

**NATIONAL CONSUMER DISPUTES REDRESSAL COMMISSION HDCF
NEW DELHI**

**JUDGEMENT RESERVED ON: 18/11/2025
JUDGEMENT PRONOUNCED ON: 05/01/2026**

FIRST APPEAL NO: 148 OF 2022

(Against the Order dated 22nd November 2021 in Complaint 211/2017 of the State
Consumer Disputes Redressal Commission Delhi)

With

IA/2320/2023 (DIRECTIONS), IA/1861/2022 (CONDONATION OF DELAY)

1. Mrs. Chandra Prabha Sharma, W/o Mr. Sukhveer Singh Sharma, R/o G-110,
H.I.G, Pratap Vihar, Ghaziabad (U.P.)
2. Mr. Shailendra Bhardwaj, S/o Mr. Sukhveer Singh Sharma, R/o G-110, H.I.G,
Pratap Vihar, Ghaziabad (U.P.)

.....Appellants

Versus

M/s Imperia Structures Ltd., Regd office at A-25 Mohan Cooperative Industrial
Estate, New Delhi-110049

.....Respondent

BEFORE:

**HON'BLE MR. JUSTICE A.P. SAHI, PRESIDENT
HON'BLE MR. BHARATKUMAR PANDYA, MEMBER**

For the Appellant : Mr. Nahar Singh, Advocate

For the Respondents : Ms. Vaishnavi, Authorised Representative

ORDER

PER BHARATKUMAR PANDYA, MEMBER

1. Heard Mr. Nahar Singh, Advocate learned counsel for the Appellants and Ms. Vaishnavi, Authorised Representative for the Respondent.
2. This is an appeal against the order of the State Commission dismissing the complaint holding that the transaction was entered into by the complainant for commercial purpose and hence he would not be eligible as a complainant within the meaning of Section 2(1)(d) of the CP Act, 1986. The brief facts of the complainant case, as pleaded in the consumer complaint before the State Commission, are that the complainants, being senior citizens and retired persons dependent upon pension and limited family income, were induced by the respondent, a real estate developer, to book a studio apartment in its project known as "Imperia Residency" situated at Greater Noida, Uttar Pradesh, on the representation that the project would be

completed within the stipulated period and that the unit would generate an assured monthly rental income. Accordingly, the complainants entered into a Memorandum of Understanding dated 13.05.2010 with the respondent for allotment of a 1 BHK Studio Apartment bearing No. C-413 admeasuring about 425 sq. ft. for a total consideration of ₹11,94,300/-, pursuant to which the complainants made payments from time to time and by May 2012, as pleaded in the complaint, had paid a total sum of ₹15,17,987/- towards the said unit. As per the said MoU, the complainant was to receive assured monthly return of ₹11,943/- (at page 126), payable with effect from June 2010 until the date of occupation, which it appears the OP has paid. However, the construction was to be completed by 30.06.2012 and that the complainants were thereafter to receive an assured rent of ₹18,000/- per month, proposed through arrangements with Hotel Clarks (Page 53) but actually and finally offered through proposed arrangement with M/s Growmore Solutions Pvt. Ltd. (Page 77), for which the respondent sought the complainants' consent in April 2012. However, despite receipt of substantial amounts, the respondent failed to complete the construction of the project within the promised time i.e., by 30.06.2012, failed to hand over possession of the said studio apartment, and also failed to arrange or pay the assured monthly rental income as promised, thereby causing continuous financial loss to the complainants who had invested their lifetime savings in the project. The complainant, in response to the demand letter from the OP dated 18.04.2012, demanding Rs. 323687/- and asking consent for lease arrangement with Growmore for lower-than-assured monthly lease rent of only Rs. 8500/-, paid the amount within two months and accepted the proposal and even waived the interest on unpaid assured returns. OP could, however, neither complete the construction till the promised date of June-2012, nor paid or arranged the promised or even the reduced rental of Rs. 8500/- pm because the project itself did not progress as promised. The complainants approached the respondent through letters dated 02.04.2014 (page 82), emails dated 23.04.2014 and 29.05.2014, and legal notice dated 16.09.2015 demanding completion of construction, delivery of possession, and payment of assured returns, but the respondent avoided compliance on one pretext or another and adopted delaying tactics. The complainants pleaded that the respondent's acts amounted to gross deficiency in service, unfair trade practice, misrepresentation, and breach of contractual obligations, resulting in severe mental agony, harassment, financial hardship, and

loss of livelihood support to the complainants and their dependent family members. The complaint was therefore filed before the State Commission on 09.02.2017. The complainants prayed for refund of Rs.15,17,987/- along with interest of Rs. 12,52,350/- at 18% p.a. from 01.07.2012 to 31.01.2017, compensation of Rs. 9,90,000/- towards financial loss due to negligence on account of loss of rent, and further compensation of Rs. 5,00,000/- for mental agony, aggregating to a total claim of Rs. 42,60,337/-, along with cost of litigation.

