(2010) 01 DEL CK 0181

In the Delhi High Court

Case No : Writ Petition (C) 583 of 2007

Cellular Operators Ass. O.I. and Others APPELLANT

Vs

Nivedita Sharma and Others RESPONDENT

Date of Decision : 15-01-2010

Acts Referred:

Citation : (2010) 166 DLT 558

Hon'ble Judges : Veena Birbal, J;Badar Durrez Ahmed, J

Bench : Division Bench

Advocate : C.S. Vaidyanathan, Manjul Bajpai, Ashish Yadav, Devika Bajpai and Akshay Misra, in W.P. C 583/2007, Saket Singh, in CMM 174/2007 and Rahul Malhotra, for R.S. Suri, Sr in CMM 443/200, for the Appellant; Manjul Bajpai, Ashish Yadav, Devika Bajpai and Akshay Misra for Respondents 2, 3 and 6 in CM(M) 174/2007 Saket Singh in W.P. (C) 583/2007, for the Respondent

Judgement

Badar Durrez Ahmed, J.—These three petitions are being disposed of by this common order inasmuch as they arise out of the order dated 26.12.2006 passed by the State Commission, Delhi, in Complaint Case No. CC-09/2006. A complaint had been filed by the complainant (respondent No. 1 in these petitions) with regard to unsolicited commercial communications being received by her on her mobile phone. Taking note of the plight of the complainant, the State Commission observed that a similar problem is being faced by a large number of people who own mobile phones and that the unsolicited commercial communications, which include short message service (SMS) communications as well as calls are a growing menace. The petitioner in WP(C) 583/2007 is an association of cellular operators. It has taken the stand on behalf of all the cellular operators, which include Bharti Airtel along with other member cellular operators.

2. The petitioners are aggrieved by the directions / orders passed by the State Commission as indicated in paragraphs 38, 39, 40 and 42, which read as under:

38. Since we have treated this complaint as a complaint filed on behalf of

numerous consumers running into lacs and since the Cellular Operators Association of India has intervened on behalf of O.P. 1 and 2 and all other Cellular operators and since the financial loss and injury is being suffered by a large number of consumers who are not identifiable conveniently, we, as a deterrent and to stop this evil, feel inclined to impose heavy punitive damages upon the O.Ps because of ''care-a-fig-for'' attitude and their having continued to indulge in these activities inspite of Supreme Court having issued notice in a PIL in 2003 and our observations and directions made in various orders passed from time to time:

(i) Penalty of Rs. 50 Lacs (Fifty Lacs) is imposed upon O.Ps 1-2 Airtel and O.P. 5 - Cellular Operators Association of India jointly and severally.

(ii) Penalty of Rs. 25 Lacs (Twenty Five Lacs) is imposed upon O.P. 3 - ICICI Bank and O.P. 4 - American Express Bank, to be shared by them equally.

(iii) We further award a compensation of Rs. 50,000/- (Fifty Thousand) to be paid to the complainant by the O.Ps, out of which O.P. 1, 2 and 5 shall pay Rs. 25,000/- (Twenty Five Thousand0) jointly or severally and O.P. 3 and O.P. 4 shall pay Rs. 25,000/- (Twenty Five Thousand) in equal shares.

39. Punitive damages shall be deposited in favour of the "State Consumer Welfare Fund (Legal Aid)".

40. Before parting, we give the following directions to service providers and direct bankers, finance companies and other persons indulging in telemarketing and direct the TRAI to take all possible steps to control this evil, as the ultimate responsibility lies over it:

(i) Cellular Operators Association of India (OP No. 5) is hereby directed to inform all its Members to immediately withdraw the list of subscribers and their mobiles telephone numbers provided by them to banks, finance companies or any other agencies or persons and give them directions in writing that they shall not use this information for any purpose whatsoever and also by way of telemarketing.

(ii) All those agencies, banks, financial institutions or persons who are having their own directories for this purpose who are neither their subscribers nor their clients, shall disband those directories forthwith.

(iii) Every such subscriber who suffers this agony, harassment and nuisance shall be entitled to a minimum compensation of Rs. 25,000/-, who has and is suffering as the complainant has suffered, as and when he approaches the Consumer Forum in this regard.

(iv) To bring in more competition, better coverage for the area with another service provider, lower rates and unsatisfactory or bad customer service with the current service provider, TRAI is directed to bring in ''NUMBER PORTABILITY'' RULE, as prevalent in the USA and other countries, so as to avoid the subscribers to change their phone number and thereby informing every now and then hundreds of friends, colleagues, relatives about the new phone number.

(v) TRAI shall establish a National ''Do Not Call'' Registry, which shall apply to all the marketers; specifically prescribing that commercial telemarketers cannot call a subscriber if that number is on the Registry. On establishment of such Registry, the subscribers will be called upon to register their telephone numbers by publicizing such a Registry in the newspapers and through Internet and messages free of cost.

42. Copy be sent to the following:

i) The Chairman, TRAI, TRAI House, A-2/14, Safdarjung Enclave, New Delhi 110029.

(ii) Presidents of all the District Fora.

(iii) National dailies for the benefit of Consumers at large and information of service providers and companies indulging in telemarketing and unsolicited commercial and other calls, SMSs etc. etc.

