

A BIRLA TECHNOLOGIES LTD.  
v.  
NEUTRAL GLASS AND ALLIED INDUSTRIES LTD.  
(Civil Appeal No.10650 of 2010)

B DECEMBER 15, 2010

[V.S. SIRPURKAR AND T.S. THAKUR, JJ.]

C *Consumer Protection Act, 1986 – s.2(1)(d)(i) and*  
*s.2(1)(d)(ii) [as amended] – Software modules developed by*  
*appellant for respondent – Dispute between the parties –*  
*Respondent filed complaint against appellant alleging*  
*deficiency in services – Maintainability of the complaint –*  
*Held: The complaint was not maintainable, firstly, on the count*  
*that u/s.2(1)(d)(i), goods were purchased for commercial*  
*purposes and on the second count that services were hired*  
*or availed of for commercial purposes – It was nobody’s case*  
*that the goods bought and used by the respondent and the*  
*services availed by respondent were exclusively for the*  
*purpose of earning the respondent’s livelihood by means of*  
*self-employment – The complaint was not maintainable in*  
*toto.*

F There was dispute between the parties as regards  
the software modules developed by the appellant for the  
respondent. The respondent filed a complaint before the  
State Consumer Disputes Redressal Commission  
alleging deficiency in services by the appellant. The State  
Commission dismissed the complaint holding that the  
respondent/ complainant was not a ‘consumer’ within the  
meaning of the Consumer Protection Act, 1986.

G The respondent/complainant filed appeal before the  
National Commission. The National Commission held that  
the software in question amounted to sale of goods by  
the appellant to the respondent for commercial purpose

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and as such the respondent would be excluded for being considered as a 'consumer' under Section 2(1)(d)(i) of the Act. However, the National Commission then proceeded to hold that there was a warranty period of one year in the year 2000 and as such since the complaint was filed on 1.8.2000, i.e. prior to the amendment of Section 2(1)(d)(ii) by the Amendment Act, 2002, a person hiring or availing of any services for a consideration was not excluded even though the services were availed for any commercial purpose, and thus the complaint could be maintained before the consumer forum.

In the instant appeal, the appellant contended that a basic error was committed by the National Commission inasmuch as it proceeded on the basis that the complaint was filed on 1.8.2000, which was prior to the amendment of Section 2(1)(d)(ii) by the Amendment Act, 2002. The appellant pointed out that the complaint in fact was filed on 26.6.2003 i.e. after the amendment of the said Section, which came on 15.3.2003.

Allowing the appeal, the Court

**HELD:** In view of the findings of the National Commission that the goods sold by the appellant to the respondent/complainant amounted to 'goods' and that such goods were purchased for commercial purpose of earning more profits, there could be no dispute that even the services which were offered had to be for the commercial purpose. Nothing was argued to the contrary. It seems that the whole error has crept in because of the wrong factual observation that the complaint was filed on 1.8.2000. In that view, it has to be held that the complaint itself was not maintainable, firstly, on the count that under Section 2(1)(d)(i), the goods have been purchased for commercial purposes and on the second count that the services were hired or availed of for commercial

A purposes. The matter does not come even under the Explanation which was introduced on the same day i.e. on 15.3.2003 by way of the amendment by the same Amendment Act, as it is nobody's case that the goods bought and used by the respondent and the services  
B availed by the respondent were exclusively for the purpose of earning the respondent's livelihood by means of self-employment. In that view, it will have to be held that the complaint itself was not maintainable *in toto*. The order of the National Commission is set aside and the  
C complaint is dismissed with costs assessed at Rs.50,000/-. [Paras 9, 10, 11] [1192-F-H; 1193-A-E]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 10650 of 2010.

D From the Judgment & Order dated 17.12.2009 of the National Consumer Disputes Redressal Commission, New Delhi in F.A. No. 218 of 2004.

E U.U. Lalit, Gaurav Pachnanda, Sidhant Goel, Renu Gupta (for Abhinav Mukerji) for the Appellant.

Sidharth Bhatnagar (for T. Mahipal) for the Respondent.

The Judgment of the Court was delivered by

F V.S. SIRPURKAR, J. 1. Leave granted.

