
(2015) 07 CAL CK 0100
In the Calcutta High Court
Case No : C.O. No. 1757 of 2008

Sanjeev Kumar and Brothers

APPELLANT

Vs

The Calcutta Tramways Company (1978) Ltd. and Others

RESPONDENT

Date of Decision : 31-07-2015

Acts Referred:

Constitution of India, 1950 — Article 226, 227

Consumer Protection Act, 1986 — Section 12, 15, 17, 19, 2(d)

Citation : (2015) 07 CAL CK 0100

Hon'ble Judges : Mir Dara Sheko, J

Bench : Single Bench

Advocate : Uday Kumar Jha and Maheswari Sharma, for the Appellant

Final Decision : Dismissed

Judgement

Mir Dara Sheko, J—The application under Article 227 of the Constitution of India has been directed against the order dated 29th February, 2008 passed by the State Commission in S.C. Case No. 136/A/2007 arising out the judgment and order dated 19th March, 2007 passed by the District Forum Unit-II in C.D.F. II, Case No. 69 of 2004. The petitioner M/s. Sanjeev Kumar & Brothers a Partnership Concern represented by its Managing Partner Sri Ajit Kumar Gupta filed a complaint before the Consumer Disputes Redressal Forum Kolkata Unit-II, being the District Forum under Section 12 of the Consumer Protection Act, 1986, alleging that despite the complainant being the highest bidder after participation in the tender process and despite deposit of the price for the materials proposed to be lifted and despite getting supply of the materials of the first lot supply of further materials were stopped by the opposite parties and the petitioner was not allowed to take the remaining materials despite several representations and personal visits.

2. Opposition was that the complaint under the Consumer Protection Act, 1986 was not maintainable since the impugned transaction was a commercial one and the petitioner was not a "consumer" within the meaning provided in the Act.

3. It is pertinent to note that to meet the objection on the point of maintainability the petitioner subsequently carried out amendment in the petition of complaint which is as follows:--

"That the petitioner carried on the aforesaid business of purchasing and selling the materials for the purpose of earning his livelihood by way of self-employment. It is further stated that the petitioner carried on the aforesaid business with the occasion aid and assistance of his family members and is fully dependent on the same for earning his livelihood", and,

"That the petitioner participated in the aforesaid tender of the opposite parties so that he can earn his livelihood by ways of self-employment."

4. The Consumer Disputes Redressal Forum Kolkata Unit-II upon hearing both sides dismissed the complaint on contest with the findings as follows:--

"We find that the complainant firm is doing large scale business as it deals in ferrous and non-ferrous materials and also acts as a metal merchant as well as general order supplier. This complainant firm cannot be treated as a "consumer" by any stretch of imagination. Therefore, the complainant firm has no jurisdiction to file a complaint before this District Forum and with indication that "the complainant firm has to file a fresh suit/case before a proper Court of Law/Forum having jurisdiction to entertain the litigation."

5. Being aggrieved by such order of the District Forum the petitioner/being the appellant preferred an appeal before the State Consumer Disputes Redressal Commission under Section 17 of the Act and the State Commission upheld the judgment of the District Forum holding the complaint as not maintainable and affirmed the finding of the District Forum that "the complainant could not be treated as a consumer by any stretch of imagination as the said firm was engaged in commercial activities".

6. Against such order dated 29th February, 2008 of the State Consumer Disputes Redressal Commission West Bengal the petitioner has come up with this application before this Court seeking interference under Article 227 of the Constitution of India on the grounds as mentioned in the revision application. The opposite party however did not participate in the hearing before this Court. Ld. Advocate, Mr. Jha submitted that the power of this Court in Articles 226 & 227 is unfettered and since injustice has been incurred by both the Forums illegally, interference is necessary with the impugned orders to render justice despite having any alternative remedy elsewhere under the Act. Submission is that even if alternative remedy lies elsewhere would not operate as an absolute bar to make interference by this Court in the given circumstances of the case. Mr. Jha relied on the cases of:--

"(i) Whirlpool Corporation v. Registrar of Trade Marks, Mumbai & Ors. reported in 1998 (8) Supreme 176.

(ii) Case of Dr (Smt.) Kuntesh Gupta Vs. Management of Hindu Kanya

Mahavidyalaya, Sitapur (U.P.) and Others, AIR 1987 SC 2186 : (1987) 13 ECR 944 : (1987) 32 ELT 8 : (1987) 3 JT 670 : (1987) LabIC 1901 : (1987) 2 SCALE 667 : (1987) 4 SCC 525 : (1988) 1 SCR 357 : (1988) 1 UJ 143 .

