

CONSUMER DISPUTES REDRESSAL
COMMISSION MAHARASHTRA STATE, MUMBAI FIRST
APPEAL NO.1249 OF 2007 Date of filing : 05/10/2007 IN
CONSUMER COMPLAINT NO.77/2007 Date of order :
25/03/2009 DISTRICT CONSUMER FORUM, PUNE @
MISC. APPLICATION NOS.1683/2007 & 344/2008

M/s.Chaitanya Engineers Contractor through its Proprietor- Shri
Pramod Baburao Mulujkar R/o. 1644, Sadashiv peth, Somnath
Smruti Apartment, 1st floor Tilak Road, Pune
411030.....Appellant/org.O.P.

V/s.

Ms.Vrushali V.Amle R/o.Survey no.18 & 19 Moze Engineering
College Near Boys Hostel, Balewadi Pune 411 045
.....Respondent/org.complainant

Coram: Justice Mr.B.B.Vagyani, Hon'ble President Shri
S.R.Khanzode, Hon'ble Judicial Member Present :
Mr.S.S.Bhalerao-Advocate for the appellant.
Mr.N.M.Shinde-Advocate for the respondent.

Oral Order: As Per Justice Mr.B.B.Vagyani, Hon'ble President

1. Heard Mr.S.S.Bhalerao-Advocate for the appellant.
Mr.N.M.Shinde-Advocate for the respondent.

2. Learned Advocate Mr.Bhalerao for the appellant forcefully
submitted that the District Consumer Forum has no jurisdiction to
entertain the complaint filed by the respondent. According to him,
the respondent should have gone to the Civil Court to redress his
grievance. We do not agree with Learned Advocate Mr.Bhalerao.
Matter pertains to the construction. Building and construction
very much falls within the purview of Consumer Protection Act,
1986. Section 3 of Consumer Protection Act, 1986 has given
additional remedy to the consumers. The consumer is to exercise
his option. Consumer has exercised his option in favour of District
Consumer Forum.

3. Learned Advocate Mr.Bhalerao then submitted that the District
Consumer Forum should not have relied upon the report of Court
Commissioner, when his request for cross examination was
rejected. Moreover, objection was raised to the report of Court
Commissioner. No doubt the prayer for cross examination was
rejected. The consumer jurisprudence is altogether different.
Consumer Forums are quasi judicial Forums. The strict law with

regard to pleadings is not applicable. Similarly, procedural law barring few provisions of CPC is not made applicable to the consumer litigation. As of right, request for cross examination in the very matter cannot be made and entertained. Appellant could have tendered the questionnaire to the Court Commissioner. That is not done. Moreover, it is not shown as to why cross examination of Court Commissioner was necessary.

4. In order to bring on record, the defects in the construction, the District Consumer Forum thought it fit to appoint an expert. Court Commissioner is a competent person. He had taken with him Shri Pawar to assist him and to take measurement. It is also material to note that in presence of both the parties, the commission work was carried out. In absence of rebuttal evidence, Court Commissioner's report can be acted and relied upon.

5. From the perusal of the Court Commissioner's report, it is noticed that because of inferior quality of plaster work, there was seepage. Seepage was noticed in the bathroom, which is below the staircase of the ground floor. Leakage is also noticed to the sink of the kitchen platform. Leakage was also noticed from the eastern, northern, southern and western walls. Leakage was also noticed from the doors and windows. Leakage was also noticed in the passage leading to bedroom on the northern side. Leakage was noticed in the balcony. Leakage was noticed from the storage water tank. Construction work is not carried out as per specification and standard. Quality of work as well as quality of building material is not maintained. As per report of Court Commissioner, an amount of Rs.1,30,000/- is required for rectification of defects. Complainant claimed Rs.1,80,000/-. District Consumer Forum has accepted the figure disclosed by the Court Commissioner. District Consumer Forum has awarded compensation of Rs.20,000/- for physical and mental harassment and thus awarded Rs.1,50,000/- to the complainant with interest @ 12% p.a. Rate of interest awarded by the District Consumer Forum is on the higher side. District Consumer Forum has not given reason as to why interest is awarded @ 12% p.a. We, therefore, modify the rate of interest from 12% to 7% p.a.

