

(2002) 03 NCDRC CK 0013

In the National Consumer Disputes Redressal Commission

Tamil Nadu Electricity Board Accounts and Executive Staff
Union

APPELLANT

Vs

B.S.BOSE

RESPONDENT

Date of Decision : 13-03-2002

Acts Referred:

Citation : 2003 2 CPJ 284

Hon'ble Judges : M.S.Janarthanam , Kayal Dinakaran J.

Final Decision : Appeal dismissed

Judgement

1. THIS appeal is directed against the order dated 5.8.1998 in O.P. No. 195/1996 on the file of the District Consumer Disputes Redressal Forum, Madurai.

2. THE appellant is the opposite party while the respondent is the complainant. Short facts may be related in order to understand the crux of the issue arising for consideration in this action.

The complainant, one V.S. Bose, it is said, is an active member of the opposite party Union namely, Tamil Nadu Electricity Board Accounts and Executive Staff Union. The Union was constituted for the benefit of the members in rendering services like advancing of loans, upliftment of education to the children of the members and other social activities. The Union created a Common Good Fund for such purposes.

3. THE complainant obtained a loan of Rs. 10,000/- from the Union by executing a promissory note dated 2.2.1991. He also deposited a title deed of his property in the shape of sale deed dated 28.6.1985 with the Union as a collateral security for the amount he had borrowed under the coverage of a promissory note. Despite the discharge of the loan amount he had borrowed under the promissory note, the title deed he had deposited with the Union was not returned to him. Such sort of an act on the part of the opposite party Union would tantamount to deficiency in service on its part besides it had created mental agony, hardship, suffering, annoyance and what not to him.

4. IN such a backdrop and setting, he knocked at the doors of the Forum below for certain reliefs as prayed for in the complaint. The opposite party in pith and substance contended that the complainant cannot at all be construed as a consumer qua the opposite party. The Forum below had no territorial jurisdiction to entertain the complaint. The title deed he had deposited with the Union opposite party had been handed over to the Counsel who was instructed to institute the civil suit in O.S. No. 8591/1992 on the file of the City Civil Court, Madras for the recovery of the amount due under the promissory note and the said Advocate misplaced the title deed and consequently the Union was unable to return the original title deed to the complainant. As such, there is no deficiency in service on its part. The complaint as such is liable to be dismissed. The Forum below on the respective pleas of the parties framed the following points for consideration : (1) Whether the complainant is a consumer ? (2) Whether this Forum has no territorial jurisdiction to entertain this complaint ? (3) Whether there is deficiency in service on the part of the opposite party ? (4) Whether the complainant is entitled to get the reliefs as prayed for in the complaint from the opposite party ?

5. THE Forum below on consideration of the materials placed on record, answered points 1 to 3 in favour of the complainant. In other words, the Forum held that the complainant is a consumer; the Forum below has jurisdiction to entertain the complaint; and there was deficiency in service on the part of the opposite party. On the basis of the findings on point Nos. 1 to 3, the Forum below on point No. 4 granted the relief to the complainant directing the opposite party to return back the original documents sale deed dated 28.6.1985 standing in the name of the complainant registered as document No. 2400/85 on the file of the Sub-Registrar, Madurai and to pay compensation of Rs. 4,000/- with interest thereon @ 18% p.a. from the date of discharge of the loan namely, 20.9.1995 till date of payment. THE Forum below also gave one month time for payment from the date of its order.

6. AGGRIEVED by the orders as above, the opposite party Union resorted to the present action by engaging a Counsel of their choice namely, learned Counsel M/s. R. Parthiban and A. Sanjiv. On service of process, the respondent/complainant entered appearance through a learned Counsel of his choice namely, learned Counsel M/s. P. Gopalan and J. Ram.

When this matter came up for hearing before us today, learned Counsel M/s. P. Gopalan and J. Ram appearing for the respondent/complainant are called absent and no representation is made on their behalf. The fact that the said learned Counsel were absent does not mean that we cannot dispose of the appeal on merits of course after hearing arguments of learned Counsel Mr. R. Parthiban appearing for the appellant/opposite party and on perusal of the materials placed on record. That is exactly what we have done in this case.

