

(2024) 02 NCDRC CK 0016

National Consumer Disputes Redressal Commission

Case No: Revision Petition No. 1243 Of 2017

Kotak Securities Ltd. & Anr

APPELLANT

Vs

C.K. Pradeep

RESPONDENT

Date of Decision: Feb. 9, 2024

Acts Referred:

- Consumer Protection Act, 1986 - Section 2(1)(d), 2(1)(d)(i), 2(1)(d)(ii), 21(b)

Hon'ble Judges: Avm J. Rajendra, Avsm Vsm (Retd.), Presiding Member

Bench: Single Bench

Advocate: Prashant Jhajharia

Final Decision: Dismissed

Judgement

Avm J. Rajendra, Avsm Vsm (Retd.), Presiding Member

1. The present Revision Petition has been filed by the Petitioner under Section 21(b) of the Consumer Protection Act, 1986 (the "Act") against impugned order dated 30.11.2016, passed by the State Consumer Disputes Redressal Commission, Thiruvananthapuram Kerala ('State Commission') in First Appeal No. 778 of 2011 wherein the State Commission allowed the Appeal in part and remanded the matter to the District Forum to decide the question of loss sustained by the Complainant and the compensation against the order dated 30.09.2011, passed by the District Consumer Disputes Redressal Forum, Kannur ("District Forum") in Consumer Complaint No.150 of 2009, wherein the Complaint filed by the Complainant was allowed.

2. As per office report, there is a delay of 20 days in filing the present Revision Petition. For the reasons stated in IA/6694/2017, the delay is condoned.

3. Brief facts of the case, as per the Complainant, are that he is an NRI who returned to India after giving up his job abroad. Attracted by the advertisements made by the Opposite Parties (OPs), he invested Rs.10,00,750/- with OP-2 for trading in shares in September 2007. The two executives deputed by OP-2 promised that they will trade in the account of Complainant only after getting confirmation for each transaction. But the OPs traded through his account even without informing him. OP-2 has done derivative trade in his Demat Account without getting any confirmation even though the OPs were aware that for derivative trading the Complainant has to pay margin money and the OPs has to open a separate bank account in the name of the Complainant and the account has to be settled through the bank. On 15.11.2007, the staff of OP-2 contacted him for doing trade and the Complainant refused to give approval. He requested OP-2 to send the ledger showing the trade done from his Account. They did not forward the same. Later, he was informed that he suffered heavy loss as a result of the trade done by OP-2. In spite of the losses OP-2 took brokerage of Rs.1.7 Lakhs. The Complainant suffered loss of 40% of the investment i.e. Rs.5,67,375/- due to the acts of OP-2 in doing trade without confirmation. The OPs have done derivative trade in the Account of the Complainant without the written authority and without any kind of instruction from him. He did not give any margin money for doing the derivative trade in his account. The OPs did not issue any contract note to him for derivative trade in his Account. The act of OPs amounts to unfair trade practice and deficiency in service. The OP-3 is refusing to provide statements of account for the transactions done in his account. He claimed Rs.5,67,375/- as loss sustained by him and a compensation of Rs.10,000/-.

4. In their reply, OP-2 (M/s Kotak Securities Ltd) contested the complaint stated that OP-2 is a member of NSE and is acting as share broker. OP-2 contended that the Complainant is not consumer as defined under on 2(1)(d) of the Act as the trades were executed with speculative motive to earn profit. The Complainant failed to furnish any details of the claim amount. While the Complainant disputed the trades executed in F & O Segment, but the details such as period, quantity, price, script etc are unspecified. The Complainant concealed the fact that he received pay-in of funds from the statement of accounts claiming the disputed period. As per the agreement entered into between the parties only the Court in Mumbai has jurisdiction. The OPs forwarded copies of contract notes, bills, trade confirmation statement of account to the Complainant in his email. The Complainant did not raise any objection against the trades executed in his account. After execution of the he had taken a pay out of Rs.58,496.54 as revealed by the ledger A/c dated 01.02.2008. It is true that he had invested Rs.10,00,750/- with the OPs. The loss is the trading loss for which OPs are not responsible. Therefore the complaint may be dismissed.

