

Amazon Seller Services Private Limited vs Vishwajit Tapia on 3 December, 2019

2nd Additional Bench

STATE CONSUMER DISPUTES REDRESSAL COMMISSION,
PUNJAB, CHANDIGARH.

First Appeal No.544 of 2019

Date of Institution : 20.08.2019

Reserved on : 18.11.2019

Date of Decision : 03.12.2019

Amazon Seller Services Private Limited, Registered Office at
Brigade Gateway, 8th Floor, 26/1, Dr. Rajkumar Road,
Malleshwaram (W), Bangalore-560055, India through its authorized
Signatory Shri Rahul Sundaram.

.....Appellant/opposite party no.1

Versus

1. Vishwajit Tapia S/o Sh. Lalit Moihan Tapia, R/o Tapia Street,
Bhikhi More, Nabha.

.....Respondent no.1/complainant

2. Motorola Solutions India Pvt. Ltd., Motorola Excellence Centre,
415/2, Mehrauli, Gurgaon Road, Sector-14, Gurgaon-122001.

.....Respondent no.2/opposite party no.2

First Appeal against order dated
19.07.2019 passed by the District
Consumer Disputes Redressal Forum,
Patiala.

Quorum:-

Ms. Kiran Sibal, Presiding Member

Present:-

For the appellant : Sh. Yugaush Siwach, Advocate For respondent no.1 : Sh. Vishwajit Tapia, in person For respondent no.2 : Ex-parte Kiran Sibal, Presiding Member:

This appeal has been preferred by the appellant against order dated 19.07.2019 passed by District Consumer Disputes Redressal Forum, Patiala (in short, "the District Forum"), whereby the complaint filed by respondent no.1/complainant, under Section 12 of the Consumer Protection Act, 1986 was allowed and the appellant/opposite party no.1 was directed to pay compensation of 3000/- as costs of litigation and further directed to refund Rs.11,750/- i.e. price of the mobile set to respondent no.1/complainant.

2. It would be apposite to mention that hereinafter the parties will be referred, as have been arrayed before the District Forum.

Facts of the Complaint

3. Brief facts, as averred in the complaint, are that complainant purchased a mobile phone MOTO G 3rd generation (black 16 GB), through agency of OPs, vide Annexure A-1. After receiving the amount of Rs.11750/-, the said mobile set was dispatched by agency of OPs on 03.09.2016, which was received on 07.09.2016. When the packet containing the mobile was opened, complainant was surprised to see that packing and seal of both packing and mobile looked old. Still the complainant believing it to be a new one, connected it to the charger, received with mobile set, but the mobile did not charge. Even after plugging it to the charger for more than five hours, it did not work. Complainant continued this process for five or six days with the hope that the same would be charged, but to no effect. Finding no solution, he contacted OP telephonically but he was told that OP had closed its return window. The complainant could not obtain the services from Motorola i.e. the maker of the mobile. He was told that the guarantee period had already been expired, as earlier this phone was sold by the company from the site of Flipkart, one year back. He served legal notice upon OP on 28.09.2016, vide Annexure A-6, but to no effect. The OPs refused to replace the same. He alleged deficiency in service and unfair trade practice on the part of the OPs. He prayed that OPs be directed to replace the defective mobile with new one and to pay costs of Rs.25,000/-with interest @12% per annum to him. Defence of the Opposite Parties

4. Upon notice, none appeared on behalf of OP No.2. Hence OP No.2 was proceeded against exparte. OP No.1 appeared through counsel and filed reply by raising preliminary objections that M/s Amazon Seller Services Private Limited (ASSPL) is the owner of the website. On the application its name was corrected in the head note of the complaint. OP neither sells nor offers to sell any product. It provides online marketplace where independent third party sellers can list their products for sale. The sellers themselves are responsible for their respective listings and products of the website. OP no.1 neither responsible for the products that are listed on the website by various third party sellers nor intervene or influence in the sale transaction between the customer and seller. OP no.1 is only a facilitator and cannot be a party to control in any manner any sale transaction on the website. The contract of sale of products on the website is strictly a bipartite contract between the customer and the seller. The complainant does not fall within the definition of consumer under the Consumer Protection Act. Complainant has not bought any goods from OP no.1 and has not paid any amount directly against any such goods or services. The goods have been bought by the complainant from an independent third party seller, which selling its products on the website operated by OP No.1. OP No.1 is merely provided online marketplace. It is neither a necessary nor a proper party in the complaint. Complaint is liable to be dismissed due to mis-joinder of parties. The complainant wrongly approached the Forum qua OP No.1 on a misunderstanding that he is a consumer of it. The "Conditions of Use" as applicable at the time of registration on the Website as a buyer was accepted by him, which state that OP No.1 is not and cannot be a party to control in any manner, any transaction between the users at the Website. There is no occasion for the complainant to approach the Forum seeking redressal of his grievance against OP No.1. OP No.1 also extracted some conditions of the contract, the repetition of which is not considered to be relevant at this stage. It

