

A THE SECRETARY, MINISTRY OF COMMERCE & ORS.

v.

M/S VINOD AND COMPANY

(Civil Appeal No.5399 of 2019)

B JULY 11, 2019

**[DR. DHANANJAYA Y CHANDRACHUD AND
M.R. SHAH, JJ.]**

- Consumer Protection Act, 1986 – s. 2(d), 2(g) and 2(o) –*
- C *Respondent applied for the grant of an REP licence for which it was entitled to a premium on the amount of exports under the scheme – Scheme for the issuance of REP licence was discontinued – Consequently, the premium was not paid to the respondent – Additional Chief Controller of imports and exports passed an order holding in abeyance the grant of premium – Respondent filed a*
 - D *claim before the District Consumer Disputes Redressal Forum – The District forum allowed the claim of the respondent – Appeal before the State Commissioner was rejected – This was confirmed in revision by the National Consumer Disputes Redressal Commission (NCDRC) – On appeal, held: The Exim policy is an incident of the fiscal policy of the State and of its overall control over foreign trade – As an incident of its policy, the State may provide a regime of incentives – The provision of those incentives does not render the State a service provider or the person who avails of the incentives as a potential user of any service – Thus, there was absence of jurisdiction in the District forum to entertain a complaint under the Act in regard to a*
 - E *claim arising out of and founded on an REP licence governed by the Exim policy – Accordingly, judgment of the NCDRC set aside.*
 - F *The respondent carried out exports from 1988 to 1993. The respondent applied for the grant of an REP licence in the f.o.b. value of Rs 6,16,116 for which it was entitled to a premium of 20 per cent on the amount of exports under the scheme. Since the scheme for the issuance of REP licence was discontinued, the premium of Rs. 1,23,223 was not paid. Additional Chief Controller of imports and exports passed an order holding in abeyance the grant of premium. Thereafter, respondent filed a*

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claim before the District Consumer Disputes Redressal Forum. The District forum allowed the claim and directed payment of Rs. 1,23,223 to the respondent. The appeal before the State Consumer Disputes Redressal Commission was rejected. This was confirmed in revision by the National Consumer Disputes Redressal Commission. Hence, the present appeals.

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Allowing the appeal, the Court

HELD: 1. The objects of the Exim policy are essentially to stimulate industrial growth by providing easy access to imported capital goods, raw materials and components, to substitute imports and promote self-reliance and to provide an impetus to exports by improving the quality of incentives. The Exim policy is an incident of the fiscal policy of the State and of its overall control over foreign trade. As an incident of its policy, the State may provide a regime of incentives. The provision of those incentives does not render the State a service provider or the person who avails of the incentives as a potential user of any service. The State, in exercise of its authority to utilise and collect revenue, puts in place diverse regulatory regimes under the law. The regime may provide for modalities for compliance, penalties for breach and incentives to achieve the purpose of the policy. The grant of these incentives does not constitute the State as a service provider. [Para 16] [567-C-E]

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2. In *Bihar School Examination Board v. Suresh Prasad Sinha* it was held that the Board is not a service provider and a student who takes an examination is not a consumer. By analogy, the same principle must govern the present case. For the above reasons, this Court comes to the conclusion that there was an absence of jurisdiction in the District Forum to entertain a complaint under the Act in regard to a claim arising out of and founded on an REP licence governed by the Exim policy. [Paras 19, 20] [568-F-H]

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Vikram Sales Corporation & Anr v. Commissioner of Commercial Taxes (1996) 4 SCC 433 : [1996] 2 Suppl. SCR 204 ; Bihar School Examination Board v. Suresh Prasad Sinha (2009) 8 SCC 483 – relied on.

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Case Law Reference

[1996] 2 Suppl. SCR 204	relied on	Para 8
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(2009) 8 SCC 483	relied on	Para 8
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CIVIL APPELLATE JURISDICTION : Civil Appeal No.5399

B of 2019

From the Judgment and Order dated 04.04.2012 of the National Consumer Disputes Redressal Commission, New Delhi in Revision Petition No. 375 of 2007

C D. L. Chidanand, Nachiketa Joshi, Sayooj Mohandas M., Ms. Anil Katiyar, B. Krishna Prasad, Advs. for the Appellants.

Shivendra Dwivedi, Rajesh Mahale, Advs. for the Respondent.

The Judgment of the Court was delivered by

DR DHANANJAYA Y CHANDRACHUD, J.

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1. Delay condoned.
2. Leave granted.

E 3. This appeal raises an interesting issue as to whether a person who has made a claim under an REP licence issued in terms of the import and export policy¹ - in this case, the policy for April 1988 to March 1991 – is a consumer within the meaning of Section 2(1)(d) of the Consumer Protection Act, 1986². Allied to this issue is whether in providing benefits under the terms of the Exim policy, the government renders a ‘service’ so as to make it amenable to the jurisdiction of the consumer fora established under the Act.

