

(2011) 09 CAL CK 0143
In the Calcutta High Court
Case No : C.O. No. 1831 of 2011

Tapas Dutta

APPELLANT

Vs

The President, State Consumer Disputes Redressal
Commission and Another

RESPONDENT

Date of Decision : 06-09-2011

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 9 Rule 9, Order 9 Rule 9(1)
Constitution of India, 1950 — Article 227
Consumer Protection Act, 1986 — Section 21, 22A

Citation : (2012) 1 CALLT 655 : (2012) 4 CHN 701

Hon'ble Judges : Prasenjit Mandal, J

Bench : Single Bench

Advocate : Tapas Dutta, for the Appellant; Tapas Kr. Ghosh and Tanmoy Chowdhury, for the Respondent

Final Decision : Allowed

Judgement

Prasenjit Mandal, J.—This application is directed against the order dated April 29, 2011 passed by the Hon'ble State Consumer Disputes Redressal Commission, West Bengal in S.C. Case No.MA-51 of 2011 in connection with Complaint Case No.CC/87 of 2009.

2. The short fact is that the petitioner filed a complaint case being No.CC/87 of 2009 before the Hon'ble State Consumer Disputes Redressal Commission of West Bengal (henceforth shall be called as "State Commission") and that complaint case was allowed by the order dated November 29, 2010 awarding compensation in favour of the petitioner ex parte. Thereafter, the opposite party no. 2 filed a misc. case being MA-05 of 2011 for recall of the order dated November 29, 2010 contending that the said order was obtained by practising fraud upon the Hon'ble State Commission. Thereafter, the State Commission recalled the ex parte order dated November 29, 2010 by the order dated February 4, 2011. 3. The petitioner has contended that the demand notice was

duly sent to the opposite party no. 2 at his address at 123, Raj Kumar Mukherjee Road, P.S. Barranagar, Kolkata - 700035. But the demand notice was returned with the remark "left" by the postal authority and as such, the petitioner served another demand notice dated January 8, 2009 upon the advocate of the opposite party no. 2 at 20, Abdul Halim Lane, Kolkata-700016, and the said notice was received by the advocate. The said notice was received. Since, the opposite party no. 2 did not make any payment of money as demanded, the petitioner filed the complaint case being No.CC/203 of 2009 before the District Consumer Disputes Redressal Forum, Calcutta mentioning the address of the said advocate at 20, Abdul Halim Lane, 3rd Floor, Kolkata - 700016. The said complaint case was rejected for non-production of some documents without admission and no notice was served upon the opposite party no. 2.

4. Being aggrieved, the petitioner preferred an appeal being No.FA/09/202 before the Hon"ble State Commission. The said appeal was admitted but when the notice was issued upon the learned Advocate, Mr. Zakir Hussain, he refused to accept the notice and it was returned back. At the time of agreement between the complainant and opposite party no. 2 on February 29, 2004 over the purchase of a flat, the opposite party no. 2 mentioned the registered office at 26/1, Raj Kumar Mukherjee Road, Kolkata - 700035 and as such, the later complaint case being No.CC/87 of 2009 was filed mentioning that address on the basis of the order dated October 23, 2009 of the State Commission. The petitioner had contended that by the order dated February 4, 2011, the Hon"ble State Commission recorded that the opposite party no. 2 disclosed his address at 123, Raj Kumar Mukherjee Road.

5. Thus, the opposite party no. 2 disclosed two different addresses and as such, when the notice could not be served upon the opposite party no. 2, the paper publication was made for effecting service upon the opposite party no. 2 for his appearance before the Hon"ble State Commission in connection with the complaint case noted earlier. Several adjournments were granted giving opportunity to the opposite party no. 2 for the ends of justice so that he could defend his case, but he did not choose to avail himself of such an opportunity and finally the Hon"ble State Commission disposed of the complaint case by the order dated November 29, 2010 in absence of the opposite party.

6. Thereafter, all of a sudden, the opposite party no. 2 filed the misc. application case being No.MA-05 of 2011 for recall of the order dated November 29, 2010.

7. Being aggrieved by the order dated February 4, 2011 passed by the Hon"ble State Commission in MA-05 of 2011, the petitioner filed an application for rectification of the mistake contending that an ex parte order cannot be recalled by way of review. The opposite party no. 2 filed an objection to the said application for rectification. Thereafter, the State Commission passed the impugned order dated April 29, 2011. Being aggrieved, this application has been preferred by the complainant.