controverted the other averments of the complainant and prayed for the dismissal of the complaint.

Evidence of the parties and finding of the District Forum

5. In support of his case, complainant tendered in evidence his affidavit Ex.CA, copy of details of order Ex.C1, copy of wrapper of cardboard Ex.C2, copy of specifications Ex.C3, copy of the picture of mobile Ex.C4, copy of statement Ex.C5, copy of legal notice Ex.C6 and postal receipt Ex.C7.

6. To rebut the above evidence of complainant, OP tendered in evidence affidavit of Rahul Sundram Ex.OPA, copy of authority letter Ex.OP1, copy of resolution Ex.OP2, copy of terms and conditions Ex.OP3, copy of reply to legal notice Ex.OP4, copy of postal receipt Ex.OP5.

7. The District Forum, after going through the record and hearing learned counsel on their behalf, partly accepted the complaint, vide impugned order. Hence, this appeal. Contentions of the Parties

8. I have heard learned counsel for the appellant and Sh. Vishwajit Tapia respondent no.1/complainant and have carefully gone through the record of the case.

9. Ld. counsel for the appellant contended that the District Forum failed to appreciate the evidence, terms and condition produced by respondent and wrongly and illegally decided the complaint, which is beyond its jurisdiction, as per condition 22 of the "conditions of Use" of the website, as per which the parties have vested exclusive jurisdiction to the Courts at Delhi. He further argued that complainant made online purchase and the delivery was received by his mother/brother. Complainant got checked the said mobile from Motorola service centre, but he did not place on the record any evidence to show that a job card was issued to him regarding any defect in the said mobile set. There is also no evidence to the effect that any communication was made to OP no.1/appellant in the form of any e-mail or otherwise and no feed back was received by the appellant. The complainant could have given his feed back under 15 days return window, but he did not do so. It was further contended that the complainant went to the service centre of respondent no.2/OP no.2 for the replacement of the charger and not for the mobile phone. He further contended that appellant is neither a manufacturer nor a seller of the product in question. The said product was sold by an independent third party seller i.e. 'Gizmo Bazaar', which has not even been impleaded as a party. He further argued that the said mobile set is still lying with the complainant and he did not deposit the same with OP no.1. The said mobile set was purchased by the complainant out of his own will and choice and the appellant acted as an 'intermediary' only, as such, appellant is not liable on any count. The appellant is the owner and operates the website www.amazon.in and the mobile application called 'Amazon', which is an online shopping website/application based upon the "marketplace model". The appellant website is only a platform where independent sellers sell their products to independent buyers without any influence of the appellant. The appellant has been granted permission to conduct business as a marketplace based model of e-commerce specifically stipulated, in Schedule 1 at entry 16.2.3 of the Regulation. The District Forum failed to appreciate the above fact and that the appellant cannot have control regulation and liability over the standard, quality and performance of the product. Averring on similar lines as in the appeal, the counsel prayed for dismissal of the complaint.

10. On the other hand, respondent no.1/complainant, who appeared in person contended that the District Forum has rightly passed the order on merits. He further stated that he is ready to deposit the mobile in question with OP no.1.

Consideration of Contentions

11. I have given thoughtful consideration to the contentions raised by the learned counsel for the appellant and respondent no.1/complainant in person.

12. First of all I would like to deal with the objection raised by the appellant that as per condition 22 of the conditions of use of the website the Courts at Delhi have the exclusive jurisdiction to entertain the complaint. In this regard, it is relevant to mention that the grievance of the complainant is that old mobile was sold to him by OPs and delivered it on his address i.e. Vishwajeet Tapia, Tappian Street, Bhikhi Mor, Near Patiala Gate, Nabha, Punjab- 147201 (India). The complainant booked the mobile by the using the site of OP no.1 at Patiala and OPs delivered the same at the given address. So, I am of the view that District Forum Patiala has the territorial jurisdiction to entertain the complaint, as per Consumer Protection Act, 1986 and the District Forum has rightly decided the complaint having territorial jurisdiction.

