

(2002) 11 NCDRC CK 0093

In the National Consumer Disputes Redressal Commission

BOMBAY BRAZZERIE

APPELLANT

Vs

MULCHAND AGARWAL

RESPONDENT

Date of Decision : 07-11-2002

Acts Referred:

Citation : 2003 1 CLT 294 : 2003 1 CPJ 4

Hon'ble Judges : D.P.Wadhwa , J.K.Mehra , B.K.Taimni J.

Final Decision : Appeal allowed

Judgement

1. IT is the opposite party, the Hotel, who is the appellant before us. There were two complainants, one was Mulchand Agarwal, whose car was stolen from the parking lot of the appellant and the second was the Insurance Company with which said car was comprehensively insured.

2. APPELLANT is running Hotel in Mumbai. Complaint was that Mulchand with his friend visited the Hotel of the appellant for food. He parked his car in the premises of the Hotel of the appellant. At the time of parking a token was given to him by the attendant of the parking lot. On this token it was written as under : "No. B. 11896 Date and time Parked by Car No. 9729 Please produce this to get your car. Management does not accept responsibility for any Theft/ Damage/Loss."

When Mulchand Agarwal came back from the Hotel he found his car missing from the parking lot. Mulchand lodged a complaint with the appellant for the loss of the car. It was the contention of the complainant that because of the negligence on the part of the appellant that his car was stolen. To meet the issue of consideration, plea taken was that when Mulchand visited the Hotel it was for taking food and charges for food included service rendered by the appellant for keeping the vehicle of the customer in the Hotel premises. It was the contention of Mulchand that it was obligation of the Hotel management to compensate him for the loss of his car which was stolen from the parking lot of the appellant's Hotel. His further contention was that Hotel of the appellant was luxury Hotel and the appellant was under obligation to take care of his car parked in the premises

of the Hotel and since the car was in the custody of the Hotel from where it was stolen it was for the appellant to compensate the complainant Mulchand for the loss of his car.

Case of the complainant as reflected in the complaint was that "the driver of the opposite party (Hotel) approached the complainant and requested the complainant to leave the car and told him that he will park the car at proper place since the opposite party provides free car parking facility to its guests". To this it was added that the cost of the food which the complainant took in the Hotel included the service charges which in turn including consideration for the parking of his car in the Hotel premises without payment of any separate charges. Lastly, it was submitted that it was the obligation of any luxury Hotel to provide facility of parking to the guests and there was obligation to take care of the vehicle so parked in the premises of the Hotel. It was further submitted that not only that the appellant charges high rates, complainant selected the Hotel of the appellant because of parking facility and other amenities available. At the gate employee of the appellant took the key of the car from him and issued him token. It was the duty of the appellant to return the key and car to Mulchand against token. There was a failure and breach of the duty when car was handed over to somebody else without taking the token from that unauthorised person. Appellant was thus negligent and careless and provided deficient service.

3. APPELLANT, Hotel, referred to the token given to Mulchand at the time of parking of his car where on the face of the token itself was clearly written "Management does not accept responsibility for any Theft/Damage/Loss". Mulchand did not pay any amount for parking of the car and in fact it was his own case that it was a free parking. Complainant though paid for his food consumed in the Hotel but no separate charge was paid by him for parking of his car. It was contended by the Hotel that when a customer comes to the Hotel and parks his car it was not necessary that he must consume food there and pay for that. A person visits the Hotel for various reasons. Some come on foot as well. It could not be said that a person who comes on foot and consumes his food would have the price for free parking included in the food consumed by him. Admittedly it was a free parking facility given by the Hotel to the customer or even to visitor coming to the Hotel. In fact, it was the contention of the appellant that it was not necessary that everyone who visits the Hotel would have food and there were people who were visiting just for the purpose of making telephone call or making certain queries or to meet the guests staying there. There are people who visit Hotel without cars. Submission was that the charges for the food would not include charges for parking of the car in the Hotel premises.

