

FAQIR CHAND GULATI

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v.

UPPAL AGENCIES PVT. LTD. & ANR.

(Civil Appeal No. 3302 of 2005)

JULY 10, 2008

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**[R.V. RAVEENDRAN AND LOKESHWAR SINGH
PANTA, JJ.]**

Consumer Protection Act, 1986: Ss. 2(1)(d)(ii)(g) & (o), 3 and 14:

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Service – Owner entering into a collaboration agreement with a builder for construction of a residential building and sharing constructed area – Can owner be termed as Consumer and builder as service provider for the purpose of application of 1986 Act – Maintainability of complaint under 1986 Act – Held: Maintainable – There was no provision in the agreement for shared control of management of joint enterprise and shared liability for losses – Under the circumstances, State Consumer Commission and National Consumer Commission erred in assuming that an agreement between landowner and builder for development of property and sharing constructed area amount to a joint venture and not an agreement for utilizing service of the builder for consideration – On facts builder is service provider, hence, 1986 Act applicable.

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Building Contract between Landowner and builder – Breach of conditions – Remedy – Held: Landowner may file suit for specific performance of contract or claim damages or can approach to Consumer Forum for relief as Consumer against a builder, service provider.

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Building Contract – Breach of condition as to supply of Completion Certificate and C & D Forms, by builder – Held: Builder liable to compensate the Landowner for all loss/damages for not complying with the conditions.

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A *Words & Phrases:**'Joint Venture' – Ingredients – Discussed.*

The questions which arose for determination before the Supreme Court in the present appeal were as to whether a land owner, who enters into an agreement with a builder for Construction of an Apartment and for sharing of the constructed area thereof, is a Consumer and the builder as a Service provider in terms of provisions under the Consumer Protection Act, 1986, and as to whether a complaint seeking delivery of Completion Certificate and C & D forms in regard to building; against the builder is maintainable under the 1986 Act.

Appellant-Landowner contended that though the agreement is captioned as 'collaboration agreement', it is not a joint venture as assumed by the State Commission and the National Commission but it is an agreement under which the builder agreed to make a housing construction for the land owner and therefore, the activity of the builder squarely fell within the definition of service; that the agreement did not amount to entering into a joint venture with the builder to share the profits and losses; and that insofar as the term of the agreement relating to construction of the ground floor for his benefit, the builder was a service provider and he was a consumer.

Respondent-builder submitted that the agreement was for collaboration in the nature of a joint venture which required the owner to contribute the land and the builder to contribute the funds for construction of a building and thereafter share the construction, that is ground floor with corresponding undivided share in the land to the owner, and upper floors with corresponding undivided share in the land to the builder, and that it was in the nature of a single business adventure under which the parties agreed to share the benefits; that the builder had paid certain sum to the owner as consideration in addition to agreeing to

give the ground floor of the new building and therefore, the agreement was also in the nature of the agreement of sale of undivided share in land by the owner to the builder; that the two parties to the agreement were associates to carry out a single enterprise or business adventure for mutual profit and such a venture resulting in profit for both the parties was not an agreement for providing service; that there was no contract for 'house construction', nor for sale of a house and therefore, it was not a 'service-contract; and that as each party had to discharge and fulfill certain obligations towards the other in consideration of the other party fulfilling certain obligations, the remedy in the event of any alleged breach, is to sue for specific performance and/or damages in a civil court but a complaint under the Act was not maintainable.

Allowing the appeal, the Court

HELD: 1.1. The usual feature of hybrid agreement entered in India is that the land-holder will have no say or control in the construction. Nor will he have any say as to whom and at what cost the builder's share of apartments are to be dealt with or disposed of. His only right is to demand delivery of his share of constructed area in accordance with the specifications. An agreement between the owner of a land and a builder, for construction of apartments and sale of those of apartments so as to share the profits in a particular ratio may be a joint venture, if the agreement discloses an intent that both parties shall exercise joint control over the construction/development and be accountable to each other for their respective acts with reference to the project. There are various terms in the agreement between the appellant and first respondent which militate against the same being a 'joint venture'. Firstly, there is a categorical statement, that the agreement shall not be deemed to constitute a partnership between the owner and the builder. The land-owner is specifically excluded from management and is barred from interfer-

A ing with the construction in any manner and the Builder
has the exclusive right to appoint the Architects, Contrac-
tors and sub-contractors for the construction. The Builder
is entitled to sell its share of the building as it deemed fit,
without reference to the land owner. The builder under-
B takes to the landowner that it will construct the building
within 12 months from the date of sanction of building
plan and deliver the owner's share to the land owner. The
Builder alone is responsible to pay penalties in respect
of deviations and for payment of compensation under the
C Workmen's Compensation Act in case of accident. Sec-
ondly, there is no community of interest or common/joint
control in the management, nor sharing of profits and
losses. The land owner has no control or participation in
the management of the venture. The requirement of each
D joint venturer being the principal as well as agent of the
other party is also significantly absent. Such hybrid agree-
ments are not a joint venture, as understood in law. (Paras
– 16 to 18) [719 E- 720 A 722 H- 723 F]

E *New Horizons Ltd vs. Union of India* (1995) 1 SCC 478 –
referred to.

Corpus Juris Secundum Vol.48A Pages 314-315;
American Jurisprudence (2nd Edition) Vol.46, Pages 19, 22-
23; *Black's Law Dictionary*, 7th Edition Page 843 – referred
to.

