

Rajeev Hitendra Pathak & Ors vs Achyut Kashinath Karekar & Anr on 19 August, 2011

Author: Dalveer Bhandari

Bench: Anil R. Dave, Mukundakam Sharma, Dalveer Bhandari

REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO.4307 OF 2007

Rajeev Hitendra Pathak & Others

... Appellants

Versus

Achyut Kashinath Karekar & Another

... Respondents

WITH

CIVIL APPEAL NO.8155 OF 2001

M.O.H. Leathers

... Appellants

Versus

United Commercial Bank

... Respondents

J U D G M E N T

Dalveer Bhandari, J.

1. These appeals emanate from the order dated 16.11.2005 in Revision Petition No.551 of 2005 and order dated 12.7.2001 in Miscellaneous Petition No.1 of 2001 in Original Petition No.110 of 1993 passed by the National Consumer Disputes Redressal Commission, New Delhi.
2. The main question which arises for consideration is whether the District Consumer Forums and the State Commissions have the power to set aside their own ex parte orders or in other words have the power to recall or review their own orders?
3. The questions of law involved in both the appeals are identical, therefore, we deem it appropriate to dispose of both these appeals by a common judgment.
4. Brief facts necessary to dispose of these appeals are recapitulated as under:

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5. Smita Achyut Karekar was admitted to Ashirwad Nursing Home as she was suffering from the ailment of slip disc. The operation was performed on 8.10.1997. It was noticed, at about 3.45 pm on that day, that her blood vessels had ruptured accidentally during the surgery. She was declared dead at 5.35 pm.

6. The complainants issued a legal notice on 24.7.1999.

Reply to the legal notice was sent on 7.8.1999. The complainants filed complaint alleging deficiency in service and claimed compensation of Rs.15,00,000/-. The complainants did not take necessary steps to remove objection and to complete procedure under the Consumer Protection Act, 1986.

The State Commission, Maharashtra issued notice to the opposite parties/appellants herein on 10.02.2004. On 9.9.2004, the State Commission dismissed the complaint for want of prosecution. On 04.11.2004, the complainants filed an application for recalling 9.9.2004 order and consequently the State Commission recalled the order dated 9.9.2004 and restored the complaint.

7. The appellants aggrieved by the said order preferred a Revision Petition No.551 of 2005 before the National Consumer Disputes Redressal Commission, New Delhi. The appellants in the revision petition made two main arguments before the Commission : firstly, that the State Commission did not have the power to restore the complaint and, secondly, that the State Commission restored the

complaint without issuing notice to the appellants. The National Commission dismissed the revision petition which has been challenged by the appellants before this Court.

8. The appellants relied on the judgment in the case of *Jyotsana Arvind Kumar Shah & Others v. Bombay Hospital Trust* (1999) 4 SCC 325. In this case, the Court held that the State Commission did not have the power to review or recall its ex parte order.

9. In *New India Assurance Co. Ltd. v. R. Srinivasan* (2000) 3 SCC 242, this Court took the contrary view and held that the State Commission could review or recall its ex parte order.

10. In the instant case, a two-Judge Bench of this Court vide judgment and order dated 17.9.2007 reported in 2007 (11) SCALE 166 noted the controversy and observed as under:

"5. In *Jyotsana's* case it was observed at para 7 as follows:

"We heard the learned counsel on both sides for quite some time. When we asked the learned counsel appearing for the respondent to point out the provision in the Act which enables the State Commission to set aside the reasoned order passed, though ex parte, he could not lay his hands on any of the provisions in the Act. As a matter of fact, before the State Commission the appellants brought to its notice the two orders, one passed by the Bihar State Commission in *Court Master, UCO Bank v. Ram Govind Agarwal* 1996 (1) CPR 351 and the other passed by the National Commission in *Director, Forest Research Institute v. Sunshine Enterprises* 1997 (1) CPR 42 holding that the redressal agencies have no power to recall or review their ex parte order. The State Commission had distinguished the abovesaid orders on the ground that in those two cases the opponents had not only not appeared but also failed to put in their written statements. In other words, in the case on hand, according to the State Commission, the opponent (respondent) having filed the written statements, the failure to consider the same by the State Commission before passing the order would be a valid ground for setting aside the ex parte order. The State Commission, however, fell into an error in not bearing in mind that the Act under which it is functioning has not provided it with any jurisdiction to set aside the ex parte reasoned order. It is also seen from the order of the State Commission that it was influenced by the concluding portion of the judgment of the Bombay High Court to the effect that the respondent (writ petitioner) could approach the appellate authority or make an appropriate application before the State Commission for setting aside the ex parte order, if permissible under the law. Here again, the State Commission failed to appreciate that the observation of the High Court would help the respondent, if permissible under the law. If the law does not permit the respondent to move the application for setting aside the ex parte order, which appears to be the position, the order of the State Commission setting aside the ex parte order cannot be sustained. As stated earlier, there is no dispute that there is no provision in the Act enabling the State Commission to set aside an ex parte order."

6. Subsequently, in New India Assurance case this Court appears to have taken a different view as it is evident from what has been stated in para 18, the same reads as follows:

"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 lis 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 a 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."

7. In the latter case i.e. New India Assurance case reference was not made to the earlier decision in Jyotsana case. Further the effect of the amendment to the Act in 2003 whereby Section 22A was introduced has the effect of conferment of power of restoration on the National Commission, but not to the State Commission. In view of the divergence of views expressed by coordinate Benches, we refer the matter to a larger Bench to consider the question whether the State Commission has the power to recall the ex parte order. Records be placed before the Hon'ble Chief Justice of India for appropriate orders."

11. We have been called upon to decide whether the State Commission has the power to recall an ex parte order.

12. Shri Siddharth Bhatnagar, learned senior counsel appearing for the appellants in Civil Appeal No.4307 of 2007 submitted that the Consumer Tribunals set up under the Consumer Protection Act, 1986 are creatures of that Statute and derive their powers only from the express provisions of the Statute. He has drawn our attention to various provisions of the Consumer Protection Act, 1986 to strengthen his submission. He referred to Section 13(4) of the Consumer Protection Act, 1986 which reads as under:

"13 (4) For the purposes of this Section, the District Forum shall have the same powers as are vested in a Civil Court under the Code of Civil Procedure, 1908 (5 of 1908), while trying a suit in respect of the following matters, namely:-

- (i) the summoning and enforcing the attendance of any defendant or witness and examining the witness on oath;
- (ii) the discovery and production of any document or other material object produced as evidence;
- (iii) the reception of evidence on affidavits;

(iv) the requisitioning of the report of the concerned analysis or test from the appropriate laboratory or from any other relevant source;

(v) issuing of any commission for the examination of any witness; and

(vi) any other matter which may be prescribed."

13. Mr. Bhatnagar has also drawn our attention to Regulation 26(1) of the Consumer Protection Regulations, 2005, framed in exercise of powers conferred by Section 30-A of the Consumer Protection Act, 1986. Regulation 26(1) reads as follows:

"26. Miscellaneous-- (1) In all proceedings before the Consumer Forum, endeavour shall be made by the parties and their counsel to avoid the use of provisions of Code of Civil Procedure, 1908 (5 of 1908):

Provided that the provisions of the Code of Civil Procedure, 1908 may be applied which have been referred to in the Act or in the rules made thereunder."