7. LEARNED Counsel Mr. R. Parthiban appearing for the appellant/opposite party with all force and vehemence submitted the points as below for consideration :

(1) The Forum below has no territorial jurisdiction at all to entertain the complaint. (2) The complainant cannot at all be construed as a consumer qua the opposite party Union. In support of such a submission, he relied upon the decision emerging from the National Commission in the case of The Additional Director C.G.H.S., Pune v. Dr. R.L. Butani, I (1996) CPJ 255 (NC)=1996 (1) CPR 136.

(3) Since the title deed deposited by the complainant with the opposite party Union was misplaced by the Counsel who was instructed to file the civil suit in the competent Court of civil jurisdiction as against the plaintiff for the recovery of the amount due by him under a promissory note, the opposite party Union is unable to return the said document to the complainant. In elaboration of such a projection of hues of view, what the said learned Counsel would state is that the law does not compel a man to do what he cannot possible perform - "Lex Non Cogit Ad Impossibilia". In support of such a submission, reliance had been placed from two decisions emerging from the Apex Court of this Country. They are : (1) Rajkumar Dey & Ors v. Tarapada Dey & Ors., AIR 1987 SC 2195, and (2) Mohammed Gazi v. State of M.P. & Ors., III (2000) SLT 448=2000 (4) Supreme Court Cases 342.

The points of hues of views so projected by the said learned Counsel may now fall for consideration in the arena of discussion to be ensued hereafter in seriatum.

8. POINT No. 1 : The complainant, as a matter of fact, did not at all include a cause of action paragraph in the complaint he had filed before the Forum below. The opposite party Union did specifically take a stand in its counter that the Forum below had no territorial jurisdiction at all to entertain the complaint and this aspect of the matter is getting revealed by a conjoint reading of paragraphs 4 and 10 of the version. In paragraph 4 of the version, specific averment had been incorporated that the promissory note had been executed by the complainant for a sum of Rs. 10,000/- on 2.2.1991 at Madras. That part, he had also deposited the title deed in the shape of a sale deed of his property as a collateral security to the opposite party at Madras. In paragraph 10 of the counter, what has been stated is that the complaint, as filed, is not maintainable before the Forum below since the entire cause of action had arisen with the jurisdiction of the city of Madras. The pecuniary as well as the territorial jurisdiction of the District Forum are dealt with by the salient provisions adumbrated under Section 11 of the Consumer Protection Act, 1986 (for short, "the Act"). Sub-section (1) of Section 11 is relatable to the pecuniary jurisdiction which is not relevant for the present purpose while Sub-section (2) thereof deals with the territorial jurisdiction. The territorial jurisdiction so dealt with therein is based upon the factors such as residential qualification of the opposite party or carrying on business or has a branch office or personally works for gain or the cause of action wholly or in part arises at the time of the institution of the complaint. Execution of the promissory note and deposit of title deed in the city

of Madras by the complainant as stated by the opposite party are not relevant at all for determining the jurisdiction of the Forum below in the light of the sanguine provisions as adumbrated under Sub-section (2) of Section 11. As such, this sort of an objection as taken by the opposite party in the counter cannot at all be expected to commend acceptance at the hands of this Commission. The position is thus crystal clear. The complainant had not at all incorporated any sort of an averment in the complaint in rather a bid to point out as to how the Forum below was having the jurisdiction to entertain the complaint. The opposite party though raised the bone of contention regarding the jurisdiction issue of the Forum below, yet, the objections the opposite party Union raised are altogether untenable in the eyes of law. The only sort of an objection that could have been taken by the opposite party, on the facts and in the circumstances of the case, is that the opposite party being located only at Madras in the sense of not having any branch office anywhere in any part the State and carrying on business therein, the Forum below is not having any jurisdiction to entertain the complaint. Alas ! that sort of an objection had not been taken by the opposite party Union. What is further worse is that the Forum below rather oblivious of the statutory provision under Sub-section (2) of Section 11 of the Act, flabbergasted and said that it had jurisdiction to entertain the complaint inasmuch as the property described in the sale deed of the complainant which had been deposited with the opposite party Union is located at Mudrai. The net result is neither of the parties nor the Forum below was in a position to understand the concept of jurisdiction as contemplated by Sub-section (2) of Section 11 of the Act.