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4. The facts, insofar as they are material, are that the respondent carried out exports from 1988 to 1993. The respondent applied for the grant of an REP licence in the f.o.b. value of Rs 6,16,116 for which it was entitled to a premium of 20 per cent on the amount of exports under the scheme. Since the scheme for the issuance of REP licence was

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discontinued, the premium of Rs 1,23,223 was not paid. The respondent received an intimation that the Additional Chief Controller of Imports and Exports had passed an order on 3 September 1991 holding in abeyance the grant of premium from February 1988 to August 1992

¹ Exim policy

H ² “Act”

which was further extended to 31 March 1993. The respondent filed an appeal before the Appellate Committee of the Ministry of Commerce. The respondent made unsuccessful attempts for the release of the premium and was informed that the scheme had been closed as a result of which the claim could not be entertained.

5. This led to the institution of proceedings before the District Consumer Disputes Redressal Forum³ at Delhi. The District Forum allowed the claim by directing that an amount of Rs 1,23,223 be paid over to the respondent together with compensation for mental agony and towards legal expenses.

6. The appellants were set down ex-parte before the District Forum. Their appeal before the State Consumer Disputes Redressal Commission⁴ was rejected on 9 October 2006. This was confirmed in revision by the National Consumer Disputes Redressal Commission⁵ on 4 April 2012.

7. The principal issue that was canvassed before the SCDRC and in revision was that the consumer fora had no jurisdiction to entertain a consumer complaint on the ground that no service is rendered by the Union government when it provides incentives under the Exim policy.

8. Mr. D L Chidanand, learned counsel appearing on behalf of the appellant assailed the decision of the fora on the following grounds:

- (i) The Exim policy is formulated in pursuance of and as an incident of the fiscal policy of the Union government and its regulatory control over foreign trade;
- (ii) The purpose and object of the Exim policy is to encourage exports and to regulate imports by laying down regulatory measures in pursuance of which a scheme of incentives is also made available to exporters;
- (iii) The benefits which are granted to an exporter do not constitute a service within the meaning of the Act.

9. In support of the submission, reliance has been placed on the decisions of this Court in **Vikram Sales Corporation & Anr vs**

³“District Forum”

⁴ “SCDRC”

⁵“NCDRC”

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A Commissioner of Commercial Taxes⁶ and Bihar School Examination Board vs Suresh Prasad Sinha⁷

10. On the other hand, Mr. Shivendra Dwivedi, learned counsel appearing on behalf of the respondent supported the decision of the consumer fora leading to the judgment of the NCDRC on the ground
B that as an exporter, the respondent was entitled to a premium against the REP licences which constituted a benefit provided and hence is a part of the services rendered by the Union government to an exporter.

11. In order to appreciate the rival submissions, it would be necessary to advert to some of the definitions which are contained in
C Section 2 of the Act. The expression “complainant” is defined in Section 2(b)(i) to mean *inter alia* a ‘consumer’.

12. Section 2(d) defines the expression “consumer” thus:
“(d)”consumer” means any person who—
D (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
E (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;
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Explanation.— For the purposes of this clause, “commercial purpose” does not include use by a person of goods bought and

H 6(1996) 4 SCC 433
7(2009) 8 SCC 483

used by him and services availed by him exclusively for the purposes of earning his livelihood by means of self-employment;" A

Section 2(e) defines the expression "consumer dispute" :

"(e)" consumer dispute" means a dispute where the person against whom a complaint has been made, denies or disputes the allegations contained in the complaint." B

The expression "defect" is defined in Section 2(f) :

"(f) "defect" means any fault, imperfection or shortcoming in the quality, quantity, potency, purity or standard which is required to be maintained by or under any law for the time being in force under any contract, express or implied or as is claimed by the trader in any manner whatsoever in relation to any goods;" C

The expression "deficiency" is defined in Section 2(g) :

"(g)" deficiency" means any fault, imperfection, shortcoming or inadequacy in the quality, nature and manner of performance which is required to be maintained by or under any law for the time being in force or has been undertaken to be performed by a person in pursuance of a contract or otherwise in relation to any service;" D

Finally, it would be necessary to refer to the expression "service" which is defined in Section 2(o):- E

"(o)" service" means service of any description which is made available to potential users and includes, but not limited to, the provision of facilities in connection with banking, financing insurance, transport, processing, supply of electrical or other energy, board or lodging or both, housing construction, entertainment, amusement or the purveying of news or other information, but does not include the rendering of any service free of charge or under a contract of personal service;" F

Under Section 2(d)(ii), a consumer is a person who hires or avails of any service for a consideration. It includes a beneficiary of a service other than the person who hires or avails of the service. The consideration for the hire or for availment of the service may be either paid or promised or partly paid and partly promised or under any system of deferred G

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- A payment. The exclusion applies to a person who avails of a service for a commercial purpose in which event such a person is not a consumer.

Section 2(g) which defines the expression “deficiency”, adverts to a fault, imperfection, shortcoming or inadequacy in the quality, nature or manner of performance which is required to be maintained by or

- B under any law or which is contractually assumed to be performed by a person in pursuance of a contract or otherwise in relation to any service.