14. Mr. Bhatnagar submitted that only very few provisions of the Code of Civil Procedure have been made applicable to the proceedings before the District Forums and the State Commissions under Section 18 of the Consumer Protection Act, which applies Sections 13 and 14 to the State Commission and the National Commission (under Section 22(1) are those under Section 13(4)). He relied on the judgment of this Court in *Morgan Stanley Mutual Fund v.*

Kartick Das (1994) 4 SCC 225 to strengthen his argument that the consumer tribunals can derive powers only from the express provisions in the Statute. In the said case, the Court observed as under:

"44. A careful reading of the above discloses that there is no power under the Act to grant any interim relief of (sic or) even an ad interim relief. Only a final relief could be granted. If the jurisdiction of the Forum to grant relief is confined to the four clauses mentioned under Section 14, it passes our comprehension as to how an interim injunction could ever be granted disregarding even the balance of convenience."

15. Mr. Bhatnagar also placed reliance on another judgment of this Court in *Gulzari Lal Agarwal v. Accounts Officer* (1996) 10 SCC 590. In this case, the Court relied on earlier judgment of this Court in the case of *Morgan Stanley Mutual Fund* and observed that the Consumer Forum has no jurisdiction or power to pass any interim order pending disposal of the original complaint filed before it.

16. Mr. Bhatnagar relied on Section 17 of the Act which deals with the jurisdiction of the State Commission. Sections 17-A and 17-B were added by the 2002 Amendment of the Act dealing with the "Transfer of Cases" and "Circuit Benches"

respectively. The objects and reasons for introducing the said provisions by way of the said amendment were as follows:

"Objects and Reasons-- Clause 15 (old) seeks to insert a new Section 17-A to empower the State Commission to transfer a case from one District Forum to another District Forum within the State if required for the ends of justice. It also seeks to insert another new Section 17-B to enable the State Commissions to hold Circuit Benches."

17. Mr. Bhatnagar also relied on Section 22 of the Act, which deals with the power and procedure of the National Commission. Before the 2002 Amendment, the said provision was as follows:

"22. Power of and procedure applicable to the National Commission-- The National Commission shall, in the disposal of any complaints or any proceedings before it, have--

a) the powers of a Civil Courts as specified in Sub-Sections (4), (5) and (6) of Section 13;

b) the power to issue an order to the opposite party directing him to do any one or more of the things referred to in clauses (a) to (i) of Sub-Section (1) of Section 14, and follow such procedure as may be prescribed by the Central Government."

18. After the 2002 Amendment, Section 22 of the Act now reads as follows:

"22. Power and procedure applicable to the National Commission -- (1) The provisions of Sections 12, 13 and 14 and the rules made thereunder for the disposal of complaints by the District Forum shall, with such modifications as may be considered necessary by the Commission, be applicable to the disposal of disputes by the National Commission.

(2) Without prejudice to the provisions contained in Sub-Section (1), the National Commission shall have the power to review any order made by it, when there is an error apparent on the face of record."

19. The 2002 Amendment also introduced Section 22A which reads as follows:

"22A. Power to set aside ex parte orders.-Where an order is passed by the National Commission ex parte against the opposite party or a complainant, as the case may be, the aggrieved party may apply to the Commission to set aside the said order in the interest of justice."

20. Mr. Bhatnagar contended that Section 22(2) was introduced in 2002 to give the National Commission the power to review its own order. This power could not have been used by the Commission before the amendment. After amendment, now the Commission has specific power to

set aside an ex parte order. This power has only been given to the National Commission and not extended to the District Forums or the State Commissions. If the legislature intended to give this power to the State Commissions and District Forums then it would have extended the same to those forums also.

21. Mr. Bhatnagar has also drawn our attention to the objects and reasons for carrying out the amendment which reads as follows:

"Objects and Reasons-- Clause 21 (old) seeks to substitute Section 22 so that the provisions of Sections 12, 13 and 14 and the rules made thereunder for the disposal of complaints by the District Forum, shall, with such modifications as may be considered necessary by the Commission, be applicable to the disposal of disputes by the National Commission. It also seeks to empower the National Commission to review any order made by it when there is an error apparent on the face of record. These provisions will make the powers and procedures in respect of the National Commission more explicit. It also seeks to insert new Sections 22-A, 22-B and 22-C and 22-D. New Section 22-A empowers the National Commission to set aside ex parte orders against the opposite party or complainant in the interest of justice....."

