Joseph Hospital, USA relied upon by the Appellant, merely states that Respondent had been taking medicine for hypertension and for

cholesterol which was reportedly normal. We are of the view that the fact that the patient was taking medicine for hypertension for some time does not amount to suppression of material fact because as is well known hypertension is usually a lifestyle disease and easily controlled with conservative medication, as in the instant case."

17) It is also submitted on behalf of the complainant that he was working in Raymond India Ltd. and he had not taken medical or any other leave for more than two days during his tenure of 15 years. No material is produced on record to establish that prior to obtaining the policy the complainant was suffering from kidney related disease which was concealed by him. Therefore, we are of the opinion that the complainant has established that he had purchased insurance policy from the opponent. The opponent has paid Rs.1,00,000/- to the complainant under other policy, immediately after submission of claim. But, the claim under the Home Suraksha Plus Policy was denied. The opponent was not justified in repudiating the insurance claim of the complainant on the ground of suppression of material fact as there was no evidence filed by the opponent on whom there was onus to prove that the opponent had undergone treatment for hypertension related problems which resulted into renal failure. Therefore, the complainant is entitled for the claim, compensation under the policy, namely Home Suraksha Plus Policy. Hence, we proceed to pass the following order:

ORDER

(i) Complaint is hereby allowed.

(ii) The opponent is hereby held as guilty for deficiency in service.

(iii)Opponent is hereby directed to pay sum of Rs.50,91,080/- along with interest @9% per annum from the date of repudiation of the claim i.e. from 29/11/2019 till realisation of the entire amount.

(iv)Opponent is also directed to pay compensation of Rs.1,00,000/- for mental agony and Rs.25,000/- towards costs of litigation.

(v) Copies of the order be furnished to the parties.

Pronounced on 05th April, 2023.

[Justice S.P. Tavade]
President

[S.T. Barne]
Judicial Member

emp

STATE CONSUMER DISPUTES REDRESSAL COMMISSION
MAHARASHTRA, MUMBAI

FIRST APPEAL NO.A/19/433

(Arisen out of Order dated 02/03/2015 passed by the learned Mumbai Suburban District in consumer complaint No.251 of 2005)

Dr.Ushakiran Chavan @
Dr.Sanjana S. Wahvel
R/at- Behind Shah Group 2/3
A 301, Shankar Tower,
Plot No.14, Sector 14,
Sanpada, Navi Mumbai,
Thane-400 705. Appellant

Versus

1. Mrs.Sonu Pankaj Kareer
   R/at 382, Squatters Colony,
   Gate No.6, Malwani,
   Malad(W),
   Mumbai 400 064.
2. Dr.Pradeep Dani
   Sanjeevani Nursing Home and
   Polyclinic
   Bhandari Compound,
   90 feet DP Road,
   Ganesh Nagar, Charkop,
   Kandivali(W),
   Mumbai 400 067. Respondents

BEFORE :

Mr.Justice S.P.Tavade, Hon'ble President
Mr.A.Z.Khwaja, Hon'ble Judicial Member

PRESENT:

For the
Appellant(s): Advocate Mateen Shaikh

For the
Respondent: Advocate Mohan Kanade

ORDER

(Dated: 3rd May, 2023)

Per : Hon'ble Mr.A.Z.Khwaja, Judicial Member

[1] Appellant Dr.Ushakiran Chavan has preferred present appeal feeling aggrieved by the Judgment and Order dated 02/03/2015 passed by the learned Mumbai Suburban District in consumer complaint No.251 of 2005 by which complaint filed by the respondent/complainant came to be allowed. Short facts leading to the filing of the present complaint may be narrated as under-

[2] Complainant-Smt.Sonu Pankaj Karir- claims to be housewife and became pregnant in the month of February 2003. Complainant therefore consulted Dr.Ushakiran Chavan, who was reputed Gynaecologist and complainant was under her guidance and treatment. Complainant visited Sanjeevani Nursing Home and Polyclinic, managed by Dr.Pradeep Dane- Opponent No.1. Complainant has contended that she had paid professional charges and had visited Dr.Ushakiran Chavan on 18/10/2003 in her Consulting Room at Matruchhaya Nursing Home. Opponent No.2 Dr.Ushakiran Chavan told her that her delivery time was due and can be postponed by a week or ten days but there was no cause for worry. Opponent No.2 instructed the complainant to get admitted to Sanjeevani Nursing Home and Polyclinic whenever she developed labour pain. Complainant developed labour pain on 28/10/2003 at around 12.30 p.m. So she went to Sanjeevani Nursing Home run by the opponent No.1 where she was admitted and was attended by the nurses. Complainant has contended that her labour pain was gradually increased. So the opponent No.2 examined her at about 4.00 p.m. and informed the complainant that the delivery will took

place within 15 minutes. Complainant asked the opponent No.2 to remain present for the delivery. But she told the complainant that she was going out and she will come back very soon and complainant should not worry. Complainant has alleged that at 5.30 p.m. her labour pain increased so the nurses on duty informed the complainant that the opponent No.2 was informed and she was expected to reach the Nursing Home within ten minutes. Thereafter, complainant was taken by the nurses to the operation theatre where two nurses attended her delivery. Complainant has contended that both the nurses present were aged about 18 to 19 years and they pressed her stomach with great pressure and were are not listening to her. At about 6.20 p.m. complainant delivered baby boy and complainant heard baby boy cry. Complainant has contended that till the delivery was over, no doctor had arrived. Complainant has stated that Dr.Ushakiran Chavan- opponent No.2 arrived at 6.50 p.m. and told her that baby was weak and was having breathing problem and was therefore kept in incubator. Subsequently the nurses told complainant that her child was 'stillborn' i.e. born dead as the cord had entangled around the neck of the baby and had encircled the neck three times. Complainant has stated that, according to the nurses due to the fastening of the cord around neck of the baby, the baby could not breathe and therefore died on delivery. However, the opponent No.2- Dr.Ushakiran Chavan told that the baby was weak and had problem in breathing and had eventually died after some time of his birth. Complainant has stated that she also came to know about the same from her sister. Complainant has contended that thereafter nurses took the baby to 'The Childrens' Hospial', Malad(W), Mumbai where Dr.Marionette Pereira examined the baby at the said hospital. Upon examination Dr.Pereira pronounced the baby as dead 10 minutes ago. Complainant has contended that she wanted to see the baby and was asked to go to operation theatre but she saw the baby was lying dead. Complainant has contended that at the time of delivery neither the opponent No.1-Dr. Pradeep Dani nor Dr.Ushakiran Chavan

were present. Complainant has contended that her husband thereafter lodged the complaint in Kandivali West Police Station and police arrived at Sanjeevani Nursing Home and Polyclinic to enquire about the matter. Subsequently postmortem was performed on the baby. Complainant has alleged that her case was high risk pregnancy but the opponent No.2 Dr. Ushakiran Chavan did not arrive well in time to supervise the delivery and had acted in negligent manner. Opponent failed to monitor the delivery and there was exfacie negligence and deficiency in service on the part of opponents. Complainant has contended that due to the negligence on the part of the Opponent Nos.1 and 2, complainant lost her baby boy on 28/10/2003. Complainant has contended that opponents had provided deficient services and so complainant lodged present complaint.

[3] After filing of the complaint, due notice was issued to the opponent Nos. 1 and 2. Opponent Nos.1 and 2 both filed written version on record. The learned District Consumer Commission thereafter recorded the evidence led by the complainant and as well as opponent Nos. 1 and 2 and also went through the documents including the medical papers on record. After appreciating the evidence, the learned District Consumer Commission came to the conclusion that there was negligence on the part of the opponent Nos. 1 and 2 as well as deficiency service and so the learned District Consumer Commission allowed the Consumer complaint and by its Judgement and Order dated 02/03/2015 which is assailed in the present appeal.

[4] We have heard Smt.Muskan Shaikh, learned Advocate for the appellant and Smt.Vaishali Parmar, learned Advocate for the respondent. We have gone through the record and proceeding as well as medical papers and notes of argument filed by both the partics. At the outset, it is vehemently submitted by the learned Advocate appearing for the appellant that the learned District Consumer Commission has not appreciated the evidence on record in proper

perspective and has therefore arrived at findings, which were erroneous in nature. On the other hand, the learned Advocate appearing for the respondent has supported the findings given by the learned District Consumer Commission. Firstly, it is contended by the learned Advocate that the learned District Consumer Commission had not considered the fact that there was no negligence much less medical negligence on the part of the appellant and the appellant had taken all the necessary care, which was expected from the Gynaecologist. In order to support this contention, the learned Advocate for the appellant has drawn our attention to the medical papers placed on record as well copy of discharge summary issued by the Sanjeevani Nursing Home and also other papers. It is an admitted fact that the complainant had became pregnant in the month of February 2003 and thereafter was taking treatment from Dr.Ushakiran Chavan who was Gynaecologist and was having Matruchhaya Nursing Home. Complainant had also visited Sanjeevani Nursing Home run by Dr.Pradeep Dani. It appears that on 18/10/2003 complainant visited opponent No.2 at her Consulting Room at Matruchhaya Nursing Home and she informed the complainant about the due date of delivery and told her not to worry and to get admitted in Sanjeevani Nursing Home whenever she developed labour pain. It is not disputed that, complainant developed labour pain on 28/10/2003 at about 12.30 p.m. and so she got admitted in Sanjeevani Nursing Home run by the opponent No.1. It is clear that the opponent No.2 Dr. Ushakiran Chavan examined her at 4.00 p.m. but the labour pain aggravated at about 5.30 p.m. and so the nurses on duty called the opponent No. 2. It is the specific case of the complainant that the opponent No.2 Dr.Ushakiran Chavan did not arrive till 5.30 p.m. and she arrived at the time of delivery. It is the case of the complainant that the baby boy was suffering from the case of 'Post Datism' pregnancy, which was high risk pregnancy. According to the complainant, at the time of delivery as the cord had entangled around the neck of the baby and had encircled the neck three times, due to which, the baby was unable to

breathe. As per the case of the complainant, there was complete negligence on the part of the Dr.Ushakiran Chavan, who was Gynaecologist, as she did not administer her skill as Gynaecologist and instead left the complainant at the mercy of the nurses on duty till last moment of delivery.

[5] If we go through the written version filed by the opponent No. 2, opponent No.2 has categorically denied all the allegations. Opponent No.2 has denied that she had not taken care of the complainant or had not given proper information to the complainant. On the contrary, opponent No. 2 has contended that the complainant herself did not come for medical examination prior to delivery and therefore she had asked the complainant as to why she did not report to her. Opponent No.2 has taken a stand that, she had examined the complainant at 3.15 p.m. on 28/10/2003 and not at 4.00 p.m. as alleged by the complainant. She had also asked the complainant, as to where she was for last 10 days from 18/10/2003. Opponent No.2 Dr.Ushakiran Chavan has denied that, she left the hospital when the delivery of the complainant was about to take place. As per the case of the opponent No. 2 she reached the Nursing Home at 6.15 p.m. and had taken the complainant to the operation theatre. It is contended that Baby boy was having three loop of cord tightly round the neck and so did not cry and did not respire. Complainant has also come with a specific case that, she heard the baby cry. But this is denied by the opponent No. 2. If we turn to the medical papers relating to the complainant on record, they do show that the baby boy was suffering from 'post datism' wherein 3 loop of cord were tied tightly round neck and so the baby did not cry and did not respire. If we go through the delivery note of Sanjeevani Nursing Home, the same shows that the baby boy did not cry at birth and infact was declared dead at 7.05 p.m., as there was no heart beats. As stated earlier, it is the contention of the appellant Dr.Ushakiran Chavan that, there was no negligence at all on her part and the opponent No.2 had taken all necessary care, which was expected

from the Gynaecologist. Opponent No.2 had also stated that it had immediately administered Endotracheal intubations and gave infraumbilicals sodabicarb and oxygen, thereby giving her best effort to save the child, however, the baby did not respond to the same and hence opponent No.2 advised to immediate transfer the baby to NICU i.e. a Children Hospital of Dr. Periera, It however, the baby was referred back by the said Doctor stating there was no scope as baby did not resound to any of Mechanism, hence relative of the baby brought back the baby to Sanjeevani Nursing Home, where opponent No.2 was present. Opponent No.2 in ray of last hope further administered oxygen but all in vain and hence declared the baby dead at 7.05 p.m. During the course of the argument, learned Advocate for the appellant has drawn over attention to the report of the Maharashtra Medical Council, Mumbai as well as one Expert Opinion given by Dr.Chetan Utge, who was working as an Obstetrician and Gynaecologist. We have gone through the said Expert Opinion as well as the report of the Maharashtra Medical Council. Bare perusal of the Expert report of Dr.Chetan Utge shows that Dr.Chetan Utge was not provided with the medical papers of the complainant and therefore he has only referred to the case of post datism and its effects on the baby in as much as there are higher chances of foetal mortality or morbidity in such cases. Dr. Chetan Utge has opined that during labour, as the baby descends, the cord gets tightened round the baby's neck literally strangulating the baby. The baby thus dies during childbirth (intra partum). But as stated earlier no medical papers of complainant were provided to the said Doctor and therefore not much weight can be given to the expert opinion of Dr.Chetan Utge. During the course of argument, the learned Advocate for the appellant has drawn our attention to the report of the Maharashtra Medical Council. It appears that after the police complaint was filed with Kandivali West police station, police had referred the case of the complainant to the Medical Board and the Board had gone through the case papers. The Medical Board had given specific opinion that it was the case of

high risk pregnancy but thereafter given finding that, the case does not fall in the category of gross negligence which is defined u/s 304A of IPC. On the basis of this opinion given by the medical board it is submitted by the learned Advocate for the appellant that there was no negligence on the part of the appellant. But we are unable to agree with the submission as the Medical Board was referring to the criminal negligence which is required to be established for establishing criminal offence under section 304A of IPC and not medical negligence as contemplated under the provisions of the Consumer Protection Act, 1986. On the other hand, the report of the Medical Board itself speaks that the case of the complainant was the case of the high risk pregnancy because of post datism i.e. three loops of cord around the neck of the baby. The Medical Board has also given finding that indoor papers were not submitted. In such situation, the contention of the learned Advocate for the appellant that there was no negligence, cannot be accepted nor much weightage can be given to the opinion given by the Medical Board. On the other hand, it is the case of the complainant that, her case was the case of high risk pregnancy. It was therefore bounden duty on the part of the opponent No.2 Dr.Ushakiran Chavan to take maximum care relating to the delivery of the complainant. But the facts on record clearly shows that, the appellant Dr.Ushakiran Chavan reached the Nursing Home just before the delivery and the baby was delivered at 6.20 p.m. Appellant has taken a stand that, she had immediately referred the child to the paediatrician -Paediatric Hospital. But nothing could be done. But in our view, the case of the complainant was certainly case of high risk pregnancy. Obviously, it was necessary for the appellant to continuously monitor the pregnancy of the complainant. But the appellant shifted the blame on the part of the complainant, by stating that, complainant did not contact her. Admittedly, due to post datism constant monitoring by Gynaecologist was necessary, which seems to have not a been taken place, which have emerged on the record from the evidence of the complainant and other papers placed on

record which clearly shows that though the appellant Dr. Ushakiran Chavan had examined the complainant at about 3.00 p.m. or 4.00 p.m., she thereafter left the Nursing Home by leaving the complainant at the mercy of the nurses and appellant Dr.Ushakiran Chavan arrived only at the time of delivery. There is no material placed on the record by the appellant to show that the appellant Dr.Ushakiran Chavan have taken all necessary care, prior to the actual delivery of the complainant. It is also not clear as to why no Caesarean section surgery was performed despite the knowledge of the high risk pregnancy of the complainant. All these factors taken together clearly point out to the fact that there was negligence on the part of the appellant as regards continuous monitoring of the condition of the complainant was concerned and this fact also finds support from the report of the Medical Board. If we go through the impugned Judgement and Order passed by the learned District Consumer Commission, it has elaborately dealt with this aspect as referred in para 13 of the Judgement.

[6] During the course of the argument, learned Advocate for the appellant placed reliance upon one Judgment of the *Hon'ble Supreme Court of India in Civil Appeal No.3541 of 2002, in the case of Martin F. D'Souza versus Mohd. Ishfaq,* wherein detailed guidelines have been given and reference was made to the landmark Judgement in the case *of Jacob Mathew versus State versus State of Punjab* and we have carefully gone through the same. Here in the present case before us, although the complainant has not led any medical evidence but the matter was referred to the Medical Board and as discussed earlier the facts on record clearly goes to show that there was negligence on the part of the appellant leading to the mental and physical harassment to the complainant, which cannot be compensated in terms of money, as the complainant lost her child at birth.

[7] In the light of the aforesaid discussion, we are unable to accept the contentions advanced by the learned Advocate for the appellant that the learned District Forum has not properly appreciated the evidence and facts in its proper perspective or that there was no medical negligence or deficiency in service on the part of appellant Dr.Ushakiran Chavan. Hence, we proceed to pass the following order –

ORDER

1] Appeal is dismissed.

2] No order as to costs.

3] Copy of this order be supplied to both the parties.

[Justice S.P.Tavade]
President

[A.Z.Khwaja]
Judicial Member

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STATE CONSUMER DISPUTES REDRESSAL COMMISSION
MAHARASHTRA, MUMBAI

FIRST APPEAL NO.A/21/137

(Arisen out of Order dated 29/10/2020 passed by the South Mumbai District Consumer Disputes Redressal, Commission, in CC/16/87)

United India Insurance
Company Ltd.
Mumbai Regional Office No.1,
5th floor, Stadium House,
Veeru Nariman Road,
Mumbai 400 020. Appellant(s)

versus

Shri.Vasant Ramdas Pai
Flat No.A-405,
Rose Garden Co.Op.Hsg.Society,
Near Planet Medico and
Konark Campus,
Viman Nagar,
Pune 411 011. Respondent(s)

BEFORE :

Mr.Justice S.P.Tavade, Hon'ble President
Mr.A.Z.Khwaja, Hon'ble Judicial Member

PRESENT:
For the Appellant: Advocate Varsha Chavan
For the Respondent: In person

ORDER
(Dated: 16th March, 2023)

Per : Hon'ble Mr.Justice S.P.Tavade, President

Being aggrieved and dissatisfied with the Order dated 29/10/2020 passed by the South Mumbai District Consumer Disputes Redressal Commission in consumer complaint No.CC/16/87 the original opponent has preferred this

appeal. Parties to this appeal shall be called and referred to as per their status in the original complaint. Facts giving rise to the present appeal can be summarised in brief as under-

[1] Complainant/respondent had filed consumer complaint bearing No.87 of 2016 claiming medical reimbursement of the treatment taken by him at the Criticare Multispeciality Hospital and Research Centre. It was contended that the complainant had taken Arogya Group Mediclaim policy from the opponent for the period covering 18/06/2013 to 17/06/2014. He had paid premium of Rs.7,316/-. Accordingly, the Mediclaim policy was issued in favour of the complainant. On 23/04/2014 complainant underwent Stress Test which was positive. Hence, Angiography was performed. Complainant was admitted in the Criticare Multispeciality Hospital and Research Centre for Multiple Vessle Disease Coronary Angiography + Bypass Surgery, for the period between 28/04/2014 to 04/05/2014. Complainant spent Rs.5,00,000/- for the surgery. Complainant submitted his claim to the opponent alongwith medical papers. Said claim was repudiated on the ground that complainant had concealed the material fact of his existing disease while filling the form for mediclaim policy. It was contended that the complainant had taken Arogya Group Insurance Policy since long. He was healthy and hearty till he was admitted in the hospital for the surgery. He had not taken any leave on account of medical disease. It was contented that the claim was wrongly repudiated by the opponent. Hence, complaint came to be filed.

[2] Opponent appeared and filed written version wherein the allegations made in the complaint were specifically denied. It was admitted that the opponent had issued Agrogya Group Mediclaim Policy. It was contended that complainant had proposed for proposal Health Insurance Plan. Complainant was provided Proposal Form which he had filled in wherein he had specifically

mentioned that he had no pre-existing disease. It was contended that the complainant submitted reimbursement claim alongwith documents which shows that he was admitted in the hospital between 28/04/2014 to 04/05/2014. It was also mentioned in the medical papers that he had undergone operation for Multiple Vessle Disease Coronary Angiography + Bypass Surgery. It was contended that the complainant was known case of hypertension since one and half year prior to operation and known case of diabetes since year 2007. Complainant did not disclose the said fact in the proposal form. He concealed the material information before obtaining the Mediclaim policy. It was further submitted that the claim in question stood repudiated vide letter dated 16/05/2014 invoking clause 4.1 of the policy which reads as under-

> *"All diseases /injuries, which are pre-existing when the cover incepts for the first time. For the purpose of applying this conditions, the date if inception of the initial medical policy taken from any Indian Insurance companies shall be taken provided the renewal have been continuous and without any break. However, this exclusion will be deleted after three consecutive claim free policy years, provided there was no hospitalisation for the pre-existing ailment during these three years of insurance."*

It is contended that complainant has concealed his pre-existing disease. Hence, his claim was rightly repudiated. The complaint is not tenable. Hence, it was prayed for dismissal of the complaint.

[3] Complainant filed his affidavit of evidence alongwith documents.

[4] Opponent filed affidavit of evidence of Smt.Smita Shinde, Senior Divisional Manager alongwith the documents namely- policy and medical papers. On going through the evidence on record the District Commission has partly allowed the complaint and granted Rs.5,00,000/- to the complainant for

his medical treatment alongwith interest @6% p.a. from the date of repudiation i.e. 26/09/2014 till 29/10/2020. The District Commission has also granted compensation of Rs.10,000/- and costs of Rs.5,000/- to the complainant. Aggrieved by the said order appellant has filed this appeal.

[5] Heard Advocate for the appellant and respondent. In this appeal it is to be seen whether the opponent has rightly repudiated the claim of the complainant or not. Admittedly, complainant had taken Arogya Group Insurance policy from the opponent. Said policy is produced on record. As per clause 2.30 of the policy, *"Pre existing disease is any condition, ailment or injury or related condition(s) for which you had signs or symptoms, and /or were diagnosed, and/or received medical advice/treatment, within 48 months prior to the first policy issued by the insurer."*

[6] Opponent has also produced on record copy of the claim form filled up by the complainant wherein he has specifically mentioned that he had no pre existing disease and in the said column it is written as 'Nil'.

[7] Admittedly, complainant was admitted in the hospital on 24/04/2014. At the time of admission the wife of the complainant had given information about the health of the complainant. In the admission note it is specifically mentioned by the wife of the complainant that the complainant was suffering from diabetes since 2007 and hypertension since one and half year to the admission. On the basis of the same admission note it is vehemently submitted that the complainant was suffering from diabetes and hypertension prior to obtaining of the policy. But the said fact was not filled in the policy form. Complainant has produced on record letter issued by the Branch Manager wherein it is mentioned that the complainant had not taken any medical leave for any disease during his tenure in the bank.

[8] In the medical history recorded by the hospital shows that the complainant was known case of Diabetes Mellitus since 2007. Blood sugar controlled with OHAs. It was also known case of Dyslipidaemia On statin since past six months. Stress Test was done in the month of December 2012 showed ST-T changes from stage 1. The above observations were noted after comprehensive health check-up and then advised for the surgery. Learned Advocate for the appellant submitted that, on going through the above medical history it can be said that the complainant was known case of diabetes and hypertension.

[9] Learned Advocate for the complainant submitted that the diabetes and hypertension is lifestyle disease. Therefore, it should not be treated as chronic one to disallow the claim. To substance this point, learned Advocate has relied upon the ratio laid down in the case of *Bajaj Allianz General Insurance Co. Ltd. versus Smt. Valsa Jose, First Appeal No.579 of 2007 delivered by the Hon'ble National Consumer Disputes Redressal Commission, New Delhi on 04/10/2012.* In the said case complainant therein had past medical history of hypertension for 4 years and she underwent Angiography and Angioplasty. The claim was repudiated on the ground of suppression of material fact that she had hypertension and since there was a nexus between hypertension and her cardiac problems. It was observed by the Hon'ble National Commission that, *"We are unable to agree with the learned Advocate for the appellant that there was suppression of material fact as no credible evidence has been filed by the appellant/ Insurance Company on whom there was onus to do so to prove that the respondent had undergone treatment for any hypertension related cardiac problems or for severe hypertension prior to 13/11/2003. The only document produced is a note addressed to the Claims Manager of the Appellant/Insurance Company from one Dr.Shaibya Saldanha who is Obstetrician & Gynaecologist which states that the Respondent was referred to her for menopausal related*

problems and at that time she was taking medication for hypothyroidism and hypertension as prescribed by Dr.Sanjay Mehrotra. No affidavit or credible evidence to support this has been filed by the Dr.Sanjay Mehrotra." Hon'ble National Commission has also relied on the ratio laid down by the *Hon'ble Supreme Court of India in the case of Mithoo Lal Nayak versus LIC of India – AIR 1962 SC 814 as also in Satwant Kaur Sandhu versus New India Assurance Co. Ltd. (2009) 8 SCC 316* has held that,

> *"the test to determine as to what is a material fact is whether that fact has any bearing on the risk undertaken by the insurer. If the fact has any bearing, it is a material fact and it not, it is not material. In the instant case, the Discharge Summary from St.Joseph Hospital, USA relied upon by the Appellant, merely states that Respondent had been taking medicine for hypertension and for cholesterol which was reportedly normal. We are of the view that the fact that the patient was taking medicine for hypertension for some time does not amount to suppression of material fact because as is well known hypertension is usually a lifestyle disease and easily controlled with conservative medication, as in the instant case."*

[10] In the instant case, the Discharge Summary from Criticare Multispeciality Hospital and Research Centre was relied upon by the appellant which merely states that the complainant had been taking medicine for hypertension and diabetes which was reportedly normal. We are of the view that the fact that the patient was taking medicine for some time for hypertension and diabetes does not mean suppression of material fact because it is well known fact that the hypertension is lifestyle disease and can be controlled by the medicine. In the instant case hypertension and diabetes was not so acute or high that it was responsible for the Multiple Vessle Disease Coronary Angiography + Bypass

Surgery of the respondent. The District Commission has considered the medical papers as well as ratio laid down by the Hon'ble National Commission in proper perspective. Appellant/ Insurance Company was not justified in repudiating the insurance claim of the respondent on the grounds of suppression of material facts as there was no credible evidence filed by the appellant/Insurance Company on whom there was onus to do so to prove that the respondent had undergone treatment for any hypertension related cardiac problems. Impugned order passed by the District Commission is proper, legal and correct. There is no reason to interfere in the findings recorded by the District Commission. Appeal has no merit. Hence, we proceed to pass the following order-

ORDER

1] Appeal is hereby dismissed.

2] Impugned Order dated 29/10/2020 passed by the South Mumbai District Consumer Disputes Redressal Commission in consumer complaint No.CC/16/87 is hereby confirmed.

3] No order as to costs.

4] Copy of this order be supplied to both the parties.

[Justice S.P.Tavade]
President

[A.Z.Khwaja]
Judicial Member

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STATE CONSUMER DISPUTES REDRESSAL COMMISSION
MAHARASHTRA, MUMBAI

FIRST APPEAL NO.A/15/945

(Arisen out of Order dated 01/01/2015 passed by the Alibaug District Consumer Disputes Redressal Commission, Raigad in consumer complaint No. CC/12/164)

1. The United India Insurance Co. Ltd.
   Divisional Office No.13,
   Union Co-operative Building,
   2nd floor,
   Mumbai 400 001.

2. The United India Insurance Co. Ltd.
   Alibagh, S.T.Stand Near
   Besides Central Bank of India,
   Alibagh-Raigad. Appellant(s)

Versus

Mr.Babaji vitthal Tube
Ashwamegh Complex,
Plot No.18, Sector 8,
Khanda Colony,
New Panvel, Jilla Raigad. Respondent(s)

BEFORE :

Mr.Justice S.P.Tavade, Hon'ble President
Smt.S.T.Barne, Hon'ble Judicial Member

PRESENT:

For the
Appellant: Advocate P D Contractor

For the
Respondent:

ORDER
(Dated: 21st March, 2023)
Per : Hon'ble Mr.Justice S.P.Tavade, President

1] Being aggrieved and dissatisfied with the Judgement and Order dated 01/01/2015 passed by the Alibaug District Consumer Dispute Redressal Commission in consumer complaint number No.164 of 2012, original opponent has preferred this appeal. The parties to this appeal shall be called and referred to as per their status in the original complaint. The facts giving to the present appeal can be summarised as under-

2] The Complainant was the owner of the Truck bearing registration number MH-06-AQ-0352. One Abdul Rashid was driver on the side vehicle. Complainant purchased the said Truck with the financial assistance of State Bank of Patiala. It was insured with the opponent for the period between 14/02/2009 to 13/02/2010. Complainant had paid premium of Rs.17,299/- for the said policy. It was contended by the complainant that on 15/11/2009 the driver had parked the truck in question in front of Khanda Colony, Panvel and handed over key to the son of the complainant on 17/11/2009. Driver of the truck went to the spot and to his surprise truck was not there. He informed the said fact to the complainant. Complainant and the driver made enquiry about the truck. But ultimately they found that the truck was stolen away. Hence, FIR 512/2009 under section 379 of IPC came to be registered with Kalamboli police station on 27/11/2009. It was contended by the complainant that, intimation of theft of truck was given to the opponent immediately after the incident. It was also contended that on

02/12/2009 complainant filed claim form along with documents and submitted to the opponent for compensation. But no action was taken by the opponent till 07/03/2011. It was contended that on 07/03/2011 opponent wrote letter and sought information about the truck and the driver. Said information was submitted to the opponent. But the claim of the complainant was repudiated. Hence, complainant filed consumer complaint against the opponent for compensation and for reimbursement of insurance amount.

3] Notice was issued to the opponent. But nobody appeared on behalf of the opponent. Hence, complaint was proceeded exparte against the opponent. Complainant produced on record affidavit of evidence alongwith number of documents on the basis of which complaint came to be allowed and the opponent was directed to pay amount of Rs.15 lakhs towards insurance and compensation in the sum of Rs.20,000/- within 30 days from the date of order. Said order is under challenge.

4] Notice of this appeal was issued to the complainant but none appeared for the complainant. Hence, this appeal is proceeded exparte against the complainant/respondent.

5] Heard Smt.P.D.Contractor, Advocate for the appellant. She submitted that the complainant was the owner of three trucks. He had taken truck in question from the financial assistance of Financial Institute. It is submitted that the alleged theft had taken place on 17/11/2009. But there is inordinate delay in

lodging FIR. It is contended that the incident was not intimated to the opponent immediately on the same day or within reasonable time. It is contended that the opponent has sought for the documents and information about the truck and the driver. But the said information was not provided by the complainant. Therefore, opponent could not carry out proper investigation of the incident of theft of truck. Learned Advocate for the opponent has also invited our attention to the report of the Surveyor and Investigator, who had opined that they had serious doubt about the incident of theft of truck. On the basis of the said report, claim of the complainant was repudiated by the opponent. It is contended that evidence on record is not properly appreciated by the District Commission. Hence, it is prayed that the appeal be allowed.

6] On going through the documents it is clear that the complainant was the owner of the truck bearing registration number MH-06-AQ-0352. Said truck was insured with the opponent for the period between 14/02/2009 to 13/02/2010. Complainant had paid premium of Rs.17,299/- for the Insurance of his truck. It is the case of the complainant that the driver of the truck had parked the said truck in the evening of 15/11/2009 at Khanda Colony, Panvel. When his driver went to ply the truck on 17/11/2009 he found that the truck was missing from the spot where it was parked. Hence, complaint came to be lodged on 19/11/2009. Subsequently Kalamboli police station lodged FIR on 27/11/2009. Complainant has produced on record the documents on the record at Exh. 3 which

show that, he had lodged complaint with Kalamboli police station. Immediately he had submitted Claim Form to the opponent on to 02/12/2009 alongwith the documents. On going through the said documents, it appears that complainant had lodged FIR immediately with the police. Similarly incident of theft was reported to the opponent alongwith document on 19/11/2009. So it cannot be said that there was delay in lodging FIR as well as giving intimation to the opponent regarding theft of truck by the complainant.

7] Opponent was duly served with the notice. But opponent failed to file written version. Therefore, opponent cannot dispute the factual aspect of the matter. In fact in the appeal, opponent has produced on record the report of the Surveyor wherein it is category mentioned that, in the light of the unanswered query, Surveyor could not confirm about the genuineness of the theft of truck. But in fact, Surveyor should have contacted Kalamboli police station who registered the offence of theft of truck. Similarly, the documents were called by the opponent which were submitted by the complainant. But there is no opinion expressed by the Surveyor that the said documents were false or bogus. In fact, the truck in question was insured with the opponent. It was reported missing on 17/11/2009. Kalamboli police station made enquiry and thereafter FIR was lodged. Therefore, it cannot be said that the incident of the truck was false. Complainant has submitted Claim Form on to 02/12/2009. It was not decided by the opponent within reasonable time. On the contrary fresh information was sought by the opponent from the complainant

vide letter dated 07/03/2011 i.e. about 2 years after the alleged incident. Complainant submitted the documents as required by the letter of opponent dated 07/03/2011. Report of the Surveyor is produced on record. It appears that the said report is dated 20/01/2011. So the Surveyor had carried out the investigation prior to 07/03/2011. So calling additional information from the complainant was nothing but frutile exercise made by the opponent. Complainant has proved that the truck was stolen from the Khanda Colony, Panvel. Accordingly FIR came to be lodged. No detailed investigation was carried out by the opponent to rebut the contention, to prove theft to be false. Truck was insured with the opponent. Therefore, the opponent was liable to pay the compensation.

8] The District Commission has considered the documents in its proper perspective and came to the right conclusion. There is no need interfere in the findings of the District Commission. Hence, we hold that the appeal is devoid of merit. Hence, we proceed to pass the following order-

ORDER

[1] Appeal is hereby dismissed.

[2] Impugned Judgement and Order dated 01/01/2015 passed by the Alibaug District Consumer Dispute Redressal Commission in consumer complaint number No.164 of 2012 stands confirmed.

[3] No order as to costs.

[4] Copy of this order be supplied to both the parties.

[Justice S.P.Tavade]
President

[S.T.Barne]
Judicial Member

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STATE CONSUMER DISPUTES REDRESSAL COMMISSION
MAHARASHTRA, MUMBAI
CONSUMER COMPLAINT NO.CC/16/1197

1.Mr.Janmejay Balwant Patil
A-5/6, Jeevan Nagar,
Mithagar Road,
Mulund(E),
Mumbai 400 081.
2.Mrs.Priti Janmejay Patil
A-5/6, Jeevan Nagar,
Mithagar Road,
Mulund(E),
Mumbai 400 081. Complainants

versus

1.M/s.Ekta Housing Pvt. Ltd.
401, Hallmark Business Plaza,
Off Theystern Express Highway,
Kalanagar, Bandra(E),
Mumbai 400 051.
2.Mr.Ashok Mohanani
401, Hallmark Business Plaza,
Off Theystern Express Highway,
Kalanagar, Bandra(E),
Mumbai 400 051.
3.Mr.Vivek Mohanani
401, Hallmark Business Plaza,
Off Theystern Express Highway,
Kalanagar, Bandra(E),
Mumbai 400 051. Opponents

BEFORE :

Mr.Justice S.P.Tavade, Hon'ble President
Smt.S.T.Barne, Hon'ble Judicial Member

PRESENT:
For the
Complainants: Advocate Abhijeet Barve

For the
Opposite parties: Advocate Gaurang Nallawala

JUDGMENT
(Dated: 3rd March , 2023)

Per: Hon'ble Mr.Justice S.P.Tavade, President-

[1] Complainants have filed present consumer complaint against opponents and u/s section 17 of the Consumer Protection Act, 1986. Complainants are resident of Mulund (E), Mumbai. In the year 2011 the complainants were in need of residential flat in the city of Nashik or nearby area. They came across advertisement published by the opponents in daily newspaper and they were impressed by the said advertisement and decided to book residential flat in the housing project 'Ekta Greenville' floated by the opponents. Accordingly, they made enquiry with the customer care representative of opponents. Opponent No.1 is the registered Company named as M/s Ekta Housing Private Limited. Opponent No.1 was carrying on its business activity as builder/developer. Opponent Nos. 2 and 3 are the Chairman and Managing Director of the opponent No.1. They are responsible for the day to day activity of the opponent No.1. Complainants after initial enquiry and after seeing construction work in progress decided to book flat in the project of opponent No.1. They made initial part payment as earnest money in the sum of Rs.3,86,438/- on 23/12/2011. It was contended that the opponent No.1 executed registered agreement to sale in favour of the complainants in respect of flat No.601 in P wing at 'Ekta Greenville' situated at Pathardi, Nashik on 07/04/2012. Total consideration of the booked flat was Rs.25,76,250/-. Opponents agreed to handover possession of the booked flat on or before 31/03/2013. It is contended that the complainant had obtained housing loan from the HDFC Bank in the sum of Rs.23,43,809/-. As per the request of the opponents, HDFC Bank disbursed entire housing loan amount to opponent No.1. It is contended that the complainants made repeated

enquiry about the completion of the project with customer care representative of the opponents. Opponents deliberately failed and neglected to intimate any specific time limit for handing over possession of the flat. After booking of the flat complainants were out of India. They returned to India in the year 2016. They made enquiry with the opponents about the completion of the project. Opponents simply stated that the project was delayed for technical reasons. It was contended that the complainants had face to face meeting with representative of the opponent No.1 and they offered alternative flat in the same complex instead of booked flat. It is contended that the complainants rejected the offer. It was contended that the opponent No.1 was under wrong impression that the complainants had accepted the offer of substitute flat and under the said wrong impression opponent No.1 sent copy of Cancellation Deed through email to cancel the agreement dated 04/02/2012. It is contended that the complainants refused to cancel the agreement to sale and also refused the offer given by the opponents. It was contended that the complainants issued notice dated 29/08/2016 and called upon the Opponents to hand over possession of the flat. Said notice was replied by the opponents on 13/09/2016. Opponents gave proposal of alternative flat. But the complainants by reply letter dated 10/10/2016 have not accepted the offer of the opponents of alternative flat. Thereafter, there was correspondence between complainants and opponents. It is contended that the opponents had financially and mentally harassed the complainants. Hence, complainants had no option but to file the consumer complaint against the opponents. Complainants have prayed for possession of the booked flat bearing No.601, P Wing, admeasuring 684.24 sq.ft carpet of 'Ekta Greenville' Housing project, situated at Pathardi, Nashik. Complainants have prayed for compensation in the sum of Rs.5,00,000/- towards mental and physical harassment. Complainants have prayed for Rs.10,00,000/- towards compensation for delayed possession of the booked flat.

[2] Notice of the present complaint was served upon the opponent No.1. Opponent No.1 appeared and filed written version. Opponent No.1 has denied the allegations made in the complaint. It is specifically admitted that the complainants had booked flat bearing No.601, P Wing, admeasuring 684.24 sq.ft carpet of 'Ekta Greenville' Housing project, situated at Pathardi, Nashik. Opponent No.1 has admitted that the complainants had deposited earnest amount in the sum of Rs.3,86,438/-. It is also admitted that the complainants obtained housing loan from the HDFC Bank and accordingly HDFC Bank released the amount of housing loan to the opponents. It is also contended that the opponents had executed registered agreement to sale dated 04/02/2012 in favour of the complainants wherein the opponents had agreed to handover possession of the booked flat to the complainants on or before 31/03/2013. It is contended that in the agreement it is specifically recorded that subject to force majeure event, the opponent No.1 shall offer the said flat to the complainants on or before 31/03/2013 and in the event opponent No.1 fails to offer the said flat on such specific date then the complainants shall be entitled to cancel and terminate the said agreement and claim refund of money paid with interest @9% p.a. It is contended that as a matter of practice, representative of the opponent No.1 were in continuous contact with complainants and complainants were updated from time to time about the progress of the work. It is contended that the opponent No.1 had informed the complainants that due to the delay on the part of the Government in granting approvals as well as force majeure events, construction of the said flat was delayed and opponent No.1 was not able to hand over possession of the booked flat to the complainants on or before 31/03/2013. It is contended that the opponent No.1 had offered the complainants to exit from the project on the terms and conditions as contained in the Booking form. At that time, complainants did not object and opted to continue with the booking of the flat. It is contended that in the month of March 2016 complainants for the first time approached the opponent No.1 and

showed their worries regarding possession of the booked flat being delayed. It is contended that meeting was scheduled on 29/04/2016 at Bandra office of the opponent No.1 wherein the complainants met Mr.Savio and Mr.Mrunal Dalvi, being the representative of the opponent No.1. It is contended that in the meeting of 29/04/2016 it was explained to the complainants that despite their best efforts, construction of the booked flat is considerably delayed. During that meeting to compensate the complainants for delayed period, offer of rent for the delayed period was given to him. It was also suggested that in the event of complainants being satisfied in lieu of cancellation of booking of the flat, opponent No.1 is ready and willing to offer flat No. 103, L wing, which was ready for fit out possession. It is contented that, during the meeting complainants accepted the offer and requested to take the matter ahead. Accordingly, email and communication were exchanged between the representative of the opponent No.1 and complaints. It is contended that the complainants had agreed to execute Deed of Cancellation of the booked flat and was ready to accept alternative flat. But thereafter complainants refused to execute Deed of Cancellation and refused to accept the offer of the alternative flat. It is contended that in the meeting dated 29/04/2016 to compensate the complainants for delayed period, Mr.Savio, being the representative of the opponent No.1 offered rent for the delayed period and also suggested that in the event of the complainants being satisfied, in lieu of cancellation of booking of the flat, the opponent No.1 was ready and willing to offer alternate flat to the complainants, which was ready to fit-out. But the complainants did not accept the said offer and opponents cannot be blamed for delayed possession. It is further contended that the complaint is false and bogus and complainants are not entitled for any compensation and it is prayed that the complaint be dismissed with cost.

[3] To prove the claim against opponents, complainants have produced on record of following documents-

a) Photo-copy of the Agreement to Sale dated 04/02/2012

b) Receipts issued by the opponent No.1 for payment of consideration.

c) Copy of legal notice dated 29/08/2016

d) Copy of reply filed by the opponent dated 13/09/2016

e) Copy of rejoinder reply addressed to the opponent by the complainant dated 10/10/2016

f) Copy of postal acknowledgement card in respect of receipt of legal notice dated 10/10/2016.

[4] Opponents have relied upon correspondence dated 15/06/2016, 22/08/2016 and 13/09/2016.

[5] On going through the pleadings and the documents filed on record, following points arise for our determination. We have recorded our findings for the reasons given below-

Sr.No.	Points	Findings
1	Whether the complainants proves that the opponents have committed deficiency in service and unfair trade practice?	In the affirmative
2	Whether the complainants are entitled for the possession of the flat No.601 in P wing at Ekta Greenville situated at Pathardi, Nashik?	In the affirmative
3	Whether the complainants are entitled for compensation and costs?	In the affirmative
4	What order?	As per final order.

