

(2016) 02 NCDRC CK 0032

In the National Consumer Disputes Redressal Commission

Case No : 2038 of 2015

BIG CINEMAS & ANR.

APPELLANT

Vs

MANOJ KUMAR

RESPONDENT

Date of Decision : 01-02-2016

Acts Referred:

[Central Excise Act, 1944](#), [Section 4A](#) -
Valuation of excisable goods with reference to retail sale price

Citation : 2016 2 CPR 84

Hon'ble Judges : J.M. Malik, Dr. S.M. Kantikar

Advocate : Buddy Ranganadhan, Malavika Prasad, D.V. Raghu Vamsy, Umesh Nagpal, Rajeev Mehra, Manish Jha, Shruti Aggarwal, Sanjib K. Mohanty

Judgement

1. The main question in this case, swirls around the question, "whether, a "service provider", can charge more than the MRP fixed on the water bottle of "Acquafina?". The other question which falls for consideration is, whether, "service provider" in the Cinema Halls can have MRP written, different from the ordinary shops or ordinary MRP?".

2. In this case, the case of Sh. Manoj Kumar, the complainant, is that MRP of an "Aquafina" bottle is Rs.16/-. On 11.08.2012, he went to see a movie in Big Cinemas, Jaipur. He felt thirsty and purchased a bottle of "aquafina" from counter of Big Cinemas, OP-1. The OP-1 issued Invoice and charged Rs.30/- from the complainant. The said bill "Tax Invoice", Big Cinemas Cinestar, Reliance Mediaworks Ltd., in the sum of Rs.30/- has been placed on record as Annexure -1, which goes to show that the price of "Aquafina" is Rs.26.09, Tax - Rs. 3.91, total being, Rs.30/-. The allegation of the complainant is that he wanted to make a complaint in the complaint book, but the same was not given to him.

3. The defence of the OPs is that for the bottles which are used/ sold in the Cinema Halls, the MRP is Rs. 30/-. It has purchased these bottles from Varun Bevarages (International) Ltd., (Trading Division), Vidhyadhar Nagar, Jaipur, where, the MRP has been shown as Rs.30/-, at the instance of "Aquafina -

Pepsico Company". However, there is no such proof on record. It was also contended that there are two types of MRPs, i.e., one for the Cinema Halls and the other for the ordinary people. Before the District Forum, the petitioners/OPs' defence was that they have made adequate provisions for free drinking water and the visitors in the cinema hall were not forced to purchase the water bottle from the counter. They denied the allegation that the MRP printed on the water bottle was Rs.16/-. They also denied that their staff were rude to the complainant.

4. The District Forum allowed the complaint and passed the following orders :-
"Therefore, on the basis of all these discussions, the Complaint of Complainant is partly allowed and it is ordered that the Opponents jointly and severally are liable and they are directed to pay an amount of Rs.14/- (Rupees Fourteen only), recovered in excess from the Complainant, within one month from today, failing which, the Complainant will be entitled to receive interest thereon at the rate of 12 percent per annum, from the date of filing of this Complaint, till payment. Besides this, the Opponents are directed to pay Rs.5,000/-, (Rupees Five thousand only) for mental agony and compensation for financial loss and Rs.1,500/- (Rupees One Thousand Five Hundred only) for costs of this complaint. The other prayers of Complainant are rejected".

5. Aggrieved by that order, an appeal was preferred before the State Commission by the OPs. The State Commission dismissed the appeal. Thereafter, the present revision petition has been filed.

6. We have heard the counsel for the parties and gone through the written synopses filed by the petitioners. It may also be mentioned here that watching the seriousness of this case, we also summoned the Director, Weights & Measures, M/s. Pepsico India Holdings Pvt. Ltd., for explanation simpliciter and Director of Legal Metrology, Department of Consumer Affairs, Ministry of Consumer Affairs, Food and Public Distribution.