F 1.2 The basic underlying purpose of the agreement
in question is the construction of a house or an apart-
ment (ground floor) in accordance with the specifications,
by the builder for the owner, the consideration for such
G construction being the transfer of undivided share in land
to the builder and grant of permission to the builder to
construct two floors. Such agreement whether called as
a 'collaboration agreement' or a 'joint-venture agreement',
is not however a 'joint-venture'. There is a contract for
H construction of an apartment or house for the appellant

in accordance with the specifications and in terms of the contract. There is a consideration for the construction, flowing from the landowner to the builder (in the form of sale of an undivided share in the land and permission to construct and own the upper floors). To adjust the value of the extent of land to be transferred, there is also payment of cash consideration by the builder. But the important aspect is the availment of services of the builder by the land-owner for a house construction (construction of owner's share of the building) for a consideration. To that extent, the land-owner is a consumer, the builder is a service-provider and if there is deficiency in service in regard to construction, the dispute raised by the land owner will be a consumer dispute. It makes no difference for the purpose whether the collaboration agreement is for construction and delivery of one apartment or one floor to the owner or whether it is for construction and delivery of multiple apartments or more than one floor to the owner. The principle would be the same and the contract will be considered as one for house construction for consideration. The deciding factor is not the number of apartments deliverable to the land owner, but whether the agreement is in the nature of a joint-venture or whether the agreement is basically for construction of certain area for the land-owner. (Para -19) [724 B - 725 A]

1.3 In a true joint venture agreement between the land-owner and another (whether a recognized builder or fund provider), the land-owner is a true partner or co-adventurer in the venture where the land owner has a say or control in the construction and participates in the business and management of the joint venture, and has a share in the profit/loss of the venture. In such a case, the land owner is not a consumer nor is the other co-adventurer in the joint venture, a service provider. The land owner himself is responsible for the construction as a co-adventurer in the venture. But such true joint ventures

A are comparatively rare. What is more prevalent are agreements of the nature found in this case, which are a hybrid agreement for construction for consideration and sale and are pseudo joint-ventures. Normally a professional builder who develops properties of others is not interested in sharing the control and management of the business or the control over the construction with the land owners. Except assuring the land owner a certain constructed area and/or certain cash consideration, the builder ensures absolute control in himself, only assuring the quality of construction and compliance with the requirements of local and municipal laws, and undertaking to deliver the owners' constructed area of the building with all certificates, clearances and approvals to the land owner. (Para – 20) [725 B-F]

D 1.4 It is now well settled that the title or caption or the nomenclature of the instrument/document is not determinative of the nature and character of the instrument/document, though the name may usually give some indication of the nature of the document. The nature and true purpose of a document has to be determined with reference to the terms of the document, which express the intention of the parties. Therefore, the use of the words 'joint venture' or 'collaboration' in the title of an agreement or even in the body of the agreement will not make the transaction a joint venture, if there are no provisions for shared control of interest or enterprise and shared liability for losses. (Para- 21) [725 G- 726 B]

G 1.5 The State Commission and National Commission have proceeded on an assumption, which appears to be clearly baseless; that wherever there is an agreement for development of a property between the property owner and builder under which the constructed area is to be divided, it would automatically amount to a joint venture and there is no question of the landholder availing the service of the builder for consideration. (Para – 22) [726 B-C]

1.6 If there is a breach by the landowner of his obligations, the builder will have to approach a civil court as the landowner is not providing any service to the builder but merely undertakes certain obligations towards the builder, breach of which would furnish a cause of action for specific performance and/or damages. On the other hand, where the builder commits breach of his obligations, the owner has two options. He has the right to enforce specific performance and/or claim damages by approaching the civil court. Or he can approach the Forum under Consumer Protection Act, for relief as consumer, against the builder as a service- provider. Section 3 of the Consumer Protection Act makes it clear that the remedy available under the Act is in addition to the normal remedy or other remedy that may be available to the complainant. (Para – 23) [727 B-E]

Lucknow Development Authority vs. M. K. Gupta 1994 (1) SCC 243 and *Friends Colony Development Committee vs. State of Orissa* 2004 (8) SCC 733 – referred to.

2.1 The builder cannot be permitted to avoid or escape the consequences of his illegal acts. The obligation on the part of the builder to secure a sanctioned plan and construct a building, carries with it an implied obligation to comply with the requirements of municipal and building laws and secure the mandatory permissions/certificates. (Para – 25) [728 C-D]

2.2 The agreement clearly contemplates the builder completing the construction and securing completion certificate. The agreement, in fact, refers to the possibility of deviations and provides that if there are deviations, the builder will have to pay the penalties, that is do whatever is necessary to get the same regularized. Even if such a provision for providing completion certificate or payment of penalties is not found in the agreement, the builder cannot escape the liability for securing the completion cer-

A tificate and providing a copy thereof to the owner if the law requires the builder to obtain completion certificate for such a building. (Para – 26) [728 F-H]

B 2.3 A prayer for completion certificate and C&D Forms cannot be brushed aside by stating that the builder has already applied for the completion certificate or C&D Forms. If it is not issued, the builder owes a duty to make necessary application and obtain it. If it is wrongly withheld, he may have to approach the appropriate court or other forum to secure it. If it is justifiably withheld or refused, necessarily the builder will have to do whatever that is required to be done to bring the building in consonance with the sanctioned plan so that the municipal authorities can inspect and issue the completion certificate and also assess the property to tax. If the builder fails to do so, he will be liable to compensate the complainant for all loss/damage. Therefore, the assumption of the State Commission and National Commission that the obligation of the builder was discharged when he merely applied for a completion certificate is incorrect. (Para – 27) [729 A-B]

E 3. The District Forum and National Commission did not examine the matter with reference to facts. The State Commission held that the complaint was not maintainable but purported to consider the factual question in a half hearted and casual manner. The orders of the National Commission, State Commission and District Forum are set aside, the appellant's complaint is held to be maintainable. The matter is remitted to District Forum for deciding it on merits. (Para – 28) [729 D-E]

G CIVILAPPELLATE JURISDICTION : Civil Appeal No. 3302 of 2005

From the order dated 3.2.2004 of the National Consumer Disputes Redressal Commission, New Delhi in Revision Petition No. 1878 of 2000

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S.K. Mehra, Mamta Mehra, Mukta Kapur and Sanjeev A
Sachdeva for the Appellant.

Anil Mittal and Dr. Kailash Chand for the Respondents.

The Judgment of the Court was delivered by

R. V. RAVEENDRAN J. This appeal is against the order B
dated 3.2.2004 passed by the National Consumer Disputes
Redressal Commission ('Commission' for short) in Revision Pe-
tition No. 1878 of 2000. It relates to the question whether a land C
owner, who enters into an agreement with a builder, for con-
struction of an Apartment Building and for sharing of the con-
structed area, is a 'consumer' entitled to maintain a complaint
against the builder as a service-provider under the Consumer
Protection Act, 1986.

