(2014) 05 NCDRC CK 0007

In the National Consumer Disputes Redressal Commission

ORIENTAL BANK OF COMMERCE — APPELLANT

Vs

Shankar Chawal Udyog Prop. Ravi Kumar Agarwal — RESPONDENT

Date of Decision : 20-05-2014

Acts Referred:

Citation : 2014 0 NCDRC 279 : 2014 3 CPJ 38

Hon'ble Judges : K.S.CHAUDHARI , B.C.Gupta J.

Advocate : H.P.BHARDWAJ , B.P.AGRAWAL , RAJIV KAPUR

Judgement

1. THIS revision petition has been filed by the petitioner against the order dated 14.08.2012 passed by the Chhattisgarh State Consumer Disputes Redressal Commission, Pandri, Raipur (in short, ''the State Commission '') in Appeal No. FA/12/140 - Oriental Bank of Commerce Vs. M/s. Shankar Chawal Udyog & Anr. by which, while dismissing appeal, order of District Forum allowing complaint against petitioner was upheld.

2. BRIEF facts of the case are that Complainant/Respondent No.1 sold paddy to M/s. Vinayak Agro Products, who issued account payee cheque of Rs.4,00,000/ - on 3.8.2009 in favour of the complainant. Cheque was dropped by messenger in the drop box of the Bank/OP No. 2/Respondent No. 2. As cheque was not credited in the account of complainant till 10.8.2009, inquiry was made and it was found that someone made overwriting on the cheque and converted it into a bearer cheque and encashed it. FIR was lodged. Alleging deficiency on the part of OPs, complainant filed complaint before District Forum. OP No. 1/petitioner resisted complaint and submitted that if account payee cheque was issued in favour of the complainant then why was it not deposited in the account of the complainant and why was it handed over to employee of the broker Manish Trading Co. for deposit. It was further submitted that cheque was never received through clearance, but it was directly presented before its employee by a person after cancellation of endorsement of account payee so, payment was made as a bearer cheque and prayed for dismissal of complaint. OP No. 2 resisted complaint and submitted that cheque was neither presented before its employee, nor

dropped in the drop box, otherwise, necessary entry would have been made in the ledger of the bank and prayed for dismissal of complaint. Learned District forum after hearing both the parties, allowed complaint and directed OP No. 1 to pay Rs.4,00,000/ - along with 6% p.a. interest and further pay Rs.3,000/ - as compensation and Rs.500/ - towards litigation expenses. Appeal filed by the OP No. 1 was dismissed by learned State Commission vide impugned order against which, this revision petition has been filed. Heard learned Counsel for the parties finally at admission stage and perused record.

3. LEARNED Counsel for the petitioner submitted that complainant had no privity of contract with the petitioner and complainant did not fall within purview of consumer vis -à -vis petitioner. It was further submitted that cheque was for commercial transaction; so, complaint was not maintainable. It was further submitted that complaint could have been filed only by M/s. Vinayak Agro Products and without impleading M/s. Vinayak Agro Products as party, complaint was not maintainable. It was further submitted that as forgery was alleged and criminal case was still pending, learned District Forum had no jurisdiction to decide the complaint and learned District Forum committed error in allowing complaint and State Commission further committed error in dismissing appeal; hence, revision petition be allowed and impugned order be set aside. On the other hand, learned Counsel for the Respondent No. 1 submitted that order passed by learned State Commission is in accordance with law; hence, revision petition be dismissed. Learned Counsel for the Respondent No. 2 submitted that no liability has been fastened on Respondent No. 2 by District Forum.

4. ADMITTEDLY , cheque was issued by Proprietor M/s. Vinayak Agro Products in favour of complainant M/s. Shankar Chawal Udyog which was an Account Payee cheque. As per version of the complainant, this cheque was dropped in drop box of State Bank of India, whereas State Bank of India in its reply denied this fact and submitted that cheque neither presented before its employee, nor dropped in the drop box, otherwise, necessary entry would have been made in the ledger of the petitioner. Had the cheque been dropped in the drop box, it could have reached to Petitioner Bank through clearance and there was no occasion for any person appearing before Petitioner Bank for crossing endorsement of Account Payee and signing the cheque as proprietor of M/s. Vinayak Agro Products. In such circumstances, story of complainant is suspicious that the cheque was dropped in the drop box of State Bank of India for clearance and someone cancelled endorsement of Account Payee cheque and got it encashed. Section 2(d)(ii) of Consumer Protection Act reads as under: ''''2(d)(ii) 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 purposes ''''.