5. The District Forum, vide order dated 30.09.2011 allowed the complaint and directed the Opposite Parties as under:

"In the result, the complaint is allowed directing the opposite parties 1 and 2 to refund Rs.5,67,375/-(Rupees Five lakhs sixty seven thousand three hundred and seventy five

only) alongwith Rs.5000/- (Rupees five thousand only) as compensation and Rs.1000/- (Rupees One thousand only) as cost of the proceedings to the complainant within 30 days from the date of receipt of this order, failing which complainant is entitled to execute the order as per the provisos of consumer protection Act."

6. Being aggrieved from the order dated 30.09.2011 of the District Forum, the OP-1&2 filed an Appeal before the State Commission and the State Commission vide order dated 30.11.2016 allowed the Appeal in part and remanded the matter to the District Forum to decide the question of loss sustained by the complainant and the compensation with the following observations:

"6. Heard the counsel for appellants/opposite parties 1 and 2 and the complainant who appeared in person.

7. The following points arise for consideration.

1. Whether the complainant is a consumer as defined under section 2(1) (d) of Consumer Protection Act?

2. Whether the complaint is maintainable?

3. Whether the impugned order of the Forum can be sustained?

8. The counsel for appellants/opposite parties 1 and 2 mainly contented that complainant cannot be considered as a Consumer as defined under sec.2(1)(d) of Consumer Protection Act as the trades were executed with speculative motive to earn profit and that National Commission as well as Apex Court have held that trading in shares is a commercial transaction. He relied on the decisions in Amit Properties Pvt.Ltd Vs. HDFC Bank (Original Petition No. 306,308 and 311 of 2000 of NCDRD decided November 01, 2013) and A. Asaithampi Vs. Sathyam Computers Ltd and others ((2012) CPJ 213 (NC).

9. But explanation to sec: 2(1)(d) provides that "commercial purpose: does not include use by a person of goods bought and used by him and services availed by him exclusively for the purpose of earning his livelihood by means of self employment. Admittedly the complainant is a retired NRI and deposited the amount with opposite parties to trade in shares to earn his livelihood. In the decisions referred above there was no pleading to the effect that complainants have traded in shares for earning their livelihood. Therefore the case of the complainant comes squarely under the Explanation to Sec:2(1)(d) of the Act. Hence we confirm the finding of the Forum that complainant is a consumer as defined under sec:2(1)(d) of the Act.

10. The further case of the complainant is that he had entrusted Rs. 10,00,750/- with the opposite party for trading in shares and sustained a loss of 40% investment by

trading without the confirmation of the complainant and that he has incurred a loss of Rs.5,67,375/- which the opposite parties are liable to refund. But no document is produced either by the complainant or opposite parties to prove the transaction in question or to show the actual loss sustained by the complainant. Complainant as PWI admitted that each and every trade is being informed to him by the opposite parties. Before this commission complainant filed a statement showing that loss. Through the Forum directed the opposite parties they did not produce the accounts relating to the transaction in question. Therefore the only course open is to remand the matter to the Forum to decide the question of loss sustained by the complaint and the compensation the complainant is entitled to.

In the result we allow the appeal in part. The finding of the Forum that complaint is maintainable is confirmed. The matter is remanded to the Forum to decide the question of loss sustained by the complainant and the compensation the complainant is entitled to. Both parties are entitled to adduce further evidence before the Forum. Both parties shall appear before the Forum on January 30, 2017. Forum shall dispose of the complaint within three months from the date of receipt of the copy of this Judgment.”

7. The learned Counsel for the Petitioners argued that the Complainant was indulging in share trading both in the cash as well as Futures & Options segments and therefore, he does not fall within the purview of consumer, as defined under Section 2(d) of the Act 1986. Also, he had no such case either in pleadings or while tendering evidence before the District Forum. He sought to allow the present Revision Petition and set aside the orders of the Fora below.

8. The learned Counsel for the Respondent reiterated the issues which were already in the complaint and argued in support of the impugned order passed by the learned District Forum and asserted that the Order is reasonable and fair and be upheld.

9. We have examined the pleadings and associated documents placed on record and rendered thoughtful consideration to the arguments advanced by the learned counsels for both the parties.

