(2006) 01 NCDRC CK 0030

In the National Consumer Disputes Redressal Commission

HOTEL NYAY MANDIR APPELLANT

Vs

Ishwarlal Jinabhai Desai RESPONDENT

Date of Decision : 09-01-2006

Acts Referred:

Citation : 2006 1 CPJ 521 : 2006 2 CPR 34

Hon'ble Judges : M.S.PARIKH , JATIN P.VAIDYA J.

Judgement

1. THIS appeal arises from order dated 18.8.2005 rendered by the learned Consumer Disputes Redressal Forum, Bharuch, in Complaint Application No. 76 of 2003 directing 1st opponent to refund Rs. 22 recovered in excess of maximum sale price of soft drink Mirinda, pay compensation in the sum of Rs. 5,000 and cost of Rs. 1,000 to the complainant and deposit Rs. 1,50,000 for Consumer Welfare Fund and display a board showing sale prices of the items (of eatables and drinks) sold in the hotel of opponent No. 1 and should not charge price in excess thereof. Learned Forum proceeded to dismiss the complaint against opponent No. 2 Pepsico India Holdings Pvt. Ltd.

2. FACTS of the case though run into a narrow compass provide an eye opener both for the consumers as well as for the traders. Complainant, Advocate by profession, on his way back from Vadodara, halted near hotel Nyay Mandir of first opponent located near Bharuch, on National Highway No. 8 and purchased four bottles of Mirinda against cash memo No. 10126 for Rs. 72 and made payment accordingly. Each bottle was the product of opponent No. 2, Pepsico India Holdings Pvt. Ltd., with registered Trade Mark of Pepsico Inc. USA, with contents of 500 ml. of soft drink. Its Maximum Retail Price (MRP) was Rs. 12.50. Yet, the first opponent charged Rs. 18 per bottle, 50% more than the maximum retail price printed on the bottle. Thus, it was the complainants case that the first opponent adopted unfair trade practice as stipulated in Section 2(1)(r) of the Consumer Protection Act, 1986 (Act for short). The complainant, therefore, prayed for following reliefs: o(a) This Honble District Forum be pleased to direct payment of refund of Rs. 22 (Rs. twenty -two only) being the difference between

the price charged and the maximum retail price chargeable. (b) This Honble Forum be pleased to call for the figures of sale (cold drink -wise) with number of bottles for a period of last three years previous to 14.5.2003 and direct refund to be paid for the difference to any consumer association doing service to consumers as donation. (c) This Honble Dist. Forum may be pleased to direct also to pay interest at the rate of 12% p.a. calculated on the refund due and payable. (d) This Honble Dist. Forum be pleased to direct compensation of Rs. 5,000 to complainant No. 1 for mental torture, harassment, anxiety, inconvenience, costs, etc. etc.''

3. IT was the case of the first opponent that complainant purchased soft drink known as Fanta and not Mirinda for the price of Rs. 15, which included Rs. 3 by way of service charges in excess of MRP of Rs. 12 per bottle. Upon appreciation of evidence placed on record, the learned Forum has accepted the complainants case and passed impugned order which has been subjected to challenge in this appeal by opponent No. 1.

4. WE have heard the learned Advocate for the first opponent at length. We have gone through the written arguments. We have perused the evidence placed on record before the learned Forum, from the copies supplied to us. We have heard the complainant at length. We have perused the impugned order. On facts it has been submitted on behalf of the appellant -1st opponent that Rs. 3 came to be charged extra per person on complainants group of four persons by way of service charges. However, admittedly, there was no board displaying that consumers of bottled soft drinks would have to pay such service charges in case they occupied space in the hotel and consumed soft drinks by availing of services in the hotel. The menu card would indicate items of bottled soft drinks separately from the items of cold drinks showing price of Rs. 18. It is not in dispute that bottled soft drink of Mirinda or Fanta contained printed maximum retail price of Rs. 12 or Rs. 12.50 as the case may be. Thus, examining the facts in any manner, the conclusion that first opponent has adopted unfair trade practice in the sale of Mirinda cold drink to the complainant and his party is inescapable. Bearing in mind the facts and circumstances of the case, we have no hesitation in confirming the finding rendered by the learned Forum as above.

