(2007) 08 KL CK 0022

In the High Court Of Kerala

Case No : O.P. No. 9437 of 2003

Secretary, Education Department and Another — APPELLANT

Vs

T.M. Thankappan Achary and Others — RESPONDENT

Date of Decision : 03-08-2007

Acts Referred:

Constitution of India, 1950 — Article 226
Consumer Protection Act, 1986 — Section 2(1)

Citation : (2007) 08 KL CK 0022

Hon'ble Judges : T.R. Ramachandran Nair, J

Bench : Single Bench

Advocate : V.T.K. Mohanan, Govt. Pleader, for the Appellant; S. Harikrishnan, for the Respondent

Final Decision : Allowed

Judgement

T.R. Ramachandran Nair, J.—The question raised in this original petition is whether the Consumer Disputes Redressal Forum has got jurisdiction to entertain a complaint in relation to non-payment of pensionary benefits of an employee who was working in an aided school. As per Ext. P-2, the Consumer Disputes Redressal Forum allowed the complainant to realise 12% interest per annum for the principal amount of Rs. 2,08,493 from 1-1-2000 to 15-6-2000. Even though the Petitioners filed an appeal before the Consumer Disputes Redressal Commission, the said appeal was dismissed as there was delay in filing the appeal. These orders are under challenge in this original petition.

2. The first Respondent was working as a Peon in the second Respondent''s school. He retired from service on 31-5-1999. The complaint was filed stating about the non-releasing of the pensionary benefits and describing it as a deficiency in service.

3. The main ground raised in this original petition is that a retired employee would not come under the definition of ''consumer'', that the non-payment of retirement benefits will not come within the meaning of ''deficiency'' as defined in

Section 2(1)(g) of the Consumer Protection Act and that the same will not come within the definition of ''service'' as defined in the Act also. Therefore, the basic question raised is as regards the jurisdiction of the Consumer Disputes Redressal Forum, to entertain the complaint.

4. The word ''consumer'' is defined in Section 2(1)(d) of the Act as follows:

(d) ''Consumer'' means any person who-

(i) 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

(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 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.

Therefore, going by the said definition only a person who buys any goods for consideration, etc. or any user of goods for consideration, etc. so as to come within the first limb of the section or any person who hires or avails of any services in tune within the conditions provided under Sub-clause (ii) alone will be a consumer. The word ''deficiency'' is defined in Section 2(1)(g) as follows:

(g) ''deficiency'' means any fault, imperfection, shortcoming or inadequacy in the quality, nature and manner of performance which is required to be maintained by or under any law for the time being in force or has been undertaken to be performed by a person in pursuance of a contract or otherwise in relation to any service,

In view of the above definition, the definition of ''service'' u/s 2(1)(o) has also to be considered. The same is reproduced below:

(o) ''service'' means service of any description which is made available to potential users and includes, but not limited to, the provision of facilities in connection with banking, financing, insurance, transport, processing, supply of electrical or other energy, board or lodging or both, housing construction, entertainment, amusement or the purveying of news or other information, but does not include the rendering of any service free of charge or under a contract of personal service.

Under the above, a contract of personal service will not be one coming within the definition of ''service''. The complaint, Ext. P-I alleges that the first Respondent was eligible for pension and other benefits of retirement. In paragraph 7, it is reiterated that the non-releasing of Petitioner''s benefits is due to the deficiency in service of the counter Petitioner which was resulted in financial difficulty to him. The relief''s sought for were for disbursement of commuted value of pension with interest and DCRG with interest along with the monthly pension at the rate of Rs. 2608 and compensation of Rs. 25,000 for mental agony and distress.

