JUDGMENT SHEET
IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

Criminal Appeal No.167 of 2017

Indus Motor Company Ltd.
Versus
A. Ammar Sehri and another

Date of Hearing:	17.06.2019 & 11.06.2020.
Appellant by:	M/s Mustafa Ramday and Ahmed Junaid, Advocates,
Respondents by:	Mr. Iftikhar Ahmad Bashir and Ms. Aisha Tabsum Advocates.

MIANGUL HASSAN AURANGZEB, J:- Through the instant criminal appeal under Section 10 of the Islamabad Consumer Protection Act, 1995 ("**the 1995 Act**"), the appellant, Indus Motor Company Ltd., impugns the order dated 10.10.2017 whereby the Court of the learned Additional Sessions Judge, Islamabad (West) exercising the powers of the Authority under Section 2(a) of the said Act, allowed the complaint filed by respondent No.1 and directed the appellant to: (i) replace the respondents' Vehicle Toyota Corolla, Altis 1.8 (Automatic), Model-2015 ("**the Vehicle**") with the current model of the same vehicle or pay an amount equivalent to the price of the current model of the same vehicle to respondent No.1, (ii) pay fine of rupees 40,000/- to respondent No.1 under Section 9 of the 1995 Act, and (iii) to pay compensation of rupees 100,000/- to respondent No. 1 as litigation expenses.

2. The facts essential for disposal of this appeal are that on 02.02.2016 respondent No.1 filed a complaint under Section 8(1) read with Section 2 (vi) of the 1995 Act against the appellant and its authorized dealership, Toyota G.T. Motors ("**respondent No.2**"), before the Court of the learned Sessions Judge-West, Islamabad, being the ex-officio Authority under section 2(a) of the 1995 Act. It was *inter alia* averred in the complaint that respondent No.1 purchased the Vehicle from the appellant through respondent No.2; that the Vehicle was delivered to respondent No.1 on 11.05.2015; that after sometime of the purchase, respondent No.1 noticed an unusual noise while closing the driver's door of the Vehicle; that on 05.12.2015 he lodged a complaint in this regard with one of the appellant's dealers i.e. Toyota Capital Motors I-9, Islamabad; that

neither the dealership nor the appellant could rectify the fault despite repeated visits for the said purpose on 05.12.2015, 10.12.2015 and 29.12.2015; that on 29.12.2015 the representative of the appellant informed him that the noise was *generic* and could not be rectified as it related to the material used in the manufacturing; and that appellant's acts and omissions amounted to unfair trade practice as envisaged in Section 2(f) of the 1995 Act. Respondent No.1 prayed for the reimbursement of costs incurred on purchase, registration of the Vehicle and allied charges, besides compensation amounting to Rs.10 Million, litigation charges and for the imprisonment of the appellant's General Manager and respondent No.2's Chief Executive under section 9 (1) of the 1995, Act.

3. The appellant contested the complaint by filing a written reply on 14.03.2016 wherein it was *inter alia* averred; that the Vehicle delivery and acceptance note dated 11.05.2015 and certificate of registration and fitness dated 18.05.2015 issued by the motor registration authority, Islamabad, show that the Vehicle was in pristine condition at the time of the delivery; that after the purchase of the Vehicle respondent No.1 visited the Toyota Capital Motors thrice but did not point out any defect in the Vehicle; that after using the Vehicle for seven months respondent No.1 complained that there was a fault in the closing of the driver's door, which could not be considered as a manufacturing defect; that after receipt of respondent No.1's complaint the appellant's dealership followed the standard protocol and the technicians made certain adjustments in the driver's door of the Vehicle for respondent No.1's satisfaction; that according to expert technicians of the appellant, the Vehicle's door was up to standard; that the alleged fault in the door, at best and without conceding, could have occurred due to use of the Vehicle for seven months; and that the allegations of respondent No.1 in the complaint do not fall within the definition of "unfair trade practice". The appellant prayed for the complaint to be dismissed with substantial costs.

4. During the proceedings before learned Authority an interlocutory order dated 06.04.2016 was passed which shows that learned counsel for respondent No.1 had stated that the Vehicle may be got inspected by a third party, and that the appellant should

either rectify the fault or replace the Vehicle. The said order also shows that the learned counsel for the appellant had agreed to an inspection of the Vehicle by a third party. The learned Authority thereafter directed the parties to submit a list of renowned workshops or experts who could examine the Vehicle. However on the following date of hearing the appellant moved an application for recalling of the order dated 06.04.2016 on the ground that it had not given any consent for the inspection of the Vehicle by a third party. The appellant's said application was allowed by the learned Authority vide order dated 21.04.2016.