The agreement D

2. The appellant is the owner of premises no. L-3, Kailash
Colony, New Delhi. He entered into a 'collaboration agreement'
dated 17.5.1991 with the first respondent, the terms of which
are, in brief, as follows :

- (i) The owner shall place at the disposal of the builder, E
vacant possession of the premises and authorize
the builder to secure necessary sanctions,
permissions and approvals for demolition of the
existing building and construction and completion of
a new building. F
- (ii) The builder shall demolish the existing structure and
construct a residential building consisting of ground,
first and second floors, at its cost and expense.
- (iii) The builder will have the right to appoint Architects, G
contractors, sub-contractors etc.
- (iv) The new building to be constructed by the builder shall
be of good quality as per the detailed specifications
contained in Annexure-A to the agreement. H

- A (v) On completion of construction, the land-owner will be entitled to the entire ground floor (consisting of three bedrooms with attached bathrooms, one drawing-cum-dining, one store room, one kitchen) with one servant room under the overhead water tank on rear terrace and one parking space, as his share in consideration of his having made available the land. The builder shall also pay a sum of Rs.8 lakhs as non-refundable consideration to the owner.
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- C (vi) The remaining part of the building (the entire first and second floors and two servant rooms and two car parking spaces) shall belong to the builder as its share of the building in consideration of having spent the cost of construction of the entire building and all other services rendered by him under the agreement.
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- E (vii) The owner and the builder shall be entitled to undivided and indivisible share in the land, proportionate to their right in the building, that is, an undivided one-third share in the land shall belong to the owner and two-third share shall belong to the developer.
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- G (viii) The builder shall be entitled to either retain or sell its share of the building. The owner shall execute necessary documents for transferring the share corresponding to the builder's portion of the building. The owner shall give an irrevocable power of attorney enabling the builder to execute the deed of conveyance in regard to the builder's share in the land. The builder will however, have the option to require the owner to personally execute the sale deed in regard to the builder's share in the land instead of using such power of attorney.
- H (ix) On completion of the building, the builder shall apply for completion certificate to the concerned authority and shall be liable to pay any penalty that may be

imposed or levied in regard to the deviations, if any, made in the construction of the building. A

(x) The owner shall not interfere or obstruct the construction and completion of the work in any manner, but will have access to the construction to point out any defect in construction or workmanship or use of inferior material, so as to require the builder to rectify such defects. B

(xi) Title deeds handed over by the owner to the builder for completing the formalities relating to the agreement shall thereafter be returned to the owner, who shall however make available the same for reference by the owners of the other floors. C

(xii) The agreement and the power of attorney executed by the owner in favour of the builder are irrevocable. In the event of neglect, failure, default on the part of the owner or the builder, the affected party shall have the right to specific performance of the said agreement at the cost and risk of the defaulting party who shall also be liable to pay damages. D E

(xiii) The agreement is not a partnership and shall not be deemed to be a partnership between the owner and the builder.

The dispute and the decision. F

3. The appellant (also referred to as 'land-owner') alleges that the first respondent (also referred to as the 'builder') secured sanction of the plan for construction from the Municipal Corporation of Delhi [for short 'MCD'] but made several unauthorized deviations during construction, resulting in several deviation notices from MCD. In fact, MCD passed an order dated 16.1.1991 to seal the premises, but subsequently, the premises was de-sealed to enable the builder to rectify the deviations. The builder delivered possession of the ground floor on 2.4.1992. The builder sold the first and second floors to four H

A persons under sale deeds dated 18.3.1992, 18.3.1992, 2.6.1995 and 2.6.1995.

B 4. The delivery of the ground floor was made by the builder to appellant's son during appellant's absence from India. On his return, the appellant sent a letter dated 29.10.1992, pointing out several shortcomings in the construction and the violations of sanctioned plan, and called upon the builder to rectify the deviations and defects. The builder did not comply.

C 5. The appellant therefore filed complaint No. 1866 of 1994 before the District Consumer Disputes Redressal Forum-IX, Delhi, under the Consumer Protection Act, 1986 ('Act' for short) seeking the following reliefs against the builder :

- a) Return of the title deeds relating to the premises;
- D b) Supply of completion certificate and C&D Forms from MCD; and
- c) Delivery of security deposit receipt for electricity meter and payment of Rs.4262.64 being the charges for change of electricity meter.

E The District Forum dismissed the complaint by order dated 10.5.1996 as not maintainable under the Act, holding that the appellant was not a 'consumer' as defined in section 2(1)(d)(ii) of the Act. It held that the agreement between the parties created mutual rights and obligations with a provision that in the event of breach of any condition, the affected party shall have the right of specific performance and such an agreement cannot be construed as a contract for hiring/availing a service, for consideration by a consumer.

G 6. The appellant filed an appeal against the order of the District Forum and the said appeal was dismissed by the State Commission, Delhi, by order dated 4.10.2000. The State Commission held that the agreement between the parties, termed as a collaboration agreement, was in the nature of a joint venture or agreement to collaborate; that the agreement contem-

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plated 'sharing' of constructed area, that is the entire ground floor of the building by the landowner and the remaining area by the builder; that the agreement did not have any element of hiring any services; and that therefore, the appellant was not a 'consumer' and the builder was not a 'service-provider'. It therefore, confirmed the District Forum's decision that the petition was not maintainable. For this purpose, it also relied on the decision of the National Commission in *C. Narasimha Rao vs. K.R. Neelakandan* – I (1994) CPJ 160 and its own decision in *Har Sarup Gupta vs. M/s Kailash Nath & Associates* – II (1995) CPJ 275. However, as the appellant was old and as the first and third reliefs (relating to delivery of title deeds and electricity meter security deposit receipt and payment of the charges for the change of electricity meter) had already been secured by the appellant and the only pending issue related to C&D forms, the State Commission proceeded to decide the appeal on merits. It noted that as the builder had already applied for the C&D forms to the competent authority and was pursuing the matter and had undertaken to hand over the same to the appellant as and when made available, nothing further was required to be done by the builder. The Appeal was, therefore, dismissed as devoid of merit.