7. Learned counsel for the petitioners vehemently argued that there are two kinds of MRPs, one is for the ordinary people, ordinary shops and its MRP is Rs.16/- per bottle of "aquafina" and the other for Cinema Halls, etc., and its MRP is Rs.30/- per Aquafina bottle. He further contended that it is a specific case of the petitioners that the complainant purchased a bottle not from the petitioners in the Big Cinemas Hall, but purchased the same by going outside the Big Cinemas, at a lower MRP and filed a false and frivolous case before the District Forum.

8. Moreover, we also do not find any evidence in this respect. This is merely an assumption and not supported by any proof. The story that the complainant purchased one another bottle from a shop outside the Cinema Hall is not only made out of whole cloth but it is an after-thought.

9. The second contention raised by him was that the complainant has filed numerous such other complaints, not only against the Big Cinemas but also

against the other business centres. The Tabular statement of complaints" proceedings filed by the complainant has been annexed with this complaint, marked as Annexure - B. It is also argued that the complainant is a habitual litigant who has sought to make business of similar proceedings and on that ground only, the version of petitioners should be accepted. It was also argued that the same Advocate filed all these proceedings.

10. All these arguments have been raised for their outright rejection. "Will a "consumer" allow the OPs to commit illegalities, time and again?". On the contrary, it appears that the complainant is a vigilant person, whistle blower and wants to bring this mal-practice to an end. "Can anybody on earth, ask an Advocate, not to accept such like cases and not to play the game of "cut and paste"?. The litigants are always interested to engage an Expert Advocate. Even though, all the cases have got similarities, but this argument has to be eschewed out of consideration.

11. It is submitted that the complainant is not a "consumer" and has cited an authority of the Delhi High Court reported in Writ Petition (C) No.11689-90 of 2006, titled Delhi Gymkhana Club Vs. Union of India. The facts of that authority are different. It was held that consumption of any refreshments or beverages by a Member or a Guest at a Club would not bring him within the definition of "consumer". The facts of that case are entirely different. There is relationship between the "consumer" and the "service provider", between the parties. Consequently, this argument deserves no consideration.

12. Lastly, it was contended that there is no principle of law or legal proposition to have different MRPs for sale of a product inside an establishment and outside it. The Central Government has admitted that there is no bar also, under the Legal Metrology Act, 2009 or the Rules framed thereto have different MRPs. The attention of this Commission was also invited towards Section 4A of the Central Excise Act, 1944, wherein, it is stated that Explanation to II (c) of Sub-section 4 of Section 4A, categorically contemplates different sale price for the same product for sale at two different outlets.

13. Now, we turn to the affidavit filed on behalf of M/s. Pepsico India Holdings Pvt. Ltd. They admitted that they are the manufacturers of the said "aquafina". It is stated that they are not concerned with this case and they should be discharged. It was also argued that in view of Mrs. Rubi (Chandra) Dutta Vs. United India Insurance Co. Ltd., 2011 ACJ 2310 , this Commission has got the limited jurisdiction. It is stated that only when one MRP is fixed on such like bottles, it is only Rs.16/-. The two bottles produced by the complainant in the Commission having two different MRPs are manipulated ones. In its written arguments, PEPSICO, on the one hand, has mentioned that the MRP fixed by them is @ Rs.16/-, and on the other hand, they have called into question, the jurisdiction of this Commission. They have stated that there are two MRPs which can be fixed. The "flip-flop" stand taken by them does not go to help the legal proceedings. They have created a doubt, "whether, they are working in cahoots

with the people like petitioners or not?". It is rightly argued that the jurisdiction of this Commission as a revisional court, is limited. There lies no rub in getting the explanation from the main players. The counsel for the petitioners has failed to substantiate his case. Also, we cannot take any action against PEPSICO, but we warn them hereby to have one MRP on the same product at different outlets or otherwise, within the parameters of law. The consumer court will not allow the petitioners/ OPs as well as anybody else, to lead the gullible people, up the garden path. In its written arguments, PEPSICO took the stand, as follows :-

"9. Pertinently, petitioners did not take the stand in the written statement - which they now sought to take before this Hon"ble Commission - that the complainant purchased the subject bottle from the petitioner in cinema and may have gone out of the cinema theatre, purchased a water bottle from outside, at a lower MRP and filed a false and fraudulent case before the District Forum. Neither any document was produced by the petitioners to support this contention nor was the complainant cross-examined on this aspect. In fact, petitioner neither denied the water bottle nor the receipt produced by the complainant before the District Forum. Petitioners could have easily refuted the contention of the complainant by producing the water bottle sold from their counter, but they failed to do so.