6. After hearing the arguments of the contesting parties, the learned Authority, vide order dated 30.04.2016, accepted the complaint, and held *inter alia* that the appellant had admitted the defect in the Vehicle and failed to remove the same. Furthermore, the appellant was directed to reimburse the purchase price of the Vehicle i.e. Rs.2,207,000/- alongwith the cost of registration i.e. Rs. 338,000/- within one month.

7. The appellant assailed the Authority's order dated 30.04.2016 before this Court in Criminal Appeal No. 113/2016. Vide judgment dated 18.11.2016, this Court allowed the appeal and remanded the matter to the Authority with a direction to frame issues from the divergent pleadings of the parties, record evidence including that of the technical expert and thereafter to decide the matter after giving due opportunity to the parties in accordance with the law. The operative part of the said judgment reads thus:

> *"14. In view of above discussion, I am of the view that the compensation awarded by the Court of learned Additional Sessions Judge (West) Islamabad/Authority under Islamabad Consumer Protection Act, 1995 is not reciprocal to the complaint, even the procedure adopted by the learned Authority is not in accordance with law rather opportunity of fair trial in terms of Article 10-A of the Constitution of Islamic Republic of Pakistan, 1973 has not been given whereas, the Authorities are under obligation to observe and extend equal protection of law under the term due process of law which imposes duty upon the Courts, Authorities, Judicial or Quasi-Judicial forums and Executives to give fair opportunity to everyone to defend himself, afford fair opportunity for submission of case by means of pleadings, affidavits, witnesses and other technical experts whereas the present case has not been decided under the said principles of law and technical evidence is the requirement of time for decision of compensation of damages, if any, therefore, the instant appeal*

is allowed and the impugned judgment dated 30.04.2016 is hereby set-aside, matter is remanded back with direction to frame issues on the basis of pleadings of the parties, record evidence including evidence of technical expert and thereafter conclude the inquiry under the law and decide the matter after giving due opportunity to the parties in accordance with law."

8. After the remand of the case, the learned Authority, vide order dated 12.01.2017, framed the following issues:

1. *Whether the instant complaint falls within the definition of unfair trade practice as envisaged by Section 2 of the Islamabad Consumer Protection Act, 1995? O.P.C.*

2. *Whether the noise coming from driver door of vehicle is "generic" in nature or the same occurred due to use of vehicle for 07 months by complainant? O.P.C. and O.P.R.*

3. *Whether after adjustment made by respondent No.1 to vehicle door alignment, the issue of driver door noise had been resolved? O.P.R.*

4. *Whether the complainant suffered, physical discomfort, mental agony, disturbance, insult and cost of litigation, as prayed, due to any illegality committed by respondent No.1? O.P.C.*

9. After framing the issues the learned Authority referred the matter for an expert opinion to the Pakistan Council for Scientific and Industrial Research ("P.C.S.I.R."). The P.C.S.I.R., vide its letter dated 02.02.2017, informed the learned Authority that it does not have technical facilities at Islamabad to carry out an evaluation of the Vehicle. On the suggestion of the P.C.S.I.R. the matter was referred to the Engineering Development Board ("E.D.B."), Ministry of Industries and Production, for an evaluation of the Vehicle.

10. Vide letter dated 7.02.2017 the Deputy General Manager Policy and Co-coordinator, E.D.B. submitted the evaluation report of the Vehicle. The said letter reads as under:

"Subject: <u>Evaluation Report of Car Toyota Corolla Altis 1.8 (Automatic) Model, 2015, Bearing Registration No. BE-093 (ICT) Islamabad, In The Matter of "Abu Ammar Sehri Versus Indus Motors Company".</u>

With reference to the subject evaluation report for car bearing registration No. BE-093 (ICT) Islamabad In the matter of "Abu Ammar Sehri Versus Indus Motors Company.
EDB has received court orders 62/17 dated February 3, 2017.
2. The Honorable Court directed EDB/Ministry of Industries and Production to carry out evaluation of said car with respect to customer's complaint. EDB's views in the matter are as under:

(a) EDB deals with the provision of manufacturing certificate to car manufacturers under relevant SROs. As such conformance to quality/standards does not fall under its mandate. It may please be noted that EDB does not have lab infrastructure to check conformance to quality. However, evaluation has been carried out under directives of Honorable Court in the interest of both; customer and the manufacturer.

(b) It has been observed that the front right door has a problem which, according to, customer was referred to dealership. The door was adjusted/repaired. However, customer was not satisfied. EDB observed that noise reported by customer is of generic nature and as such it is not a manufacturing fault.