4. STATE Commission went into the categories of the Hotel whether it is a Three Star, Four Star or Five Star, where such services of free parking are provided by the Management. Reference was also made to supply of food to passengers in the Airlines. It was held that even though charges were not levied for supply of food to the customers, still the Airlines was liable for providing bad quality of

food to the customer. STATE Commission noticed that even in the Airlines food was provided free to all the passengers and some passengers take food, others do not. A distinction was, therefore, drawn that it could not be said that those who do not enjoy the facility of free food could not be passengers or they are charged less not having consumed the food supplied by the Airlines. STATE Commission rejected the argument of the appellant that since no extra charge was levied by the appellant for parking there was no liability to compensate the complainant. STATE Commission, therefore, concluded that the services rendered by the complainant was deficient and it was liable to compensate the complainant for the loss of his car. Total claim made by the complainant was Rs. 2,40,000/- on account of : (i) replacement costs, (ii) replacement of air-conditioner, (iii) replacement of Pioneer Tow-in-one, (iv) Taxi charges from 4.5.1992 to 6.10.1992, and (v) expenses towards insurance claim, and (vi) compensation of Rs. 25,000/-. Out of these claims of Rs. 2,40,000/-, a sum of Rs. 1,22,000/- had been paid by the second complainant-Insurance Company after filing the complaint. This amount of Rs. 1,22,000/- was received by the complainant towards loss of his car. The STATE Commission, therefore, directed the appellant to pay a sum of Rs. 1,00,000/- to the complainant-Mulchand. Then certain directions were given for interest. Aggrieved of this order appellant has filed this appeal. It raises important issue as to the liability of Hotel management to compensate customer/person visiting the Hotel and keeping his car in the parking lot provided by the Hotel management. Mr. Kumar and Mr. Francis, learned Counsel for the appellant submitted that reasoning of the State Commission was not correct and that impugned judgment is faulty on various grounds including that it was against contractual terms. They referred to certain English decisions which we note.

5. IN *Rutter v. Palmer*, (1922) 2 KB 87, the owner of a motor car deposited the car for sale on commission with the keeper of a garage upon the terms of a printed document containing the clause "Customers" cars are driven by your staff at customers" sole risk". Car was sent out by the keeper in charge of one of his drivers to be shown to a prospective purchaser, and was injured owing to the negligence of the driver. The owner of the car filed a suit against the keeper of the garage. It was held that the clause protected the keeper of the garage from any liability for the negligence of his servants. It was observed that in the circumstances of the case the words "at customers" sole risk" can have only one meaning namely, that the keeper of the garage will not be liable for the negligence of his drivers. It was also observed that the words "you staff" would mean "your regular driving staff" and the clause must be read as if it ran "Customers" cars are driven by your drivers at customers" sole risk". It was also observed that the principles of the carriers cases do not apply to the bailees of this class and still less to a bailee of a motor car who for special reason is unwilling to accept the risk of damage. Further it was also observed that it is an accepted proposition that if a party to a contract would exempt himself from a liability he must express himself in plain words.

6. IN the Thompson v. London, Midland and Scottish Railway Company, (1930) 1 KB 41 (CA), the plaintiff, who could not read, had an excursion ticket taken for her by her niece on the face of which were printed the words : "Excursion. For conditions see back"; and on the back was a notice that the ticket was issued subject to the conditions in the defendant Company's time tables and excursion bills. On the excursion bills excursion tickets were stated to be issued subject to the conditions shown in the Company's current time tables. The time tables, which could be obtained for six pence each, stated : "Excursion tickets... are issued subject to the general regulations and to the condition that the holders ... shall have no rights of action against the Company ...in respect of ... injury (fatal or otherwise) ... however caused". A special Jury found that an accident to the plaintiff on the journey covered by the excursion ticket was due to negligence on the part of the defendant Company. However, rejecting the stand taken by the Jury it was observed that as a matter of law when ticket was accepted the contract was complete, and therefore, there was no evidence on which Jury could find as they did. It was held that the fact that the plaintiff could not read, did not alter the legal position; that she was bound by the special contract made on the excursion ticket on the acceptance of the ticket; and that the indication of the special conditions by reference to the time tables was sufficient notice of their existence and contents. There was comment in the judgment on the submission that plaintiff in this case cannot read and it was observed "that having regard to the authorities, and the condition of education in this country, I do not think that avails her in any degree". The ticket was issued to the plaintiff by the Railway Company for a particular journey and the journey was an excursion ticket, and on the face of the said ticket were printed inter alia the words "Excursion, for conditions see back", and on the back of the said ticket were printed inter alia words "issued subject to the conditions and regulations in the Company's time tables and notices and excursion and other bills". On the excursion bill of the Railway Company were printed inter alia the words "Excursion tickets and tickets issued at fares less than the ordinary fares are issued subject to the general regulations and conditions and also the condition that neither the holders nor any other person shall have any right of action against the Company... in any respect of ... injury (fatal or otherwise) loss, damage or delay however caused". Time table was not freely available and could be purchased for a certain price. The question that would arise is if the knowledge of the clause could be attributed to the plaintiff. English Court of Appeal gave the answer in affirmative. In Hood v. Anchor Line Henderson Brothers, Ltd., (1918) AC 837 (House of Lords) - in answer to an action by a passenger against a steamship Company for damages for personal injuries alleged to have been sustained through the negligence of the Company's servants, in the course of a voyage from New York to Glasgow in a steamship belonging to the Company the defenders pleaded a condition in the pursuer's ticket limiting their liability for injury to passengers ... 101. The ticket was purchased at the defender's New York office by one of the pursuer's clerk, who, on payment of the passage money, received in exchange a ticket enclosed in an envelope, on the front of which was printed in capital letters a notice

