

(2001) 09 NCDRC CK 0076

In the National Consumer Disputes Redressal Commission

GAMMON INDIA LTD.

APPELLANT

Vs

GULMOHAR ESTATES LTD.

RESPONDENT

Date of Decision : 04-09-2001

Acts Referred:

Citation : 2001 3 CPR 86 : 2002 2 CLT 79 : 2002 3 CPJ 416

Hon'ble Judges : D.P.Wadhwa , C.L.Chaudhry , J.K.Mehra , Rajyalakshmi Rao , B.K.Taimni J.

Final Decision : Petition dismissed

Judgement

1. WITH this order we are deciding Miscellaneous Petition No. 14/1996 filed by the complainant seeking, in effect, review of the order of the National Commission dated 9.11.1995. This petition arises in the following circumstances : On 3.3.1994 complaint was filed by the complainant seeking direction to the opposite party to hand over possession of certain flats in the "Garden Estates" developed by the opposite party. The agreement under which contract was entered into between the parties contain an arbitration clause as under : "In the event of any dispute or difference arising out of or relating to this Agreement between the parties, the same shall be referred to the arbitration of a nominee of Shri A.N. Haksar, the Chairman of the Vendor and any award made in such arbitration shall be final, conclusive and binding on the parties. The venue of such arbitration shall be New Delhi."

2. WHEN the matter was taken up on 9.11.1995 following order was passed by the National Commission, declining to go into the merits of the complaint : "For the Complainant : Mr. Raju Ramachandran and Mr. Vishwajit Singh, Advocates. For the Opposite Party : Mr. M.N. Krishnamani, Sr. Advocate and Mr. B.R. Menon and Mr. Rohit Chaudhary, Advocate with him. ORDER Since pursuant to the clause contained in the contract between the parties the dispute raised in the present complaint petition stands already referred to arbitration and the Arbitrator is said to have entered on the reference, we are not inclined to conduct a concurrent adjudication of the same question while the arbitration

proceedings are pending. On this short ground we decline to go into the merits of his complaint and dismiss this petition without expressing any opinion whatever on the contentions raised by the parties. Sd/- (V. Balakrishna Eradi) President Sd/- (B.S. Yadav) Member Sd/- (S.S. Chadha) Member Sd/- (R. Thamarajakshi) Member Sd/- (S.P. Bagla) Member"

Complainant took the matter to the Supreme Court (Civil Appeal No. 11637 of 1995), when it passed the following order on 4.1.1996 : "We see no ground to interfere with the impugned order of the National Commission. The civil appeal is dismissed. Mr. R.K. Jain, learned Senior Counsel appearing for the appellant wanted to invite our attention to various documents to build an argument that in fact there is no arbitration clause between the parties. He may, if so advised, show these documents to the Commission, if permitted under law. Sd/-J. (Kuldip Singh) Sd/-J. (S. Saghir Ahmad)" 4. In view of the observation made in the order of the Supreme Court, the complainant filed the present miscellaneous petition. On 24.8.2000 this Commission after receipt of this petition, passed the following order : "The original petition is restored. Post this original petition in due course."

Two questions arise as to the validity of this order dated 24.8.2000 itself and the maintainability of miscellaneous petition. 5. It has been held by the Supreme Court in the case of Jyotsana Arvind Kumar Shah & Ors. v. Bombay Hospital Trust, III (1999) CPJ 1 (SC)=VII (1999) SLT 146, that National Commission is not empowered to review its own order. Even an ex parte order on merit cannot be reviewed. This miscellaneous petition for review is, therefore, not maintainable as it is not permissible under the law. 6. The question as to the jurisdiction of the National Commission to review its order was recently considered by this Commission in the light of the decision of the Supreme Court in the case of Bombay Hospital Trust, in the matter M.O.H. Leathers v. United Commercial Bank, Miscellaneous Petition No. 1/2001 in Original Petition No. 110/1993, decided on 12.7.2001. This is how the matter was considered : "This is an application seeking view of the order dated 30th May, 1996. The order though in brief is on merit. Against this order the complainant went in appeal to the Supreme Court (Civil Appeal No. 10990/1996). On September 9, 1997, Supreme Court passed the following order : "Learned Counsel for the appellant states that the impugned order was passed by the National Consumer Disputes Redressal Commission behind the back of the complainant. It is stated that the notice was sent to the learned Counsel for the complainant on May 20, 1996 for hearing which was fixed on May 30, 1996. The notice was returned unserved as the Counsel had already left for summer vacation. Be that as it may, we give liberty to the complainant to move an application for setting aside the order on the alleged ground. The appeal is disposed of. We, however, give liberty to the appellant to approach this Court after the final order is passed by the Commission. On strength of this order present application has been filed seeking