13. The next objection of the appellant is that the District Forum has overlooked the fact that the appellant is an intermediary, as defined under Section 2(1)(w) of the IT Act. It is neither a manufacturer nor a seller of the product in question. No doubt, the role of appellant/opposite party no.1 is that of intermediary in the present case, but it cannot be said that it has no role to play in the harassment and loss caused to the complainant due to supply of old mobile hand set, vide Ex.C-1. Online market place Company earns revenue each time a consumer clicks and visits on its website. Moreover, the same is being done as per the terms and conditions between the online portal company and the sellers for a consideration. It is the duty of the intermediary that it should verify the bona fides of the seller, who sells the articles and products. Intermediaries are entities and provide service enabling delivery of online contents to the end user. "Intermediary" has been defined in Section 2(w) of the Information Technology Act, 2000 and thereafter the guidelines have been issued in the form of the Information Technology (Intermediary Guidelines) Rules, 2011. For providing protection to the intermediaries, general conditions have been framed as Safe Harbour Protection subject to restrictions mentioned in Sub-Sections (2) and (3) of Section 79 of the Information and Technology Act, 2000.

14. Section 79 of the Information and Technology Act, 2000, is a safe harbour provision subject to restrictions imposed in sub- sections (2) and (3) thereof. If an online intermediary has specific knowledge or has reasonable belief based on information supplied by the right holder about the contents and the intermediary fails to act despite such knowledge, online intermediary can be held liable for infringement. To prove actual knowledge obviously is very difficult. E-commerce portal is required to identify and report infringement. Suppose the HP informs an intermediary that it does not manufacture and sell mobile covers, thus, all products on its portal are counterfeit and must be removed. On that basis e- commerce portal/intermediary can insist that it must provide specified URL to act upon the request. Internet Protocol (in short, "I.P.") owner will need to put resources to

constantly monitor online space and to report to the intermediary seeking its removal. Amazon has become a place where we can get everything quickly and have it delivered in 2 days. The products are coming from third-party sellers i.e. products sold on Amazon marketplace merchants. Amazon marketplace serves as a sort of newspaper classified advertisements section, connecting potential consumers with the sellers in an efficient, modern and in a streamlined manner. Amazon places products on its shelves to the stream of commerce. Now a days, the brands are warning consumers against purchasing products online.

15. Admittedly, users carry out activities on market place platform of the portal. Thus, they play an active role in facilitating the infringement conduct. Apparently, online marketplace operator portals appear to be responsible for infringements carried out by the users on their platform. It is a very crucial and debatable issue. The liability and exemption of the e-commerce portal acting as hosting service provider, in relation to posting of information provided by the recipients of its services, needs to be examined in the light of statutory provisions and the facts of present appeal arising from the consumer complaint. The following point arises for consideration:-

Whether online marketplace operator/portal can be held liable for the infringement that occurred on its platform, if so, then to what extent?

16. In the present case, the complainant placed the order through Amazon for purchase of said motorola mobile set from opposite party No.2. The receipts came from Amazon-opposite party No.1, vide Ex.C-1 and C-5. So, Amazon is a co-seller. Laws need to catch up with reality. It is worth noting that the product is a part of 'fulfilled by Amazon' program which means that the product is being stored with Amazon and delivered by it. Amazon should ensure that product being sold on its marketplace by the seller is genuine. It cannot be presumed that all products sold through it by the sellers are genuine. The portal has to certify that the products shipped are inspected before sending to the buyers. The sellers sell products on Amazon in two ways:-

i) The sellers-who list, pack, ship and deliver directly to consumers;

and

ii) The sellers-who opt to list on Amazon using "Fulfilled by Amazon" (in short "FBA") service.

In the present case, seller opted to list on Amazon and used 'fulfilled by Amazon' (FBA) service. In such cases, Amazon does not break open the seal of the products but it has mechanism in FCs to ensure that the products are genuine and they take photographs of the product before dispatch. Amazon must have taken photographs with weight. The packing must have been video-recorded, but no such evidence had been placed on record.