3. In order to ensure customer satisfaction, EDB has advised the company to replace the said door if deemed appropriate.

Best regards,

(Asim Ayaz)
DGM (SP&C/Coord)
Ph:051-9203564
asim@edb.gov.pk"

11. On the appellant's application, Mr. Asim Ayaz, General Manager Policy and Co-ordination, E.D.B., appeared as Court witness ("CW-1"). The said witness was cross-examined by the appellant as well as respondent No.1. Thereafter the said parties produced their oral and documentary evidence.

12. On 27.04.2017 respondent No.1/Complainant appeared before the Authority as PW-1 and produced his affidavit-in-evidence (Ex P-1). In his documentary evidence, he produced Vehicle Delivery Note dated 11.05.2015 (Mark-A), Registration and Fitness Certificate dated 18.05.2015 issued by Islamabad Motor Registration Authority (Mark-B), insurance certificate dated 11.05.2015 from Adamjee Insurance (Mark-C), Copy of Warranty Booklet (Mark-D), Diagnosis Sheet dated 07.01.2016 (Mark-E), legal notice dated 02.01.2016 issued by respondent No.1's counsel (Mark-F), and Marketing Booklet for the Vehicle (Mark-G). Respondent No.1 was cross-examined by the appellant on 04.05.2017.

13. Mr. Muhammad Ishfaque, the appellant's Deputy Manager Central Region, appeared as DW-1 and produced his affidavit-in-evidence (Ex-D1), authority letter dated 12.05.2017 (Ex-D2), and the appellant's board resolution dated 11.07.2012 (Ex-D3). DW-1 also produced Vehicle Delivery Note dated 11.05.2015 (Ex-D4), reply to the legal notice dated 27.01.2016 (Mark-DA), repair orders dated

15.05.2015, 22.05.2015 and 13.06.2015 (Ex-D5 to D7), and brochure for Toyota Altis Grande 1.8 L (Ex-D8 OSR).

14. The learned Authority after completing the inquiry and hearing the parties returned its issue-wise findings on the complaint vide impugned judgment dated 10.10.2017; accepted respondent No.1's complaint; and gave directions as mentioned in the first paragraph of this judgment. The said judgment has been assailed in the instant appeal.

15. Learned counsel for the appellant after narrating the facts leading to the filing of the instant appeal submitted that on 11.05.2015, the Vehicle purchased by respondent No.1 was delivered to him; that at that time respondent No.1 signed the Vehicle Delivery and Acceptance Note (Exh.-D4/Mark-A) acknowledging delivery of Vehicle in perfect condition; that seven months after the said delivery i.e. on 05.12.2015, respondent No.1, submitted a complaint regarding a humming noise on closing the Vehicle's right front door; that on three occasions prior to the submission of the complaint, respondent No.1 had taken the Vehicle to the appellant's premises for maintenance etc.; that on all the three occasions, respondent No.1 did not make any complaint regarding abnormal noise in the Vehicle's door; that on respondent No.1's insistence, the Vehicle was inspected once again on 29.12.2015, and the inspection did not reveal any defect in the Vehicle's door; that since the Vehicle had been driven for six months, it was noticed that the Vehicle's door was closing hard, which caused the appellant to carry out an adjustment; that on 02.01.2016, a legal notice was sent on respondent No.1's behalf to the appellant; that the report dated 07.01.2016 prepared by the appellant showed that there was no noise in the Vehicle's door; that on 27.01.2016, the appellant sent a reply to the said notice; that on 02.02.2016, respondent No.1 submitted a complaint before the Authority; that vide order dated 30.04.2016, respondent No.1's complaint was allowed; that the appellant's appeal against the said order was allowed by this Court vide order dated 18.11.2016 and the matter was remanded to the Authority with the direction to frame issues and record evidence including the evidence of a technical expert and thereafter to conclude the inquiry in accordance with the

law; that in the post-remand proceedings, issues were framed and evidence of the contesting parties was recorded; and that the proceedings culminated in the impugned order dated 10.10.2017.