9. IT is not as if the question of jurisdiction had been dealt with by the Forum below as a preliminary issue and what happened was the question of jurisdiction instead of being decided by way of a preliminary issue, had been joined with other questions on merits and the case had been disposed of by the Forum below. If the case had been decided on the question of jurisdiction as a preliminary issue in the sense of recording a finding that the Forum below had jurisdiction to entertain the complaint and an appeal as against such an order had been preferred before this Commission, cocksure it is we could have set aside the order and directed the complainant to initiate proceedings before the District Forum having jurisdiction. As already indicated, the Forum below disposed of the case on merits on all the issues inclusive of the preliminary question. No doubt, in passing such an order, the Forum below committed an error in recording a finding that the Forum below had the necessary and requisite jurisdiction to entertain the complaint. The fact that such an error occurred in the disposal of the case on merits on all the issues is of no consequence, we rather feel, unless it appears that such an error has in fact occasioned in a failure of justice. In the case on hand, we are unable to find such an error had resulted in the failure of justice to the opposite party. Therefore, we are of the view that there is no need at all to set aside the order of the Forum below on the question of jurisdictional error as committed by the Forum below and direct the complainant to institute a fresh proceedings before the District Forum having

necessary and requisite jurisdiction. We answer this point accordingly.

10. POINT No. 2 : This point takes under its fold as to whether the complainant could ever be construed as a consumer qua the opposite party Union. The main thrust of the argument of learned Counsel appearing for the appellant in this regard is that since the complainant is a member of the opposite party Union and participate in all its activities, he cannot at all be construed as a consumer qua the opposite party Union. In support of such a submission, the decision emerging from the National Commission in the case of Dr. R.L. Butani (supra), cannot at all be expected to advance the case of the appellant/opposite party to any extent whatever. In that case, a Central Government employee joined the Central Government Health Scheme. His wife became sick and she had taken treatment under the Scheme at the Government Hospital. The question there arose for consideration was whether the service rendered by the doctors attached to the Government Hospital could ever be construed as "service" as defined in Section 2(1)(o) of the Act. In that context, the National Commission held thus : "Service rendered at a Government hospital/health centre/dispensary where no charge whatsoever is made from any person availing the services and all patients (rich and poor) are given free service - is outside the purview of the expression "service" as defined in Section 2(1)(o) of the Act. The payment of a token amount for registration purpose only at hospital/nursing home would not alter the position."

In the instant case, the Union, admittedly renders service to its members in the sense of provision of facility in connection with financing and other related matters. Such being the case, it goes without saying that the service rendered by the opposite party Union definitely falls within the inclusive definition of "service" as contemplated by Section 2(1)(o) of the Act. It is only in connection with the rendering of such services, the complainant availed of a loan of Rs. 10,000/- and executed a promissory note therefor and also deposited his title deed as a collateral security. Admittedly, despite discharge of the amount borrowed by him by way of a promissory note, the title deed he had deposited was not at all returned to him. The non-return of the title deed, in such circumstances, would definitely tantamount to deficiency in service on the part of the opposite party Union. This sort of a finding we have recorded herein is subject to what we are going to say in point No. 3. This point is answered accordingly.

Point No. 3 : The main thrust of the argument of learned Counsel appearing for the appellant/opposite party Union under this point is based upon the Latin maxim "Lex Non Cogit Ad Impossibilia" which means that law does not compel a man to do what he cannot possibly perform. In support of such a stand, two decisions emerging from the Apex Court of the country had been relied on as already adverted to. The first case is Rajkumar Dey (supra). For understanding the principle evolved in the said decision, certain essential facts have to be stated in an incisive fashion. We accordingly do so. An award was passed by the Arbitrators. The award so passed by the Arbitrators is required to be registered

under the relevant provision of the Registration Act within a specified time. The award was filed in Court pursuant to a Court's order. The Arbitrators were unable to get back the award which was filed in Court for purpose of registration in view of subsisting injunction preventing the Arbitrators from taking back the award from Court. Thus, the award was remaining in the custody of the Court up to a certain date due to order of injunction. The moment the award was returned to the Arbitrators immediately it was presented for registration the next day. In such a situation, the question that arose for consideration was as to whether the entire period during which the award remained in the custody of the Court has to be excluded. The Supreme Court said in the affirmative. In such a context, the Supreme Court said that law does not compel a man to do what he cannot possibly perform and act of Court shall prejudice no man would apply based on the maxim "Actus Curiae Neminem Gravabit".