6. Learned Advocate Mr.Bhalerao relied upon the decision of Hon'ble Supreme Court in the case of Synco Industries V/s. State Bank of Bikaner & Jaipur and others reported in AIR 2002 Supreme Court 568. The facts of the said case are quite different. In the said case, detailed evidence was required and therefore Supreme Court observed that claim cannot be entertained by

Consumer Forum and the Civil suit is the proper remedy. Case in hand is simple one and can be settled on the basis of affidavits.

7. Ld. Advocate Mr. Bhalerao also placed his reliance on the decision of Hon'ble Bombay High Court in the case of Khurshed Banoo W/o. Murtaza Hasan (deceased by LRs) V/s. Vasant Mallikarjun Manthalkar (deceased by LRs) AIR 2003 Bombay page 52. The observations made in Head note (B) cannot be pressed into service. In the said case, there was no proof of evidence furnished by plaintiff to substantiate his claim. Therefore, Hon'ble High Court has observed that in absence of proof of evidence, decree cannot be passed on the basis of Commissioner's report. In the case in hand, District Consumer Forum has examined the Court Commissioner's report and thereby passed an appropriate order. In the result, we pass following order:- ORDER 1. Appeal is partly allowed. 2. Rate of interest " @ 12% p.a." in the operative part of the order is to be read as " @ 7% p.a." 3. Rest of the order stands confirmed. 4. In lieu of above order in appeal, misc. application no. 344/2008 has become infructuous and stands disposed of accordingly. 5. Misc. application no. 1683/2007 for stay stands disposed of. 6. Copies of the order be furnished to the parties. (S.R. Khanzode) (B.B. Vagyani) Judicial Member President R.B. POPAT PRACTICING C.A. [Scorecard : 54] Posted about a year ago 2009(1) Bom.C.R.(Cri.) 157 Before : Karnik D.G., J. Vasant S. Naik ... Petitioner. Versus Municipal Corporation of Greater Mumbai & anr. ... Respondents. Criminal Revision Application No. 244 of 1999, (Converted from Criminal Writ Petition No. 1491 of 1999), decided on 18-3-2008. Bombay Municipal Corporation Act, 1888, Secs. 381, 471 & 68 - Complaint to Municipal Corporation - For not waterproofing, nuisance of leakage in flat - Validity of notice for prosecution - Prosecution was launched, by Deputy Municipal Commissioner and petitioner ordered by Magistrate to pay fine of Rs. 300/- and in default to suffer simple imprisonment for 7 days - Appeal against it dismissed by Sessions Court - Contention that presentation without proper notice by Commissioner under section 381 was erroneous - Contra that notice was properly given by Deputy Municipal Commissioner, officer under powers delegated by Commissioner - Held, as per section 56 all acts of Deputy Municipal Commissioner/Additional Commissioner are deemed to be done by Commissioner. But it is to be noted that Deputy Municipal Commissioner does not get all powers of Commissioner by mere appointment as Deputy Municipal Commissioner. He is to perform all such acts which Commissioner deposes him to do

from time to time. He does not get all powers of Commissioner. Hence prosecution without valid notice from Commissioner was not proper. Revision allowed and petitioner acquitted. (Paras 5, 7, 10 & 15) Cases referred : 1. Bombay Municipal Corporation Vs. Dhondu Narayan Chowdhari, 1965 DGLS (soft) 26 : A.I.R. 1965 S.C. 1486. 2. Municipal Corporation of Greater Mumbai Vs. P.V. Sebastian, 1993(1) Bom.C.R. 717. Advocates appeared : B.G. Vaidya i/b. P.N. Shastri, for petitioner. Mrs. Aliya I. Pathan, for respondent No. 1. Mrs. M.M. Deshmukh, A.P.P., for respondent No. 2. KARNIK D.G., J.: - By this revision application, the petitioner challenges the judgment and Order dated 19th July 1999 passed by the Court of Sessions for Greater Mumbai dismissing Criminal Appeal No. 17 of 1999. That appeal was directed against the judgment and Order of the Metropolitan Magistrate, 41st Court, Shindewadi, Dadar, Mumbai dated 12th March 1999 convicting the petitioner accused of an offence punishable under section 381 read with section 471 of the Mumbai Municipal Corporation Act, 1888 (hereinafter referred to as "the M.M.C. Act"). 2. The petitioner is an occupier of flats bearing Nos. 11 and 12 situate on the 3rd floor of the building of Ramnath Co-operative Housing Society Ltd., D'Silvawadi, Prabhadevi, Mumbai. The flat below bearing No. 9 situated on the second floor of the building is in occupation of Mr. Pandit. It appears that there was leakage of water from flat Nos. 11 and 12 causing dampness in the roof and walls of flat No. 9 below, in occupation of Mr. Pandit. As the applicant was not taking remedial action for repairs despite repeated requests by Mr. Pandit, he complained to the Ward Officer / Assistant Commissioner of Mumbai Municipal Corporation. Thereupon, Mr. Pawar, sub-Engineer inspected the flat No. 9 on 28th May, 1997 and found substance in the allegation of leakage of water from flat Nos. 11 and 12 into flat No. 9. Accordingly, he submitted a report to the Assistant Engineer Mr. P.K. Desarkar, who agreeing with the report issued a notice to the petitioner on 3rd June, 1997 under section 381 of the M.M.C. Act calling upon him to discontinue and abate the nuisance (of leakage of water) by taking necessary measures of water proofing. On failure of the petitioner to respond the M.M.C., through Mr. Uday Mande, Junior Legal Assistant, launched a criminal prosecution of the petitioner for the alleged offence punishable under section 381 read with 471 of the M.M.C. Act. 3. The prosecution examined Mr. Pawar, Junior Engineer (P.W. 1), to prove the leakage and Mr. P.K. Desarkar, Assistant Engineer (P.W. 2) to prove the authorisation given to him by the Deputy Municipal Commissioner, Zone- II,

