(2017) 04 NCDRC CK 0047

In the National Consumer Disputes Redressal Commission

Case No : 1323 of 2016

MANOJ KUMAR PATEL APPELLANT

Vs

I.C.I.C.I BANK & ANR RESPONDENT

Date of Decision : 17-04-2017

Acts Referred:

Consumer Protection Act, 1986, Section 21(b), Section 2(1)(d)(II), Section 2(1(d) - Jurisdiction of the National Commission - Definitions - Definitions

Citation : 2017 2 CPR 575

Hon'ble Judges : Rekha Gupta

Advocate : Anup Banerjee

Judgement

1. Present Revision Petition has been filed by the Petitioner/ Complainant against the impugned order dated 30.03.2016, passed by West Bengal State Consumer Disputes Redressal Commission at Kolkata (for short, ''State Commission'') in First Appeal No.652 of 2013.

2. Brief facts of the case are that Petitioner/Complainant was an a/c holder in respect of a savings a/c and a DEMAT a/c with Respondent No.1/Opposite Party No.1. He used to run an on-line share trading through a website namely ICICI Direct.Com. of the Respondent-Bank On or about 05.02.2007 he opted for a limit of Rs.16,202.66 towards purchasing power of option trading and the same was sanctioned by the Respondent No.1. Further, he had placed a purchase order through the ICICI Direct. Com on assessment that it would be within sanctioned limit, as he had compared the same to the base price of the purchase order, which was well within the said limit in accordance with the provision of National Stock Exchange Circular No. NSE/F & O/0040/2002 dated 31.10.2002. But to his utter surprise he found that the Respondent No.1''s Bank claimed an additional amount of Rs.5,20,325/-from him, for which he made several correspondence with the Respondent No.1, so that they might withdraw the same but to no avail. Hence, he filed Consumer Complainant praying for direction to the Respondents/ Opposite Parties to pass an order for immediate repudiation of the claim amount

of Rs. 5,20,325/- and also directed the Respondents for payment of the compensation of Rs.19,00,000/- for the undue harassment and cost for pursuing a Legal procedure.

3. The Respondent No.1/Opposite Party No.2 resisted the Complaint by filing the written version by denying and disputing all material allegations stating inter alia, that the matter in dispute had already been decided by Arbitrator Mr.Debasis Mukhopadhyay at National Stock Exchange, Kolkata on 22.08.2007, and, further, that amendment vide circular No.NSE/F & O/0041/2003 download No.NSE/F & O/4389 dated 05.09.2003 done by the National Stock Exchange to its Circular No.NSE/F & O/0010/2001dated 30.05.2001 and NSE/F & O/0014/2001 dated 29.06.2001 had not been considered by the District Forum while arriving at a conclusion. Accordingly, Respondent No.1 prayed for dismissal of the Complaint with costs.

4. The Respondent No.1/Opposite Party No.2 stated that ICICI Securities Ltd. offers an internet trading service through the website www. icici direct com. The Complainant had opened a trading A/c no.850090699 with ICICI Securities Ltd, bank A/c no. 006101045050 and a d-mat a/c no.52758904 with ICICI Bank. Through these accounts, the petitioner availed online trading services through internet. All orders placed by clients on NSE and BSE are forwarded to them without any manual interference. The clients are responsible for the profits or losses emanating from the trading decisions made by them and the interest of Respondent No.1 in the said transactions in the brokerage it receives.

5. Respondent No.1 further stated that the Petitioner was not a consumer as he had availed the services for commercial purposes to earn profit and trading in future and options which is regarded as a speculative activity.

6. Respondent No.2/Opposite Party No.2?National Stock Exchange of India did not contest the case and the matter was heard against them ex parte.

7. The District Consumer Disputes Redressal Forum, Unit-1, Kolkata(for short, ''District Forum'') vide its order dated 15.05.2013 while allowing the Complaint filed by the Petitioner, held as under; " That the case is allowed on contest with cost against o.p. nos. 1 to 3 and ex parte with cost against o.p. no. 4. O.ps. are jointly and/or severally directed reverse the claim amount of Rs.5,20,525/- (Rupees File Lakhs Twenty Thousand five hundred twenty five) only are and further directed to pay to the complainant compensation of Rs. 50,000/-(Rupees Fifty Thousand) only for harassment and mental agony and litigation cost of Rs.5,000/-(Rupees Five Thousand) only within 45 days from the date of communication of this order. i.e. an interest @ 10% P.A. shall accrue over the entire sum due to the credit of the complainant till full realization"

8. Being aggrieved by the order of the District Forum, the Respondent No.1/ Opposite Party No.1, preferred an Appeal before the State Commission on the grounds inter alia, that the District Forum has failed to appreciate that the Petitioner/Complainant was a Central Government Employee, who had been

trading in the share market with high speculation for gaining high returns and further, had never mentioned in the Complaint that he indulged share trading in order to earn his livelihood by self-employment, and, therefore,the Arbitration Award dated 22.08.2007 was binding upon the Complainant.

9. The State Commission while allowing the Appeal of the Respondent No.1 and dismissing the Complaint of the Petitioner, observed as under; " Having heard submissions made by both sides and on perusal of the documents on record and the decisions referred by the parties, it appears that the Complainant used to run online share trading and being dissatisfied with the claim amount by the Appellant Bank has filed a Complaint case before the Ld. District Forum below. Now the moot points to be determined at first instance are 1) whether the complainant is a Consumer under the Appellant as per provision of the Sec 2(1) (d) of the C.P. Act and 2) whether the Consumer Redressal Agencies have the jurisdiction to entertain the Complaint case subsequently after Arbitral Award passed by Ld. Arbitrator. If the answer of these points are affirmative then the case should be adjudicated on merit.

