
(1996) 07 NCDRC CK 0051

In the National Consumer Disputes Redressal Commission

HERO HONDA MOTORS LTD.

APPELLANT

Vs

KANNEGOLLA VENKATA VANI

RESPONDENT

Date of Decision : 01-07-1996

Acts Referred:

Citation : 1996 3 CPJ 502

Hon'ble Judges : A.Venkatarami Reddy , J.Ananda Lakshmi , K.Ranga Raos J.

Final Decision : Appeal allowed

Judgement

1. THIS appeal is preferred by the first opposite party i.e., M/s. Hero Honda Motors Ltd., in CD 309/90 questioning the order of the District Forum, Eluru, whereby it directed the opposite parties i.e., Hero Honda Motors Ltd., and also its dealer at Vijayawada to deliver Hero Honda motorcycle after collecting the rate prevailing in January, 1987 and to take refund of Rs. 725/- sent by them to the complainant and costs.

2. THE complainant booked Hero Honda Motor cycle and paid a sum of Rs. 500/- to the opposite party No. 1 on 28.9.85 and was allotted with Priority No. 0000982 and dealer Code No. 24104. As the vehicle was not delivered even after a lapse of 2 years, the complainant wrote a letter on 31.1.89 to the opposite party No. 1 to cancel the booking of the vehicle and seeking refund of the deposit amount of Rs. 500/- with interest. As the amount was not refunded inspite of the demands made by the complainant on 17.6.89, 15.12.89 and 20.3.90, she filed CD 59/90 before the District Forum, Eluru seeking refund of the amount from the opposite parties 1 and 2. THE first opposite party sent a letter dated 27.7.90 both to the complainant and the President of the District Forum, Eluru stating that as per the records available, the vehicle was already delivered against priority No. 982 with dealer Code No. 24102 and requested the complainant to withdraw the complaint. Realising have been mistakenly intimated that the vehicle was delivered to the complainant and that in fact the vehicle was delivered to a different dealer with Code No. 24102 and priority No. 982. THE first opposite party addressed a letter on 20.9.90 to the complainant under copy

to the District Forum, Eluru stating that they are enclosing the refund order for a sum of Rs. 725/- towards the money and interest i.e., Rs. 500/- + 225/- and requested the complainant to withdraw the case. THE first opposite party also by registered letter dated 21.9.90 intimated the District Forum that they have already issued a refund order to the complainant vide letter dated 29.9.90 and in view thereof requested the District Forum to drop the proceedings initiated against the company. On 9.10.90 the District Forum passed the following order. OP No. 2 called absent and set ex-parte. No representation for complainant and called absent. Hence complaint is dismissed.

Evidently, it was not brought to the notice of the Presiding Officer of the District Forum that another letter dated 21.9.90 was sent by the opposite party No. 1, to the District Forum intimating that the amount was sent. After the dismissal of CD 59/90 the complainant filed another CD 309 /90 on 7.11.90 to direct the opposite parties to deliver the vehicle as it was not delivered to her as intimated in the letter dated 27.7.90 and as there was no reply from the first opposite party to her letter requesting to inform enquire as to whom the vehicle was delivered. The complainant therefore suspected the bona fides of the opposite parties and filed a complaint to direct the opposite parties to deliver the vehicle at the price prevailing in January, 1987 as it was due to be delivered on that day and to take back the refund amount.

3. THE first opposite party sent its version by post stating that the priority number of the complainant is 0000982 and it was with dealer Code No. 24104. When the complainant requested for refund of the booking money, the opposite parties enquired and by oversight No. 24102 was investigated instead of dealer Code No. 24104, and that the first opposite party informed that the dealer delivered the vehicle against priority No. 982 of his Code. THE complainant was therefore intimated that the vehicle was delivered. But later it came to light that by mistake the letter was sent to the complainant stating that the vehicle was delivered and in fact it was delivered by some other dealer with that priority number and not the dealer with whom the complainant booked the order. THEREUPON on 29.9.90, they sent the refund order and hence the question of delivering the vehicle does not arise. The second opposite party repeated the version of the first opposite party.

4. NO oral evidence was adduced by both the parties and on behalf of the complainant Exs. A1 to A6 were marked and as there was no representation on behalf of both the opposite parties they were set ex-parte. The District Forum held that earlier complaint CD 59/90 was dismissed on the ground that the vehicle was already delivered. But as it transpired, the vehicle was not delivered, but amount of Rs. 725/- was sent, therefore mere refund of Rs. 725/- does not absolve the opposite parties from their liability to deliver the vehicle to the complainant, it therefore, directed the opposite parties to deliver the vehicle to the complainant at the price prevailing in January, 1987. Aggrieved by the said order, the first opposite party preferred CDA 310/92. That appeal was heard by

two members without the presence of the President and it was allowed on 6.4.94. On a Revision RP 655/94 preferred by the complainant, the National Commission by its order dated 21.8.95 set aside the order passed by the two members without the presence of the President holding it null and void and remitted the matter to the State Commission for being disposed of afresh according to law.