16. Learned counsel for the appellant further submitted that the impugned order dated 10.10.2017 is not sustainable; that the relief granted by the Authority to respondent No.1 was most disproportionate; that on a complaint regarding a humming noise in one of the Vehicle's doors, the Authority could not have directed the appellant to replace respondent No.1's Vehicle with another vehicle of the current model or pay him the value of the current model; that the Authority did not give due credence to the expert's evidence; that the Authority erred by not appreciating that respondent No.1 had not made any complaint regarding the quality and standard of the Vehicle; that the complaint pertained only to an alleged defect in one of the Vehicle's doors; that the defect with respect to which the complaint was filed was covered under a warranty; that the Authority erred by not appreciating that the report dated 07.01.2016 (Mark-E) was the appellant's internal report; that the inspection of the Vehicle had taken place on 13.06.2015 whereas the said report was made on 07.01.2016 i.e. after the date of the first complaint made by respondent No.1 (i.e. 05.12.2015); that no unfair trade practice had been committed by the appellant; that the impugned order was passed without determining whether there existed any manufacturing defect in the Vehicle's door; that onus to prove that there was a manufacturing defect in the Vehicle's door was on respondent No.1; that there was no evidence on the record to establish the existence of a manufacturing defect in the Vehicle's door; that the evaluation report with respect to the Vehicle submitted by Mr. Asim Ayaz (CW.1), who appeared as a Court witness, clearly mentioned that the noise in the Vehicle's door reported by respondent No.1 was *"of generic nature and as such it is not a manufacturing fault";* that in the cross-examination, CW.1 explained that the term "generic" is not a manufacturing fault and that on the day of evaluation, there was no obnoxious noise in the Vehicle's door; that although CW.1, in part-B of the report had observed that the front door has a problem, but in his cross-examination he deposed that it was so stated in the report because

of respondent No.1's statement; that since respondent No.1 had not been able to prove the existence of a defect in the Vehicle, the appellant could not have been required to prove that there was no defect in the Vehicle; that the hard closing of the Vehicle's door could not be equated with the existence of a humming noise in the Vehicle's door; and that the learned Authority erred by not appreciating that under the terms of the warranty, the repair or replacement of any defective part of the Vehicle could be made, provided it was within the scope of a warranty. Learned counsel for the appellant prayed for the appeal to be allowed in terms of the relief sought therein.

17. On the other hand, learned counsel for respondent No.1 submitted that respondent No.1 had had the Vehicle insured comprehensively through Adamjee Insurance; that after some time, respondent No.1 noticed an unusual noise while closing the driver's door of the Vehicle; that by this time, the Vehicle was driven 1740 Kms; that respondent No.1 submitted a formal complaint to the appellant on 05.12.2015; that respondent No.1 was fatigued by taking the Vehicle for inspection on two occasions; that respondent No.1 turned down the appellant's request to sign a note to the effect that the noise from the Vehicle's door had been rectified; that respondent No.1 was mentally perturbed and was not driving the Vehicle due to the unusual noise in the Vehicle's door; that due to the said noise, the Vehicle purchased by respondent No.1 was not of a merchantable quality and was a defective product; that respondent No.1 had been subjected to three rounds of litigation before his endeavors were crowned with success with the passing of the impugned judgment dated 10.10.2017; that the report (Mark-E) is an admitted document which shows that the Vehicle's door was faulty and the appellant had to rectify the fault; that the appellant's employees tried their best to hide their admission made in the report (Mark-E) regarding the defect in the Vehicle's door; that the report of the technical expert from the Engineering Development Board supports respondent No.1's stance; that in the said report, it is clearly mentioned that the front right door of the Vehicle has a problem; that respondent No.1 failed to rectify the defect in the Vehicle's door despite the warranty; that the humming noise in the

Vehicle's door was verified and checked by a third party evaluator/expert pursuant to the remand order passed by this Court; that the Vehicle was under warranty when it was taken for inspection to the appellant; that it is an admitted fact that the Vehicle's door was closing hard; that in Mark-E, it is stated that the humming noise in the Vehicle's door was fixed with certain adjustments whereas DW.1 in his evidence had deposed that the specialist had made an adjustment regarding the hard closing of the door rather than any noise in the door; that respondent No.1 had paid Rs.2.6 Million and waited for long before the delivery of the Vehicle; and that with the installation of the tracker and payment of the registration fees, insurance and government taxes, respondent No.1 has paid more than Rs.3 Million for the Vehicle. Learned counsel for respondent No.1 prayed for the appeal to be dismissed.

18. I have heard the contentions of the learned counsel for the contesting parties and have perused the record with their able assistance. The facts leading to the filing of the instant appeal have been set out in sufficient detail in paragraphs 2 to 14 above, and need not be recapitulated. Diagnosis

19. In the complaint dated 02.02.2016 respondent No.1 alleged that an unfair trade practice had been committed by the appellant. In the said complaint respondent No.1 described the defect in the Vehicle in the following terms:

> *"4) That after some time of delivery Complainant noticed an unusual noise while closing the driver's door...."*

20. Respondent No.1 further alleged that he was told by the appellant and its dealership that the noise from the door was a *generic noise* and could not be rectified as it related to the material used during manufacturing. In paragraphs 11 and 13 of respondent No.1's statement (Ex-P1) he specifically alleged that the appellant had committed an unfair trade practice by (i) breaching the warranty offered under warranty booklet (Mark-D) in failing to rectify the defect, and (ii) the Vehicle did not adhere to the representation in vehicle brochure (Mark-G) about quality of the Vehicle and customer satisfaction.