Reasons-

For the Point Nos.1 to 3-

[6] Admittedly complainants had booked flat No.601 in P wing at 'Ekta Greenville' situated at Pathardi, Nashik with opponent No.1. Opponents had

executed registered agreement to sale in favour of the complainants on 07/04/2012. Total consideration of the booked flat was Rs.25,76,250/-. Complainants made initial part payment as earnest money in the sum of Rs.3,86,438/- on 23/12/2011 to the opponents. Complainants had obtained housing loan from the HDFC Bank in the sum of Rs.23,43,809/-. As per the request of the opponents, HDFC Bank disbursed entire housing loan amount to the opponent No.1. So it is established that the complainants had paid entire amount of consideration to the opponents towards booking of the flat. Opponents agreed to handover possession of the booked flat on or before 31/03/2013 to the complainants. It is specifically mentioned in the agreement that subject to force majeure event, the opponent No.1 shall offer the said flat to the complainants on or before 31/03/2013 and in the event opponent No.1 fails to offer the said flat on such specific date then the complainants shall be entitled to cancel and terminate the said agreement and claim refund of money paid with interest @9% p.a. Complainants were in continuous contact with the opponents and used to get updates from time to time about the progress of the construction work. Learned Advocate for the opponents argued that the construction was delayed due to delay on the part of the government department in granting approvals said fact is not denied by the complainants. So it can be said that the project was delayed for want of prompt approvals from the government department. It is also admitted fact that in the month of April 2016 complainants approached opponent No. 1 and showed their worries regarding possession of the booked flat being delayed. It is also admitted fact that there was meeting between the complainants and the representative of opponent No.1- Mr.Savio on 29th April 2016 wherein representative of opponent No.1 had offered alternative flat bearing No. 103 L Wing, in lieu of cancellation of the booked flat. Said offer was considered by the Complainants but ultimately they refused it. It is submitted by the learned Advocate for the opponents that there was meeting between the Advocates for both the parties. But it was not

materialised. On the basis of the said facts learned Advocate for the opponents submitted that the opponents tried their level best to consider the aspect of delay in handing over possession of the booked flat and offered alternative flat to the complainants. But they denied the same. Therefore, the complainants are not entitled for compensation for delayed in delivery of possession of the booked flat. It is true that the representative of opponent No.1 had offered alternative flat to the complainants but said offer was denied by the complainants and cause for denial was communicated to the opponents. But that is not the ground to hold that complainants were at fault. Opponents had agreed to hand over possession of the booked flat in the month of March 2013 but till April 2016 possession was not handed over and it was delayed. Complainants were no way concerned with the cause for delay. Complainants cannot be forced to accept alternative flat in lieu of the booked flat. Therefore, rejection of offer of alternative flat cannot be held against the interest of the complainants. Complainants had paid entire amount of consideration to the opponents. Therefore, the opponents are duty-bound to handover possession of the booked flat with all legal formalities. Complainants had to suffer physically, mentally and financially at the hands of the opponents. Therefore, the opponents are held liable to compensate the complainants for delay in handing over possession of the booked flat. Complainants are entitled for compensation towards mental and physical agony. Hence, we proceed to pass the following order-

ORDER

1] Complaint is hereby partly allowed.

2] It is hereby declared that the opponents are guilty of deficiency in service and unfair trade practice.

3] Opponent Nos.1 to 3 are jointly and severally directed to handover possession of the flat bearing No.601, P Wing, admeasuring 684.24 sq.ft carpet of 'Ekta Greenville' Housing project, situated at Pathardi, Nashik within three months from the date of passing of this order.

4] Opponent Nos.1 to 3 are jointly and severally directed to pay interest @9% p.a. on the amount of Rs.25,76,250/- from 01/04/2013 till handing over possession of the flat to the complainants.

5] Opponent Nos.1 to 3 are jointly and severally directed to pay amount of Rs.2,00,000/- to the complainants towards compensation for mental and physical agony.

6] Opponent Nos.1 to 3 are jointly and severally directed to pay costs of Rs.25,000/- to the complainants.

7] Opponent Nos.1 to 3 are jointly and severally directed to comply with the aforesaid order clause Nos.4 to 6 within 30 days from the date of passing of this order.

8] Copy of this order be supplied to both the parties.

[Justice S.P.Tavade]
President

[S.T.Barne]
Judicial Member

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STATE CONSUMER DISPUTES REDRESSAL COMMISSION, MAHARASHTRA, MUMBAI

Complaint Case No. CC/11/78

Jyoti Avenue Co-operative Housing Society,
Having its office at: Plot No.291,
Shere-Punjab Society,
Mahakali, Andheri (E),
Mumbai 400 093. .....Complainant(s)

Versus

1. M/s.Jyoti Developers and Builders,
A partnership firm, having its office at:
102, Jyoti Dwelling Dr.Charat Singh Colony,
New Link Road, Andheri (East),
Mumbai 400 093,
Through its partner,
Atul Sachdev,
R/at: 170, Shere-E-Punjab Colony,
Mahakali, Andheri (East),
Mumbai 400 093.

2. Atul Sachdev,
R/at: 170, Shere-E-Punjab Colony,
Mahakali, andheri (E),
Mumbai 400 093.

3. Vikas Sachdev,
R/at: 170, Shere-E-Punjab Colony,
Mahakali, andheri (E),
Mumbai 400 093.

4. Sachdeva Housing Pvt. Ltd.,
Having office at:
102, Jyoti Dwelling Dr.Charat Singh Colony, ...Opponent(s)
New Link Road, Andheri (East),
Mumbai 400 093.
Through its Director,
Rakesh Sachdev,
R/at: 170, Shere-E-Punjab Colony,
Mahakali, andheri (E),
Mumbai 400 093.

5. Rakesh Sachdev,
R/at: 170, Shere-E-Punjab Colony,
Mahakali, andheri (E),
Mumbai 400 093.

6. Harishchandra Construction Pvt. Ltd.,
Having office at:
102, Jyoti Dwelling Dr.Charat Singh Colony,
New Link Road, Andheri (East),
Mumbai 400 093.

Through its Director,
Atul Sachdev,
R/at: 170, Shere-E-Punjab Colony,
Mahakali, andheri (E),
Mumbai 400 093.

7. Shere-E-Punjab Society Ltd.,
Having its office at: Mahakali,
Near Gurudvara, Andheri (E),
Mumbai 400 093.

BEFORE:

P.B. Joshi, Presiding Judicial Member
Dr.S.K. Kakade, Member

For the Complainant(s): **Advocate Mr.Uday Wavikar.**

For the Opponent(s): **Advocate Mr.Anand Patwardhan for opponent nos.2, 3 and 5.**

Advocate Mr.Digambar Thakare for opponent no.7.

ORAL ORDER

Per Hon'ble Mr.P.B. Joshi – Presiding Judicial Member:

(1) Complainant is a society of the flat purchasers constructed on C.T.S. No.368, Plot No.291, Shere-Punjab Society, Mahakali, Andheri (E), Mumbai 400 093. The members society before forming society have entered into agreement with opponent nos.1, 2, 3, 4 and 5 and

also with opponent no.6 by different flat purchasers. The opponent no.7 is a parent Co-operative Housing Society. First agreement for booking of the flat was in the year 1992 and thereafter from time to time different agreements were executed in favour of different purchasers. Entire consideration was paid by the purchasers from time to time. However, the society was not formed by the opponents and hence, the purchasers themselves have formed the society. The opponents have not obtained occupancy certificate and building completion certificate. The opponents have not executed conveyance in favour of the society. The opponents have not paid the outgoings on account of property taxes and water charges and hence, consumer complaint has been filed with the prayer that the opponent nos.1 to 6 be directed to execute the conveyance in favour of the complainant society, to transfer right, title and interest along with structure standing thereon in respect of the property situated on C.T.S. No.368, Plot No.291, Shere-Punjab Society, Mahakali, Andheri (E), Mumbai 400 093 admeasuring 1242 sq. meters. Complainant has also prayed that opponent no.7 be directed to transfer the share certificates in favour of the complainant and direct the opponent nos.1 to co-operate for the same. The complainant has also prayed that the opposite parties be directed to handover occupancy certificate, building completion certificates and other original documents lying with the opponents. Complainant also prayed that opponents be directed to reimburse Rs.70,000/- being the expenses incurred for getting permanent municipal drinking water connection along with interest @21% per annum from the date of payment i.e. from December, 1998 till realization. Complainant also prayed that opponent nos.1 to 6 jointly and severally be directed to reimburse Rs.50,03,967/- in respect of the property tax and Rs.6,56,805/- for water charges. Complainant also

prayed that opponents to reimburse Rs.1,15,522/- being the amount taken by opponent nos.1 to 6 for formation of society along with interest @21% per annum from the date of payment till realization. Complainant prayed that opponents be directed to pay Rs.5,00,000/- towards compensation for inconvenience, harassment and mental agony suffered by the complainant society.

(2) Opponent nos.2, 3 and 5 have filed their written version and resisted the complaint. It was contended that opponent nos.1, 4 and 6 are not in existence as they are already dissolved. It is not disputed that opponent nos.2 and 3 were partners of opponent no.1 and opponent no.5 was the director of opponent no.4 and opponent no.2 was also director of opponent no.6. The opponents have not disputed about the execution of agreements with the different flat purchasers, payment of consideration, however, contended that this Commission has no pecuniary jurisdiction to entertain the complaint. It was contended that the complaint is time barred. There is no deficiency in service on the part of the opponents. The opponents are not liable to pay any amount as claimed by the complainant and hence, it was also contended that complainant is not entitled for conveyance as claimed and hence, prayed for dismissal of the complaint.

(3) Opponent no.7 filed written version and contended that opponent no.7 is ready to give share certificate to the complainant and ready to execute the conveyance subject to clearance of dues. It was contended that opponent no.1 should comply for that and give all the necessary things. It was contended that opponent no.1 is member of opponent no.7.

(4) Considering the submissions made before us, considering the record and keeping in view the scope of the complaint, following points

arise for our determination and our findings thereon are noted for the reasons as below:-

Sr. No.	Points		Finding
(i)	Whether this Commission has pecuniary jurisdiction to entertain the complaint?	:	Yes.
(ii)	Whether there is deficiency in service on the part of the opponents?	:	Yes.
(iii)	Whether the complaint is barred by limitation?	:	No.
(iv)	Whether the complainant is entitled for the amounts claimed?	:	Yes. As per order
(v)	Whether the complainant is entitled for amount of Rs.5,00,000/- on account of compensation for the inconvenience, harassment and mental agony suffered by the members of the complainant society?	:	Yes. As per order.
(vi)	Whether the complainant is entitled for direction to opponents to obtain occupancy certificate, completion certificate and other documents?	:	Yes.
(vii)	Whether complainant is entitled for conveyance?	:	Yes.
(v)	What order?	:	As per final order.

REASONS:

Point no.(i) Pecuniary Jurisdiction:

(5) Advocate for the opponents has submitted that this Commission has no pecuniary jurisdiction to entertain the complaint as amount

claimed by the complainant is more than Rs.1 crore. Advocate for the opponents has given statement showing how the opponents have arrived at the amount of Rs.2,40,44,676.60 as valuation of the complaint. After perusing the said documents, we find that out of Rs.2,40,44,676.60 amount of interest shown in the said document is Rs.1,75,98,382.60. It is because of this amount only total comes to Rs.2,40,44,676.60. If this amount is not considered then valuation is within pecuniary jurisdiction of this Commission. Said interest is calculated @21% per annum from 8th October, 1998 till date of filing of the complaint i.e. 17/02/2011. The question remains, whether that amount can be considered? There cannot be any dispute that if the interest is claimed prior to filing of the complaint then it should be calculated till filing of the complaint and that should be considered for deciding the pecuniary jurisdiction of this Commission. So, it is necessary to consider the prayers made in the complaint. Prayer as far as pecuniary claims are concerned prayer (e) is about claiming Rs.70,000/- for the expenses incurred for getting permanent Municipal drinking water connection along with interest @21% from December, 1998 till realisation. In the calculations submitted by advocate for the opponents interest on the said amount is shown of Rs.1,91,100/-. Prayer clause (f) is also about the monetary claim where the complainant claimed that opponents be jointly and severally directed to reimburse the amount of Rs.50,03,967/- in respect of property tax and Rs.6,56,805/- towards water charges. However, in that prayer clause interest is not claimed on the said amounts. No doubt, in statement of claim it is mentioned that Rs.50,03,967/- as property tax along with interest @21% per annum from the date of payment calculated upto March, 2010. However, the calculation of the interest is not given in the statement of claim and the prayer of the interest on the said amount

is not mentioned in the prayer clause. So, only because in statement of claim it is mentioned 'along with interest' from the date of payment that cannot be considered. The reason is very simple that the statement of claim should be according to prayer clause only and hence, statement of claim is only for the purpose of valuation on the basis of the prayer made in the complaint. So, when the prayer of interest on Rs.50,03,967/- is not made in the prayer clause, there is no question of calculating interest on that amount and consider it for the valuation the complaint. So without that interest the valuation of claim is Rs.64,46,294/-, that is mentioned in the statement of claim filed along with the complaint and that is also mentioned in the document filed by Advocate of opponent. The only addition made in this calculation is interest, which is Rs.1,75,00,000/- and odd amount and it is because of that the said figure of Rs.2,40,44,676.60 has come and it was contended that this Commission has no pecuniary jurisdiction to prosecute the complaint. However, in view of above discussion it is very clear that in prayer clause complainant has not claimed interest on the said amounts, i.e. on Rs.50,03,967/- and Rs.6,56,805/-. Thus, it is very clear that the complaint filed by the complainant is correctly valued only for Rs.64,46,294/-. Hence, this Commission has pecuniary jurisdiction to entertain the complaint and hence, we answer point no.(i) in affirmative.

Point no.(ii) Deficiency:

(6) It is the contention of complainant that opponents have not obtained occupancy certificate, building completion certificate and have not formed the society. They have also not executed the conveyance and that is admitted position. So, there is clear-cut deficiency in service in not complying those statutory obligations. Hence, we answer point no.(ii) in affirmative.

Point nos.(iii) Barred by limitation and (iv) Entitlement of amount claimed:

(7) Complainant claimed that amount of Rs.50,03,967/- was paid by the complainant for property tax and amount of Rs.6,56,805/- was paid for water charges which opponents were under obligation to pay. It was submitted that complainant was compelled to pay said amount to avoid auction of the property and disconnection of the water supply. The complainant has filed the documents about payment of the said amount. The documents are at page nos.288 to 293. These documents are the extract of the accounts maintained by society for payment of property tax and water charges from time to time and the total is shown on page 293 as Rs.50,03,967/- on account of municipal taxes and Rs.6,56,805/- as water charges. It was submitted that the payment was made by cheques and cheque numbers are also mentioned on those documents. It was contended that it is the duty of the opponents to pay all these charges till the conveyance is executed or at least obtaining of occupancy certificate. The advocate for complainant has drawn our attention to Section 6 of Maharashtra Ownership of Flats (Regulation of the Promotion of Construction, Sale, Management and Transfer) Act, 1963 (hereinafter referred to as 'MOFA' for the sake of brevity) and contended that as per the said provision it is the liability of the opponents to pay all these charges and taxes. The Ld.Advocate for the opponents has contended that the liability of opponents is there when the opponents are in possession. It was contended that the possession is already handed over to the flat purchasers and hence, opponents are not liable to pay any amount as claimed by the complainant. So, it is necessary to go through Section 6 of MOFA, which reads as under:

SECTION 06: RESPONSIBILITY FOR PAYMENT OF OUTGOING TILL PROPERTY IS TRANSFERRED:

A promoter shall, while he is in possession and where he collects from persons who have taken over flats or are to take over flats sums for the payment of outgoings even thereafter, pay all outgoings (including ground rent, municipal or other local taxes, on income taxes, water charges, electricity charges, revenue assessment, interest on any mortgage other encumbrances, if any), until he transfers property to the persons taking over the flats, or to the organisation of any such persons, where any promoter fails to pay all or any of the outgoings collected by him from the persons who have taken over flats or are to take over flats, before transferring the property to the persons taking over the flats or to the organisation of any such persons, the promoter shall continue to be liable, even after the transfer of the property, to pay such outgoings and penal charges (if any) to the authority or person to whom they are payable and to be responsible for any legal proceedings which may be taken therefor by such authority or persons.

(8) The Advocate for the opponents has given stress on the words "*while he is in possession and where he collects from persons who have taken over flats*". It was submitted that, here in the present case the opponents have not collected any amount from the complainant except for formation of society and possession is already given to the members of complainant society and hence, the opponents are not liable to pay any outgoings as per Section-6 of MOFA. It is not disputed that the members of the opponents are in possession of the flats. However, it was contended that it was not a

legal possession and hence, flat purchasers cannot be considered as in possession in the eyes of law and for the purpose of Section 6 of MOFA. As per section 3(2)(i) of MOFA promoter shall not allow person to enter into possession until a completion certificate is duly given by the local authority. Herein the present case it is admitted position that no completion certificate and occupancy certificate are issued by the concerned authority. So, without obtaining such completion certificate and occupancy certificate, no possession can be given and law mandates that the promoter shall not allow any person to enter into possession until the completion certificate is obtained. No doubt, it is also mentioned in the said provision that no person shall take possession of the flat until such completion certificate has been duly given by the local authority. So, it is also necessary for the flat purchasers not to take possession or not to enter into flat unless occupancy certificate is obtained. However, it is material to note that Section 3 of MOFA is about general liability of the promoter. So, it is the liability of the promoter that he shall not allow any person to enter into any possession until he obtains occupancy certificate and building completion certificate. It is statutory duty of the promoter to obtain occupancy certificate and building completion certificate and then only he should allow anybody to enter the flat.

(9) It was submitted that possession of the flats was given to the purchasers for furnishing i.e. fit-out possession. However, there is no such concept in the law and hence, the said contention cannot be accepted.

(10) It was contended that the flat purchasers have done some illegal construction in the flats or outside the flats and it is because of that the Corporation is not giving occupancy certificate and completion

certificate. So, it is because of the flat purchasers the opponents are not getting occupancy certificate and building completion certificate. We find that, in most of the cases it is the defence of the promoter that the flat purchasers have taken the possession for furnishing or fit-out possession and continued in possession and have done some alteration which is not allowed and hence, Corporation is not giving occupancy certificate and building completion certificate. However, the promoter cannot take such defence for the simple reason that the law mandates that, he should not handover possession to the flat purchasers unless he obtains building completion certificate. It is the duty of the promoter to complete the construction in all respects, to obtain building completion certificate and then only handover possession to the flat purchasers. Therefore, if any alteration or addition is done by the flat purchasers, in that case the flat purchasers would be responsible. Here in the present case when the promoter is allowing somebody to enter the flat without obtaining completion certificate and now saying that purchasers have done some modification which is not in the plan and hence, promoter cannot get the completion certificate and occupancy certificate as the Corporation is not giving because of the illegal or unauthorised act of the flat purchasers, cannot be accepted. So, it is very clear that the contention of the opponents that as the member of the complainant society are in possession and opponents are not in possession and hence, Section-6 of MOFA is not applicable cannot be accepted. No doubt, in Section-6 of MOFA it is also mentioned that '*where he collects from persons who have taken over flats*'. It means the promoter can collect the amount for payment of outgoings from the persons who have taken over the possession of the flat after obtaining occupancy certificate and building completion certificate. If after obtaining occupancy certificate and building completion

certificate the possession is given then it is the liability of the occupier to pay necessary charges and the promoter can collect those charges for paying to the Corporation till the conveyance is executed and after execution of conveyance no question of collecting any amount by the promoter from the purchasers. So for this period after obtaining occupancy certificate and before execution of conveyance the promoter can collect money from the occupier for payment to the concerned authority. Here, we have already mentioned that the opponents have not collected any money for payment of charges. However as legal possession is not given, occupancy certificate and building certificate are not obtained it is the liability of the promoter i.e. opponent nos.1 to 6 to pay all outgoings. We have already referred above and discussed about the claim of Rs.50,03,967/- on account of property tax and Rs.6,56,805/- on account of water charges which were paid by the flat purchasers the members of the society and it is liability of the opponent nos.1 to 6 to pay the said amount to the complainant.

(11) The advocate for the opponents has argued that those amounts i.e. taxes since 1992-93 and hence, those are time barred as not claimed within two years. It is admitted fact that complaint is filed in the year 2011. We again go to the provisions of Section-6 of MOFA and as per said Provision it is the liability of the promoter to pay all outgoings till conveyance is executed. It means that the promoter shall continue to be liable even after the transfer of the property to pay such outgoings. It means even if the conveyance is executed and if any arrears are there to be paid on account of outgoings it is for the promoter to pay those outgoings even after the execution of the conveyance. It means law mandates that the promoter shall pay that amount and he is continued to be liable to pay that amount. It

means it is a continuous cause of action as it is a statutory obligation of the promoter and hence, it cannot be said that amount claimed is barred by limitation.

(12) Complainant claimed the amount of Rs.1,15,522/- collected by the opponents from the flat purchasers for formation of the society. However, the opponents have not formed the society and the flat purchasers themselves have formed the society and it is not disputed by the opponents. Thus, it is very obvious that the opponents should return the said amount as that was collected for formation of society and that was not formed by the opponents, but, it was formed by the flat purchasers. That is also statutory duty on the part of the promoter to form the society and hence, if the amount is collected for formation of society and it is not formed then it is statutory duty to return that amount. Hence, complainant is entitled for that amount also.

(13) The complainant claimed Rs.70,000/- paid for getting permanent water connection. However, advocate for the complainant has submitted that complainant is not pressing the said amount as complainant is not having any documentary evidence to that effect and hence, complainant is not entitled to get amount of Rs.70,000/- on account of water connection charges and interest thereon.

(14) In view of above discussion the complainant is entitled for amount of Rs.50,03,967/- on account of property tax, amount of Rs.6,56,805/- on account of water charges and amount of Rs.1,15,522/-collected for formation of society. Hence, we answer this point accordingly.

Point No.(v) Compensation for inconvenience, harassment and mental agony:

(15) Complainant claimed Rs.5,00,000/- on account of mental agony suffered by the members of the society. The advocate for the opponents has submitted that the complainant is a society and there is no question of any mental agony to the complainant. However, it is material to note that the members of the society have suffered mental agony as the first booking was in the year 1992 and till today they could not get occupancy certificate, building completion certificate and conveyance and they were required to knock the door of this Commission for getting relief. Hence, complainant society's members must have suffered mental agony. There are 22 members in the society and they are claiming Rs.5,00,000/- on account of mental agony. Considering the members of the society we find it proper to grant the said amount as claimed. Hence, we answer point no.(v) accordingly.

Point No.(vi) occupancy certificate and building completion certificate:

(16) The complainants claimed that opponents be directed to obtain occupancy certificate and building completion certificate as that is statutory duty of the opponents/promoter. We have already discussed above the defence taken by the opponents that the purchasers have done some illegal act in the flats or outside the flats and that is why the Corporation is not giving occupancy certificate and building completion certificate. We have already discussed above that it was necessary for the opponents to construct the building in all respects, obtain occupancy certificate and building completion certificate and then only handover the possession of the flats and for which also law mandates. So flouting the law the

possession is given then he has to face the consequences and hence, it is the duty of the opponents to obtain occupancy certificate, building completion certificate and other necessary documents and handover to the complainant. Hence, we answer point no.(vi) accordingly.

Point no.(vii) Execution of conveyance:

(17) It was contended by advocate for the complainant society that opponent no.1 is a partnership firm who has entered into an agreement with flat purchasers. It was contended that opponent no.1, opponent no.4 and opponent no.6 have jointly decided to construct the building for the purchasers. Advocate for the complainant has drawn our attention to page 74, 75 and 76. It is the part of the agreement and that document shows that what part of construction is to be done by opponent no.1, what part is to be done by opponent no.4 and what part is to be done by opponent tno.6. So, they are promoters. It was contended by the advocate for opponents that opponent no.1 was partnership firm. It was already dissolved. However it is not disputed that opponent nos.2 and 3 were the partners of the said firm. So, it is very clear that though the partnership firm is dissolved the liability is continued with the partners or it is for them to show that who has taken liability of the partnership firm. There is no documentary evidence to show that somebody has taken the liability of the said partnership firm and in absence of the same those partners i.e. opponent nos.2 and 3 who were the partners of opponent no.1 are under obligation to comply all necessary things which were to be done by opponent no.1 as partnership firm.

(18) Opponent nos.4 and 6 were the private limited companies. It was submitted that those are already wound up. However, it is not disputed that opponent no.5 was the Director of opponent nos.4 and opponent no.2 was director of Opponent no.6. So even if the Company is wound up the Director has liability to comply the liability unless otherwise shown. Here nothing is shown who has to comply the liability of the company and hence, opponent nos.4 and 5 are liable for that. It is necessary to consider Section 11 of MOFA which reads as:

SECTION 11: PROMOTER TO CONVEY TITLE, ETC. AND EXECUTE DOCUMENTS, ACCORDING TO AGREEMENT:

" A promoter shall take all necessary steps to complete his title and convey to the organisation of persons, who take flats, which is registered either as a co-operative society or as a company as aforesaid or to an association of flat takers or apartment owners, his right, title and interest in the land and building, and execute all relevant documents therefor in accordance with the agreement".

(19) It was submitted that opponent nos.1, 4 and 6 were the members of original society – opponent no.7 and that is not disputed. Thus, it is for the opponent nos.1 to 6 to take all necessary steps for execution of the conveyance in favour of the complainant society. It is also necessary for them to take all necessary steps for getting the share certificate by the complainant from opponent no.7. Opponent no.7 is ready to issue share certificate and even execute conveyance provided opponent no.1 should do the necessary things for that. So, it is the liability of opponent nos.1 to 6 to do all necessary things which are necessary for getting share certificate by the complainant society and for getting conveyance by complainant society. Hence, we answer point no.(vii) accordingly.

(20) In view of answer to point nos.(i) to (vi) the consumer complaint deserves to be partly allowed and hence, we pass the following order:

ORDER

(i) Consumer complaint is partly allowed with costs quantified at Rs.25,000/- (Rupees Twenty Five Thousand only) to be paid by the opponent nos.1 to 6 jointly and severally to the complainant.

(ii) Opponent nos.1 to 6 are jointly and severally directed to pay to the complainant Rs.57,76,024/- (Rupees Fifty Seven Lacs Seventy Six Thousand Twenty Four only) (i.e. Rs.50,03,967/- on account of property tax, Rs.6,56,805/- on account of water charges and Rs.1,15,522/-collected for formation of society) within two months from the date of this order. In default the amount of Rs.57,76,024/- shall carry interest @12% per annum from the date of this order till realisation.

(iii) Opponent nos.1 to 6 are jointly and severally directed to pay to the complainant Rs.5,00,000/- (Rupees Five Lacs only) as compensation for inconvenience, harassment and mental agony suffered by the members of the complainant society.

(iv) Opponent nos.1 to 6 are jointly and severally directed to obtain occupancy certificate, building completion certificate and handover all necessary documents to the complainant.

(v) Opponent nos.1 to 7 are jointly and severally directed to do all necessary things for execution of conveyance in favour of the complainant within two months from the date of this order.

(vi) Copies of this order be given to the parties free of costs.

Pronounced on 24th October, 2018.

[P.B. Joshi]
Presiding Judicial Member

[Dr.S.K. Kakade]
Member

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BEFORE THE HON'BLE STATE CONSUMER DISPUTES REDRESSAL COMMISSION, MAHARASHTRA, MUMBAI

Complaint Case No. CC/05/109

Lilac Garden Co-op. Hsg. Society
Regd. Office at C.T.S. No.200, 201 & 204,
Charkop, Kandivali (West),
Mumbai – 400 067.
.....Complainant(s)

Versus

M/s.M.S. Shah & Ors.
102/B3 Building, Mapkhan Nagar,
Marol Naka, Andheri (East),
Mumbai – 400 059.
.....Opp. Party(s)

BEFORE:

P. B. Joshi PRESIDING JUDICIAL MEMBER
Dhanraj Khamatkar MEMBER

For the Complainant:	Ms.Smita Gaidhani, Advocate for the complainant.
For the Opponent:	None present for the opponents.

ORDER

Per Shri P.B. Joshi, Hon'ble Presiding Judicial Member

Complainant co-operative Housing Society Ltd. has filed a consumer complaint against the opponents-builder/developer for different reliefs. Members of the complainant-Society booked flats with the opponents and paid the entire consideration. Possessions of the flats were given during period 1995-1996. However, occupation certificate has not been obtained by the opponents. Conveyance Deed has not been executed by the opponents in favour of the complainant-Society. Money was collected from the flat purchasers by the opponents for formation of the society. However, society was not formed by the opponents. Water connection was not supplied to the flat purchasers by the opponents. Members of complainant-Society spent Rs.6,14,280/- for getting water through Tanker during period 1998-2000. In 2001 flat purchasers got

water connection on humanitarian ground for which they have paid huge amount of Rs.19,33,942/- in absence of occupation certificate. Members of the complainant-Society are paying ¼ higher property taxes from 1998. Complainant-Society filed consumer complaint for claiming occupation certificate, conveyance deed and different amounts on different counts, for direction to opponent for providing amenities. Complainant-Society also claimed Rs.59,000/- as spent on rent of office of the Society. Complainant-Society claimed total amount of Rs.69,62,018/-.

2. Opponent resisted the complaint by filing written version. Opponent has contended that the opponent is not owner of the plot where construction is made. There is no contract or understanding or any obligation casted on the opponent for providing any services whatsoever to the complainant. Complaint is not maintainable. It was contended that the original owner of the land is not made party to the complaint and hence, complaint cannot be allowed for want of necessary party. It was also contended that complaint is time-barred. It was further contended that Writ Petition No.311/2002 was filed by the complainant-Society and for the same relief consumer complaint cannot be filed. It was contended that amounts which are lying with the opponent for society formation, etc. opponent is ready and willing to give to the original flat purchasers and shop purchasers on taking account. Opponent has contended that the opponent is agreeing to carry out said work even as on today and also ready and willing to carry out said work in the said complainant-Society building as more particularly, mentioned in the terms and conditions of settlement. Opponent has prayed for dismissal of the complaint.

3. Considering the rival contentions of the parties, considering the record and keeping in view the scope of the complaint, following points arise for our determination and our findings thereon are noted for the

reasons as below :-

Sr.No.	Points	Finding
1.	Whether complaint is bad for non-joinder of necessary party?	No
2.	Whether complaint is barred by res-judicata?	No
3.	Whether complaint is barred by limitation?	No
4.	Whether there is deficiency in service on the part of opponent?	Yes
5.	Whether complainant is entitled for conveyance to be executed by the opponent in favour of complainant-society?	Yes
6.	Whether complainant is entitled for occupation certificate?	Yes
7.	Whether complainant is entitled for amenities as claimed?	Yes
8.	Whether complainant is entitled for amounts as claimed in the complaint?	Yes, as per final order.
9.	What order?	Complaint is partly allowed.

REASONS :-

4. Point No.1 :- It is the contention of the opponent that original owner of the land is not made party to the complaint and opponents have no power to execute conveyance as relief of conveyance is sought, the original owner is necessary party and as original owner is not made party, complaint is bad for non-joinder of necessary party. Learned Advocate for the complainant has submitted that opponents entered into agreement with the flat purchasers, members of the complainant-Society. Power of Attorney was executed by original owner of the land in favour of the opponents and that power of attorney is on record. By way of that power of attorney, opponents have every right in respect of land, development, sale and conveyance. Hence, opponents can very well execute the conveyance in favour of the complainant-Society. In view of this

submission, we find that the original owner is not a necessary party as he has already executed power of attorney in favour of the opponents and hence, there is no substance in the contention of the opponents that the complaint is bad for non-joinder of necessary party. Hence, we answer Point No.1 in negative.

5. Point No.2 :- It is the contention of the opponents that one Writ Petition was filed by the complainant-Society before Hon'ble High Court and hence, consumer complaint cannot be filed for the same reliefs. Copy of said Writ Petition is not filed on record. However, order of Writ Petition is filed on record. After going through said order, we find that contention of the opponent cannot be accepted. The reason is that the point raised in that Writ Petition that respondent No.5 should not run Hotel without obtaining proper licence/permission of B.M.C. and statement was made by Advocate of respondent No.5 that respondent No.5 will not run Hotel without obtaining licence. It was further directed to respondent Nos.1to4 that any proposal made by respondent No.5 for construction on the land earmarked as garden shall not be granted without giving notice of hearing to the petitioner. It was further observed that if after hearing the petitioner any permission is granted by respondent Nos.1to4 to respondent No.5 for construction on the land earmarked as garden, such sanction shall not come into effect for period of six weeks from the date of communication of such sanction to the petitioner. The contentions of the petitioner as well as respondent No.5 are kept open to be agitated before the B.M.C. as well as any subsequent proceeding, if any. Thus, in view of that order, it is very clear that said Writ Petition was not for the reliefs for which present consumer complaint is filed and hence, there is no question of res-judicata. Hence, we answer Point No.2 in negative.

6. Point No.3 :- Opponents have contended that complaint is time-

barred. However, we find that relief of conveyance, relief of occupation certificate are statutory obligations and point of limitation cannot be raised at least in respect of those two reliefs. As far as common amenities are concerned, we find that even in that respect, point of limitation cannot be raised as occupation certificate is not obtained and that is sought by way of this complaint. Conveyance is also not executed. Common amenities are to be provided to the complainant-Society at least at the time of conveyance. Admittedly, conveyance is not executed and hence, it cannot be accepted that the complaint is time-barred as far as common amenities are concerned. The complainant claimed different amounts on different counts. Complainant claimed payment made to the B.M.C. towards property taxes. Complainant claimed money collected by the opponents for formation of society. Complainant claimed money collected by the opponents from members of the complainant-society under clause 16 of the agreement. Amount paid as higher property taxes, amount paid to B.M.C. as land tax, amount paid for obtaining water connection, amount paid for water meter renewal charges and amount paid for water taxes, amount paid on account of non-agricultural taxes, garden equipment, notice board & letter box charges, amount paid by the complainant for rent of the office. We find that all these amounts cannot be said to be time-barred as conveyance is not yet executed and till that time it is responsibility of the opponents as promoter/builder to pay. Hence, we find that it cannot be said that complaint is time-barred.

7. Point No.4 :- As far as deficiency of service is concerned, it is very clear that occupation certificate is not obtained, conveyance is not executed, common amenities were not provided. It is mentioned in the written version itself that opponents are ready and willing to repay the amount lying with them for formation of society, etc. It makes position very clear that the society was not formed by opponents but it was formed

by the flat purchasers and that is deficiency in service on the part of opponents. Not returning the amount collected for that purpose is also a deficiency on the part of opponents. Para xii of the written version makes the position clear that garden, club house and other amenities were not provided by the opponents to the complainant and that is also deficiency on the part of the opponents. It is mentioned in the same para that opponents are ready to carry out said work and that makes the position very clear that there is deficiency on the part of opponents on that count also. Thus, there is deficiency on the part of opponents as contended by the complainant. Hence, we answer Point No.4 in affirmative.

8. Point Nos.5&6 :- As far as conveyance and occupation certificate are concerned, it is statutory liability of the opponents. Opponents have not denied the liability. However, opponents have not complied the liability. Hence, complainant is entitled for conveyance. No doubt, it was contended by the opponents that land is not owned by the opponents and hence, they have no authority to execute the conveyance. However, we have already discussed above in Point No.1 that power of attorney was executed by original land owner in favour of the opponents and in view of that power of attorney; opponents have every right and authority to execute conveyance. Thus, complainant is entitled for conveyance from the opponents and complainant is also entitled for occupation certificate which should be obtained by the opponents and should be given to the complainant-Society. Hence, we answer Point Nos.5&6 in affirmative.

9. Point No.7 :- As far as common amenities are concerned, those are mentioned in the agreement executed by the opponents in favour of each flat purchaser i.e. members of the complainant-Society. It is not contention of the opponents that those common amenities were supplied or provided. On the contrary as we have referred above, it is the contention

of the opponents that some of the flat purchasers obstructed the opponents in the work of those common amenities. It was further contended that opponents are ready and willing to supply or provide those amenities and carry out work of said amenities. Hence, complainant is entitled for all common amenities as mentioned in the complaint. Hence, we answer Point No.7 in affirmative.

10. Point No.8 :- Complainant-Society claimed an amount of Rs.2,46,265/- on account of payment made to the B.M.C. towards property tax. Complainant-Society claiming said amount as conveyance is not executed and till that time, opponent is liable to pay the property tax. However, it is material to note that the complainant-Society has not filed any receipt about payment of said tax. No doubt, some correspondence is on record about it. It was submitted that the opponent has not specifically denied about said payment made by the complainant to the B.M.C. However, we find that there is no specific admission about it by the opponent. In that situation it was necessary for the complainant-Society to file receipts about said payment. In absence of any receipt, said claim of the complainant-Society cannot be accepted.

11. Complainant-Society claimed Rs.14,52,450/- on account of amount collected as per clause 16 of the agreement from 138 members of the complainant-Society. Clause 16 shows different amount on different counts. Opponent in written version has admitted about the amount collected from the members of the complainant-Society. In the written version, opponent has mentioned about clause 16A of the agreement executed with the various flat purchasers. It is also further admitted that the amounts were received by the opponent from the flat purchasers. It was contended that the opponent will produce all necessary documents proving expenses incurred by the opponent under various heads. The

opponents further submitted that the amount which were lying deposited with the opponents for society formation, etc. opponents are ready and willing to repay the said amount to original flat/shop purchasers on taking accounts. However, it is material to note that no evidence is brought on record by the opponents to support expenditure made by the opponents after collection of the amount from members of the complainant-Society. Society is not formed by the opponents, but it was formed by purchasers-members of the complainant-Society themselves as contended by the complainant-Society. It was also contended by the complainant-Society that the opponents did not spend the amount for which the amount was collected from members of the complainant-Society. As discussed above, opponents have contended that the amount was spent and the opponents will file necessary documents. However, no document to support said contention is filed on record and hence, the complainant-Society is entitled for said amount of Rs.14,52,450/-.

12. Complainant-Society claimed amount of Rs.84,000/- collected from members of the complainant-Society for maintenance. It was contended by the complainant-Society that the opponents have not spent any amount on maintenance and members of the complainant-Society spent amount on the maintenance. No evidence is filed by the opponents to show that said amount collected from members of complainant-Society are spent on maintenance. In the written version, opponents have not disputed about collection of the amount from the flat purchasers-members of the complainant-Society. However, no evidence to show that said amount was spent for which it was collected. Hence, complainant-Society is entitled for Rs.84,000/- on this count.

13. Complainant-Society claimed amount of Rs.6,14,280/- on account of expenses incurred on water tankers. It was contended that because of

deficiency on the part of opponents for supplying sufficient water, said expenses were incurred by members of the complainant-Society. Those receipts are at page-610to627 of complaint compilation. However, total of these receipts comes to Rs.6,09,660/- and hence, complainant-Society is entitled for said amount and not for the amount claimed in the complaint.

14. Complainant-Society claimed amount of Rs.2,58,127/- spent for water connection on humanitarian ground. Complainant-Society also claimed amount of Rs.59,652/- on account of water meter renewal charges paid to the B.M.C. for 1999-2001. Receipts about said payments are at page-628to729 of complaint compilation. It was contended that it was obligation of the opponents to give adequate water connection. However, because of deficiency on the part of opponents, on humanitarian ground the members of the complainant-Society have taken water connection and spent Rs.2,58,127/-. Hence, complainant-Society is entitled for the said amount. Complainant-Society is also entitled for amount of Rs.59,652/- incurred by complainant-Society on account of water meter renewal charges paid to the B.M.C. for 1999-2001.

15. Complainant-Society claimed amount of Rs.2,22,238/- on account of enlarge water connection expenses incurred in the year 2004. Receipts about the said expenses are at page-730to736 of complaint compilation. We find that possession was taken by the flat purchasers-members of the complainant-Society long back and therefore, the expenses incurred by the complainant-Society in April 2004 on account of enlarge water connection cannot be granted.

16. Complainant-Society claimed amount of Rs.7,79,645/- on account of excess water tax till March 2005. Said amount was incurred as Occupation Certificate was not obtained by the opponents. Receipts are at page-412to562 of complaint compilation. As Occupation Certificate was

not obtained by the opponents, complainant-Society is entitled the said amount. However, total of receipts filed on record comes to Rs.7,30,369/-. Hence, complainant-Society is entitled for Rs.7,30,369/-.

17. Complainant-Society claimed amount of Rs.22,82,664/- on account of ¼ higher property tax paid since 1998 to 2005 as Occupation Certificate was not obtained by the opponents. Receipts of said payment are at page-566to599 of complaint compilation. Total amount paid is Rs.81,25,236/- and ¼ of said amount comes to Rs.20,31,309/-. ¼ excess amount was charged by B.M.C. and paid by the flat purchasers-members of complainant-Society only because Occupation Certificate was not obtained by the opponents. Hence, complainant-Society is entitled for amount of Rs.20,31,309/- for which receipts are filed on record.

18. Complainant-Society claimed amount of Rs.2,46,717/- on account of land tax paid to the B.M.C. There is no receipt found on record to support said claim of complainant-Society. Hence, complainant-Society is not entitled for the said amount.

19. Complainant-Society claimed amount of Rs.26,091/- on account of non-agricultural tax. Receipts about it are at page -602to608 of complaint compilation. Complainant-Society is entitled for said amount as it was responsibility of the opponents.

20. Complainant-Society claimed amount of Rs.29,090/- on account of garden equipments which were purchased by the complainant-Society though it was duty of the opponents to provide those equipments. Bills and receipts about said payment are at page-737&738 of complaint compilation. As per amenities, it was necessary for the opponents to provide those garden equipments and hence, complainant-Society is entitled for the said amount.

21. Complainant-Society claimed amount of Rs.6,38,079/- on account of work of waterproofing as that was to be done because of deficiency on the part of opponents. Opponents in written version have stated that they are ready to do all necessary repairs. However, that was not done. Hence, complainant-Society has done it. However, receipts filed on record are of the amount of Rs.5,27,455/-. Hence, complainant-Society is entitled for amount of Rs.5,27,455/- only.

22. Complainant-Society claimed amount of Rs.32,720/- on account of Notice Board and Letter Boxes. As per amenities it was necessary for the opponents to provide Notice Board and Letter Boxes. However, that was not done by the opponents and hence, complainant-Society has spent for that and receipts are at page-777&778 of complaint compilation. Hence, complainant-Society is entitled for the said amount.

23. Point No.9 :- In view of answers of Point Nos.1to8, consumer complaint deserves to be allowed partly. Hence, we pass the following order :-

-: ORDER :-

1. Consumer complaint is partly allowed.
2. Opponents are directed to execute Conveyance Deed in favour of complainant-Society and also to obtain & hand over Occupation Certificate to the complainant-Society within three months from the date of order, failing which opponents shall pay Rs.500/- per day to the complainant-Society till compliance.
3. Opponents are directed to provide all the amenities to the complainant-Society as mentioned in the agreement executed by the opponents in favour of each flat purchaser i.e. members of complainant-Society.
4. Opponents are directed to pay Rs.58,40,923/- (Rupees Fifty-Eight

Lakhs Forty Thousand Nine Hundred Twenty-Three only) to the complainant-Society within forty-five days from the date of order, failing which the amount shall carry interest @ 9% p.a. till realization.

5. Opponents should pay Rs.15,000/- (Rupees Fifteen Thousand only) to the complainant-Society towards costs of this complaint.

6. One set of the complaint compilation be retained and rest of the sets be returned to the complainant-Society.

7. Copies of the order be furnished to the parties.

Pronounced
Dated 23rd September 2016

[P. B. Joshi]
PRESIDING JUDICIAL MEMBER

[Dhanraj Khamatkar]
MEMBER

dd.

Gaidhani
Adv. for complainant
23/9/16

Received copy
for [signature] Nilesh Gord 20/10/2016 @ 3:40 pm
Adv. Smita gaidhani
adv. for complainant.

BEFORE THE HON'BLE STATE CONSUMER DISPUTES REDRESSAL COMMISSION, MAHARASHTRA, MUMBAI

Complaint Case No. CC/12/13

1. Shrimankar Gas Car Services P. Ltd.
Situated at Old Jakaria Bunder Road,
Opp. Nav Bharat Potteries,
Near Sewri Railway Station,
Sewri (W), Mumbai – 400 015.

2. Bajaj Allianz General Insurance Co. Ltd.
Head Office at GE Plaza,
Airport Road, Yerwada, Pune-411 006.

.....Complainant(s)

Versus

Conware, Container Freight Station
At Plot No.2, Sector-2,
Dronagiri Node, Navi Mumbai-400 707. .....Opp.Party(s)

BEFORE:

Usha S. Thakare PRESIDING JUDICIAL MEMBER
P. B. Joshi JUDICIAL MEMBER

For the Complainant: Mr.Sanjit Shenoy, Advocate for the complainants.