11. WE are of the view that the decision is of no use in advancing the case of the appellant/opposite party. In the case on hand, it is not as if the document of title deed which the complainant had deposited with the opposite party Union were in the custody of the Court which was unable to be obtained by the subsisting order of injunction by the opposite party Union and consequently could not deliver the same to the complainant. The sordid fact is the title deed which had been deposited with the opposite party Union was said to have been misplaced or lost by the callous or cavalier act of negligence, both of the opposite party and also learned Counsel engaged by the opposite party in filing a suit in the competent Civil Court for the recovery of the amount due under the promissory note from the complainant. The reason why we say that there was negligence, both on the part of the opposite party and also the Advocate engaged by them is this : Admittedly, the suit that had been filed is one for the recovery of the amount due on the promissory note. The necessary and requisite document to be handed over to learned Counsel who filed the suit for the recovery of the amount due on the promissory note from the complainant is the promissory note and not the title deed he had handed over as a collateral security. If the suit which had been filed is a mortgage suit, one can very well understand the handing over of the title deed to the Advocate for the institution of such a suit. But, that is not the case on hand. This apart, learned Counsel to whom the title deed had been handed over had lost the document in the process of shifting his house and this aspect of the matter is getting revealed by Ex. A5 letter dated 27.3.1996 he had addressed to the General Secretary of the opposite party Union. A cursory perusal of the letter under Ex. A5 would indicate that the promissory note alone had been marked as an exhibit in the civil suit in O.S. No. 8591/1992 on the file of the City Civil Court, Madras and the document of title deposited by the complainant with the opposite party Union which handed over the same to the said Advocate was lost in the process of shifting of his house from one place to another. The loss of the document of title deed in such circumstances can't be anyone other than the callous or cavalier negligence on the part of the opposite party Union as well as learned Counsel engaged by the Union for the filing of the

suit for the recovery of the amount due on a promissory note from the complainant. The other decision emerging from the Supreme Court as cited by learned Counsel appearing for the appellant is Mohammed Gazi (supra). The facts of the case may be stated in an incisive manner so as to understand the principles evolved therein. A contract for the disposal of tendu leaves was awarded by the respondent, State of M.P. to the appellant. Stay order was granted by the High Court in a writ proceedings filed by another tenderer namely, respondent No. 4 whose bid was not accepted, thereby preventing the appellant from collecting tendu leaves for which he had deposited earnest money. Appellant was however not made a party in that proceedings. By lapse of time, tendu leaves, being perishable item, became useless. But the respondent State by an order compelled the appellant to execute the contract by lifting the tendu leaves and to deposit the balance contract price. In such a situation, the appellant filed a writ petition for quashing that order and refund of the earnest money. High Court took the view that though there was no fault on the part of the appellant but as the State could not also be held responsible for the fault, directed the refund of the earnest money to the appellant after deducting a sum of Rs. 30,000/- therefrom. In such a context, the Supreme Court held that the High Court was not justified in doing so as the appellant was entitled to the entire earnest money. The Supreme Court in arriving such a conclusion, rightly applied the Latin maxim "lex non cogit ad impossibilia". What the Supreme Court stated in para 7 is relevant and it gets reflected as under : "7. In the facts and circumstances of the case, the maxim of equity, namely, *actus curiae neminem gravabit* - an act of the Court shall prejudice no man, shall be applicable. This maxim is founded upon justice and good sense which serves a safe and certain guide for the administration of law. The other maxim is, *lex non cogit ad impossibilia* - the law does not compel a man to do what he cannot possibly perform. The law itself and its administration is understood to disclaim as it does in its general aphorisms, all intention of compelling impossibilities, and the administration of law must adopt that general exception in the consideration of particular cases."

12. THIS decision of the Apex Court is also inapplicable to the facts of the present case. THIS point, as such, is answered against the appellant/opposite party Union. In view of all the points going against the appellant/opposite party Union, it goes without saying that the appeal deserves to be dismissed. In fine, the appeal fails and the same is dismissed. We make no order as to costs on the facts and in the circumstances of the case. The award of the Forum below as confirmed by us is required to be complied with by the opposite party Union within a month from the date of receipt of our order or otherwise the complainant would be perfectly at liberty to invoke the provisions of Section 27 of the Act. Appeal dismissed.