review of the order of Commission dated May 30, 1996. No doubt the order of the Commission was made ex parte. The order of the Commission was, however, based on the provisions of Consumer Protection Act, 1986 under which the Commission has been constituted. In *Jyotsana Arvind Kumar Shah & Ors. v. Bombay Hospital Trust*, VII (1999) SLT 146=III (1999) CPJ 1 (SC)=1999 (4) SCC 325 {decided on 22.1.1999}, while considering the powers of State Commission under the Act for setting aside an ex parte order, Supreme Court held that no such jurisdiction vested with the State Commission. In the case before the Supreme Court an ex parte order was made against the respondent and on merit compensation of Rs. 7.00 lakhs with interest @ 12% was awarded in favour of the appellant. Respondent instead of preferring an appeal under the Act filed a writ petition in the Bombay High Court which was dismissed with an observation that the respondent could approach the Appellate Authority or to make an appropriate application before the State Commission for setting aside the ex parte order, if permissible under the law. Armed with the order of the High Court respondent filed an application before the State Commission for setting aside ex parte order which was allowed. Review was filed by the respondent before the National Commission which was dismissed. Appellant then filed an appeal in the Supreme Court against that order. Supreme Court said that the order of the State Commission setting aside its ex parte order was one without jurisdiction. It said that State Commission fell into an error in not bearing in mind that the Act under which it was functioning had not provided it with a jurisdiction to set aside an ex parte reasoned order. Supreme Court added : "It is also seen from the order of the State Commission that it was influenced by the concluding portion of the judgment of the Bombay High Court to the effect that the respondent (writ petitioner) could approach the Appellate Authority or make an appropriate application before the State Commission for setting aside the ex parte order, if permissible under the law. Here again, the State Commission failed to appreciate that the observation of the High Court would help the respondent, if permissible under the law. If the law does not permit the respondent to move the application for setting aside the ex parte order, which appears to be the position, the order of the State Commission setting aside the ex parte order cannot be sustained. As stated earlier, there is no dispute that there is no provision in the Act enabling the State Commission to set aside an ex parte order." This judgment of the Supreme Court squarely covers the present case and was rendered considering the provisions of the very Act with which we are concerned. The learned Counsel for the complainant referred to other judgments of the Supreme Court, however, not rendered under the provisions of the Act, to contend that there is inherent jurisdiction with any Tribunal to set aside its ex parte order. It is not necessary for us to go into those judgments as we have to follow the law laid down by the Supreme Court in the case of *Jyotsana Arvind Kumar Shah & Ors. v. Bombay Hospital Trust*. We have to consider the application for setting aside an ex parte reasoned order as per law. The application is dismissed."

7. Similar arguments which we noticed in our aforesaid order have been stressed

again by Ms. Indira Jai Singh, learned Senior Advocate now appearing for the complainant. We are afraid, we are unable to agree with her contention. Then it was submitted by Ms. Singh that on the date of hearing when the complaint was rejected it was just on the statement made by Counsel for the respondent and there was no time for the complainant to get instructions if the matter had already been referred to arbitration. We cannot take note of such a contention, particularly when we find that two Senior Counsel engaged by the parties appeared before the Commission on that date. There was an arbitration clause which we have quoted above. In view of the judgment of the Supreme Court in Bombay Hospital Trust case, the order restoring the original petition is non est being contrary to the law laid down by the Supreme Court. The order dated 9.11.1995 cannot be reviewed. In these circumstances, this miscellaneous petition fails and it is dismissed. Petition dismissed.