7. The appellant filed a revision petition before the National Commission. The appellant challenged the finding that the complaint was not maintainable. He also contended that as the builder had failed to secure and furnish the completion certificate and C&D forms (that is property tax assessment listing) from MCD, his complaint could not have been dismissed. He also submitted that in view of the violations, the MCD had demolished certain portions of the structure and was insisting upon the other deviations which were beyond compoundable limits to be rectified; and that MCD was refusing to issue the completion certificate and C&D forms without those rectifications; and that the prayer for delivery of completion certificate and C&D forms required the builder to rectify all defects and bring the deviations within permissible limits and secured completion

- A certificate and C&D forms. He pointed out that in the absence of completion certificate and C&D forms, he was facing threats of demolition apart from harassment from MCD. He contended that the non-completion of building as per the sanctioned plan and making deviations on a large scale resulting in non-issue of completion certificate and C&D forms amounted to deficiency in service and therefore, his complaint ought to have been allowed.

8. The National Commission dismissed the revision petition by order dated 3.2.2004. The order extracted the relevant provisions of the agreement *in extenso* and then proceeded to reject the petition by merely observing that the agreement was in the nature of a joint venture and transaction did not have any element of hiring the services of the builder within the meaning of section 2(1)(d)(ii) of the Act and that the District Forum and the State Commission had rightly held that the appellant was not a consumer. The said order is challenged in this appeal by special leave.

Legal Provisions.

9. We may briefly notice the provisions of the Act before referring to the contentions of the parties. The object of the Act is to provide for better protection of the interests of consumers. It establishes consumer disputes redressal agencies and enables persons having grievances regarding goods supplied or services provided, to file complaints before such redressal agencies. Section 14 enumerates the reliefs that can be granted by a redressal agency to the complainant if he satisfies the agency about the defect in goods or deficiency in service. Two of the reliefs that can be granted by the forum, if it is satisfied that any of the allegations contained in the complaint about the deficiency in the service are proved, are, a direction to the opposite party to remove the deficiencies in the service in question and a direction to pay compensation to the consumer for any loss or injury suffered by him. Section 3 provides that the provisions of the Act shall be in addition and not in derogation of the provi-

sions of any other law for the time being in force. Any allegation in writing made by the complainant that the services hired or availed of or agreed to be hired or availed of by him suffered from deficiency in any respect, with a view to obtaining any relief provided for by or under the Act, is a 'complaint' under section 2(1)(c) of the Act.

9.1) The terms 'consumer', 'deficiency', and 'service' defined in clauses (d), (g) and (o) of section 2(1) of the Act as it stood at the time when the appellant approached the District Forum in 1994 are extracted below :

"(d). 'Consumer' means any person who -

(i) xxxxxx

(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.*

[*The above definition was amended by Consumer Protection (Amendment) Act, 62 of 2002 by adding the words '*but does not include a person who avails of such services for any commercial purpose*', at the end].

(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."

(o). 'Service' means service of any description which is made available to potential users and includes the

- A 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.”^x
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[^xThe words ‘*the provision of*’ are substituted by the words ‘*but not limited to, the provision of*’ by the Consumer Protection (Amendment) Act, 2002 (62 of 2002) with effect from 15.3.2003]

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Contentions :

10. The appellant contends that though the agreement is captioned as ‘collaboration agreement’, it is not a joint venture as assumed by the State Commission and National Commission but an agreement under which the builder agreed to make a housing construction for the land owner and therefore, the activity of the builder squarely falls within the definition of service. According to him, the fact that he entered into an agreement making available the plot for construction of a three-storied building and agreeing to share the building after construction and receive towards his share the ground floor of the building plus Rs.8 lakhs did not amount to entering into a joint venture to share the profits and losses. He submitted that the basic scheme of the agreement was that the builder should construct and deliver a house (ground floor of the building) to the owner and if there was any deficiency in fulfilling the obligations undertaken in connection with such construction, there would be a deficiency in service; and that therefore, insofar as the term relating to construction of the ground floor for his benefit, the builder was a service provider and he was a consumer.
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11. On the other hand, the respondent contended that the agreement was for collaboration in the nature of a joint venture which required the owner to contribute the land and the builder to contribute the funds for construction of a building and there-
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after share the construction that is ground floor with corresponding undivided share to the owner and upper floors with corresponding undivided share to the builder, and that it was in the nature of a single business adventure under which the parties agreed to share the benefits. It is also pointed out that the builder had paid a sum of Rs.8 lakhs to the owner as consideration in addition to agreeing to give the ground floor of the new building and therefore, the agreement was also in the nature of the agreement of sale of undivided share in land by the owner to the builder. It was contended that the two parties to the agreement were associates to carry out a single enterprise or business adventure for mutual profit and such a venture resulting in profit for both the parties was not an agreement for providing service. The respondent submitted that there was no contract for 'house construction' as such, nor for sale of a house and therefore, it was not a 'service-provider'. It was also pointed out that it was not only the builder who had certain obligations towards the owner, but the owner also had the following obligations towards the builder :

- a) The owner shall execute all documents required for effecting transfer of builder's share of the land.
- b) The owner shall not obstruct or interfere with the construction in any manner.
- c) The owner had to keep the property wholly free from encumbrances during the currency of the agreement.
- d) If the owner's title was found to be defective, owner was liable to pay damages, losses and costs to the builder and its nominees.
- e) Owner shall do all acts, deeds and things required to keep the rights in the land subsisting.
- f) Owner shall not revoke or cancel the agreement or power of attorney.

As each party had to discharge and fulfill certain obligations towards the other in consideration of the other party fulfill-

A ing some certain obligations, the remedy in the event of any alleged breach, according to the builder, is to sue for specific performance and/or damages in a civil court and a complaint under the Act was not maintainable.