19. On 17.11.2015, this Hon"ble Commission, while issuing notice in the present matter, directed the petitioners to produce certificate from the wholesalers to know as to what was the MRP on the disputed date and the bottles of that batch, if available. It seems that the petitioners have failed to produce the certificate and the bottles, as directed.

21. From the respective contentions raised by the parties before the District Forum and the State Commission, it is clear that the petitioners had failed to produce the contemporaneous "aquafina" water bottle sold at their cinema premises. The production of contemporaneous Aquafina water bottle would have substantiated the petitioner"s

contention that the respondent produced Aquafina water bottle different from one available at the petitioner"s premises. Petitioner"s failure to do so, has gone against them and the District Forum as well as the State Commission believed the contention of the complainant that the picture of water bottle purchased from the petitioner"s premises. Even the petitioners" argument that the bill of M/s. Sellwell shows MRP of Aquafina bottle at Rs.30/-, was rejected by the State Commission on the ground that the said bill do not record the MRP of Aquafina water bottle at Rs.30/-. In view of the aforesaid, it is clear that the petitioners failed to substantiate their contention either before the District Forum or before the State Commission".

27 . The Hon"ble Supreme Court in Pallavi Refractories & Ors. VS. Singareni Collieries Co. Ltd., 2005 (2) SCC 227 at para 19, while upholding the legality of dual pricing, has held :-

"There is no such law that a particular commodity cannot have a dual fixation of price. Dual fixation of price based on reasonable classification from different types of customers has met with approval from the courts. Monopolistic organisations, like Electricity Boards, Petroleum Corporations are having dual price fixation. It is a common feature that Electricity Boards which generate power, sell the power at different rates to different types of customers, such as, domestic, agricultural and industrial consumers. Even different types of industries are charged different rates".

"28. Indeed, compared to cinema halls, normal retail stores or outlets, outside the cinema hall, do not charge Pepsico for keeping their packaged water bottle, and therefore, the MRP of the Aquafina water bottle available at such retail stores are priced lesser in comparison to Aquafina available at cinema halls".

" 30. "Maximum Retail Price" is defined under the Legal Metrology (Packaged) Commodities Rules, 2011 ("Rules), as :-

The maximum price at which the commodity in packaged form may be sold to the ultimate customer and the price shall be printed on the package, in the manner Maximum or Max, retail price Rs.... Inclusive of all taxes or in the form MRP Rs. ---- inclusive of all taxes".

14. It was also argued that the present complaint is not maintainable and there is no unfair trade practice. In *Pustak Mahal (Supra)*, while interpreting Section 2(1) (r) ix), this Hon"ble Commission has held as under :-

" 8. Here, in this case, we do not see how this clause is applicable. There is no question of misleading the public concerning the price at which products or like products, namely, books are to be sold. There is no restriction on the publisher to increase the price of the book. Both the parties knew the price being charged, there were no misrepresentation or misleading factors are involved and since it was an agreed and voluntary contract, there is no question of any unfair trade practice".

15. Similar view was taken in *Travel Agents Federation of India (Supra)*. In the matter of *Goa Bottling Co. Ltd. (Supra)*, the Customs, Excise and Gold (Control) Appellate Tribunal has recognised the factum of different MRPs, for the same packaged product.