For the Opponent: Mr.Pritish Chatterji, Advocate for the opponent.

ORDER

Per Shri P.B. Joshi, Hon'ble Judicial Member

First complainant is a limited company incorporated under the Indian Companies Act. Second complainant is Insurance Company. Opponent is engaged in business of Container Freight Station (CFS) for terminal services like container handling and allied activities in relation to the warehousing of international cargo. Complainant No.1 had imported from Italy to Mumbai the cargo of 3 Pallets consisting of 'STC CNG Kit Parts' of 'Compatible Laser Catridges Parts' that were taken into the custody by the opponent for cargo handling services. Complainant No.1's cargo was de-stuffed by the opponent at their Container Freight Station (CFS). However, on 31/01/2010 because of fire entire goods were

destroyed. First complainant duly lodged monetary claim upon the opponent on 25/02/2010 calling upon the opponent to reimburse the first complainant the value of said cargo which was completely gutted in fire. Opponent wilfully failed to reimburse the loss of cargo while in the custody of opponent. The complainant No.2 appointed Subhash Chander & Associates firm of Surveyors to confirm the destruction of first complainant's cargo. The destruction of cargo has been confirmed by survey report. The opponent confirm the loss caused to the consignment vide damage delivery certificate dated 19/03/2010. First complainant had taken a marine insurance policy from second complainant to cover risk of said consignment during its transit. Second complainant settled the claim of first complainant under said insurance policy for a sum of Rs.19,74,144/- towards full and final settlement of its claim. First complainant in pursuance of payment received from second complainant executed a letter of subrogation and special power of attorney in favour of second complainant for Rs.18,87,702/-. By virtue of subrogation, second complainant is subrogated to all the rights and remedies accrued to the first complainant against opponent's responsibility for loss of insured consignment. Second complainant is entitled to claim from opponent the sum to the extent of amount paid by second complainant to first complainant. As the opponent had not satisfied the claim of first complainant for the loss of goods while in custody of opponent, there is deficiency on the part of the opponent. Hence, on the basis of subrogation letter and special power of attorney, complainant No.2 along with complainant No.1 filed a consumer complaint against the opponent and claimed Rs.18,87,702/- with interest @ 18% p.a. from the date of loss of the goods till realization. Complainants also claimed Rs.50,000/- as costs and Rs.2 Lakhs as damages.

2. Opponent resisted the complaint by filing written version.

Opponent has not disputed about receipt of goods from complainant No.1 and stored in the warehouse of opponent. Opponent has also not disputed about fire and destruction of the goods. However, opponent has contended that complaint is filed against Conware, Container Freight Station. It was contended that there is no entity named Conware, Container Freight Station. The Punjab State Container and Warehousing Corporation Ltd. set up a Container Freight Station in the address set out in the cause title. The complaint deserves to be dismissed on this count alone.

3. Opponent has contended that complainant is not a consumer as defined under Section 2(1)(d) of Consumer Protection Act, 1986. Opponent has contended that opponent has entered into an Operation and Management Agreement with Gateway Distriparks Ltd. granting in favour of Gateway the right to exclusively operate, maintain the CFS and carry on permitted activities as more particularly set out in O & M Agreement including handling of consignments of import and export including containers. Complaint is bad for non-joinder of necessary party as Gateway is not added as party. It was further contended that there is no privity of contract between first complainant and opponent as opponent has been appointed as custodian under Section 45 of Customs Act.

4. It was contended that all the steps were taken by the opponent for prevention of damage due to said fire. Opponent has contended that damage delivery certificate dated 19/03/2010 was issued without prejudice by the opponent on the specific request for the purpose of enabling lodgement of claim with whom the subject consignment was insured. Opponent prayed for dismissal of the complaint.

5. Considering the rival contentions of the parties, considering the record and keeping in view the scope of the complaint, following points arise for our determination and our findings thereon are noted for the

reasons as below :-

Sr.No.	Points	Finding
1.	Whether complainants are consumers as contemplated under Section 2(1)(d) of Consumer Protection Act, 1986?	No
2.	Whether consumer complaint is tenable?	No
3.	Whether complaint is bad for non-joinder of necessary party?	Does not arise
4.	Whether there is deficiency in service on the part of opponent?	Does not arise
5.	Whether complainants are entitled for the amount claimed?	No
6.	What order?	Complaint is dismissed.

REASONS

6. Point No.1 :- Most of the facts are admitted. Goods were imported by the complainant No.1 and were given in the custody of opponent. It is admitted that on 31/01/2010 goods were gutted in fire when the goods were in the custody of opponent. Defence of the opponent is that complainant No.1 is not a consumer as he availed the services for commercial purpose. Advocate for the complainants has submitted that the services were not availed for the commercial purpose. He has relied on so many authorities to support his contention. Learned Advocate for the complainants has submitted judgment of this Commission dated 07/10/2013 passed in First Appeal No.1106/2010 [*WSA Shipping (Bombay) Pvt. Ltd. V/s. Advanced Enzyme Technologies Ltd.]*. It was observed in the said judgment that the Apex Court explained the principle of liability of common carrier as per provisions of Section 9 of the Carriers Act, 1865 holding that the common carrier in India is equivalent to an Insurer. In case of insurance policy, in the matter of *Harsolia Motors V/s. National Insurance Company, I(2005) CPJ 27(NC)*, Hon'ble National

Commission has held that a person who avails insurance policy to cover risk does not take the policy for commercial purpose. Policy is only for indemnification of actual loss. It is not intended to generate profit. Relying on these observations, this Commission has held in the case before this Commission that contention of the appellant that respondent is not a consumer within meaning of Section 2(1)(d) of Consumer Protection Act, 1986 is not tenable.

7. Learned Advocate for the complainants also submitted judgment dated 21/06/2013 of this Commission in Appeal No.968/2010 *(Mysore Silk International Ltd. V/s. DTDC Worldwide Express Ltd.)*. In the said judgment it was observed that – *"Since the liability is that of insurer and considering the nature of services hired of the carrier, it cannot be said that it had nexus with profit and loss of the complainant. Services hired are not for commercial purpose. A useful reference on the point can be made to a ratio decidendi decision of the National Commission in the matter of Harsolia Motors V/s. National Insurance Company, I(2005) CPJ 27(NC)."*

8. Learned Advocate for the complainants has also submitted judgment of the State Consumer Commission Delhi in consumer complaint No.41/2003 dated 04/03/2010 *(M/s.Orbit Peripheral Pvt. Ltd. V/s. General Manager (Cargo), Airport Authority of India)*. It was observed in the said judgment that – *"It has also been pleaded by the opponent that complainant is not a consumer within meaning of Consumer Protection Act, 1986 and as such is not liable for payment of compensation. This plea flies in the face of opponent itself because opponent had itself agreed to pay Rs.16,972/- to the complainant as compensation. If the complainant was not the consumer within meaning of Consumer Protection Act, 1986, why should the opponent prepared to pay the*

compensation."

9. Learned Advocate for the complainants has also submitted judgment of the State Consumer Commission, Delhi in Appeal No.374/2001 dated 09/04/2007 *(Airports Authority of India V/s. Indo-Dan Lampshades Pvt. Ltd.)* In the said judgment it was observed by the Commission that – *"From the aforesaid conspectus of facts and rival contentions of the parties, we find that there is no substance in the contention of opponent Nos.1&2 that complainant was not a consumer as the services were availed through the agent for the benefit of the complainant and hiring of any service like the one in question and beneficiary of hiring of such services comes within the definition of 'consumer' as defined under Section 2(1)(d)(ii) of Consumer Protection Act, 1986."* The transaction in that matter was of the year prior to 2003. Since amendment in Section 2(1)(d)(ii) with effect from 15/03/2003 position has been changed.

10. Learned Advocate for the complainants has also submitted judgment dated 03/12/2004 of the National Commission in First Appeal No.159/2004, 160/2004 & 161/2004 *(M/s.Harsolia Motors V/s. M/s.National Insurance Co. Ltd.)*. The beginning of said judgment is relevant for consideration which reads as *"The only question requiring decision in these appeals is whether insurance policy taken by the commercial units could be held to be hiring of services for commercial purpose and thereby excluded from the purview of consumer under Consumer Protection Act, 1986"* and that question was answered by Hon'ble National Commission on the last page of the judgment which reads as *"In this view of the matter, a person who takes insurance policy to cover envisaged risk does not take the policy for commercial purpose."*

11. Advocate for the complainants has also submitted a judgment of this Commission filed against the present opponent i.e. complaint No.181/2011

(Cipla Limited & Anr. V/s. Conware, Container Freight Station) and in that judgment it was held that complainant is a consumer. Reliance was placed on Harsolia Motors's case. We have already discussed above that the Harsolia Motors is about the insurance policy. That matter was filed against the Insurance Company. This Commission in the said case observed that – *"holding common carrier in India is equivalent to an Insurer and in case of Harsolia Motors', it is held that person who avails the insurance policy to cover risk does not take the policy for commercial purpose. Policy is only for indemnification of actual loss. It is not intended to generate profit. Therefore, in the present case, contention of the opponent that complainant No.1 is not a consumer within meaning of Section 2(1)(d) of Consumer Protection Act, 1986 is not tenable."*

12. After going through all these judgments, we find that in all these matters, main question was whether taking insurance policy is hiring services for commercial purpose or not and Hon'ble National Commission in the case of Harsolia Motors (mentioned supra) elaborately discussed the point and concluded that taking of insurance policy to cover risk is not for commercial purpose. We find that there cannot be any dispute about said proposition of law. Here the question is whether transaction for which services were availed is for commercial in nature or not. In most of the judgments referred above, it was observed that in view of judgment of the Harsolia Motors's case, taking insurance policy of the goods is not a commercial purpose and hence, complainant is a consumer. We find that in the Harsolia Motors's case, complaint was filed against the Insurance Company. Hence, question for decision was whether insurance policy taken by the commercial unit could be held to be hiring of services for commercial purpose and thereby excluded from the purview of Consumer Protection Act, 1986 and it was answered that taking of insurance policy is not a commercial purpose. However, all other judgments referred above

are not against the Insurance Company. Those complaints were filed against the service provider, but not against the Insurance Company and hence, only by observing that common carrier in India is equivalent to Insurer will not help for branding the complainants as consumer who availed services of common carrier.

13. A person who avails services of common carrier may or may not be a consumer. The common carrier in India is equivalent to Insurer in respect of liability. However, that will not help to decide the nature for which services were availed. If the insurance policy is taken and during the period of policy any damage is caused to insured goods then the Insurance Company is liable to make good the loss in view of insurance taken. Likewise if the goods are handed over to common carrier for carrying from one place to another place and if any damage caused to the goods during transit then the common carrier is liable to compensate the owner of the goods for the loss suffered. For this purpose, common carrier in India is equivalent to Insurer. However, the question is not about liability. The question is about nature of transaction. The nature of services availed. To make the point more clear we find it proper to mention that if the services of common carrier are availed by any person for carrying his household goods from one place to another place then said person has not availed the services for commercial purpose. However, if the same person availed the services of common carrier for carrying his goods of his business then certainly the services availed are for the commercial purpose. Hence, question before us is whether services availed are for commercial purpose or not and the question is not whether common carrier is liable as like an Insurer. Hence, all these judgments referred above and relied by the complainants are not helpful to the complainants on the point to show that complainant No.1 is a consumer.

14. In judgment of First Appeal No.573/2006 dated 26/08/2011 *(Swiss*

Air Cargo V/s. M/s.Century Silk Inc. & Ors.), Hon'ble National Commission has observed that - *"Opponents also took the plea that the goods were being transported to Athens for a commercial purpose and therefore, complainant is not a consumer. The plea of commercial purpose was not accepted by the State Commission on the ground that services of the opponents were availed only for transportation of goods from Bangalore to Athens. As this did not involve any sale, the question of commercial purpose did not arise."* We find that Hon'ble National Commission in Harsolia Motors's case has elaborately discussed this aspect. We would like to refer observations of the National Commission in Harsolia Motors' case. Hon'ble National Commission has observed that in the *Laxmi Engineering Works V/s. PSG Industrial Institute, (1995) 3 SCC 583*, the Apex Court considered the dictionary meaning of the word 'commerce' and explained what is meant by 'commercial purpose' by giving illustrations. Relevant paragraph is as under :-

> *""The National Commission appears to have been taking a consistent view that where a person purchases goods "with a view to using such goods for carrying on any activity on a large scale for the purpose of earning profit" he will not be a 'consumer' within the meaning of Section 2(d)(i) of the Act. Broadly affirming the said view and more particularly with a view to obviate any confusion — the expression "large scale" is not a very precise expression — Parliament stepped in and added the explanation to Section 2(d)(i) by Ordinance/Amendment Act, 1993. The explanation excludes certain purposes from the purview of the expression "commercial purpose" — a case of exception to an exception. Let us elaborate: a person who buys a typewriter or a car and uses them for his personal use is certainly a consumer but a person who buys a typewriter or a car for typing others' work for consideration or for*

plying the car as a taxi can be said to be using the typewriter/car for a commercial purpose. The explanation however clarifies that in certain situations, purchase of goods for "commercial purpose" would not yet take the purchaser out of the definition of expression 'consumer'. If the commercial use is by the purchaser himself for the purpose of earning his livelihood by means of self-employment, such purchaser of goods is yet a 'consumer'. In the illustration given above, if the purchaser himself works on typewriter or plies the car as a taxi himself, he does not cease to be a consumer. In other words, if the buyer of goods uses them himself, i.e., by self-employment, for earning his livelihood, it would not be treated as a "commercial purpose" and he does not cease to be a consumer for the purposes of the Act. The explanation reduces the question, what is a "commercial purpose", to a question of fact to be decided in the facts of each case. It is not the value of the goods that matters but the purpose to which the goods bought are put to. The several words employed in the explanation, viz., "uses them by himself", "exclusively for the purpose of earning his livelihood" and "by means of self-employment" make the intention of Parliament abundantly clear, that the goods bought must be used by the buyer himself, by employing himself for earning his livelihood. A few more illustrations would serve to emphasise what we say. A person who purchases an auto-rickshaw to ply it himself on hire for earning his livelihood would be a consumer. Similarly, a purchaser of a truck who purchases it for plying it as a public carrier by himself would be a consumer. A person who purchases a lathe machine or other machine to operate it himself for earning his livelihood would be a consumer. (In the above illustrations, if such buyer takes the assistance of one or two persons to assist/help him in operating the

vehicle or machinery, he does not cease to be a consumer.) As against this a person who purchases an auto-rickshaw, a car or a lathe machine or other machine to be plied or operated exclusively by another person would not be a consumer."

15. It was further observed by the Hon'ble National Commission that – *"If the goods are purchased for resale for commercial purpose, then such consumer would be excluded from the coverage of Consumer Protection Act, 1986. Such illustration could be that a manufacturer who is producing one product 'A' for such production he may be required to purchase articles, which may be raw-material, then purchase of such articles would be for commercial purpose. As against this, the same manufacturer if he purchases a refrigerator or a television or an air-conditioner for his use at his residence or even at his office, it cannot be held to be for commercial purpose and for this purpose he is entitled to approach the Consumer Forum under the Consumer Protection Act, 1986. Similarly, a hospital which hires the services of a medical practitioner, it would be a commercial purpose. But, if a person avails of such services for his ailment it would be held to be not a commercial purpose."*

16. Learned Advocate for the opponent has submitted that the goods which were given in the custody of opponent were imported from Italy as per the case of complainants. Learned Advocate has relied on authority reported in *Laxmi Engineering Works V/s. PSG Industrial Institute, (1995) 3 SCC 583*, it was observed by their Lordships of the Hon'ble Apex court that – *"the proprietary concern purchased machinery for carrying on business of manufacture of machine parts and the purchaser entered into an agreement with the company for supply of certain parts to be used by the company and the machinery supplied found defective and the complaint was filed by the purchaser against the company, it was held that machine purchased was not goods purchased for the use by himself*

exclusively for earning his livelihood of self-employment and therefore, the complaint filed by him was not maintainable." In the same judgment, their Lordships of the Apex Court have observed that – *"Parliament intended to restrict the benefits of the Act to the ordinary consumers purchasing goods either for their own consumption or even for use in some small venture which they may have embarked upon in order to make a living as distinct from large scale manufacturing or processing activity carried on for profit."*

17. This Commission has also delivered a judgment dated 30/01/2015 in the consumer complaints Nos.122, 123, 124 & 125/2013 *(ABB Ltd. V/s. M/s.Super Laxmi Roadways).* Those matters were filed by the Insurance Company along with ABB Ltd. who has taken insurance policy and availed services of M/s.Super Laxmi Roadways. The complaints were filed against M/s.Super Laxmi Roadways. Relying on the judgment of the Apex court in the case of *M/s.Economic Transport Organisation V/s. M/s.Charan Spinning Mills (P) Ltd. & Anr. (2010) 2 SCALE 427*, this Commission has held that the complainants in those complaints were not consumers. In Economic Transport case (referred supra), their Lordships of the Apex Court have observed that – *"We may also notice that Section 2(1)(d) of the Consumer Protection Act, 1986 was amended by Amendment Act 62 of 2002 with effect from 15/03/2003 by adding words* ***'but does not include a person who avails of such services for any commercial purpose'*** *in the definition of 'consumer". After said amendment, if the services of the carrier had been availed for any commercial purpose, then the person who availed such services will not be a 'consumer' and consequently, complaint will not be maintainable in such case."*

18. Here in the present case, the complainant had imported the goods from Italy which were given in the custody of opponent. Complainant No.1 is the limited company incorporated under the Indian Companies

Act. Keeping in view all these facts, it is very clear that the goods which the complainant No.1 had imported which were in the custody of opponent were certainly for commercial purpose and that is crux of the matter. The question whether opponent being custodian of the goods is liable for damage caused to the goods is another aspect of the matter. First question is whether complainant No.1 is a consumer or not.

19. It is the case of the complainant that the goods which were given in the custody of opponent were worth of Rs.19,74,144/- and same were imported by the complainant No.1. In the process of import, goods were given in the custody of the opponent. Importing the goods that too worth of Rs.19,74,144/- is certainly a commercial transaction. Thus, it is clear that the services of opponent were availed by the complainant No.1 in the process of importing the goods. Thus, the services were availed for commercial purpose.

20. Section 2(1)(d)(ii) of the Consumer Protection Act, 1986 was amended with effect from 15/03/2003 and the person who avails services for commercial purpose is excluded from the definition of consumer.

21. Here in the present case, the complainant No.1 availed the services of opponent after 15/03/2003 i.e. in the year 2010 for commercial purpose. The complainant No.1 is a registered company. Hence, there is no question of attracting explanation for earning livelihood by means of self-employment. Even that is not the case of the complainant. In view of above discussion, it is clear that the complainant No.1 is not a consumer as contemplated under Section 2(1)(d)(ii) of the Consumer Protection Act, 1986. By way of subrogation, complainant No.2 acquired rights of complainant No.1 and on that basis filed the complaint. As the complainant No.1 is not a consumer, complainant No.2 cannot become consumer as contemplated under the Consumer Protection Act, 1986.

Hence, we answer Point No.1 in negative.

22. Point No.2 :- In view of answer of Point No.1 in negative, consumer complaint is not tenable and does not survive for consideration. Hence, we answer this point accordingly.

23. Point Nos.3&4 :- In view of answer of Point Nos.1&2 in negative, these points do not arise for consideration. Hence, we answer these points accordingly.

24. Point No.5 :- In view of answer of Point Nos.1&2 in negative, complainants are not entitled for any amount as claimed in the consumer complaint. Hence, we answer this point in negative.

25. Point No.6 :- In view of answer of Point No.1 in negative, this consumer complaint deserves to be dismissed. Hence, we pass the following order :-

-: ORDER :-

1. Consumer complaint stands dismissed.
2. In the circumstances of case, parties to bear their own costs.
3. One set of the complaint compilation be retained and rest of the sets be returned to the complainant.
4. Copies of the order be furnished to the parties

Pronounced
Dated 14th September 2016.

[Usha S. Thakare]
PRESIDING JUDICIAL MEMBER

[P. B. Joshi]
JUDICIAL MEMBER

dd.

(12) (9)

BEFORE THE HON'BLE STATE CONSUMER DISPUTES REDRESSAL COMMISSION, MAHARASHTRA, MUMBAI

Complaint Case No. CC/12/12

1. Torrent Pharmaceuticals Ltd.
Corporate Office at Torrent House,
Off. Ashram Road, Ahmedabad-380 009.

2. Bajaj Allianz General Insurance Co. Ltd.
Head Office at GE Plaza,
Airport Road, Yerwada, Pune-411 006. .....Complainant(s)

Versus

Conware, Container Freight Station
At Plot No.2, Sector-2,
Dronagiri Node, Navi Mumbai-400 707. .....Opp.Party(s)

BEFORE:

Usha S. Thakare PRESIDING JUDICIAL MEMBER
P. B. Joshi JUDICIAL MEMBER

For the Complainant:	Mr.Sanjit Shenoy, Advocate for the complainants.
For the Opponent:	Mr.Pritish Chatterji, Advocate for the opponent.

ORDER

Per Shri P.B. Joshi, Hon'ble Judicial Member

First complainant is a limited company incorporated under the Indian Companies Act. Second complainant is Insurance Company. Opponent is engaged in business of Container Freight Station (CFS) for terminal services like container handling and allied activities in relation to the warehousing of international cargo. 79 cartons of medicines for intended export to Yemen were delivered to opponent for the purpose of stuffing the same into LCL Containers and were stored in the opponent's LCL shed. However, on 31/01/2010 because of fire entire goods were destroyed. First complainant duly lodged monetary claim upon the opponent on 18/03/2010 calling upon the opponent to reimburse the first

complainant the value of said cargo which was completely gutted in fire. Opponent wilfully failed to reimburse the loss of cargo while in the custody of opponent. The complainant No.2 appointed Gondolia Associates firm of Surveyors to confirm the destruction of first complainant's cargo. The destruction of cargo has been confirmed by survey report. The opponent confirm the loss caused to the consignment vide damage delivery certificate dated 08/03/2010. First complainant had taken a marine insurance policy from second complainant to cover risk of said consignment during its transit. Second complainant settled the claim of first complainant under said insurance policy for a sum of Rs.14,09,126/- towards full and final settlement of its claim. First complainant in pursuance of payment received from second complainant executed a letter of subrogation and special power of attorney in favour of second complainant for Rs.14,09,126/-. By virtue of subrogation, second complainant is subrogated to all the rights and remedies accrued to the first complainant against opponent's responsibility for loss of insured consignment. Second complainant is entitled to claim from opponent the sum to the extent of amount paid by second complainant to first complainant. As the opponent had not satisfied the claim of first complainant for the loss of goods while in custody of opponent, there is deficiency on the part of the opponent. Hence, on the basis of subrogation letter and special power of attorney, complainant No.2 along with complainant No.1 filed a consumer complaint against the opponent and claimed Rs.14,09,126/- with interest @ 18% p.a. from the date of loss of the goods till realization. Complainants also claimed Rs.50,000/- as costs and Rs.3 Lakhs as damages.

2. Opponent resisted the complaint by filing written version. Opponent has not disputed about receipt of goods from complainant No.1 and stored in the warehouse of opponent. Opponent has also not disputed

about fire and destruction of the goods. However, opponent has contended that complaint is filed against Conware, Container Freight Station. It was contended that there is no entity named Conware, Container Freight Station. The Punjab State Container and Warehousing Corporation Ltd. set up a Container Freight Station in the address set out in the cause title. The complaint deserves to be dismissed on this count alone.

3. Opponent has contended that complainant is not a consumer as defined under Section 2(1)(d) of Consumer Protection Act, 1986. Opponent has contended that opponent has entered into an Operation and Management Agreement with Gateway Distriparks Ltd. granting in favour of Gateway the right to exclusively operate, maintain the CFS and carry on permitted activities as more particularly set out in O & M Agreement including handling of consignments of import and export including containers. Complaint is bad for non-joinder of necessary party as Gateway is not added as party. It was further contended that there is no privity of contract between first complainant and opponent as opponent has been appointed as custodian under Section 45 of Customs Act.

4. It was contended that all the steps were taken by the opponent for prevention of damage due to said fire. Opponent has contended that damage delivery certificate dated 08/03/2010 was issued without prejudice by the opponent on the specific request for the purpose of enabling lodgement of claim with whom the subject consignment was insured. Opponent prayed for dismissal of the complaint.

5. Considering the rival contentions of the parties, considering the record and keeping in view the scope of the complaint, following points arise for our determination and our findings thereon are noted for the reasons as below :-

Sr.No.	Points	Finding
1.	Whether complainants are consumers as contemplated under Section 2(1)(d) of Consumer Protection Act, 1986?	No
2.	Whether consumer complaint is tenable?	No
3.	Whether complaint is bad for non-joinder of necessary party?	Does not arise
4.	Whether there is deficiency in service on the part of opponent?	Does not arise
5.	Whether complainants are entitled for the amount claimed?	No
6.	What order?	Complaint is dismissed.

REASONS

6. Point No.1 :- Most of the facts are admitted. Goods of the complainant No.1 were given in the custody of opponent. The goods were to be exported. It is admitted that on 31/01/2010 goods were gutted in fire when the goods were in the custody of opponent. Defence of the opponent is that complainant No.1 is not a consumer as he availed the services for commercial purpose. Learned Advocate for the complainants has submitted that the services were not availed for the commercial purpose. He has relied on so many authorities to support his contention. Learned Advocate for the complainants has submitted judgment of this Commission dated 07/10/2013 passed in First Appeal No.1106/2010 [*WSA Shipping (Bombay) Pvt. Ltd. V/s. Advanced Enzyme Technologies Ltd.*]. It was observed in the said judgment that the Apex Court explained the principle of liability of common carrier as per provisions of Section 9 of the Carriers Act, 1865 holding that the common carrier in India is equivalent to an Insurer. In case of insurance policy, in the matter of *Harsolia Motors V/s. National Insurance Company, I(2005) CPJ 27(NC)*,

Hon'ble National Commission has held that a person who avails insurance policy to cover risk does not take the policy for commercial purpose. Policy is only for indemnification of actual loss. It is not intended to generate profit. Relying on these observations, this Commission has held in the case before this Commission that contention of the appellant that respondent is not a consumer within meaning of Section 2(1)(d) of Consumer Protection Act, 1986 is not tenable.

7. Learned Advocate for the complainants also submitted judgment dated 21/06/2013 of this Commission in Appeal No.968/2010 *(Mysore Silk International Ltd. V/s. DTDC Worldwide Express Ltd.)*. In the said judgment it was observed that – *"Since the liability is that of insurer and considering the nature of services hired of the carrier, it cannot be said that it had nexus with profit and loss of the complainant. Services hired are not for commercial purpose. A useful reference on the point can be made to a ratio decidendi decision of the National Commission in the matter of Harsolia Motors V/s. National Insurance Company, I(2005) CPJ 27(NC)."*

8. Learned Advocate for the complainants has also submitted judgment of the State Consumer Commission Delhi in consumer complaint No.41/2003 dated 04/03/2010 *(M/s.Orbit Peripheral Pvt. Ltd. V/s. General Manager (Cargo), Airport Authority of India)*. It was observed in the said judgment that – *"It has also been pleaded by the opponent that complainant is not a consumer within meaning of Consumer Protection Act, 1986 and as such is not liable for payment of compensation. This plea flies in the face of opponent itself because opponent had itself agreed to pay Rs.16,972/- to the complainant as compensation. If the complainant was not the consumer within meaning of Consumer Protection Act, 1986, why should the opponent prepared to pay the compensation."*

9. Learned Advocate for the complainants has also submitted judgment of the State Consumer Commission, Delhi in Appeal No.374/2001 dated 09/04/2007 *(Airports Authority of India V/s. Indo-Dan Lampshades Pvt. Ltd.)* In the said judgment it was observed by the Commission that – *"From the aforesaid conspectus of facts and rival contentions of the parties, we find that there is no substance in the contention of opponent Nos.1&2 that complainant was not a consumer as the services were availed through the agent for the benefit of the complainant and hiring of any service like the one in question and beneficiary of hiring of such services comes within the definition of 'consumer' as defined under Section 2(1)(d)(ii) of Consumer Protection Act, 1986."* The transaction in that matter was of the year prior to 2003. Since amendment in Section 2(1)(d)(ii) with effect from 15/03/2003 position has been changed.

10. Learned Advocate for the complainants has also submitted judgment dated 03/12/2004 of the National Commission in First Appeal No.159/2004, 160/2004 & 161/2004 *(M/s.Harsolia Motors V/s. M/s.National Insurance Co. Ltd.)*. The beginning of said judgment is relevant for consideration which reads as *"The only question requiring decision in these appeals is whether insurance policy taken by the commercial units could be held to be hiring of services for commercial purpose and thereby excluded from the purview of consumer under Consumer Protection Act, 1986"* and that question was answered by Hon'ble National Commission on the last page of the judgment which reads as *"In this view of the matter, a person who takes insurance policy to cover envisaged risk does not take the policy for commercial purpose."*

11. Advocate for the complainants has also submitted a judgment of this Commission filed against the present opponent i.e. complaint No.181/2011 *(Cipla Limited & Anr. V/s. Conware, Container Freight Station)* and in that judgment it was held that complainant is a consumer. Reliance was

placed on Harsolia Motors's case. We have already discussed above that the Harsolia Motors is about the insurance policy. That matter was filed against the Insurance Company. This Commission in the said case observed that – *"holding common carrier in India is equivalent to an Insurer and in case of Harsolia Motors', it is held that person who avails the insurance policy to cover risk does not take the policy for commercial purpose. Policy is only for indemnification of actual loss. It is not intended to generate profit. Therefore, in the present case, contention of the opponent that complainant No.1 is not a consumer within meaning of Section 2(1)(d) of Consumer Protection Act, 1986 is not tenable."*

12. After going through all these judgments, we find that in all these matters, main question was whether taking insurance policy is hiring services for commercial purpose or not and Hon'ble National Commission in the case of Harsolia Motors (mentioned supra) elaborately discussed the point and concluded that taking of insurance policy to cover risk is not for commercial purpose. We find that there cannot be any dispute about said proposition of law. Here the question is whether transaction for which services were availed is for commercial in nature or not. In most of the judgments referred above, it was observed that in view of judgment of the Harsolia Motors's case, taking insurance policy of the goods is not a commercial purpose and hence, complainant is a consumer. We find that in the Harsolia Motors's case, complaint was filed against the Insurance Company. Hence, question for decision was whether insurance policy taken by the commercial unit could be held to be hiring of services for commercial purpose and thereby excluded from the purview of Consumer Protection Act, 1986 and it was answered that taking of insurance policy is not a commercial purpose. However, all other judgments referred above are not against the Insurance Company. Those complaints were filed against the service provider, but not against the Insurance Company and

hence, only by observing that common carrier in India is equivalent to Insurer will not help for branding the complainants as consumer who availed services of common carrier.

13. A person who avails services of common carrier may or may not be a consumer. The common carrier in India is equivalent to Insurer in respect of liability. However, that will not help to decide the nature for which services were availed. If the insurance policy is taken and during the period of policy any damage is caused to insured goods then the Insurance Company is liable to make good the loss in view of insurance taken. Likewise if the goods are handed over to common carrier for carrying from one place to another place and if any damage caused to the goods during transit then the common carrier is liable to compensate the owner of the goods for the loss suffered. For this purpose, common carrier in India is equivalent to Insurer. However, the question is not about liability. The question is about nature of transaction. The nature of services availed. To make the point more clear we find it proper to mention that if the services of common carrier are availed by any person for carrying his household goods from one place to another place then said person has not availed the services for commercial purpose. However, if the same person availed the services of common carrier for carrying his goods of his business then certainly the services availed are for the commercial purpose. Hence, question before us is whether services availed are for commercial purpose or not and the question is not whether common carrier is liable as like an Insurer. Hence, all these judgments referred above and relied by the complainants are not helpful to the complainants on the point to show that complainant No.1 is a consumer.

14. In judgment of First Appeal No.573/2006 dated 26/08/2011 *(Swiss Air Cargo V/s. M/s.Century Silk Inc. & Ors.)*, Hon'ble National Commission has observed that - *"Opponents also took the plea that the*

goods were being transported to Athens for a commercial purpose and therefore, complainant is not a consumer. The plea of commercial purpose was not accepted by the State Commission on the ground that services of the opponents were availed only for transportation of goods from Bangalore to Athens. As this did not involve any sale, the question of commercial purpose did not arise." We find that Hon'ble National Commission in Harsolia Motors's case has elaborately discussed this aspect. We would like to refer observations of the National Commission in Harsolia Motors' case. Hon'ble National Commission has observed that in the *Laxmi Engineering Works V/s. PSG Industrial Institute, (1995) 3 SCC 583,* the Apex Court considered the dictionary meaning of the word 'commerce' and explained what is meant by 'commercial purpose' by giving illustrations. Relevant paragraph is as under :-

> *""The National Commission appears to have been taking a consistent view that where a person purchases goods "with a view to using such goods for carrying on any activity on a large scale for the purpose of earning profit" he will not be a 'consumer' within the meaning of Section 2(d)(i) of the Act. Broadly affirming the said view and more particularly with a view to obviate any confusion — the expression "large scale" is not a very precise expression — Parliament stepped in and added the explanation to Section 2(d)(i) by Ordinance/Amendment Act, 1993. The explanation excludes certain purposes from the purview of the expression "commercial purpose" — a case of exception to an exception. Let us elaborate: a person who buys a typewriter or a car and uses them for his personal use is certainly a consumer but a person who buys a typewriter or a car for typing others' work for consideration or for plying the car as a taxi can be said to be using the typewriter/car for a commercial purpose. The explanation however clarifies that in*

certain situations, purchase of goods for "commercial purpose" would not yet take the purchaser out of the definition of expression 'consumer'. If the commercial use is by the purchaser himself for the purpose of earning his livelihood by means of self-employment, such purchaser of goods is yet a 'consumer'. In the illustration given above, if the purchaser himself works on typewriter or plies the car as a taxi himself, he does not cease to be a consumer. In other words, if the buyer of goods uses them himself, i.e., by self-employment, for earning his livelihood, it would not be treated as a "commercial purpose" and he does not cease to be a consumer for the purposes of the Act. The explanation reduces the question, what is a "commercial purpose", to a question of fact to be decided in the facts of each case. It is not the value of the goods that matters but the purpose to which the goods bought are put to. The several words employed in the explanation, viz., "uses them by himself", "exclusively for the purpose of earning his livelihood" and "by means of self-employment" make the intention of Parliament abundantly clear, that the goods bought must be used by the buyer himself, by employing himself for earning his livelihood. A few more illustrations would serve to emphasise what we say. A person who purchases an auto-rickshaw to ply it himself on hire for earning his livelihood would be a consumer. Similarly, a purchaser of a truck who purchases it for plying it as a public carrier by himself would be a consumer. A person who purchases a lathe machine or other machine to operate it himself for earning his livelihood would be a consumer. (In the above illustrations, if such buyer takes the assistance of one or two persons to assist/help him in operating the vehicle or machinery, he does not cease to be a consumer.) As against this a person who purchases an auto-rickshaw, a car or a lathe machine or other machine to be plied or operated exclusively

by another person would not be a consumer."

15. It was further observed by the Hon'ble National Commission that – *"If the goods are purchased for resale for commercial purpose, then such consumer would be excluded from the coverage of Consumer Protection Act, 1986. Such illustration could be that a manufacturer who is producing one product 'A', for such production he may be required to purchase articles, which may be raw-material, then purchase of such articles would be for commercial purpose. As against this, the same manufacturer if he purchases a refrigerator or a television or an air-conditioner for his use at his residence or even at his office, it cannot be held to be for commercial purpose and for this purpose he is entitled to approach the Consumer Forum under the Consumer Protection Act, 1986. Similarly, a hospital which hires the services of a medical practitioner, it would be a commercial purpose. But, if a person avails of such services for his ailment it would be held to be not a commercial purpose."*

16. Learned Advocate for the opponent has submitted that the goods which were given in the custody of opponent were to be exported as per the case of complainants. Learned Advocate has relied on authority reported in *Laxmi Engineering Works V/s. PSG Industrial Institute, (1995) 3 SCC 583*, it was observed by their Lordships of the Hon'ble Apex court that – *"the proprietary concern purchased machinery for carrying on business of manufacture of machine parts and the purchaser entered into an agreement with the company for supply of certain parts to be used by the company and the machinery supplied found defective and the complaint was filed by the purchaser against the company, it was held that machine purchased was not goods purchased for the use by himself exclusively for earning his livelihood of self-employment and therefore, the complaint filed by him was not maintainable."* In the same judgment, their Lordships of the Apex Court have observed that – *"Parliament*

or unnecessary treatment. A balance should be achieved between the need for disclosing necessary and adequate information and at the same time avoid the possibility of the patient being deterred from agreeing to a necessary treatment or offering to undergo an unnecessary treatment.

(iii) Consent given only for a diagnostic procedure, cannot be considered as consent for therapeutic treatment. Consent given for a specific treatment procedure will not be valid for conducting some other treatment procedure. The fact that the unauthorized additional surgery is beneficial to the patient, or that it would save considerable time and expense to the patient, or would relieve the patient from pain and suffering in future, are not grounds of defence in an action in tort for negligence or assault and battery. The only exception to this rule is where the additional procedure though unauthorized, is necessary in order to save the life or preserve the health of the patient and it would be unreasonable to delay such unauthorized procedure until patient regains consciousness and takes a decision.

(iv) There can be a common consent for diagnostic and operative procedures where they are contemplated. There can also be a common consent for a particular surgical procedure and an additional or further procedure that may become necessary during the course of surgery.

(v) The nature and extent of information to be furnished by the doctor to the patient to secure the consent need not be of the stringent and high degree mentioned in Canterbury but should be of the extent which is accepted as normal and proper by a body of medical men skilled and experienced in the particular field. It will depend upon the physical and mental condition of the patient, the nature of treatment, and the risk and consequences attached to the treatment."

16. Dr.Parelkar-Opponent no.2 has submitted that the risk is to be explained to the patient and that was explained to the patient. He has drawn our attention to page no.180 of complaint compilation, which is part of the case papers dated 14/05/2004, the day on which the operation was done. It is mentioned on the said document i.e. case paper that during the discussion with patient and her husband, Dr.Parelkar has explained the post operative risk and complication of D-11 and D-12 spine surgery including motor and sensory neurological complications and cardio respiratory complication are explained to the patient and patient's

husband. It is clear from the case paper that it was explained to the patient and patient's husband prior to the operation. It is admitted position that the patient was admitted in the said hospital as she had pain in lower limbs and altered sensations in the lower limbs. After taking the advice of her family doctor and then Dr.Badani, MRI was taken and then it was shown to Dr.Parelkar-opponent no.2 and, thereafter, operation was fixed. It was to be done by opponent no.2 at opponent no.1. Consent for that was given as referred above and risk was explained to the patient and her husband as noted in the case paper and referred by us above. Thus, we find that there is no substance in the contention of the complainant that the consent of the complainant was not taken for the said surgery.

17. Dr.Parelkar-opponent no.2 has submitted that paraplegia which was developed after surgery was not due to surgery but because of the condition of the spinal cord of the patient. The surgery was only to decompress the cord and that was done without touching the spinal cord. We have discussed above that there is no material on record to show that there was any deficiency on the part of opponent no.2 while performing the said surgery and Dr.Kamath has conceded the said position as referred by us above. From the complaint it is clear that complainant had a pain in lower limb. That is also noted in the case paper. MRI was taken and it is mentioned in the case paper dated 03/05/2004 that MRI spine severe canal stenosis on D-11 & D-12. Said case paper also shows that patient had history of paresthesia while sitting/standing for a long time since 8-10 months. Complaint of pain in the left leg, weakness and inability to walk without support. Dr.Parelkar has drawn our attention to MRI dated 06/04/4004 which is at page 13 of complaint compilation. The conclusion of the report is to the effect that there is severe central canal stenosis at D11-D12 due to a postero-central disc protrusion and thickened ligamentum flavum. Significant compression of the spinal cord is noted

with evidence of cord edema/ischemia. Evidence of facetal arthropathy is noted from L3-L4 to L5-S1 bilaterally. Dr.Parelkar has submitted that the said pre-operative MRI shows the condition of the spinal cord of the patient and there was evidence of cord edema and ischaemia. By way of operation laminectomy decompression was done. During operation, surgeon has not touched the cord. However, because of condition of the cord before operation was showing edema and ischaemia and it is because of that condition the cord paraplegia was developed by the patient and not because of operation laminectomy which was done by Dr.Parelkar-Opponent no.2.

18. Considering the submissions made before us, considering the record, we find that what patient suffered is not because of the operation but because of the pre operative condition of the spinal cord. The operation was done i.e. laminectomy. Only spine was decompressed and because of that no harm or injury was caused to the spine. Thus, we find much substance in the argument advanced by Dr.Parelkar that paraplegia which was developed was not because of the operation but because of the conditional spinal cord of the patient even prior to operation.

19. Learned authorized representative of complainant Dr.Kamath has argued that patient walked in the hospital. However, came out of hospital in a paralysed condition, which shows that there was deficiency on the part of doctor. However, we find that only because the patient walked in the hospital and came out in paralytical condition, it cannot be said that there was deficiency on the part of opponent. We have already discussed above that there is no material on record to show that there was any deficiency or fault in the surgery. On the other hand, as discussed above, Dr.Kamath has conceded that there was no deficiency or fault in the operation. We have already discussed above about the consent and found that consent was obtained for the operation laminectomy.

20. It is contention of the complainant that there was deficiency in post operative care. Dr.Kamath has contended that post operative MRI was taken on the next day as there was no facility of MRI in the hospital of opponent no.1 and, thus, the said hospital was not well equipped and opponent no.2 should not have done said operation at such hospital.

21. Dr.Parelkar has submitted that facility of MRI is not available in all the hospitals. That facility is available at very few centers and it is not necessary that there should be facility of MRI where there is operation theatre for surgery. It is contended by opponent no.2 that he is owner and proprietor of opponent no.1 hospital and he is an experienced senior Orthopedic Surgeon having vast experience of spine surgery at B.Y.L.Nair Hospital, Bhagwati Hospital, Bhakti Vedanta Hospital, Karuna Hospital, Suvarna Hospital and Mandpeshwar Hospital. When all the 12 experts in the field whose affidavits are filed in support of opponents have mentioned about competency of opponent no.2, then only because there was no facility of MRI in the opponent no.1, hospital it cannot be stated that there was deficiency on the part of opponents.

22. It is admitted that post operative MRI was taken on the next day of the operation. However, Dr.Parelkar has submitted that there was no urgency in taking MRI as line of treatment after the operation was not changed because of MRI.

23. Dr.Parelkar has submitted that spinal cord of the patient was already showing concentric compression, edema and ischemia prior to surgery. She was operated for the procedure called laminectomy to decompress spinal cord at D-11 and D-12 so as to relieve her radiculopathy pain, backache and weakness in limbs. The paralysis that she developed and which was treated conservatively with anti-inflammatory, rest and physiotherapy. Paralysis was due to inherent disease process, natural and spontaneous reasons beyond the control of

opponent and not related to surgery. It was submitted by Dr.Parelkar that only modality of treatment of paraparesis that the complainant was suffering from at the time of her admission is surgical decompression by way of laminectomy which is a standard peer approved treatment even though it is associated at times with a risk of post operative paralysis as in any case, she would have developed paralysis in absence of operative treatment because of natural disease process. No evidence by way of expert's affidavit was led by the complainant to show that the post operative treatment was not as per protocol. On the other hand, 12 doctors expert in the field have filed their evidence affidavits in support of opponent to show that even the post operative care, which was taken by opponent no.2 was proper and line of treatment was also proper. The interrogatives were given to those doctors by complainant and those were answered by those doctors. However, nothing is brought on record by way of those interrogatories that the post operative care was not proper or that line of treatment was not proper. Thus, we find that there is no material on record to accept the contention of the complainant that post operative treatment was not proper or line of treatment was not proper. On the other hand, there is sufficient material on record to show that proper post operative care was taken and line of treatment was proper and correct. Thus, we find no substance in the contention of the complainant that there is deficiency on the part of opponents in taking the post operative care.