B 12. On the contentions raised, two questions arise for consideration :

C (i) Whether on the facts and circumstances, a complaint under the Consumer Protection Act, 1986 is maintainable, in regard to the Agreement dated 17.5.1991 between the parties

D (ii) Whether a complaint is maintainable under the Act for a prayer seeking delivery of completion certificate and C&D Forms in regard to a building and whether the prayer for completion certificate/C&D Forms involves a prayer for rectification of the deficiencies in the building so as to secure the completion certificate and C&D Forms.

Re : First Question :

E 13. The first question in fact involves examination of the following issue: When the owner of a plot of land enters into an agreement with a builder for development of the property by construction of a building and sharing the constructed area between the owner and the builder, and the developer commits
F any breach either by failing to deliver owner's share of constructed area or by constructing the building contrary to specifications, or by failing to fulfill the obligations relating to completion certificate or amenities like water, electricity and drainage, whether the owner can maintain a complaint under the Consumer Protection Act and whether in such circumstances, the
G owner can claim that he is a consumer and the builder is the service- provider.

H 14. In *Lucknow Development Authority vs. M. K. Gupta* [1994 (1) SCC 243] referring to the nature and object of the Act, this Court observed:

"To begin with the preamble of the Act, which can afford useful assistance to ascertain the legislative intention, it was enacted, 'to provide for the protection of the interest of consumers'. Use of the word 'protection' furnishes key to the minds of makers of the Act. Various definitions and provisions which elaborately attempt to achieve this objective have to be construed in this light without departing from the settled view that a preamble cannot control otherwise plain meaning of a provision. In fact the law meets long felt necessity of protecting the common man from such wrongs for which the remedy under ordinary law for various reasons has become illusory. Various legislations and regulations permitting the State to intervene and protect interest of the consumers have become a haven for unscrupulous ones and the enforcement machinery either does not move or it moves ineffectively, inefficiently and for reasons which are not necessary to be stated. The importance of the Act lies in promoting welfare of the society by enabling the consumer to participate directly in the market economy. It attempts to remove the helplessness of a consumer which he faces against powerful business, described as, 'a network of rackets' or a society in which, 'producers have secured power' to 'rob the rest' and the might of public bodies which are degenerating into store house of inaction where papers do not move from one desk to another as a matter of duty and responsibility but for extraneous consideration leaving the common man helpless, bewildered and shocked. The malady is becoming so rampant, widespread and deep that the society instead of bothering, complaining and fighting for it, is accepting it as part of life. The enactment in these unbelievable yet harsh realities appears to be a silver lining, which may in course of time succeed in checking the rot. A scrutiny of various definitions such as 'consumer', 'service', 'trader', 'unfair' trade practice indicates that legislature has attempted to widen the reach of the Act. Each of these definitions are in two

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A parts, one, explanatory and the other expandatory. The explanatory or the main part itself uses expressions of wide amplitude indicating clearly its wide sweep then its ambit is widened to such things which otherwise would have been beyond its natural import."

B This Court next considered the meaning of the word 'service'. Thereafter, this Court dealt with the question whether 'service' included housing construction, even before the inclusion of 'housing construction' in the definition of 'service' by Act No.50 of 1993 with effect from 18.6.1993. This Court observed:

C "What is the meaning of the word 'service'? Does it extend to deficiency in the building of a house or flat? Can a complaint be filed under the Act against the statutory authority or a builder or contractor for any deficiency in respect of given property. The answer to all this shall
D understanding of the word 'service'. The term has variety of meanings. It may mean any benefit or any act resulting in promoting interest or happiness. It may be contractual, professional, public, domestic, legal, statutory etc. The concept of service thus is very wide. How it should be
E understood and what it means depends in the context in which it has been used in an enactment.

F What remains to be examined is if housing construction or building activity carried on by a private or statutory body was service within meaning of Clause (o) of Section 2 of the Act as it stood prior to inclusion of the expression 'housing construction' in the definition of "service" by Ordinance No. 24 of 1993. As pointed out earlier the entire purpose of widening the definition is to include in it not only day to day buying and selling activity undertaken by
G a common man but even to such activities which are otherwise not commercial in nature yet they partake of a character in which some benefit is conferred on the consumer. Construction of a house or flat is for the benefit of person for whom it is constructed. He may do it himself
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or hire services of a builder or contractor. The latter being A
for consideration is service as defined in the Act.... If the
service is defective or it is not what was represented then
it would be unfair trade practice as defined' in the Act. Any
defect in construction activity would be denial of comfort
and service to a consumer. When possession of property B
is not delivered within stipulated period the delay so
caused is denial of service. Such disputes or claims are
not in respect of immoveable property as argued but
deficiency in rendering of service of particular standard,
quality or grade. Such deficiencies or omissions are C
defined in Sub-clause (ii) of Clause (r) of Section 2 as
unfair trade practice. If a builder of a house uses sub-
standard material in construction of a building or makes
false or misleading representation about the condition of
the house then it is denial of the facility or benefit of which D
a consumer is entitled to claim value under the Act. When
the contractor or builder undertakes to erect a house or
flat then it is inherent in it that he shall perform his obligation
as agreed to. A flat with a leaking roof, or cracking wall or
sub-standard floor is denial of service.A person
who applies for allotment of a building site or for a flat E
constructed by the development authority or enters into an
agreement with a builder or a contractor is a potential
user and nature of transaction is covered in the expression
'service of any description'. It further indicates that the
definition is not exhaustive. The inclusive clause succeeded F
in widening its scope but not exhausting the services which
could be covered in earlier part. So any service except
when it is free of charge or under a constraint of personal
service is included in it. Since housing activity is a service
it was covered in the clause as it stood before 1993." G

15. The predicament faced by the persons who deal with
builders and promoters, was noticed by this Court in *Friends Colony
Development Committee vs. State of Orissa* [2004 (8) SCC 733]
in a different context while dealing with town planning laws ;