2.2. The Opposite Party/Respondent filed Written Statement and denied all allegations of deficiency in service and unfair trade practice and raised a preliminary objection regarding the maintainability of the complaint, contending that the complainants do not fall within the definition of "consumer" under Section 2(1)(d) of the Consumer Protection Act, 1986, as the subject studio apartment was admittedly booked for commercial and investment purposes with the sole objective of earning assured rental income. The OP admitted the MOU dated 13.05.2010 and the assured returns promise but stated that the complainants had entered into the MOU with the dominant intention of profit generation through leasing and not personal residential use, which is evident from the complainants' own pleadings seeking recovery of monthly lease rent of ₹18,000/- and reliance on leasing arrangements with Hotel Clarks and subsequently M/s Growmore Solutions Pvt. Ltd. It was specifically pleaded that earning of fixed rental income cannot be equated with earning of livelihood by means of self-employment, and therefore, the statutory exception to "commercial purpose" is not applicable or available to the complainants. The OP further stated that the complainants failed to place on record any cogent material to show that the unit was booked for self-employment or that the complainants or their family members were dependent upon such income for survival. The OP averred that the complainant and their family have booked 2 units and the transaction is for investment, earning of rental income and subsequent sale and thus for commercial purpose. Without prejudice to such objection on maintainability of the complaint, on merits, the Opposite Party relied contended that the promise of assured returns was subject to other conditions in the MOU. Relying upon Allahabad HC judgment dated 21.10.2011, whereunder the Greater NOIDA Authority was debarred from implementing Master Plan 2021 till approval from NCRP Board, it was contended that the project was thus affected by circumstances beyond its control and *force majeure* events resulting in suspension of construction

activities and consequent delay, and therefore no liability could be fastened upon the Opposite Party for the alleged delay or non-payment of assured returns. It was also pleaded that the assured returns were subject to other terms and conditions of the MoU, including force majeure clauses, and were not unconditional or absolute. It was also categorically stated that the complainant did not take possession of the unit despite repeated reminders from the OP. The OP denied any misrepresentation or deceit and asserted that the complainants were fully aware of the nature of the transaction at the time of booking. Accordingly, the Opposite Party prayed for dismissal of the consumer complaint at the threshold as being not maintainable as also for reason of having no merits.

3. After hearing the submissions of both parties, the State Commission dismissed the complainant on preliminary ground of maintainability by holding that the complainants had booked the studio apartment under an assured rental/return scheme and that the transaction was inherently commercial in nature, because the very foundation of the booking was the promise of assured monthly rent of ₹18,000/-, through assured lease arrangements third parties, which clearly demonstrated that the dominant purpose of the transaction was investment and profit generation rather than personal residential use. The State Commission further held that earning assured rental income does not amount to earning livelihood by means of self-employment within the meaning of the proviso to Section 2(1)(d) of the Consumer Protection Act, 1986, and that the complainants had failed to place on record any material to establish that the unit was booked exclusively for such purpose. It was observed that the reliefs claimed by the complainants themselves, including recovery of assured monthly rent, reinforced the commercial character of the transaction. Accordingly, the State Commission concluded that the complainants did not fall within the definition of "consumer" under the Act and, on this preliminary ground, dismissed the consumer complaint as not maintainable. The order of the State Commission is reproduced herein below:

"10. We have heard the counsel for the Opposite Party and perused through the material available on record.

*11. The preliminary issue to be decided is whether the Complainants are Consumer as per the provisions of the Consumer Protection Act or whether the present complaint falls within the definition of "**Commercial Purpose**".*

12. The term Consumer has been defined under section 2 sub-clause (d) of the Consumer Protection Act, 1986, which has been reproduced below:

(d) "consumer" means any person who—

(i) buys any goods for a consideration which has been paid or promised or partly paid and partly promised, or under any system of deferred payment

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

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

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;

13. The aforesaid provision is clear that the act covers only those who purchase the goods for final consumption or for their own use. However, if the goods are purchased for commercial purposes including resale, the person shall not be termed as a consumer and cannot file the case within the provisions of the Consumer Protection Act.

14. In the present case, the sole purpose, as is evident from the perusal of the Complaint, is to earn rent from the apartment, which is the subject matter of the present complaint. The evidence by way of Affidavit is clear to this effect that the Opposite Party promised a certain amount of rent, which could be earned by the Complainant, on which premise, the Complainants made the investment in the said project. Moreover, the Opposite Party even requested for certain documents, so that a lease could be executed between the Complainants and some other person, which request was acceded to by the Complainants. Hence, in its entirety, the facts are clear that the goods i.e. the apartment was not purchased for self-consumption but for Commercial Activity.

15. The Complainants have even failed to prove that the Commercial Activity undertaken was to earn livelihood, which could have made the case fall within the exception as appended to section 2 sub-clause (d) of the Consumer Protection Act, 1986

16. Hence, without any doubt, the present complainants do not fall within the category of Consumers as defined under the Consumer Protection Act, 1986 and cannot maintain a complaint before this Commission.