Section 2(o) has defined the expression “service” to mean a service of any description. The issue essentially is whether in formulating the Exim policy and in providing a regulatory regime, the government

- C performs a service of any description.

Since in the present case the relevant Exim policy is for the period from April 1988 to March 1991, it would be instructive to extract the purpose and object of the policy as contained in the foreword to the document;

- D “The Import and Export Policy plays a crucial role in the economy as a whole and in particular the industrial and export sectors. The main objectives of the new Policy are -

(i) to stimulate industrial growth by providing easy access to essential imported capital goods, raw materials and components

- E to industry and to sustain the movement towards modernisation, technological upgradation and make the industry progressively competitive internationally.

(ii) to promote efficient import substitution and self-reliance;

(iii) to give a fresh impetus to export promotion by improving the quality of incentives and their administration; and

(iv) to simplify and rationalise Police and Procedures.

These objectives are sought to be achieved keeping in view the constraints of both domestic and external resources.”

- G Chapter XIX provided for the Duty Exemption Scheme under which paragraph 239 provided for a special REP facility in the following terms:-

“Special REP Facility

239. (1) The licence holder under this scheme would be eligible to an REP licence after he has fulfilled the export obligation and the

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DEEC has been discharged. The value of the REP licence would be equal to 10 per cent of the value addition achieved (f.o.b. value of exports minus c.i.f. value of imports). The value of the REP licence so calculated would be further limited to the REP entitlement on the total f.o.b. value of exports, as per Appendix 17 or as per para 166(2) (For Residual Products) of this policy, as the case may be. The REP licence so issued will be valid for the import of the items as allowed against the relevant export product in Appendix 17 or para 166(2) of this Policy, at the time of issue of the licence.”

The objects of the policy are essentially to stimulate industrial growth by providing easy access to imported capital goods, raw materials and components, to substitute imports and promote self-reliance and to provide an impetus to exports by improving the quality of incentives. The Exim policy is an incident of the fiscal policy of the State and of its overall control over foreign trade. As an incident of its policy, the State may provide a regime of incentives. The provision of those incentives does not render the State a service provider or the person who avails of the incentives as a potential user of any service. The State, in exercise of its authority to utilise and collect revenue, puts in place diverse regulatory regimes under the law. The regime may provide for modalities for compliance, penalties for breach and incentives to achieve the purpose of the policy. The grant of these incentives does not constitute the State as a service provider.

Before a three judge Bench of this Court in **Vikas Sales Corporation** (supra), the issue for consideration was whether the transfer of an REP licence or Exim scrip to another constitutes a sale of goods within the meaning of state sales tax legislation. Explaining the objectives of the import policy, the Court held:

“4.The objective behind the licences was to provide to the registered exporters the facility of importing the essential inputs required for the manufacture of the products exported. The essential idea was to encourage exports and for that purpose import licences called REP Licences were issued equal to the prescribed percentage of the value of exports. These licences were made freely transferable. It was provided that the transfer such licences did not require any endorsement or permission from the licencing

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- A authority. It was clarified that such would be: “governed by the ordinary law”. It only required a letter from the transferor recording and evidencing the transfer. On that basis, the transferee; became the due and lawful holder of the licence and could either import the goods permitted thereunder or sell it to another in turn.”
- B In **Bihar School Examination Board** (*supra*) which was decided by a Bench of two judges, the issue was whether the Board of Examinations governed by state law is amenable to the jurisdiction of the District Forum under the Consumer Protection Act, 1986. Answering the question in the negative, this Court held:
- C “12. When the Examination Board conducts an examination in discharge of its statutory function, it does not offer its “services” to any candidate. Nor does a student who participates in the examination conducted by the Board, hire or avail of any service from the Board for a consideration. On the other hand, a candidate who participates in the examination conducted by the Board, is a person who has undergone a course of study and who requests the Board to test him as to whether he has imbibed sufficient knowledge to be fit to be declared as having successfully completed the said course of education; and if so, determine his position or rank or competence vis-a-vis other examinees. The process is not, therefore, availment of a service by a student, but participation in a general examination conducted by the Board to ascertain whether he is eligible and fit to be considered as having successfully completed the secondary education course. The examination fee paid by the student is not the consideration for availment of any service, but the charge paid for the privilege of participation in the examination.”

In the circumstances, it was held that the Board is not a service provider and a student who takes an examination is not a consumer.

- G We are of the view that by analogy, the same principle must govern the present case for the reasons that we have indicated.

For the above reasons, we allow the appeal having come to the conclusion that there was an absence of jurisdiction in the District Forum to entertain a complaint under the Act in regard to a claim arising out of and founded on an REP licence governed by the Exim policy.

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The judgment of the NCDRC dated 4 April 2012 is accordingly A set aside. However, there shall be no order as to costs.

Pending application(s), if any, shall stand disposed of.

Ankit Gyan

Appeal allowed.