under section 68 of the M.M.C. Act. The petitioner did not adduce any evidence in defence. Considering the evidence on record, the Metropolitan Magistrate convicted the petitioner of an offence punishable under section 381 read with 471 of the M.M.C. Act and sentenced the petitioner to pay fine of Rs. 300/- and in default to undergo simple imprisonment for 7 days. Appeal filed by the petitioner, being Criminal Appeal No. 73/1999, was dismissed by the learned Sessions Judge on 19th July 1999. Aggrieved petitioner is in revision. 4. Apart from the challenge to the decision on merits, learned Counsel for the petitioner submitted that there was no proper authorisation in favour of Mr. P.K. Desarkar and he was not authorised to issue the notice under section 381 of the M.M.C. Act. As issuance of a notice under section 381 is a sine qua non for the prosecution and as no valid notice was issued by the Commissioner or a person duly authorised by him, the Order of conviction was erroneous. 5. Section 381 of the M.M.C. Act provides that the Commissioner may, by a notice in writing, to require the person by whose act, a nuisance arises, exists or continues or likely to arise and the owner, lessee and occupier of the land, building or premises on which the nuisance arises, exists or continues or is likely to arise or anyone or more of such person, owner, lessee or occupier, to remove, discontinue or abate the nuisance by taking such measures and by executing such work in such manner and in such period of time as the Commissioner shall prescribe in such notice. Section 471 of the M.M.C. Act provides that whoever contravenes any of the provisions of any of the sections of the Act or fails to comply with any requisition lawfully made upon him under any of the provisions of the Act, shall be punished for each offence with fine which may extend to the amount mentioned in the Act. 6. In order to sustain the conviction for breach of section 471 of the M.M.C. Act, the prosecution is required to prove that a proper and valid notice under section 381 of the M.M.C. Act was served on the petitioner by the Commissioner or by an officer duly authorised by him in accordance with section 68 or any other provision of the M.M.C. Act to issue the notice. It is only then that the person can be in breach for non-compliance of the notice. The question that arises for my consideration in this revision is: Whether the notice dated 3rd June 1997 issued under the signature of Mr. P.K. Desarkar, Assistant Engineer, G-South Ward was legal and valid notice - that is to say whether Mr. Desarkar was authorised to issue the said notice? 7. Section 381 of the M.M.C. Act authorises the Commissioner to issue a notice requiring the person causing nuisance to abate it. Section 381

does not explicitly authorise an officer subordinate to the Commissioner to issue the notice. Learned Counsel for the M.M.C., however, submitted that section 68 of the M.M.C. Act authorises the Commissioner to delegate any of his powers, duties and functions to any Municipal Officer by a general or special order made from time to time. She submitted that the powers were delegated to Mr. P.K. Desarkar by Deputy Municipal Commissioner, Zone-II by an order dated 13th August 1996 (Exhibit P-11). She further submitted that by reason of section 56(3) of the M.M.C. Act, all acts and things performed and done by a Deputy Municipal Commissioner during the tenure of his office are deemed to have been performed by the Commissioner. Consequently, delegation of powers to Mr. Desarkar by the Deputy Municipal Commissioner must be deemed to be delegation made by the Commissioner himself and therefore delegation was valid.