17. In terms of the aforesaid discussion, the present complaint stands dismissed as not maintainable.”

4. The appellant/complainant, being aggrieved by the impugned order dated 22.11.2021 passed by the Delhi State Commission, whereby the consumer complaint was dismissed at the threshold on the preliminary ground of non-maintainability by holding that the appellant does not fall within the definition of “consumer” under Section 2(1)(d) of the Consumer Protection Act, 1986, without adjudicating the matter on merits and without appreciating the pleadings, evidence, and settled legal position governing assured return schemes and the concept of “commercial purpose”, has challenged the said order as being illegal, arbitrary, contrary to law, and based on erroneous appreciation of facts and law, and has therefore filed the present First Appeal before this Commission on 04.03.2022, inter alia, on the following grounds, which are urged without prejudice to one another:

- A. Because the State Commission has grossly erred in holding that the Appellant is not a "consumer" within the meaning of Section 2(1)(d) of the Consumer Protection Act, 1986, without properly appreciating the pleadings and evidence on record and without applying the correct legal test relating to "commercial purpose".
- B. Because the State Commission failed to appreciate that mere booking of a residential unit with an assured return clause does not automatically render the transaction commercial, unless it is established that the dominant intention of the Appellant was resale, business, or profit-making as a regular commercial activity.
- C. Because the State Commission erred in law in holding that earning assured rental income amounts to a commercial purpose, without examining whether such income was intended to supplement livelihood, particularly when the Appellants are senior citizens and retired persons dependent upon limited sources of income.
- D. Because the State Commission did not consider that the Appellant had not purchased multiple units, nor had the Respondent shown that the Appellant was habitually dealing in buying and selling of properties, which is a crucial factor in determining commercial purpose.
- E. Because the State Commission failed to appreciate that the Appellant never intended resale of the unit, and the booking was made for long-term income security and family sustenance, which cannot be equated with business or trade.
- F. Because the State Commission failed to appreciate that the complaint involved serious allegations of delay in construction, non-delivery of possession, and non-payment of assured returns, which required adjudication on merits instead of summary dismissal.

5. The appeal memo brings out the facts and states that the State Commission erred in concluding that the complainant is not "consumer" within the meaning of section 2(1)(d) on the ground that the OP booked the unit exclusively for earning "rent" and therefore for earning profits and therefore for a commercial purpose. The fact that the OP-builder made a representation and promise of "assured monthly returns" and time-bound possession to allure the prospective buyers including the appellant, which promise was not fulfilled, the consequent allegation of deficiency made by the complainant could not have been turned against the complainant to hold purpose of his simple one-time transaction of obtaining service of the OP to be "commercial", without any evidence to that effect on record, so as to hold him "not a consumer u/s 2(1)(d)". The detailed factual and legal averments to support the grounds have been made in the appeal. It is particularly stressed that the complainant is not engaged in any commercial activity at all and the purpose of the transaction of booking the studio apartment was also not commercial at all. The complainant is not engaged in any real estate business or in any trading or brokering in any real estate business. The only purpose of the transaction was to own an apartment for which the OP's representations including the promise of assured return appeared quite positive and attractive. Being attracted, enticed and influenced by representation of the developer of assured returns in making a decision while choosing a developer for an apartment cannot in law make the transaction for any commercial purpose or for any profit motive. Insisting on fulfillment of the initial

representations and promise positively made by the Developer as a part of his marketing strategy, including that for assured returns, can not turn the allottee's booking into that for any commercial purpose. The State Commission also erred in concluding that the "sole purpose" of the complainant was to "earn rent", when in fact, the same was one of the key representation and promise of the Developer. State Commission also erred in concluding that the acquisition of the unit if not intended to be immediately self-occupied by the allottee, or is planned to be rented, such non-occupation or plan to rent-out itself would render such transaction in "goods" not for self-consumption and therefore automatically for commercial purpose. The complainant obtained services of the OP, and there is no evidence that the transaction was between two business entities or that it was for any commercial purpose or that the complainant is engaged in any commercial activity in real estate. Therefore complaint could not have been held to be not maintainable u/s 2(1)(d). On merits, it is the contention that the unit was not ready till the complaint was filed, which is not categorically disputed, but rather attempted to justified as being due to *force majeure* in the reply filed before the State Commission, hence prayer for allowing the relief as claimed in the complaint.

5.1 The Respondent filed a reply to the Appeal on 22.02.2023 and stated that the present appeal is false, frivolous, mala fide and an abuse of the process of law, and all allegations and grounds as urged by the Appellant are denied. The complaint has been dismissed by the Ld. State Commission on the ground of maintainability, holding that the Appellant does not fall within the definition of a "consumer" under the Consumer Protection Act, as the transaction was purely commercial in nature. The Appellant failed to place any evidence on record to establish that the unit was purchased for personal use, whereas the documents clearly demonstrate that the booking was made with the intent of earning profits through assured returns and resale, thereby rendering the Appellant an investor and not a consumer. The Appellant voluntarily executed the Booking Application Form and entered into a Memorandum of Understanding dated 13.05.2010, agreeing to all terms and conditions, including limitation of liability and dispute resolution mechanisms. The MoU specifically contains a *Force Majeure* clause Clause 6 (page no.69) absolving the Respondent from performance obligations, including payment of committed returns, in circumstances beyond its control. The Hon'ble Allahabad High Court, by its judgment dated 21.10.2011, categorically observed that the Greater Noida