22. Mr. Bhatnagar submitted that the limited applicability of the provisions of the Civil Procedure Code to the Tribunals under the Act is under Section 13(4) of the Act. There is no power of review or recall under the said provision. Even under Section 13(4)(vi), no Rule has been framed in terms of Section 30(1) by the Central Government which provides power to review or recall of orders.

23. Learned senior counsel for the appellants also relied on M/s Eureka Estates (P) Ltd. v. A.P. State Consumer Disputes Redressal Commission and Others AIR 2005 AP 118 in which the Court observed that the District Forums and the State Commissions are entitled to exercise only such powers which are specifically vested in them under the Act and the Rules.

24. Mr. Bhatnagar submitted that it is evident from the Statement of Objects and Reasons of the Act that the purpose of the Act is to provide speedy and simple redressal to consumer disputes. It is for this reason that all the provisions of the Civil Procedure Code have not been extended to the Consumer Forums.

25. Mr. Bhatnagar further submitted that the salutary object of speedy and simple redressal under the Act is to be found inter alia in Sections 13(2) and (3) of the Act which provide for the procedure to be adopted by the forum in deciding the complaints admitted by it. The said provisions read as follows:

13. (2) The District Forum shall, if the complaints admitted by it under Section 12 relates to goods in respect of which the procedure specified in Sub-

Section (1) cannot be followed, or if the complaint relates to any services,--

(a) refer a copy of such complaint to the opposite party directing him to give his version of the case within a period of thirty days or such extended period not exceeding fifteen days as may be granted by the District Forum;

(b) where the opposite party, on receipt of a copy of the complaint, referred to him under clause (a) denies or disputes the allegations contained in the complaint, or omits or fails to take any action to represent his case within the time given by the District Forum, the District Forum shall proceed to settle the consumer dispute,--

(i) on the basis of evidence brought to its notice by the complainant and the opposite party, where the opposite party denies or disputes the allegations contained in the complaint, or

(ii) ex parte on the basis of evidence brought to its notice by the complainant where the opposite party omits or fails to take any action to represent his case within the time given by the Forum.

(c) where the complainant fails to appear on the date of hearing before the District Forum, the District Forum may either dismiss the complaint for default or decide it on merits.

(3) No proceedings complying with the procedure laid down in Sub-Sections (1) and (2) shall be called in question in any court on the ground that the principles of natural justice have not been complied with."

26. Mr. Bhatnagar also relied on Section 12(3) of the Act which reads as follows:

"12(3) On receipt of a complaint made under Sub-Section (1), the District Forum may, by order, allow the complaint to be proceeded with or rejected:

Provided that a complaint shall not be rejected under this Sub-Section unless an opportunity of being heard has been given to the complainant: Provided further that the admissibility of the complaint shall ordinarily be decided within twenty- one days from the date on which the complaint was received."

27. Mr. Bhatnagar tried to explain the legislative intent behind introducing Section 22-A. According to him, only the National Commission has been given power to set aside ex parte orders and the same power has not been extended to the District Forums or the State Commissions because against the orders of the District Forums and the State Commissions, appeal or revision can be filed before the State Commission and the National Commission respectively. But in the case of the orders of the National Commission, prior to the amendment, the parties were compelled to approach this Court even against the orders by which the cases were dismissed in default. It became extremely expensive and time consuming. In this view of the matter, it became imperative to give this power to the National Commission.

28. According to the counsel for the appellants, in New India Assurance Co. Ltd., this Court did not notice the earlier decision in Jyotsana's case. He submitted that the Tribunals constituted under the

Consumer Protection Act, 1986 exercise only such powers as are expressly conferred by the provisions of the said Act and Rules framed thereunder.

Since no power of review and recall was conferred on the District Forums and the State Commissions, they can exercise no such power.