21. Now section 2(f) of the 1995 Act defines an unfair trade practice as follows:

"2(f) "unfair trade practice" means a trade practice which, for the purpose of sale, use or supply of any goods or for provision of any service or for their promotion, adopts one or more of the following practices, causes loss or injury though hoarding, black-marketing,, adulteration, selling of expired drugs, food items and commodities unfit for human consumption, or charging for the goods and service in excess of the prices fixed by an authority authorized to do so under any law for the time being in force or in furtherance of such sale, use or supply makes any statement, whether orally or in writing, or by chalking on walls or through sign-boards or neon-sign or by distributing pamphlets or by publication in any manner, including through electronic media, by--

(i) falsely representing that the goods or, as the case may be, services are of a particular standard, quality, quantity, grade, composition, style or mode;
(ii) falsely representing any rebuilt, second-hand, renovated, reconditioned or old goods as new goods;
(iii) falsely representing that the goods or, as the case may be, services have sponsorship or approval of the competent agency or authority or possesses specified characteristics, performance, accessories, uses or benefits which such goods or services do not have;
(iv) falsely representing that the goods or services offered fulfil the prescribed standard fixed by local or international authorities;
(v) giving misleading representation of the need for, or the usefulness of any goods or services;
(vi) falsely giving to the public any warranty or guarantee of the performance, specification, required ingredients, efficacy or length of life of a product or any goods that is not based on an adequate or proper tests thereof;
(vii) falsely offering for sale or on lease any premises, house, shop or building with specified facilities or with the promise to deliver possession thereof within a specified period or without any escalation in price or by falsely representing that such premises, house, shop or building is being sold, built or constructed in accordance with the approved plans, specification and approval of the concerned authorities;
(viii) misleading the public concerning the price at which a product or products or goods or services have been, or are ordinarily sold or provided;
(ix) giving false or misleading facts regarding facilities available in the private educational institutions or falsely representing that such institutions have proper approval of the concerned authorities;
(x) falsely representing for provision of services by professionals and experts, including by doctors, engineers, advocates, mechanics, teachers, hakeems and spiritual healers;
(xi) giving false or misleading facts disparaging the goods, services or trade of another person, firms, company or business concern;
(xii) advertising for the sale or supply at a bargain price of goods or services which are not intended to be offered for sale or supply at such price;
(xiii) offering of gifts, prizes or other items with the intention of not providing them as offered or creating the impression that something is being given or offered free of charge when it is fully or partly covered by the amount charged in the transaction; and

(xiv) falsely gives description of commodities and services offered through mail order.
(Emphasis supplied)

22. Section 2(f) of the 1995 Act when read in conjunction with the respondent No.1's complaint shows that the allegations in the complaint fall in the ambit of unfair trade practice as defined in Section 2(f)(i) and (iii) of the 1995 Act.

23. The initial onus of proof was on the respondent No.1 to establish that an unfair trade practice had been committed by the appellant by making a false representation with regard to quality and customer satisfaction regarding the Vehicle. The only evidence that respondent No.1 produced in this regard was the brochure (Mark-G). Now, the Vehicle Delivery and Acceptance Note dated 11.05.2015 (Ex-D4) is an admitted document as the same was also produced by respondent No.1 as Mark-A. The said document was signed by respondent No.1 as well as the Appellant's representative. In the said document a column under the head of "Owner's Manuals/Literature" lists the documents which were provided to respondent No.1. In the said column there is no mention of the brochure (Mark-G). In addition to that during cross-examination respondent No.1 admitted that the said brochure (Mark-G) was about another variant namely Toyota Corolla Altis Grande 1.8 and not about the Vehicle purchased by respondent No.1. The relevant portion of respondent No.1's cross-examination reads as under:

> *"It is correct that the vehicle in question Altis 1.8 Cruisetronic A/T and not Grande Model. It is correct that Mark-G is a brochure of Toyota Corolla Altis Grande 1.8 and not of the vehicle in question, volunteered that it is the only broucher which had been provided to me by the manufacturer dealer before purchasing of the vehicle in question and no other broucher was provided to me regarding the said vehicle. It is correct that immobilizer mentioned on page No.31 of Mark-G is not available in the vehicle in question, voluntarily stated as it is not provided by the manufacturer which should be as per the broucher. I have not ever agitated in this regard."*

24. Respondent No.1's statement shows that the representations in Mark-G did not relate to the Vehicle. He admitted that he was in the knowledge that the feature of immobilizer mentioned in the brochure (Mark-G) did not exist in the Vehicle. This corresponds to his admission that he was aware that the representations made in

the brochure (Mark-G) did not relate to the Vehicle. Since respondent No.1 was unable to prove that the appellant/manufacturer had made any representations to him regarding the Vehicle, it did not lie in his mouth to say that false representations had been made to him. Consequently, it is my view that respondent No.1's complaint to the extent of the alleged unfair trade practice within the meaning of Section 2 (f) (i) of the 1995 Act was liable to be dismissed.