Authority could not proceed with implementation of the Master Plan 2021 without approval from the NCR Planning Board, and consequently directed that no development be carried out under the draft Master Plan. Pursuant to the said order, the Respondent also received a notice from the Greater Noida Authority directing compliance with the High Court's directions, as passed in the writ petitions relating to Village Patwari, including Writ Petition No. 37443/2011. These judicial and statutory restraints squarely fall within the ambit of force majeure and were entirely beyond the control of the Respondent. Additionally, the subject property is situated in Noida, Uttar Pradesh, and therefore does not fall within the territorial jurisdiction of the State Commission, nor does the monetary value of the dispute meet the pecuniary jurisdiction threshold. Furthermore, both the Booking Application Form and the MoU contain arbitration clauses mandating reference of disputes to a sole arbitrator, which the Appellant consciously accepted. In view of the above facts, the complaint as well as the present appeal are premeditated, vexatious and filed solely with the intent of unjust enrichment, and therefore deserve to be dismissed on these grounds alone. Further the respondent have denied all the grounds mentioned by the appellant from A-P stating that the State Commission has not erred in its decision and there is absence of any cogent proof from the appellant's side.

5.2 The appellant filed a rejoinder and parties filed written arguments.

6. We have heard the learned counsels for the parties, and have duly considered the material on record. During the course of hearing, Mr. Nahar Singh for the appellant has reiterated the grounds and contentions and elaborated the same. On the maintainability issue, the fundamental contention is that the singular transaction of booking a residential unit cannot be termed, merely on the ground of desire to rent out, as "for commercial purpose" so as to non-suit the complainant under section 2(1)(d). It is the contention that the State Commission ignored all the relevant considerations and related principles explained by this Supreme Court and by this Commission in deciding what may amount to "for commercial purpose", and that that the burden of proof is on the OP builder to establish the same. The Appellant also relied upon *Rakesh Kumar Bohre v. Vatika Ltd.*, 2022 SCC OnLine NCDRC 230, *Kavita Ahuja V. Shipra Estates (2016) CPJ 31*, *Santosh Johari & Ors. V. Unitech Ltd. (NCDRC)*, *Lilavati Kirtilal Mehta Medical Trust V. Unique Shanti Developers & Ors. (Hon'ble Supreme Court Of India)*, *Prem Lata Arora V. Today Homes & Infrastructure (NCDRC)*, to contend that the onus of proving commercial

purpose of transaction lies on the developer and that those purchasers of services for residential units do not cease to be consumers merely because some income or return or rent is contemplated. On merits, it is re-asserted that that despite assuring completion by 30.06.2012 through MOU and a further letter dated 18.04.2012, the Respondent failed to deliver the unit and falsely invoked *Force Majeure* while continuing to demand payments. The MOU dated 13.05.2010 assured the allottee a fixed monthly return of ₹11,943/- (at page 126), from June 2010 until the date of possession/occupation as further supported by MOU dated 18.03.2010 executed between the OP and M/s U.P. Hotel Clarks Ltd. (at page 52 of the appeal paper-book). It is the specific case of the Appellants that the promise of assured rentals formed the solemn promise of the OP and basis of the transaction and induced the Appellants to opt for the OP as service provider and invest their lifetime savings, but the said assured return scheme was subsequently unilaterally abandoned by the builder. The total consideration was paid fully, yet construction remained incomplete with no completion certificate or occupation certificate obtained by the OP. The Appellants are retired school teacher and engineer and draw draw pensions of ₹24,250/- and ₹30,686/- respectively, support unemployed dependents namely Pankaj Bhardwaj and Shailendra Bhardwaj and his wife, and booked the unit to invest and earn rental income for livelihood and dignity. It is inconceivable that in doing so, the complainant can be termed to have entered into the transaction for "any commercial purpose". It is therefore urged that the OP is liable for deceptive trade practices, deficiency in service and mental agony and seek appeal and the complaint to be allowed.

6.1 Ms. Vaishnavi, the learned AR for the OP/Respondent, relied upon the decisions of the Hon'ble Supreme Court in *National Insurance Co. Ltd. v. Harsolia Motors & Ors.* and *Shriram Chits (India) Pvt. Ltd. v. Raghachand Associates*, as well as the judgments of this Commission in *Akhilesh Kumar Naithani & Anr. v. M3M India Pvt. Ltd.* and *M/s Grand Venezia Buyers Association (Regd.) v. M/s Grand Venezia Commercial Towers Pvt. Ltd.*, apart from strongly relying upon the impugned order dated 22.11.2021 passed by the Delhi State Commission, contending that the State Commission had rightly held that the transaction in question was commercial in nature and that the complainants did not fall within the definition of "consumer" under the Consumer Protection Act, 1986. It is urged that the complainant himself had categorically pleaded in the complaint that the

transaction was entered into for earning rent. The obvious and main purpose of the complainant of earning rent and considering such earning more critical and significant than acquiring the flat, unambiguously brings out the commercial nature of the transaction. The facts of such commercial purpose as pleaded in the complaint and which otherwise is obvious stood established on the basis of pleadings and therefore the State Commission rightly held that the complainant has brought no evidence on record to establish the purpose being earning of livelihood through self-employment. On merits, the counsel heavily relied on the fact that there the order of the HC of Allahabad dated 21.10.2011 was the cause for delay in construction which, being force majeure, is a valid defence as per MOU for failure to arrange assured return and delay in handing over possession. The AR also relied on the written arguments filed.