8. Now, the question is whether the impugned order should be sustained.

9. Mr. Tapas Dutta appearing in person has contended that the Hon''ble State Commission passed the impugned order dated April 29, 2011 and the order dated February 4, 2011 in contravention of the provisions of Section 22A of the Consumer Protection Act, 1986. Save and except, the Hon''ble National Commission, no other Forum or State Commission established under the 1986 Act, is empowered to recall an ex parte order passed by it. The State Commission has failed to rectify its own mistake as noted in the application being No.MA-51 of 2011. Therefore, the impugned order is not proper and there is an apparent error on the face of record. For that reason, the impugned order should set aside.

10. On the other hand, Mr. Tapas Kr. Ghosh appearing on behalf of the opposite parties submits that this Hon''ble Court cannot entertain any matter relating to the orders passed by the State Commission under the provisions of the Consumer Protection Act, 1986. The said Act provides for a complete procedure to ventilate the grievance, if any, and no revision lies against the order passed by the State Commission. In support of his contention, he has referred to an unreported decision passed in C.O. No. 3091 of 2009 passed by a Single Bench of this Hon''ble Court.

11. In order to substantiate the maintainability of this application Mr. Tapas Dutta has referred to the following decisions:-

i) The decision of Jyotsana Arvindkumar Shah and Others Vs. Bombay Hospital Trust, and thus, he submits that the ex parte order passed by the State Commission, based on reasons, and the order of recall or review thereof by the State Commission is not permissible.

ii) The decision of New India Assurance Co. Ltd. Vs. R. Srinivasan, and thus, he refers to the following observations made by the Division Bench:-

We have already indicated above that the CPC has been applied to the proceedings under the Consumer Protection Act only to a limited extent. If the intention of the Legislature was to apply the provisions of Order 9 also to the proceedings under the Consumer Protection Act, it would have clearly provided in the Act that the provisions of Order 9 will also be applicable to the proceedings before the District Forum or the State Commission or, for that matter before the National Commission. If the Legislature itself did not apply the rule of prohibition contained in Order 9, Rule 9(1), it will be difficult for the Courts to extend that provision to the proceedings under the Act.

Thus, he submits that the State Commission has no authority to set aside the ex parte order passed by it. Of course, he has referred to Section 22A of the Consumer Protection Act, 1986, and thus, he has submitted that although, now, the National Commission is empowered to set aside the ex parte order passed by it w.e.f. March 15, 2003, the District Forum or the State Commission is not

empowered to set aside the ex parte order passed by it in the said Amendment Act of 2003.

iii) The decision of T. Gunasundari v. B. Ch ITR a and Ors., AIR 2005 Mad 181 and thus, he submits that the District Consumer Redressal Forum has no jurisdiction to set aside its previous ex parte order. This decision, I find, is based on Jyotsana Arvind kumar Shah & ors. (supra).

12. The Hon''ble State Commission has discussed the decisions of Jyotsana Arvind kumar Shah and Ors. (supra), New India Assurance Co. Ltd. (supra) and T. Gunasundari v. B. Chitra and Ors. of Madras High Court (supra). But with due respect to the Hon''ble State Commission, I am of the view that the conclusion of the Hon''ble State Commission that the decision of New India Assurance Co. Ltd. (supra) would prevail over the decision of Jyotsana Arvind kumar Shah and Ors. (supra) cannot be supported. When the two Benches of co-ordinate jurisdiction having equal strength dealt with the same matter in issue and arrived at different conclusions, the decision of the earlier Bench shall prevail. But the State Commission has taken a contrary view in the judgment. My conclusion gets support from a number of decisions of the Apex Court and also of this Hon''ble Court, such as the decision of Union of India (UOI) and Others Vs. S.K. Kapoor, , the decision of Union of India (UOI) Vs. Budhlani Engineering Pvt. Ltd., and the decision of Bhowanipore Gujarati Education Society & Anr. v. Kolkata Municipal Corporation and Ors. reported in 2009 (1) CLJ (Cal) 53. So, the observations of the Hon''ble State Commission that this later decision of New India Assurance Co. Ltd. (supra) should prevail over the earlier decision of the case of Jyotsana Arvind kumar Shah and Ors. (supra), cannot be supported.