10. The matter entails two main issues viz. whether the Complainant is a “Consumer” under the Consumer Protection Act and whether the State Commission has rightly remanded back the matter to decide the question of loss sustained by the complainant and the compensation. Adverting to the first issue, the definition of the term ‘Consumer’ as contained in Section 2(1)(d) of the Act of 1986 as it stood after the amendment Act of 2002, reads:

(d) “consumer” means any person who,- (i) buys any goods for a consideration which has been paid or promised or partly paid and partly promised, or under any system of deferred payment and includes any user of such goods other than the person who buys such goods

for consideration paid or promised or partly paid or partly promised, or under any system of deferred payment when such use is made with the approval of such person, but does not include a person who obtains such goods for resale or for any commercial purpose; or

(ii) hires or avails of any services for a consideration which has been paid or promised or partly paid and partly promised, or under any system of deferred payment and includes any beneficiary of such services other than the person who hires or avails of the services for consideration paid or promised, or partly paid and partly promised, or under any system of deferred payment, when such services are availed of with the approval of the first mentioned person but does not include a person who avails of such services for any commercial purpose.

[Explanation.— For the purposes of this clause, “commercial purpose” does not include use by a person of goods bought and used by him and services availed by him exclusively for the purposes of earning his livelihood by means of self-employment;] (Emphasis supplied)

11. While elaborately discussing the impact of amendments made to the definition of ‘Consumer’ in relation to exclusion of categories of activities envisaged under the exception of commercial activity, particularly after the 2002 Amendment, the Hon’ble Supreme Court in *Shrikant G. Mantri Vs. Punjab National Bank*, Civil Appeal No.11397 of 2016 decided on 22.02.2022, held as under:-

30. *It could thus be seen that by the 2002 Amendment Act, the legislature clearly provided that a person, who avails of such services for any commercial purpose would be beyond the ambit of definition of the term ‘consumer’. The Explanation, which is an exception to an exception, which earlier excluded a person from the term ‘commercial purpose’, if goods were purchased by such a person for the purposes of earning his livelihood by means of self-employment, was substituted and the Explanation was made applicable to both clauses (i) and (ii). It can thus clearly be seen that by the 2002 Amendment Act, though the legislature provided that whenever a person avails of services for commercial purposes, he would not be a consumer; it further clarified that the ‘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 selfemployment.*

31. *It is thus clear that by the 2002 Amendment Act, the legislature has done two things. Firstly, it has kept the commercial transactions, insofar as the services are concerned, beyond the ambit of the term ‘consumer’ and brought it in parity with Section 2(1)(d)(i), wherein a person, who bought such goods for resale or for any commercial purpose, was already out of the ambit of the term ‘consumer’. The second thing that the legislature did was that even if a person availed of the commercial services, if the services availed by him were exclusively for the purposes of earning his livelihood by means of selfemployment, he would still be a ‘consumer’ for the purposes of the said Act. Thus, a person who availed of services for commercial purpose exclusively for the purposes of earning his livelihood by means of*

self-employment was kept out of the term 'commercial purpose' and brought into the ambit of 'consumer', by bringing him on par with similarly circumstanced person, who bought and used goods exclusively for the purposes of earning his livelihood by means of selfemployment. It could thus be seen that the legislature's intent is clear. If a person buys goods for commercial purpose or avails services for commercial purpose, though ordinarily, he would have been out of the ambit of the term 'consumer', by virtue of Explanation, which is now common to both Sections 2(1)(d)(i) and 2(1)(d)(ii), he would still come within the ambit of the term 'consumer', if purchase of such goods or availing of such services was exclusively for the purposes of earning his livelihood by means of selfemployment. With this legislative history in background, we will have to consider the present case.

32. The purpose of the said Act has been succinctly described by this Court in the case of *Laxmi Engineering Works vs. P.S.G. Industrial Institute* 6 (1995) 3SCC 583, which is as under:

"10. A review of the provisions of the Act discloses that the quasijudicial bodies/authorities/agencies created by the Act known as District Forums, State Commissions and the National Commission are not courts though invested with some of the powers of a civil court. They are quasijudicial tribunals brought into existence to render inexpensive and speedy remedies to consumers. It is equally clear that these forums/commissions were not supposed to supplant but supplement the existing judicial system. The idea was to provide an additional forum providing inexpensive and speedy resolution of disputes arising between consumers and suppliers of goods and services. The forum so created is uninhibited by the requirement of court fee or the formal procedures of a court. Any consumer can go and file a complaint. Complaint need not necessarily be filed by the complainant himself; any recognized consumers' association can espouse his cause. Where a large number of consumers have a similar complaint, one or more can file a complaint on behalf of all. Even the Central Government and State Governments can act on his/their behalf. The idea was to help the consumers get justice and fair treatment in the matter of goods and services purchased and availed by them in a market dominated by large trading and manufacturing bodies. Indeed, the entire Act revolves round the consumer and is designed to protect his interest. The Act provides for "business to consumer" disputes and not for "business to business" disputes. This scheme of the Act, in our opinion, is relevant to and helps in interpreting the words that fall for consideration in this appeal."