The Complainant (Respondent herein) has averred that he used to trade online shares through a website as addressed as ICICI Direct.Com. It is evident that share trading involved in direct reselling of the service. Further nowhere in the petition of Complaint the Complainant has stated that he indulged in share trading for earning his livelihood. In M/s. India Bulls Financial Services Ltd. Hon''ble National Commission held that investment of hard earn money for purchasing share in order to earn livelihood of the investor after retirement and not for the commercial gain. However, in the instant case the Complainant did not state that whether he is a retired person or not or whether he invested the capital for earning his livelihood. In absence of such averment and keeping the resale factor in mind we are inclined to hold that Complainant is not Consumer under the O.Ps ."

10. I have heard the Counsel for the Petitioner and gone through the record very carefully.

11. The counsel for the Petitioner contended that the Petitioner-Complainant had invested in the online trading services of the Respondent No.1 by opening of Saving and D-mat for earning his livelihood by means of self-employment. The Counsel however, admitted that the petitioner was a Class-I Officer in Central Government, employed in telecom sector. The Counsel further admitted that in the Complaint, the Petitioner/Complainant has nowhere pleaded that he had opened the Saving and D-mat account with the Respondent No.1 for online share trading for earning his livelihood by means of his self-employment.

12. On-going through the Complaint, it is seen that in Para 1, the Petitioner/ Complainant has mentioned as under; "That your complainant states that he has a saving and d-mat account for on line share Trading with OP No.1, 2 and 3 in their future and option segment, where all communications and transactions are

made through ICICI Direct. com ."

13. A Coordinate Bench of this Commission in the matter of M/s. Steel City Securities Ltd. Vs. Shri G. P. Ramesh & Anr, (Revision Petition No.3060 of 2011), decided on 03.02.2014 , observed as under; "9. Thus, the short question which arise for consideration in the present case is as to whether respondents are consumers or not as per Section 2 (1) (d) of the Act.

10. Expression consumer has been defined in Section 2 (1) (d) of the Act, which reads as under;

d Consumer means any person who,---

1. buys any goods for a consideration which has been paid or promised or partly paid and partly promised, or under any system of deferred payment and includes any user of such goods other than the person who buys such goods for consideration paid or promised or partly paid or partly promised, or under any system of deferred payment, when such use is made with the approval of such person, but does not include a person who obtains such goods for resale or for any commercial purpose; or

2. hires or avails of any services for a consideration which has been paid or promised or partly paid and partly promised, or under any system of deferred payment and includes any beneficiary of such services other than the person who hires or avails of the services for consideration paid or promised, or partly paid and partly promised, or under any system of deferred payment, when such services are availed of with the approval of the first mentioned person but does not include a person who avails of such services for any commercial purpose;

Explanation------

For the purpose of this clause, commercial purpose does not include use by a person of goods bought and used by him and services availed by him exclusively for the purposes of earning his livelihood by means of self-employment.

11. Respondents have nowhere pleaded in their complaint that they are doing the share trading business for self-employment nor it has been pleaded that the services provided by the petitioner are being availed exclusively for the purpose of earning their livelihood by means of self-employment. It is well-settled that the dispute between the parties relating to commercial purposes are excluded under the Act.

12. This Commission in Vijay Kumar Vs. Indusind Bank, II (2012) CPJ 181 (NC) has held;

"Since, petitioner has been trading regularly in the shares which is a commercial transaction and for which he has also availed the over-draft facility from the respondent, as such he would not be a consumer as per Section 2 (1) (d) (ii) of the Act. Moreover, regular trading in the purchase and sale of the shares is a commercial transaction and the only motive is to earn profit. Thus, this activity is purely commercial one and is not covered under the Act."

13 . Since, respondents are trading regularly in the share business which is commercial activity, under these circumstances, respondents would not fall under the definition of consumer as per the Act. Moreover, regular trading in the sale and purchase of shares is a purely commercial activity and the only motive is to earn profits. Therefore, this activity being purely commercial one, is not covered under the provisions of the Act.

14. Accordingly, we hold that since respondents are not the Consumers as per provisions of the Act, the State Commission committed grave error in allowing their complaint. Consequently, we allow the present revision petition and set aside the impugned order passed by the State Commission and restore the order of the District Forum. With the result, the complaint filed by the respondents before the District Forum shall stand dismissed ."

14. In the instant case also, it is an admitted fact that the Petitioner/ Complainant was gainfully employed as a Class I Officer in Central Government in telecom sector. Thus, it cannot be said that Petitioner, who had been engaged in online share trading for earning his livelihood by means of self-employment. I agree with the findings given by the State Commission that the Petitioner does not fall within the ambit of ''consumer'' as defined under Section 2 (1) (d) of the Consumer Protection Act, 1986.

15. Thus, in view of the above discussions, I find that no jurisdictional or legal error has been shown in the impugned order to call for interference in the exercise of powers under Section 21(b) of the Consumer Protection Act, 1986 and does not call for any interference nor does it suffer from any infirmity or erroneous exercise of jurisdiction or material irregularity in dismissing the appeal preferred by the Petitioner. Thus, the present Revision Petition being devoid of any merits is hereby dismissed. Consequently, the Consumer Complaint filed by the Petitioner/ Complainant before the District Forum is also dismissed.

16. No order as to cost.