
(2011) 12 SC CK 0019

In the Supreme Court Of India

Case No : C.A. No. 10706 of 2011 (Arising out of SLP (C) No. 17213 of 2010)

Nivedita Sharma

APPELLANT

Vs

Cellular Operators Assn. of India and Others

RESPONDENT

Date of Decision : 07-12-2011

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 9
Constitution of India, 1950 — Article 226, 227, 32
Consumer Protection Act, 1986 — Section 11, 12, 13, 14, 17

Citation : (2012) 4 RCR(Civil) 850 : (2011) 13 SCALE 584

Hon'ble Judges : Sudhansu Jyoti Mukhopadhyaya, J;G.S. Singhvi, J

Bench : Division Bench

Final Decision : Allowed

Judgement

1. Leave granted.

2. The question which requires consideration in this appeal is whether the Division Bench of the Delhi High Court was justified in entertaining the writ petitions filed by Respondent No. 1 and Ors. against order dated 26.12.2006 passed by the State Consumer Disputes Redressal Commission (for short, "the State Commission") ignoring that statutory remedy of appeal was available to them u/s 19 of the Consumer Protection Act, 1986 (for short, "the 1986 Act").

3. Respondent No. 1 filed a complaint against Bharti Tele-ventures Ltd., ICICI Bank Limited and American Express Bank Ltd. with the prayer for award of exemplary damages to the tune of `34,50,000/- for harassment, mental agony and financial loss suffered by her on account of unsolicited calls received on her mobile phone from various banks/ financial institutions and other companies. She pleaded that despite repeated representations made to the opposite parties, no remedial measure was taken by them and she continued to suffer harassment due to unsolicited calls which had adversely affected her life in different ways.

4. The State Commission took cognizance of the complaint filed by the Appellant,

issued notice to the opposite parties and passed order dated 01.05.2006, paragraphs 9 and 10 of which are extracted below:

9. We hereby, by interim order direct all the service providers of mobile phone services not to disclose any personal information in their possession including the mobile phone number in their possession to any unauthorised persons including the Banks, financial institutions, finance companies as it is a breach of "Privacy Statement" and undertaking and may invite the cancellation of their licence as no stranger can possess such information without being provided by the service provider who alone is in its possession.

10. At the same time all unauthorised persons including the Banks, financial institutions, finance companies and any other persons who are not supposed to be in possession of the information of the subscribers including the mobile phone number are restrained from making calls or sending SMS to any consumer as they are vicariously, as well as directly liable for these acts

5. The application filed by Respondent No. 1 - Cellular Operators Association of India for impleadment as a party to the complaint was allowed by the State Commission vide order dated 04.07.2006. Thereafter, the State Commission passed another interim order on 27.09.2006 and gave the following directions:

While reiterating our interim order dated 25.5.2006, we hereby make the following directions to all the service providers of mobile telephone in the city as well as banks, financial institutions and any other agency who is engaged in making unsolicited calls and messages to those consumers with whom they have no contract of any kind in this regard:

(i) That every service provider shall write to their consumers whether he is interested on being put on DND, i.e., (Do not disturb) service vis-avis their calls/messages and if so as to what kind of calls and messages a consumer wants to be put on this service. Till such a communication is sent by the service providers to their consumers and response is received, the service provider shall not make any call or send any message including reminding about the telephone bills, i.e., due date of payment, etc., or informing about the new services as they should do so by sending letters giving details of such services as the contract is only payment of the bills on receipt of bill containing details of all the calls made by the consumer so as to allow the consumer to raise any objection if the calls shown are correct or not. Sending a bill by way of message calling upon the consumer to make the payment is against the terms of the contract as such message creates disturbance, inconvenience and mental agony to the consumer when he is busy in the meeting or in some other urgent work or in the office or any other place.

(ii) All the banks, financial institutions or any other kind of agency are hereby directed not to send unsolicited calls or messages to the consumers of the service providers with whom they have no contract of any kind whatsoever in this regard as this phenomenon is causing lot of inconvenience, mental agony

and harassment to the consumers of service providers of mobile telephones. Presumption would be raised that they have obtained the information from the service providers as to the details of the consumers as well as mobile telephone number and for this the service provider or the banks, financial institutions shall be deemed to be severally and jointly liable.