requesting the passenger to read the conditions of the enclosed contract. The ticket contained on its face a printed notice that it was issued subject to the conditions thereafter set out (which included the condition in question) and on the foot a printed request to the passenger to read carefully the above contract. Neither the pursuer nor his clerk was aware of the conditions. It was held that the defenders had taken all reasonable steps to bring to the knowledge of the pursuer the existence of the conditions and that he was bound by them.

In the case of *Bharathi Knitting Company v. DHL Worldwide Express Courier Vision of Airfreight Ltd.*, II (1996) CPJ 25 (SC)=(1996) 4 SCC 704, we take the facts from head note. The appellant manufacturer signed a contract with the respondent courier Company for sending certain export documents under a cover to a foreign buyer with whom the appellant had an agreement of sale pertaining to the summer season. Under the terms and conditions of the contract between the appellant and the respondent, the liability of the respondent for any loss or damage to the consignment of the documents was limited to a specified amount only and its liability for any consequential or special or any other indirect loss, including loss of market or any other indirect loss was excluded. Despite the advice of the respondent to the customers contained in "Important Notice", mentioned on the consignment note, to purchase insurance cover to ensure protection of customer's interests, the appellant had not purchased the insurance cover. The cover containing the documents did not reach the destination. Though the duplicate copies were subsequently sent by the date of receipt of the consignment, the season was over. Resultantly, the consignee agreed to pay a lesser amount instead of the invoice value. The appellant, therefore, laid a complaint before the State Commission claiming difference of the loss incurred by it which was ordered. In appeal preferred by the respondent the National Commission held that since the liability was only to the extent mentioned in the terms of the contract, the appellant was entitled for the deficiency of service only to that extent plus interest at the rate of 18%. The question before the Supreme Court was when parties have contracted and limited their liabilities whether the State/National Commission could go behind the terms of the contract and give relief for damages in excess of the limit prescribed under the contract ? The Court held that when a person signs a document which contains certain contractual terms normally parties are bound by such contract; it is for the party to establish exception in a suit. When a party to the contract disputes the binding nature of the signed document, it is for him to prove the terms in the contract or circumstances in which he came to sign the documents need to be established.

7. JUDGMENTS in the case of *Rutter v. Palmer* (supra), *Hood v. Anchor Lines Henderson Brothers, Ltd.* (supra), and *Bharathi Knitting Company v. DHL Worldwide Express Courier Division of Airfreight Ltd.* (supra), appear to be quite relevant to the issue involved in the present case though in the later case the customer had put his signature on the document containing the terms of contract. Token issued to the complainant at the time when his car was taken for

parking tells him in unmistakable and unambiguous language that Hotel management would not be responsible for any theft/damage/loss. The fact that he took the token without any protest and availing of the facility of free parking would bind him to the terms of the token which would constitute a binding contract between him and the Hotel. We are unable to find any provision of rule or regulation which obliges a luxury Hotel to provide free parking facility to its guests and even to provide free valet service for parking of the car of the guests. That may be the condition for granting certain "stars" to a Hotel but then could it be said on that account that Hotel would be liable for the loss of the car or any loss/theft/damage to the car so parked in the Hotel premises or that would amount to providing of consideration from the customer to the Hotel. We also cannot proceed on mere presumptions and hold Hotel liable when it specifically provides while handing over token to guests that Hotel management would not be responsible for any theft, damage or loss to the vehicle parked in the Hotel premises. Free parking is a facility to attract more people to come to the Hotel and more the people more the income. It may be that expense on free parking facility is met from the income of the Hotel but that would certainly not mean consideration flowing from the customer for use of free parking of his car.