G 2. This appeal is filed against the judgment passed by National Consumer Disputes Redressal Commission (hereinafter called "the National Commission" for short), allowing the First Appeal filed by the respondent herein holding that the complaint filed by the respondent herein was tenable relating to its grievance about the deficiency of service, under Section 2(1)(d)(ii) of The Consumer Protection Act, 1986 (hereinafter called "the Act" for short) as amended.

H 3. The appellant had sent a detailed proposal for

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developing certain computer software for the respondent at a cost of Rs.36 lacs on 11.2.1998. This proposal was accepted by the respondent who sent the letter of intent indicating its intention to entrust the appellant with the development of the said software. On 1.4.1998, the respondent sent a purchase order to the appellant regarding the terms and conditions at which the appellant was to develop the software for the respondent. That software was to take care of (1) Financial Accounting, (2) Production, (3) Marketing, (4) Purchase, (5) Stores/Inventory, (6) Fixed Assets, and (7) Pay Roll and Personnel System. The appellant wrote to the respondent on 3.2.1999 informing that the Stores and Purchase Modules had been installed in the respondent's office on 1.2.1999. The appellant wrote on 4.2.1999 to the respondent that since the respondent's requirements for the Marketing Module had gone up considerably in comparison with what had been initially agreed between the parties, the appellant would require additional 250 man hours to complete. On 26.2.1999, the appellant informed the respondent that three Modules had been successfully installed, they being, (1) Stores, (2) Purchase, and (3) Production. Again on 17.3.1999, the appellant confirmed that even the Financial Accounting Module was also successfully installed. Further, the appellant wrote to the respondent that in view of the additional requirements of the respondent, it would require 350 man hours more. On 30.3.1999, the appellant informed the respondent that the changes suggested by the respondent had been successfully carried out. The appellant informed the respondent again that due to the addition of 48 new functions to the Marketing Module, the estimation for the Module had gone up by 45 man days, costing an additional Rs.60,000. On 7.4.1999 and 13.4.1999, the appellant informed that the Stores and Purchase Module and Financial Accounting and Marketing Modules were also installed respectively on those dates and sought for their feedback. Thereafter, there was a lot of correspondence between the parties as regards the work of the said software and in respect of the different Modules. It seems, at times, the

A respondent/complainant expressed its satisfaction over the working of the Modules. All this happened in the last months of 1999 and in January, 2000. It seems that till February, 2000, the payment of the appellant was not released requiring the appellant to write to the respondent for the same. The  
B respondent thereafter started complaining about the working of some Modules. In the month of September, 2000, the respondent placed a fresh purchase order with the appellant for enhancement of the Production Module, on which the appellant requested the respondent to clear the outstanding  
C dues which were not cleared till then. The appellant again wrote to the respondent for payment in the month of April, 2001.

4. The disputes started taking ugly shape and the respondent started complaining about the working of various Modules. On 15.4.2002, the respondent wrote a letter to the  
D appellant identifying the problems with various Modules of the software, which letter was replied to by the appellant. There was then lot of correspondence between September, 2002 and March, 2003 as regards the Modules supplied. The respondent, however, sent a legal notice to the appellant through its  
E Advocate on 4.4.2003, wherein it alleged deficiency in services rendered by the appellant with respect to all seven Modules developed by the appellant. There was another legal notice sent by hand and ultimately a complaint against the appellant came to be filed on 26.6.2003 before the State Consumer Disputes  
F Redressal Commission (hereinafter called "the State Commission" for short). The appellant, by way of its reply to the complaint, raised a preliminary objection that the respondent/complainant was not a 'consumer' within the meaning of the Act and also sought the decision on this preliminary objection as  
G an issue. A rejoinder was sent to this reply.

5. By its order dated 4.3.2004, the State Commission accepted the appellant's preliminary objection and dismissed the complaint. The respondent/complainant, therefore, filed First  
H Appeal No. 218 of 2004 before the National Commission. By

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its order dated 17.12.2009, which is impugned here, the National Commission reversed the order of the State Commission and held that the 'goods' purchased by the respondent from the appellant were being used by the respondent for a commercial purpose, and, therefore, the respondent was not a 'consumer' within the meaning of Section 2(1)(d)(i) of the Act. However, the National Commission further held that notwithstanding such findings, the respondent was entitled to maintain a complaint under the Act with respect to the deficiency in service during one year warranty period with respect to said goods relying on Section 2(1)(d)(ii) of the Act.