7. After careful perusal of the written arguments and after going through and duly considering the import of the authorities relied upon by the parties, we agree with the contentions on behalf of the appellant. The complainant pleaded in the complaint that he was attracted by the promise of the OP of "assured returns" and booked the unit to earn rental income and is aggrieved by intentional failure of the OP to honour this representation. We do not think this in itself establishes any "commercial purpose" of the transaction as explained in *Harsolia Motors and Lilavati*. As held by SC in *Wing Commander Arifur Rehman v. DLF Southern Homes Pvt Ltd (2020) 16 SCC 512*, representations in the brochure are critical promises of the Developer and if that promise be of assured returns, the customer does not *ipso facto* engage into any "commercial activity" or his transaction does not become "for any commercial purpose" when he books a unit. We find that there is absolutely no material on record to conclude that the complainant has entered into the underlying "transaction" with the respondent for "any commercial purpose". Firstly, the complainant entered into the composite contract with the respondent primarily for obtaining the services of housing and building construction on the terms as agreed between the parties. No goods have been purchased. Though there is specific averment by the complainant that he is aggrieved primarily by the OP's failure in paying the "assured monthly returns", as promised in the MOU dated 13.05.2010, there is no averment by the OP or evidence on record to establish that the appellant has obtained the unit or has booked the unit as part of his commercial enterprise or commercial adventure of trading in the apartments or of systematically exploiting

such real estate for earning “any profit”. As such there is no averment of any regular commercial activity or any “large scale” transactions in any real estate. It is thus clear that the only “commerce” or “commercial activity” alleged by the respondent-OP, to have been engaged into by the complainant, is the very transaction with the OP. At the preliminary level, it is not understood how, without any evidence of any pre-transaction and pre-existing organised commercial or profit-generating “large scale” activity of the complainant, the “commercial purpose” has been found by the State Commission in the “transaction” of availing the services of the OP. In *Lilavati Kirtilal Mehta Medical Trust v. Unique Shanti Developers*, (2020) 2 SCC 265, the Hon’ble Supreme Court authoritatively explained the scope and meaning of the expression “commercial purpose” under the Consumer Protection Act and held that there can be no straitjacket formula for determining whether a transaction is commercial in nature, as the issue must be decided on the facts and circumstances of each case; the Court clarified that the dominant purpose test is the governing principle and that a transaction can be termed commercial only where there exists a close and direct nexus with a profit-generating activity, while the identity of the purchaser or the monetary value of the transaction is not determinative, and if the dominant intention behind the purchase is personal use or consumption, or is otherwise not linked to any commercial activity, the transaction would not fall within the exclusion of “commercial purpose”:

“19. To summarise from the above discussion, though a strait jacket formula cannot be adopted in every case, the following broad principles can be culled out for determining whether an activity or transaction is “for a commercial purpose”:

19.1. The question of 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.

19.2. The purchase of the good or service should have a close and direct nexus with a profit-generating activity.

19.3. The identity of the person making the purchase or the value of the transaction is not conclusive to the question of whether it is for a commercial purpose. It has to be seen whether the dominant intention or dominant purpose for the transaction was to facilitate some kind of profit generation for the purchaser and/or their beneficiary.

19.4. If it is found that the dominant purpose behind purchasing the good or service was for the personal use and consumption of the purchaser and/or their beneficiary, or is otherwise not linked to any commercial activity, the question of whether such a purchase was for the purpose of “generating livelihood by means of self-employment” need not be looked into.”

7.1 Though essentially the answer would depend on the particular facts of each case, primarily, such purpose can be found, though not always, in a given “business

to business” transaction between commercial entities. If the service-availing complainant is not evidenced to be a pre-transaction commercial entity, as in the present case, the chance or probability that the subject transaction is or can be held to be for commercial purpose is relatively low. In this context, this commission also in *Kavita Ahuja* duly and elaborately explained the difference and distinction between the “profit generating activity” of a commercial entity and “return generating action” of investment, which was followed with approval in *Santosh Johari v. Unitech Ltd.*, 2015 SCC OnLine NCDRC 2429, wherein this Commission authoritatively clarified the scope of the expression “commercial purpose” in the context of purchase of residential flats and held that mere intention to let out a flat in future or to use it after retirement does not render the transaction commercial, and while rejecting a similar objection raised by the builder, this Commission observed as under:

“15. It was contended by the learned counsel for the opposite party that some of the complainants plan to shift to the flats booked by them only after their retirement, meaning thereby that right now they do not need a flat for their personal residence and they will let out the flat on taking possession from the opposite party. The contention is that that purchase of the flat by such persons would be for a commercial purpose and, therefore, they are not consumers within the meaning of Section 2(1)(d) of the Consumer Protection Act. I, however, find no merit in this contention. The expression commercial purpose used in Section 2(1)(d) of the Act came up for consideration of this Commission in Kavita Ahuja v. Shipra Estates Ltd., CC 137 of 2010 decided on 12-02-2015 and the following view was taken:

“The expression ‘commercial purpose’ has not been defined in the Act and therefore, as held herein below by the Hon’ble Supreme Court in Laxmi Engineering Works v. P.S.G. Industrial Institute (1995) 3 SCC 583, we have to go by the dictionary meanings,

“In the absence of a definition, we have to go by its ordinary meaning ‘Commercial’ denotes “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).”

6. Going by the Dictionary meaning of the expression ‘Commerce’ as far as hiring or availing services are concerned, a person can be said to have hired or availed services only if they are connected or related to the business or commerce in which he is engaged. In other words, the services in order to exclude the hirer from the ambit of Section 2(1)(d) of the Act should be availed for the purpose of promoting, advancing or augmenting an activity, the primary aim of which is to earn profit with use of the said services. It would ordinarily include activities such as manufacturing, trading or rendering services. In the case of the purchase of houses which the service provider undertakes to construct for the purchaser, the purchase can be said to be for a commercial purpose only where it is shown that the purchaser is engaged in the business of purchasing and selling houses and/or plots on a regular basis, solely with a view to make profit by sale of such houses. If however, a house to be constructed by the service provider is purchased by him purely as an investment and he is not undertaking the trading of houses on a regular basis and in the normal course of the business profession or services in which he is engaged, it would be difficult to say that he had purchased houses for a commercial purpose. A person having surplus funds available with him would not like to keep such funds idle and would seek to invest them in such a manner that he gets maximum returns on his investment. He may invest such funds in a Bank Deposits, Shares, Mutual Funds and

Bonds or Debentures etc. Likewise, he may also invest his surplus funds in purchase of one or more houses, which is/are proposed to be constructed by the service provider, in the hope that he would get better return on his investment by selling the said house(s) on a future date when the market value of such house (s) is higher than the price paid or agreed to be paid by him. That by itself would not mean that he was engaged in the commerce or business of purchasing and selling the house (s).

7. Generating profit by way of trading, in my view is altogether different from earning capital gains on account of appreciation in the market value of the property unless it is shown that the person acquiring the property was engaged in such acquisition on a regular basis and it was by way of a business activity."

7.2 In the present case, the complainant, in booking a one-bed room studio, entered into a transaction of availing service of the builder-developer on agreed terms, including that for assured return. Concurrent promise or representation made by the builder was that of assured monthly returns till the possession was handed over. It appears that the builder also enticed the complainant by representing that the builder would facilitate long-term leasing or renting of the studio apartment at Rs. 18000/- pm by arrangement with Hotel Clark. In our opinion, none of these promises or representation made by the builder, and insistence by the complainant for fulfillment thereof, *ipso facto*, can convert a simple act and decision of retired complainants of investing a small amount of nearly Rs.12-15 lacs, so as to constitute the purpose of the transaction, which in our opinion, dominantly is to invest in and own a studio apartment, into that for "commercial purpose" as held by the State Commission. The desire and strategy of acts of investments, yielding some returns including assured returns, and including by way of rent, through availing construction services from builder, in tune with the representations made by the builder, in our opinion, does not make the transaction a "profit generating systematic activity of a business" so as to classify the transaction as one for commercial purpose. If that be so, the availing of simple banking service of depositing or keeping surplus funds in bank account or in fixed deposits, yielding interest "income", would and should be equally held to be "for commercial purpose" which in itself would lead to absurdity. In other words, it would be erroneous to classify a transaction to be for "commercial purpose" simply and exclusively on the ground that the complainant "expected" or "planned" some financial returns therefrom. There is obvious and inherent difference between "return from investment" and "income from commercial activity". As a matter of fact, in the present case, the transaction between the parties has not at all any "close and direct nexus with profit-generating activity of the complainant" because the complainant is not at all engaged in any profit generating "activity". What the