It is made clear that if in future any violation or non-compliance of this order is brought to the notice of this Commission by any consumer of any service provider of such service, it would be treated as failure or omission to comply with the order and shall invite not only heavy punitive damages but sentence of imprisonment as provided u/s 27 of the Consumers Protection Act, 1986 for a term which shall not be less than one month but which may extend to three years or with fine which shall not be less than two thousand rupees but which may extend to ten thousand rupees, or with both. Chief Executive Officers of the service providers, banks and the financial institutions shall be liable for this punishment.

6. Respondent Nos. 1, 2, 4, 5 and one Shri Rajiv Arora filed Writ Petition Nos. 16332-34 of 2006 for quashing the aforesaid order. The Division Bench of the High Court issued notice and stayed the operation of order dated 27.09.2006.

7. During the pendency of the writ petitions, the State Commission took up the complaint filed by the Appellant, treated it as a complaint on her behalf and on behalf of large number of consumers by observing that the Cellular Operators Association of India had already been impleaded as one of the parties, considered various issues and passed order dated 26.12.2006, paragraphs 38 to 40 of 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 ` 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 ` 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 Thousand) 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.

8. The Respondents challenged the directions contained in paragraph 38 of the aforementioned order in Writ Petition (Civil) No. 583 of 2007 and CM(M) No. 443 of 2007. The Telecom Regulatory Authority of India also filed CM(M) No. 174 of 2007 for quashing the directions contained in the order of the State Commission.

9. The Division Bench of the High Court disposed of all the petitions and set aside the directions contained in paragraph 38(i) and (ii) of the order of the State Commission. The Division Bench also expunged the remarks contained in paragraph 31 of the order.

10. Shri Sanjeev Anand, Learned Counsel for the Appellant argued that even

though the exercise of power by the High Courts under Articles 226 and 227 of the Constitution is not hedged with any limitation/constraint, the Division Bench of the Delhi High Court committed serious error by entertaining the writ petition ignoring that the 1986 Act is a code unto itself and the remedy of appeal available against an order passed by the State Commission is an equally efficacious alternative remedy.

11. Shri C.S. Vaidyanathan, learned senior counsel appearing for Respondent No. 1 and Shri R.S. Suri, learned senior counsel appearing for proforma Respondent No. 4 argued that even though their clients could have availed the remedy of appeal u/s 19 of the 1986 Act, the Division Bench of the High Court did not commit any error by entertaining the petitions filed under Articles 226 and 227 of the Constitution because the directions given by the State Commission were ex facie beyond the scope of the 1986 Act. In support of this argument, Shri Vaidyanathan relied upon the judgments of this Court in *East India Commercial Company Ltd. Calcutta and Anr. v. The Collector of Customs Calcutta* (1963) 3 SCR 338 *State of West Bengal v. North Adjai Coal Company Ltd* (1971) 1 SCC 309 *Whirlpool Corporation v. Registrar of Trade Marks Mumbai and Ors.* (1998) 8 SCC 1 and *Popcorn Entertainment and Anr. v. City Industrial Development Corporation and Anr.* (2007) 9 SCC 593 . Shri Vaidyanathan also submitted that the State Commission should have exercised restraint and deferred the hearing of the complaint because the writ petitions filed by the Respondents questioning its jurisdiction to pass order dated 27.09.2006 were pending before the High Court.

12. We have considered the respective arguments/submissions. There cannot be any dispute that the power of the High Courts to issue directions, orders or writs including writs in the nature of habeas corpus, certiorari, mandamus, quo warranto and prohibition under Article 226 of the Constitution is a basic feature of the Constitution and cannot be curtailed by parliamentary legislation *L. Chandra Kumar v. Union of India* (1997) 3 SCC 261 . However, it is one thing to say that in exercise of the power vested in it under Article 226 of the Constitution, the High Court can entertain a writ petition against any order passed by or action taken by the State and/or its agency/instrumentality or any public authority or order passed by a quasi-judicial body/authority, and it is an altogether different thing to say that each and every petition filed under Article 226 of the Constitution must be entertained by the High Court as a matter of course ignoring the fact that the aggrieved person has an effective alternative remedy. Rather, it is settled law that when a statutory forum is created by law for redressal of grievances, a writ petition should not be entertained ignoring the statutory dispensation.