(iii) Union of India (UOI) and Others Vs. Tania Construction Pvt. Ltd., (2011) 2 ARBLR 115 : (2011) 5 JT 59 : (2011) 3 RCR(Civil) 821 : (2011) 4 SCALE 745 : (2011) 5 SCC 697 : (2011) 5 SCR 397 : (2011) 4 UJ 2210 .

(iv) Surya Dev Rai Vs. Ram Chander Rai and Others, AIR 2003 SC 3044 : (2003) 4 CTC 48 : (2003) 6 SCALE 133 : (2003) 6 SCC 675 : (2003) 2 SCR 290 Supp : (2003) WritLR 722 : (2003) AIRSCW 3872 : (2003) 6 Supreme 390 .

(v) State of Karnataka Vs. Vishwabarathi House Building Coop. Society and Others, AIR 2003 SC 1043 : (2003) 95 CLT 445 : (2003) 113 CompCas 536 : (2004) 1 CompLJ 321 : (2003) 1 CTC 409 : (2003) 96 FLR 743 : (2003) 1 JT 344 : (2003) 1 SCALE 309 : (2003) 2 SCC 412 : (2003) 1 SCR 397 : (2003) 1 UJ 420 .

(vi) L. Chandra Kumar Vs. Union of India and others, AIR 1997 SC 1125 : (1997) 83 CLT 815 : (1997) 92 ELT 318 : (1997) 228 ITR 725 : (1997) 3 JT 589 : (1997) 3 SCALE 40 : (1997) 3 SCC 261 : (1997) SCC(L&S) 577 : (1997) 2 SCR 1186 : (1997) 105 STC 618 : (1997) AIRSCW 1345 : (1997) 3 Supreme 147 ."

Submission is that the rule of exclusion of writ jurisdiction due to availability of an alternative remedy is of discretion and not one compulsion, and, there could be contingencies in which the High Court exercised its jurisdiction in spite of availability of an alternative remedy, and, alternative remedy is not an absolute bar to the maintainability of a writ petition. Submitted that if an authority acts wholly without jurisdiction or in arbitrary manner and not in appreciating the law on the issue the High Court should not refuse to exercise its jurisdiction under the Articles available under constitution of India.

7. On principle there cannot be any second thought about enjoying power of superintendence by this Court, provided it is noticed that the Forum or Tribunal under any Act did not or has failed to exercise the jurisdiction vested in it, or, in other way, the jurisdiction which is inherent under the Act and ought to have been acted on the same did not act, rather acted in such a manner that has violated natural justice or, to say it more explicitly that the court of course shall interfere had there been any illegality and wrong in the decision making process of the authority vested with the power to act. Mr. Jha cited the case of Sanjoy Kumar Agarwalla v. The State of West Bengal reported in 1997 C.Cr.L.R. (Cal) 316 and Gopal Sarkar v. The State of West Bengal reported in 2000 C.Cr.L.R. (Cal) 315 to ventilate that if the authority under the special Act acts without jurisdiction and though any alternative remedy is available by appeal, nonetheless High Court may interfere within revisional jurisdiction in exercise of power of superintendence over the Courts or tribunals subordinate to the High Court.

8. Since the Forum at the first instance within the ambit of Section 12 and the First Appellate Court under the Act within the ambit of Section 17 have held the complaint not maintainable and when the grievance of the petitioner has been denied by both the Forums question may come why this Court should attend the issue under Article 227 of the Constitution while remedy of the petitioner would lie elsewhere.

9. Under the Consumer Protection Act, 1986 against the order of the District Forum there is the provision of first appeal before the State Commission within the State under Section 15 and jurisdiction of the State Commission either to entertain appeal or revision subject to pecuniary limit has been determined under Section 17 of the Act. From the observation of the State Commission it is apparent that the District Forum of the first instance not only decided the point of maintainability but also decided the case on merit. If any person aggrieved by an order of the State Commission in exercise on its power conferred by Sub-clause (i) of Clause (a) of Section 17 may prefer an appeal against the same to the National Commission within the prescribed time limit under Section 19 of the Act, jurisdiction of the National Commission over which has been determined thereby under Section 21. It is pertinent to mention that Section 21 has vested the National Commission with the power not only of the appeal as against the order passed by the State Commission but also revision under Section 21(b).