17. Opposite party no.2 chose not to appear before the District Forum despite service and was proceeded against ex parte, therefore, the averments made in the complaint deemed to have been admitted by it. The Amazon-opposite party no.1 has not placed on record the terms and conditions

or any Agreement, which must have been executed between it and opposite party no.2 for allowing its marketplace/portal to opposite party No.2-seller for selling the products and in the absence of the same, an adverse inference is to be drawn against opposite party no.1 and the benefit of safe harbour protection subject to restrictions as provided under Sub-Sections (2) and (3) of Section 79 of the Information and Technology Act, 2000 cannot be given to appellant/opposite party No.1. As such the plea of the appellant that the complaint is bad for non-joinder of necessary parties i.e. 'Gizmo Bazaar' is not tenable.

18. The definition of "delivery" has been given in Sub-Section (2) of Section 2 of the Sale of Goods Act, 1930, which means voluntary transfer of possession from one person to another. The liability of marketplace e-commerce Company arises from the concept of secondary/contributory infringement. In case in hand Amazon facilitated infringement by OP no 2-Seller and provided a space for sale of infringing product. Amazon had actual or constructive knowledge of such infringement and has reason to believe that an infringement had occurred at its place as the product was packed in its box and delivered by it to the complainant. As such, it is also personally and jointly liable. Amazon is not a neutral or passive, instead it optimizes, promotes and offers for sale and its duties are in the nature of pro-activeness.

19. Perusal of evidence on record clearly establishes that OP no.1 is not a mere broker or intermediary as considered in the commercial world. I have no doubt, whatsoever, that it was acting as a representative or agent of OP no.2 during the negotiation. All transactions routed through OP no.1 and contract also concluded between the complainant and OP no.2 through it. The delivery of product to the complainant was also through it. In view of this, OP no.1 is personally answerable for the supply and delivery of goods and would also be liable for the consequences arising out of the breach of contract.

20. As far as the contentions raised by the learned counsel for the appellant during the course of final arguments that no evidence has been placed by the complainant regarding the issuance of job card, receipt of e-mail regarding the feed back etc. are concerned, it is relevant to mention here that these contentions are not part of the pleadings before the District Forum as well as in the appeal filed before this Commission. Therefore, in the absence of specific pleadings the above contentions are rejected.

21. In identical circumstance, State Consumer Disputes Redressal Commission, U.T., Chandigarh in First Appeal No.27 of 2017 (Amazon Sellers Service Private Limited v. Gopal Krishan and others) decided on 17.2.2017 while holding Amazon Sellers Service Private Limited liable has held as under:-

"8. Contention of Counsel for the appellant that as per terms and conditions of sale, no liability can be fastened upon the appellant, is liable to be rejected. An agent, who sells a product, is duty bound to ensure its quality, and if the product is found defective, agent shall be vicariously liable for the loss caused to the purchaser, alongwith the manufacturer of the product."

It was so held by the Hon'ble National Consumer Disputes Redressal Commission, New Delhi in the case titled as "Emerging India Real Assets Pvt. Ltd. & Anr. Vs Kamer Chand & Anr. Revision Petition No.765 of 2016 decided on 30.3.2016" that it was bounden duty of the facilitator to ensure that goods sold through any individual are manufactured as per quality standard. If the goods purchased through online are found not up to the mark, online portal through which goods were purchased, cannot escape its liability.

22. In the light of above discussion, I hold that the appellant/ OP no.1 was agent and co-seller of OP no.2 and is not merely an intermediary. So, OP no.1 is also held personally and jointly liable for the deficiency in service and harassment caused to the complainant.

23. In view of my above discussion, I do not find any merit in this appeal and the same is hereby dismissed by affirming the order of the District Forum, Patiala dated 19.07.2019 with some modification to the effect that appellant/OP no.1 is at liberty to send his representative to the house of complainant to collect the said mobile set. The complainant will hand over the said mobile set to the representative of OP no.1 against proper receipt.

24. The appellant/ OP no.1 had deposited a sum of Rs.7375/- at the time of filing of the appeal. It deposited another sum of Rs.7375/-, vide receipt dated 26.09.2019 in compliance with order of this Commission. Both these sums, along with interest which has accrued thereon, if any, be remitted by the registry to the District Forum forthwith. The complainant may approach the District Forum for the release of the above amounts and the District Forum may pass the appropriate order in this regard after the expiry of limitation period in accordance with law.

(KIRAN SIBAL) PRESIDING MEMBER December 03, 2019.

MM