13. In *Thansingh Nathmal v. Superintendent of Taxes* AIR 1964 SC 1419 this Court adverted to the rule of self-imposed restraint that writ petition will not be entertained if an effective remedy is available to the aggrieved person and observed:

The High Court does not therefore act as a court of appeal against the decision of a court or tribunal, to correct errors of fact, and does not by assuming jurisdiction under Article 226 trench upon an alternative remedy provided by statute for obtaining relief. Where it is open to the aggrieved Petitioner to move another tribunal, or even itself in another jurisdiction for obtaining redress in the manner provided by a statute, the High Court normally will not permit by entertaining a petition under Article 226 of the Constitution the machinery created under the statute to be bypassed, and will leave the party applying to it to seek resort to the machinery so set up.

14. In *Titaghur Paper Mills Company Ltd. v. State of Orissa* (1983) 2 SCC 433 this Court observed:

It is now well recognised that where a right or liability is created by a statute which gives a special remedy for enforcing it, the remedy provided by that statute only must be availed of. This rule was stated with great clarity by Willes, J. in *Wolverhampton New Waterworks Company v. Hawkesford* (1859) 6 CBNS 336: 141 ER 486 in the following passage:

... There are three classes of cases in which a liability may be established founded upon a statute.....But there is a third class, viz., where a liability not existing at common law is created by a statute which at the same time gives a special and particular remedy for enforcing it.....The remedy provided by the statute must be followed, and it is not competent to the party to pursue the course applicable to cases of the second class. The form given by the statute must be adopted and adhered to.

The rule laid down in this passage was approved by the House of Lords in *Neville v. London Express Newspapers Ltd.* 1919 AC 368: (1918-19)

All ER Rep. 61 (HL) and has been reaffirmed by the Privy Council in *Attorney General of Trinidad and Tobago v. Gordon Grant and Company Ltd* 1935 AC 532 and *Secy, of State v. Mask and Company* (1939-40) 67 IA 222: AIR 1940 PC 105. It has also been held to be equally applicable to enforcement of rights, and has been followed by this Court throughout. The High Court was therefore justified in dismissing the writ petitions in limine.

15. In *Mafatlal Industries Ltd. v. Union of India* (1997) 5 SCC 536 B.P. Jeevan Reddy, J. (speaking for the majority of the larger Bench) observed:

So far as the jurisdiction of the High Court under Article 226 or for that matter, the jurisdiction of this Court under Article 32 is concerned, it is obvious that the provisions of the Act cannot bar and curtail these remedies. It is, however, equally obvious that while exercising the power under Article 226/Article 32, the Court would certainly take note of the legislative intent manifested in the provisions of the Act and would exercise their jurisdiction consistent with the provisions of the enactment.

16. In the judgments relied upon by Shri Vaidyanathan, which, by and large,

reiterate the proposition laid down in Baburam Prakash Chandra Maheshwari v. Antarim Zila Parishad now Zila Parishad, Muzaffarnagar AIR 1969 SC 556 it has been held that an alternative remedy is not a bar to the entertaining of writ petition filed for the enforcement of any of the fundamental rights or where there has been a violation of the principles of natural justice or where the order under challenge is wholly without jurisdiction or the vires of the statute is under challenge.

17. It can, thus, be said that this Court has recognized some exceptions to the rule of alternative remedy. However, the proposition laid down in Thansingh Nathmal v. Superintendent of Taxes (supra) and other similar judgments that the High Court will not entertain a petition under Article 226 of the Constitution if an effective alternative remedy is available to the aggrieved person or the statute under which the action complained of has been taken itself contains a mechanism for redressal of grievance still hold field.

