

(1993) 01 NCDRC CK 0008

In the National Consumer Disputes Redressal Commission

BHAGWAN BHATTA UDYOG MANDAL

APPELLANT

Vs

CHEEMA ENGINEERING SERVICES (P) LTD.

RESPONDENT

Date of Decision : 07-01-1993

Acts Referred:

Citation : 1993 3 CPJ 1466 : 1994 1 CLT 50

Hon'ble Judges : S.S.Sandhawalia , Basanti Devi , S.Kulwant Singh J.

Final Decision : Preliminary Objections rejected

Judgement

1. FOR the limited purpose of adjudicating on the preliminary jurisdictional objections, it is unnecessary to delve deeply into the facts and the merits of this complaint. It suffices to mention that the complainant-concern obtained its registration from the Registrar of Cooperative Societies on the 26th of April, 1990 vide Annexure P.1. Annexures P.2 & P.3 are the Memorandum of Association and the Rules and Regulations of the complainant-Mandal. The basic plea is that the present complainant is a non-profit earning organisation and any surplus sums remaining after meeting the cost and other huge expenses are to be utilised for the promotion of Khadi and Village Industries and conducting training centres therefor and other social purposes like the eradication of untouchability, improvement of the conditions of the down-trodden etc. It is pointed out that none of the members of the Society is permitted to have a share of the surplus profits if any and there is further restriction of earning surplus of a profits of more than 5% of the sale and the Mandal is barred from selling its products at a price exceeding either the cost price or 20% over and above the same. Even if the Mandal is wound up, the surplus if any left cannot be distributed amongst the members but has to be handed over to some other body having similar objects. In sum, the stand is that the complainant is a Khadi and Village Industry with no profit motive and runs on a "no profit no loss basis."

2. THE complainant-Mandal on the basis of news items and advertisement in Newspapers made enquiry with regard to the machine called "Brikman" manufactured by the Opposite Party which was claimed to manufacture excellent

bricks of uniform size out of mud, straightway without requiring any kneading etc. In pursuance thereof, Mr. Apjinder Singh Cheema, a Director of the Opposite Party visited the premises of the complainant-Mandal in June, 1990 and a decision was taken to buy a machine and a sum of Rs. 5,000/- was paid over to the said Mr. Cheema on the 10th of June, 1991 at Jind itself vide receipt Annexure P.8. THE said machine carried a guarantee for a period of one year from the date of its delivery and subsequently the complainant paid a total sum of Rs. 1,95,000/-vide receipts Annexures P.10 to P.13. THE primal allegation is that the said machine was totally defective and did not even remotely measure up to the claim with regard to its capacity to manufacture bricks either in their quantity or in their quality. THE complainant protested to the opposite party with regard to the alleged manufacturing defects in the building of the machine. It was consequently taken back to the premises of the opposite party at Bazpur and thereafter brought back to Jind after replacement of certain parts. However, even thereafter, the same did not at all function satisfactorily and consequently the present complaint has been filed to claim compensation to the tune of Rs. 5,75,000/-. Documents Annexures P. 1 to P.22 are annexed in support of the complaint. On notice being issued a written statement has been filed raising a number of preliminary jurisdictional objections. Firstly on the basis of R. 1 to R. 3 being the Order Acceptance slip and a copy of the invoice and that of the challan respectively. It is pleaded that this Commission has no territorial jurisdiction because these documents contained a clause to the effect -"All Disputes Subject to Kashipur Jurisdiction." Secondly, it is pleaded that the machine was purchased by the complainant for a commercial purpose. Reliance is placed on Annexures R. 4 and R. 5 therefor. Unavoidably, the stand is that the complainant would not come within the ambit of a consumer. Lastly, objection is that no part of the cause of action has arisen within the State of Haryana, therefore, the complaint should not be entertained.

Mr. R.S. Ghuman, the learned Counsel for the Opposite Party had with great ability and persistence projected the plea that the territorial jurisdiction for the present case was confined only to Kashipur. It was submitted on the basis of R. 1 and R. 3 that all of them have a foot-note carrying the words "All Disputes Subject to Kashipur Jurisdiction". On that basis the plea was that whatever the nature of disputes, whether in the consumer field or in the Civil Courts, the same had to be tried in Kashipur alone. Reliance was placed on 1992 Consumer Protection Cases 536, M/s. Yamuna Diagnostics of Yamuna Nagar v. Phillips India, Peico Electronics and Electricals Ltd. and 1992 Consumer Protection Cases, 344 Simla Development Authority v. Yashpal Dass & Ors.

3. ON the other hand, Mr. Randip S.Surjewala, with equal ability and great erudition, had relied on a catena of authorities for his plea that the aforesaid foot notes to R. 1 to R. 3 were either not binding or in the alternative did not imply a categorical exclusion of all other jurisdictions because the conclusive words "only", "alone" or "exclusive" had not been used therein. In the alternative, it was argued that herein, we are in the consumer jurisdiction and in fact there was