8. UNFORTUNATELY, State Commission gave short shrift to the argument of the Hotel that all types of persons visits the Hotel premises, some with car and some without car. Purpose of visit to Hotel could be different and it would not be necessary that any guest coming to Hotel must have his food or pay any other charge for availing any facility in the Hotel. It could be that a guest visits the Hotel to make enquiries or even to make a call from the public booth that may be installed in the Hotel premises. We find ourselves unable to agree with the observations of the State Commission that it is to be presumed that free parking service is rendered by the Hotel of a particular category. Observation of the State Commission that no free service could be rendered by any Hotel unless and until such charges are recovered either directly or indirectly does not appear to be based on any sound reasoning. State Commission, in our view, was unduly impressed by the argument that a passenger in Airlines may or may not take food though food is provided free to all passengers. Such an argument is not compatible with the case of car parking in the Hotel in hand. Ticket for any Airlines includes all the facilities to be provided while flying whether any passenger avails of that facility or not. We do not think it was necessary for the State Commission to go into all this discussion. We are concerned here only with the question if payment for food would include sufficient consideration for the Hotel management not to charge for parking. It is not disputed that Mulchand came to the Hotel with his friend for taking food and for which he paid. The laws regarding bailment apply when a customer pays to park his car in a parking lot and it is stolen or damaged. A bailment occurs when the owner of the car (bailor) transfers the possession, care, and/or control of his car to another person (bailee) for limited time and for a special purpose. Chapter IX of the Contract Act, 1872 contains provisions regarding bailment. Section 148* defines bailment.

It is the delivery of goods by one person to another for some purpose upon a contract that they shall, when the purpose is accomplished, be returned according to the directions of the person delivering them. The person delivering the goods is the bailor and the person whom these are delivered is the bailee. under Section 151* bailee is bound to take such care of goods bailed to him as a man of ordinary prudence would, under similar circumstances, take of his own goods. under Section 152* the bailee, in the absence of any special contract, is not responsible for the loss, destruction or deterioration of the thing bailed, if he has taken the amount of care of it described in Section 151. Under Section 161* if by the fault of the bailee, the goods are not returned or delivered, he is responsible to the bailor for any loss of the goods. The bailment thus envisages the contract between the bailor and the bailee. A contract requires consideration emanating from the promisor to promisee i.e. from the bailor to the bailee. In the present case we are proceeding on the assumption that price paid for the food consumed would include the consideration from the consumer, the bailor to the Hotel, the bailee. We are not considering the question when the car is given to the Hotel management for parking gratuitously. It cannot however be the case that the car has been lent by Mulchand to the Hotel management for its use gratuitously as per the requirement of Section 151 of the Contract Act. In any case the contract squarely provided that Hotel management would not be responsible for any theft/loss/damage to the car. We are thus of the view that Mulchand, complainant is not entitled to claim for loss of his car under the laws of bailment. But then that does not conclude the matter.

9. LEAVING the generalisation aside we examine the case from the angle of Mulchand, a consumer, accepting the case of the Hotel that it had a valid contract to protect it and was not liable under the laws of bailment. Car of Mulchand, the complainant was comprehensively insured with the United India Insurance Company Ltd. and admittedly he had since received Rs. 1,22,000/- towards his claim for theft of his car from the parking of the Hotel, from Insurance Company. Mulchand in his complaint made a claim for Rs. 2,40,000/- towards price of the car and other items which included taxi charges perhaps during the period his case was not considered by the Insurance Company and a compensation of Rs. 25,000/-. He brings his friend to the Hotel for taking food. At the doorsteps of the Hotel a driver employed by the Hotel, meets him, takes his car and in terms tells him that while he takes food he need not bother about his car as the same will be taken care of by the Hotel management. A token is handed over to Mulchand from which he knows that appellant will not be liable for any theft/loss or damage to his car while it is in the custody of the Hotel management. Nevertheless, there is certainly an assurance that car will be looked after while he takes his food in the Hotel and pays for that. Consideration is there but Hotel is taking shelter behind the terms of the contract which excludes its liability. Hotel is taking shelter behind the terms of the contract which excludes its liability when car is stolen. Once we hold that Hotel is not liable the question still remains for consideration as to whether complainant is still entitled to any amount as a

consumer.