10. Mr. Jha citing the case of *The Managing Director, Nadippaisai Pulavar K.R. Ramaswamy Sugar Mills Vs. A. Fareed Bawa and others*, AIR 1997 Mad 204 : (1996) 2 LW 767 argued that as there is no other remedy except approaching the Court under Article 227 of the Constitution of India the instant proceeding has been initiated to save the petitioner from any further injustice already suffered by him. The case of the Managing Director, (Supra) is of no use in the aid of the petitioner since it deals with only Sections 17 and 19. It did not deal with Section 21 of the Act or more particularly to say on Section 21(b) which read is as follows:--

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

11. The provision quoted above clearly indicates that the petitioner though was aggrieved by the order of the State Commission he had remedy before the National Commission at least within the ambit of Section 21(b) of the Consumer Protection Act, 1986 to ventilate his merit, if any, in the tune of amendment of his petition of complaint to come within the explanation clause appended to the definition of "consumer" under Section 2(d) of the Act. Instead, he came up with the instant proceeding seeking exercise of the power under Section 227 of the Constitution of India. Before observing on merit of the impugned order deciding

the issue let me cite the definition of consumer available under the Act which is as follows:--

Consumer means who

"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

(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 purposes 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;)"

12. The explanation inserted by Amendment Act 1993 provides that "commercial purpose" does not include use by a consumer of goods bought and used by him exclusively for the purpose of earning his livelihood, by means of self-employment. This explanation provides exception to an exception. The explanation is clarificatory in nature, the onus on which has to be discharged by adducing evidence or counter evidence so that the nature and volume of the business proposed to be transacted can come out without any ambiguity. In the case of Laxmi Engineering Works Vs. P.S.G. Industrial Institute, AIR 1995 SC 1428 : (1995) 84 CompCas 121 : (1995) 3 JT 433 : (1995) 2 SCALE 626 : (1995) 3 SCC 583 : (1995) 3 SCR 174 : (1995) 2 UJ 253 , considered also by District Forum, it has been settled that the explanation reduces the question, what is "the commercial purpose", is a question of fact to be decided in the facts and circumstances of each case. It is not the value of the goods that matters but the purposes to which the goods bought are put to. Benefit of that explanation may be available, provided, the goods bought are used by the buyer himself by employment of himself for earning his livelihood and not beyond that. But from the letter heads pad used by the petitioner to join in the tender process etc. in the name and style "Sanjeev Kumar & Brothers Dealers in: ALL KINDS OF FERROUS & NON-FERROUS METAL MERCHANT AND GENRAL ORDER SUPPLIERS, having their office address 17/1, GALIFF STREET, (New Mahatma Sisir Kr. Sarani) Kolkata-700 004 (WEST BENGAL) INDIA denotes the characteristics of the

business as observed by the Forum as well as the State Commission.

13. Although, the petitioner had amended their original petition of complaint presented under Section 12 of the Act before the District Forum Presumably to take benefit of the explanation of the definition "consumer" but the onus has not been discharged producing believable evidence to the Forums under the Act either to assert the claim in the tune of amendment or to rebut the characteristics of the business, failing which the same speaks a volume debarring the petitioner to come within the definition of a "consumer" under the Act. Therefore, despite having alternative remedy available under Section 21(b) of the Consumer Protection Act, 1986, the petitioner while did not knock the door of the National Commission, rather having thought wise to come within the instant proceeding under Article 227 of the Constitution of India, I observed that on principle there is no legal bar to scrutinize the order under challenge in exercising power of superintendence over the decision making authorities subordinate to the High Court. Therefore, in exercise of said authority I having not found any legal infirmity or perverseness rendering injustice in violation of natural justice in the decision making process by interpreting the law in the matter of attending the petition of complaint of the petitioner by the District Forum under Section 12 and then the State Commission within the ambit of Section 15 read with Section 17, I do not find any legal reason to make any interference with the impugned order within the ambit of Article 227 of the Constitution of India, since in attending the complaint the District Forum and then the State Commission did not make lapses in interpreting the provision of law come on the way of decision making process, available within the provision of the Act.

Hence, the revisional application fails.

No order as to costs.

Let the copy of such order be communicated to the State Commission as well the District Consumer Disputes Redressal Forum Unit-II for information.

Urgent certified copy be supplied to the parties if applied for.