33. It could thus be seen that this Court has clearly held that the idea of enacting the said Act was to help the consumers get justice and fair treatment in the matter of goods and services purchased and availed by them in a market dominated by large trading and manufacturing bodies. It has been held that the entire Act revolves round the consumer and is designed to protect his interest. It provides for "business to consumer" disputes and not for "business to business" disputes. It has been held that forums/ commissions provided by the said Act are not supposed to supplant but supplement the existing judicial system. The idea

was to provide an additional forum providing inexpensive and speedy resolution of disputes arising between consumers and suppliers of goods and services.

34. In the case of *Laxmi Engineering Works (supra)*, this Court, while considering the scope of the definition of the expression 'consumer' with relation to Section 2(1)(d)(i) of the said Act and the Explanation added by 1993 Amendment Act, observed thus:

"11. Now coming back to the definition of the expression 'consumer' in Section 2(d), a consumer means insofar as is relevant for the purpose of this appeal, (i) a person who buys any goods for consideration; it is immaterial whether the consideration is paid or promised, or partly paid and partly promised, or whether the payment of consideration is deferred; (ii) a person who uses such goods with the approval of the person who buys such goods for consideration; (iii) but does not include a person who buys such goods for resale or for any commercial purpose. The expression 'resale' is clear enough. Controversy has, however, arisen with respect to meaning of the expression "commercial purpose". It is also not defined in the Act. In the absence of a definition, we have to go by its ordinary meaning. 'Commercial' de-notes "pertaining to commerce" (*Chamber's Twentieth Century Dictionary*); it means "connected with, or engaged in commerce; mercantile; having profit as the main aim" (*Collins English Dictionary*) whereas the word 'commerce' means "financial transactions especially buying and selling of merchandise, on a large scale" (*Concise Oxford Dictionary*). 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 selfemployment, 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 selfemployment, 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 selfemployment” 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 autorickshaw 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 autorickshaw, a car or a lathe machine or other machine to be plied or operated exclusively by another person would not be a consumer. This is the necessary limitation flowing from the expressions “used by him”, and “by means of selfemployment” in the explanation. The ambiguity in the meaning of the words “for the purpose of earning his livelihood” is explained and clarified by the other two sets of words.” [Emphasis supplied]

35. It can thus be seen that this Court observed that the National Commission was 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. This Court observed that in order to obviate any confusion that the expression “large scale” was not a very precise expression, the Parliament stepped in and added the explanation to Section 2(d)(i) by Ordinance/ Amendment Act, 1993. It has been held that that the explanation excludes certain purposes from the purview of the expression “commercial purpose”. Various examples have been given by this Court as to what would come within the term of ‘selfemployment’.

36. One instance given is that a person who purchases a typewriter and works on the typewriter himself, the purchase would be for the purposes of earning his livelihood by means of selfemployment and he would not cease to be a ‘consumer’ for the purposes of the said Act. Another example given is that, if a person who purchases an autorickshaw to ply it himself on hire for earning his livelihood, he would still be a consumer too. This Court held that the question as to whether the transaction is for the ‘commercial purpose’ or for ‘earning his livelihood by means of selfemployment’ is a question of fact that has to be decided in the facts of each case. It has been held that it is not the value of the goods that matters but the purpose to which the goods so bought, are put to. It has been held that several words used 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 the Parliament abundantly clear, that the goods bought must be used by the buyer himself, for earning his livelihood.