8. Section 68 of the M.M.C. Act reads as follows: "68. Delegation of powers of Municipal Authorities.- Any of the powers, duties and functions conferred upon, assigned to or vested in the Corporation the Mayor, Commissioner or the General Manager, Brihan Mumbai Electric Supply and Transport Undertaking, by or under this Act, may be exercised, performed or discharged by any Municipal Officer to whom such powers, duties and functions are delegated by the concerned authority by general or special order made, from time to time, in this behalf." Undoubtedly, by section 68 of the M.M.C. Act the Commissioner is empowered to delegate any of his powers, duties and functions conferred upon, assigned or vested in him to any Municipal Officer by a general or special order made from time to time. Admittedly, the delegation of powers to Mr. Desarkar (Exhibit P-11) is not made by the Commissioner. The same is made by the Deputy Municipal Commissioner.

9. Learned Counsel for the Municipal Corporation submitted that sub-section (3) of section 56 of the M.M.C. Act treats the Deputy Municipal Commissioner to be the Commissioner for the purpose of all the acts and things done by him under the M.M.C. Act and, therefore, the delegation by the Deputy Municipal Commissioner would be deemed to be delegation by the Commissioner within the meaning of section 68 of the M.M.C. Act. In order to appreciate the contention of the learned Counsel, it is necessary to refer to section 56 of the M.M.C. Act, which reads as follows:- "56. Functions of Commissioner, the Director and a Deputy Commissioner.- (1) The Commissioner, the Director or a Deputy Commissioner or an additional Deputy Commissioner so appointed shall be subordinate to the Commissioner and, subject to his orders, shall

exercise such of the powers and perform such of the duties of the Commissioner as the Commissioner shall from time to time depute to him: (2) Provided that - (a) Deleted (b) The Commissioner shall inform the corporation of the powers and duties which he from time to time deposes to the Director or a Deputy Commissioner. (2-A) Provided further that when an additional Deputy Commissioner or more than one additional Deputy Commissioner have been appointed, the Commissioner shall prescribe the respective spheres of duties of each of such additional Deputy Commissioners and in so doing may allot to the Deputy Commissioner or the additional Deputy Commissioner designated by him responsibility, subject to the control of the Commissioner for the Municipal Government of the suburbs in so far as such responsibility is consistent with the powers and duties deputed to him under sub-section (1). (3) All acts and things performed and done by the Director or a Deputy Commissioner and an additional Deputy Commissioner during his tenure of the said office and in virtue thereof, shall for all purposes be deemed to have been performed and done by the Commissioner.

Sub-section (1) of section 56 provides that a Director (appointed under section 54(A) or a Deputy Commissioner or an Additional Deputy Commissioner shall be subordinate to the Commissioner and subject to his orders shall exercise such of the powers and perform such of the duties of the Commissioner as the Commissioner shall from time to time depute to him. Sub-section (2) provides that the Commissioner shall inform the corporation of the powers and duties which he from time to time deposes to a Director or a Deputy Commissioner. Sub-section 2-A provides that when an additional Deputy Commissioner or more than one additional Deputy Commissioner have been appointed, the Commissioner shall prescribe the respective duties of each of such additional Deputy Commissioners. Sub-section (3) provides that all acts and things performed and done by the Director or the Deputy Commissioner and additional Deputy Commissioner during his tenure of the said office and in virtue thereof shall for all purposes be deemed to have been performed or done by the Commissioner.

10. It may be noted that under sub-section (1), a Deputy Commissioner does not merely, by virtue of his appointment as a Deputy Commissioner, get all the powers of the Commissioner. He exercises such powers and performs such of the duties of the Commissioner as the Commissioner shall from time to time depute to him. The Commissioner may delegate all or only some of the powers to the Deputy Commissioner and/or an Additional Deputy Commissioner and reserve the remaining