18. In the light of the above, we shall now consider whether the Division Bench of the High Court committed an error by entertaining the writ petition filed by the Respondents.

19. The 1986 Act was enacted for better protection of the interests of consumers by making provision for the establishment of consumer councils and other authorities for the settlement of consumer disputes. The object and purpose of enacting the 1986 Act is to provide for simple, inexpensive and speedy remedy to the consumers who have grievance against defective goods and deficient services. This benevolent piece of legislation intended to protect a large body of consumers from exploitation. Prior to the 1986 Act, consumers were required to approach the Civil Court for securing justice for the wrong done to them and it is a known fact that decision of the litigation instituted in the Civil Court could take several years. Under the 1986 Act, the consumers are provided with an alternative, efficacious and speedy remedy before consumer forums at district, state and national level.

20. In Fair Air Engineers Pvt. Ltd. v. N.K. Modi (1996) 6 SCC 385 this Court referred to the judgment in Lucknow Development Authority v, M.K. Gupta (1994) 1 SCC 243 and observed:

Accordingly, it must be held that the provisions of the Act are to be construed widely to give effect to the object and purpose of the Act. It is seen that Section 3 envisages that the provisions of the Act are in addition to and are not in derogation of any other law in force. It is true, as rightly contended by Shri Suri, that the words "in derogation of the Provisions of any other law for the time being in force" would be given proper meaning and effect and if the complaint is not stayed and the parties are not relegated to the arbitration, the Act purports to operate in derogation of the provisions of the Arbitration Act. Prima facie, the contention appears to be plausible but on construction and conspectus of the provisions of the Act we think that the contention is not well founded. The

Parliament is aware of the provisions of the Arbitration Act and the Contract Act, 1872 and the consequential remedy available u/s 9 of the Code of Civil Procedure, i.e., to avail of right of civil action in a competent court of civil jurisdiction. Nonetheless, the Act provides the additional remedy.

21. In *haran Singh v. Healing Touch Hospital* (2000) 7 SCC 668 this Court observed:

Consumer Protection Act is one of the benevolent pieces of legislation intended to protect a large body of consumers from exploitation. The Act provides for an alternative system of consumer justice by summary trial. The authorities under the Act exercise quasi-judicial powers for redressal of consumer disputes and it is one of the postulates of such a body that it should arrive at a conclusion based on reason. The necessity to provide reasons, howsoever, brief in support of its conclusion by such a forum, is too obvious to be reiterated and needs no emphasising. Obligation to give reasons not only introduces clarity but it also excludes, or at any rate minimizes, the chances of arbitrariness and the higher forum can test the correctness of those reasons. Unfortunately we have not been able to find from the impugned order any reasons in support of the conclusion that the claim of the Appellant is "unrealistic" or "exaggerated" or "excessive". Loss of salary is not the sole factor which was required to be taken into consideration. While quantifying damages, consumer forums are required to make an attempt to serve ends of justice so that compensation is awarded, in an established case, which not only serves the purpose of recompensing the individual, but which also at the same time, aims to bring about a qualitative change in the attitude of the service provider.

Indeed, calculation of damages depends on the facts and circumstances of each case. No hard-and-fast rule can be laid down for universal application. While awarding compensation, a Consumer Forum has to take into account all relevant factors and assess compensation on the basis of accepted legal principles, on moderation. It is for the Consumer Forum to grant compensation to the extent it finds it reasonable, fair and proper in the facts and circumstances of a given case according to established judicial standards where the claimant is able to establish his charge.

22. Section 17(1) of the 1986 Act which outlines the jurisdiction of the State Commission and Section 19 which provides for an appeal against the order of the State Commission read as under:

Section 17. Jurisdiction of the State Commission-

(1) Subject to the other provisions of this Act, the State Commission shall have jurisdiction-

(a) to entertain-

(i) complaints where the value of the goods or services and compensation, if any, claimed exceeds rupees twenty lakhs but does not exceed rupees one crore; and

(ii) appeals against the orders of any District Forum within the State; and

(b) to call for the records and pass appropriate orders in any consumer dispute which is pending before or has been decided by any District Forum within the State, where it appears to the State Commission that such District Forum has exercised a jurisdiction not vested in it by law, or has failed to exercise a jurisdiction so vested or has acted in exercise of its jurisdiction illegally or with material irregularity.