25. The second aspect of respondent No.1's complaint was with regard to the appellant's breach of warranty contained in the warranty booklet (Mark-D). This allegation fell within the ambit of the definition of unfair trade practice in Section 2(f)(vi) of the 1995 Act. This aspect of the case is crucial because respondent No.1 had sought replacement of Vehicle in addition to compensation from the appellant. The warranty booklet (Mark-D) is an admitted document and it is also admitted that respondent No.1 made the complaint regarding a defect in the Vehicle within warranty period. This warranty booklet also sets out the rights and liabilities of parties with regard to service under warranty. About the appellant's liability, the Basic Coverage Period in the warranty booklet (Mark-D) is in the following terms:-

> *"Basic Coverage Period: Toyota warrants that it will either repair or replace any part that Toyota supplies that is defective in material or workmanship under normal use except those items listed under "What Is Not Covered" for a period of 24 months or 50,000/- kilometers (30,000 miles), whichever comes first."* (Emphasis given)

26. In the warranty booklet (Mark-D) the appellant did not assume the responsibility to replace the entire vehicle, instead it undertook to repair or replace the defective part in the Vehicle within the warranty period. A clause in warranty has to be literally interpreted. In case of Maruti Udyog Ltd. Vs Susheel Kumar Gabgotra (2006 (4) SCC 644) a similar proposition came for consideration before the Supreme Court of India. The complainant in the said case had purchased a Mahruti Car from the appellant through its authorized dealer. After some time of the purchase the complainant noticed that the car's clutch was not functioning properly since it had developed an unusual noisy jerks on the running of the engine. The complainant took the car to the appellant, who examined the same

but the defect could not be cured. The complainant, by treating the defect as a "manufacturing fault" demanded the replacement of the car with a new one from the appellant. Eventually the complainant approached the Consumer Redressal Commission. The Commission allowed his complaint and the appellant/manufacturer was *inter alia* directed to replace the car. The High Court dismissed appeal against order of the Commission. However, the Supreme Court of India allowed the appeal against orders of the Commission and the High Court and the said orders were modified by holding that the appellant was liable to replace the defective part but not the whole car. It was also held that where conditions of warranty are explicitly set out, the case could not be termed as one of silence of the contract of sale as to warranty. The relevant portion of the judgment is reproduced hereunder;

> *'9. The Commission and the High Court have relied on so called admission of the appellant in para 3 of the objections filed before the Commission. In various documents, more particularly the letter dated 19.2.1997 written by respondent No. 1 to the appellant, it is clearly stated that the appellant had indicated that downing of the engine was necessary to trace the problem. There was no agreement to replace the engine system. Additionally, it is not disputed by learned counsel for the respondent No. 1 that when the appellant had asked the vehicle to be brought for the aforesaid purpose the respondent No. 1 had not done so. To infer that there was any manufacturing defect in the said background is without any foundation.*
>
> *10. In Corpus Juris Secundum the observations to which reference was made by the High Court read as follows:*
>
> > *"On a sale of a motor vehicle by a manufacturer to a dealer there may be an implied warranty that it is reasonably fit for, or adapted to, the uses for which it is made and sold; and such a warranty is not excluded by the silence of the contract of sale as to warranties."*
>
> *11. The principles stated above can never be doubted. But what is relevant in the case at hand is that the warranty conditions were specially stated. This is not a case of silence of a contract of sale as to warranty. Therefore, the High Court was not justified in directing replacement of the vehicle.*
>
> *12. But on the peculiar fact of the case relief to the respondent No. 1 has to be moulded. In almost a similar case certain directions were given in Jose Philip Mampillil v. Premier Automobiles Ltd. AIR (2004) SC 1529.*
>
> *13. In line with what has been stated in the aforesaid case, we direct as follows:-*

(1) On respondent No. 1 taking the vehicle in question to the authorized service center of the appellant at Jammu within three weeks, the defective part, that is, clutch assembly shall be replaced. Respondent No. 1 shall not be required to pay any charge for the replacement.