24. In view of the above discussion, we find that there is absolutely no material on record to show that there was any deficiency on the part of opponents while operating and post operative treatment. We have already discussed above that patient suffered paraplegia post operative. However, that is not because of the operation but because of the condition of the spinal cord of the patient prior to operation. Thus, we have to answer point no.1 in negative.

Point No.2 – Compensation:

25. In view of answer to point no.1 in negative, complainant is not entitled for any amount as claimed. Hence, we answer point no.2 in negative.

26. We have full sympathy with complainant as she suffered paralysis. However, in view of answer to point nos.1 & 2 in negative, complaint deserves to be dismissed. Hence, we pass the following order:-

ORDER

Consumer Complaint stands dismissed.

Parties to bear their own costs.

Pronounced on 14th September, 2016.

[P.B.JOSHI]
PRESIDING JUDICIAL MEMBER

[DHANRAJ KHAMATKAR]
MEMBER

Ms

BEFORE THE HON'BLE STATE CONSUMER DISPUTES REDRESSAL COMMISSION, MAHARASHTRA, MUMBAI

Appeal No. A/00/910
(Arisen out of order dated 15/10/1999 passed in complaint No.75/1996 by District Raigad)

The Oriental Insurance Co. Ltd.
Shivdas Sadan, 2nd floor,
Line Ali, Shivaji Chowk,
Panvel.
.....Appellant (s)

Versus

1. Shri Digambar Janardan Chougule
R/o. Kudegaon, Post-Navghar
Tal. Uran, Dist. Raigad.

2. Dena Bank
Kegaon Branch through Manager,
At Kegaon, Tal. Uran, Dist. Raigad.
.....Respondent (s)

BEFORE:
P. B. Joshi PRESIDING JUDICIAL MEMBER
Narendra Kawde MEMBER

For the Appellant:	Mr.A.S. Vidyarthi, Advocate for the appellant.
For the Respondent:	None present for the respondents.

ORDER

Per Shri P.B. Joshi, Hon'ble Presiding Judicial Member

Being aggrieved by the order dated 15/10/1999 in consumer complaint No.75/1996 allowing the complaint, present appeal has been preferred by the opponent No.1.

2. Facts necessary for deciding this appeal can be stated as under :-

The complainant had taken insurance policy from opponent No.1 for period 16/08/1990 to 15/08/1991 for fishing boat. Premium was paid. Policy was issued. Opponent No.1 accepted the extra premium of Rs.16,219/- through opponent No.2. Then the complainant sent said boat for fishing operation in the sea. Said fishing boat sunk in the sea and there was total loss and hence, claim was made by the complainant. Opponent

No.1 repudiated the claim due to reason that since 01/06/1991 to 24/08/1991 fishing was strictly prohibited. As per the complainant while accepting extra premium for that period, opponent No.1 has not disclosed said fact to the complainant. As opponent No.1 repudiated the claim, the complaint was filed by the complainant.

3. Opponent No.1 filed written version and opponent No.2 also filed written version.

4. Opponent No.1 has contended that there was no deficiency on the part of the opponent No.1 and claim was rightly repudiated after due application of mind as there was breach of warranty and violation of orders of Government of Maharashtra Fisheries Department. No further clearance from the authorities of Sasoon Docks to operate between 15/06/1991 to 15/08/1991 was taken. It was also contended that warning was given to the fishermen on 07/07/1991 by the Metrological Department stating that there would be rough weather and sea with wind speed would reach 60 kmph with rain, thunder showers and visibility to become poor. It was contended that loss of said fishing boat occurred due to cyclone which prevailed in the coast of Maharashtra on 07/07/1991 at about 15 hrs. It was further contended by opponent No.1 that since complainant had taken a bank loan, interest due till the date of loss was Rs.6,84,986.50. The Policy was endorsed in the name of Digambar Janaradan Chougule for period 16/08/1989 to 15/08/1990 for sum of Rs.7,50,000/-. The policy based on the proposal form dated 16/08/1989 filled in by the complainant whereby all the right, title, interest in the within mentioned policy were assigned in favour of Dena Bank and was subject to TL. CTL, SC and SL including personal accident cover for the members. The policy was subject to following warranties :-

"1) Warranted vessel engaged in fishing and operations connected there with on the coast of Gujarat, Maharashtra and Goa

with leave to proceed up to Karwar and not beyond 50 nautical miles into the sea from the shore.

2) At the request of the insured it is hereby declared and agreed to waive the vessel laid up from 15/06/1991 to 15/08/1991 (Both days inclusive) subject to clearance from the port authorities to employ the vessel during the period in consideration of which an additional premium of Rs.10,697/- was paid."

Opponent No.1 prayed for dismissal of the complaint.

5. Considering the pleading of the parties and considering the record, District Forum allowed the complaint and directed the opponent No.1-Insurance Company to settle the claim of the complainant of insured fishing vessel for the amount covered under the policy after deducting 40% depreciation. It is against that order present appeal has been filed by opponent No.1.

6. Considering the rival contentions of the parties, considering the submissions made before us by both parties, considering the record and scope of the appeal, following points arise for our determination and our findings thereon are noted as against them for the reasons herein below :-

Sr.No.	Points	Findings
1.	Whether opponent No.1 has repudiated the claim legally?	Yes
2.	Whether there is deficiency on the part of opponent No.1?	No
3.	Whether complainant is entitled for the amount granted by the District Forum?	No
4.	What order?	Appeal is allowed.

REASONS

7. Point No.1 :- From the record and from the submissions made before us it is clear that the policy was obtained by the complainant from opponent No.1. Some extra premium was also taken by opponent No.1.

Vessel sunk while on fishing in the sea during the policy period. It is the contention of the complainant that after the incident, it was informed to opponent No.1/Insurance Company and claim was made which was wrongly and illegally repudiated. Advocate for opponent No.1 has contended that claim was rightly repudiated as clearance from Port Authority of Sasoon Docks, Bombay was not obtained by the complainant before sailing on 07/07/1991 or fishing since it was mandatory as per policy. It was also contended by Advocate for opponent No.1 that the Maharashtra Sea Fishing Rules 1981 in force from 1982 has prohibited the fishermen from traditional fishing and to keep the vessel laid up from 01/06/1991 to 24/08/1991. The restrictions were to be complied by all the fishermen using mechanised boats. This order has been violated by the complainant. It was also contended that the claim was repudiated on the ground of warning of Metrological Department to the fishermen given on 07/07/1991 about rough weather and sea with winds speed reaching 60 Kmph with rain and thunder showers with visibility becoming poor was totally ignored by the complainant. It would amount to breach of warrantee and violation of Government of Maharashtra Fisheries Rules 1981.

8. Now, it is to be seen whether there was any such warning from the Metrological Department and also to see the rules prohibiting the fishermen from traditional fishing and to keep the vessel laid up from 01/06/1991 to 24/08/1991. Even if accepting that there was breach of condition of the policy, it is to be seen why the claim was not settled on non-standard basis. We find that District Forum has allowed the claim of the complainant on non-standard basis by observing that opponent No.1 failed to produce any documentary evidence that the Department of Fisheries, Maharashtra State prohibiting for fishing during the monsoon period from 01/06/1991 to 24/08/1991. It was also observed that opponent No.1 accepted the extra premium through Dena Bank under the Marine

Insurance Policy and after accepting extra premium under the said policy, repudiated the claim. We find that at page-85 of appeal compilation there is a letter from Metrological Department dated 30/10/1991 which shows the condition of the weather and sea that – *"Isolated rain or thundershowers, Visibility becoming poor in rain or thundershowers, Sea would be rough with wind speed 45 kmph reaching to 60 kmph."* The incident happened on 07/07/1991 itself. This document was not considered by the District Forum.

9. It is admitted position that extra premium was taken by the Insurance Company. Said policy is at page-77 of appeal compilation. It is mentioned that – *"At the request of the insured, it is hereby declared and agreed to waive the vessel laid-up from 15th June 1991 to 15th August 1991 (b.d.i.) subject to clearance from the port authorities to employ the vessel during the above period. In consideration whereof an additional premium of Rs.10,687/- is hereby charged to the insured."* Thus, it is clear that though extra premium was taken by the Insurance Company from the complainant, the vessel to be laid up subject to clearance from the Port Authorities to employ vessel during said period of 15/06/1991 to 15/08/1991. This was not obtained by the complainant. It means that without getting clearance from the concerned authority, the vessel was laid up by the complainant into the sea resulting into loss of the vessel. It is on this ground the appellant/Insurance Company repudiated the claim. We have already referred above the repudiation letter which is at page-44 of the appeal compilation.

10. Here we would like to refer the observations of Hon'ble National Commission in the case of reported in 2015(1) CPR 383 (NC) in the case of *M/s.HDFC Ergo General Insurance Co. Ltd. V/s. Shri Bhagchand Saini.* In the said judgment, Hon'ble National Commission has referred to the judgment of the Apex Court in the case of *Oriental Insurance Co. Ltd.*

V/s. Parvesh Chaner Chadha, in which Hon'ble Supreme Court observed as follows :- *"Admittedly, the respondent had not informed the appellant about the alleged theft of the insured vehicle till he sent letter dated 22/05/1995 to the Branch Manager."* It was further observed by their Lordships of the Apex Court that – *"In our view, the appellant cannot be saddled with the liability to pay compensation to the respondent despite the fact that he had not complied with the terms of the policy."* It was observed in Para 14 by Hon'ble National Commission that – *"In so far as the order of the Hon'ble Supreme Court in Amlendu Sahoo V/s. Oriental Insurance Company as relied upon by the District Forum, it is very clear that the facts of that case were entirely different because the violation relates to the nature of use of the vehicle only. The vehicle was registered for private use but it was being used for hire."* Hon'ble National Commission has held that – *"the complainant is not entitled for any compensation even on non-standard basis. The orders passed by the District Forum and the State Commission are therefore set aside and the consumer complaint in question stands dismissed."*

11. In view of above discussion, if the facts of the case before us are considered, we find that here the complainant though paid extra premium and having policy to that effect however has not complied the conditions mentioned in the said extended policy about extra premium of clearance from Port Authority to employ the vessel during the period 15/06/1991 to 15/08/1991 and vis-à-vis direct nexus to the incident of loss of the vessel. It is also material to note that the Metrological Department has also issued warning for the said period for not laying down the vessel in the sea because of rough sea and thus, we find that the Insurance Company has rightly repudiated the claim and hence, we answer Point No.1 in affirmative.

12. Point Nos.2&3 :- In view of answer of Point No.1 in affirmative, we

find that there is no deficiency of service on the part of opponent No.1 and hence, complainant is not entitled for any amount as claimed and granted by the District Forum. Hence, we answer Point Nos.2&3 accordingly.

13. Point No.4 :- In view of answers of Point Nos.1to3, appeal deserves to be allowed. Hence, we pass the following order :-

-: ORDER :-

1. Appeal is allowed. The impugned order dated 15/10/1999 is quashed and set aside. Complaint stands dismissed.
2. In the circumstances of the case, no order as to costs.
3. One set of the appeal compilation be retained and rest of the sets be returned to the appellant.
4. Copies of the order be furnished to the parties

Pronounced
Dated 9th March 2016.

[P. B. Joshi]
PRESIDING JUDICIAL MEMBER

[Narendra Kawde]
MEMBER

dd.

(15)

राज्य आयोग, महाराष्ट्र मुंबई (12)
जावक क्र. 4927
दिनांक :- 17/10/2016

BEFORE THE HON'BLE STATE CONSUMER DISPUTES REDRESSAL COMMISSION, MAHARASHTRA, MUMBAI

CONSUMER COMPLAINT NO. CC/00/423

Mrs.Nilima P.Shirude
9, Dattakunj Apartments,
Near Anand Nagar,
Near Akashwani Tower,
Off Gangapur Road,
Nashik 422 005.

.....Complainant/s

Versus

1.Dr.Pradip Pawar.
Runanubandha
Murkute Colony (New Pandit Colony)
Nashik 422 002.

2.Dr.Mrs.Suwarna Pawar
Runanubandha
Murkute Colony (New Pandit Colony)
Nashik 422 002.

3.Vidula Nursing Home &
Infertility Clinic
Runanubandha
Murkute Colony (New Pandit Colony)
Nashik 422 002.

.....Opponent/s

BEFORE: **Hon'ble Smt. Usha S. Thakare, Presiding Judicial Member**
Hon'ble Mr. Dhanraj Khamatkar, Member

For the
Complainant-

Dr.M.S.Kamath,

AuthorizedRepresentative

For the
Opponent(s)-Advocate
Shri.S.B.Prabhavalkar

ORDER

Per – Hon'ble Smt. Usha S. Thakare, Presiding Judicial Member

Complainant Smt. Nilima P. Shirude has filed this consumer complaint against the Opponents by alleging deficiency in service, u/s 12 read with section 17 of the Consumer Protection Act,1986. Facts giving rise to the present consumer complaint in short are as under-

[1] Complainant married on 21/1/1993 and settled at Nashik in1995. She did not conceive and took medical treatment from several doctors for infertility. She was asked to undergo different types of treatment. In the year 1998 her family physician Dr.Mrs.Pranitha Gujarathi referred her to the Opponent No. 1 – Dr.Pradip Pawar for treatment of infertility. Complainant and her husband visited the Opponent No.1 at his hospital in or about March 1998. Opponent No.1 informed that there was minor surgical problem in her husband and her husband would have to undergo minor surgery. Accordingly, husband of complainant underwent varicocoele surgery (surgery for blockage of veins in the scrotal bag) on 8.5.1998. Said operation was performed by Dr.NandanVilekar. Complainant conceived within 145 days of surgery. After becoming pregnant, complainant visited opponent No.1 for examination and directed to undergo sonography test. After test, opponent No.1 confirmed that complainant was pregnant. Five days after the examination, complainant

noticed that blood was passing through genital area. She immediately informed opponent No.1. On his advice, she was admitted in the opponent No.3 hospital. Sonography was performed. Opponent No.1 gave her some hormonal injunctions. She was admitted at the hospital for four days and discharged thereafter. After about five days of returning home, complainant again noticed fresh blood clots. She wished to inform opponent No.1.At the relevant time, opponent No.1 was not available and his wife i.e. opponent No.2 asked complainant to get admitted in their hospital. Opponent No.1 did another sonography on her admission and after some treatment, discharged from the hospital after about five days. It is alleged that per period of about three months, complainant regularly visited opponents for medical check-up. At every visit, opponent No.1 did sonography and informed that growth of foetus was excellent and normal. In the 6th month of pregnancy, complainant was informed that her blood pressure was high, though the opponent No.1 never examined the blood pressure himself. In the 6th month of pregnancy, opponent No.1 asked her to get admitted in his hospital for putting stitches on the mouth of uterus. At that time, it was diagnosed that complainant was suffering from high blood pressure and urine report showed presence of albumin and sugar. Assistant doctor told complainant that there was some wrong with the pregnancy. Complainant put her doubt to the opponent No.1, but her doubt was not clear. She was discharged from the hospital after two days. It is further alleged that during

one of the visits to the opponent No.1, mother of the complaint asked opponent No.1 whether she could arrange for delivery at Dombivali where she is residing. Opponent No.1 told her that he was the only one who knew the case well and it could not be advisable to shift the complainant outside Nashik. During another visit of routine check-up, opponent No.1said that the complainant be examined by the cardiologist. Opponent No.1 referred the complainant to Dr.Manoj Chopda. However, complainant got herself examined by doctor Kunal Gupte. Report of Dr. Gupte was shown to the opponent No.1. He said that complainant should not have gone to the doctor other than one to whom she was referred. Sometime in January 1999, opponent No.1 asked to his assistance to check up the blood pressure. The latter said that it was 140/90. At this stage, Opponent took the blood pressure himself and said that it was -150/116 mm or Hg. and asked to get admitted. Due to the lack of arrangement at home, complainant was not ready to admit. Opponent No.1 said that if she did not get admitted there were chances of brain haemorrhage, kidney failure or convulsions. On hearing these words, complainant got admitted. Complainant was regularly examined by Dr.Abhimanyu Pawar, Physician, who was related to the opponent No.1. Complainant made inquiry because earlier she was examined by the cardiologist. Question was asked why she was examined by Dr.Abhimanyu Pawar, physician.

[2] It was alleged that being dissatisfied, complainant decided to change gynecologist. She approached to Dr.Ranjeet Mehta, Gynecologist and Obstetrician having clinic at Kulkarni colony, Nashik 2. He took the history in detail and examined complainant. Based on the report of sonography given by opponent No.1, he prescribed certain medicines. He asked complainant to go for sonography after a few weeks. It was conducted on 15-3-1999 along with Neonatal Stress Test. After seeing the results of tests, Dr. Mehta observed that there was serious defect in the foetus. On 16-3-1999, the test was repeated as a matter of abundant caution to confirm the findings of previous date. The results of sonography came as a shock to everybody, including the attending doctor. The sonography showed that the foetus in the womb had a defective spinal canal with irregularities, which is termed in medical Parlance as Meningomyelocoele. This is a severe, serious and hazardous type of congenital malformation of the foetus. On seeing the sonography report, Dr. Mehta advised to carry out caesarean operation for delivery of baby. Complainant was found in 37th week of pregnancy. Therefore, it was not possible to carry out abortion. On 16th March 1999, caesarean operation was performed and a female child with spinal defects and major congenital defects in both lower extremities was delivered. The baby was named as "Sushimta" was shown to many pediatricians and pediatric surgeons. All of them have opined that the defect is incurable and the deformity will remain for the entire life of the

child. Pediatric surgeons at Wadia Children's hospital have operated on the child on twice, but except for giving some relief the major problems of movement, bladder and bowel function still persist. In short, the child will be severely crippled all its life.

[3] Main allegations of the complainant against opponents are that opponents knew that the pregnancy was precious for the complainant. Opponents repeatedly performed sonography as many as 7 to 8 times. It was incumbent upon the opponents to give detailed sonography report with pictures. Complainant had paid for it. Except for timely collections of professional fees and assurances 'all is well' opponents did not give the complainant either written report or sonography plates for future reference. The diagnostic tool of sonography is meant to detect the problems of foetal malformation in the earliest possible stage and to abort unhealthy and or malformed foetus. The opponents were unable to detect the serious malformation Meningomyelocoele which is quite easy and simple to diagnose in the early stages of pregnancy, either due to lack of knowledge or due to sheer carelessness on their part. The non-diagnosis of this serous malformation in time lead to the pregnancy reaching in advanced stage wherein there was no option but to continue the pregnancy. The entire purpose of sonography was to detect and treat malformations at an early stage, but this was defeated by the negligent attitude and reports of

opponents. The complainant was unable to take preventive action, it was too late and as a result, complainant is saddle with congenitally deformed child. Complainant has to look out the needs of the child and attend to it for entire life. The complainant has prayed for compensation of Rs.17,50,000/- jointly and severally from opponents and also prayed for the cost, by filing present complaint.

[4] Opponents oppose the consumer complaint by filing written statement. They have denied the allegations specifically allegations of negligence, deficiency in service and unfair trade practice. Opponent No.1 Dr.Pradip Pawar is practicing as an Obstetrician and Gynecologist and Infertility Specialist. He has passed MBBS in 1987 from Pune University and did post graduation viz Diplomat of National Board in Obstetrics and Gynecology and also obtained the other degrees such as DGO (Pune), DFP (CPS Bombay), DICOG (Bombay). Opponent No.2 is his wife. She is a qualified Gynecologist having qualification MD, DGO (Bombay). She is the proprietress of the Opponent no.3 hospital. According to the Opponents the complaint is false, frivolous and vexatious. It is filed with an intention to take out handsome ransom from the Opponents. The claim is exaggerated and same is not based on any cogent evidence or actual proof for compensation. Present complaint involves complicated questions of law. Complainant has made wild allegations of medical negligence. Issue

involved in the complaint cannot be tried within the four corners of the provisions of the Consumer Protection Act, 1986. The remedy for the complainant is to approach the Civil Court. Complaint is not maintainable before this Commission. It is denied that the complainant is constrained to file the present complaint and further it is denied that there was negligence or lack of skill and care of opponents in carrying out sonógrapy on the complainant, as a result, complainant had to give birth of child with severe and serious congenital malformations.

[5] It is submitted that the Opponent No.1 was treating the complainant upto 29/1/1999. Complainant stopped visiting nursing home of opponents thereafter. Opponent No.1 is not aware as to whether the child was borne on 16/3/1999 and the said child was crippled because he had no occasion to examine the child. Complainant has not substantiated the allegations on the strength of any expert opinion or any medical evidence. Therefore, the complainant has no right to jump to the conclusion that child will be crippled throughout the life. Allegations are mischievous and are made with malafide intentions. Opponent No.1 is not aware and does not admit that on 16/3/1999 Dr. Mehta observed that there was serious defect in the baby at the time of her birth. It appears that the child was borne or about 16/3/1999 and as per the information at that time the child was not crippled. The alleged deformity as suggested by the complainant was seen in the

baby in any event Menigomyelocoele was not seen by Dr.Mehta who performed delivery. The said fact can be ascertained from in M.R.I. report. Therefore, deformity if any appears to have been detected subsequently for which the complainant has no right to blame the opponents. It is significant to note that the findings of Menigomyelocoele allegedly reflected in the sonography report dt.15/3/1999 of Dr.Kothekar appears to be incorrect for the simple reason that the finding has not been reflected in MRI report of the same baby dt.1/4/1999. It is further submitted that the sonography tests was recommended in the case of complainant on account of need of hour as per the patient/complainant. Complainant was not charged for each and every sonography. Right from the beginning complainant was aware that in the hospital of opponent no.1, facility to take out photographs of sonography is not available. Requisite notice is displayed on the notice board since beginning and all patients are orally informed about the same at the first visit and again at the time of first sonography. Complainant was also informed about the said position. Hand written reports of sonography of complainant speaks volumes about the falsity of the said allegation. Opponent No.1 is a trained and acquired knowledge of obstetrical and gynecological sonography in 1992 and is doing it since then to aid and help his clinical diagnosis. Ultra-sonography has its own limitations for the inutero diagnosis of congenital abnormalities due to technical difficulties related to foetal position, amniotic fluid, volume and foetal movements.

[6] All sonographies were done on account of need of hour. The first sonography of complainant was done on 11/8/1998 to confirm pregnancy when she presented with the history of missing her period for the first time. The second sonography was done to look for the presence of foetal heart activity i.e. viability because the first sonography could not demonstrate the presence of foetal heart beats and also to assess the amount of internal bleeding which was seen on the first ultrasonography and the complainant also had complained of per vaginal bleeding. The third sonography was done on 3/9/1998 when the complainant came to the hospital with complaints of fresh vaginal bleeding. This sonography was necessary to assess the damage caused by the fresh bleeding, to assess the size of the blood clot, to decide the location of the blood clot and to differentiate between the various types of abortions which in turn decide the further plan of actions whether to terminate the pregnancy or to salvage the pregnancy. On 13th October the sonography was done to find out about the interval growth and to rule out missed abortion as the previous sonography had shown retro chorionic hemorrhage. During this sonography the patient was diagnosed to have placenta previa. On 2/11/1998 complainant had came to the hospital with complaint of pain in the abdomen. To find out the reason for pain in abdomen, sonography was done. The sonography report at the time did not reveal any abnormality in that position at that time. Complainant was asked to wait for her urinary bladder to become full and

wrote a note on the sonography report. However, complainant refused to wait and went away. On 10/12/1998 on complainant's routine visit, opponent found that the cervix was shortened and it had started opening prematurely. This could have led to premature delivery. To confirm the doubt about premature delivery, sonography was carried out on the complainant. Doubt was vindicated because sonography revealed funneling sign which diagnoses the foetus at risk for premature delivery as its earliest. This sonography was a screening scan done with a limited goal to diagnose the status of the cervix to decide whether to put in the Shirodkar's or Macdlonald's stitch around the cervix or not. Complainant was suffering from placenta previa. The last sonography was done on 29/1/1999 was to check for placental migration. Thus all sonographies done were absolutely indicated at that time because of the nature of problems encountered during the pregnancy and were never performed with the negligent attitude as alleged by the complainant. All sonographies were done with the intention of an additional aid to the clinical diagnosis.

[7] It is further submitted that complainant and her husband approached him through Dr. Praneeta Gujrathi. According to the history narrated, they were married before seven years and were trying for pregnancy for five to six years. When Shirue couple came to his clinic for consultation, he had examined them thoroughly. He found that the problem

was not in the complainant but that in Mr. Shirude. After consultation, Mr. Shirude was operated in Vidula Nursing Home & Fertility Clinic. 45 days after operation the complainant conceived spontaneously. During conception, complainant had repeated per vaginal bleeding episodes for which she was hospitalized twice [16/8/1998 and 3/9/1998]. In the first three months of pregnancy, whenever the complainant presented the complaints of per vaginal bleeding, ultrasonography was performed to diagnose the viability of foetus, to assess the severity of bleeding, to assess the extent of damage done by the bout of bleeding and to differentiate between the various types of abortions. Condition of the complainant stabilized on medication and strict bed rest. On each visits, complainant's blood pressure, foetal growth, foetal heart beats were recorded by him. She was not charged for such sonographic examinations. In the sixth month of pregnancy, complainant developed condition of hypertension called – PIH. Complainant had also started passing albumin in her urine which confirmed the diagnosis of PIH. This condition was informed to the Complainant. She was also found one more complication of pregnancy i.e. placenta previa. This condition was diagnosed on ultasonograpy which can cause torrential painless per vaginal bleeding leading to maternal and foetal morbidity and mortality. If placental migration takes place the patient is less likely to suffer from the torrential per vaginal bleeding in the second half of pregnancy. The diagnosis of placental migration can be made only on

ultrasonography. In the sixth month of pregnancy, on 10/12/1998, the blood pressure reading was 170/116 and in the last five weeks she had put on four and half kg of weight which was excessive. Opponent further noticed that the cervix had shortened with signs of premature delivery. To confirm the findings, ultrasonography was done which showed "funneling sign". Complainant was asked to get hospitalized and as a treatment stitch was put around the mouth of the uterus to avoid premature delivery.

[8] Opponents have denied the rest of the allegations about not answering the queries, suggesting the mother of complainant not to go at her mother's place at Dombivli and attempted to detain the complainant in their hospital on one pretext or the other. It is further submitted that pregnancy induced hypertension which is managed by the gynecologists themselves because they are competent in treating such cases. But since the husband of the complainant being a medical representative, visits different physicians and cardiologist though it was wise to take an expert opinion, opponent suggested a cardiologist's opinion to offer the best possible services under the circumstances. Since complainant's husband know Dr. Manoj Chopda, a cardiologist, on request of complainant's husband, opponent had given referral letter. But for the reasons best known to them they chose to go to Dr. Kunal Gupte and consulted him. Since 25/11/1998 to 28/1/1999 the blood pressure of the complainant was in the range of

150/110 and 170/116. All the BP readings were personally taken by the opponent doctor Pradip Pawar and were entered in the OPD paper in his own hand writing. It is further submitted that it is a known fact that as the pregnancy advances the PIH becomes more severe. The complainant was diagnosed to have PIH in the sixth month itself and subsequently her BP readings varied as above. On 9/1/1999, when the BP of the complainant was 160/110, she was asked to get admitted to control her hypertension to avoid complications of PIH. During hospitalization, complainant was given choice of inviting a cardiologist of her choice or to take Dr. Abhirmanyuoo Pawar's opinion who was staying in the hospital building. Since Dr. Kunal Gupte had already given the guidelines it was easier to follow the same instructions under the supervision of a physician. It is further stated that complainant stopped visiting his clinic after 29/1/1999. Opponent is not aware about further development in her pregnancy after the said date. Opponent had taken all efforts to treat infertility as well as pregnancy adequately. All sonographies were done with the intention of an additional aid to the clinical diagnosis. They were never performed with the intention of generating revenue as alleged. It is further submitted that the patient/complainant did not pay the charges of hospitalization twice for which when repeatedly questioned, chose to abandon Opponent's treatment. Each and every sonography was performed with utmost case as per the patients complaints and given treatment accordingly at that time.

Opponents have denied the allegation of negligence and deficiency in service and prayed for dismissal of complaint with costs.

[9] Complainant has filed rejoinder and denied averment made by the Opponents in written statement. Along with rejoinder she has filed case papers of doctors who have attended her to show the serious neurological defect in the child along with bills of expenses incurred on that behalf. It is submitted that the Opponents did not give picture or photographs of the sonography they performed. Such action itself amounts to deficiency of service, since such making and handing over of pictures is the universal rule not only in India but all over the world. These pictures are documentary evidence of the sonography. Opponents have repeatedly averred that on several occasions he did a sonography with 'limited purpose' to see certain signs within the complainant's body. The basic method of sonography is to check all vital organs and the foetus. If it is being stated that only certain parts of the uterus were seen and the much more prominent and precious baby lying in the uterus was not given even a cursory look, this amounts to further deficiency of service on the part of the opponents. Sonography is supposed to detect congenital anomalies in one or maximum two sittings or procedures. The very fact that the complainant was subjected to seven sonographies and still not diagnosed to be suffering from the malformation in the foetus is gross negligence on the part of the

opponents and attracts the principle of *Res ipsa loquitur*. Reports of sonographies clearly aver to the foetus being seen and no abnormality detected in the same. There is no mention in the sonography reports that the sonography was done for a limited purpose as is being alleged by the opponents. It is contended by the complainant that seven sonographies were carried out to generate revenue rather than to give services to the complainant. Hence, complainant is entitled for the reliefs as prayed for.

[10] On these pleadings of the parties following points arise for our determination and we have recorded our findings for the reasons below-

Sr.No.	POINTS	FINDINGS
1	Whether the consumer complaint filed by the complainant is maintainable before this Commission ?	In the affirmative
2	Whether the Opponents are guilty of deficiency in service ?	In the affirmative
3	Whether complainant is entitled for compensation?	In the affirmative
4	What order ?	As per final order

[11] To substantiate the claim of compensation complainant has led her evidence by filing affidavit of evidence. She has placed reliance on the sonography reports of the opponents at Annexure 'A', Indoor case papers of opponents pertaining to the complainant at Annexure 'B', sonography

report of Dr.D.M.Kothekar dt.15/3/1999 at Annexure 'C', MRI report of baby Sushmita Shirodkar at Bhatia Hospital dt.1/4/1999, details of all operations performed, discharge cards and report of all pediatricians and pediatric surgeons who have seen and opined on the condition of the child, details of some of the expenses incurred in treatment of the child from birth to date.

[12] To give counter blow, Opponent No.1- Dr. Pradip Pawar led his evidence by filing his affidavit. He has filed copies of certificates to prove his academic qualifications and experience so also academic qualification of his wife with a view to prove that they are skilled and expert in their filed. To substantiate the plea of innocence the Opponents have placed reliance on evidence of Dr. Rajendra Shankar Shivde, Dr. Mandar Vaidya and Dr. Nitin Chaubal.

Admitted Facts

[13] Complainant was married in January 1991 and became pregnant in early 1998, after being investigated for infertility. For this reason, the pregnancy was a precious pregnancy. She has to be admitted on two or three occasions in Opponent No.3 Hospital for complications arising out of pregnancy, but was able to tide over them and carried on till 37th week of her pregnancy. During the entire period of pregnancy she had to

undergo as many as seven to eight sonographies on various pretexts and all of them were reported 'normal'. In early 1999, complainant changed her Obstetrician Gynecologist for personal reasons and then approached to Dr. Ranjit Mehta, Obstetrician Gynecologist, who sent her for a sonography to Dr.D.M.Kothekar at Nidaan Sonography centre. The report of the said doctor and centre said unequivocally that the foetus was having very serious birth disorder of the spine known as Meningomyelocoele, where the baby would be born with small lower limb and be paralyzed from the waist downwards. When the said disease was detected, complainant was in the 37th week of pregnancy and it was not permitted in law to carry out an abortion. A caesarean section surgery was carried out on 16/3/1999 and the child was subsequently confirmed to have severe spinal disorder. At present the child is 15 yrs old and though of good intelligence has had to suffer the major problem of being paralyzed waits downwards with poorly developed lower limbs.

[14] These facts are not seriously disputed by the Opponents. However, it is specifically denied by the Opponents that, Opponents are guilty of deficiency in service as defects are not detected during sonographies. It is submitted that Ultrasonography is a useful tool for diagnosis of abnormalities but it is not a prefer tool.

[15] By keeping in mind the admitted facts and the allegations which are denied let us proceed to appreciate evidence on record.

REASONS

As to the Point No.1-

[16] The Opponents have raised objection about the maintainability of the consumer complaint before this Commission on the ground that the complicated questions of facts and law are involved. Therefore, complainant ought to have filed Civil Suit for redressal of her grievances. Complicated questions of law cannot be decided in summary manner simply on the basis of affidavits of evidence.

[17] We do not agree with the submissions advanced on behalf of the opponents. It is to be noted here that the complainant was under the treatment of the Opponents. Complainant had undergone 7-8 sonography tests. Sonography was performed by the Opponent No.1. Sonography reports issued by the Opponents are not disputed. In each and every report, foetus was shown as 'normal'. Only question is to be decided whether the Opponents could have found out in sonography test that the foetus was having 'Meningomyelocoele'.

[18] It is to be decided whether the Opponents on the basis of

sonographies were able to find out defective spinal canal with irregularities i.e. Meningomyelocoele on the basis of available evidence and reports. It is not difficult to decide this issue on in summary trials when sonography test and reports done by the opponent No.1 are admitted.

In Dr.J.J.Merchant and others vs. Shrinath Chaturvedi, reported in (2002) 6 Supreme Court Cases 635, the Hon'ble apex court observed that,

> **" Under the Act [Consumer Protection Act, 1986] for summary or speedy trial, exhaustive procedure in conformity with the principles of natural justice is provided. For the trial to be just and reasonable, long-drawn delayed procedure, giving ample opportunity to the litigant to harass the aggrieved other side, is not necessary. The legislature has provided alternative, efficacious, simple, inexpensive and speedy remedy to the consumers and that should not be curtailed on such ground. It would also be a totally wrong assumption that because summary trial is provided, justice cannot be done when some questions of facts are required to be dealt with or decided. The Act provides sufficient safeguards. The Hon'ble National Commission or State Commission is empowered to follow the procedure contained in Section 13 of the Act.**

Under section 13, unlike the provisions of Order 8 Rule 1 CPC, the legislative intent is not to give 90 days of time but only maximum 45 days for filing the version by the opposite party.

It should be kept in mind that the legislature has provided alternative, efficacious, simple inexpensive and speedy remedy to the consumers and that should not be curtailed on such ground. It would also be a totally wrong assumption that because summary trial is provided, justice cannot be done when some questions of facts are required to be dealt with or decided. The Act provides sufficient safeguards."

[19] Considering the ruling given by the Hon'ble Apex Court, we are of the view that consumer complaint is maintainable before this Commission and this Commission has jurisdiction to try the consumer complaint filed by the complainant. Hence, we answer the point No.1 in the affirmative.

<u>As to the Point No.2-</u>

[20] It is crystal clear that baby 'Sushmita' was precious for the

Shirude couple. Admittedly, complainant Mrs. Nilima Shirude was married on 21/1/1993. She had seen many doctors as she did not conceive and she was required to undergo various types of treatments. Sometime in the year 1998, she was referred to the Opponent No.1 for infertility by Dr.Pradip Pawar for treatment of infertility. Complainant and her husband visited the Opponent No.1 at his hospital in or about March 1998. Opponent No.1 informed that there was minor surgical problem in her husband and her husband would have to undergo minor surgery. Accordingly, husband of complainant underwent varicocoelesurgery (surgery for blockage of veins in the scrotal bag) on 8.5.1998. Said operation was performed by Dr. Nandan Vilekar. Complainant conceived within 45 days of surgery. She was under medical treatment of the Opponents. During the period of pregnancy she was required to be admitted in the hospital of opponent no.1 for twice. She had undergone 7-8 sonography tests. Each and every time it was informed that the growth of the foetus was excellent and normal. In the sixth month of pregnancy, it was noticed that she had high blood pressure. All these facts are not seriously disputed. In early 1999, complainant went to Dr.Ranjeet Mehta, Gynecologist and Obstetrician. It is evident that Dr. Mehta sent her to Dr. Kothekar at Nidaan Sonography. Report of said doctor and centre said that foetus was having very serious disorder of spine known as 'Meningomyelocoele'. where the baby would be born with small lower limb and be paralyzed from the waist downwards. When the

said disease was detected, complainant was in the 37th week of pregnancy and it was not permitted in law to carry out an abortion. A caesarean section surgery was carried out on 16/3/1999 and the child was subsequently confirmed to have severe spinal disorder. At present the child is 15 yrs old and though of good intelligence has had to suffer the major problem of being paralysed waits downwards with poorly developed lower limbs.

[21] Ld. Authorized Representative Dr. Kamath for the complainant vehemently urged that, the Opponents knew that the pregnancy was precious for the complainant as complainant became pregnant after taking treatment for infertility. It was for the Opponents to offer the best possible services under these circumstances. The Opponent repeatedly performed sonographies on as many as 7-8 occasions. Sonographies were done as routine. It was incumbent on the Opponents to give detailed report of sonographies. Opponents did not give complainant either written reports or sonography plates. The diagnostic tool of sonography is meant to detect congenital anomalies, the problem of foetus malformation in the early stage and to abort unhealthy foetus. Opponents were unable to detect serious malformation of Meningomyelocoele either due to lack of knowledge or due to sheer carelessness. The inefficiency of the opponent is brought into sharp focus by the fact that, on the very first examination, the second sonologist, Dr. Kothekar promptly diagnosed the

foetus to be suffering from such disease. None diagnosis of the condition led to the birth of a child which has to suffer from the ailment throughout life and the parents have to suffer along with the child. Further, it is argued that the three affidavits are given on behalf of doctors who speak of the medical condition of the child, but without ever taking into consideration or mentioning therein that the complainant underwent 7-8 sonographies- when the standard method of detection of foetal anomalies is two sonographies.

[22] Ld. Advocate Shri. Prabhavalkar for the Opponents urged that the allegations made against the Opponents are baseless. Opponent No.1 examined the couple and found out that real fault of infertility. Husband of complainant under went varicocoele surgery and Complainant conceived within 45 days of surgery. Complainant failed to consider diagnosis made by the Opponent No.1. 7-8 sonographies were carried out because it was necessary to carry out those tests to preserve valuable pregnancy and to find out real cause of complication. All sonographies were done on account of need of hour.

[I] The first sonography of complainant was done on 11/8/1998 to confirm pregnancy when she presented with the history of missing her period for the first time.

[II] The second sonography was done to look for the presence of foetal heart activity i.e. viability because the first sonography could not demonstrate the presence of foetal heart beats and also to assess the amount of internal bleeding which was seen on the first ultrasonography and the complainant also had complained of per vaginal bleeding.

[III] The third sonography was done on 3/9/1998 when the complainant came to the hospital with complaints of fresh vaginal bleeding. This sonography was necessary to assess the damage caused by the fresh bleeding, to assess the size of the blood clot, to decide the location of the blood clot and to differentiate between the various types of abortions which in turn decide the further plan of actions whether to terminate the pregnancy or to salvage the pregnancy.

[IV] On 13th October the sonography was done to find out about the interval growth and to rule out missed abortion as the previous sonography had shown retro chorionic haemorrhage. During this sonography the patient was diagnosed to have placenta previa.

[V] On 2/11/1998 complainant had came to the hospital with complaint of pain in the abdomen. To find out the reason for pain in abdomen, sonography was done. The sonography report at the time did not reveal any abnormality in that position at that time.

[VI] On 10/12/1998 on complainant's routine visit, opponent found that the cervix was shortened and it had started opening prematurely. This could have led to premature delivery. To confirm the doubt about premature delivery, sonography was carried out on the complainant. Doubt was vindicated because sonography revealed funnelling sign which diagnoses the foetus at risk for premature delivery as its earliest. This sonography was a screening scan done with a limited goal to diagnose the status of the cervix to decide whether to put in the Shirodkar's or Macdlonald's stitch around the cervix or not. Complainant was suffering from placenta previa.

[VII] As the pregnancy grows the size of the uterus grows and the uterus and the placenta is known to shift away from the mouth of the uterus thereby minimizing the chance of life threatening bleeding episodes. It is called 'placental

migration'.

[VII] The last sonography was done on 29/1/1999 was to check for placental migration.

All sonographies were done because of nature of problem during pregnancy and were never performed with negligent attitude.

[23] We have perused sonography reports of sonographies which were performed by the Opponent No.1. In all reports condition of foetus is shown as 'normal'. It is very surprising that the Opponent No.1 did not find out defect in the foetus. The standard method advised by the medical science for detection of defect is 'sonography'. In spite of 7-8 sonographies were done, Opponent No.1 could neither detect nor diagnose condition of serious spinal defect in the foetus. On the other hand in all reports condition of the foetus is shown as 'normal'. Dr. Kothekar diagnosed foetus suffering from serious spinal defect. It is brought to our knowledge that at present child 'Sushmita' is 15 yrs old and she is suffering from serious deformities. She is living life as crippled child.

[24] Opponents have placed reliance on the affidavits of experts i.e. Dr. Rajendra Shankar Shivde, Dr. Mandar Madhukar Vaidya and Dr. Nitin

Gangadhar Chaubal. According to the opponents all three doctors are highly qualified and experts in their field. Witness Dr. Rajendra S. Shivde is practicing as Ultrasonologist and radiologist in Nashik. He has passed MD [Radiology] and DMRD examinations from Mumbai University. He is doing ultrasonographic scanning for last 17 yrs. Witness Dr. Mandar Madhukar Vaidya is practicing as pediatric surgeon in Nashik. He has passed MS [General Surgery] examination in December 1989 from Sassoon General Hospitals, B.J.Medical College Pune. He has also passed Mch [pediatric surgery] examination in June 1993 from KEM Hospital, Seth G.S.Medical College, Mumbai. He is practicing as a consultant pediatric surgeon in Nashik for last 9 yrs. Dr. Nitin Gangadhar Chaubal is practicing as Ultrasonologist and Radiologist in Thane and Mumbai. He has passed DMRD [Radiology] and MD examinations from Mumbai University in 1983 and 1984 respectively. He is doing ultrasonographic scanning for last 19 yrs.

[25] Dr. Shivde testified that all foetal anomalies may not always be visible due to technical difficulties related to foetal position, amniotic fluid [fluid around the foetus] volume and foetal movements. He has further stated that as the foetus grows in size the anatomic malformations like spinal abnormalities also grow in size and become detectable only at the end of pregnancy or at birth. Ultrasonic waves cannot travel through air and

bones and hence intraspinal lesions like 'diestemetamyelia' are difficult to diagnose. Due to technical difficulties, negative prenatal ultrasonographic examination does not provide absolute assurance that a foetus is defect free.

[26] Another expert Dr. Chaubal has stated that evaluation of foetal anatomy is universally recognized as an integral part of obstetrical sonography. But the sensitivity of ultrasonography to detect abnormalities varies from as low as 16.6% to as high as 84.3% in various studies published worldwide. He has further stated that foetal anomalies may not always be visible due to technical difficulties related to foetal position, amniotic fluid [fluid around the foetus] volume and foetal movements. Further it has been stated that, Ultrasonic waves cannot travel through air and bones and hence intraspinal lesions like 'diestemetamyelia' are difficult to diagnose.