6. We have gone through the impugned judgment, wherein there is a clear cut finding that the software in question amounted to sale of goods by the appellant to the respondent for commercial purpose and as such the respondent would be excluded for being considered as a 'consumer' under Section 2(1)(d)(i) of the Act. However, the National Commission then proceeded to hold that there was a warranty period of one year in the year 2000 and as such since the complaint was filed on 1.8.2000, i.e. prior to the amendment of Section 2(1)(d)(ii) by the Amendment Act, 2002, a person hiring or availing of any services for a consideration was not excluded even though the services were availed for any commercial purpose. In that view, it proceeded to hold that if there was any deficiency in service during the warranty period, the complaint could be maintained before the consumer forum for the said purpose. For this, the National Commission relied on its judgment in *Meera Industries, Howrah Vs. Modern Constructions, Howrah* passed in R.P. No. 1765 of 2007.

7. Shri U.U. Lalit, learned Senior Counsel appearing on behalf of the appellant pointed out that there is a basic error committed by the National Commission inasmuch as it has proceeded on the basis that the complaint was filed on 1.8.2000, which was prior to the amendment of Section 2(1)(d)(ii) by the Amendment Act, 2002. Shri Lalit pointed out

A that the complaint in fact was filed on 26.6.2003 i.e. after the  
amendment of the said Section, which came on 15.3.2003. The  
learned Senior Counsel, therefore, submitted that even if there  
was any service which was hired from the appellant in view of  
the finding of the National Commission that the goods  
B themselves were purchased from the appellant for commercial  
purposes, there would be no question of the service being  
included in Section 2(1)(d)(ii) particularly in view of the  
amendment. The learned Senior Counsel pointed out that the  
service offered by the appellant was only for proper working of  
C the Modules which were included in the software and as such  
was for commercial purpose. He, therefore, pointed out that the  
order of the National Commission holding the complaint  
maintainable to the extent of services offered is clearly  
incorrect, as it proceeds on the wrong assumption that the  
complaint was filed on 1.8.2000 i.e. before 15.3.2003 when the  
D amendment was made to Section 2(1)(d)(ii).

8. Shri Sidharth Bhatnagar, learned Counsel appearing on  
behalf of the respondent could not dispute this proposition and  
fairly accepted that the complaint was in fact filed on 26.6.2003  
E i.e. much after the amendment to Section 2(1)(d)(ii), by which  
the following words were added:-

“but does not include a person who avails of such services  
for any commercial purpose.”

F 9. In view of the findings of the National Commission that  
the goods sold by the appellant to the respondent/complainant  
amounted to ‘goods’ and that such goods were purchased for  
commercial purpose of earning more profits, there could be no  
dispute that even the services which were offered had to be  
G for the commercial purpose. Nothing was argued to the contrary.  
It seems that the whole error has crept in because of the wrong  
factual observation that the complaint was filed on 1.8.2000. In  
that view, it has to be held that the complaint itself was not  
maintainable, firstly, on the count that under Section 2(1)(d)(i),  
H the goods have been purchased for commercial purposes and

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on the second count that the services were hired or availed of for commercial purposes. The matter does not come even under the Explanation which was introduced on the same day i.e. on 15.3.2003 by way of the amendment by the same Amendment Act, as it is nobody's case that the goods bought and used by the respondent herein and the services availed by the respondent were exclusively for the purpose of earning the respondent's livelihood by means of self-employment. In that view, it will have to be held that the complaint itself was not maintainable in toto.

10. However, the National Commission has observed that if the respondent/complainant choose to file a suit for relief claimed in those proceedings, they can do so according to law and in such a case, they can claim the benefit of Section 14 of the Limitation Act to exclude the period spent in prosecuting proceedings under the Act while computing the period of limitation prescribed for such a suit.

11. Shri Lalit, learned Senior Counsel did not assail this observation. We, therefore, do not wish to interfere with that observation. However, we observe that the parties may avail of the remedies available to them in accordance with law. The appeal is allowed. The order of the National Commission is set aside and the complaint is dismissed with costs assessed at Rs.50,000/-.

B.B.B.

Appeal allowed.