13. Above all in conclusion, the State Commission has also observed the minority view expressed by Hon''ble Justice Mahmood in the case of Nursing Das v. Mongol Dubey and Ors. reported in ILR All 163 and quoted the said observations in the following manner mentioned in New India Assurance Co. Ltd. But I find that the observations made by Justice Mahmood was a dissenting one. For convenience, the relevant paragraph is quoted below:

The Courts are not to act upon the principle that every procedure is to be taken as prohibited unless it is expressly provided for by the Code, but on the converse principle that every procedure is to be understood as permissible till it is shown to be prohibited by the law. As a matter of general principle, prohibitions cannot be presumed, and in the present case, therefore, it rests upon the defendants to show that the suit in the form in which it has been brought is prohibited by the rules of procedure applicable to the Courts of justice in India. We only intend to invoke the spirit of the principle behind the above dictum in support of our view that every court or judicial body or authority, which has a duty to decide a lies between two parties, inherently possesses the power to dismiss a case in default. Where a case is called up for hearing and the party is not present. The court or the judicial or quasi-judicial body is under no obligation to keep the matter pending before it or to pursue the matter on behalf of the complainant who had

instituted the proceedings. That is not the function of the court or, for that matter, of judicial or quasi-judicial body. In the absence of the complainant, therefore, the court will be well within its jurisdiction to dismiss the complaint for non-prosecution. So also, it would have the inherent power and jurisdiction to restore the complaint on good cause being shown for the non-appearance of the complainant.

14. So, on perusal of the above paragraph, it does not appear anywhere that the decision of New India Assurance Co. Ltd. (supra) lays down that an ex parte order passed by a competent quasi judicial body giving reasons should be set aside. There is no express provision in the Consumer Protection Act that the State Commission can set aside an ex parte award passed by it. In the case of New India Assurance Co. Ltd. (supra), nowhere it is stated that the State Commission having disposed of a complaint case ex parte based on reasons is also empowered to set aside the said ex parte award on the pre-text that sufficient reasons have been shown for setting aside the said ex parte order just like a civil court having power to pass appropriate orders under Order 9 Rule 9 of the C.P.C. Above all, the ratio of a decision is only relevant. There is a provision for the aggrieved party to take appropriate steps in the said Act against the ex parte order passed by the State Commission and that recourse is to be adopted. Section 21 of the 1986 Act is an effective remedy to the aggrieved person against an ex parte order passed by State Commission. When such a remedy is provided in the Act for the aggrieved person, the prayer for setting aside the ex parte order before the Hon''ble State Commission is impermissible.

15. Having considered the provisions of the Consumer Protection Act, above facts, circumstances and the decisions cited above, I am of the view that the decision of Jyotsana Arvind kumar Shah and Ors. (supra) is the appropriate in the instant situation. The Hon''ble State Commission has, therefore, exceeded its jurisdiction in dealing with an application of complaint for setting aside the ex parte award and subsequently by rejection of another application for re-consideration of the order of setting aside the ex parte decree on the ground that it had no authority to take such a recourse.

16. When the State Commission had acted without jurisdiction in passing the impugned order and setting aside the award passed ex parte, I am of the view that in exercising the jurisdiction under Article 227 of the Constitution of India, this Hon''ble Court can interfere with the orders passed by the State Commission and so, in appropriate cases, when the orders passed by the State Commission are without jurisdiction, this Hon''ble Court should rise to the occasion to take the appropriate steps according to the situation. My view, in this regard, gets support from the decision of Sri Gouri Sankar Chatterjee & Anr. v. Howrah Municipal Corporation and Ors. reported in 1998 (1) CLJ 500. I am, therefore, of the view that the impugned orders cannot be sustained.

17. In the result, the revisional application succeeds. It is, therefore, allowed. Consequently, the impugned orders passed by the State Commission is hereby

set aside. The other order dated February 4, 2011 passed by the Hon"ble State Commission in Case No.MA-05 of 2011 in C.O. No.CC/87/09 being without jurisdiction, is hereby set aside.

18. Considering the circumstances, there will be no order as to costs.

19. Urgent xerox certified copy of this order, if applied for, be supplied to the learned Advocates for the parties on their usual undertaking.