(2) In addition, respondent No. 1 shall be entitled to receive a consolidated sum of Rs. 50,000/- (Rupees fifty thousand only) from the appellant for cost of travel to Karnal which admittedly was wrongly advised by the appellant, for the inconvenience caused to respondent No. 1 on account of the acts of the appellant and the respondent No. 2 and the cost of litigation."

27. It is an admitted position that the Vehicle was delivered to respondent No.1 on 11.05.2015. It was not until 05.12.2015 that respondent No.1 submitted a complaint to the appellant regarding a noise in the driver's door of the Vehicle. The Vehicle had been used by respondent No.1 for about seven months before the said complaint was lodged. It is not disputed that the complaint was only with respect to a humming noise while closing one of the Vehicle's doors. For the Authority to have directed the appellant to provide respondent No.1 with a brand new car of the current model or its value when the complaint was only regarding a noise in one of the Vehicle's doors is, in my view, most disproportionate and irrational. At best, if warranted under the circumstances of the case, the Authority could have directed the appellant to replace the Vehicle's door with respect to which the complaint was filed by respondent No.1, but certainly not a brand new car.

28. As to whether or not a breach of warranty on the appellant's part was established, it ought to be borne in mind that respondent No.1 had agitated just one defect in the Vehicle i.e noise from the driver's door only while closing the door. That being the sole defect in the Vehicle was reaffirmed by respondent No.1 during his cross-examination. A defect of such a nature cannot be considered to have an impact upon the road worthiness of the Vehicle and has no bearing on the basic design or the function of the Vehicle. Such defects can be rectified by repair or if necessary, by replacement of parts causing the defect. It was respondent No.1's own stance that he had taken the Vehicle for inspection to the dealer and manufacturer several times after the defect was first noticed. This means that the Vehicle was being driven without being required to be towed or loaded onto a carrier. A manufacturing defect on the

other hand as defined in the Black's Law Dictionary means "*An imperfection in a product that departs from its intended design even though all possible care was exercised in its assembly.*" An abnormal noise from one of the doors of the Vehicle at the time of closing the said door cannot be considered a major defect or imperfection of entire product. In paragraph 30 of the impugned judgment dated 10.10.2017 the learned Authority itself held the appellant liable of selling the Vehicle with defective part. It is however not understandable how the learned Authority termed the defective part as manufacturing fault. The relevant portion of paragraph 30 is reproduced hereinbelow:-

> *"30.....After observations and discussion made under Issues No. 2 and 3, it has become crystal clear that selling a vehicle with defective part and upon failure to do the needful provided under warranty coverage, the respondent No.1 has indulged into unfair trade practice as provided under the Act ibid."*

29. The appellant, in its reply dated 14.03.2016, explicitly disputed the very existence of the defect with respect to which respondent No.1 had filed the complaint. However, the learned Authority did not frame a separate issue in this regard. Where a complainant alleges the commission of an unfair trade practice on the basis of a defect in a product, and the manufacturer denies the existence of such a defect, it would be the complainant's foremost duty to prove that the defect existed at the time of filing the complaint. This burden is for the complainant to discharge. In order to prove the existence of the defect respondent No.1 produced his own affidavit-in-evidence as Ex-P1 and the Diagnosis Sheet dated 07.01.2016 as Mark-E, which is the appellant's report dated 07.01.2016 setting out the chronology of the events with respect to the Vehicle. It would be pertinent to mention that the appellant filed the said Diagnosis Sheet along with its reply dated 14.03.2016. Respondent No.1 admitted during cross-examination that the document Mark-E as produced by him was a photocopy of annexure-R1 earlier available on record of the Authority. In the impugned judgment dated 10.10.2017 the learned Authority drew a crucial inference from clause 'f' of Mark-E wherein under the head of "root cause" it is mentioned that "*Driver Door gives humming noise which had been fixed by door & its striker adjustment and cleaning of weather strip performed by IMC*

Production, whereas as actual root cause in under study'. The learned Authority considered this to be in contradiction with DW-1's deposition that an adjustment was done for the hard closing of the door and not for the door noise. The learned Authority also observed that DW-1 could not satisfactorily explain the expression "*actual root cause is under study.*"

30. The Diagnosis Sheet dated 07.01.2016 (Mark-E) records that various technicians inspected the Vehicle on three different occasions i.e. on 5.12.2015, 10.12.2015 and 29.12.2015. On all the three occasions the technicians adopted various approaches for the respondent No.1's satisfaction. So much so that on 5.12.2015, in the respondent No.1's presence, the dealership staff performed a comparison with another vehicle of the same model. Now, the learned Authority disregarded the appellant's justification that they performed the adjustment work for the satisfaction of the customer. It had been clearly mentioned in Mark-E that the driver's door was fixed, and was OK and to standard level. No admission in these circumstances can be ascribed to the appellant on the basis of the expression, " root cause is under study".