5. A plain reading of the definition of ''consumer'' will show that it should be construed to comprehend only consumer and services of commercial and trade oriented nature. As far as the employees of an aided school are concerned, they are being paid salary and other benefits and retirement benefits by the Government based on the provisions of the Kerala Education Act and the Rules. Therefore, at any rate, it cannot be contended that a person who is under the employment in an aided school, will be a ''consumer'' for the purpose of Consumer Protection Act. The definition of ''service'' u/s 2(1)(o) has specifically included facilities in connection with banking, financing, insurance, transport, processing, supply of electrical or other energy, board or lodging or both, housing construction, entertainment, amusement or the purveying of news or other information. Any service rendered on free of charge or under a contract of personal service is excluded from the definition of ''service'' u/s 2(1)(o). It cannot be disputed that the first Respondent was working under the contract of personal service with the management of an aided school, viz. the second Respondent. It is therefore a case where there is specific exclusion as far as such a contract of personal service is concerned, when considering the meaning of the word ''service''. Only if deficiency is one alleged in respect of matters covered by the main part of Section 2(1)(o) alone, a complaint can be maintained before the Consumer Disputes Redressal Forum.

6. The above legal position has been examined in relation to a Government servant by a learned Single Judge of this Court in Divisional Forest Officer v. Aravindaksha Menon 2002 (2) KLT 48. That was a complaint relating to payment of interest for the delayed payment of commutation benefits. The question was examined in the light of the definition of ''consumer'' u/s 2(1)(d). After referring to the purpose of the Act, it was held by the learned Single Judge as follows:

However, an employee or for that matter, a Government servant can, by no stretch of imagination, be treated as a consumer vis-a-vis his employer. A dispute of the nature adjudicated by the Forum therefore was without jurisdiction. It was never intended by the enactment and the claim has been entertained without jurisdiction and the award is therefore a nullity, ab initio void and cannot be enforced.

The above dictum squarely applies to the facts of this case also.

7. It cannot be disputed that a person in employment is getting the pay and other benefits on the basis of the relationship known as master and servant

relationship or employer-employee relationship. Therefore, such a person cannot be considered to be as a ''consumer'' for the purpose of Consumer Protection Act. It will be evident from the definition of ''complaint'' u/s 2(1)(c) also that a complaint like Ext. P-I may not come within its definition. Section 2(1)(c) shows that complaint means any allegation in writing made by a complainant that:

(i) and (ii) * * * * (iii) the services hired or availed of or agreed to be hired or availed of by him suffer from deficiency in any respect.

(iv), (v) and (vi) * * * *

This is the only limb that can have application in relation to the allegation of deficiency of service under the definition of ''complaint''. Going by the same also the relationship between a master and servant cannot be termed as a service hired or availed of or agreed to be hired or availed of between a complainant and the Respondent. Nowhere in the definition of consumer there is mention of employer-employee relationship as one covered under the said definition. Hence, I am of the view that the first Respondent who was only an employee in an aided school, will not be a "consumer" for the purpose of the Consumer Protection Act.

8. The interpretation of the words ''consumer'' and ''service'' have been considered in various decisions of the Supreme Court. After considering the meaning of the words, Their Lordships of the Supreme Court held in Lucknow Development Authority Vs. M.K. Gupta, as follows:

The Act thus aims to protect the economic interest of a consumer as understood in commercial sense as a purchaser of goods and in the larger sense of user of services. The common characteristics of goods and services are that they are supplied at a price to cover the costs and. generate profit or income for the seller of goods or provider of services. But the defect in one and deficiency in other may have to be removed and compensated differently. The former is, normally, capable of being replaced and repaired whereas the other may be required to be compensated by award of the just equivalent of the value or damages for loss.

Again, referring to the meaning of the word ''service'' it was held as follows:

The term has variety of meaning. It may mean any benefit or any act resulting in promoting interest or happiness. It may be contractual, professional, public, domestic, legal statutory etc. The concept of service thus is very wide.

How it should be understood and what it means depends on the context in which it has been used in an enactment. Clause (o) of the definition section defines it as under:

''service'' means service of any description which is made available to potential users and includes the provision of facilities in connection with banking, financing, insurance, transport processing, supply of electrical or other energy, board or lodging or both, housing construction, entertainment, amusement or the purveying of news or other information, but does not include the rendering of any service free of charge or under a contract of personal service.