A "Builders violate with impunity the sanctioned building
plans and indulge deviations much to the prejudice of the
planned development of the city and at the peril of the
occupants of the premises constructed or of the inhabitants
of the city at large. Serious threat is posed to ecology and
B environment and, at the same time, the infrastructure
consisting of water supply, sewerage and traffic movement
facilities suffer unbearable burden and are often thrown
out of gear. Unwary purchasers in search of roof over their
heads and purchasing flats/apartments from builders, find
C themselves having fallen prey and become victims to the
design of unscrupulous builders. *The builder conveniently
walks away having pocketed the money leaving behind
the unfortunate occupants to face the music in the event
of unauthorized constructions being detected or exposed
and threatened with demolition.* Though the local
D authorities have the staff consisting of engineers and
inspectors whose duty is to keep a watch on building
activities and to promptly stop the illegal constructions or
deviations coming up, they often fail in discharging their
duty. Either they don't act or do not act promptly or do
E connive at such activities apparently for illegitimate
considerations. If such activities are to stop, some stringent
actions are required to be taken by ruthlessly demolishing
the illegal constructions and non-compoundable deviations.
The unwary purchasers who shall be the sufferers must be
adequately compensated by the builder. The arms of the
F law must stretch to catch hold of such unscrupulous builders.
At the same time in order to secure vigilant performance
of duties, responsibility should be fixed on the officials
whose duty was to prevent unauthorized construction, but
G who failed in doing so either by negligence or connivance."

[Emphasis supplied]

16. There is no dispute or doubt that a complaint under
the Act will be maintainable in the following circumstances :

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- (a) Where the owner/holder of a land who has entrusted the construction of a house to a contractor, has a complaint of deficiency of service with reference to the construction. A
- (b) Where the purchaser or intending purchaser of an apartment/flat/ house has a complaint against the builder/developer with reference to construction or delivery or amenities. B

But we are concerned with a third hybrid category which is popularly called as 'Joint-Venture Agreements' or 'Development Agreements' or 'Collaboration Agreements' between a land-holder and a Builder. In such transactions, the land-holder provides the land. The Builder puts up a building. Thereafter, the land owner and builder share the constructed area. The builder delivers the 'owner's share' to the land-holder and retains the 'Builder's share'. The land-holder sells/transfers undivided share/s in the land corresponding to the Builder's share of the building to the builder or his nominees. As a result each Apartment owner becomes the owner of the Apartment with corresponding undivided share in the land and an undivided share in the common areas of the building. In such a contract, the owner's share may be a single apartment or several apartments. The land-holder who gets some apartments may retain the same or may dispose of his share of apartments with corresponding undivided shares to others. The usual feature of these agreements is that the land-holder will have no say or control in the construction. Nor will he have any say as to whom and at what cost the builder's share of apartments are to be dealt with or disposed of. His only right is to demand delivery of his share of constructed area in accordance with the specifications. The builders contend that such agreements are neither contracts for construction, nor contracts for sale of apartments, but are contracts entered for mutual benefit and profit and in such a contract, they are not 'service-providers' to the land-owners, but a co-adventurer with the land-holder in a 'joint venture', in developing the land by putting up multiple-housing (Apartments) and

A sharing the benefits of the project. The question is whether such agreements are truly joint-ventures in the legal sense.

17. This Court had occasion to consider the nature of 'joint-venture' in *New Horizons Ltd vs. Union of India* [1995 (1) SCC 478]. This Court held :

B "The expression "joint venture" is more frequently used in the United States. It connotes a legal entity in the nature of a partnership engaged in the joint undertaking of a particular transaction for mutual profit or an association of persons or companies jointly undertaking some commercial enterprise wherein all contribute assets and share risks. *It requires a community of interest in the performance of the subject matter, a right to direct and govern the policy in connection therewith, and duty, which may be altered by agreement, to share both in profit and losses.* [Black's Law Dictionary; Sixth Edition, p. 839]. According to Words and Phrases, Permanent Edition, a joint venture is an association of two or more persons to carry out a single business enterprise for profit [P.117, Vol. 23]."

E [Emphasis supplied]

The following definition of 'joint venture' occurring in American Jurisprudence [2nd Edition, Vol.46 pages 19, 22 and 23] is relevant:

F "A joint venture is frequently defined as an association of two or more persons formed to carry out a single business enterprise for profit. More specifically, it is in association of persons with intent, by way of contract, express or implied, to engage in and carry out a single business venture for joint profit, for which purpose such persons combine their property, money, effects, skill, and knowledge, without creating a partnership, a corporation or other business entity, pursuant to an agreement that *there shall be a community of interest*

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among the parties as to the purpose of the undertaking, and that each joint venturer must stand in the relation of principal, as well as agent, as to each of the other coventurers within the general scope of the enterprise.

Joint ventures are, in general, governed by the same rules as partnerships. The relations of the parties to a joint venture and the nature of their association are so similar and closely akin to a partnership that their rights, duties, and liabilities are generally tested by rules which are closely analogous to and substantially the same, if not exactly the same as those which govern partnerships. Since the legal consequences of a joint venture are equivalent to those of a partnership, the courts freely apply partnership law to joint ventures when appropriate. In fact, it has been said that the trend in the law has been to blur the distinctions between a partnership and a joint venture, very little law being found applicable to one that does not apply to the other. Thus, the liability for torts of parties to a joint venture agreement is governed by the law applicable to partnerships."

"A joint venture is to be distinguished from a relationship of independent contractor, the latter being one who, exercising an independent employment, contracts to do work according to his own methods and without being subject to the control of his employer except as to the result of the work, while a joint venture is a special combination of two or more persons where, in some specific venture, a profit is jointly sought without any actual partnership or corporate designation."

(emphasis supplied)

To the same effect is the definition in Corpus Juris Secundum (Vol. 48A pages 314-315):

"Joint venture," a term used interchangeably and synonymous with 'joint adventure', or coventure, has been defined as a special combination of two or more persons

- A wherein some specific venture for profit is jointly sought without any actual partnership or corporate designation, or as an association of two or more persons to carry out a single business enterprise for profit or a special combination of persons undertaking jointly some specific
- B adventure for profit, for which purpose they combine their property, money, effects, skill, and knowledge..... Among the acts or conduct which are indicative of a joint venture, no single one of which is controlling in determining whether a joint venture exists, are: (1) joint ownership and control
- C of property; (2) *sharing of expenses, profits and losses, and having and exercising some voice in determining division of net earnings*; (3) *community of control over, and active participation in, management and direction of business enterprise*; (4) intention of parties, express or implied; and (5) fixing of salaries by joint agreement."
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(emphasis supplied)

Black's Law Dictionary (7th Edition, page 843) defines 'joint venture' thus :

- E "Joint Venture : A business undertaking by two or more persons engaged in a single defined project. The necessary elements are : (1) an express or implied agreement; (2) a common purpose that the group intends to carry out; (3) shared profits and losses; and (4) each
- F member's equal voice in controlling the project."