31. In a situation where the parties are at variance about the existence of a defect or its nature, an inspection by a commission appointed by the Authority or a report of an expert is of paramount importance. Now apart from Mark-E the learned authority in paragraph 23 of the impugned judgment relied on the expert report (Ex-C1) to arrive on the conclusion that a defect existed in the door. However, quite surprisingly the learned Authority in paragraph 27 of the impugned judgment disregarded the very same report of the expert and held the said expert's report (Ex-C1) was contradictory. The relevant paragraphs read as under:-

> *"23.....Furthermore, the expert evaluation report Ex-C1 substantiates the assertion of complainant where it is mentioned under clause (b) that "it has been observed that the front right door has a problem."*
>
> *"27. The aforesaid observations do appear to be contradictory, as on one had the driver door* ***has a problem****, despite having been repaired/ adjusted; whereas on the other hand it was observed that there is a normal noise in the door which is not a manufacturing fault..."*

32. In its reasoning the learned Authority did not consider the statement of Court Witness (CW-1), who was the scribe of the report (Ex-C1). The said witness was cross-examined by respondent No.1. In response to respondent No.1's suggestion CW-1 unambiguously stated that there was no obnoxious noise in the door of the Vehicle on the day of evaluation and that it was OK. The relevant portion of the CW-1's statement is reproduced hereinbelow;

> *"It is not correct to say that there was an obnoxious noise in the driving door of the vehicle in question."*
>
> *"It is correct that I observed that the front right door of vehicle in question was adjusted/repaired by the dealer. On the day of evaluation, the front right door of vehicle in question was OK and did not require any further repair."*

33. Furthermore, the expert witness (CW-1) during his cross-examination by the appellant explained the contents of his report in the following terms:-

> *"It is correct that problem mentioned in paragraph 2(b) of Ex-C1 has been mentioned according to the statement/stance of the customer."*

34. There is, thus, on the record a clear stance of the expert CW-1 that on the day of evaluation of the Vehicle by him, no obnoxious noise was coming from its front right door which was OK. The expert witness had appeared in the witness box not only to verify his report but he was also cross-examined by the parties. During his cross-examination the expert witness explained the contents of the report. The learned Authority ought to have read the report in conjunction with CW-1's statement on oath. It is pertinent to mention that respondent No.1, during CW-1's cross-examination did not raise any question with regard to his credibility, and did not put a suggestion that he is not stating the truth. Therefore, from the CW-1's statement it can be safely deduced that no obnoxious noise was coming from the front right door of the Vehicle on the day of the evaluation by CW-1.

35. Since the respondent No.1 could not produce any evidence with regard to existence of alleged defect at the time of filing complaint and since the independent evaluator CW-1 had stated on oath before the learned Authority that on the day of evaluation no

noise was coming from the front driver's door and that the said door was OK, I am of the view that no breach of warranty and unfair trade practice could be attributed to the appellant.

36. Since I have held that respondent No.1 had been unsuccessful in establishing the existence of a defect in the Vehicle as alleged in his complaint before the Authority, the complaint would merit dismissal. However, it ought to be mentioned that while deciding issue No.4 regarding compensation, the learned Authority in paragraph 32 of its judgment dated 10.10.2017 had observed that "*...Record has been perused and nothing could be brought on record by the complainant to evaluate his discomfort, agony, insult etc in monetary terms...*" Now, Section 9(3) of the 1995 Act provides for payment of compensation to the consumer for any damage or loss suffered by him due to an unfair trade practice. Since the learned Authority had held that respondent No.1/complainant could not produce evidence to prove his loss or damage, there was no occasion for saddling the appellant with the liability to pay compensation of Rs.100,000/- to respondent No.1. Similarly, the fine of Rs. 40,000/- under penal provision of Section 9(1) of the 1995 Act had been imposed on the appellant without recording any reasons for the same.

37. For the above-mentioned reasons, the instant appeal is allowed; the impugned judgment dated 10.10.2017 passed by the learned Additional Sessions Judge, Islamabad (West) exercising powers of the Authority under the 1995 Act is set aside; and the complaint dated 02.02.2016 filed by respondent No.1 is dismissed. There shall be no order as to costs.

(MIANGUL HASSAN AURANGZEB)
JUDGE

ANNOUNCED IN AN OPEN COURT ON 12-06-**/2020**

(JUDGE)

Aamer Baig*