complainant did was to avail services from the developer, and to further insist on fulfillment of the representation and promises, including for lease arrangements, made by the builder. That does not make him any less a consumer. The State Commission has simply concluded without any sound basis that *"In the present case, the sole purpose, as is evident from the perusal of the Complaint, is to earn rent from the apartment, which is the subject matter of the present complaint. The Evidence by way of Affidavit is clear to this effect that the Opposite Party promised certain amount of rent, which could be earned by the Complainant, on which premise, the Complainants made the investment in the said project"*. State Commission, in our opinion, mis-directed itself in construing the representation of the builder of facilitating the rental returns to be the "sole purpose" of the transaction. The builders do make various enticing representations regarding amenities and concessions to attract the customers. The financial incentives/promises can and do include interest subvention, discounts on upfront payments and incentives on timely honouring each instalment. It would be erroneous to conclude that these incentives or "rebates or returns" are the "sole objective" for availing the service, though they might be the alluring and may even be decisive factors for a given allottee. But allottee's decision to "invest" in or opt for services of construction of the unit on that basis alone can not, in our opinion, thereby become "for commercial purpose". Also, as held and explained by the Supreme Court in *Harsolia Motors*, unless it is positively established by the builder that the complainant is engaged in the the business or commercial enterprise of investing in, owning and renting out on regular basis through multiple and regular transactions, so as to amount, on facts, to be running a "commercial activity or enterprise" in the first place, there is no onus on the complainant to establish the conduct of the said alleged commercial activity to be for earning livelihood. In the judgment of this Commission in *Rakesh Kumar Bohre v. Vatika Ltd.*, 2022 SCC OnLine NCDRC 230, this Commission has categorically reiterated the settled legal position regarding the burden of proof in cases where the opposite party alleges that the complainant is an investor or that the transaction is for a commercial purpose, and while dealing with the issue of maintainability, it was held as under in paragraph 6 of the said order:

6. The contention of the Learned Counsel for the Opposite Party that the Complainants are not 'Consumer' and that they had booked the subject flat for earning profits is completely unsustainable in the light of the judgement of this Commission in

Kavita Ahuja v. Shipra Estates (2016) 1 CPJ 31, in which the principle laid down is that the onus of establishing that the Complainant was dealing in real estate i.e. in the purchase and sale of plots/flats in his normal course of business to earn profits, shifts to the Opposite Party, which in the instant case they had failed to discharge by filing any documentary evidence to establish their case. Therefore we are of the considered view that the Complainants fall under the definition of 'Consumer' as defined under Section 2 (1)(d) of the Act.

7.3 The learned counsel for the complainant/appellant further placed reliance on the decision of this Commission in *Prem Lata Arora v. Today Homes and Infrastructure Private Limited*, 2019 SCC OnLine NCDRC 298, wherein this Commission, while dealing with a similar objection raised by the builder that the allottee was an investor and not a consumer categorically rejected such contentions and reiterated the settled position that the burden to prove commercial purpose lies squarely on the opposite party, and in that context, it was observed as under in paragraph 12 of the said judgment:

12. The first contention of the learned counsel for the Opposite Party that the Complainant is not a Consumer and is only an investor is not supported by any documentary evidence. The onus is on the Opposite Party to establish that the Complainant purchased the same to indulge in 'purchase and sale of flats' as was held by this Commission in Kavita Ahuja v. Shipra Estates, I (2016) CPJ 31. However, the Opposite Party did not discharge its onus regarding this aspect. Hence it is held that the Complainant is a Consumer as defined under Section 2(1)(d) of the Consumer Protection Act, 1986.

7.4 There is no evidence on record in the present case that the respondent-builder discharged its initial onus or even otherwise also that the transaction was for any commercial purpose. There is no requirement therefore for the appellant to establish the self-employment or livelihood aspect to remain an eligible complainant under the CP Act. We find no merit in the contentions on behalf of the respondent that the booking of another unit by the other family member of the appellant in itself is also any relevant consideration or that such fact changes the character of the transaction *qua* the appellant. The decisions of *Harsolia Motors* and *Sriram Chits* relied upon by the respondent are laying down the principles for determining the character of the transaction as to being for commercial purpose, which when rightly applied, supports the case of the appellant and not of the respondent. We may quote from the Hon'ble Supreme Court decision in *National Insurance Co. Ltd. v. Harsolia Motors & Ors*, (2023) 8 SCC 362

"37. Applying the above principles to the present case, what needs to be determined is whether the insurance service has a close and direct nexus with the profit generating activity and whether the dominant intention or dominant purpose for the transaction was to facilitate some kind of profit generation for the purchaser and/or their beneficiary. The fact that the insured is a commercial enterprise is unrelated to the determination of whether

the insurance policy shall be counted as a commercial purpose within the purview of Section 2(1)(d) of the Act.

...
40. *Similarly, a hospital which hires services of a medical practitioner, it would be a commercial purpose, but if a person avails such services for his ailment, it would be held to be a non commercial purpose. Taking a wide meaning of the words "for any commercial purpose", it would mean that the goods purchased or services hired should be used in any activity directly intended to generate profit. Profit is the main aim of commercial purpose, but in a case where goods purchased or services hired is an activity, which is not directly intended to generate profit, it would not be a commercial purpose."*

7.5 Supreme Court has in effect ruled that what requires to be looked into is the fact whether obtaining insurance service has any close and direct nexus with "profit generating activity" of the complainant, and not the fact that the complainant is otherwise engaged in any commercial activity. In the present case, we find no business or commercial activity of the complainant at all, so no question of the transaction's direct nexus of this transaction's nexus with profit from such activity arises. Para 40 also similarly rather supports the appellant. In the present case, the dominant purpose of the appellant is obtaining housing services along with benefit of promises as made by the Developer. Similarly, we do not appreciate how *Shriram Chits (India) Pvt. Ltd., earlier known as Shriram Chits (K) Pvt. Ltd v. Raghachand Associates., SLP(C) No. 15290 of 2021, decided on 10.05.2024*, which fundamentally lays down that the initial burden of establishing commercial purpose is on the developer, can come to the assistance of the respondent to support the contention that the burden of establishing the livelihood exception need to be established by the complainant which is not so established, when in our opinion, there is no evidence in the first instance adduced by the respondent to establish that the transaction was a part of the commercial activity of the appellant having direct nexus with profit generation:

"19. Before we deal with the contention of Sri Shailesh Madiyal, it would be necessary to set out the manner in which consumer forums must decide technical pleas raised by service providers to the effect that the services obtained/goods bought was for a commercial purpose and, therefore, the complaint filed on behalf of such persons are not maintainable. The crucial step in deciding such pleas would turn on the manner in which the issues are framed. Unless the burden of proof is properly cast on the relevant party, the consumer forum would not be in a position to arrive at proper decision. Therefore, we proceed to provide some guidance on how the issues must be framed and the manner in which the evidence must be appreciated.

20. As we have shown above, the definition of consumer has three parts. The significance of deconstructing the definition into three parts was for the purpose of explaining on whom lies the onus to prove each of the different parts. There can hardly be any dispute that the onus of proving the first part i.e. that the person had bought goods/availed services for a consideration, rests on the complainant himself. The carve out clause, in the second part, is invoked by the service providers to exclude the complainants from availing benefits under the Act. The onus of proving that the person falls within the carve out must necessarily rest on the service provider and not the complainant. This is in sync with the

general principle embodied in Section 101 and 102 of the Evidence Act that 'one who pleads must prove'. Since it is always the service provider who pleads that the service was obtained for a commercial purpose, the onus of proving the same would have to be borne by it. Further, it cannot be forgotten that the Consumer Protection Act is a consumer-friendly and beneficial legislation intended to address grievances of consumers. Moreover, a negative burden cannot be placed on the complainant to show that the service available was not for a commercial purpose.

...
22. If and only if, the service provider discharges its onus of showing that the service was availed, in fact for a commercial purpose, does the onus shift back to the complainant to bring its case within the third part, i.e. the Explanation (a) to Section 2(7) – to show that the service was obtained exclusively for the purpose of earning its livelihood by means of self employment.”

7.6 Reliance of the respondent on this Commission's decisions in *Akhilesh Kumar Naithani & Anr. v. M3M India Pvt. Ltd., CC/562/2020*, decided on 15.09.2021, and on *M/s. Grand Venezia Buyers Association (Regd.) v. M/s. Grand Venezia Commercial Towers Pvt. Ltd., CC/402/2015*, decided on 06.10.2017, equally has no merits in light of the principles laid down in subsequent decision of the Supreme Court in *Harsolia Motors and Sriram Chits* referred to and relied upon by the parties. Moreover, in *Akhilesh Kumar* and in *Grand Venezia*, relied upon by the respondent, the unit booked was a commercial unit which factor and fact was central in those decisions. Both these decisions are therefore clearly distinguishable on facts and therefore of no avail for the respondent, particularly when we have held that there is no evidence at all brought on record by the respondent to establish any commercial activity of the appellant and of the transaction's direct nexus with the profit generation therefrom. We may however, reproduce from *Akhilesh Kumar*.

10. Further, this Hon'ble Commission in *M/s. Grand Venezia Buyers Association (Regd.) v. M/s. Grand Venezia Commercial Towers Pvt. Ltd., CC/402/2015*, decided on 06.10.2017, clarified that commercial units bought to earn lease and rental income would fall within the ambit of "commercial purpose".

"11. From the aforesaid cases, it is clear that a person, who purchases the goods for resale or for any commercial purpose or avails services for commercial purpose is not a consumer under Section 2 (1) (d). But if he proves that the good is purchased or the service is availed for his personal use or exclusively for the purposes of earning livelihood by means of self-employment, then he is not excluded from the definition of the consumer. This issue has to be decided on the basis of the evidence adduced in the case."

8. As such, after considering the totality of the facts and circumstances, we are unable to agree with the State Commission that when the complainant in a complaint attempts to hold the builder accountable for the representation or promise of monthly returns or rents if so made by the builder, he can, on that basis alone, be held to have entered into the transaction for any "commercial purpose". There is material

difference in earning rental incomes, which involves neither any commerce nor any profits, on one hand, and in earning profits from any organised business activity, on the other. We find that the transaction entered into by the complainant is not for any commercial purpose. Therefore, we set aside the order of the State Commission and restore the complaint back to its original number with the State Commission to be now expeditiously decided on merits after giving opportunities to both the parties.

9. Appeal is allowed. Both the parties shall present themselves before the State Commission on 05.02.2026 after which the State Commission shall proceed in accordance with law to decide the complaint preferably within 6 months.

Sd/-

.....
(A.P. SAHI, J.)
PRESIDENT

Sd/-

.....
(BHARATKUMAR PANDYA)
MEMBER

pawan/aj