5. IT is submitted by the learned Counsel for the appellant that the complainant on 31.1.89 requested for cancellation of the booking and refund of the deposit amount of Rs. 500/- with interest. The said amount was refunded on 20.9.90. Having cancelled the booking and sought for refund of the money, it is not open to the complainant once again to seek delivery of the possession of the vehicle. We see sufficient force in the aforesaid contention. IT is not in dispute that the complainant wrote on 31.1.89 for cancellation of the booking and refund of the deposit amount. But according to the complainant by letter dated 27.7.90 she was informed that the vehicle was already delivered. IT is therefore submitted that as the vehicle was not delivered as intimated on 27.7.90, this complaint was filed for delivery of the vehicle. But the opposite party No. 1 explained that the letter dated 27.9.90 was written under the mistaken impression. According to them, instead of making enquiries with the dealer Code No. 24104, with whom the complainant booked the vehicle, an enquiry was made with a wrong dealer with Code No. 24102. On realising the same even before the disposal of the CD 59/90, they intimated on 21.9.90 itself to the District Forum about the mistake committed by the first opposite party. But the District Forum dismissed the complaint in the absence of the complainant as well as the opposite parties on the ground that the possession was already delivered and in fact by that date as could be seen by letter dated 21.9.90 the opposite party sent refund of the amount. When once the complainant cancelled the booking and sought for refund, the opposite parties are under no obligation to deliver the vehicle and it therefore cannot be said that there is no deficiency of service on the part of the oppose parties in not delivering the vehicle.

6. IT is also submitted by the learned Counsel for the appellant that when the complainant filed CD 59/90 and on the same cause of action sought for refund of the deposit amount, it is not open to the complainant once again to file CD 309/90 on the basis of the same cause of action, claiming the relief of delivery of possession. This relief, he would have claimed even in the complaint CD 59/90, and hence the present complaint is barred by principles of res-judicata and also the principles laid down under Order 2 Rule 2, CPC. The learned Counsel for the appellant invited our attention to the decision of National Commission in Branch Manager, LIC of India & Anr. v. Smt. Zarrena Sulaiman, I (1995) CPJ 4 (NC). In the said case, the complainant's husband died in a Motor accident. The complainant claimed the policy amount and it was paid by the Insurance Company. Subsequently, she claimed double amount from the Insurance Company and the same was rejected. The National Commission held that the second complaint filed on the same cause of action was not maintainable when

the respondent/complainant had previously filed a complaint based on her rights under the policy of Insurance and had been awarded the amount under that Policy. It was further observed that the sound principles of Order 2 Rule 2, CPC are to be followed by the Fora constituted under the Consumer Protection Act though all the provisions of CPC are not applicable.

On the other hand the learned Counsel for the respondent Mr. V. Gourisankar Rao invited our attention to the decision of Supreme Court of India in *Shashibushan Prasad Misra (Dead) and Another v. Babuaji Rai (Dead)* by His Legal Representatives and Others, AIR 1970 Supreme Court 809. It was observed by their Lordships that since the question whether the suit lands appertained to the village of the deity became res-sub-judice on filing of first appeal and since this question was not finally decided between deity and other contesting defendants in appeal in the absence of any decision by High Court on merits on this question there was no final decision against deity. Thus there was no question of res-judicata between co-defendants.

7. BUT it is to be seen in the instant case, the question is whether the complainant who had a right to claim delivery of possession of the vehicle even at the time when he filed CD 59/90 did not claim the same. Since the cause of action for both is one and the same, we are of the view that the principles laid down under Order 2 Rule 2, CPC are applicable to the instant case. The fact of this case are different from that of the Supreme Court of India and the aforesaid decision of the Lordships of the Supreme Court of India has no application to the facts of the instant case. It is next submitted by the learned Counsel for the respondent No. 1 that by the date of 31.1.89 when the complainant wrote letter for cancellation of booking and refund of the amount, the priority of the complainant became matured and instead of allotting the vehicle to the complainant, the opposite parties allotted the vehicle to the individuals whose priority number was subsequent to that of the complainant. He therefore, submitted relying on the decision of *Omprakash v. Assistant Engineer, Haryana Agro Industries Corporation Limited & Anr.*, II (1994) CPJ 1 (SC) that in the said case it was alleged that the dealer went on supplying the tractors who are below in the list, but by the time it delivered the vehicle to the complainant, the price has gone up by Rs. 40,690/-. It was observed by their Lordships of the Supreme Court of India that it is well known that many of the traders having advance information, or on speculation regarding rise in the price of different articles, in order to avail the increase in the price, withhold the supply of different goods or articles to the consumers. In this process they cause loss or damage to consumers by making them to pay the excess price which they would not have been compelled to pay, if the goods or articles had been supplied in time. The object and purpose of the Consumer Protection Act is to save the consumer from such unfair conduct and practice of the traders also. If on account of such unfair conduct or practice the trader has collected the excess amount, he is liable to refund the difference in the amount.

8. BUT in the instant case, except alleging that the persons who were below the priority list were delivered vehicles earlier, no details have been given as to the names of such persons and their priority numbers and that they were delivered in the absence of these particulars, it cannot be said that the opposite parties overlooked the priority of the complainant and delivered vehicles to the persons whose names were registered far below the list. It therefore cannot be said that there is any unfair trade practice on the part of the opposite parties. Except the mistaken intimation sent to the complainant that the vehicle was delivered which the opposite parties realised subsequently and send the refund order, there is no other material to show that there was any unfair conduct or practice on the part of the opposite parties. In the absence of any material to show that the complainant's registration number matured in January, 1987, the District Forum ought not to have directed the opposite parties to deliver the vehicle with the price prevailing on that date. Even otherwise according to the terms and conditions of the booking the price of the vehicle prevailing on the date of the delivery has to be paid by the complainant. Hence the direction of the District Forum to deliver the vehicle to the complainant at the price prevailing in January, 1987 cannot be sustained. For all the aforesaid reasons, the appeal is allowed and the order of the District Forum is set aside. The appellant shall validate the refund order and send the same to the complainant. There shall be no order as to costs in this appeal. Appeal allowed.