[27] Dr. Shivde and Dr. Chaubal have firmly opined that there is no medical negligence or deficiency in service on the part of Opponents and the opponents have discharged their duties as per the best ability and professional skill.

[28] Dr. Mandar Madhukar Vaidya was involved at some point of time in treating the daughter of the complainant-'Sushmita'. He had seen

'Sushmita' on 16/3/1999 at Dr. Ranjeet Mehta Hospital. He noticed that baby had palpable lipoma [soft tissue tumor] in lower lumber region. On neurological examination both lower limbs had power but the left lower limb had less power than right. He had advised MRI scan to rule out spina bifida with associated anomalies like intradural lipoma/diastemetamyelia etc. Since the lesion was covered with normal skin unlike the thin membranes seen with meningomyelocele there was no urgency in doing surgery. According to him, it is incorrect to suggest that the said baby had Meningomyelocoele at the time of her birth so as to attribute any negligence on the part of Dr. Pradeep Pawar.

[29] Complainant has not filed affidavit of evidence of any expert to support the contentions. But the documents placed on record filed by the complainant are self explanatory. Doctrine of ***res ipsa locator*** will attract in this case. In 7-8 sonography reports condition of foetus is shown as 'normal'.

[30] Dr. Kamath- Authorised Representative for complainant has filed on record medical literature. In the literature named as ***'Diagnostic Imaging of Fetal Anomalies'*** edited by David A. Nyberg, M.D., John P.McGahan, M.D., Dolores H. Pretorius, M.D., Gianluigi Pilu, M.D. It has been stated as under-

"A surroundin myelomeningocele sac may or may not be present. The presence of a sac certainly aids the diagnosis of the spinal defect whereas the absence of a sac can make detection difficult. This myelomeningocele sac should not be confused for a skin-covered defect, however,

Ultra-sound can predict the location and extent of the spinal defect with a high degree of accuracy. Sagittal and coronal views are most useful in this evaluation. Closed spinal defects are extremely difficult to diagnose, with the possible exception of lipomeningoceles.

The accuracy in the diagnosis of spina bifida depends heavily on the experience of the operator, the quality of the equipment, and the amount of time dedicated to the scan. We believe the accuracy of referral centres should be close to 100%, in large part due to recognition of associate cranial findings. The fact that not all centers have reached this rate means further improvements in overall screening for fetal anomalies can be expected."

[31] Opponents did not file on record any literature to oppose the view edited by David A. Nyberg, M.D., John P.McGahan, M.D., Dolores

H. Pretorius, M.D., Gianluigi Pilu, M.D. Opponent No.1 did not file any medical literature or medical paper to support the view expressed by himself and his witnesses. Case of the complainant cannot be thrown out only because complainant has not filed any expert opinion. Apart from that, Court is not bound by evidence of expert which is to a large extends in advisory in nature. Court has to derive at its own conclusion upon considering opinion of expert which may be adduced by both sides cautiously.

[32] In *Criminal Appeal Nos.1191-1194 of 2005 between Malay Kumar Ganguly v/s. Dr. Sukumar Mukherjee and ors.* Wherein it has been held that,

> **"A Court is not bound by the evidence of the experts which is to a large extent advisory in nature. The Court must derive its own conclusion upon considering the opinion of the experts which may be adduced by both sides, cautiously, and upon taking into consideration the authorities on the point on which he deposes.**
>
> **Medical science is a difficult one. The court for the purpose of arriving at a decision on the basis of the opinions of experts must take into consideration the difference**

between an 'expert witness' and an 'ordinary witness'. The opinion must be based on a person having special skill or knowledge in medical science. It could be admitted or denied. Whether such an evidence could be admitted or how much weight should be given thereto, lies within the domain of the court. The evidence of an expert should, however, be interpreted like any other evidence."

[33] Dr. Kamath during the course of argument placed reliance on the ruling of *Hon'ble National Consumer Disputes Redressal Commission, New Delhi reported in 2009 (I) CPR 191 (NC) between M/s Senthil Scan Centre v/s. Mrs. Shanthi Sridharan & Anr.,* in which it is held as under-

"Respondent approached appellant a scanning centre for taking a diagnostic ultrasound picture to seek report regarding her pregnancy. First report confirmed a single live baby but did not suggest any malformation or other physical defects. After completing 33 weeks of pregnancy respondent 1 took a third scan which also showed that there was no obvious anomalies. Respondent gave birth to a baby girl but was shocked to find that her child was born only with a stump below the elbow. Complaint alleging

deficiency in service. Held if there was only a small stump below elbow and there was no forearm, one could not believe that such an obvious anomaly could be escaped from scrutiny of specialist who was expected to observe scan carefully knowing history of respondent 1. Appellant faulted in diagnosing scan correctly, especially when they repeatedly mentioned that in the second and in the third scan report they had noted that they visualized limbs and thereafter concluded that there was no obvious anomalies. State Commission rightly held that there was deficiency in service and negligence on part of appellant. No reason to interfere with well reasoned order of State Commission. Appeal dismissed."

[34] The above ruling is squarely applicable to the case in hand. The Opponent No.1 had done sonography tests of complainant for 7-8 times. He was confident about accuracy of sonography tests. Spinal defect could be found out within 2-3 sonography tests. But in spite of 7-8 sonography tests, defect was not found out. Opponent No.1 was duty bound to do sonography tests to find out anomaly. He was duty bound to do sonongraphy in changed position so that he could locate the defect.

[35] Dr. Kamath, Authorized Representative for complainant, has drawn our attention to para 6 and para 10 of the judgment cited supra.

Para 6 of the judgment is as under-

> **"Technical limitations produced by foetal position, maternal obesity, and abnormal amniotic fluid volume may significantly limit sonographic evaluation of foetal anomalies. Problems related to foetal anomalies are easier to correct than other contributing factors. Changing the beam path by moving the transducer to various locations on the maternal abdomen may improve visualization of foetal parts. A change in maternal position, such as decubitus positions, may alter the foetal position and thus permit optimal imaging. We have also found that endovaginal scanning may be useful for examining foetal structures when the area of interest is low in the maternal pelvis. In some cases, a delayed study a few hours or days later may be necessary.**
>
> **The foetus is also usually in the dependent portion of the uterus, increasing the distance from the foetus to the ultrasound transducer in the presence of polyhydramnios.**

The difficulties resented by abnormal amniotic fluid volume are emphasized by the study of Manchester and associates, who found that 43% of missed anomalies could be attributed to abnormalities of amniotic fluid volume."

Para 10 of the judgment is as under-

"Learned counsel referred to medical text given at page 88 of the Diagnostic Ultrasound of Fetal Anomalies :Text and Atlas, by David A. Nyberg, Barry S. Mahony and Dolores H. Pretorius references regarding sonographic accuracy, which is reproduced hereunder:

An overview or prenatal sonographic detection of fetal malformations- Prenatal sonography has developed as a powerful tool for the detection and delineation of scongenital anomalies. Optimal examination by experienced sonographers can diagnose the vast majority malformation and even minor malformations have been correctly detected."

[36] Above ruling of **Hon'ble National Consumer Disputes**

Redressal Commission acted as guideline for us. In our view, the Opponent No.1 faulted in diagnosing spinal defect of the foetus. The sonography as discussed above, cannot be for limited purpose. The basic method of sonography is to check all vital organs of foetus. If it is being stated that only certain parts of the uterus were seen the much more prominent and 'precious' baby lying in the uterus was not given even a cursory look, this amounts to further deficiency of service on the part of the opponents. It is an admitted fact that 7-8 sonography tests were done. The very fact that the complainant was subjected to seven sonographies and still not diagnosed to be suffering from the malformation in the foetus is gross negligence on the part of the opponents and attracts the principle of *Res ipsa loquitur*. Reports of sonographies clearly aver to the foetus being seen and no abnormality detected in the same. There is no mention in the sonography reports that the sonography was done for a limited purpose as is being alleged by the opponents. It amounts to negligence and deficiency in service on the part of the opponents. Shirude couple has suffered a lot due to the negligence and deficiency in service on the part of the opponents. Complainant was constrained to give birth to crippled child 'Sushmita'. She has to lead live of parasite. Certainly, opponents are liable to compensate the complainant for the same. The Opponents are guilty of deficiency in service. As a result, we answer point no.2 accordingly.

<u>As to the Point No.3-</u>

[37] Record shows that complainant was required to spend Rs.7,50,000/- towards treatment of crippled child 'Sushmita'. In future she has to take regular medical treatment at the cost of complainant. The child and parents suffered a lot, due to negligence of the opponents. Hence, in our opinion Opponent Nos. 1 to 3 jointly and severally are liable to pay compensation of Rs.17,50,000/- to complainant. With this view we pass following order-

ORDER

1] Consumer complaint No.CC/00/423 is hereby Partly allowed.

2] Opponent Nos. 1 to 3 are held guilty for deficiency in service.

3] Opponent Nos. 1 to 3 jointly and severally do pay an amount of Rs.17,50,000/- [Rupees Seventeen Lakh Fifty Thousand only] to the complainant towards compensation and costs of litigation within 2 months from the date of this order. Else, amount shall carry simple interest @ 9% p.a. from the date of this order till realization.

4] One set of complaint compilation be retained and rest be returned to the complainant.

5] Certified copy of order be supplied to both the parties free of cost.

Pronounced and dictated on 21st September, 2016

[Usha S. Thakare]
PRESIDING JUDICIAL MEMBER

[Dhanraj Khamatkar]
MEMBER

rsc

(16)

आयक्त क्र. ....1195.....
दिनांक :..19/08/2016

BEFORE THE HON'BLE STATE CONSUMER DISPUTES REDRESSAL COMMISSION, MAHARASHTRA, MUMBAI

(13)

Revision Petition No.RP/15/344

Syndicate Bank
APMC Market, K.U.Bazar
Vashi, Turbhe
Navi Mumbai 400 705 .....Revision petitioner

Versus

Dr.Balasaheb Krishna Bagal
R/o.Row House no.7, Agresen Co-op.
Hsg.Society, Agarwal Park .....Respondent
Sector no.8, Airoli, New Mumbai 410 218

BEFORE:

Smt.Usha S.Thakare Presiding Judicial Member
Dhanraj Khamatkar, Member

PRESENT:

Ms.Sandhya Nanavare-Advocate for revision petitioner

ORDER

Per Smt.Usha S.Thakare Hon'ble Presiding Judicial Member

1. Heard Ms.Sandhya Nanavare-Advocate for revision petitioner with authority letter on admission.

2. Revision petition is filed to challenge the order passed in consumer complaint bearing no.CC/15/193 dated 16/10/2015 passed by Additional District Consumer Disputes Redressal Forum, Thane. Learned District Forum directed to proceed without written version of the opponent/petitioner. On that date, written version was not filed. It is urged that written version was ready but concerned advocate reached late to Additional District Forum, Thane and, therefore, written version could not be filed. Prior to it order was passed. Record shows that written version was not filed within 45 days from the date of admission. No case is made out to point out that the order of the District Forum is illegal and incorrect. As per provisions of law, it is mandatory to file

written version within 45 days.

3. Their Lordships of the Hon'ble Supreme Court in the case of Civil Appeal Nos.10941 – 10942 of 2013 (In the matters of *New India Assurance Co. Ltd. Vs. Hilli Multipurpose Cold Storage Pvt. Ltd*) decided on 04/12/2015, in paragraph (17) of the order, observed as follows:-

> *"We are, therefore, of the view that the judgment delivered in the case of Dr. J. J. Merchant & Ors. Vs. Shrinath Chaturvedi, reported in [2002-(6)-SCC-635] holds the field and therefore, we reiterate the view that the District Forum can grant a further period of 15 days to the opposite party for filing his version or reply and not beyond that."*

4. The Hon'ble Apex Court made it clear that its earlier view expressed in the case of ***Dr. J. J. Merchant*** **(supra)** should be followed. Upon plain reading of Section-13(1)(a) of the Consumer Protection Act, 1986 one can find that the opposite party is given time of thirty days for giving his version and the said period for filing or giving the version can be extended by the District Forum or State Commission, as the case may be, but the extension should not exceed a period for fifteen days. Thus, the upper cap of forty-five days is imposed under the Consumer Protection Act, 1986 for filing written version by the opposite party.

5. In view of guidelines of the Hon'ble Apex Court, we have no hesitation to hold that in the present case, the Petitioner/Opponent failed to establish as to how the order under challenge passed by the learned District Forum is illegal, improper, and incorrect or suffers from material irregularity so as to invoke revisional jurisdiction of this Commission, as contemplated under Section-17(1)(b) of the Consumer Protection Act, 1986. In absence of written version,

as per settled law, the Petitioner/Opponent can participate in the proceedings before the District Forum and can attack the consumer complaint only on law points. Thus, present revision petition deserves to be dismissed being devoid of merit.

Hence, we proceed to pass the following order:-

ORDER

The revision petition is not admitted and stands dismissed in limine.

Under these circumstances, the parties shall bear their own costs.

Pronounced on 15th February, 2016.

[Smt.Usha S.Thakare]
Presiding Judicial Member

[Dhanraj Khamatkar]
Member

Ms.

STATE CONSUMER DISPUTES REDRESSAL COMMISSION
MAHARASHTRA, MUMBAI

MISC.APPLICATION NO.MA/15/243 IN A/15/547
(Arisen out of Order Dated 01/09/2014 in Consumer Complaint No.212/2014 of Mumbai Suburban District Forum at Mumbai)

Mr.Bhaskar Manu Puthran
R.No.18, 1st floor, 123, Modi St.
Nafeesa Chamber, Fort,
Mumbai 400 001.

Vs. Ms.Sujatha Kamire
Through Secretary/Manager,
The R.S.Co-operative Bank Ltd.
7, Suryadarshan, 3rd Kasturba Road, Borivali East,
Mumbai 400 066.

2. The Senior Divisional Manager, The Life Insurance Corporation of India,
Salary Saving Scheme Division,
Jeevan Seva Building,
S.V.Road, Santacruz West,
Mumbai 400 054.

BEFORE:

Usha S. Thakare - Presiding Judicial Member
Dhanraj Khamatkar – Member

Dated : 14/10/2016

ORDER

Per Mrs.Usha S. Thakare, Presiding Judicial Member

[1] Adv.P.M.Bhatt is present for the applicant/appellant. He has filed his vakalatnmana on record. None is present for the respondent no.1. Adv.Damale is present for the respondent no.2.

[2] Costs are paid as per direction in the Legal Aid Account of the Commission.

[3] Being aggrieved by the order passed by District Consumer Disputes Redressal Forum, Mumbai Suburban District, Mumbai in consumer complaint no.212/2014 dated 01/09/2014, original complainant, Bhaskar Manju Puthran has filed present appeal. However, there is a delay of 243 days in filing the appeal. According to the applicant, the delay is neither intentional nor deliberate. The applicant received the copy of order on 02/092014. His mother-in-law was ill since long. He had to take care of

mother-in-law, as she was suffering from diabetics, eye sight problem and various other complications. Nobody was there to look after her. The applicant had other household problems too. Therefore, the applicant could not file appeal well within time. If the delay is not condoned, applicant will suffer hardship and irreparable loss which cannot be compensated in terms of money.

[4] Application is opposed by the respondent no.2.

[5] While drafting the delay condonation application, original respondent no.1, R.S.Co-operative Bank Ltd. is not cited as a party, but in appeal, bank is cited as respondent no.1.

[6] Heard learned counsel Mr.P.M.Bhatt for the applicant/appellant and learned counsel Mr.Damale for the respondent no.2.

[7] Consumer complaint was decided by an order dated 01/09/2014. Free copy was sent to both the parties. As per own admission, the applicant received the free copy on 02/09/2014. There is an inordinate delay of 243 days in filing the appeal. As per settled law, the applicant/appellant has to explain day-today delay by sufficient and cogent reason. On perusal of application, it appears that the applicant is seeking condonation of delay on general grounds. Nothing on record to show that mother-in-law of the applicant was suffering from several health problems like diabetics, eye sight problem etc. Medical papers are not filed on record. Affidavit of mother-in-law does not find place on record. It is not made clear how many members are there in family of the applicant. General submissions are made on behalf of the applicant. He has not narrated which household problems restrained him from filing the appeal well within time.

[8] On perusal of copy of order, it prima-facie case on merit. Benefit under the policy was never denied. Only issue is to obtain succession certificate.

[9] On the point of delay, there is judgment of Hon'ble National Commission reported in 2014 (I) CPR 203 – *Sanjeev Gupta vs. Oriental*

Insurance Co.Ltd., wherein it is observed that –

> *7. A view has been taken by the Honble Apex Court in a number of judgments given recently, that the delay in filing Appeal/Revision Petition etc. should not be condoned, unless there are valid and cogent reasons for doing the same. In this regard, reference may be made to the order passed by the Honble Apex Court in case R.B. Ramlingam Vs. R.B. Bhavaneshwari 2009(2)SCALE108, where it has been observed:*
>
> *We hold that in each and every case the Court has to examine whether delay in filing the special appeal leave petitions stands properly explained. This is the basic test which needs to be applied. The true guide is whether the petitioner has acted with reasonable diligence in the prosecution of his appeal/petition.*

[10] Even in the case of *Anshul Aggarwal vs. New Okhala Industrial Development Authority*, the Hon'ble Supreme Court has observed that –

> *It is also apposite to observe that while deciding an application filed in such cases for condonation of delay, the Court has to keep in mind that the special period of limitation has been prescribed under the Consumer Protection Act, 1986 for filing appeals and revisions in consumer matters and the object of expeditious adjudication of the consumer disputes will get defeated if this Court was to entertain highly belated petitions filed against the orders of the consumer Foras.*

[11] In view of the above rulings, we have no hesitation to hold that applicant failed to make out sufficient reason to condone the delay of 243 days. Application deserves to be rejected. Hence, the order.

ORDER

1) The application for condonation of delay bearing no.MA/15/243 is hereby dismissed.

2) Consequently, the first appeal bearing no.A/15/547 does not survive for consideration.

[Usha S. Thakare]
Presiding Judicial Member

[Dhanraj Khamatkar]
Member

pg

(18)

BEFORE THE HON'BLE STATE CONSUMER DISPUTES REDRESSAL COMMISSION, MAHARASHTRA, MUMBAI (15)

MISC.APPLICATION NO.MA/15/533 IN APPEAL NO.A/15/1232

1.M/s.Suparshwa Enterprises
A partnership firm
Office at 10.12, Navoroji Lane
Behind S.K.Patil Garden,
Thakurdwar, Mumbai 400 002
2. Mr.Jayantilal Lunkad
Partner of M/s.Suparshwa Enterprises
Office at 10.12, Navoroji Lane
Behind S.K.Patil Garden,
Thakurdwar, Mumbai 400 002
3. Mr.Kishore B.Rathod
Partner of M/s.Suparshwa Enterprises
5/11, Navjivan Commercial Premises
Building no.3, Lamington Road
Mumbai Central. .....Applicants/Appellants

Versus

1.Suparshwa Co-op.Hsg.Soc.Ltd.
Through its Secretary
Mr.S.G.Bibawanekar
R/o.A wing, S.L.Matkar Marg
Elphinston Road (West)
Mumbai 400 025
2. Municipal Corporation of Greater Mumbai
'E' ward, Building Proposal department .....Respondents
Byculla, Mumbai

BEFORE:

Usha S.Thakare, Presiding Judicial Member
Dhanraj Khamatkar Member

PRESENT: Advocate Mr.Anand Patwardhan for applicants/appellants
Advocate Mr.Akshay Deshmukh for the respondent no.1.

ORDER

Per Hon'ble Smt.Usha S.Thakare, Presiding Judicial Member

Being aggrieved by the order passed by South Mumbai District Consumer Disputes Redressal Forum, South Mumbai in consumer complaint no.318/2006 on 27/12/2013, original opponent no.1 has preferred the appeal to

However, there is delay of 625 days in filing the appeal. Therefore, applicants /appellants have filed an application for condonation of delay bearing no.MA/15/533 and have requested for condonation of delay in filing the appeal.

2. According to applicants, Learned District Forum, South Mumbai at Parel passed order in consumer complaint no.CC/06/318 on 27/12/2013. Certified copy was received by the applicants on 10/01/2014 by hand. Certified copy was collected by applicant no.2-Mr.Jayantilal Lunkand through authorized person in January 2014. Applicant no.2 tried to contact applicant no.3, as there was separation of the partners before the impugned order was passed by the District Forum. After much deliberation, applicant nos.2& came together. They considered the order on all aspects and decided to file the appeal in last week of March 2014. They approached Advocate Mr.Anand Patwardhan for filing an appeal. Appeal was taken up for preparation. It was followed up by Advocate Mr.Adil Khan from the office of Advocate Mr.Anand Patardhan. Advocate Mr.Adil Khan had taken up the matter for drafting. Thereafter, soft copy of draft was mailed to the applicants somewhere in second week of April, 2014. It was signed by both the partners after approval. Draft was given to Advocate Mr.Adil Khan for further action. The applicants were in anticipation of appeal getting completed and ready for filing. They ha sworn affidavit in support of appeal and sent to office of Advocate Mr.Anand Patwardhan. Advocate Mr.Adil Khan was handling the matter and was preparing all required papers to get the said appeal filed. Unfortunately, Advocate Mr.Adil Khan left office of Advocate Mr.Anand Patwardhan somewhere in May 2014 and settled at Jaipur. Due to sudden departure of Advocate Mr.Adil Khan, the matter was left unattended and got misplaced. The applicants were under impression that said appeal was filed by office of Advocate Mr.Anand Patwardhan. In the month of September 2015, applicants contacted with the office of Advocate Mr.Anand Patwardhan. Office of advocate searched said file. Office came to know that said appeal though prepared and sworn was not filed through oversight and remained with other files in the office of Advocate Mr.Anand Patwardhan. Delay is not deliberate

or intentional and, hence, it may be condoned, as the applicants have strong case on merits.

3. Misc.application is strongly opposed by respondent no.1/original complainant on affidavit. It is specifically denied that the applicants are entitled for condonation of delay. It is submitted that the application is misconceived. There is more delay than 625 days in filing an appeal. Application is filed without any sufficient cause for condonation of delay. All averments are vague. No particulars are given. Allegations are made against the advocate but advocate has not joined as party. The applicants have not made any follow up with senior or junior advocate for filing an appeal. Application is without merit and liable to be rejected with costs.

4. Heard Learned counsel Mr.Anand Patwardhan for the applicants/appellants and Mr.Akshay Deshmukh for respondent no.1/org. complainant. None present for respondent no.2.

5. The applicants received certified copy of the order passed in consumer complaint no.CC/06/318 on 10/01/2014 by hand. Appeal is filed on 28/09/2015. Applicant nos.2&3 have taken decision to file an appeal in last week of March, 2014. There was inordinate delay on the part of applicants to take decision to file an appeal. There is no document filed on record to hold that there was separation of the partner before passing impugned order. Applicant no.1 M/s.Suparshwa Enterprises is a partnership firm. Whatever changes effected in partnership firm are required to be reflected in certificate of Registration. Applicants should have filed copy of registration of partnership and changes effected in partnership firm. The reason for delay in taking decision is not at all satisfactory.

6. The applicants tried to shift liability of delay in filing appeal on Advocate Mr.Adil Khan, junior advocate from the office of senior advocate Mr.Anand Patwardhan. For the sake of argument, if it is considered that work of drafting appeal was allotted to Advocate Mr.Adil Khan by the senior advocate and he has drafted the appeal. Appeal memo was lying at office of senior counsel. Said appeal memo was found out in the month of September 2015 as per own submission of the applicants in para 2 of the application. It means that para

of appeal were lying in the office of senior advocate. One thing is clear that Advocate Mr.Adil Khan did not carry papers of appeal with him at Jaipur.
The applicants are of the view that Advocate Mr.Adil Khan was attending the said appeal. He subsequently left the office and said file left unattended and got misplaced.

7. The work to draft the appeal and to file appeal was allotted to senior advocate. It was for the senior advocate to see and verify whether his junior had done the work properly or not. We have common knowledge that the senior advocate has control over the office affairs and on his juniors.

8. In application it is not made clear when Advocate Mr.Adil Khan prepared the appeal memo and when he left the office. Defaulting advocate Mr.Adil Khan was from the office of senior advocate Mr.Anand Patwardhan. Affidavit of Advocate Mr.Adil Khan does not find place on record. No action was taken against him by the applicants although he was at fault.

9. Only because file was handed over at office of Advocate Mr.Anand Patwardhan by the applicants, it does not minimize the duty of the applicants or clients. It is for the clients/applicants to do follow up of the matter entrusted to the senior advocate. The clients must be in touch with lawyers/ advocates to know the progress of their case. The responsibility/ duty of the client will not come to an end only because file was handed over to the advocate. It is not expected that the clients should visit of the office of advocate only in the month of September 2015, particularly, when they have submitted the papers for drafting the appeal to the senior advocate in the second week of April, 2014. When the applicants are not at all diligent in getting instructions about appeal from the advocate, they cannot blame the advocate.

10. In our view, reasons mentioned by the applicants for condonation of delay are not at all sufficient to condone the inordinate delay of 625 days. Remedy under the Consumer Protection Act, 1986 is a speedy remedy made available for the consumers. Considering the preamble of the Consumer Protection act, it is not at all desirable to condone huge delay of 625 days when it is not properly explained.

11. In the case of *Anshul Aggarwal Vs. New Okhla Industrial Development Authority* ~ reported in (2012)-14-SCC-578, highlighting the object and scope of the Act and deprecating entertainment of belated petitions, the Hon'ble Supreme Court had observed that entertainment of highly belated petitions defeats the very object of expeditious adjudication of the consumer dispute.

12. In the case of *R. B. Ramlingam Vs. R. B. Bhavaneshwari* ~ reported in 2009-(2)-Scale-108, Apex Court held and observed that in each and every case the Court has to examine whether delay in filing the special appeal leave petitions stands properly explained. This is the basic test which needs to be applied. The true guide is whether the petitioner has acted with reasonable diligence in the prosecution of his appeal/petition.

13. In the case of *G.G.Medical Institute & Research Centre & another v/s. Dinesh Kumar Shrivastava & ors. Reported in I(2015) CPJ 678 (NC)*, Hon'ble National Commission observed as under:-

> *"6. The following authorities neatly dovetail with our view. In Banshi Vs. Lakshmi Narain 1993 (1) R.L.R. 68, it was held that reason for delay was sought to be explained on the ground that thecounsel did not inform the appellant in time, was not accepted since it was primarily the duty of the party himself to have gone to lawyers office and inquired about the case.*
>
> *7. In Jaswant Singh Vs. Assistant Registrar, Co-operative Societies 2000 (3) Punj. L.R. 83, it was observed that cause of delay was that the counsel of the appellant in the lower Court had told them that there was no need of their coming to Court and they would be informed of the result, as and when the decision comes, was held to be a story which cannot be believed.*
>
> *8. In Bhandari Dass Vs. Sushila, 1997 (2) Raj LW 845, it was held that accusing the lawyer that he did not inform the client about the progress of the case nor did he send any letter, was disbelieved while rejecting an application to condone delay.*
>
> *9. Now it has become a fashion to accuse the advocates, which is nothing but a ruse to make sure that the application for condonation of delay is accepted. A lawyer cannot be negligent for a period of more than 1 years. No affidavit of the advocates saw the light of the*

day. No action was taken against the advocates. No complaint was filed before the Bar Council of India against the counsel."

14. The above rulings acted as guidelines for us. Applicants failed to make out sufficient reason for condonation of delay. Hence, misc.application for condonation of delay deserves to be dismissed. With this view, we pass the following order:-

ORDER

1. Misc. application no.MA/15/533 for condonation of delay is hereby rejected. Consequently, appeal is not entertained for hearing.
2. Parties to bear their own costs.

Pronounced on 13th June, 2016.

[Usha S.Thakare]
PRESIDING JUDICIAL MEMBER

[Dhanraj Khamatkar]
MEMBER

Ms.

(19)

736

16/02/2016

(16)

BEFORE THE HON'BLE STATE CONSUMER DISPUTES REDRESSAL COMMISSION, MAHARASHTRA, MUMBAI

Complaint Case No. CC/15/207

1. M/s.The Monte Vista Residence Welfare Association through its Secretary, Shri Chandulal S. Thakkar

2. Monte Vista Co-op. Hsg. Soc. Ltd. (Proposed) Through its Chief Promoter Shri Chandulal S. Thakkar
Having address at 2802, Monte Vista, Madan Mohan Mallavia Road, Mulund (W), Mumbai – 400 080. .....Complainant(s)

Versus

1. Marathon Realty Ltd.
Formerly known as –
M/s.Chhaganlal Khimji & Co. Pvt. Ltd.
Having office at 702, Marathon Max, Mulund Goregaon Link Road, Mulund (W), Mumbai – 400 080.

2. Mr.Mayur S. Shah
Promoter & Director of opponent No.1
Having address at 702, Marathon Max, Mulund Goregaon Link Road, Mulund (W), Mumbai – 400 080.

3. Mr.Chetan Shah
Promoter & Director of opponent No.1
Having address at 702, Marathon Max, Mulund Goregaon Link Road, Mulund (W), Mumbai – 400 080.

4. The Executive Engineer
Building Proposal (Eastern Suburbs)
Municipal Corporation of Greater Mumbai
Paper Mills Compound, L.B.S. Marg, Vikhroli, Mumbai – 400 083. .....Opp.Party(s)

BEFORE:

Smt.Usha S. Thakare PRESIDING JUDICIAL MEMBER
Dhanraj Khamatkar MEMBER

For the Complainant:	Mr.Naushad Engineer -Advocate for the complainants.
For the Opp. Party:	Mr.Prasad Dani-Advocate, Mr.Kunal Vajani-Advocate, Mr.Raghav Gupta-Advocate and Sumanth Anchan- Advocate i/b. Wadia Ghandy & Company for opponent nos.1, 2&3 None present for opponent no.4

ORDER

Per Mr.Dhanraj Khamatkar Hon'ble Member

1. Complainant No.1 is the Welfare Association of the flat owners duly registered under the Societies Registration Act and complainant No.2 is the proposed Society of flat owners who have purchased the flats in the building known as 'Monte Vista' (hereinafter referred to as 'complainants') have filed a consumer complaint against the opponent Nos.1to4. Opponent No.1 is builder and developer-company and opponent Nos.2&3 are Directors of opponent No.1 (hereinafter referred to as 'opponents/builders'). Opponent No.4 is Municipal Corporation of Greater Mumbai which has sanctioned the construction plans (hereinafter referred to as 'MCGM').

2. The complainants have alleged that all the opponents are deficient in service provided to the complainants and also adopted unfair trade practices. The deficiency in service and unfair trade practices adopted by all the opponents are summarized as under :-

The opponents/builders have induced the complainants to book flats in their construction by exhibiting in brochure showing the world-class facilities and making a disclosure to hand over parking in basement under the building known as 'Monte Vista' which was to be handed over to the complainants. Opponents/builders have shown to the complainants that they are going to construct a building on plot Nos.28,29,30,31,42&43 bearing Survey No.119 part, 120 part, Survey No.121, Hissa No.1 part, Survey No.126 part, Survey

No.127, Hissa No.1 part of Village Nahur, admeasuring 20417 sq.yds. equivalent to 17071 sq.mtrs. together with building and other structures more particularly described in the First Schedule of the agreements executed by opponents/builders. The site was to be developed by opponents/builders as Phase-1 shown in the plan demarcated in blue colour boundary line and Phase-2 shown in the plan demarcated in red colour boundary line annexed with the agreement. According to the proposal placed before the complainants, in Phase-1 of the development of larger property described Firstly in the First Schedule, the opponents/builders have shown constructing various buildings described as 'Monte Vista' and 'Monte Carlo' with ground and five upper floors of shops/offices and in Phase-2 of the development of the larger property described secondly in the First Schedule includes construction of 'Monte Serena' and 'Marathon House' along with Club House. The complainants further alleged that opponents/builder have entered into an agreement to sell with majority of flat holders in the year 2012 and collected more than 20% of the consideration before entering into the agreement of sale. The agreements were entered under Section 4 of Maharashtra Ownership of Flats (Regulation of the Promotion of Construction, Sale, Management and Transfer) Act, 1963 (In short 'MOFA'). It is also alleged that in the agreement entered into after 2012, the cost of parking is included in the flat consideration. Car parking spaces actually have been separately sold.

3. The complainants further stated that MOFA prescribed Model Agreement under Form V. However, the agreements executed with the complainants are not as provided in the MOFA. Opponents/builders have delayed handing over of possession of more than a year and they have handed over possession of the flats not as represented, promised and assured. The opponents/builders sometime after September 2013 allotted to few members of the complainants to carry out fit out and interior work in their flats. While handing over

possession, opponents/builders have collected advance maintenance deposit for one year, society corpus charges, society registration charges and also made to sign various undertakings and other letters as a pre-condition. Even for carrying out interior work, opponents/builders have collected Rs.2 Lakhs per flat from members of the complainants. The complainants state that after all the documents were signed and amounts as demanded were paid by the complainants, opponents/builders handed over possession of the flats to the complainants. The undertakings the complainants signed have signed under duress. It is also stated that amenities as represented, promised and assured to be provided have not been provided till date. The entire 6th floor had not been utilized to construct and provide the swimming pool and gymnasium as originally represented, assured and promised by opponents/builders. The opponents/builders have constructed three flats on the 6th floor unauthorisedly. The swimming pool provided is not as per specifications as promised. Children play area provided by the opponents/builders is not adequate. The building comprises with 230 flats and the amenities provided are not adequate for 230 flats. As the construction of the parking space in basement No.1 below their building 'Monte Vista' was still in progress. The flat owners used to park their cars outside the building premises. The complainants were assured that there was ample parking space available and the basement would be made available to the flat purchasers. The complainants further state that occupation certificate for the building 'Monte Vista' has been issued by opponent No.4/MCGM on 29/03/2014. On inquiry made with the statutory authority it was represented by opponents/builders to MCGM that parking spaces for flat owners of the said building had been provided for in the three basements below the said building 'Monte Vista'. Despite taking a huge amount ranging from Rs.4to6 Lakhs from each member of the complainants, opponents/builders have utterly failed to provide the same till today. This

shows that opponents/builders have made false representation not only to the complainants but also to MCGM and obtained occupation certificate by suppressing true facts. The parking spaces have not still been made available to the members of the complainants. Despite of collecting amount of Rs.1 Lakh from each of flat owners towards advance maintenance charges, the opponents/builders have illegally and highhandedly raised bills towards maintenance charges and demanded further amount from all the flat owners.

4. The complainants and other residents further shocked to learn that the parking spaces in the three basements that were being constructed beneath the structure of building 'Monte Vista' and four basements being constructed below the appurtenant land thereto were not in fact constructed for the benefit and use of the flat owners of building 'Monte Vista', but were being constructed as public parking lots and were proposed to be handed over to the MCGM under the Public Parking Lot (PPL) Scheme. Under the PPL scheme, the developer would be entitled to additional FSI from the MCGM and which would be utilized by the developer in increasing the number of floors of his under construction building 'Monte Carlo'. It was informed by representative of opponent No.1 that parking spaces for flat owners/residents would be provided in a ground + ¾ storey structure proposed to be constructed approximately 6 metres across the main foyer/entrance of building 'Monte Vista'. The proposed action of opponents/builders of handing over all the basements to MCGM would undoubtedly put the safety and security of the building and the residents at a great risk. Since there is no clarity and concrete information on this change in plans by opponents/builders, members of the complainants by their detailed letter dated 19/05/2014 set forth the various serious concerns of the flat owners and sought clarifications.

5. In the months of May and June 2014 meetings were held between representative of opponent No.1 and representative of flat owners to discuss

various issues. As there was no response to the earlier letters, remainder was issued on 21/06/2014 to the developer for seeking explanation on various violations. It is submitted that number of flat purchasers had purchased the flats after reposing a lot of trust and faith in the goodwill and brand value of opponent No.1 and its reputation. Subsequently, on 09/07/2014 at the request of senior management of opponents/builders, a meeting was held. In the meeting, it was confirmed by representative of opponents/builders that opponents/builders were breaching their promises and that parking spaces for the flat owners would not be provided in the basement below their building 'Monte Vista'. It was suggested that parking spaces for flat owners of Monte Vista would be provided in a 3-4 storied structure proposed to be constructed at a distance of 6 metres from the main entrance of building Monte Vista. It was apparent that there was deviation from the original plans as represented and informed by the opponents/builders. It was learnt that said additional FSI so obtained would be utilized for the construction of additional floors in a building 'Monte Carlo' or other proposed building to be constructed on the larger property. For earning profits and enriching themselves, opponents/ builders have committed breach of their assurances and promises. This situation would not only cause severe inconvenience but also a grave security hazard for the residents of the building Monte Vista.

6. Representative of the flat owners visited office of MCGM on 16/07/2014 for follow-up of application which was moved under the RTI Act, 2005. The officers of MCGM avoided to parting with the requisite information. MCGM simply handed over huge bundles of files wrapped up in cloth. The flat owners managed to trace out the plans submitted by opponents/builders for obtaining occupation certificate dated 29/03/2014. On 20/07/2014 another meeting was held by representative of opponents/builders and authorized representative of flat owners for amicable resolution of the issues. The flat owners visited

MCGM office for inspection of documents on 31/07/2014 and 02/08/2014. On 01/08/2014 a detailed complaint was filed with Police for criminal breach of trust, cheating, fraud, misappropriation and other serious offences committed by the opponents/builders. On 06/08/2014 a detailed letter was addressed to MCGM. The flat owners appointed Architect Mr. Shrikant Hadke as a Consulting Architect, who visited the building site on 07/08/2014 for detailed inspection. On receipt of said report of Architect of dated 19/08/2014, the complainants were shocked and surprised to note that opponents/builders have mislead the MCGM while obtaining occupation certificate without completing the construction work including parking facilities, basements, lifts, staircases, etc. The Architect had taken photographs of the construction.

7. The main grievance of the complainants is that representations were made to the flat owners in respect of basement parking spaces at the time of accepting bookings and sale of the flats viz., (i) as per the brochure, parking in basements below the building, (ii) oral representations that parking spaces would be provided in the basement below the building itself, (iii) compulsory purchase of minimum one car parking space per flat @ Rs.4-6 Lakhs and additional car parking spaces can be purchased at such additional costs. The full occupation certificate issued by MCGM on 29/03/2014 was on the basis of plan submitted by opponents/builders wherein parking spaces for the flat owners have been shown to have been provided in the basements below the building Monte Vista. However, opponents/builders have deviated from the original sanctioned plan. The space provided for parking is now been proposed to be handed over to the MCGM and not to the flat owners.

8. The next grievance of the complainants is that the flat owners were represented and shown that recreation ground would be on the ground level in front of the building structure. The sanctioned plan also clearly displayed that recreation ground has been shown to be on the ground level and said open

space was shown and represented to be exclusively for RG. The opponents/builders have deviated from all these assurances and promises. The opponents/builders had only disclosed to the flat owners that 5 buildings/ structures proposed to be part of the entire development project. As per opponents/builders' disclosure of layout plan to every flat purchaser, the larger property was to be developed in two phases. Phase-1 comprised of a 33 storied building Monte Vista and a 42 storied building Monte Carlo. Phase-2 comprised of a 31 storied building Monte Serena, Marathon House, a 9 storied commercial building and Club Nextgen a private recreation club. Apart fro above 5 structures, no other structure/building was disclosed to the flat purchasers either at the time of booking of the flats or at the time of executing agreements for sale or at the time of taking possession of the flats or at the time of obtaining occupation certificate. The additional structure i.e. additional building comprising of 3 to 4 storied building at a distance of 6 metres was never disclosed. At the time of obtaining occupation certificate or handing over possession of the flats, the flat purchasers were never informed about construction of additional building.

9. Admittedly, plan for additional building had been approved only as lat as 14/11/2014. This additional building was never part of the original sanctioned layout or part of the scheme of the project. No consent has been sought by the opponents/builders from the flat owners and the flat owners have not been informed about change of layout plan for additional construction. The construction of 4 storied structure for parking was never part of the original plans as shown and represented by the opponents/builders and because of deviations made by the opponents/builders, a lot of inconvenience, hardship, harassment, mental and physical trauma has been caused to the complainants. If the opponents/ builders are allowed to be continued the same will definitely result in causing extreme hardship, inconvenience, monetary, physical and

mental losses to the flat purchasers. The opponents/builders are intending to develop children play area, jogging track, garden and other landscaping only above the proposed G+3 storied structure. Said proposal of opponents/builders amounts to breach of trust and cheating as it is against the representations, assurances and disclosures only with a view to earn profits. As on today, neither there is space provided for children play area or jogging/walking track or any other space for senior citizens. The proposed deviation would cause obstruction to free flow of air and passage of light besides violating the privacy of flat purchasers on the lower floors. Opponents/builders in utter violation of MOFA, Development Control Rules and the mandate laid down by Hon'ble Supreme Court as well as various High Courts illegally sold the overhead common terrace to innocent and unwary flat purchasers. Terrace is an exclusive property of the residents and meant solely for their use and enjoyment.

10. It is submitted that the opponents/builders failed to form and register the society of the flat purchasers despite of full occupation certificate obtained from MCGM. The opponents/builders have informed that they will form society after completion of the entire project on the larger property. The opponents/builders have already collected advance maintenance deposits from the flat purchasers. The opponents/builders have illegally raised bills and not furnished the accounts. The present Association has been formed to look after the interests and welfare of the flat purchasers. Presently, opponent Nos.2&3 are looking after the day-to-day affairs of the building Monte Vista. Present complaint is filed through Secretary of the Flat Owners Association in view of Resolution which authorized Secretary to take necessary steps. Opponents/builders are bound to execute conveyance and transfer their rights and interest in the building, the basements and lower ground parking and the promised amenities to the complainants/flat purchasers. The complainants/ flat

purchasers have performed their obligations as per agreements of sale. Opponents/builders have a contractual and statutory obligation to the complainants and their members not to carry out any construction or any additional construction except in accordance with the disclosed layout. Opponents/builders are not entitled to carry out any construction on any part of the layout and particularly, in any part of the RG area marked and approved as such in the disclosed layout or to alter the location of such RG areas at any time or after completion of the project of development in terms of disclosed layout approved by MCGM. Opponents/builders failed and neglected to hand over details of accounts of the payments made by the flat purchasers as required to be separately maintained by them. They are liable and responsible to complete all incomplete work. There is continuous cause of action since opponents/builders have failed to take steps to share information regarding proposed development. They are trying to create third party interest by selling open terrace of the building. Therefore, complainants have filed a consumer complaint by alleging deficiency in service rendered by the opponents/builders and unfair trade practices adopted by the opponents/builders and prayed for the reliefs as per the prayer clauses in the complaint.

11. The opponent nos.1 to 3 have filed written version, resisted the complaint contending that a building known as Marathon Monte Vista (hereinafter referred to as **"Monte Vista"**) on the land formed by amalgamating plot nos.28, 29, 30, 31, 42 & 43, now assigned C.T.Survey No.551/13, of Village Nahur, Taluka Kurla, Situated at Madan Mohan Malviya Road, Mulund (West), Mumbai, admeasuring 16,898.20 sq. meters (hereinafter referred to as the "Larger Property") is constructed by the opponent nos.1 to 3 after taking approval from the Bombay Municipal Corporation. The opponent/builder submitted that the complaint is untenable in law and devoid of merit. The complaint has been filed with oblique motives and solely with a view to harass

the opponents. The opponent/builder denied all the allegations/ submissions/insinuations contained in the complaint and submitted that nothing in the complaint be deemed to be admitted by opponent/builder for want of specific denials/non-traverse unless specifically admitted herein. The complaint needs to be dismissed *in limine* on the basis of the preliminary objections.

12. The opponent/builder has raised the point of *locus standi* to file or maintain the complaint as the complainants are not consumers under section 18 r/w sections 12 and section 2(1)(b) of the Consumer Protection Act (hereinafter referred as 'Act'). As per section 18 r/w section 12 of the Act, the complaint can be filed by 'consumer' as defined under section 2(1)(d) of the Act or any 'recognized consumer association' or 'one or more consumers in a representative capacity' with specific permission of the Consumer Fora or the Central Government/State Government, as the case may be.