It is in three parts. The main part is followed by inclusive clause and ends by exclusionary clause. The main clause itself is very wide. It applies to any service made available to potential users. The words ''any'' and ''potential'' are significant. Both are of wide amplitude. The word ''any'' dictionarily means ''one or some or all''. In Black''s Law Dictionary it is explained thus, "word ''any'' has a diversity of meaning and may be employed to indicate ''all'' or ''every'' as well as ''some'' or ''one'' and its meaning in a given statute depends upon the context and the subject-matter of the statute". The use of the word ''any'' in the context it has been used in Clause (o) indicates that it has been used in wider sense extending from one to all. The other word ''potential'' is again very wide. In Oxford Dictionary it is defined as ''capable'' of coming into being, ''possibility''. In Black''s Law Dictionary it is defined as "existing in possibility but not in act. Naturally and probably expected to come into existence at some future time, though not now existing; for example, the future product of grain or trees already planted, or the successive future installments or payments on a contract or engagement already made". In other words service which is not only extended to actual users but those who are capable of using it are covered in the definition. The clause is thus very wide and extends to any or all actual or potential users. But the Legislature did not stop there. It expanded the meaning of the word further in modern sense by extending it to even such facilities as are available to a consumer in connection with banking, financing etc. Each of these are wide ranging activities in day today life."

In Morgan Stanley Mutual Fund Vs. Kartick Das, after considering the meaning of the word ''consumer'' Their Lordships held as follows:

The consumer as the term implies is one who consumes. As per the definition, consumer is the one who purchases goods for private use or consumption. The meaning of the word ''consumer'' is broadly stated in the above definition so as to include anyone who consumes goods or services at the end of the chain of production. The comprehensive definition aims at covering every man who pays money as the price or cost of goods and services. The consumer deserves to get what he pays for in real quantity and true quality. In every society, consumer remains the centre of gravity of all business and industrial activity. He needs protection from the manufacture, producer, supplier, wholesaler and retailer.

9. The question whether the term ''service'' will apply to a Government servant, was examined by the Supreme Court in State of Orissa Vs. Divisional Manager, LIC and another, . Their Lordships, after considering the effect of the exclusion clause, held as follows:

A reading of the definition would indicate that the services contemplated there under alone are the services within the meaning of the Act except excluded services mentioned there under. The excluded services are ''service free of charge or under a contract of personal service''. The concept of contract of personal service was considered in a recent judgment of this Court in Indian Medical Assn. v. V.P. Shantha. This Court held therein that the expression ''personal service'' has a well-known legal connotation and has been construed in the context of the right to seek enforcement of such a contract under the Specific Relief Act, 1963. For that purpose, a contract of personal service has been held to cover a civil servant, the managing agents of a company and a professor in the University. There can be a contract of personal service if there is relationship of master and servant between a doctor and the availing of his services and in that event the services rendered by the doctor to his employer would be excluded from the purview of the expression u/s 2(1)(o) of the Act by virtue of the exclusionary clause in the said definition. The other excluded service is service rendered free of charge.

It is not in dispute that the Respondent was a Government servant and, therefore, he is bound by the service conditions and the State was rendering services free of charge to the contesting Respondent. Under those circumstances, the Government servant has been excluded from the purview of the Act to claim any damages against the State under the Act. Therefore, if any claim arises for the contesting Respondent, it would be open to him to claim, in any other forum, but not under the Act.

Therefore, the complaint itself is not maintainable. The meaning of the expression ''contract of personal service'' is well-known. Going by the provisions of the Specific Relief Act, it is well-settled that a contract of personal service cannot be specifically enforced, of course subject to the three well recognised exceptions. When the said expression covers master and servant relationship, the said person cannot invoke the provisions of the Consumer Protection Act obviously to rope in complaints regarding pension and other benefits.

10. Ext. P-I is the complaint filed before the District Consumer Disputes Redressal Forum which resulted in Ext. P-2 order. It is true that Exts. P-3 and P-4 were not considered on merits by the State Consumer Disputes Redressal Commission and the same were dismissed only on the ground of delay. But still, since the question raised is one affecting the very jurisdiction of the Forum under the Act, the challenge against those orders under Article 226 of the Constitution of India is sustainable. It is a case where the orders have been passed by the authority without jurisdiction. The same will be a nullity and they cannot be enforced at all.

Therefore, the Original Petition is allowed and Exts. P-2 and P-5 are quashed. This will not preclude the rights of the first Respondent to agitate his claims before the appropriate forum.