42. It is thus clear, that this Court has held that the question, as to whether a transaction is for a commercial purpose would depend upon the facts and circumstances of each case. However, ordinarily, "commercial purpose" is understood to include manufacturing/industrial activity or business to business transactions between commercial entities; that the purchase of the good or service should have a close and direct nexus with a profit generating activity; that the identity of the person making the purchase or the value of the transaction is not conclusive for determining the question as to whether it is for a commercial purpose or not. What is relevant is the dominant intention or dominant purpose for the transaction and as to whether the same was to facilitate some kind of profit generation for the purchaser and/or their beneficiary. It has further been held that if the dominant purpose behind purchasing the good or service was for the personal use and the consumption of the purchaser and/or their beneficiary, or is otherwise not linked to any commercial activity, then the question of whether such a purchase was for the purpose of "generating livelihood by means of self-employment" need not be looked into.

45. It could thus be seen, that when a person avails a service for a commercial purpose, to come within the meaning of consumer' as defined in the said Act, he will have to establish that the services were availed exclusively for the purposes of earning his livelihood by means of self-employment. There cannot be any straitjacket formula and such a question will have to be decided in the facts of each case, depending upon the evidence placed on record.

46. In the present matter, it is not in dispute that the appellant was already engaged in the profession of stockbroker, much before he availed of service of the overdraft facility from the respondent Bank. It is also not in dispute that he was also acting as a stockbroker for the respondent Bank. It is also not in dispute that the appellant took the overdraft facility and also sought enhancement of the same from time to time in furtherance of his business as a stockbroker and for the purpose of enhancing the profits therein. As already held by this Court in the case of Laxmi Engineering Works (supra), the terms "services availed by him", "exclusively for the purpose of earning his livelihood" and "by means of selfemployment" will have to be given its meaning, as intended by the legislature. The said terms will have to be construed in context with the purpose for which the said Act is enacted. We have elaborately discussed the legislative history as to how Section 2(1)(d) of the said Act has come in its present form from the original form. The amendments incorporated by the 1993 Amendment Act as well as by the 2002 Amendment Act would clearly show that the legislative intent is to keep the commercial transactions out of the purview of the said Act and at the same time, to give benefit of the said Act to a person who enters into such commercial transactions, when he uses such goods or avails such services exclusively for the purposes of earning his livelihood by means of selfemployment.

47. In the present case, the Commission has come to a finding that the appellant had opened an account with the respondent Bank, took overdraft facility to expand his business

profits, and subsequently from time to time the overdraft facility was enhanced so as to further expand his business and increase his profits. The relations between the appellant and the respondent is purely "business to business" relationship. As such, the transactions would clearly come within the ambit of 'commercial purpose'. It cannot be said that the services were availed "exclusively for the purposes of earning his livelihood" "by means of self-employment". If the interpretation as sought to be placed by the appellant is to be accepted, then the 'business to business' disputes would also have to be construed as consumer disputes, thereby defeating the very purpose of providing speedy and simple redressal to consumer disputes."

12. The first issue in the case is whether the dispute pertaining to the trading of shares of the Respondent/Complainant with the Petitioners/ OP1&2 constitutes a Consumer dispute under the Act? In this regard, as enunciated in the Act and clarified by the Hon'ble Supreme Court, the Act is mainly for the purpose of securing expeditious legal remedies to Consumers. As per Section 2(1)(d) of the Act, a Consumer is a person who buys goods or hires or avails services for consideration, except for commercial purposes. However, this exception has been expanded to a limited extent that, if such transactions are carried out for the purpose of earning livelihood, the individual undertaking such transaction will be considered as a Consumer. In the present case, the Respondent/Complainant, who is stated to be a retired NRI and returned to India after giving up his job in gulf. These specific pleadings have been asserted in the first para of the complaint. Therefore, the Respondent/Complainant is a consumer as defined under Section 2(1) (d) of the Act.

13. With regard to the second issue, whether the State Commission has rightly remanded the matter to decide the question of loss sustained by the complainant and the compensation, the learned State Commission has specifically mentioned that no document is produced either by the Respondent/Complainant or Petitioner/OP1&2 to prove the transaction in question or to show the actual loss sustained by the Respondent/Complainant. Therefore, in my considered opinion the State Commission has rightly remanded the matter to decide the quantum of loss sustained by the Complainant and the compensation.

14. In view of the foregoing deliberations, I am of the considered view that the well reasoned Order of the learned State Commission dated 30.11.2016 does not suffer from any illegality and thus no intervention is warranted. Therefore, the Revision Petition No.1243 of 2017 is dismissed.

15. There shall be no order as to costs.

16. All pending Applications, if any stand disposed of accordingly.