13. The opponent/ builder submitted that complainant no.1 is registered with the Charity Commissioner, Mumbai, as a Charitable Society under the Societies Registration Act, 1860, objects of which do not allow filing of consumer complaints. It is also stated that the complainant no.1 has been formed by 7 individuals, who are the flat purchasers of Monte Vista. All the 7 persons, who have formed the association are in default of their obligations towards either payment of the balance consideration under Clause 4 and/or other taxes/charges under Clause 44/Clause 45(A) and/or the maintenance charges under Clause 45(D), of their respective agreements with the opponents. The objects of complainant no.1 are akin to a public charitable trust and would not fall within the category of a recognized consumer association. The objects of complainant no.1 are not for the benefit of individual apartment purchasers in Monte Vista and do not contemplate

/permit raising of grievances on behalf of the apartment purchasers in Monte Vista or filing of this consumer dispute. The complainant no.1 is not privy to the agreements entered into between the individual apartment purchasers with opponent/builder and would not fall within the definition of Consumer u/sec.2(1)(d) of the Act.

14. It is further stated that complainant no.2 is a proposed co-operative housing society having no legal existence as well as no recognition under the agreements. Hence, the complainants neither fall within the definition of a Consumer nor can be considered as recognized consumer association and, thus have no *locus standi*. As regards the representative complaint, the same would be untenable particularly, because no prior permission of this Commission was obtained for filing the complaint. The opponent/builder further stated that Monte Vista building has 230 residential apartments and the complainant no.1 has been formed by 7 purchasers and, hence, the complaint cannot be in a representative capacity. The complainants have neither averred to have filed the complaint in a representative capacity nor provided list of the individual apartment purchasers, who are members of the complainant society. Hence, the complainants have no *locus standi* to file the complaint.

15. The opponent/builder has raised the point of jurisdiction. According to opponent/builder, as it is an admitted position that the agreements, not only record the terms and conditions governing the rights and obligations of the opponents as well as individual apartment purchasers, but also clearly record all the representations/disclosures made by opponent/builder as well as the irrevocable consents/confirmations on the part of the individual apartment purchasers. The averments made in the complaint as well as the reliefs sought for are noting but an attempt to, under the guise of alleged deficiency of service, renege/rescind from the agreements. It is also stated that the opponent/builder has complied with its obligations under the agreements and

has never denied compliance of the balance obligations, which are to be fulfilled at the relevant time as set out in the agreements. Opponent/builder states that the complaint is based on alleged oral and visual representations seeking performance of alleged obligations contrary to the agreements. Opponent/builder submitted that the jurisdiction of this Hon'ble Commission is restricted to inquiry into alleged deficiency of service only in respect of the obligations contained in the agreements and this Hon'ble Commission cannot adjudicate disputes regarding recession of contracts and/or cannot direct performance of obligations which are not found in the contracts viz. the agreements in the instant case and/or sit in interpretation/test the validity of the clauses in the agreements. The prayers sought by the complainants can only be adjudicated and granted either by a civil court of competent jurisdiction or by competent authorities/tribunals constituted under specific laws.

16. Opponent/builder has challenged the complaint on the point of limitation. Section 24A of the Act provides for filing of a complaint within two years from the date on which the cause of action arose. The complaint ought to have been filed within two years of signing of the agreements in the year 2012 as admitted in paragraph 5 of the complaint. The complaint is filed on 18th February, 2015 and is beyond the statutory period of limitation as prescribed under the Act.

17. The complaint not only is a compendium of frivolous/ bald/vague allegations, but also suppressio very and suggestio falsi. The complainants have *inter alia* suppressed and/or for obvious reasons twisted the following facts:-

a. Monte Vista forms part of the Larger Property which is being developed by the opponent no.1 as a layout development;
b. The layout development being undertaken by the opponent no.1 comprises construction of several buildings on Larger Property;

c. The layout development is to be completed in two phases, viz. Phase 1 and Phase 2 as more particularly indicated in the agreements;

d. Drafts of the respective agreements were made available to each of the individual apartment purchasers well in advance so as to enable them to peruse and understand the same and were thereafter executed and duly registered;

e. Under the agreements each of the individual apartment purchasers have clearly and unequivocally agreed that the agreements shall be governed under the provisions of Maharashtra Apartment Ownership Act, 1970.

f. The details of the construction/development of the saleable areas on the Larger Property being carried out in phases by the opponent no.1, as well as the construction of car parking spaces as a facility, manner of conveyance and handover of common areas/limited areas, were all disclosed to as well as agreed and confirmed by, the individual apartment purchasers in the agreements;

g. The individual apartment purchasers had visited their respective apartments and had taken inspection of their respective apartments as well as the building/common areas and had thereafter duly filled the inspection forms, *inter alia*, confirming that their respective apartments as well as the building/common areas were in good condition.

h. After completing the inspection to their satisfaction, the individual apartment purchasers took possession of their respective apartments and *inter alia* confirmed the following in the Letter of Possession as well as Declaration cum Undertaking, duly executed by the individual apartment purchasers in Monte Vista:-

(i) That the entire building including their apartment has been constructed in accordance with the provisions of the Agreements;

(ii) That they are aware that the development on the Larger Property

of which Monte Vista is a part, is still being undertaken by the opponent no.1 and the same shall be completed in phases and the completion thereof may take a long time;

(iii) That they have given their positive consent for such construction and have no grievance or any objection of whatsoever nature as regards to such construction or any inconvenience that may be caused till the time the entire construction activity is completed;

(iv) That they are liable to pay maintenance charges from the date specified in the said Letter of Possession and that the rates of maintenance charges to be levied as well as collected will be increased annually by 10% depending on the inapartmentionary trends till the time the affairs are handed over;

(v) That they are liable to pay all assessment tax, service tax, MVAT and other municipal charges etc., and

(vi) That they have no complaint or grievance of any nature whatsoever against the opponent no.1 in respect of Monte Vista including the apartment and all the issues, claims, demands, objections, complaints of whatsoever nature, including but not limited to the possession of apartment (if any, raised earlier), had been resolved and fully settled to the utmost satisfaction of the apartment purchasers.

18. The opponents have enclosed the Letter of Possession as well as Declaration cum Undertaking executed by the individual apartment purchasers in Monte Vista. In the agreements it is recorded that the opponents would be handing over the basements of Monte Vista to MMRDA or MCGM and shall be at its own cost constructing in the complex (layout) the facility of the car parking spaces.

19. Accordingly, pending such construction of the facility of the car parking spaces, the opponents allotted temporary car parking spaces to the individual apartment purchasers in Monte Vista and the temporary car parking letters recording/accepting the same were duly executed by the individual apartment purchasers in Monte Vista. The opponents have annexed the copies of the temporary car parking letters executed by the individual apartment purchasers in Monte Vista.

20. The podium car parking building being constructed by the opponent no.1 is not only on the portion of the land which falls part of Phase 2 of the Larger Property but also is nothing but a construction of a facility of the car parking spaces as *inter alia* agreed to be constructed under the agreements. The podium car parking building being constructed within the layout/complex is meant as a facility for car parking not only of the apartment purchasers in Monte Vista but also for the other purchasers in the entire layout/complex. Pertinently, the podium car parking building has been duly sanctioned by the MCGM i.e. opponent no.4. The complainants have for the reasons best known to them suppressed or twisted the facts and are thus guilty of *suppresio very and suggestio falsi.* The complaint is nothing but an abuse of process of law.

21. The opponents have denied the allegations regarding violation of the provisions of MOFA. It is further stated that they have applied for an Occupation Certificate in respect of Monte Vista in the year 2012 and the same is granted by the opponent no.4 on 29/03/2014. The opponents have denied the allegations regarding collection of monies that were not agreed to be payable by the individual apartment purchasers and stated that all amounts collected in the nature of deposits by the opponent no.1 will be eventually transferred to the Condominium of apartment owners as and when formed in accordance with the agreements.

22. The opponents have denied all adverse allegations against them made by the complainants. The allegation that parking spaces have still not been made available is an admitted position. However, they have been provided temporary car parking spaces and the apartment purchasers have executed temporary car parking letters, which proves that they have been provided a temporary car parking. The allegation that the opponent/ builder has flouted the Development Control Regulations and the occupation permission dated 29/03/2014 as well as the opponent/builder has provided false information to opponent no.4 with respect to the parking spaces for the purpose of obtaining Occupation Certificate is completely baseless/misconceived and in any event denied. The opponent no.1 has complied its obligation under the agreements and never denied compliance of balance obligations, which are to be fulfilled at the relevant time.

23. The opponents have carried out development of the Larger Property in accordance with the sanctioned plans and not based on alleged oral representations made to the complainants. Nowhere in the agreements the opponent/builder has promised the apartment purchasers to provide parking in a basement. It is further submitted that the construction of the alleged parking structure was in accordance with the plan sanctioned by MCGM. The apartment purchasers from the time of executing the agreements were made fully aware that the parking in the basement of Monte Vista would be handed over to MCGM or MMRDA and this fact is also borne out by the temporary car parking letters signed by the apartment purchasers. The complainants have failed to adduce any documentary evidence in respect of alleged meeting dated 20/07/2015 and the alleged assurances given by the opponent/builder's representative. The opponent/builder further stated that the contents of the architect's report sought to be relied upon by the complainants are strongly denied and disputed as the observations contained in the report is qualified

with numerous disclaimers which undermines the report.

24. The opponent/builder had made all the requisite disclosures and all the consents required in law, if any, from the individual apartment purchasers were duly granted as well as recorded in the agreements. The podium car parking building being constructed by opponent/builder is on the portion of the land which falls Part of Phase 2 of the Larger Property and is nothing but a construction of a facility of the car parking spaces as *inter alia* agreed to be constructed under the agreements. It is also stated in the agreements that the agreements unequivocally permits the opponent/builder to change, modify and amend the building plans from time to time even after receipt of occupation certificate and that the individual apartment purchasers would have no objection to the same. The allegations of the complainants that the opponent/builder failed to disclose the development plans is completely false. The opponents have denied that the purchase of the car parking was made mandatory to the apartment purchasers and they have paid for car parking in cash and cheque.

25. The opponent/builder denied that it is obligatory to form a co-operative society of the apartment purchasers or convey the land and the building thereon. The agreements clearly stipulates formation of a Condominium and conveyance thereupon only upon completion of Phase 2 i.e. December 2020, as stipulated in the Possession Letter. The opponents have denied that they have dealt with the open terrace in any manner contrary to the terms of the agreement or established provisions of law. The opponent/builder prayed that as the complaint filed is devoid of merits, the same be dismissed with exemplary costs.

26. The opponent no.4 though served failed to appear and file written statement otherwise also opponent no.4 is a formal party.

27. Both the parties led evidence by filing affidavits and relied on several

documents. Heard learned counsel for the complainants and learned counsel for the opponent. Perused brief notes of arguments filed by both the parties.

28. After considering pleadings of both the parties following points arise for our determination and we record our findings for the reasons below:

Sr.No.	Points for consideration	Answer
1	Whether the complainants have *locus standi* to file complaint?	Yes
2	Whether consumer complaint is maintainable within the jurisdiction of this Commission?	Yes
3	Whether consumer complaint is within limitation?	Yes
4	Do the complainants prove that the opponents are guilty of deficiency in service and unfair trade practice?	Yes
5	Whether complainants are entitled for reliefs as claimed? If yes to what extent?	Yes As per final order
6	What order?	As per final order.

Reasons:

As to Point No.1:

It is urged on behalf of opponent/builder that the complainants have no locus standi to file the complaint and said complaint is not maintainable under section 18 r/w. sections 12 and 2(1)(b) of Act. The complaint can only be filed by a 'consumer' or any 'recognized consumer association' or 'one or more consumers in a representative capacity' or the Central Government/State Government, as the case may be. The complainant no.1 is registered with the Charity Commissioner, Mumbai, as a Charitable Society under the Societies Registration Act, 1860, objects of which do not allow filing of consumer complaints.

The complainant no.1 is registered association of flat owners duly registered under the Societies Registration Act, 1860. The complainant no.2 is proposed society of the flat purchasers. The complainant no.1 is a recognized consumer association within the meaning of sections 2(1)(d)(ii) and 2(1)(m)(iv) of Act. It is brought to our knowledge that 104 flat owners are members of complainant no.1. Registration certificate of the society and minutes of meeting held on 27/07/2014 along with resolution passed by the members are filed on record. 43 members attended the said meeting.

Section 2(1)(b) gives definition of 'complainant'. As per the opponents, complainants are not 'consumer'. However, section 2(1)(m) gives definition of a 'person' and the 'person' includes a firm, whether registered or not, a Hindu Undivided Family, a Co-operative society, every other association of persons whether registered under the Societies Registration Act, 1860 or not. In the present complaint, the complaint will have to be ascertained as per section 2(1)(b) and 2(1)(m) of Act and, the complainants are consumers as per provisions of Act.

In the case of *Lotus Panache Welfare Association v/s. M/s.Granite Great Properties Pvt.Ltd. and 4 others,* while deciding consumer complaint no.CC/15/120 along with IA/1234/2015, IA/1235/2015, IA/2248/2015, IA/2249/2015, IA/3002/2015, IA/4016/2015, IA/5498/2015, decided on 28/08/2015, Hon'ble National Commission observed in para 3 as under:-

> *"Section 12(1)(b) of the Consumer Protection Act, 1986, to the extent it is relevant, provides that a complaint in relation to any service provided or agreed to be provided, may be filed by any recognized consumer association whether the consumer to whom the services provided or agreed to be provided is a member of such association or not. The explanation below Section 12*

provides that the recognized consumer association means any voluntary consumer association, registered under the Companies Act, 1956or any other law for the time being in force."

In the case in hand, the complaint is filed by the association and the flat purchasers are the members of the association. They have filed an affidavit as well as written declaration in this regard. Prior to filing of complaint, meeting of flat purchasers was held, a resolution was passed and the flat purchasers gave authorization to Secretary Mr.Chandulal Thakkar to file the consumer complaint by passing a resolution in a meeting. He was authorized by Monte Vista Residents' Welfare Association to file the complaint with State Commission. Mr.Chandulal Thakkar is appointed as Chief Promoter of proposed housing society. The proposed housing society decided to file a complaint. Complaint was filed for the benefit of all flat purchasers of building Monte Vista in pursuance of the object of the society. Object of the society was to consider the welfare of the residents / members.

While deciding case of *Welfare and Service Organisation (Regd.) and another v/s. Haryana Urban Development Authority and others reported in I (2003) CPJ 234 (NC)*, it is held as under:-

"4. It is the case of the opposite party that complainant is not a consumer on two counts –one that it has been filed by two complainants namely Welfare and Service Organisation (WASO) and WASO Public School. The complaint can be filed by one complainant and not two and secondly, complainants are not consumer within its definition given in Consumer Protection Act, 1986. It needs to be seen that WASO is the mother/parent organization and WASO Public School is one of its organizations engaged in imparting education. Section 2(1)(b) defines 'complainant' means a 'consumer'. Word consumer is defined in section 2(1)(d).

5. Here is an association of persons, registered in pursuit of a common cause and it is they who had applied for a piece of land

for the welfare of the under privileged. They fall very much within the definition of consumer. We see no merit in the preliminary objection raised by the opposite party."

The above judgment acted as guideline for us. The consumer complaint is filed by association of persons registered under Societies Registration Act 1860, who is a person in view of section 2(1)(m) of the Act and, as such, the complainant is a consumer. Therefore, complainant has locus standi to file the consumer complaint.

The consumer complaint is filed by alleging deficiency in service provided by opponent nos.1 to 3 and also by alleging adoption of unfair trade practice by the opponents. Learned counsel for the complainant during the course of arguments argued that this Commission has jurisdiction to hear the complaint. The complaint is maintainable in as much it complains against deficiency of service provided by opponent nos.1 to 3 under section 2(1)(g) of Act and unfair trade practice under section 2(1)(r) of the Act.

Learned counsel for the complainant has placed reliance on following rulings:-

i. *Virender Jain v Alaknanda Co-op. Group Housing Society Ltd. & ors. (2013) 9 SCC 383;*
ii. *Faqir Chand Gulati v/s. Uppal Agencies Pvt.Ltd. & Anr. (2008) 10 SCC 345;*
iii. *Lucknow Development Authority v/s. M.K.Gupta (AIR 1994 SC 787);*
iv. *Fair Air Engineers (P) Ltd. v/s. N.K.Modi (1996) 6 SCC 385; and*
v. *DLF Limited and another v/s. Mridul Estate (P) Ltd. and another[III(2013)CPJ 439 (NC)].*

There is no doubt that complaint under the Act will be maintainable. The purchasers have a complaint against the builder/ developer with reference to the construction or delivery of the amenities. Therefore, the consumer

complaint is maintainable and have jurisdiction to try this consumer complaint. Hence, we answer this point in affirmative.

As to Point No.2:

The next limb of objection is that in the case in hand, complicated questions of facts and law are involved. Therefore, complainants ought to have filed civil suit for Redressal of their grievances. Complicated questions of law cannot be decided in a summary manner simply on the basis of affidavits of evidence. It is to be noted here that sale of the flats to the occupants of building Monte Vista is not disputed. So also the agreements and documents filed by both the parties are not seriously challenged. In the case in hand, only there is question of interpretation of all the documents.

Hon'ble Apex Court in the matter of *CCI Chambers Co-op. Hsg. Society v/s. Development Credit Bank Ltd.* reported in (2003) 7 Supreme Court Cases 233 laid down as under:-

> *"It cannot be denied that fora at the National Level, the State level and at the District level have been constituted under the Act with the avowed object of providing summary and speedy remedy in conformity with the principles of natural justice, taking care of such grievances as are amenable to the jurisdiction of the fora established under the Act. These fora have been established and conferred with jurisdiction in addition to the conventional courts. The principal object sought to be achieved by establishing such fora is to relieve the conventional courts of their burden which is ever-increasing with the mounting arrears and whereat the disposal is delayed because of the complicated and detailed procedure which at times is accompanied by technicalities. Merely because recording of evidence is required, or some questions of fact and law arise which would need to be*

investigated and determined, cannot be a ground for shutting the doors of any forum under the Act to the person aggrieved.

It is further laid down that the decisive test is not the complicated nature of the questions of fact and law arising for decision. The anvil on which entertainability of a complaint by a forum under the Act is to be determined is whether the questions, though complicated they may be, are capable being determined by summary enquiry i.e. by doing away with the need of a detailed and complicated method of recording evidence. It has to be remembered that the fora under the Act at every level are headed by experienced persons. The National Commission is headed by a person who is or has been a Judge of the Supreme Court. The State Commission is headed by a person who is or has been a Judge of the High Court. Each District Forum is headed by person who is, or has been, or is qualified to be a District Judge. We do not think that mere complication either of facts or of law can be a ground for the denial of hearing by a forum under the Act. In the matter of Synco Industries v/s. State Bank of Bikaner & Jaipur reported in (2002)2 SCC 1, this Court upheld that order of NCDRC holding the complaint before it not a fit case to be tried under the Act and allowing liberty to the complainant to approach the Civil Court because this Court agreed with the opinion formed by the Commission that "very detailed evidence would have to be led, both to prove the claim and thereafter to prove the damages and expenses". The Court concluded that in any event it was "not appropriate case to be heard and disposed of in a summary fashion."

In case of Dr.J.J.Merchant and others vs. Shrinath Chaturvedi, reported

in (2002)6 Supreme Court Cases 635, the Hon'ble Apex Court observed that Under the Act [Consumer Protection Act, 1986] for summary or speedy trial, exhaustive procedure in conformity with the principles of natural justice is provided. For the trial to be just and reasonable, long-drawn delayed procedure, giving ample opportunity to the litigant to harass the aggrieved other side, is not necessary. The legislature has provided alternative, efficacious, simple, inexpensive and speedy remedy to the consumers and that should not be curtailed on such ground. It would also be a totally wrong assumption that because summary trial is provided, justice cannot be done when some questions of facts are required to be dealt with or decided. The Act provides sufficient safeguards. The Hon'ble National Commission or State Commission is empowered to follow the procedure contained in Section 13 of the Act. Under Section 13, unlike the provisions of Order 8 Rule 1 CPC, the legislative intent is not to give 90 days of time but only maximum 45 days for filing the version by the opposite party.

It should be kept in mind that the legislature has provided alternative, efficacious, simple inexpensive and speedy remedy to the consumers and that should not be curtailed on such ground. It would also be a totally wrong assumption that because summary trial is provided justice cannot be done when some questions of fact are required to be dealt with or decided. The Act provides sufficient safeguards.

Considering the guidelines given by the Hon'ble Apex Court, we are of the view that consumer complaint is maintainable before this Commission and this Commission has jurisdiction to try the consumer complaint filed by the complainant. As a result, we answer point no.2 for determination in affirmative.

<u>As to Point no.3:</u>

It is vehemently urged on behalf of opponent/builder that consumer

complaint is barred by limitation. It is urged that section 24-A of the Act provides for filing the complaint within two years from the date on which the cause of action arose. Assuming but denying that opponent no.1 has compelled individual flat purchasers to execute the agreements under duress, the complaint ought to have been filed within two years from signing of the agreements, first of which was executed in the year 2010. The complaint was filed before this Commission on 18/02/2015, which is beyond the statutory period, without application for condonation of delay and, therefore, it is not maintainable.

This consumer complaint was admitted by this Commission by order dated 11/08/2015. Order of admission was challenged by the opponents before the Hon'ble National Commission by filing an appeal. Said appeal was dismissed and order was confirmed by Hon'ble National Commission by deciding appeal no.626/15. While deciding the appeal point of limitation, jurisdiction and maintainability were considered. Then only the consumer complaint was admitted.

In the case in hand, order of interim relief was passed on 02/06/2015. Opponent no.1 has challenged the said order by filing first appeal no.492/15. Hon'ble National Commission was pleased to allow the said appeal. Order of temporary injunction granted in favour of complainant was set aside. However, complainants have challenged the said order before the Hon'ble Apex Court by filing Special Leave Appeal bearing no.2668/15. Hon'ble Apex Court was pleased to allow said appeal. Order passed by the State Commission in consumer complaint no.CC/15/207 pertaining to interim relief was upheld.

It is true that complaint has been filed on 18/02/2015. The occupation certificate was received by opponent no.1 on 29/03/2014. Majority of the flat purchasers and members of complainant no.1 have taken possession of flat on 29/03/2014. Change in the layout admittedly has been sanctioned by opponent

no.4 allegedly on 14/11/2014. Said change is not disclosed to the flat purchasers. Consumer complaint is filed for claiming parking space, recreation ground, play area and other amenities promised by opponent no.1 builder. The cause of action is continuous, which is based on non performance of contractual and statutory obligation. We find substance in the arguments advanced on behalf of complainants that the consumer complaint is within limitation. Cause of action remains continuous till allotment of promised amenities. Consumer complaint is not barred by limitation. Accordingly, we answer this point for determination in affirmative.

As to point no.4:

Now the crucial question is whether the opponents are guilty of deficiency in service and unfair trade practice. It is vehemently urged on behalf of the complainants that amenities as represented, promised and assured to be provided to the flat purchasers are not provided till date. As per representations made, the opponents failed to give parking space at basement, failed to leave recreation ground besides the building Monte Vista. The recreation ground as per new plan is shifted to podium level. Area of recreation ground is reduced. The flat purchasers have invested huge amount for purchase of their dream houses but the acts of opponent no.1 are contradictory to the disclosure, promises and the representations made by them.

Learned counsel for the complainants has taken us to the brochures of the building, plan submitted to opponent no.2, occupation certificate and other documents. Now we will consider the documents placed before us by the complainants. The brochure filed by the complainants is not disputed by the opponents. It was published at the time of sale of flats of building Monte Vista and other buildings from the project of opponent no.1. In brochure, admittedly, parking place is shown in the basement.

It is urged on behalf of the opponents that the brochures and promotional materials are not part of the disclosure. So also layout and building plans cannot be considered as disclosure. The complainants are well aware that the project of the opponents is a big project and huge construction is to be undertaken. At the time of executing agreements, the complainants were well aware about the construction of other buildings. They have consented for construction of larger property of the opponent. The brochure is not a legal document. The primary objective of the brochure is to explain the details in concise form and in simple language.

During the course of arguments, learned counsel for the complainants has placed reliance on several rulings. Reliance is placed on ruling laid down by the Hon'ble Bombay High Court in the matter of *Eternia Co-op.Hsg. Soc.Ltd. and ors. v/s. Lakeview Developers and ors. Reported in 2015(5) Bom CR 680*, Single Bench of Hon'ble Bombay High Court observed as under:-

> *"Brochures and promotional materials are part of the disclosure, just as much as layout and building plans, and it is, I think, no argument to say that the 'consent' must be limited to the clauses of the FPA in question and perhaps the plans, but ignoring altogether the other material on which individuals are induced into taking flats, no matter what their size or value".*

The order and judgment passed by the Learned Single Bench of Hon'ble High Court is further challenged before the Hon'ble Division Bench by filing Appeal bearing no.189 of 2015 in Notice of Motion NO.62 of 2014 in Suit No.54 of 2014. It was decided by order dated 25/03/2015. Hon'ble Division Bench while deciding the appeal was pleased to appreciate provisions of MOFA in para 34 of the judgment which reads as under:-

> *"34. The Maharashtra Ownership flats (Regulations of the Promotion of Construction, Sale, Management and Transfer) Act,*

1963 was passed to regulate promotion of construction, sale, management and transfer of flats on ownership basis. The said Act was passed pursuant to the report submitted by the Committee which was appointed by the Government Resolution regarding several matters of abuses, malpractices, difficulties faced by the flat purchasers in respect of sale, management and transfer of flats. The basic purpose behind the Act was to ensure that shortage of housing is reduced by proper cooperation and coordination between the promoter and the flat purchasers. The Act sought to ensure transparency in the intention of the promoter to develop a plot layout by making true and correct disclosure to the flat purchasers and also to ensure that the land is conveyed to the Society comprising of flats purchasers within a reasonable period of time".

In para 43 of judgment, Hon'ble Bombay High Court observed as under:-

"43. In our view, therefore, from the aforesaid judgment, it is clear that the developer cannot claim that he can continuously exploit the building potential for eternity without conveying the land in favour of the Society. The obligation to convey the land in favour of the Society within a prescribed time and the obligation to make true and full disclosure under Clauses 3 and 4 of Form V remains unfettered".

It is gathered from the judgment of Hon'ble Bombay High Court that the object and reason behind passing of MOFA can be seen from the Preamble of the said Act and it was passed because it became necessary to protect the interest of buyers/flat purchasers. In view of addition of section 7A, obligation which was cast on the developer to give true and proper disclosure continued in the form of Section 3 and 4.

It is to be noted here that this judgment of Hon'ble Bombay High Court is confirmed by the Hon'ble Apex Court while deciding Special Leave to Appeal (C) Nos.27472-27473/2015 filed by *Lakeview Developers and anr. v/s. Eternia Co-op.Hsg. Soc.Ltd.and ors.* by order dated 07/10/2015. The opponents were well aware about the said ruling of the Hon'ble Apex Court.

Now it is clear that brochures and promotional materials induced complainants to book their flats by investing huge amount from building Monte Vista. The representations made by opponent no.1 through brochures and disclosures about recreational ground, about car parking space were considered. The nature of amenities which are to be provided to the purchasers, induced the complainants to book the flats for residence and huge amount was invested by them to book their dream houses and, ultimately, they purchased their dream houses.

Opponent no.1 not only made representation in the brochure but same fact was disclosed by the opponent on website i.e. www.montevista.in. On website, the representation made is as under:-

> *"All cars will disappear underground in our only basement car parking facility after drop-off. In an attempt to redefine planning, we thought : why waster valuable space on parked cars? Instead we decided to use the extra ground-floor space for gardens, sitting area and other social infrastructure for community living, that truly adds value of life".*

Certainly, flat purchasers/ flat holders have relied on this representation and disclosures made by opponent no.1 on website. This representation on website is not disputed or challenged by opponent no.1. Now in a changed plan, the flat holders did not get car parking in basement as per assurance and representations. Now the place in basement is allowed for public parking under the public parking scheme. Due to allotment of this space to public

body for public parking, the opponent no.1 is benefited and opponent no.1 got additional FSI. Therefore, opponent no.1 is intending to make construction of new building on the area preserved as recreational ground. There was no disclosure at the time of agreement or subsequently about construction of new building in place of recreational ground.

As per brochures filed on record and not disputed by the opponents, open space, recreational ground, children play area, etc. are at ground level of the building. This fact is incorporated in the brochure as well as displayed on website. The flat owners have purchased the flats on promotional material marketed by opponent no.1. There is substance in the arguments advanced on behalf of the complainants that at the time of booking, opponent no.1 painted very rosy picture and had willfully induced middle class purchasers to invest their hard earned money in the project in question.

The complainants have filed on record occupation certificate dated 29/03/2014 in support of their submissions, allegations and claim. The parking is shown at the basement of Monte Vista. In occupation certificate dated 29/03/2014, parking space is shown in the basement and recreational ground on ground floor besides the building Monte Vista. Now the opponent no.1 is trying to construct additional building of 3-4 storied on the recreational ground provided in plan for the project. The construction of public parking also started on the land reserved as recreational ground. This plan of construction of new building was never disclosed to flat purchasers of building Monte Vista.

Learned Counsel for the complainants has taken us to the approved plan submitted by opponent no.1. Said plan was submitted by the opponent no.1 to opponent no.4. It was approved on 28/01/2010. Said plan was disclosed to the complainants and it was within the knowledge of the complainants. In this plan of 2010, parking space is shown at basement, recreation ground is shown on East side of the building. Said plan makes it clear that till 2010, it was

represented by opponent no.1 and disclosed by opponent no.1 that car parking for the residents of the building was at basement and recreation ground would be on ground floor.

Subsequently, opponent no.1 submitted latest plan to opponent no.4 in which recreation ground is not shown on ground floor, so also, parking space for residents of building was changed. The latest plan with reference to letter dated 14/11/2014 issued by opponent no.4 is not disputed by the opponent. As per latest plan permission was obtained to make construction of new building i.e. 6th building. In the said plan, recreation ground is not shown on ground floor but it was shown at podium level. According to complainants not providing recreational space at ground level is a contravention of the directions given by Hon'ble Apex Court. It is against the law of land.

Learned counsel for the complainants has placed reliance on the ruling laid down by the Hon'ble Apex Court in the matter of *MCGM v/s. Kohinoor CTNL Infrastructure Co. Pvt. Ltd. reported in (2014) 4 SCC 538.* Hon'ble Apex Court laid down as under :-

> *"minimum recreational space as laid down under Development Control Regulation 23 at ground level would be latest on the basis of DCR 38(34). The recreational space, if any, provided on the podium as per DCR 38(34)(iv) shall be in addition to that provided as per DCR 23".*

This judgment of Kohinoor, cited Supra, is arisen out of SLP (C) 33042/2012 from the judgment and order dated 09/07/2012 of the Hon'ble High Court of Judicature of Bombay in Writ petition no.143/12. While deciding the case cited supra, the Hon'ble Apex Court was pleased to give following directions:-

> The minimum recreational space as laid down under DCR 23 at ground level cannot be reduced on the basis of DCR 38(34). The

recreational space, if any, provided on the podium as per DCR 38(34)(iv) shall be in addition to that provided as per DCR 23". Direction was given to State Government of Maharashtra. It is directed that Government of Maharashtra shall issue necessary notification within 4 weeks of the order, reconstituting the "Technical Committee for the High-Rise Buildings", as directed in para nos.64 to 66, including the additional terms of reference, as mentioned in para 67. The appellant is directed to render assistance and provide the required honorarium, as mentioned in para 68.

It is urged on behalf of the opponents that the directions given by the Hon'ble Apex Court pertaining to recreational ground in case of the Kohinoor are not retrospective and, therefore, those directions will not be applicable to the present case. We do not agree with this submission made on behalf of opponents.

As per the disclosures, the opponent had disclosed construction of 5 buildings. Construction of additional building i.e. 6th building does not form part of the disclosed layout and is proposed to be constructed on the area shown as recreational ground. Proposed construction is in utter violation, not only as per provisions of section 7 of MOFA, DCR 23 and in contravention of the guidelines given by the Hon'ble Apex Court in Kohinoor's judgment. It is in contravention of the breach of occupation certificate dated 29/03/2014. It is mandatory to provide recreational space on the ground floor. It is pertinent to note here that while granting permission of construction of 6th building, a specific condition was placed by opponent no.4. Condition no.33 of the Letter of Intent dated 25/06/2014 is as under:-

"That the order of Hon'ble Supreme Court dated 17/12/2013 in SLP (C) No.33402 of 2012 shall be complied with."

As per said judgment, it is mandatory to have recreational ground on ground floor. That condition is violated when the recreational ground was shifted to podium level.

As regards the contention of the opponent that the law laid down by the Apex Court in the Kohinoor Judgement is not applicable in the present case. The judgment is delivered on 17/12/2013. Occupation certificate was received on 29/03/2014 showing parking in the basements only and the RG for total plot and ground level. Even in LOI given by the Planning Authority i.e. Mumbai Municipal Corporation, there is condition that the law laid down by the Apex Court in Kohinoor Judgment be complied. The plans for the additional structure were approved only on 14/11/2014 wherein the RG is now sought to be shifted on a higher floor and is no longer at the ground level.

Because of additional 6th building, opponent no.1 proposed parking space on the podium level, which is contrary to the sanction plan, brochures, website and display models. The reason for this deviation in the plan is that opponent no.1 agreed to hand over parking space in the basement to the MCGM. It is clear that Letter of Intent dated 25/06/2014 is subsequent to receipt of occupation certificate. It is contrary to the provisions of section 11 of Maharashtra Ownership Flats Act and in contravention of sections 3,4 & 7 of MOFA. Under the amendment plans of November 2014, recreational ground for the whole project is proposed on higher level and not on ground level. Recreation ground is required to be on ground level. Merely because the alternate arrangement is made for car parking of the flat owners, will not regularize the illegal act.

It is urged that consent was given by the flat owners while executing the agreements. The complainants have rightly submitted that consent was a blanket consent and statutory provisions will prevail over the agreements. Shifting of recreational ground is in contravention of law declared by the

Hon'ble Apex Court. Change in layout of the property without disclosure to the flat purchasers is against the representations made by the opponents.

In the present complaint, to what an extent, builder/developer can construct additional building in the light of the law laid down by the High Court and Apex Court, taking into consideration the provisions of Sec.7 and 7A and other relevant provisions of MOFA and rules framed thereunder is to be decided. It is an admitted fact that in the first layout plan sanctioned by the development authority i.e. Mumbai Municipal Corporation, no reference is made for the proposed construction of 6th building on the plot to be developed by the opponent no.1, 2 and 3. This construction was never disclosed.

In the case of *Jayantilal Investments v/s. Madhuvihar Co-op.Housing Society Ltd. reported in (2007)9 SCC page 220,* Hon'ble Supreme Court in para nos.18 & 19 observed as under:-

> "*18. The above clauses 3 and 4 are declared to be statutory and mandatory by the legislature because the promoter is not only obliged statutorily to give the particulars of the land, amenities, facilities etc., he is also obliged to make full and true disclosure of the development potentiality of the plot which is the subject matter of the agreement. The promoter is not only required to make disclosure concerning the inherent FSI, he is also required at the stage of lay out plan to declare whether the plot in question in future is capable of being loaded with additional FSI/ floating FSI/ TDR. In other words, at the time of execution of the agreement with the flat takers the promoter is obliged statutorily to place before the flat takers the entire project/ scheme, be it a one building scheme or multiple number of buildings scheme. Clause 4 shows the effect of the formation of the Society.*
>
> *19. In our view, the above condition of true and full disclosure*

flows from the obligation of the promoter under MOFA vide Sections 3 and 4 and Form V which prescribes the form of agreement to the extent indicated above. This obligation remains unfettered because the concept of developeability has to be harmoniously read with the concept of registration of society and conveyance of title. Once the entire project is placed before the flat takers at the time of the agreement, then the promoter is not required to obtain prior consent of the flat takers as long as the builder put up additional construction in accordance with the lay out plan, building rules and Development Control Regulations etc.."

Legislature has enacted the MOFA and added Sec.7-A by the amendment to reconcile the interests of developers and flat purchasers. The main intention of the legislature was to ensure that the flat purchaser is not deprived of the rights which were promised to him at the time of booking his flat but also the other amenities could not be taken away by obtaining permission from the planning authority or local authority and, at the same time, right of the developer to construct the additional buildings which was permissible under the law and after true and proper disclosure was made by him to the flat purchaser is also protected. These conflicting interests therefore have been reconciled be Section 7 and Section 7A. It is a practice amongst the developers to carry out development of the property unabatedly.

Opponents have executed the agreements under MOFA and in the same agreements incorporating the provisions of Maharahstra Apartment Ownership Act, prima facie is contradictory. When the agreements itself are under MOFA, provisions of Mahashtra Apartment Ownership Act will not come in play. The opponents have handed over possession of the flats to the respective flat purchasers in the year 2013 and collected maintenance charges from the

occupants of Monte Vista without furnishing any account of the said maintenance charges. It is the prayer of the complainants that opponent nos.1,2&3 are legally bound to form Co-operative Society. However, no action has been taken by the opponents so far. It is very strange that occupants/complainants are paying maintenance charges and the opponents are incurring the expenditure without any knowledge to the occupants i.e. complainants.

Both the parties were directed by this Commission to file plan sanctioned by M.C.G.M. in the year 2009. The said plan is within the knowledge and in the custody of opponent no.1. However, opponent no.1 failed to file said plan to ascertain the disclosure but it is submitted and urged on behalf of opponent no.1 that neither party seeks to rely upon the plan sanctioned by MCGM in the year 2009 and avoided to file the said plan. It was very easy for the opponents to file the plan on record. Said plan is withheld by opponent no.1. Opponent no.1 failed to make out true and correct disclosure. Hence for non availability of material document in spite of direction, it is necessary to draw an adverse inference against opponent no.1.

Instead of submitting the plan sanctioned by MCGM, opponent no.1 has tried to point out the provisions of the agreements. On the other hand, opponent no.1 suggested to rely upon the agreement executed between the parties and filed on record. In our view agreements are subsequent to the disclosure as made in brochure, website and plans submitted to MCGM. In view of above discussion and in view of documents on record, which are admitted by both the parties, it is clear that opponent no.1 changed the parking place and place of recreational ground. When the flat purchasers booked the flats in building Monte Vista, disclosure of construction of 5 buildings was shown. Construction of 6th building was never disclosed. Opponent nos.1 to 3 have presently revised the plan unilaterally and that too after receipt of

occupation certificate in respect of building of the complainants known as Monte Vista. The revised plan is in complete violation of the original layout plan and D.C.R. 23. Construction of additional 6th building is on recreational ground. It is contrary to the disclosure made to the flat purchasers. Actual booking of the flats was commenced on 27/03/2009. The complainants have proved breach of O.C. dated 29/03/2014 by opponent nos.1 to 3.

We have gone through the clauses of the agreements. The opponents have sold the terrace to some flat purchasers denying the entry to other flat purchasers on the area. The agreement is in total violation of the provisions of MOFA. Liability cannot be imposed on purchasers along with other flat holders to contribute proportionate share of the maintenance charges of the flats, shops, office premises, which are not sold and disposed of by the promoters.

Clause 72 of the Agreement states, it is expressly agreed that the Promoter shall be entitled to put up the hoardings (the said hoardings may be illuminated or comprising of neon sign) and Communication Tower for Cellular Telephony or Satellite T.V. or Communication or Disc Antenna on the said Property or on the Building or Buildings on the said Property or any parts of the Building or Buildings on the said property and for that purpose Promoters are fully authorized to allow temporary or permanent construction or erection in installation either on the exterior of the said Building or on the Terrace/s of the said Building or on the said Property as the case may be and the Purchasers agree not to object or dispute the same. It is agreed that all such hoardings and Towers shall be exclusive and independent property of the Promoters. This clause in the agreement is in total violation of MOFA.

In view of this discussion, we have no hesitation to hold that opponent nos.1 to 3 are guilty of deficiency in service and adopting unfair trade practice. As a result, we answer point no.4 in affirmative.

As to point no.5:- In view of answer to point no.4 in affirmative, opponent nos.1, 2 & 3 are held guilty of deficiency in service and adopting unfair trade practice. In the interest of justice, it is necessary to direct opponent nos.1 to 3 to provide car parking to the complainants and occupants of Monte Vista building in the basement as per promise. It is required to give direction to opponent nos.1 to 3 to leave place of recreational ground as shown in plans, brochures and promotional materials. The complainants faced hardship, mental harassment and agony due to change in plan by the opponent nos.1 to 3. The complainants are entitled for compensation. Complainants were required to file consumer complaint and, hence, they are entitled for costs of the litigation. The complainants have prayed for compensation of Rs.10,00,000/- for the deficiency in service on part of opponent nos.1 to 3. Looking into the facts and circumstances of the case, a compensation of Rs.5,00,000/- to the complainants for their mental agony, deficiency in service will meet the ends of justice.

The complainants have requested to direct opponent nos.1 to 3 to take all steps for formation of Co-operative Housing society under the provisions of Maharashtra Co-op. Societies Act. It is submitted on behalf of opponent nos.1 to 3 that Monte Vista is a part of larger property. Larger property is taken for construction by the opponents/builder. It is specifically agreed while executing agreements that condominium of flat purchasers will be formed only after completing development of larger property. Corporation has already issued Occupation Certificate in respect of building Monte Vista. Flat purchasers have received possession of their respective flats and they are residing at the flats purchased by them. Considering the number of occupants i.e. 230 flat purchasers and considering the provisions of MOFA, opponent

nos.1 to 3 are duty bound to form society in respect of building Monte Vista. Till today society is not formed. Therefore it will be proper to give direction to opponent nos.1 to 3 for formation of society for building Monte Vista and to hand over accounts. In fact complainants have already applied for registration of the society to Deputy Registrar of Co-operative Societies. The opponents are supposed to extend co-operation to the complainants. Till completion of larger project, it is not possible for the opponents to execute conveyance. That relief cannot be granted in favour of the complainants. With this view, we pass the following order:-

ORDER

1. Consumer complaint is partly allowed.

2. It is hereby declared that opponent nos.1 to 3 are guilty of deficiency in service and unfair trade practice.

3. The Opponent nos.1 to 3 are hereby directed to provide car parking space at basement as per disclosure to the complainants.

4. The Opponent nos.1 to 3 are hereby directed to provide recreational ground at ground floor, to the complainants as per disclosure.

5. The opponent nos.1 to 3 are hereby directed to form Housing Society under the provisions of MOFA and to hand over all accounts to the Housing Society as prayed.

6. The opponent nos.1 to 3 do pay jointly and severally an amount of Rs.5,00,000/- by way of compensation towards mental torture, harassment and inconvenience caused to the complainants.

7. The opponent nos.1 to 3 do pay jointly and severally an amount of Rs.50,000/- to the complainants towards cost of litigation and shall bear their own.

8. Opponent no.4 is a formal party, hence no direction is given to opponent no.4.

9. Copies of the order be furnished to the parties.

Pronounced on 10 February, 2016

[Usha S. Thakare]
PRESIDING JUDICIAL MEMBER

[Dhanraj Khamatkar]
MEMBER

dd/Ms/Pgg.

Read copy Complete.
Advot. Meetkari. Iyer
16/02/2016 Nitin Adsule
Cont. Com.