powers in himself. Sub-section (2) further requires the Commissioner to inform the corporation which of the powers or duties he has deputed (delegated) to the Deputy Commissioner. This clearly indicates that the Commissioner is not bound to delegate all or any of the powers to the Deputy Commissioner. Sub-section 2-A also provides that when an additional Deputy Commissioner or more than one additional Deputy Commissioner are appointed, the Commissioner may prescribe the respective spheres of operation of them meaning thereby he may delegate some powers to the Deputy Commissioner and some powers to the additional Deputy Commissioner or additional Deputy Commissioners and he may retain some powers to himself without delegating them to the Deputy Commissioner or an additional Deputy Commissioner. When sub-section (3) says that all acts and things performed by the Deputy Commissioner or an additional Deputy Commissioner shall be deemed to have been performed and done by the Commissioner, it obviously means the acts done by the Deputy Commissioner or an additional Deputy Commissioner by virtue of the powers delegated to him under sub-section (1). The Deputy Commissioner cannot perform any functions which have not been delegated to him by the Commissioner under sub-section (1). Sub-section (3) only means that the acts done by the Deputy Commissioner or an additional Deputy Commissioner in respect of powers delegated to him shall be deemed to be acts of the Commissioner. The Deputy Commissioner has no power to perform any act, duty or function of the Commissioner which has not been delegated to him by the Commissioner under sub-section (1) of section 56. A fortiori, an act performed by the Deputy Commissioner without delegation under sub-section (1) of section 56 would not be regarded as done by the Commissioner by reason of the deeming provision contained in sub-section (3) of section 56. 11. In the present case, the prosecution has not produced on record any delegation made by the Commissioner to the Deputy Commissioner. Not even a copy of any delegation by the Commissioner to the Deputy Commissioner is produced on record, much less is it proved. The prosecution was required to prove that the Deputy Commissioner had the powers delegated to him under section 381 of the M.M.C. Act. If such a delegation was proved, then a further delegation by him to Mr. P.K. Desarkar by order dated 10th August 1996 (Exhibit P-11) could be regarded as a delegation by the Commissioner himself by reason of the deeming provision of section 56(3) of the M.M.C. Act. In the absence of the proof that the Commissioner had delegated his power to issue notice under

section 391 to Deputy Commissioner, the delegation by the Deputy Commissioner to Mr. P.K. Desarkar cannot be regarded as delegation under section 68 of the M.M.C. Act. 12. Learned Counsel for the Municipal Corporation invited my attention to a decision of the Supreme Court in (Bombay Municipal Corporation Vs. Dhondu Narayan Chowdhari)¹, 1965 DGLS (soft) 26 : A.I.R. 1965 S.C. 1486. In that case, one Govind Hari was a monthly tenant of a room in a chawl belonging to the Municipal Corporation. After his death in 1961, the tenancy devolved on his widow who took in a boarder. Proceedings for her eviction were initiated under Chapter VI-A of the M.M.C. Act by an officer to whom the powers of the Commissioner were delegated under section 68 of the M.M.C. Act. It was contended that the power of taking eviction proceedings was a quasi judicial power and could not have been delegated under section 68. Rejecting the contention, the Supreme Court held that though the quasi judicial power cannot ordinarily be delegated unless the law expressly or by clear implication permitted it, sections 105-D and 105-E of the M.M.C. Act indicated legislative intention that the judicial or quasi judicial powers contained in Chapter VI-A were intended to be delegated. The issue before me is not whether the power could be delegated by the Commissioner to the Deputy Commissioner, but is whether there is any material on record to show that the powers were in fact delegated by the Commissioner to the Deputy Commissioner. I have already held that there is no material on record to prove the delegation. Consequently, the decision is of no assistance to the Municipal Corporation. 13. Learned Counsel for the Municipal Corporation also referred to and relied upon a decision of this Court in (Municipal Corporation of Greater Mumbai Vs. P.V. Sebastian)², 1993(1) Bom.C.R. 717. There is some reference to delegation of powers to the Deputy Commissioner under section 56 of the M.M.C. Act. However, in that case, it appears that there was no dispute as to the fact whether the powers were delegated by the Commissioner to the Deputy Commissioner under section 56(1) of the M.M.C. Act. That appears to have been an undisputed position. In the circumstances, that decision is also of no assistance to the respondent. 15. In my view, the prosecution has failed to prove that Mr. P.K. Desarkar was authorised to issue notice under section 381 of the M.M.C. Act. Consequently, it is not proved that the petitioner has failed to comply with a legal and valid notice issued under section 381 of the M.M.C. Act. The revision application is accordingly allowed and the petitioner is acquitted of all the charges. Fine, if it has been paid, be refunded to the

petitioner. Revision application allowed. -----

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