(2) A complaint shall be instituted in a State Commission within the limits of whose jurisdiction,-

(a) the opposite party or each of the opposite parties, where there are more than one, at the time of the institution of the complaint, actually and voluntarily resides or carries on business or has a branch office or personally works for gain; or

(b) any of the opposite parties, where there are more than one, at the time of the institution of the complaint, actually and voluntarily resides, or carries on business or has a branch office or personally works for gain, provided that in such case either the permission of the State Commission is given or the opposite parties who do not reside or carry on business or have a branch office or personally works for gain, as the case may be, acquiesce in such institution; or

(c) the cause of action, wholly or in part, arises.

Section 19. Appeals - Any person aggrieved by an order made by the State Commission in exercise of its powers conferred by Sub-clause (i) of Clause (a) of Section 17 may prefer an appeal against such order to the National Commission within a period of thirty days from the date of the order in such form and manner as may be prescribed:

Provided that the National Commission may entertain an appeal after the expiry of the said period of thirty days if it is satisfied that there was sufficient cause for not filing it within that period:

Provided further that no appeal by a person, who is required to pay any amount in terms of an order of the State Commission, shall be entertained by the National Commission unless the Appellant has deposited in the prescribed manner fifty per cent, of the amount or rupees thirty-five thousand, whichever is less.

23. A reading of the plain language of Section 17 shows that every State Commission has the jurisdiction to entertain complaints where the value of the goods or services and compensation, if any, claimed exceeds Rs. 20 lacs but does not exceed Rs. 1 crore. By Section 18 the provisions of Sections 12 to 14 and the Rules made thereunder, for the disposal of complaints by the District Forum, have been made applicable for deciding the disputes by the State Commission. Section 19 provides for remedy of appeal against an order made by the State

Commission in exercise of its powers under Sub-clause (i) of Clause (a) of Section 17. If Sections 11, 17 and 21 of the 1986 Act which relate to the jurisdiction of the District Forum, the State Commission and the National Commission, there does not appear any plausible reason to interpret the same in a manner which would frustrate the object of legislation.

24. What has surprised us is that the High Court has not even referred to Sections 17 and 19 of the 1986 Act and the law laid down in various judgments of this Court and yet it has declared that the directions given by the State Commission are without jurisdiction and that too by overlooking the availability of statutory remedy of appeal to the Respondents.

25. We also find that the High Court has taken cognizance of the statement made on behalf of the counsel for the Petitioners that their clients would challenge Clause (iii) of para 38 of the State Commission's order by filing an appeal u/s 19 of the Act and the fact that one of the aggrieved parties, namely, American Express Bank Limited has already filed an appeal questioning paragraph 38(iii) of the order of the State Commission. After having noticed that some of the Petitioners were inclined to avail the remedy of appeal against the particular portion of the order passed by the State Commission, the High Court should not have entertained the writ petition filed under Article 226 of the Constitution and the miscellaneous petitions filed under Article 227 of the Constitution and directed them to avail remedy of appeal u/s 19 of the 1986 Act.

26. The appeal is accordingly allowed and the impugned order is set aside.

27. However, liberty is given to Respondent No. 1 and Ors. to challenge the order of the State Commission by availing alternative remedy of appeal u/s 19 of the 1986 Act. We also direct that if the Respondents or any one of them file(s) an appeal within a period of 60 days from today, then the same shall be entertained by the National Commission and decided on merits. We also give liberty to American Express Bank Limited to amend the memo of appeal for the purpose of challenging the order of the State Commission on other grounds. It will also be open to Respondent No. 1 and Ors. to apply for stay of the order of the State Commission. If any such application is filed, the National Commission shall decide the same on its own merits without being influenced by the observations contained in the impugned order.