5. IT has been submitted on behalf of the first opponent that looking to the averments made in the complaint it is clearly in representative capacity as well as in individual capacity and such a complaint would not be maintainable at law and learned Forum also would not have jurisdiction to entertain the same. Reference has first been made to Section 2(1)(b)(iv) of the Act that defines complainant. The provision reads as under: ''(b) complainant means - (i) xxxx (ii) xxxx (iii) xxxx (iv) one or more consumers, where there are numerous consumers having the same interest. This provision was introduced by Act 50 of 1993 with effect from 18.6.1993. Then provision of Section 12(1)(c) was read. It says that a complaint may be filed by one or more consumers, where there are numerous consumers having the same interest, with the permission of the

District Forum, on behalf of, or for the benefit of, all consumers so interested.

6. REFERENCE has also been made to Section 13(6) of the Act which reads as under: ''Section 13. Procedure on receipt of complaint - (1) to (5) xxxx (6) Where the complainant is a consumer referred to in Sub -clause (iv) of Clause (b) of Sub -section (1) of Section 2, the provisions of Rule 8 of Order 1 of the First Schedule to the Code of Civil Procedure, 1908 (5 of 1908) shall apply subject to the modification that every reference therein to a suit or decree shall be construed as a reference to a complaint or the order of the District Forum thereon.'' This provision has also been added by the aforesaid Act of 1993, although the title of Section 13 procedure on admission of complaint has been substituted by the Amendment Act of 2002 which came into force from 15.3.2003. It may also be noted at this very stage in the aforesaid Sub -section (6) of Section 13, there is no reference to Section 12(1)(c) of the Act. What has been referred to in this section is Section 2(1)(b)(iv) of the Act which has been excerpted hereinabove. Upon reading of the aforesaid provision, it has been submitted that as permission of the District Forum has not been obtained and as provisions of Order 1 Rule 8 of the C.P.C. have not been followed, the complaint is not maintainable and the learned Forum did not have jurisdiction to hear the complaint.

7. WE might, at this stage refer to the provision of Order 1 Rule 8 of the C.P.C. It reads - ''8(1) Where there are numerous having the same interest in one suit: (a) one or more of such persons may, with the permission of the Court, sue or be sued, or may defend such suit, on behalf of, or for the benefit of, all persons so interested; (b) The Court may direct that one or more of such persons or complainants may sue or defend such suit on behalf of or for the benefit of persons so interested. Sub -rule (2) speaks about public notice. Sub -rule (3) permits any such person to apply for being made a party to the suit. Sub -rule (4) restricts withdrawal, abandonment, settlement, adjustment or satisfaction of the suit only after notice to all person interested therein. Sub -rule (5) speaks about substitution of parties. Sub -rule (6) states that decree in the suit shall be binding on all persons on whose behalf, or for whose benefit the suit is instituted or defended.

8. IT would clearly appear from the reading of the aforesaid provisions of Order 1 Rule 8 of the Code of Civil Procedure that large number of persons are concerned in such a proceeding before a Court of Law. However, such large number of persons are specified persons and can be identified and who can have their claim canvassed against other parties or defence set up against suitor. It would further appear from the provisions of the Act which have been excerpted in foregoing paras that similar class action has been contemplated under the Act. Some difference, however, clearly appear to have been made by the amendment introduced under the Act by amendment Act of 2002 which came into force on 15.3.2003. That precisely has been canvassed by the complainant so as to submit before this Commission that this is not a case as has been contemplated

by the provisions which have been referred to on behalf of the appellant. We may, therefore, notice the provision so canvassed and introduced by the amendment Act of 2002. It is not in dispute that the complaint before the learned Forum was filed after the amendment Act came into force on 15.3.2003. Section 14 of the Act says that if the District Forum is satisfied that the goods complained against suffer from any of the defects specified in the complaint or that any of the allegations contained the complaint about the services are proved, it shall issue an order to the opposite party directing him to do one or more of the things that have been specified in Clauses (a) to (i). Clause (hb) has been introduced by the aforesaid Amendment Act and it reads ''to pay such sum as may be determined by it if it is of the opinion that loss or injury has been suffered by a large number of consumers who are not identifiable conveniently; provided that the minimum amount of sum so payable shall not be less than 5% of the value of such defective goods or services provided as the case may be, to such consumers; provided further that the amount so obtained shall be credited in favour of such person and utilised in such manner as may be prescribed''. A combined reading of all the aforesaid provisions would indicate that the Act contemplates two different types of class actions. One class action is such as can be instituted by one or more persons with the permission of the Forum with a view to give benefit of such action to specified number of other consumers who cannot be brought before the Forum at the initial stage of filing of the complaint. Another class action which has been contemplated by the Act is to see that large number of consumers who cannot be identified even after publishing notice might get the benefit of the order as required to be passed for removal of defects in the goods or removal of deficiency in service and for awarding specified amount as stated above so as to benefit the consumers through a fund to be established by the Government. It would, therefore, clearly appear that when a complaint being a class complaint is to be made the complainant who is a consumer can canvass his own grievance which can be specified and can claim compensation for the wrong which has been done to him as also canvass before the Forum remedy which might be available to a large body of consumers who cannot be ascertained. It would, therefore, clearly appear that the procedure which has been noted above for first part of the class action would not be applicable to the 2nd part of class action as it would be futile either to seek permission of the Forum for such a relief at the initial stage or to issue public notice for such a relief. In our considered opinion, even if no relief has been prayed for, beneficial order may be passed by the Forum so as to benefit a body of consumers as can be canvassed by the complainant or can be taken care of by the Forum as per the merits of the case which ultimately might stand established.