no such alternative redressal Commission functioning at Kashipur itself to conform to the clause. ON that ground also it was alleged that the stipulation would become non-est. Though the matter was canvassed before us at great length with a plethora of authorities it seems unnecessary to now advert to the same because we are of the view that the matter is concluded in favour of the complainant by the somewhat recent observations of final Court in A.B.C. Laminart Pvt. Ltd. v. A.P. Agencies, Salem, AIR 1989 SC 1239, The relevant observations merit notice in extenso : "xx xx xx As regards construction of the ouster clause when words like "alone", "only", "exclusive", and the like have been used there may be no difficulty. Even without such words in appropriate cases the maxim "expressio unius est exclusio alterius" - expression of one is the exclusion of another may be applied. What is an appropriate case shall depend on the facts of the case, xx xx The question then is whether it can be construed to have excluded the jurisdiction of the Court at Salem. In the clause "any dispute arising out of this sale shall be subject to Kaira jurisdiction" ex facie we do not find exclusive words like "exclusive", "alone" "only" and the like. Can the maxim "expressio unius est exclusio alterius" be applied under the facts and circumstances of the case? The order of the confirmation is of no assistance. The other general terms and conditions are also not indicative of exclusion of other jurisdictions. Under the facts and circumstances of the case we hold that while connecting factor with Kaira jurisdiction was ensured by fixing the situs of the contract within Kaira, other jurisdictions having connecting factors were not clearly, unambiguously and explicitly excluded. That being the position it could not be said that the jurisdiction of the Court at Salem which Court otherwise had jurisdiction under law through connecting factor of delivery of goods threat was expressly excluded."

4. IN view of the aforesaid ratio, it seems unnecessary to elaborate the matter. It suffices to say that on an overall view of all the pleadings in the present case, we are unable to hold that there has been a categorical exclusion of all other jurisdictions. IN the absence of the additional words "only" or "alone, the basic plea of Mr. Ghuman, therefore must fail against the overwhelming weight of the precedents of the Apex Court. In view of the aforesaid conclusion it seems unnecessary to adjudicate on the somewhat interesting and alternative argument of Mr. Sujewala that the clause would not be applicable to the consumer jurisdiction at all because no such forum in the shape of a State Commission existed at Kashipur proper itself. Mr. Ghuman had then contended that on the complainant's own showing there was some element of profit motive either in the use of the machine or in the objects of the Mandal and therefore, the purchase must be considered as one for a commercial purpose. On that plea it was contended that the complainant does not come within the ambit of a consumer and therefore, disentitled to invoke this beneficent jurisdiction.

5. RELIANCE was placed on I (1991) CPJ 499 (NC), Synco Textiles Pvt. Ltd. v. Greaves Cotton & Company Ltd. and I (1992) CPJ 195 (NC), M/s. Star Paper Mills Ltd. v. M/s. Batlibai & Co.; and II (1991) CPJ 71, M/s. Spia Plastic Industries v. M/

s. Karthika Heavy Equipment Tools Engineering & Ors.

6. THERE can possibly no quarrel now with the proposition that if the machine in question had been purchased for a commercial purpose, the complainant would have to be necessarily non-suited. However, it is equally well-settled that to determine the same, certain well-known tests would have to be applied. The threshold one is whether the purchaser's intent was to earn profits and secondly whether the activity was on a scale so large as to leave no manner of doubt about its commercial aspect. Lastly, a close and direct nexus betwixt the object of purchase and the purpose has to exist and a more collateral purpose would not non-suit a consumer. Applying these tests, it would appear on the present record that the complainant-organisation would not fall within the net of a commercial organisation as such. Our attention was drawn by Mr. Surjewala to Annexure P.2 being the very Memorandum of the Association of the Mandal and equally to its rules and regulations Annexure P.3. It is common ground that the complainant is a body falling within the ambit of Khadi & Village Industries Commission Act, 1956. The primal objects in Annexure P.2 which is the Memorandum of Association, would indicate that the same is indeed far from being purely a commercial body. The primal functions to which reference may be made are to start; encourage, assist and carry an Khadi & Village Industries; to render assistance as may be necessary to persons engaged in Khadi & Village Industries; to organise and aid societies and registered institutions for Khadi & Village Industries and to conduct training centres etc. It is then mandated that the income and property of the society shall be applied solely towards the promotion of the objects of the society as set-forth in the Memorandum of Association, and no part thereof shall be paid or transferred by way of profit to the members of the society. And further, the society is required to apply its income in promoting its objects and even on dissolution its assets shall not be paid or distributed against the members of the society but shall be given or transferred to some other Institutions having similar objects. Corresponding rules and regulations which are all a pointer to the fact that the Mandal is not a profit making organization exist in Annexure P.3 a copy of its rules and regulations. Now apart from the above, on the present re cord it could not be shown on behalf of the opposite parties that the alleged activity of the complainant was on so large a scale as to merit the label that the purchase of the machine was necessarily for a commercial purpose. Equally the test of a close and direct nexus could not be established by the opposite party at this threshold stage. The second preliminary objection raised must therefore also fail. 13. Lastly, the plea taken on behalf of the opposite party was that no part of the cause of action has arisen within the State of Haryana and therefore, under Section 11 of the Consumer Protection Act this Commission would have no jurisdiction. This submission has however only to be noticed and rejected. On the present pleadings it is the case that the advance for the purchase of the machine was paid to a representative of the opposite party at Jind in Haryana itself. Equally the order acceptance slip is also averred to have been issued at Jind. It is the

complainant's case that the machine was delivered by the opposite party at Jind itself. It is then common ground that the machine was working at Jind and any defects therein have arisen there only. Consequently, it has necessarily to be held that a part of the cause of action did arise within the State of Haryana. The matter would thus be squarely within the ambit of Section 11 and the objection on this score has therefore, to be over-ruled. 14. For the foregoing reasons, all the preliminary objections fail and are hereby rejected. The complaint will now proceed for its trial on merits. Preliminary Objections rejected. _____