3. Apart from this, the petitioner in CM(M) 174/2007, being the Telecom Regulatory Authority of India, is aggrieved by the remarks made in paragraph 31 of the impugned order with regard to its functioning. The said authority (TRAI) was not even a party before the State Commission and thus is aggrieved by the fact that these remarks have been made against it without giving it a hearing. There is a prayer made for expunction of such remarks.

4. We have heard the counsel for the petitioners as well the complainant, who is an advocate and who appears in person. There has been a consensus amongst the petitioners that insofar as the directions given in paragraph 38 (iii) of the impugned order are concerned, the same could be the subject matter of an appeal before the National Consumer Forum. In fact, one of the parties (American Express Bank Limited) has already filed an appeal before the National Consumer Forum. Apart from this, the petitioners state that they have already paid the amount of Rs 50,000/- directed by way of compensation to the complainant, who has received the same. However, the petitioners state that the payment has been made without prejudice to their rights to challenge the said order before this Court and also before the National Commission. The petitioners, who have not approached the National Commission, request this Court to grant them leave to approach the National Commission by way of an appeal.

5. With regard to the penalties of Rs 50 lacs and Rs 25 lacs, as indicated in paragraphs 38(i) and 38(ii) of the impugned order, we find that the State Commission does not have any power for making a penalty order other than the power given u/s 27 of the Consumer Protection Act, 1986. That power is to be exercised when an order passed by the Commission is not complied with by a trader or a person against whom a complaint is made. Secondly, the power prescribed u/s 27 limits the penalty to ten thousand rupees. It is obvious that the penalty orders that have been passed in paragraphs 38 (i) and 38(ii) are not

orders passed u/s 27 of the said Act. The complainant submitted that the penalty orders had been passed in furtherance of the powers under the proviso to Section 14(1)(d). She also referred to the impugned order and, in particular, to paragraph 38 where the penalty has been described as "punitive damages".

6. Section 14(1)(d) provides for the payment of compensation to the consumer for any loss or injury suffered by the consumer due to the negligence of the opposite party. The said section contains a proviso which reads as under:

Provided that the District Forum shall have the power to grant punitive damages in such circumstances as it deems fit;

The ''penalties'', which have also been referred to as ''punitive damages'' in the impugned order, have been directed to be deposited in favour of the State Consumer Welfare Fund (Legal Aid). We find no reference to any such fund under the Consumer Protection Act, 1986. There is also no indication as to the manner in which the said fund would be distributed to the consumers who have actually been effected. We are of the view that the award of ''penalties'', which have been referred to as ''punitive damages'' in the said order, was beyond the jurisdiction of the State Commission. The said directions are, therefore, liable to be set aside and are set aside.

7. Insofar as the directions contained in paragraph 40 are concerned, we find that the same are also outside the scope and purview of the State Commission inasmuch as directions have been given to the TRAI, which is the sole regulatory body under the Telecom Regulatory Authority of India Act, 1997. Furthermore, a direction has been given in paragraph 40 (iii) indicating that every subscriber, who suffers this agony, harassment and nuisance, shall be entitled to a minimum compensation of Rs 25,000/- as and when he approaches the Consumer Forum in this regard. This, to our mind, also amounts to legislation, which power the State Consumer Forum does not possess. Whether it is the District Consumer Forum or the State Consumer Forum or the National Consumer Forum, they have to function within the precincts of the Consumer Protection Act, 1986 and they have to decide the quantum of compensation on a case to case basis. They can neither fix a minimum or maximum compensation when no such minimum or maximum is provided under the Act.

8. We also feel that the remarks against the TRAI, contained in paragraph 31 of the impugned order, deserve to be expunged. This is primarily because the TRAI was not a party to the proceedings and without hearing them, such remarks ought not to have been made. We also feel that the parties, who wish to approach the National Commission in respect of the directions given in paragraph 38 (iii) of the said Act, ought to be permitted to do so.

9. Having said this, we feel that the cellular operators must ensure that this menace of unsolicited commercial communications is reduced and put an end to. The counsel for the petitioners state that there are regulations, which have been issued by the TRAI in this regard and which they are duty bound to implement as

they are under the guidance of TRAI. We are also informed that a "Do Not Call" Registry has been established and the same is being managed by the National Informatics Centre, Government of India. If there is any violation of these regulations, then the petitioners would obviously be liable for the same.

10. One of the consequences of this order is that the ''penalties'' of Rs 50 lacs and Rs 25 lacs imposed by the impugned order would have to be refunded to the concerned parties. Out of the said amounts, the Cellular Operators Association of India has volunteered to donate a sum of Rs 7.5 lacs to SOS Children Village of India, A-7 Nizamuddin West, New Delhi and a sum of Rs 7.5 lacs to the Delhi High Court Bar Association for its Advocates Welfare Fund. Similarly, ICICI Bank has also volunteered to donate a sum of Rs 2.5 lacs to SOS Children Village of India, A-7 Nizamuddin West, New Delhi and a sum of Rs 2.5 lacs to the Delhi High Court Bar Association for its Advocates Welfare Fund.

11. With these directions and observations, the writ petition and the CM(M)s stand disposed of.