- An illustration of joint venture may be of some assistance. An agreement between the owner of a land and a builder, for construction of apartments and sale of those of apartments so as to share the profits in a particular ratio may be a joint venture, if the agreement discloses an intent that both parties shall exercise joint control over the construction/development and be accountable to each other for their respective acts with reference to the project.
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- H 18. We may now notice the various terms in the agree-

ment between the appellant and first respondent which militate against the same being a 'joint venture'. Firstly, there is a categorical statement in clause 24, that the agreement shall not be deemed to constitute a partnership between the owner and the builder. The land-owner is specifically excluded from management and is barred from interfering with the construction in any manner (vide clause 15) and the Builder has the exclusive right to appoint the Architects, contractors and sub-contractors for the construction (vide clause 16). The Builder is entitled to sell its share of the building as it deemed fit, without reference to the land owner. (vide clauses 7 and 13). The builder undertakes to the landowner that it will construct the building within 12 months from the date of sanction of building plan and deliver the owner's share to the land owner (vide clauses 9 & 14). The Builder alone is responsible to pay penalties in respect of deviations (vide clause 12) and for payment of compensation under the Workmen's Compensation Act in case of accident (vide clause 10). Secondly, there is no community of interest or common/joint control in the management, nor sharing of profits and losses. The land owner has no control or participation in the management of the venture. The requirement of each joint venturer being the principal as well as agent of the other party is also significantly absent. We are therefore of the view that such an agreement is not a joint venture, as understood in law.

19. What then is the nature of the agreement between the appellant and the first respondent? Appellant is the owner of the land. He wants a new house, but is not able to construct a new house for himself either on account of paucity of funds or lack of expertise or resources. He, therefore, enters into an agreement with the builder. He asks the builder to construct a house and give it to him. He says that as he does not have the money to pay for the construction and will therefore permit the builder to construct and own additional floor/s as consideration. He also agrees to transfer an undivided share in the land corresponding to the additional floor/s which falls to the share of the builder. As a result, instead of being the full owner of the land

- A with an old building, he becomes a co-owner of the land with a one-third share in the land and absolute owner of the ground floor of the newly constructed building and agrees that the builder will become the owner of the upper floors with corresponding two-third share in the land. As the cost of the undivided two-third share in the land which the land owner agrees to transfer to the builder, is more than the cost of construction of the ground floor by the builder for the landowner, it is also mutually agreed that the builder will pay the landowner an additional cash consideration of Rs.8 lakhs. The basic underlying purpose of the
- C agreement is the construction of a house or an apartment (ground floor) in accordance with the specifications, by the builder for the owner, the consideration for such construction being the transfer of undivided share in land to the builder and grant of permission to the builder to construct two floors. Such
- D agreement whether called as a 'collaboration agreement' or a 'joint-venture agreement', is not however a 'joint-venture'. There is a contract for construction of an apartment or house for the appellant, in accordance with the specifications and in terms of the contract. There is a consideration for such construction, flowing from the landowner to the builder (in the form of sale of an
- E undivided share in the land and permission to construct and own the upper floors). To adjust the value of the extent of land to be transferred, there is also payment of cash consideration by the builder. But the important aspect is the availment of services of the builder by the land-owner for a house construction
- F (construction of owner's share of the building) for a consideration. To that extent, the land-owner is a consumer, the builder is a service-provider and if there is deficiency in service in regard to construction, the dispute raised by the land owner will be a consumer dispute. We may mention that it makes no difference for this purpose whether the collaboration agreement is for construction and delivery of one apartment or one floor to the owner or whether it is for construction and delivery of multiple apartments or more than one floor to the owner. The principle would be the same and the contract will be considered as
- H one for house construction for consideration. The deciding fac-

tor is not the number of apartments deliverable to the land owner, but whether the agreement is in the nature of a joint-venture or whether the agreement is basically for construction of certain area for the land-owner.

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20. It is however true that where the contract is a true joint venture the scope of which has been pointed out in para 17 above, the position will be different. In a true joint venture agreement between the land-owner and another (whether a recognized builder or fund provider), the land-owner is a true partner or co-adventurer in the venture where the land owner has a say or control in the construction and participates in the business and management of the joint venture, and has a share in the profit/loss of the venture. In such a case, the land owner is not a consumer nor is the other co-adventurer in the joint venture, a service provider. The land owner himself is responsible for the construction as a co-adventurer in the venture. But such true joint ventures are comparatively rare. What is more prevalent are agreements of the nature found in this case, which are a hybrid agreement for construction for consideration and sale and are pseudo joint-ventures. Normally a professional builder who develops properties of others is not interested in sharing the control and management of the business or the control over the construction with the land owners. Except assuring the land owner a certain constructed area and/or certain cash consideration, the builder ensures absolute control in himself, only assuring the quality of construction and compliance with the requirements of local and municipal laws, and undertaking to deliver the owners' constructed area of the building with all certificates, clearances and approvals to the land owner.

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21. Learned counsel for the respondent contended that the agreement was titled as "collaboration agreement" which shows an intention to collaborate and therefore it is a joint venture. It is now well settled that the title or caption or the nomenclature of the instrument/document is not determinative of the nature and character of the instrument/document, though the name may usually give some indication of the nature of the docu-

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- A ment. The nature and true purpose of a document has to be
determined with reference to the terms of the document, which
express the intention of the parties. Therefore, the use of the
words 'joint venture' or 'collaboration' in the title of an agree-
ment or even in the body of the agreement will not make the
B transaction a joint venture, if there are no provisions for shared
control of interest or enterprise and shared liability for losses.