10. DEFICIENCY in service has two aspects- (i) claim for the amount of actual loss, and (ii) damages for inconvenience, harassment and mental tension. This second aspect is what we call consumer factor or consumer component or consumer surplus like the present one. Consumer component may not be present in every contract. It would depend upon the nature of the contract. Mulchand had given his car to the Hotel management apparently for safe parking till he consumes his food and pays the price. One of the factors which brought him to the Hotel was the offer of the Hotel management for free but safe parking. After consuming his food and paying the price Mulchand comes out and to his horror he finds his car has been stolen. He and his friend suffer a great deal of inconvenience and mental tension. Mulchand has claimed compensation for inconvenience, harassment and mental tension which he had to undergo. In our view, though the Mulchand may not be entitled to the price of the car in view of the contract he is certainly entitled to damages for mental tension, harassment and inconvenience caused to him and his friends. Mulchand has claimed Rs. 25,000/- as compensation on this account. In *Ruxley Electronics v. Forsyth*, (1996) AC 344, HL, Ruxley, the builder had been contracted to build a 7'6" swimming pool but constructed a 6 ft. deep swimming pool. The pool was safe for diving and the shortfall did not decrease its value. At first instance the Trial Judge rejected the claim for Rs. 1,21,000/- for reinstatement but awarded 12,500/- for loss of amenity. For certain reasons the loss of amenity award was not in issue in the House of Lords. However, several of the Law Lords commented on it. Lloyd of Berwick LJ. said that "He (the Judge) took the view that the contract was one "for the provision of a pleasurable amenity". In the event, Mr. Forsyth's pleasure was not so great as it would have been if the swimming pool had been 7 feet 6 inches deep. This was a view which the Judge was entitled to take". However Lord Mustil indicated a more principled approach to the assessment of damages in such situation he said, "The law must cater for those occasions where the value of the promise to the promisee exceeds the financial enhancement of his position which full performance will secure. This excess, often referred to in the literature as the "consumer surplus" is usually incapable of precise valuation in terms of money, exactly because it represents a personal, subjective and non-monetary gain. Nevertheless where it exists the law should recognise it and compensate the promisee if the misperformance takes it away".

Keeping in view the aspect of "consumer factor" or "consumer component" or "consumer surplus" as aforementioned we are of the opinion that Mulchand is certainly entitled to compensation for the mental tension, harassment and inconvenience caused to him. Mulchand has claimed Rs. 25,000/- but in our view award of Rs. 10,000/- will meet the ends of justice. There cannot be any standard for measuring damages in such a situation.

11. IN the complaint INSurance Company has also been added as co-complainant by Mulchand. It was submitted by Mr. Vishnu Mehra, learned Counsel appearing

for the INSurance Company that in case Consumer Forum allows the complaint and grants compensation, INSurance Company is entitled to be reimbursed inasmuch as the price of the car had since been paid by the INSurance Company to Mulchand. We are unable to appreciate such an argument. For one thing if the complainant-Mulchand had been paid price of the car by the INSurance Company under the policy of insurance he cannot claim the same amount again in the complaint on a pretext as a consumer under the Consumer Protection Act, 1986. He cannot get better right by also adding the INSurance Company as co-complainant. INSurance Company cannot be a consumer under the Consumer Protection Act and has certainly no cause against Hotel. We cannot allow the complainant to enrich himself when we find that he had already received the price of the car from the INSurance Company. If the INSurance Company is of the view that fault lay with the Hotel it could bring a civil suit against the Hotel and could implead Mulchand-complainant as well, but Mulchand cannot file his complaint for the benefit of the INSurance Company. We, therefore, allow this appeal and set aside the order of the State Commission except to the extent of Rs. 10,000/- which amount Mulchand, complainant shall be entitled from the appellant. We make no order as to costs. Appeal allowed.