Perusal of aforesaid provision makes it clear that services must be availed for consideration paid or promised to pay. In the case in hand, admittedly, complainant neither paid any consideration, nor promised to pay any consideration to the Petitioner Bank for clearance of cheque issued by M/s. Vinayak Agro Products. Complainant was customer vis -à -vis State Bank of India, but he cannot be treated as consumer of Petitioner Bank as aforesaid clearance of cheque was without any consideration paid or promised to be paid and in such circumstances, complaint filed by the complainant against petitioner was not maintainable. There was no privity of contract between the complainant and the Petitioner Bank. This Commission in Appeal No. 54 of 2007 - HimkasthSales Depot Vs. Branch Manager, State Bank of Patiala endorsed the view taken by the State Commission that complaint filed by the complainant was not maintainable, as there was no privity of contract with OP/Respondent No. 1. This Commission in (1997) 5 CompLJ 607 NCDRC - The Gauhati Co -operative Urban Vs. SantoshKumar Tewari & Ors. observed that as there was no hiring of service for consideration, complainant did not fall within the purview of consumer. In the light of aforesaid judgments, we are of the view that as complainant had not hired services of petitioner, complainant was not a consumer vis -à -vis petitioner and complaint was not maintainable against the petitioner. Only M/s. Vinayak Agro Products, who was account holder of petitioner could have filed complaint against the petitioner.

5. LEARNED Counsel for the respondent has placed reliance on the judgment of Hon ''ble Apex Court delivered in M/s. Spring Meadows Hospital & Anr. Vs. HarjolAhluwalia in which it was held that beneficiaries can also file complaint. In the aforesaid case, complaint was filed by parents regarding medical negligence to their minor child, whereas in the case in hand, complainant cannot be treated as beneficiary of M/s. Vinayak Agro Products and in such circumstances, complaint filed by the complainant against the petitioner was not maintainable.

6. AS per allegations in the complaint, someone crossed endorsement of Account Payee cheque and got it encashed meaning thereby, forgery was alleged. It is also admitted that FIR was lodged and criminal case was still pending regarding this forgery. Learned District Forum and Learned State Commission have placed reliance on the report of Mr. M.N. Pandey, State Examiner of Questioned Documents, Govt. of Chhattisgarh, Raipur, which was given in criminal case. He has not been examined before the Learned District Forum and petitioner had no opportunity to cross -examine him. In such circumstances, no reliance should have been placed on the report of Mr. M.N. Pandey and Learned District Forum and Learned State Commission committed error in holding that cancellation of endorsement Account Payee was forged one. Learned Counsel for the petitioner has placed reliance on (1993) 2 SCC 97 - Bank of Mahrashtra Vs. Automotive Engineering Co. in which it was held that petitioner is not liable on the ground of negligence merely because of its failure to scrutinise the cheque in ultra violet ray lamp. In such circumstances, no liability should have been fastened on the petitioner for encashment of cheque on the basis of forged cancellation of

endorsement. Learned Counsel for the Respondent no. 1 has placed reliance on judgment of Hon ''ble Apex Court in 1987 (2) SCC 666 - CanaraBank Vs. CanaraSales Corporation in which it was observed in paragraph 42 as under: '"'42. The bank''s business depends upon this trust. Whenever a cheque purporting to be by a customer is presented before a bank it carries a mandate to the bank to pay. If a cheque is forged there is no such mandate. The bank can escape liability only if it can establish knowledge to the customer of the forgery in the cheques. In -action for continuously long period cannot by itself afford a satisfactory ground for the bank to escape the liability. The plaintiff in this case swung into action immediately on the discovery of the fraud committed by its accountant as in the case before the Privy Council. This judgment does not help to the petitioner because as per aforesaid judgment, petitioner was under an obligation to pay amount of cheque to the bearer of cheque after cancellation of endorsement of Account Payee. No doubt, if the cheque was forged one, there was no such mandate to make payment, but by necked eye, it cannot be said that cancellation of endorsement of Account Payee was a forged one.

As there was allegation of forgery in the complaint and criminal case was also pending before the Court, learned District Forum should have dismissed complaint and directed complainant to approach to the Civil Court for redressal of his grievances and learned State Commission further committed error in dismissing appeal and revision petition is to be allowed.

7. CONSEQUENTLY , revision petition filed by the petitioner is allowed and impugned order dated 14.8.2012 passed by learned State Commission in Appeal No. FA/12/140 - Oriental Bank of Commerce Vs. M/s. Shankar Chawal Udyog & Anr. and order of District Forum dated 21.02.2012 passed in Complaint No. 93 of 2011 - M/s. Shankar Chawal Udyog Vs. Oriental Bank of Commerce is set aside and complaint stands dismissed with liberty to the complainant to approach Civil Court for redressal of its grievance.