16. Again, Sh. B.N. Dixit, the Director of Legal Metrology Department, Department of Consumer Affairs, M/o Consumer Affairs, Food & Public Distribution, has also filed written submissions. In his affidavit, he has referred to various Sections of Legal Metrology Act, 2009 (1 of 2010). It is submitted that Section 4A of the Central Excise Act, 1944 (as amended from time to time), which utilises the Legal Metrology (Packaged) Commodities Rules, 2011, for the purpose of levying of excise duty on basis of maximum retail sale price, a mandatory marking required on all packaged commodities. He has also referred

to three authorities of the Hon"ble Supreme Court, reported in (1) India Photographic Co. Ltd. Vs. H.D. Shourie, AIR 1999 SC 2453, decided on 03.08.1999 (2) Whirlpool of India Ltd. Vs. Union of India & Ors., AIR 2008 SC 397, dated 02.11.2007 and (3) M/s. Jayanti Food Processing (P) Ltd. Vs. Commissioner of Central Excise, (2007) 8 SCC 34, dated 22.08.2007. Further, he has also referred to a judgment of this Commission decided by this Bench, in D.K. Chopra Vs. Snack Bar, Chennai Airport, (RP No.4090/2012) , where, this Bench had imposed costs of Rs.50.00 Lakhs and had held that the Airport authority cannot disturb the MRP rates. It subsequently, transpired that that the said order of this Bench, was stayed by the Delhi High Court.

17. The affidavit further mentions about other various judgments. The judgment dated 09.04.2008 by 2-Judge Bench of Kerala High Court in W.A. No. 218 of 2003 in the matter of Union of India & Ors. Vs. Godrej - GE Appliances Ltd. & other connected cases, reported in 2009 (235) ELT 435, ILR 2008)3) Kerala 102, 2008 (2) KLJ 716 and 2008 (3) KLT 694 and judgment dated 11.02.2005 of the Delhi High Court in LPA 334/2007 & 343/2007 in Union of India Vs. Federation of Hotels & National Restaurant Associations wherein the court held that packaged water cannot be sold over MRP.

18. It was contended that all packaged commodities, including the petitioner's products in pre-packaged form are covered under the definition of pre-packed commodity in Section 2(1) of the Legal Metrology Act, 2009 and the petitioners are required to comply with the provisions of the Act and Rules. The manufacturer/ importer, packer, is required, as per Rule 6 of the Rules to declare on packages the following mandatory information for the benefit of the consumer :-

"a) Name & address of the Manufacturer / Packer / Importer.

b) Common or generic name of the commodity contained in the package.

c) Net quantity of the commodity contained in the package or where commodity is packed or sold by the number, the number of commodity contained in the package shall be mentioned.

d) Month and year of manufacturing / pre-packing / importing.

e) Retail sales price of the package (as maximum retail price Rs. ____, inclusive of all taxes)

f) Dimensions of the commodity where the sizes of the commodity contained in the package is relevant".

19. The exemptions are provided in Rule 6(2). However, the counsel for the petitioners could not show that the case falls under the exemptions.

20. Instead of touching the heart of the problem, the counsel for the PEPSICO has set up a "but and ben" stance. They were just called to explain the position, but they have taken so many objections, merely for the sake of cavil. The OPs

have cited authorities which hardly dovetail with the facts of this case.

21. There cannot be two MRPs, except in accordance with the law. The whole gamut of the facts and circumstances, detailed above, clearly leans in favour of the Metrology Department. The MRP of Rs.30/- is of their (OPs) own making. That MRP was not made / sanctioned by the Manufacturers. The complainant should have made PEPSICO and Varun Beverages (International) Ltd., as parties in this case. The Learned Director of Legal Metrology should wake up, make an enquiry and take legal action against the wrong doers. This is well said that "money is a bottomless sea, where, honour, conscience and truth may be drowned".

22. Keeping in view the facts and circumstances, we affirm the order passed by the fora below and impose further costs in the sum of Rs.5,00,000/- on the petitioners because they must have made illegal enrichment by charging/ extorting money from their customers. The said amount be deposited with the Consumer Legal Aid Account of this Commission, within 90 days from today, failing which, after the expiry of the said period, it will carry interest @ 9% per annum, till its realization.

23. It is thus made clear that we are not deciding, whether, there is any unfair trade practice on the part of PEPSICO. They are not a party to the present case and we cannot take any action against them and there can be no fault attributed to them. They have nowhere stated that they have got two MRPs in the case of "Aquafina" water bottle. They are conspicuously silent about it. The silence on their part is pernicious for the petitioners. The case against the petitioners stands fully proved.