(Clerk)
17/2/2015
at 2.15pm
1 to 3

STATE CONSUMER DISPUTES REDRESSAL COMMISSION
MAHARASHTRA, MUMBAI
CONSUMER COMPLAINT NO.CC/19/503

Top Gear Transmission Pvt. Ltd.
Through its Director
Shri.Shashikant Bhausaheb Pawar
r/o Plot No.M-70, Addl.MIDC,
Satara. Complainant(s)

versus

1. Maharashtra State Electricity
   Distribution Co. Ltd.
   Through Addl.Executive Engineer
   Satara City Sub-Division
   217A, Pratapganj Peth,
   Satara.
2. Maharashtra State Electricity
   Distribution Co. Ltd.
   Through Addl.Executive Engineer
   Flying Squad,
   Krishnanagar,
   Satara.
3. Maharashtra State Electricity
   Distribution Co. Ltd.
   Through Branch Manager
   MIDC Branch office,
   Addl.MIDC,
   Satara. Respondent(s)

BEFORE:
Usha S.Thakare, Hon'ble Presiding Judicial Member
D.R.Shirasao, Hon'ble Judicial Member

PRESENT:
For the
Complainant: Advocate Jagdale
For the
Opponent: Advocate Jinsiwale

ORDER

Per: Usha S.Thakare, Hon'ble Presiding Judicial Member

[1] Heard Shri.Jagdale, learned Advocate for the complainant and Shri.Jinsiwale, learned Advocate for opponent on the point of admission. The complainant has filed consumer complaint by alleging that opponents have adopted unfair trade practice and they are guilty of deficiency in service. Complaint is filed with request to declare that notice sent by opponent No.1 dated 22/02/2019 is illegal and demand of bill of Rs.28,23,420/- is also illegal. It is requested to order not to recover bill of Rs.28,23,420/- from the complainant. Complainant has also claimed compensation and costs from opponents.

[2] It is alleged that complainant lodged complaint on 04/03/2019 regarding same bill and call opponents for checking use of electricity use for industrial purpose. Opponent No.1 found that complainant did not carry out industrial activity and electric supply is used for administrative building and stand alone R & D Lab. i.e. commercial activity without seeing any actual situation of the premises. It is the case of opponent that premises was used for commercial purpose.

[3] We have perused provisional bill dated 21/02/2019. It was issued by opponent No.1 u/s 126 of Electricity Act, 2003. It is to be noted here that opponent sent bill of Rs.28,23,420/- to the complainant under section 126 of Electricity Act, 2003. As per Flying Squad Report of opponent No.1 dated 20/02/2019 bill was issued for recovery u/s 126 of the Electricity Act, 2003.

[4] Learned counsel Jinsiwale for opponents vehemently urged that consumer complaint is not tenable before the Consumer Fora . During the course of argument learned Counsel for opponents has placed reliance on ruling of ***Hon'ble Apex Court in Uttar Pradesh Power Corporation Limited and ors. versus Anis Ahmad, reported in (2013) 8 Supreme Court Cases 491*** in which it is observed as under-

In case of inconsistency between Electricity Act, 2003 and Consumer Protection Act, 1986, provisions of Consumer Protection Act, 1986 will prevail, but ipso facto the same will not vest Consumer Forum with the power to redress any dispute with regard to the matters which do not come within the meaning of "service" or "complaint" as defined under Ss..2(1)(o) and 2(1)(c) of Consumer Protection Act, 1986. Hence, by virtue of S.3 of the Consumer Protection Act, 1986 or Ss.173, 174 and 175 of Electricity Act, 2003, Consumer Forum cannot derive power to adjudicate a dispute in relation to assessment made under S.126 or offences under Ss.135 to 140 of Electricity Act, as the acts of indulging in "unauthorized use of electricity" do not fall within the meaning of "complaint" as defined under S.2(1)(c) of Consumer Protection Act, 1986.

[5] It is urged on behalf of complainant that complainant has strong evidence to show that the electricity was used only for the purpose of industry and there was no unauthorized use of electricity.

[6] The ruling laid down by the Hon'ble Apex Court is acted as guideline for us. Observations made by the Hon'ble Apex Court in para 59 of the Judgment makes it clear that the acts of indulgence in "unauthorized use of electricity" by a person, as defined in clause(b) of the Explanation below Section 16 of the Electricity Act, 2003 neither has any relationship with "unfair trade practice" or "restrictive trade practice" or "deficiency in service" nor does it amount to hazardous services by the licensee. Such acts of "unauthorized use of electricity" has nothing to do with charging price in excess of the price. Therefore, acts of person in indulging in "unauthorized use of electricity", do not fall within the meaning of "complaint", and therefore, the "complaint" against assessment under Section 126 is not maintainable before the Consumer Forum. Offences under section 135 to 140 can be tried only by a Special Court constituted under section 153 of the Electricity Act, 2003. Complaint against assessment made by assessing officer u/s 126 of the Electricity Act, 2003 is not maintainable before the

SPL ERROR - Incomplete Session by time out

POSITION : 0x7c1aa (508330)

SYSTEM : h6fwsim/os_hook

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VERSION : SPL 5.98 07-24-2014

ERROR CODE : 11-1112

Consumer Fora. In view of the Judgment passed by the Hon'ble Apex Court in case of ***Hon'ble Apex Court in Uttar Pradesh Power Corporation Limited and ors. versus Anis Ahmad, reported in (2013) 8 Supreme Court Cases 491***we are of the opinion that present consumer complaint is not maintainable. Hence, it is not admitted. It is disposed of. No order as to costs.

Certified copy of this order be supplied to the parties.

Pronounced on
22nd November, 2019.

[USHA S.THAKARE]
PRESIDING JUDICIAL MEMBER

[D.R.SHIRASAO]
JUDICIAL MEMBER

rsc

STATE CONSUMER DISPUTES REDRESSAL COMMISSION
MAHARASHTRA, MUMBAI
FIRST APPEAL NO.A/17/21 AND A/17/136
(Arisen out of Judgment and order dated 28/12/2016 passed by Ld. Thane District Forum in complaint No.503 of 2016)

A/17/21
Mr.Abdulrashid A.Dawoodani
E/5-104, Nav Yuwan CHS Ltd.,
Shrishti Complex,
Sector No.4,Mira Road(E),
Dist.Thane 401 107. Appellant(s)

Versus
The Superintendent
Civil Court
Office of the Superintendent
C.O.C.Office,
Room No.18, Ground Floor,
Thane Civil Court,
Court Naka,
Thane 401 601. Respondent(s)

A/17/136

The Superintendent
Civil Court
Office of the Superintendent
C.O.C.Office,
Room No.18, Ground Floor,
Thane Civil Court,
Court Naka,
Thane 401 601. Appellant(s)

Versus
Mr.Abdulrashid A.Dawoodani
E/5-104, Nav Yuwan CHS Ltd.,
Shrishti Complex,
Sector No.4,
Mira Road(E),
Dist.Thane 401 107. Respondent(s)

BEFORE:
Hon'ble Mr.Justice A.P.Bhangale, President
Hon'ble Mr.A.K.Zade, Member

PRESENT:

For the Appellant(s): Advocate Smt.Gauri S.Rao in A/17/21
None present for appellant in A/17/136

For the Respondent(s): None present for respondent in A/17/21
Advocate Smt.Gauri S.Rao in A/17/136

COMMON ORDER

Per: Hon'ble Mr.Justice A.P.Bhangale, President

[1] Both these appeals have questioned validity and legality of the impugned Judgment and Order dated 28/12/2016 passed by the learned District Consumer Disputes Redressal Forum, Thane in consumer complaint No.503 of 2016 whereby it was held that the Superintendent, Civil Court, Office of the Superintendent, Thane Civil Court, Thane 400 601 is blameworthy for deficiency in service in respect of not delivering the certified copies pursuant to the application dated 23/05/2016 preferred by the complainant. Ld. District Forum below had directed the Superintendent of Civil Court, Thane to give certified copies of the documents pursuant to the application dated 23/05/2016 (except at Sr.No.3 of the application) to the complainant and further it is directed that if it is difficult or not possible according to the rules then proper explanation be given to the complainant in addition to the compensation in the sum of Rs.250/- towards mental harassment and litigation costs in the sum of Rs.250/- were also awarded against Superintendent of Civil Court, Thane.

[2] In appeal No.136 of 2017, Superintendent of Civil Court, Thane also challenged validity and legality of the impugned Judgment and Award on the ground that opponent was doing the administrative work in good faith within the limits of four corners of law and had no power to pass any Judgment and Order with reference to the application. The application itself was praying for the orders/directions/circulars/rule or any other mandate which provide the details of functions, duties and powers of the Superintendent and the Asstt. Superintendent, Civil Court, Thane. Applicant

has also sought order/directions/ circulars/rule/provision of law or any other mandate on the basis of which office objection was raised on 05/04/2016 as regards maintainability and jurisdiction in the M.A.Stamp No.2683/16 in the matter of Mr.Abdulrashid Abdulbhai Dawoodani v/s. Mrs.Daulatben Abdulbhai Dawoodani. It does appear that for obtaining certified copy the amount in the sum of Rs.50/- was accepted on 08/06/2016 by receipt bearing No.1100. However, the deposit appears accepted with reference to MA.Stamp No.2683/16.

[3] In our view, the application for obtaining certified copies of any order or Judgment is governed under the provisions of Civil Manual which are guidelines issued by the Hon'ble High Court in the State of Maharashtra for guidance of subordinate courts. The application is made to the authority concerned, in this case, Superintendent of Civil Court, Thane. The application should have mention as to which certified copies of documents are sought and could not have questioned the authority regarding the orders/directions /circulars/ rule/ provision of law or any other mandate which provide details of functions, duties and powers of the Superintendent and the Asstt.Superintendent, Civil Court, Thane. It is well understood that in the event application for certified copy is made to the authority concerned by making deposit of certain payment as consideration for obtaining certified copy it is no doubt true that technically the person who is making an application for certified copy for consideration in the form of deposit when service is not provided to such applicant may seek redress in the Consumer Fora. However, in such case, where the application is made to the Clerk of Civil Court or Superintendent of Civil Court for supply of certified copy in respect of any Order or Judgment at the most deficiency in service may be considered in respect of delay for providing certified copies or not providing certified copies as prayed for. However, in such matters Principal District Judge of the District Court concerned is an administrative head and grievance need to be made to the Principal District Judge concerned so that as an administrative head District Judge or if functions are delegated to

Civil Judge, Senior Division as an administrative head he may consider the reasons as to why certified copies as prayed for were delayed or not supplied to the applicant. This was not done in this case and complainant chose to approach directly to the Consumer Forum citing the ruling in ***Prabhakar Vyankoba Aadone v/s. Superintendent, Civil Court, decided on 8th July, 2002 reported in LAWS (NCD) 2002-7-51 decided by the Hon'ble National Consumer Disputes Redressal Commission, New Delhi in Revision Petition No.2135 of 2000.*** It was the case in respect of complaint in which delay had occurred as alleged in issuance of certified copies of Judgment and the District Consumer Disputes Redressal Forum awarded compensation and costs holding that there was deficiency in service. State Consumer Disputes Redressal Commission, Maharashtra in that case had recorded finding that the Superintendent of Civil Court, Senior Division, Solapur being a Government agency was exercising sovereign function and any deficiency in service arising could not be amenable to the jurisdiction of the Consumer Fora functioning under the Consumer Protection Act, 1986 and holding so had set aside the Order passed in favour of the complainant who had alleged delay in issuance of certified copy of Judgment dated 27/07/1994 in RCS 364/94 passed by the Civil Court, Solapur in respect of which urgent certified copy was applied for on 04/08/1994 by depositing sum of Rs.20/- for certified copy which according to the complainant was normally given within three days from the date of application as it was application for urgent certified copy. However, the Copying Department of Civil Judge, Senior Division, Solapur delayed the same and supplied it on 12/10/1994. Thus, more than two months later certified copy was supplied though it was an application for urgent certified copy. It was in the facts and circumstances of that case learned District Forum held that there was deficiency in service requiring award for compensation bringing that case under the provisions of the Consumer Protection Act, 1986 and dealing with it with reference to the definition of 'consumer' u/s 2(1)(d) of the Consumer Protection Act, 1986. It does appear that Hon'ble National Consumer

Disputes Redressal Commission, New Delhi with assistance of Amicus Curiae appointed in that case went through the legal position including the definition of 'service' u/s 2(1)(o), definition of the term 'consumer' u/s 2(1)(d) of the Consumer Protection Act, 1986 and earlier decisions to finally conclude that the Code of Civil Procedure, 1908, Order 20 Rule 20 and the Rules made there under and the Rules of the concerned High Court regarding application for certified copies and the preparation and delivery of such copies and the Court Fees Act, 1870, section 6 read with Schedule 1 (Entry No.6) thereof, are the provisions which are governed by statutes and are statutory/administrative functions and performance of administrative functions are delegated to Judicial Officer it was also held that the concept of sovereign function has undergone changes and in a welfare state, where the activities of the Government extend to several spheres, the distinction between sovereign and non-sovereign for the purpose of immunity has largely disappeared. As Judicial Officers are protected in respect of their judicial functioning and they do not enjoy such immunity for the administrative functions performed by them or by their staff.

[4] In the facts and circumstances of the present case basically we do not find from the application for certified copy as to which exhibit or which order in the proceeding bearing M.A. No.2683/16 were applied for. The application reads thus-

" *23/5/2016*

The Superintendent
Thane Civil Court,
Court Naka,
Thane 400 601.
Sir,

Please provide certified copy of the following documents-

(i) Orders/directions/circulars/rule/or any other mandate which provide the details of judicial functions and duties of the Courts;

(ii) Orders/directions/circulars/rule/or any other mandate which provide the details of matters incidental and ancillary to the judicial functions and duties of the Courts;

(iii) Order/directions/circulars/rule/or any other mandate which provide the details of functions, duties and powers of the Superintendent and the Asstt. Superintendent, Civil Court, Thane;

(iv) Order/directions/circulars/rule/ provision of law or any other mandate on the basis of which office objection was raised on 5/4/2016 as regards maintainability and jurisdiction in the M.A.Stamp no.2683 /16 in the matter of Mr.Abdulrashid Abdulbhai Dawoodani v/s. Mrs.Daulatben Abdulbhai Dawoodani despite there being specific provision of Order 47 Rule 1 of the code of Civil Procedure."

[5] From the above application it is clear that the applicant in the consumer complaint No.503 of 2016 was not himself clear as to which certified copies of exhibit or documents or orders were applied for. The contents of application itself appears vague. It does not throw light as to which certified copies were demanded though amount was deposited in the sum of Rs.50/- only. Learned District Forum below ignored this vital aspect and furthermore, complainant did not approach the Administrative Head either Principal District Judge, Thane District or Civil Judge, Senior Division, Thane so as to complain about the inaction, if any, on the part of Superintendent of Civil Court, Thane. In our view, when we had queried learned Advocate for appellant in appeal No.21 of 2017 who also fairly submitted that the application which was made by the complainant did not clearly mention the documents of which certified copies were applied for. Under these circumstances, office note as well as there is Judicial Order passed below the application the certified copies of circulations/ rule/ provision of law cannot be supplied to applicant as he is not entitled for it. Hence, application to the extent of point No.1,2 and 4, stands rejected.

Certified copies of point No.3 be supplied to the applicant as per rule. This Order dated 06/06/2016 in respect of which remedy was available for the complainant to apply for revision or complaint before the learned Principal District Judge. That remedy was not availed on by the complainant. In these facts and situation therefore in our view impugned Order passed by the learned District Forum below awarding compensation and costs as also to partly allow the consumer complaint was wrong particularly when remedy as against the judicial order passed by the learned Civil Judge, Senior Division, Thane dated 06/06/2016 could have been got revised from the learned Principal District Judge, Thane. We, therefore, set aside impugned Judgment and Order. The complainant is at liberty to avail of legal remedy in respect of judicial order passed by the learned Civil Judge, Senior Division, Thane dated 06/06/2016, if at all complainant is aggrieved by the said order. **For the reasons stated above, impugned Judgment and Award is set aside. Appeal bearing No.136 of 2017 is allowed while appeal bearing No.21 of 2017 is dismissed. No order as to costs.**

Certified copy of this order be supplied to both the parties.

Pronounced on
2nd November, 2018.

[JUSTICE A.P.BHANGALE]
PRESIDENT

[A.K.ZADE]
MEMBER

rsc

BEFORE THE HON'BLE STATE CONSUMER DISPUTES REDRESSAL COMMISSION, MAHARASHTRA, MUMBAI

Appeal No.A/15/249

M/s.Shriram Transport Finance Co.Ltd.
A/P-3984, First floor, Ausekar Building
Near Tanpure Maharaj Math
Station Road, Pandharpur
District Solapur .....Appellant

Versus

Mr.Jaysingh Damodar Patil
At Post Nagaj, Taluka Kavathe Mahankal
District Sangli 416 405 .....Respondent

BEFORE:
Justice A.P.Bhangale President
Dhanraj Khamatkar Member

PRESENT: Adv.Mr.Rajesh Kanojia and Adv. Smt.Deepika Motagi both i/b. Res Juris for the appellant
Adv.A.A.Koparde for respondent

ORDER

Per Justice A.P.Bhangale Hon'ble President

1. Heard submissions at the Bar. Perused documents on record. The Appeal questions the validity of then judgment and order dated 30.01.2015 passed in the Complaint No.CC/52/2011 by the Consumer Disputes Redressal Forum at District Sangli. The District Forum allowed the complaint directing appellant to pay compensation aggregating a sum of Rs.10,59,521/- .

2. The complainant had obtained loan facilities in the year 2008 from the appellant finance Company and had entered into Loan cum Hypothecation agreement. Loan was disbursed to the complainant. The Complainant was irregular in re-payments of EMIs. The complainant committed defaults in repayments in the year 2008 and 2009 and due to persisting defaults, the

appellant Company resorted to repossession of the Vehicle and sold it by public auction on 07.06.2009.

3. The complainant lodged complaint on 25.02.2011 claiming compensation for forcible repossession and Sale of Vehicle without due process of law.

4. The appellant contested the Complaint on the ground that the complainant was not consumer and that the appellant company had right to seize the vehicle in view of the defaults. According to the appellant notices were given to the complainant before the act of repossession of the vehicle.

5. First question raised is as to whether the District forum erred to hold that the complainant was 'consumer'. As per Section 2(1)(d) of Consumer Protection Act, 1986, "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 the 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."

6. Reading the definition as it appears one cannot dispute that the complainant who hired service of the finance company to purchase motor vehicle is within the meaning of the term "Consumer".

7. Whether in view of the agreement between the parties the Finance Company had right to seize the vehicle in case of default? and whether due process of service of notice ought to have been followed before repossession of the Vehicle?

8. In case of hypothecated vehicle subject to Hire- Purchase Agreements, the recovery process has to be in accordance with law and the recovery process referred to in the Agreements also contemplates such recovery to be effected in due process of law and not by use of force. Till such time as the ownership is not transferred to the purchaser, the hirer normally continues to be the owner of the goods, but that does not entitle him on the strength of the agreement to take back possession of the vehicle by use of force. The guidelines which had been laid down by the Reserve Bank of India binds Appellant finance company such conduct of forcible repossession of the motor vehicle is not justified. If any action is taken complaining of forcible recovery or repossession of vehicle in violation of such RBI guidelines or the violation of the principles of due process of law as laid down by the Apex Court, such complaint must be entertained. It would also be not out of place to mention here that it has not been the case of Appellant that they complied with the guidelines of the Reserve Bank of India. As such, the whole action of the appellant in taking back the possession of the vehicle of the complainant, details of which have been given here-in-above, cannot be justified and it clearly appears that the finance company had resorted to forcibly taking repossession of the vehicle by the help of muscle-men. It thus becomes evident that the repossession was

taken by the Finance company in flagrant violation of the guidelines issued by the Reserve Bank of India and also the law laid down by the highest Court of the country. No doubt an agreement had been entered into between the complainant and the financer company which provides for "Lender's Right' which may include the right of the Company to take possession of the vehicle in case of default, but what is to be considered here is as to whether the finance company itself could determine that there was a default and thereby start proceedings to take possession of the vehicle financed by it without resorting to the due procedure prescribed by law. In the present case, what we notice is that no prior information was given to the petitioner before taking possession of the vehicle. The District Forum upon evidence led by the parties found that the vehicle was seized without following the due process of law and that the appellant had not given the prior notice or pre intimation to the complainant before sale of the vehicle.

9. The contention of the appellant mainly is that complainant was not a consumer. However, considering the definition of the term 'Consumer' as afore stated, in our view, the complainant who purchased the vehicle on the basis of Hire Purchase agreement and agreed to pay price by way of EMIs could be covered as complainant within the definition of term 'Consumer'. Therefore, argument that the complainant was not a 'consumer' is not acceptable.

10. The next contention of the appellant is that the appellant had right to repossess the vehicle on the ground that the complainant neglected to pay legitimate dues to the appellant and caused financial loss to the appellant. It is true that the appellant can recover the price of the vehicle, as agreed by the complainant and may also follow due process of law to repossess the vehicle and then take further steps to recover the price of the said vehicle as agreed by the complainant. However, there can be no justification for to resorting to force

to repossess the vehicle by adopting forcible measures and by utter disregard to the due process of law. The complainant had alleged that the vehicle was repossessed by the appellant/ opponent by using muscle power by means of some miscreants to repossess it. District Forum while passing the impugned order, considered the contentions of the opponent that no force was used. However, it was specifically noted by the District Forum that due process of law was not followed by issuance of notice of at least 15 days period from the opponent to the complainant for intended sale of the vehicle. District Forum therefore accepted the contention of the complainant that due process of law was not followed when vehicle was repossessed and sold in secrecy. The opponent did not disclose as to when the vehicle was sold. That being so, the opponent was held blameworthy for deficiency of service. No affidavit was filed to vouch safe the facts in respect of expert valuation of the vehicle for resale thereof. It was not just and proper on the part of opponent to resale the vehicle without proper valuation before resale. Notice ought to have been given to the complainant for intended repossession and resale of the vehicle, as also valuation thereof. Omission on the part of opponent amounted to deficiency in service.

11. Learned District Forum made reference to ruling of Hon'ble National Commission, New Delhi in *Citicorp Maruti Finance Ltd. v/s. S.Vijayalaxmi* decided on 27/07/2007. That ruling in Revision Petition no.737 of 2005 decided on 27/07/2007 by Hon'ble National Commission was carried into Hon'ble Supreme Court and in Civil Appeal nos.9711 to 9716 of 2011 in *Citicorp Maruti Finance Ltd. v/s. S.Vijayalaxmi* reported in AIR 2012 Supreme Court 509. Hon'ble Apex Court in para 21, made observations as to legal position which is settled that even in case of mortgaged goods subject to Hire Purchase Agreements, the recovery process has to be in accordance with law and the recovery process referred to in the Agreements also contemplates

such recovery to be effected in due process of law and not by use of force. Till such time as the ownership is not transferred to the purchaser, the hirer normally continues to be the owner of the goods, but that does not entitle him on the strength of the agreement to take back possession of the vehicle by use of force. The guidelines which had been laid down by the Reserve Bank of India in fact support and make virtue of such conduct. If any action is taken in recovery in violation of such guideline or the principles as laid down by the Hon'ble Supreme Court, such an action cannot be struck down.

12. Thus, action on the party of Finance Company to repossess the vehicle without following due process of law and to resale it without following due process of law and by violating the principles of natural justice is not acceptable.

13. In another ruling of Hon'ble National Commission in the matter of *MAGMA Fincorp Ltd. v/s. Ashok Kumar Gupta* reported in 2010(4) CPR 193 (NC), Hon'ble National Commission considered the important point that banks- financing agencies should resort to procedure recognized by law to take possession of vehicles. In other words, strong arm tactics cannot be resorted to for to repossess and to resale the vehicle. In such cases, a person entering into Hire Purchase agreement with the Finance Company could be a consumer vis-à-vis Finance Co. therefore is entitled to file a complaint under the Consumer Protection Act, 1986. This view was reiterated in the matter of *RPG Itochu Finance Ltd. & Ors. v/s. Ramesh Chand & Anr. Reported in 2005(1) CPR 222* decided by Delhi State Commission, New Delhi.

14. Looking into these rulings, legal position appears well settled that financier bank or company cannot be allowed to undertake procedure unknown to law and to take forcible repossession of the vehicle pursuant to Hire Purchase Agreement. Due process of law must be followed by taking just and proper legal steps pursuant to the Hire Purchase Agreement, in case default

occurs in repayment of loan. Therefore, since it is not permissible for the financier company to take possession of the vehicle without due process of law, it amounts to unfair trade practice or deficiency in service within the meaning of section 2(1)(g) of the Act, as held in *The Mahindra & Mahindra Financial Services Ltd. v/s. Abdul Quaium S/o. Md.Sahimuddin reported in 2010(3) CPR 217* decided by West Bengal State Commission, Calcutta.

15. The contention on behalf of the appellant that the complainant was not eligible to receive punitive damages from the appellant needs to be considered at this stage. The District Forum ordered refund of margin money as well as down payment in the sum of Rs.4,54,521/- along with interest @ 8% p.a. w.e.f. 28/03/2008. The complaint was decided on 30/01/2015. The interest was payable within 4 weeks from the date of order. Under the circumstances, award on the ground of harassment (physical and mental) in the sum of Rs.1,00,000/- appears on higher side. Looking into the award that amount was to be refunded along with interest within 4 weeks from the date of order, damages awarded on account of commercial loss, ought not to have been granted. The amount of compensation ought to be reasonable, just and not bonanza or jack pot for the complainant. The opponent company was already made to pay interest @ 8% p.a. for considerable period w.e.f.28/03/2008. Under these circumstances, there was no need to award damages on account of commercial loss to the complainant consequential upon repossession of the vehicle. Damages awarded in the sum of Rs.1,00,000/- towards mental and physical harassment is also on higher side. In our view, just and reasonable damages could be limited to sum of Rs.25,000/- in the interest of justice bearing in mind the fact that complainants were already allowed to recover the amount paid towards margin money and down payment in the substantive sum of Rs.4,54,521/- along with interest @ 8% p.a. w.e.f. 28/03/2008. Hence, we need to modify the impugned order by reducing the punitive damages and

cancelling the award as to commercial loss while maintaining the amount awarded except to the extent of award stated in clause (4) of the impugned order.

16. We are of the view that the compensation awarded must be just, reasonable and not exorbitant or excessive. It cannot be a lottery or jack pot for the complainant. Compensation awarded appears on higher side for the non-pecuniary ground, considering that the loss of the complainant was already compensated with interest at the rate of Rs.8% per annum upon the refunded amount.

17. The amount awarded on account of commercial loss appears to be arbitrarily and unreasonably fixed, when the complainant was compensated with award of interest for the loss, hence it must be set aside. Non pecuniary damages for mental agony and harassment shall also be just and reasonable and not excessive considering the facts and circumstances of each particular case.

Hence, the following order:-

ORDER

Appeal is partly allowed as under:-

A) The impugned order awarding Compensation by clause 4 on the ground of damages on account of commercial loss in the sum of Rs.One Lakh is quashed and set aside .

B) The sum of damages i.e. Rs.1,00,000/- awarded on account of mental agony and harassment is reduced to the sum of Rs.25,000/-

C) Rest of order by the District Forum is maintained.

Pronounced on 10th February, 2016.

[Justice A.P.Bhangale]
PRESIDENT

[Dhanraj Khamatkar]
MEMBER

Ms.

STATE CONSUMER DISPUTES REDRESSAL COMMISSION,
MAHARASHTRA, MUMBAI

Consumer Complaint No.CC/03/21

Mr.Sudhakar R.Chowkekar-Deceased
Through legal heirs
1.Smt.Sindhu Sudhakar Chowkekar
R/o.104, Natasha Manor-A
Chandawarkar Road, Borivali(West)
Mumbai 400 092
2.Smt.Supriya Sudhir Shirke
R/o.202 D, Shivneri society
Majiwada,Thane(West)
Thane 400 0601
3. Mr.Hemant Sudhakar Chowkekar
R/o.104, Natasha Manor-A
Chandawarkar Road, Borivali(West)
Mumbai 400 092
4.Smt.Usha Sachin Khadtare
R/o.605-A, Nilganga Society
Hanuman Lane, Lower Parel
Mumbai 400 013
5. Smt.Smita Sunil Ghate
R/o.1004, Presidential Plaza
Opp.R-City Mall, LBS Road
Ghatkopar(West), Mumbai 400 086 .....Complainants

Versus

1.M/s.Allergen Surgical (U.S.A.)
Regd.Address in India as
M/s.Allergen India Pvt.Ltd.
No.3, Kasturba Road
Level 2, Prestige Obelisk
Bangalore 560 001, Karnataka
2. M/s.Allergen Surgical
C/o.Shivneh Phaco & Eye Microsurgery
Krishna Niwas, 3rd floor
Jn. Queens Road & Churni Road
Mumbai 400 004
3. Dr.R.C.Patel
Consulting Ophthalmic Surgeon
Bombay Hospital & Research Centre
12, Marine Lines
Mumbai 400 020 .....Opponents

BEFORE: Justice Mr.A.P.Bhangale, President
Mr.Narendra Kawde, Member

PRESENT : Mr.Hemant Sudhakar Chowkekar-A.R. for the complainants.
None present for the opponents

Per Hon'ble Mr.Narendra Kawde, Member

1. Shri Sudhakar Ramchandra Chowkekar has filed this consumer complaint alleging medical negligence against the opponents for failure of cataract surgeries as the Intraocular Lens (I.O.L.) inserted during the first surgery became opaque (non transparent) and ineffective, thereby resulting into deterioration of his eye sight. During pendency of the complaint, the complainant expired and his legal heirs were brought on record. For the sake of brevity, the original complainant is referred to as 'the patient' in short.

2. Patient was admitted under the care of opponent no.3 i.e. Dr.R.C.Patel in the Bombay Hospital and Research Centre with complaint of reduced eye sight. He was advised by opponent no.3 to undergo surgery for cataract operation. Since the patient was diabetic, all the preoperative tests were carried out and only thereafter the patient was operated for removal of cataract of left eye on 16/01/2001 in the Bombay Hospital and Research Centre. During the post operative check up, it was noticed by the opponent no.3 doctor that the lens inserted during eye surgery procedure, became opaque (non transparent) and ineffective and, therefore, patient was advised to undergo second surgery. Following the advice, second surgery for cataract procedure was performed on 01/05/2001 by removing the defective opaque lens manufactured by opponent no.1, which were supplied by opponent no.2. Even thereafter it was noticed that eye sight of the patient was worsening though the follow-up post operative treatment was continued with opponent no.3.

3. According to opponent no.3, the intra ocular lens manufactured

by opponent no.1 were defective, adversely affecting the vision and the only solution was second surgery for removal of the defective lens and inserting the fresh one. Despite two surgeries patient could not regain the vision as expected. Opponent no.3 accepted the fact that due to surgeries the left eye cornea was affected considerably. The patient underwent the trauma and he had to give up his regular work due to physical and mental torture as his eye sight could not be improved. The consumer complaint has been filed for direction to opponents to compensate for Rs.15,00,000/- in all for the medical negligence leading to deficient services by the opponents.

4. Opponent no.1 though duly served failed to remain present in the complaint proceeding. Opponent nos.2 & 3 have jointly filed written version refuting all adverse allegations against them. However, admitted that opponent no.2, who is not regular agent facilitated purchase of Lens (I.O.L.) from opponent no.1. Opponent no.3 admitted to have performed two surgeries for cataract. Second surgery was necessitated due to defective lens inserted during the first surgery. Even the second surgery could not provide the relief due to delayed **'decompensation of the cornea'**, which is the outcome of second surgery as opined by opponent no.3. It is also the case of opponent no.3 that second surgery was performed cost free and amount of Rs.29,931/- payable out of the total hospital charges were borne by him. Opponent no.3 took up the matter immediately with the manufacturer. Opponent no.1 readily agreed to bear entire cost of the defective lens and assured to analyse in the manufacturer's laboratory the defective lens.

5. We have heard the submissions extensively made by one of the legal heirs Mr.Hemant Sudhakar Chowkekar of the original

complainant and learned Advocate Mr.Anand Patwardhan for opponent nos.2 & 3. The Commission granted permission to Mr.Anand Patwardhan to advance his submissions with undertaking to file his vakalatnama. However, Mr.Patwardhan failed to file the same even on second day of argument i.e. on 03/05/2016. Later on belatedly vakalatnama of Advocate Anand Patwardhan has been filed on 20/05/2016, which is taken on record in the interest of justice.

6. Learned Advocate Mr.Patwardhan appearing for opponent nos.2 & 3 relied on the judgment of Hon'ble National Commission in the matter of *Janak Kumari, petitioner v/s. Dr.Balwinder Kaur Nagpal and another, respondents reported in 2003(CT3)-GJX 0057-NCDRC decided on 17/01/2003,* which bars legal heirs to be brought on record. However, the latest legal position as relied upon by the complainant in the matter of *Dr.Niraj Awasthi v/s. Jagdish Bharti decided on 02/02/2010, permits* legal heirs to be brought on record in the event of death of complainant during the pendency of consumer complaint. In view of this legal position, the legal heirs are entitled for right to sue which devolved upon such legal heirs and, therefore, the submissions advanced by Mr.Patwardhan are not acceptable to us.

7. Mr.Patwardhan tried to explain the eventualities that can occur during the course of procedure of operation which were downloaded from the Website. However, opponent no.3 has not spelt out or elaborately recorded any of the eventualities, which he had confronted with procedure. Even if it presumed that both surgeries went on uneventful, yet, there is no substantive evidence to support the contentions of opponent no.3 to establish that patient's worsening condition is solely due to alleged

manufacturing defects in lens. In view of this, we are not in agreement to accept version that both the surgeries went on uneventful.

8. The facts which are not in dispute are that the patient was admitted in the Bombay Hospital & Research Centre under the care of opponent no.3 for cataract surgery. Opponent no.2 purchased the (I.O.L.) lens from manufacturer i.e. Opponent no.1 on payment of Rs.3200/- borne by complainant. The case papers of Bombay Hospital & Research Centre available in the complaint compilation establish that second surgery was necessitated. Even after second surgery for removal of the cataract, the patient's vision did not improve. According to opponent no.3, the defective vision was due to delayed **'decompensation of cornea'** and other unexplained causes consequent to second surgery. It was submitted on behalf of complainants that though the Opponent no.3 has admitted insertion of defective lens, but failed to lead any evidence in support of his contentions except merely stating that the opponent no.3 did not have any specialized equipments to carry out tests for functional ability and quality of lenses, which is an attempt to conceal errors that might have occurred during operation. These lenses are received in sterile packed containers, which cannot be opened and interfered except at the time of actual insertion thereof in the human eyes.

9. Upon hearing submission on behalf of both the parties and perusal of the record, we do not find laboratory analysis report from manufacturer. Opponent no.3 was aware of the premedical condition of the patient, who was a diabetic with poor vision. On behalf of the complainants, complications arising during the surgical procedure, were pointed out to us, which include inability to remove all of the cataract, tearing of the lens capsule, bleeding

inside the eye, a bit of the cataract dropping into back of the eye and damage to other parts of the eye, such as, the transparent outer layer of the eye (cornea). In the case of the patient, even opponent no.3 has admitted and attributed defective vision of the patient due to delayed **'decompensation of cornea'** as a fall out of second surgery. In plain language decompensation of cornea is a nonspecific response to mechanical injury from incidental corneal contact by intraocular instruments during surgery in case of senior citizen, case like this patient, most common cause of decompensation of cornea is cataract removal. Opponent no.3 took recourse to this diagnosis in the written version without there being any clinical findings on record and suggestive remedial measures. This indicates that failure of operation cannot be attributed to alleged defective lens alone.

10. It is evident that the second surgery was advised due to failure of first surgery. However, there is no supporting document to establish that the lens inserted during first surgery were opaque (non-transparent) or defective except the statement of the opponent no.3. It is to be borne in mind that the patient particularly of this category undergoes surgery for removal of cataract for improving the vision. There are no known complications on large scale unless pre- medical condition of the patient is a matter of concern. In case of this patient, he was known diabetic and after taking adequate care the first and second operation was carried out. Opponent no.3 did not agree of having committed any error, during first surgery. However, yet the question arises as to how the lens inserted first time were found to be opaque or ineffective. There is no manufacturer's laboratory report on record.

11. We are aware that doctor cannot be held negligent if he follows standard protocol of treatment and standard operating procedure. However, in this case, opponent no.3 did not adduce evidence to establish that standard protocol of treatment was adhered to except blaming opponent no.1 i.e. manufacturer for alleged defective lens. Merely passing on blame to opponent no.1 without there being any record to support the contentions of defective/opaque lens is of no avail and would not absolve opponent no.3 of his duties and obligations towards patient. Even there is no record to show that the opponent no.3 was cautious enough to verify the accuracy of measurement of lens (as per his order) from the facing sheet of the delivery carton.

13. In the facts and circumstances, we are of the opinion that opponent no.3 is primarily liable for rendering defective service leading to medical negligence. Opponent no.1 is manufacturer of I.O.L. lens and Opponent no.2 is the supplier having the identical address as that of Opponent no.3. We hold that Opponent nos.1, 2 and 3 have acted in unison and therefore, they are liable jointly and severally. Complainants are entitled to receive reasonable compensation for trauma suffered by patient and mental agony, which we quantify to Rs.5,00,000/-. Hence, we hold accordingly by allowing the consumer complaint on the following terms:-

ORDER

1. Consumer complaint is partly allowed with costs quantified at Rs.20,000/- (Rupees twenty thousand only) to be paid jointly and severally by all opponents.
2. Opponent nos.1, 2 & 3 jointly and severally shall pay an amount of Rs.5,00,000/- (Rupees five lakhs) as lump sum compensation and reimburse Rs.1,64,364/- (Rupees one lakh sixty four thousand three hundred sixty four only) towards Medical expenses to the complainants.

3. The opponents shall pay the aforesaid amount within a period of 45 days from the date of order, failing which, aforesaid amount shall carry interest @ 9% p.a.

Pronounced on 8th June, 2016.

[JUSTICE A.P.BHANGALE]
PRESIDENT

[NARENDRA KAWDE]
MEMBER

Ms

(21)

(21)

STATE CONSUMER DISPUTES REDRESSAL COMMISSION,
MAHARASHTRA, MUMBAI

Appeal No.A/17/172
(Arisen out of order dtd.07/11/2016 in Complaint No.243 of 2012 of Thane District Consumer Disputes Redressal Forum)

State Bank of India,
Branch Office at – Marigold,
Sadguru Garden, Kopari Branch,
Thane (East). .....Appellant/
(Original Opponent)

Versus

1. Mrs.Yamuna Ganpat Mhatre,
   R/at –1/2, beside P.W. D. Chawl No.1,
   Kopari Colony, Thane (East).
2. Ld.Consumer Disputes Redressal Forum,
   Thane. .....Respondents.

BEFORE: Justice Mr.A.P.Bhangale, President
Mr.A.K. Zade, Member

PRESENT: Advocate Mr.Kiran Shinde for appellant.
Advocate Mr.Pravin Mhatre for respondent.

ORDER

Per Hon'ble Mr.A.K. Zade – Member:

1) This appeal is filed against the order dtd.07/11/2016 passed by Ld.District Forum by which the consumer complaint filed by Respondent-Complainant was partly allowed and Opponent was directed to pay the amount of Rs.1,11,100/- to Complainant alongwith interest @ 9% with effect from 30/05/2012 i.e. date of filing complaint till realization. By the said order Opponent was also directed to pay to Complainant till 31/12/2016, an amount of Rs.5,000/- towards mental harassment and Rs.10,000/- towards cost of complaint. It was further directed that, if the

said amount was not paid until the said period, then the same will have to be paid alongwith interest @ 9% with effect from 01/01/2017.

2) As per Complainant, facts of the case are as follows –

Complainant was having Saving Bank Account with Opponent and Opponent had provided ATM-cum-Debit Card facility to her. However, she had not used the said ATM Card at all and was not knowing number of the said ATM Card. Complainant further stated that she lost her ATM Card while traveling from Shegaon to Thane by train on 28/08/2011. On 29th morning after returning to Thane, she approached Branch Manager of Opponent Bank and informed him about loss of her ATM/Debit Card requesting him to block transactions of her ATM Card forthwith. However, instead of blocking the said card, Manager advised Complainant to lodge complaint about it to SBI Customer Care. As per Complainant, she then tried to contact Customer Care repeatedly and on 30/08/2011, she succeeded in lodging complaint in that respect to SBI Customer Care bearing complaint No.20110903980376 and she was assured that her lost ATM-cum-Debit Card would be blocked. Next two days i.e.31/08/2011 and 01/09/2011 were holidays on account of Ramzan Id and Ganesh Chaturthi respectively. On 02/09/2011, Complainant could not approach the bank because of Ganesh festival at her home. She therefore, approached the relevant branch of Opponent on 03/09/2011 to obtain new ATM-cum-Debit Card and also to update passbook. But due to failure of computer, she could not update her passbook on that day. On 05/09/2011 when she again approached the bank and got updated her passbook she came to know that an amount of Rs.1,11,100/- was withdrawn/stolen through her ATM Card from Indian Overseas Bank ATM ID No.IOBD-9708 at Puri Railway Station, Bhuvaneswar. Complainant immediately approached the Branch Manager of Opponent Branch again and informed him about the abovesaid withdrawal. However, Opponent Branch Manager refused to co-operate.

Complainant therefore, wrote letter dtd.06/09/2011 to said Branch Manager and also wrote complaint to Sr.Police Inspector, Kopari about the same. She also wrote letters to Thane Crime and Cyber Cell on 07/09/2011 informing them about the said incident. Complainant approached the bank on many occasions for recovery of the said amount, but the same was not reimbursed to her. Her complaint was also registered with Kopari Police Station for offence u/s.379 of I.P.C., but she did not get her money back from the bank. She therefore sent legal notice to Opponent and filed the subject consumer complaint alleging negligent and deficient service on the part of opponent and praying for direction to Opponent to pay Rs.1,11,100/- to Complainant alongwith interest @ 18% till realization and also to pay the amounts of Rs.50,000/- towards mental agony and Rs.15,000/- towards cost of the proceeding.

3) The said consumer complaint was resisted by Opponent by filing written statement before the Ld.District Forum stating that the complaint was false, frivolous, vexatious and deserved to be dismissed out rightly with costs. As per Opponent, there was no cause of action for the subject complaint and that Complainant had deliberately projected untrue picture with malafide motive to extract illegal money from Opponent Bank and had come to Forum with unclean hands. Opponent had denied all allegations against it. However, Opponent admitted that complainant had come to Opponent Bank on 29/08/2011 and enquired about procedure to be followed in case of loss of ATM Card on which she was instructed to contact Customer Care Service for lodging complaint and for blocking the card and customer care number was pointed out to her. She was also instructed to give in writing, the details of her account mentioning therein that her ATM Card was lost and she was requesting to block the same. However, as per Opponent, Complainant neither gave any details nor lodged any written complaint with Opponent Bank on 29/08/2011 about the same. Opponent

further submitted that, Complainant telephoned Customer Care on 30th August, but failed to give details and for the first time on 03/09/2011 she contacted Customer Care for blocking her ATM Card. It is also admitted by Opponent that Complainant had lodged her first written complaint on 06/09/2011 regarding the same. Opponent therefore, denied that there was any deficiency in service on its part and that it cannot be held liable for negligence for the same because as per the user manual, the Complainant was specifically instructed to keep the Card and PIN in safe custody and that procedure in the event of loss of card was also mentioned therein. Opponent therefore, stated that Complainant was not entitled for any relief whatsoever and prayed for dismissal of subject consumer complaint with cost.

4) Both parties submitted their affidavits of evidence and written arguments and also advanced oral arguments after hearing of which and after perusing the entire record, the Ld.District Forum passed the impugned order which is subject matter of this appeal.