29. The counter affidavit was filed by the respondents stating that the Commission was justified in setting aside the ex parte order and restoring the respondents' complaint. The counter affidavit also states that the respondents cannot be deprived of their right without contest on the basis of trivial technicalities.

30. The respondents relied upon the judgment of this Court in New India Assurance Co. Ltd. in which this Court held that the Consumer Courts have inherent powers to restore the complaints dismissed for default. It is also stated in the counter affidavit that due to old age, respondent no.1 lost track of the case and therefore, the State Commission was justified in setting aside the ex parte order in order to ensure that justice is done to the parties.

CIVIL APPEAL NO.8155 OF 2001

31. In Civil Appeal No.8155 of 2001, the National Commission passed an ex parte order and in the appeal against the order, this Court gave liberty to the appellants to approach the Commission for setting aside the ex parte order.

Thereafter, an application was filed by the complainants for review of the order. The Commission vide order dated 12.7.2001 (relied on the judgment of Jyotsana's case) dismissed the application. Aggrieved by the said order, the appellant has filed this appeal.

32. Mr. M.S. Ganesh, learned senior counsel appearing on behalf of the appellants in Civil Appeal No.8155 of 2001 submitted that the National Commission has implied and inherent power to recall the order dated 30.5.1996 passed in Original Petition No.110 of 1993.

33. Mr. Ganesh also submitted that the notice of hearing sent by the National Commission was never served on the counsel for the appellants yet the National Commission proceeded to an ex parte decision on the appellants' complaint and dismissed it on the ground of limitation.

34. According to Mr. Ganesh, the decision in Jyotsana's case is manifestly per incuriam. It does not even refer to the doctrine of implied powers and was not aware of its applicability. The later decision in New India Assurance Co.

Ltd. is expressly mindful of the doctrine. He submitted that an external aid to the interpretation of the Consumer Protection Act, 1986 also reinforces the above construction of the Act.

35. We have carefully scrutinized the provisions of the Consumer Protection Act, 1986. We have also carefully analyzed the submissions and the cases cited by the learned counsel for the parties.

36. On careful analysis of the provisions of the Act, it is abundantly clear that the Tribunals are creatures of the Statute and derive their power from the express provisions of the Statute. The District Forums and the State Commissions have not been given any power to set aside ex parte orders and power of review and the powers which have not been expressly given by the Statute cannot be exercised.

37. The legislature chose to give the National Commission power to review its ex parte orders. Before amendment, against dismissal of any case by the Commission, the consumer had to rush to this Court. The amendment in Section 22 and introduction of Section 22-A were done for the convenience of the consumers. We have carefully ascertained the legislative intention and interpreted the law accordingly.

38. In our considered opinion, the decision in Jyotsana's case laid down the correct law and the view taken in the later decision of this Court in New India Assurance Co. Ltd. is untenable and cannot be sustained.

39. In view of the legal position, in Civil Appeal No.4307 of 2007, the findings of the National Commission are set aside as far as it has held that the State Commission can review its own orders. After the amendment in Section 22 and introduction of Section 22A in the Act in the year 2002 by which the power of review or recall has vested with the National Commission only. However, we agree with the findings of the National Commission holding that the Complaint No.473 of 1999 be restored to its original number for hearing in accordance with law.

40. There has been considerable delay in disposal of the complaint. Therefore, we direct the State Commission to dispose of the Complaint No.473 of 1999 [in Civil Appeal No.4307 of 2007] as expeditiously as possible and in any event within three months from the date of the communication of this order.

41. Similarly, in Civil Appeal No.8155 of 2001, we set aside the impugned order and direct the National Commission to dispose of the Original Petition No.110 of 2003 de novo as expeditiously as possible and in any event within three months from the date of the communication of this order.

42. Both the appeals are disposed of accordingly. The parties are directed to bear their own costs.

.....J. (Dalveer Bhandari)J. (Mukundakam Sharma)
.....J. (Anil R. Dave) New Delhi;

August 19, 2011