9. BEARING in mind the aforesaid position of law under the Consumer Protection Act, the decisions in the cases of Rajasthan State Road Transport Corporation v. Sunil Kumar and Others, III (2005) CPJ 568; D.D. Kumar and Another v. General Manager, Northern Railways and Another, II (2005) CPJ 727; Kumaravelu Chettiar and Others v. T.R. Ramaswami Ayyar and Others, AIR 1933 PC 183;

Smt. Munni Devi and Others v. Satguru Dayal Tandon and Others, AIR 1973 Allahabad 281; and Kalyan Singh v. Smt. Chhoti and Others, AIR 1990 SC 396, will not have any application to the present case. We have, therefore, no hesitation to find that the complaint as filed by the complainant before the learned Forum was clearly maintainable at law and the learned Forum did have jurisdiction to hear and decide the same.

10. IT has been submitted on behalf of the original opponent No. 1, now appellant that the learned Forum did not have jurisdiction to hear the complaint if aforesaid provision of Section 14(1)(hb) is borne in mind. Accordingly, the minimum amount of sum payable would not be less than 5% of the value of such defective goods sold or services provided, as the case may be, to the consumers. The learned Forum has awarded Rs. 1,50,000 on a working made by it as compensation which would be 5% of the total value of the goods sold and that would come to nearly Rs. 30,000. Thus, the learned Forum did not have pecuniary jurisdiction to entertain the complaint. Reference in this connection has been made to following decisions: 1. Farook Haji Ismail Saya v. Gavahai Bhesania and Others, (GSCDRC) II (1991) CPJ 452; 2. Quality Foils India Pvt. Ltd. v. Bank of Madura Ltd. and Another, II (1996) CPJ 103 (NC); 3. Public Health Engineering Department v. Upbhokta Sanrakshan Samiti, I (1992) CPJ 182 (NC). It is settled proposition of law that pecuniary jurisdiction has to be decided from the prayer made in the complaint and not from the ultimate order passed by the Court or the Forum. We appreciate the ingenuity of the argument advanced by the learned Advocate for the appellant. However, we are unable to endorse the same in view of settled position of law that pecuniary jurisdiction has to be decided from the prayer made in the complaint and not from the ultimate order passed by the Court/Forum. It is here that the decisions which have been canvassed will not be applicable to the present case. Reference in this connection may be made to a decision of the Honble National Commission in the case of Shahbad Co -operative Sugar Mills Limited v. National Insurance Co. Ltd. and Others, reported in II (2003) CPJ 81 (NC), where it has been held that even demand of 18% interest on the claim up to the date of complaint cannot be added to the claim for ousting the complaint on account of lack of pecuniary jurisdiction.

11. IN view of what is stated above and bearing in mind the facts of the present case we do not find any infirmity in the impugned order rendered by the learned Forum.

12. IT has however been submitted by the complainant that the appellant should be saddled with very heavy cost in the present appeal and it should not be less than Rs. 10,000. In our considered opinion, the learned Forum has exercised the discretion in the matter of award of compensation and cost together payable at Rs. 6,000. When we find that the award of lumpsum cost and compensation in the sum of Rs. 6,000 is quite reasonable, we do not propose to exceed that amount in the form of cost of this appeal although the complainant might have

incurred some more expenditure in defending the present appeal. We, accordingly, propose to quantify the cost of this appeal at Rs. 6,000. Following order is, therefore, passed. ORDER This appeal is dismissed. The appellant will pay cost quantified at Rs. 6,000 to the original complainant. Order passed by the learned Forum as well as the order of cost in this appeal shall be complied with by the original opponent, now appellant in this appeal, within eight weeks from today. Appeal dismissed.