5) Appellant had filed this appeal on the grounds that the ATM Card can only be used when the customer inputs his personal four digit identification number which was selected by the customer and not by the bank and that customer is advised to retain PIN in memory so that no one else can have its information and also that unless a person is in possession of the relevant ATM Card and also knows the four digit PIN, the ATM Card cannot be used and operated. But Complainant failed to take due precaution and therefore, Opponent cannot be held liable for the same, but Ld.District Forum failed to appreciate the aforesaid facts and therefore, the impugned order passed by Ld.District Forum was bad-in-law and erroneous. Further, regarding tearing of ATM PIN packet and its opening, the expert opinion of Adv.Ashish Gogate obtained by the Ld.District Forum was the opinion of a

person who was not an expert and who was not able to ascertain the issues related to ATM/Debit Card. It is also another ground of Opponent that whether the transaction relating to withdrawal of the said amount from account of Complainant was fraudulent or not and whether withdrawal of the said amount was within knowledge of the Complainant or not, can be decided only by detailed enquiry/investigation either by police or Civil Court after examining the entire record of disputed transactions, examination and cross-examination of witnesses and after detailed evidence alongwith production of all necessary documents etc., but the same was beyond the purview of summary jurisdiction of Ld.District Forum. As per Appellant, the Ld.District Forum erred in holding that Appellant/Opponent was deficient in rendering service and also in holding that it was a moral duty of appellant to block ATM/Debit Card immediately on 29/08/2011. The appellant also contended that the Ld.District Forum failed to appreciate that it was duty of the Cardholder to immediately inform customer branch or contact center by letter or on phone about the lost card, but it was clear from the evidence on record that Respondent/Complainant did not bother to take immediate steps to put up written complaint to Opponent branch while she had made written request on dtd.30/08/2011 in respect of loss of her another ATM Card of other bank i.e. Thane Janata Sahakari Bank, Kopari Branch, to the said bank, as admitted by Complainant herself. Complainant failed to take same steps immediately in respect of her ATM Card with Appellant/Opponent and it was only on 06/09/2011 that she put up her written letter to Opponent Bank although her ATM-cum-Debit Card was already blocked on 03/09/2011 after her call and information to Customer Care/Contact Center, but the Ld.District Forum ignored the above facts while passing the impugned order. Appellant therefore, prayed for setting aside the impugned order with cost of the appeal.

6) Perused record. Heard arguments on behalf of the parties.

7) The Ld.District Forum observed that Complainant had filed sealed envelope in respect of PIN, in Consumer Forum and stated that she had never opened the said envelope. Ld.District Forum appointed Adv.Ashish Gogate to verify the said contention of Complainant regarding opening of sealed envelope as an expert. The said expert submitted his expert report with affidavit stating that "the said PIN packet did not indicate any obvious tear, tampering, scratching or fondling etc." and in his opinion, the said packet did not show any obvious and apparent indication that it was ever opened and subsequently sealed again." Opponent objected the expert report and submitted that after loss of the first ATM Card, Opponent had issued another ATM Card with PIN envelope to her and the alleged transactions might be by the said another PIN. The Ld.District Forum rejected this objection of Opponent for the reason that the disputed transaction were carried out in between 30/08/2011 and 02/09/2011 while the second PIN was issued by the bank on 05/09/2011 to Complainant and there was no evidence by the Opponent in respect of any transaction made by the said second ATM Card/PIN by the Complainant. The Ld.District Forum therefore, held that it was not established that the said ATM PIN was used by Complainant during the said period.

8) The Ld.District Forum also observed that Complainant had asked for list of the said transactions from opponent's Contact Center Department AGM, ATM, Navi Mumbai and also ATM Switch Centre, customer transaction and also observed that Complainant had asked for relevant CCTV footage of the said ATM from Manager of the concerned bank i.e. Indian Overseas Bank. However, Indian Overseas Bank expressed its inability to provide the said CCTV Footage. From the documents produced by Opponent, Ld.District Forum observed that the alleged transactions for Rs.1,11,100/- were carried out during the period 31/06/2011 to 02/09/2011 from Complainant's saving bank account at Indian Overseas Bank, Puri

Railway Station ATM ID No.IOBD9708. It is observed by Ld.District Forum that Opponent had admitted that the information regarding loss of ATM Card was received by Opponent on 29/08/2011. The Ld.District Forum also observed that when Complainant approached Opponent Bank on 29/08/2011 informing about loss of ATM Card and asking for further procedure, Opponent directed complainant to take Customer Care Number but did not take any action on its part by taking account number from Complainant and informing Customer Care about the same. The said card was not blocked for the technical reason that there was no written complaint by complainant and therefore, because of the non action on the part of Opponent, the said loss of Rs.1,11,100/- was caused to the Complainant. In written arguments, Opponent had pointed out towards para 4 of terms and conditions in respect of ATM Cards wherein it is mentioned -

> "Loss of card- The cardholder should immediately notify the customer branch or contact centre by letter or by phone call followed by confirmation in writing, if card is lost/stolen".

The Ld.District Forum observed that, accordingly Complainant had personally visited Opponent Bank on 29/08/2011 and had informed about the said loss of ATM Card. Complainant had also submitted evidence before the Ld.District Forum in respect of phone calls made by Complainant to Customer Care on 30/08/2011. However, the Customer Care had blocked the said card on 03/09/2011. As per the Ld.District Forum, when complainant personally visited Opponent Bank, informed Opponent about loss of her ATM Card and asked for further procedure, it was necessary for the Bank to immediately block transactions in respect of the said card but the Opponent Bank did not take due cognizance of the complaint of Complainant and did not block the said card for the technical reason of not receiving written complaint and did not properly guide Complainant and therefore, caused deficiency in service. The Ld.District Forum further

observed that, if Opponent would have taken due cognizance of the complaint of Complainant on 29/08/2011 itself, then it would have been possible to avoid said disputed transactions and therefore, it is Opponent who is responsible for the said monetary loss to Complainant which was caused to her for no fault on her part and passed the impugned order.

9) During arguments, the Ld.Advocate for appellant pointed out that the so called calls made by Complainant to Customer Care on 29/08/2011, was only for 14 seconds and therefore, in the said call, it was not possible for her or for anyone to communicate information of loss of the said card during that period. It is also argued on behalf of appellant that the ATM PIN is known to cardholder only and the accountholder is supposed to memorize it and to keep card in safe custody. The said envelope which was produced before the Ld.District Forum for proving that it was not opened at all by Complainant might be relating to the second ATM Card and not the first however, there is no concrete evidence to support this contention of appellant. In our view, when it is admitted by Opponent that Complainant had approached the Opponent Bank and also the responsible officer of the respective branch i.e. Branch Manager, informing him about loss of the said card and requesting him to block the said card, it was a bounden duty of Opponent to take due cognizance of the said complaint and to inform the Customer Care to block the said card at least temporarily, if not permanently, to prevent unauthorized transactions, which was the immediate possible action required to be taken by concerned bank in case of loss of the card. The Opponent bank could have obtained details from Complainant and also the written request, then and there only, to prevent unauthorized transactions, if any, instead of directing her to Customer Care and leaving her to herself. We therefore, agree with the findings of the Ld.District Forum. We also find that the impugned order is a well reasoned order and the Ld.District Forum had passed the impugned order after

discussing the entire evidence in details. We therefore, do not find any reason to intervene with the impugned order and find that the impugned order is just and proper. We therefore pass the following order –

ORDER

(i) Appeal No.A/17/172 is hereby dismissed.

(ii) No order as to cost.

(iii) Copies of this order be furnished to the parties.

Pronounced on 27th November, 2018.

[Justice A.P.Bhangale]
President

[A.K.Zade]
Member

aj

(25) (22)

राज्य आयोग, महाराष्ट्र मुंबई
जावक क्र. 939
दिनांक : 02/03/2016

STATE CONSUMER DISPUTES REDRESSAL COMMISSION, MAHARASHTRA, MUMBAI

Consumer Complaint No.CC/13/38

NATIONAL SPOT EXCHANGE LTD.
HAVING OFFICE AT:-
FT TOWER, CTS NO.256 & 257;
04TH FLOOR, SUREN ROAD,
CHAKALA, ANDHERI (EAST)
MUMBAI – 400 093. .....COMPLAINANT/s

Versus

NEW INDIA ASSURANCE COMPANY LTD.,
HAVING ITS OFFICE AT:-
22, 02ND FLOOR, MITTAL CHAMBERS, ...OPPONENT/s
NARIMAN POINT, MUMBAI – 400 021.

BEFORE: HON'BLE MR. JUSTICE A. P. BHANGALE, PRESIDENT
HON'BLE MR. DHANRAJ KHAMATKAR, MEMBER

ORDER

Per – Hon'ble Mr. Dhanraj Khamatkar, Member

This is a consumer complaint under Section-17(1)(a)(i) read with Section-12 of the Consumer Protection Act, 1986 filed by National Spot Exchange Ltd. (hereinafter referred to as, 'the Complainant' for the sake of brevity) alleging deficiency in service on the part of the New India Assurance Company Ltd. (hereinafter referred to as, 'the Insurance Company' for the sake of brevity).

[2] Facts leading to this consumer complaint can be summarized as under:-

The Complainant is a company incorporated under the provisions of the Companies Act, 1956. The Complainant is a nationwide electronic

spot exchange for agro and allied products and provides an electronic platform for farmers to sell their produce at competitive prices. It is the case of the Complainant that in the course of business, the National Agricultural Cooperative Marketing Federation of India Ltd. (NAFED), a leading government agency, appointed the Complainant as a State Level Agent to procure and process raw cotton in the State of Andhra Pradesh under the Minimum Support Price operation of the Government of India for the Cotton Season 2008-09. According to the Complainant, under the agreement the Complainant was under an obligation to buy raw cotton from the farmers of designated stations, thereafter cleans, gin, dispose of the seeds obtained by ginning, press the cotton fibre into bales and hand the cotton bales to NAFED. Under the agreement, the Complainant was also required to avail services of insurance company under an insurance policy to protect its stock stored at various locations from fire and other perils. Accordingly, the Complainant availed services of insurance cover from the Opponent/Insurance Company a Standard Fire and Special Perils Policy to insure all its stocks that would be stored at various locations for consideration of premium of Rs.12,75,000/-. The period of insurance was from 23/01/2009 to 22/06/2009 and the insured amount was of Rs.37,50,00,000/-. The policy covered damage caused by fire, lighting and aircraft damage and other perils. The policy specifically covered five different godowns/warehouses of cotton ginning and pressing mills. It is the case of the Complainant that on 08/02/2009 and 09/03/2009, fire broke out in the premises of M/s. Salasar Balaji G. & P. Factory, and Jagadamba G. & P. Pvt. Ltd., respectively, both located at Adilabad.

[3] Present complaint relates to the incident of fire that occurred at around 09:30 p.m. on 08/02/2009. The Opponent/Insurance Company

was immediately informed about the said incident. Accordingly, a preliminary survey was conducted by the Insurance Company, through its surveyor, on 11/02/2009. According to the Complainant, another survey was conducted on 12/02/2009 by M/s. Chandak Associates, Hyderabad. The Complainant states that after thorough verification of records, including the books of accounts, the surveyor assessed the loss at Rs.28,88,891/-.

[4] It is the case of the Complainant that during the survey and assessment of fire accident, a second accident of fire took place on 09/03/2009 and the Insurance Company appointed another surveyor for the second incident. According to the Complainant, final survey of the first accident was conducted on 12/02/2009and the surveyor submitted his report to the Insurance Company on 28/04/2009. The Complainant states that the surveyors made certain significant observations in the said survey report and the same are summarized as under:-

"*(a) There was no breach of warranties on the part of the Complainant,*

(b) The Insured had an insurable interest in the subject matter referred to above,

(c) The cause of fire was not attributable to the act of Complainant and/or any of their employees,

(d) The Insured were maintaining all the necessary records and books of accounts at the factory site and a daily progress report,

(e) The Complainants representative was also maintaining a stock register in respect of the date-wise purchases/arrivals of stocks."

[5] As the Insurance Company did not pay the claimed amount under the policy despite a positive survey report in favour of the Complainant, the Complainant addressed a letter dated 20/07/2009 to the Insurance

Company requesting them to expedite the matter. After addressing the said letter, the Complainant regularly followed up the claims with the Insurance Company.

[6] According to the Complainant, the Insurance Company addressed a letter dated 08/09/2009 to the Complainant stating that the claim was being withheld as the loss assessment had to be correlated with claim of the second fire incident and only then could the claim of the first fire be finalized. The Complainant alleges that the default of the Insurance Company in withholding the amount of the claim arising out of the first fire by correlating it to the second incident of fire was totally illegal, arbitrary and contrary to the law and is nothing but deficiency in service and an unfair trade practice.

[7] From here onwards, the consumer complaint is not happily worded. May be there are some errors on the part of the Complainant. However, for the sake of convenience, we reproduce the allegations of the Complainant in paragraph (04)(o) on internal page (7 of 23) of the consumer complaint, which reads as follows:-

> *"The Complainant states that despite of several requests and reminders made to the Opposite Party, the Opposite Party failed and neglected to settle the claim arising out of first fire. Instead, the Opposite Party tried to pressurize the Complainant to accept a lower settlement of the second claim to secure payment of the first claim. Therefore, the* ***Opposite Party*** *(**emphasis***

> ***supplied)*** *was forced to accept payment of first claim, under protest, though the amount offered for the loss, by the Opposite Party was not acceptable to the Complainant. It is pertinent to mention here that the* ***Opposite Party*** *(**emphasis supplied**) signed the voucher of the second claim on December 2, 2011 and payment was received on January 15, 2011, and only thereafter the voucher for the first claim was issued by the Opposite Party on January 17, 2012. The said voucher dated January 17, 2012 was signed by the Complainant under coercion and distress situation as the Opposite Party would pay the amount only upon signing such a voucher. The Opposite Party thereafter made payment on January 19, 2012 of an amount of Rs.24,84,841 (Rupees Twenty Four Lakhs Eighty Four Thousand Eight Hundred and Forty One Only) against the actual loss, as assessed by the surveyor of the Opposite Party, of Rs.28,88,891 (Rupees Twenty Eight Lakhs Eight Eight Thousand Eight Hundred and Ninety One Only)...."*

[8] It is the grievance of the Complainant that the first Rs.10,000/- irrespective of the claim was exempted from payment. However, the Opponent/Insurance Company deducted Rs.4,10,000/- purportedly on the

basis of the terms of the policy and that, any endorsement made by the Insurance Company after issuance of policy behind back of the Complainant will not bind the Complainant. It is the case of the Complainant that the Complainant had accepted the amount offered by the Insurance Company under distress, influence and coercion in view of huge amount withheld by the Insurance Company. According to the Complainant, mere execution of a discharge voucher would not deprive the consumer from preferring a claim with respect to deficiency in service or consequential benefits. On these main grounds and other grounds, as set out in the consumer complaint, the Complainant prayed for a direction as against the Insurance Company to pay to the Complainant an amount of Rs.4,04,050/- towards additional excess amount at the time of making payment besides an amount of Rs.4,050/- deducted by the Insurance Company towards unsolicited premium amount at the time of making payment together with consequential relief of interest and damages, more specifically sought in prayer clause (24) of the consumer complaint.

[9] Pursuant to the notice issued by this Commission, the Opponent/Insurance Company appeared and resisted the consumer complaint by filing its written version of defence and denied all the adverse allegations against it and prayed that consumer complaint may be dismissed.

[10] Parties have led their respective evidence on affidavits and they have also filed voluminous record in support of their respective contentions.

[11] We have heard learned Adv. Charles De Souza on behalf of the Complainant and learned Adv. Smt. Sneha S. Dwivedi on behalf of the

Opponent/Insurance Company at length. With their help we have also carefully perused the material placed on record.

[12] In the consumer complaint, it is the case of the Complainant that as against the actual loss of Rs.28,88,891/-, as assessed by the surveyor, the Opponent/Insurance Company offered to the Complainant, only an amount of Rs.24,85,841/- and that, the Complainant had accepted the payment under distress, influence and coercion in view of huge amount withheld by the Opponent/Insurance Company. It is settled principle of law through various judicial pronouncements that, a bald plea of fraud, coercion, duress or undue influence is not enough and the party who sets up a plea, must *prima-facie* establish details of the same by placing sufficient material before the Court/Forum. Viewed thus, the relevant averments in the consumer complaint filed by the Complainant needs to be considered.

[13] In several insurance claim cases arising under Consumer Protection Act, 1986, it has been consistently held that if a complainant/claimant satisfies the consumer forum that discharge vouchers were obtained by fraud, coercion, undue influence etc., they should be ignored, but if they were found to be voluntary, the claimant will be bound by it resulting in rejection of complaint. In the case of, *United India Insurance Co. Ltd. Vs. Ajmer Singh Cotton & General Mills*, reported in **1999-(6)-SCC-400;** Their Lordships of the Hon'ble Supreme Court held that, mere execution of the discharge voucher would not always deprive the consumer from preferring claim with respect to the deficiency in service or consequential benefits arising out of the amount paid in default of the service rendered. Despite execution of the discharge voucher, the consumer may be in a position to satisfy the Tribunal or the Commission under the Act that such

discharge voucher or receipt had been obtained from him under the circumstances which can be termed as fraudulent or exercise of undue influence or by misrepresentation or the like. If in a given case the consumer satisfies the authority under the Act that the discharge voucher was obtained by fraud, misrepresentation, undue influence or the like, coercive bargaining compelled by circumstances, the authority before whom, the complaint is made would be justified in granting appropriate relief.

[14] In the present case, the Complainant is not an individual person who has availed the services rendered by the Opponent/Insurance Company for the purposes of earning livelihood by means of self-employment. The Complainant/Insured is a company incorporated under the provisions of the Companies Act, 1956. In the present case, the bargaining power of contracting parties is equal or almost equal and the present case pertains to a dispute between the parties equal in bargaining power and the case in hand is not an example where, the inequality of bargaining power is the result of the great disparity in the economic strength of the contracting parties. Situation involved in the present case is not such that the so-called '*weaker party*' (the Complainant/Insured) is in a position in which he can obtain goods or services or means of livelihood only upon the terms imposed by the alleged, '*stronger party*' (the Opponent/Insurer) or go without them. It is not the case that the Complainant/Insured had no choice, or rather no meaningful choice, but to give assent to a contract or to sign on the dotted line in a prescribed or standard form or to accept a set of rules as part of the contract, however unfair, unreasonable and unconscionable a clause in that contract or form or rules may be.

[15] Upon taking into consideration the financial status of the Complainant/Insured, it is improbable that such a company would feel financially constrained and stands coerced as alleged, in signing the Discharge Voucher. The Complainant has miserably failed to lead any cogent evidence on record to corroborate the contention that it has accepted the payment under distress, influence and coercion in view of huge amount withheld by the Opponent/Insurance Company. In our considered view, the plea raised by the Complainant is bereft of any details and particulars, and cannot be anything but a bald assertion. Given the fact that there was no protest or demur raised around the time or soon after the discharge voucher was signed and accordingly, pursuant thereto, payment was received on 19/01/2012 and that upon receipt of payment, the Complainant's protest letter dated 07/02/2012 itself was nearly after three weeks and that the financial condition of the Complainant/Insured was not so precarious that it was left with no alternative but to accept the terms as suggested, we are of the firm view that the discharge in the present case was not because of exercise of any undue influence. Such discharge was voluntary and free from any coercion or undue influence. Once the insurance claim was settled and the Complainant/Insured received payment and issued a full & final discharge voucher, there was discharge of the contract by accord and satisfaction. As a result, neither the contract nor any claim survived. When a discharge voucher was issued by the Complainant/Insured, acknowledging receipt of the amount paid by the Opponent/Insurer, in full & final settlement and confirming that there are no pending claims against the Opponent/Insurer, such discharge voucher needs to be accepted on its face value as a discharge of contract by full and final settlement. Consequently, it should entail '*ipso jure*', rejection in limine of any subsequent claim. Further, having

received the payment under the said discharge voucher, the Complainant/Insured cannot, while retaining and enjoying the benefit of the full & final payment, challenge the validity or correctness of the discharge voucher. In the circumstances, we hold that upon execution of discharge voucher and upon receipt of amount disbursed by the Opponent/Insurance, there was full and final settlement of the claim. Since our answer to the question, whether there was really accord and satisfaction, is in the affirmative, in our view no dispute existed between the parties so as to invoke the jurisdiction of the Consumer Forum. Our reasoning is fortified by the observations of Their Lordships of the Hon'ble Supreme Court in the case of Civil Appeal No.10784 of 2014 (In the case of, *New India Assurance Company Ltd. Vs. Genus Power Infrastructure Ltd.*), decided on 04/12/2014.

In view of foregoing discussions, we hold that the consumer complaint is devoid of any merit and it deserves to be dismissed. We hold accordingly and proceed to pass the following order:-

ORDER

The consumer complaint stands dismissed.

Under the circumstances, the parties shall bear their own costs.

Pronounced on 10th February, 2016

[JUSTICE A. P. BHANGALE]
PRESIDENT

[DHANRAJ KHAMATKAR]
MEMBER

KVS

BEFORE THE HON'BLE STATE CONSUMER DISPUTES REDRESSAL COMMISSION, MAHARASHTRA, MUMBAI

CONSUMER COMPLAINT NO.CC/14/279

NAMITA MUKESH VANKAWALA,
RESIDING AT D-4, OM CASTLE,
GULMOHAR ROAD, 6, JVPD SCHEME,
JUHU, VILE PARLE, MUMBAI 400 049. .....Complainant

Versus

1. LIBERTY VIDEOCON GENERAL INSURANCE COMPANY LIMITED.
HAVING ITS OFFICE AT:
10TH FLOOR, TOWER A,
PENINSULA BUSINESS PARK, GANPATRAO KADAM MARG,
LOWER PAREL, MAUMBAI 400 013.

2. BMW FINANCIAL SERVICES PRIVATE LIMITED,
HAVING ITS OFFICE AT:
DLF CYBER CITY, PHASE II,
BUILDING NO.10, TOWER C, 14TH FLOOR,
GURGAON 122 002, HARYANA. .....Opponent(s)

BEFORE:

MR.D.R.SHIRASAO, PRESIDING JUDICIAL MEMBER
DR.S.K.KAKADE, MEMBER

For the Complainant(s):	**Advocate Ms. Varsha Chavan**
For the Opponent(s):	**Advocate Mr.D.B. Joshi for opponent no.1.** **Advocate Mr.Shrikant Patil i/b Advocate Mr.Vivek Patil and Associates for opponent no.2.**

ORDER

Per Dr.S.K.Kakade, Hon'ble Member:

1. This is a case of repudiation of complainant's car insurance claim by the opposite party-Liberty Videocon General Insurance Company. The complainant who is artist by profession owns the car while opposite party no. 1 is the insurance company and opposite Party no. 2 is financer of the car. The car met with accident on Mumbai Pune expressway on 17th August 2013, the insurance for the car was purchased from opposite party no. 1. The claim lodged by the complainant with the Insurance company was repudiated on the basis that the driver at the time of accident did not possess valid licence and thus with this dispute, the complainant has filed complaint in the State Consumer Disputes Redressal Commission, Maharashtra under Sec.17 of Consumer Protection Act 1986. Brief Facts of this case are as follows.

2. The complainant who is artist by profession, bought vehicle - car bearing number GA 03 P 005 for Rs. 76 lakh in May 2011. The vehicle was insured with the opposite party no. one which is Liberty Videocon General Insurance Company for a period from 6th July 2013 to 5th July 2014 under the private car policy bearing no. 2011-400 401- 13- 1000 667- 00- 00 0. The opposite Party no. 2 is the finance company which has financed the said vehicle.

3. The complainant's Car was taken away by her friend Mr. Bharat Kapoor on 17th August 2013 and drove the car from Mumbai towards Lonavala along with his friend Mr. Deepak Raju. While driving the vehicle on Mumbai Lonavala Expressway suddenly Mr. Bharat Kapoor lost control over the car because of rain, and the car

hit a milestone turning the car upside down. Both the travellers had to be taken to hospital, Kokilaben Dhirubhai Ambani Hospital, Andheri and received treatment. The driver Mr.Bharat Kapoor suffered from severe injuries to his both legs and was operated there. The opposite party appointed surveyor for the investigations who submitted report that the driver at the time of accident was Mr. Deepak Raju who did not possess valid and legal driving license
The opposite party no. 1 repudiated the Insurance claim for the damage of the vehicle with above ground. The complainant filed the complaint with the state consumer Commission against the repudiation of his claim by the opposite party.

4. The opposite party no.1, the Insurance Company resisted the complaint by filing written statement which is at pages 115 to 130 of this compilation. The opposite party contended that the act of repudiation of the claim was after considering all the material and the relevant facts, which cannot be termed as "deficiency in service". It was also contended that immediate versions of victims injured in the said accident corroborated with the conditions of the vehicle after the accident as narrated by an IRDA accredited surveyor on that, the vehicle was in fact being driven by Mr. Deepak Raju who did not hold any valid and effective driving licence. Hence the opposite party was right in repudiating the Insurance claim. Opposite party prayed for dismissal of the complaint.

5. Considering the rival contentions of both parties,submissions made before us, considering record and scope of the complaint, following points arise for our determination and our findings thereon are noted against them for the reasons given below:

POINTS:

Sr.No.	Point	Findings
1.	Whether the complainant proved that the opposite party was wrong in repudiating the insurance claim?	Yes
2.	Whether complainants prove that there was deficiency in service by the opponent?	Yes
3.	Whether the complainant is entitled for insurance claim and compensation?	Yes
4.	What Order?	As per the final order

6. **As to the Point No.1Repudiation of Insurance claim**

From the pleading and submissions made before us it is clear that the complainant purchased private car insurance policy from opposite party number 1 for the period of 6th July 2013 to 5thJuly 2014 wide policy No. 2011- 400401-13-1000667- 00-000 which is page number 39 and private car insurance package policy terms and conditions on pages 134 to 145 of the compilation, the complainant paid premium Rs.1, 40,008/- (Rs. One Lakh, forty thousand and Eight rupees) only. It was not disputed that the car met with an accident on 17thAugust 2013 on Mumbai Pune express highway within the jurisdiction of Rasayani Police Station FIR of the said accident, dated 31st August 2013 is on page 46 of the compilation. After the accident, both injured victims were taken to MGM hospital for immediate medical attention and later on shifted to Kokilaben Dhirubhai Ambani Hospital, Andheri. The complainant submitted claim with the opposite party no.1 for the recovery of value of damaged vehicle, which was registered by OP no.1 as Claim no.

2011-400401-2011-13-1-100105-1. The opposite party no. 1 repudiated the claim lodged by the owner of the vehicle, Ms. NamitaVankawala by sending claim repudiation letter dated 29th November 2013 which is page 72- 75 of the compilation, for the reason that at the time of accident the car was driven by Deepak Raju and he did not possess valid driving license.

7. Learned advocate for complainant submitted that at the time of accident the car turned upside down and the police personnel and the people around came to rescue both the passengers of this vehicle. Mr. Deepak Raju who was sitting next to the driver seat could be easily removed out of the car while the driver Mr. Bharat Kapoor caught between dashboard and Steering Wheel, so seat of driver had to be removed by breaking the door of driver side. Mr Bharat Kapoor was serious and he was immediately shifted to ICU of Kokilaben Dhirubhai Ambani Hospital at Andheri. Since Mr. Bharat Kapoor suffered from multiple injuries, he had to be operated upon and was treated in ICU due to serious nature of the injuries sustained by him. Mr Deepak Raju having neck injury was treated and discharged early from the hospital. The complainant lodged the claim of the vehicle accident with the insurance company by providing necessary documents asked by the opposite party no. 1. The Panchnama was done by one patrolling Inspector of IRB Mr.Navnath Gole (page 51 to 54) at accident site and the statements were recorded of both the travellers of this vehicle. Additionally in the hospital again the statements were recorded of both the passengers by Versova police station. It was contended by the learned advocate for opposite party, that after finding the discrepancy in the statements of both travellers Mr.Bharat and Mr.

Deepak and alleging that Mr. Deepak who did not have valid driving licence, was driving the vehicle because of which the accident took place.

8. The learned advocate for complainant invited our attention to the repudiation letter on page 72 to 75dated 29th November 2013, for the reason stated above, that at the time of accident the car was driven by Deepak Raju who did not possess valid driving license. Exhibit L, page 71, report of the Patrolling Inspector of IRB Mr.Navnath Gole (dated 23rd August 2013) has recorded that, the driver was entrapped in the car and he was extracted out after cutting of the car door, there was injury to both of his legs and was taken in ambulance to the hospital. Corroborating this with the medical records from the hospital, Mr.Bharat Kapoor had severe injury to his both legs and fracture that was treated in the hospital. Considering the statements recorded by the police, panchnama, medical records, we are of the opinion that, Mr.Bharat Kapoor was driving the vehicle and he suffered from the injuries to his legs.Page 109,Exhibit R, the report from Police constable, Mr.Subhash Narayan Mhatre, dated 31st August 2013, gives the details of accident and mentions that Mr.Bharat Kapoor was the driver of the said car. Hence advocate for the complainant has proven that the repudiation on the disputed basis of the driver, is wrong, and so the repudiation of the genuine insurance claim. Hence we answer the **POINT no.1** as **AFFIRMATIVE.**

9. **<u>As to the Point No.2</u>** **Deficiency in Service**

Learned advocate for respondent, OP no.1, the insurance company, Adv.D.B.Joshi, submitted that there are certain issues that need to considered in the instant case, such as the vehicle was driven by

driver without valid licence, there is dispute about the driver, there was delay in informing to the Insurance Company. Further the Insurance claim was repudiated by the OP no.1 as the driver while accident took place did not possess valid driving licence.

10. The advocate for the opposite party no.1 invited our attention to various Case laws / rulings filed by him along with the legal principle postulated in the judgment:

    1. *Ravaneet Singh Bagga vs M/s KLM Royal Dutch Airlines & Anr,* (2000)1 SCC 66, Supreme Court CA no.8701 of 1997, decided on 2nd Nov.1999.

       "The test in deficiency in service lay in Complainant proving that there was some fault, imperfection, shortcoming or inadequacy in the manner of the insurance company and further such fault etc. must be wilful."

    2. *Bajaj Allianz General Insurance Company Limited versus Smt. Lakshmi Lakshmamma and others,* RP no. 1433 of 2008 NCDRC"The crystallized legal position as of now is that unless the condition of policy with regard to holding of a valid driving license is fulfilled, the insurance company could not be hold / made liable to meet the claim"

    3. *New India Assurance Company Limited versus Dinesh Kumar,* RP no. 1046 of 2015, NCDRC"When the complainant has obtained insurance policy with false declaration that no claim was registered in previous year, the policy is null and void and complainant is not entitled for any claim regarding theft of the vehicle"

    4. *Life Insurance Corporation of India versus Smt. Santosh Devi,* 2014 STPL(web) 2044 NC "The misrepresentation/suppression

of facts related personally to the insured, it cannot be said that it was a bonafide suppression without any malafide intention"

5. *The Chairman cum Managing Director, Rajasthan Financial Corporation and another versus Commander S.C. Jain (Rtd.) and Anr* Civil Appeal no. 2774 of 2010 (arising out of SLP (c) no. 16323 of 2006) Supreme Court of India "When there is no deficiency found on the part of appellant, it cannot be forced to pay compensation"
6. *Branch Manager, National Insurance Company Limited versus Sri. Srinivasa Cotton Traders,* First Appeal no. 818 of 2003, NCDRC"The deficiency in service has to be distinguished from the tortious acts of the respondent. In the absence of deficiency in service the aggrieved person may have remedy under the common law to file a suit for damages but cannot insist for grant of relief under the act for the alleged acts of omission and commission attributable to the respondent which otherwise do not amount to deficiency in service"

   The above rulings are not applicable to the present case for the simple reason that the facts and circumstances of the cases mentioned are different with that of the instant case in hand and that there is proved deficiency in service in repudiation of the insurance claim.

11. In support of her contentions, learned advocate for Complainant referred following rulings and enumerated along with the legal principles set in the rulings.
    1. *M/s HundiLal Jain Cold Storage vs Oriental Insurance*, OP 122 of 95, NCDRC decided on 24 May 2004

"In an admitted effective policy, burden of proof is on insurance company to establish that, there was violation of conditions of insurance policy and those conditions were known to the insured"

2. *M/s National Insurance Company Limited versus Pramod Kumar Jain,*First Appeal no. 201 of 2008 in Complaint case no. 433 of 2006 of District Consumer Forum, Aurangabad, NCDRC
   "In the absence of any evidence of alleged fraud committed by the Complainant, the insurance company committed deficiency in service by repudiating claim of complainant"
3. *The Oriental Insurance Company Limited versus M/s Khemani electronics,* First Appeal no. 234 of 1992, NCDRC decided on 16thNovember 1993
   "It is futile for the insurance company who submits the report of investigations after much time passed showing that, the claim submitted is on wrong facts, when actually evidence shows it to be genuine, repudiation is deficiency in service".

12. After going through the reports submitted by the insurance company about the investigations of the accident, the interpretation of the reports submitted by the investigator, page no.149 to page 153, dated 8th October 2013 with no affidavit along with it. We are of the opinion that the survey was conducted almost 15 days afterwards without intimation to the complainants. Hence cannot be accepted as it is. Considering the statements recorded by police, correlating injury to the driver Mr.Bharat Kapoor the interpretation of the survey is not acceptable, and hence there is deficiency in service in repudiation of the genuine claim of the complainant. Hence we answer the **POINT no.2** as **AFFIRMATIVE.**

13. **<u>As to the Point No.3</u> Entitlement of Insurance claim and Compensation:**

In view of above discussion, we are of the opinion that, the complainant is entitled for Insurance claim and the compensation prayed for. The complainant is entitled for the insurance claim of Insured Declared Value of the vehicle Rs.57 Lakh along with reasonable interest as this is the repudiation of claim in 2013. Also since the complainant suffered from mental agony and harassment due to repudiation of the insurance claim, the complainant is also entitled for compensation on that account, we think Rs.2 Lakh to be reasonable amount for the same. Hence the answer to **POINT no.3** is **AFFIRMATIVE.**

14. **<u>As to the Point No.4</u> what order?**

In view of the answers of Points 1 to 3, the consumer complaint deserves to be partly allowed. Hence we proceed to pass the following order.

<u>ORDER</u>

1. The complaint ispartly allowed with costs of Rs.25,000/- (Rupees Twenty Five thousand only) to be paid by the respondent to the complainant.

2. It is declared that the opposite party no.1, the Insurance Company as deficient in providing services to the complainant under the contract of Insurance.

3. The opposite party No.1 is hereby directed to pay the insured's declared value of the insured vehicle Rs.57 Lakh to the complainant

with the interest @ 8.5% from the date of filing this complaint, i.e. 10th July 2014; within 2 months of the date of this order failing which the interest will be @ 12% till realization.

4. The opposite party no.1 is also directed to pay Rs.2 Lakh as compensation towards toeing charges, mental agony, harassment to the complainant within 2 months from the date of this order, failing which the interest levied will be @ 12% till realization.

5. Free certified copies of the order be furnished to the parties forthwith.

Pronounced
Dated 1st February 2019.

[D.R.SHIRASAO]
PRESIDING JUDICIAL MEMBER

[DR.S.K.KAKADE]
MEMBER

-BEFORE THE HON'BLE STATE CONSUMER DISPUTES REDRESSAL COMMISSION, MAHARASHTRA, MUMBAI

Execution Application No. EA/12/13
(Arisen out of order dated 17/09/2009 in CC/02/429)

1. Shri Pradip Sitaram Shelte,
A-406, Ramkrishana Apartment, Kedar Chowk,
Tembipada Road, Bhandup, Mumbai 400 078.

2. Shri Jayan Radhakrishnan Nambiar,
302, Saiparsha,m Plot No.74, Sec.19, Nerul,
Navi Mumbai 400 706.

3. Shri Ashok Motiram Govalkar,
Type III A/10/118, RCF Colony, Chembur,
Mumbai 400 074.

4. Shri Manickam Munian,
Type III A/10/112, RCF Colony, Chembur,
Mumbai 400 074.

5. Smt. Leela Nambiar,
11, Tejal Bhuvan, N.P. Thakkar Road,
Vile Parle East, Mumbai 400 056.

6. Shri Nitin Uddhav Deshpande,
Flat No.8, Torana CHS, Plot No.2A,
Sec. 15, Nerul, Navi Mumbai 400 706.

7. Shri Wilfrade G. D'souza,
401 A, Silver Thread, Vakola,
Santacruz East, Mumbai 400 055. .....Executant(s)

Versus

1. M/s. Joshua Estate Developers Pvt. Ltd. –
Deleted.
Mukta CHS Ltd., Near Panchavati Aksha Hotel,
Ambachi Road, Vasai West.

2. Shri P.K. Thomas – **Deleted** .....Opponents/Accused.(s
Managing Director,)

Mukta CHS Ltd., Near Panchavati Aksha Hotel,
Ambachi Road, Vasai West.

3. Shri B.S. Menghe,
R/at Type II/18/403, RCF Colony, Chembur,
Mumbai 400 074.

4. Shri Rajaram M. Sawant, – **Abated**
R/at R.No.201, A Wing, Gulmohar CHS,
Pakhadi, Kharegaon, Kalwa, Thane 400 605.

5. Shri Sunil R. Batwalkar,
R/at Shri Saikrupa CHS, Juinagar,
Sec. 23, Navi Mumbai.

BEFORE:

HON'BLE Mr.A.P. Bhangale, PRESIDENT
HON'BLE MR. Narendra Kawde MEMBER

PRESENT: **Executants along with Advocate Mr.Padmanabh Pise**
Accused No.3 Mr.B.S. Menghe and Accused No.5 Mr.Sunil R. Batwalkar are present along with Advocate Mr. Uday Wavikar.

ORDER

Per Hon'ble Mr. Justice A.P. Bhangale, President

Heard Submission of both the sides on execution application u/sec 27 of Consumer Protection Act, 1986

Today Ld.Advocate Mr.Wavikar for the opponent/accused apprehending jail for opposite party prayed for interim stay to the execution proceeding of the order dated 10/06/2016 for non-compliance of the final order passed by us, which is subject matter of the present execution proceeding no.EA/12/13. He prayed for suspension of sentence pending the appeal and for release of opponents/accused on bail. We have queried whether any appeal is pending so as to attract Section 389 of Cr.P.C. Advocate Mr.Wavikar submitted that the appeal is being

prepared by him. Shri Wavikar prayed for bail in view of impending action of remanding opponent to the jail custody for non-obedience of the final order in CC/02/429. In our view, since we have accorded a fair opportunity in execution proceeding to the opponents/accused including following summary procedure as contemplated under the Code of Criminal Procedure in order to hear the opponents, we have also recorded evidence in accordance with law of summary trial execution proceeding and recorded statement of accused in defence. Opponents/accused, in spite of final order, have chosen to simply deny their liability while admitting material facts. They were also given opportunity to lead evidence in defence, if any, so as to clarify as to why the final order was not complied and obeyed. They were also accorded liberty to lead evidence of witnesses. However, despite recording of evidence in the present case though long and time consuming, there can be no excuse for the opponents to disown their liability pursuant to the final order to refund the amounts to the complainants. We have already mentioned about this liability of the opponents in order dated 10/06/2016. Opponents no.3 and 5 have shown no remorse for non-payment of the amounts to the complainants/award holders who are entitled to enforce the operative order inclusive of direction as to payment of interest on the amounts to be refunded as also compensation and costs directed to be paid. We, therefore, have no other option but to remand the disobedient opponents no.3 and 5 to jail custody directing that unless they pay the entire awarded amounts pursuant to the final order in CC/02/429 decided on 17/09/2009 pursuant to the evidence recorded in executing

proceedings. Unless and until the opponents/accused no.3 and 5 pay the entire amount as awarded they shall continue to be detained in jail custody and imprisonment, maximum to the extent of term of three years as permissible under Section 27 of the Consumer Protection Act from the date of this order. In the event they pay the entire amount as awarded, they shall be released after order upon reference to this Commission. It is made clear that the opponents are being taken in custody pursuant to the non-obedience of the final order passed by this Commission with a direction that until and unless final order is complied by the opponent/accused no.3 and 5 Shri B.S. Menghe and Shri Sunil R. Batwalkar respectively they shall continue to be remanded to the jail custody and shall be sent to undergo imprisonment alike civil detenue in the jail subject to maximum jail custody of three years. Order accordingly.

Pronounced Dated 13th June, 2016.

[HON'BLE Mr.Justice A.P. Bhangale]
PRESIDENT

HON'BLE MR. Narendra Kawde]
MEMBER

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BEFORE THE STATE CONSUMER DISPUTES REDRESSAL COMMISSION, MAHARASHTRA, MUMBAI

Revision Petition No. RP/15/349
(Arising out of order dated 07/09/2015 in Consumer Complaint No.CC/13/83 of Addl.District Thane)

M/s. Shubham Developer,through its Proprietor,
Mr.Suresh Meghji Shah,
Q-31, APMC Market – II,
Vashi, Navi Mumbai – 400 703. .....**Petitioner(s)**

Versus

Shubham Palace Co-operative Housing Society Ltd.,
Sector 15, Koparkhairane, Navi Mumbai 400 703,
Through its Chairman, Mr.Satish Dhanji Vora &
Secretary Mr.Rajan Damodar Walinjkar .....**Respondent(s)**

BEFORE:
Usha S. Thakare - Presiding Judicial Member
Dhanraj Khamatkar – Member

For the petitioner: **Advocate Ms.Sushma Mishra**
For the respondent: **Advocate Mr.Dattatray Daund**

ORDER

Per Hon'ble Mrs.Usha S. Thakare – Presiding Judicial Member:

(1) Advocate Ms.Sushma Mishra is present for the petitioner. Advocate Mr.Dattatray Daund is present for the respondent. He has filed vakalatnama on behalf of the respondent. Taken on record. Heard both the parties on the point of admission.

(2) On perusal of record and after hearing both the parties it is clear that the petitioner/original opponent failed to file written version within 45 days as per procedure of law. It is settled principle of law that period of filing written version cannot be extended.

(3) Their Lordships of the Hon'ble Supreme Court in the case of Civil Appeal Nos.10941 – 10942 of 2013 (In the matters of *New India Assurance Co. Ltd. Vs. Hilli Multipurpose Cold Storage Pvt. Ltd*) decided on 04/12/2015, in paragraph (17) of the order, observed as follows:-

> *"We are, therefore, of the view that the judgment delivered in the case of Dr. J. J. Merchant & Ors. Vs. Shrinath Chaturvedi, reported in [2002-(6)-SCC-635] holds the field and therefore, we reiterate the view that the District Forum can grant a further period of 15 days to the opposite party for filing his version or reply and not beyond that."*

(4) The Hon'ble Apex Court made it clear that its earlier view expressed in the case of ***Dr. J. J. Merchant*** **(supra)** should be followed. Upon plain reading of Section-13(1)(a) of the Consumer Protection Act, 1986 one can find that the opposite party is given time of thirty days for giving his version and the said period for filing or giving the version can be extended by the District Forum or State Commission, as the case may be, but the extension should not exceed a period for fifteen days. Thus, the upper cap of forty-five days is imposed under the Consumer Protection Act, 1986 for filing written version by the opposite party.

(5) In view of guidelines of the Hon'ble Apex Court, we have no hesitation to hold that in the present case, the Petitioners/Opponents failed to establish as to how the order under challenge passed by the learned District Forum is illegal, improper, and incorrect or suffers from material irregularity so as to invoke revisional jurisdiction of this Commission, as contemplated under Section-17(1)(b) of the Consumer Protection Act, 1986. Permission cannot be granted to the petitioner for filing written version beyond statutory period of 45 days. At the most petitioner can participate in proceeding before the District Forum and make attack on law points and not on merit. With this view, revision petition is not admitted, as the petitioner failed to make out case for admission. It is disposed of. Parties to bear their own costs.

Pronounced on 25th January, 2016.

[Usha S. Thakare]
Presiding Judicial Member

[Dhanraj Khamatkar]
Member

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