22. The State Commission and National Commission have
proceeded on an assumption, which appears to be clearly base-
less, that wherever there is an agreement for development of a
C property between the property owner and builder under which
the constructed area is to be divided, it would automatically
amount to a joint venture and there is no question of the land-
holder availing the service of the builder for consideration. Re-
liance was placed on two decisions, the first being that of the
D National Commission in *C Narasimha Rao v. K R Neelakandan*
- I (1994) CPJ 160 and the second being that of the Delhi State
Commission in *Har Sarup Gupta v. M/s. Kailash Nath & As-*
sociates - II (1995) CPJ 275. In *C Narasimha Rao*, there was
an agreement between the landowners and a builder for con-
E struction of a building and sharing of the constructed area. The
old building was demolished, but the builder failed to complete
the construction of a new building and hand over the owner's
share of flats. The landowners preferred a complaint claiming
Rs.94,000/- as the value of the *malba* (retrievable valuables
F from the debris of the old building) that had been removed by
the builder. The National Commission held that as the claim
was for recovery of the money being value of the *malba* removed
by the builder, it does not amount to a claim based on defi-
ciency of service and therefore such a claim would fall outside
the scope of the Consumer Protection Act. The said decision is
G wholly inapplicable, as it dealt with a different question. In *Har*
Swarup Gupta, the State Commission was concerned with a
claim of the landowners for compensation alleging that the
builder had not built the flats in terms of the contract under which
the landowners were entitled to 36% and the builder was en-
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titled to 64% of the built up area. The State Commission held that the complaint was not maintainable on the ground that on similar facts the National Commission in *Narasimha Rao's* case (supra) had held that the fora under the Consumer Protection Act did not have jurisdiction. But *Narasimha Rao* (supra), as noticed above, was not similar on facts, nor did it lay down any such proposition. *Har Swarup Gupta* is clearly wrongly decided.

23. We may notice here that if there is a breach by the landowner of his obligations, the builder will have to approach a civil court as the landowner is not providing any service to the builder but merely undertakes certain obligations towards the builder, breach of which would furnish a cause of action for specific performance and/or damages. On the other hand, where the builder commits breach of his obligations, the owner has two options. He has the right to enforce specific performance and/or claim damages by approaching the civil court. Or he can approach the Forum under Consumer Protection Act, for relief as consumer, against the builder as a service-provider. Section 3 of the Act makes it clear that the remedy available under the Act is in addition to the normal remedy or other remedy that may be available to the complainant.

24. The District Forum, the State Commission and the National Commission committed a serious error in wrongly assuming that agreements of this nature being in the nature of joint venture are outside the scope of consumer disputes.

Re : Second Question

25. Under the agreement, the builder is required to construct the ground floor in accordance with the sanctioned plan, and specifications and the terms in the agreement and deliver the same to the owner. If the construction is part of a building which in law requires a completion certificate or C&D forms (relating to assessment), the builder is bound to provide the completion certificate or C&D forms. He is also bound to provide amenities and facilities like water, electricity and drainage

- A in terms of the agreement. If the completion certificate and C&D forms are not being issued by the Corporation because the builder has made deviations/violations in construction, it is his duty to rectify those deviations or bring the deviations within permissible limits and secure a completion certificate and C&D forms from MCD. The builder can not say that he has constructed a ground floor and delivered it and therefore fulfilled his obligations. Nor can the builder contend that he is not bound to produce the completion certificate, but only bound to apply for completion certificate. He cannot say that he is not concerned whether the building is in accordance with the sanction plan or not, whether it fulfills the requirements of the municipal bye-laws or not, or whether there are violations or deviations. The builder cannot be permitted to avoid or escape the consequences of his illegal acts. The obligation on the part of the builder to secure a sanctioned plan and construct a building, carries with it an implied obligation to comply with the requirements of municipal and building laws and secure the mandatory permissions/certificates.
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26. The surviving prayer is no doubt only for a direction to the builder to furnish the completion certificate and C&D forms.

- E It is not disputed that a building of this nature requires a completion certificate and building assessment (C&D forms). The completion certificate and C&D forms will not be issued if the building constructed is contrary to the bye-laws and sanctioned plan or if the deviations are beyond the permissible compoundable limits. The agreement clearly contemplates the builder completing the construction and securing completion certificate. The agreement, in fact, refers to the possibility of deviations and provides that if there are deviations, the builder will have to pay the penalties, that is do whatever is necessary to get the same regularized. Even if such a provision for providing completion certificate or payment of penalties is not found in the agreement, the builder cannot escape the liability for securing the completion certificate and providing a copy thereof to the owner if the law requires the builder to obtain completion certificate for such a building.
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27. A prayer for completion certificate and C&D Forms cannot be brushed aside by stating that the builder has already applied for the completion certificate or C&D Forms. If it is not issued, the builder owes a duty to make necessary application and obtain it. If it is wrongly withheld, he may have to approach the appropriate court or other forum to secure it. If it is justifiably withheld or refused, necessarily the builder will have to do whatever that is required to be done to bring the building in consonance with the sanctioned plan so that the municipal authorities can inspect and issue the completion certificate and also assess the property to tax. If the builder fails to do so, he will be liable to compensate the complainant for all loss/damage. Therefore, the assumption of the State Commission and National Commission that the obligation of the builder was discharged when he merely applied for a completion certificate is incorrect.

Conclusion

28. The District Forum and National Commission did not examine the matter with reference to facts. The State Commission held that the complaint was not maintainable but purported to consider the factual question in a half-hearted and casual manner. The matter will now have to go back to District Forum for deciding the matter on merits. We, accordingly, allow this appeal as follows :

- a) The orders of the National Commission, State Commission and District Forum are set aside.
- b) The appellant's complaint is held to be maintainable.
- c) The District Forum is directed to consider the matter on merits and dispose of the matter in accordance with law, within six months from the date of receipt of this order.
- d) The respondents shall pay costs of Rs.25,000/- to the appellant.

S.K.S.

Appeal allowed.