

M/S Mahindra Holidays And Resorts India ... vs Dr Louis Fisher on 8 April, 2019

Daily Order

KERALA STATE CONSUMER DISPUTES REDRESSAL COMMISSION SISUVIHARLANE VAZHUTHACADU THIURVANA

APPEAL NO.856/15

JUDGMENT DATED : 08.04.2019

(Appeal filed against the order in CC.No.297/12

on the file of CDRF, Ernakulam)

PRESENT

SRI.T.S.P.MOOSATH

: JUDICIAL MEMBER

SMT.BEENA KUMARI.A

: MEMBER

APPELLANTS / OPPOSITE PARTIES

M/s.Mahindra Holidays and Resorts India Ltd, Mahindra Towers, 2nd Floor, 17/18, Patullous Road, Chennai 600 002 M/s.Mahindra Holidays and Resorts India Ltd, K.G.Oxford Business Centre, 39/4609, Sreekandath Road, Ravipuram, Cochin - 682 016 (BY Adv.Sri.P.J.Philip)

VS RESPONDENTS / COMPLAINANTS Dr.Louie Fischer, M.O.S.C.Medical College Hospital, Kolencherry - 682 311 Dr.Elizabeth Fischer, M.O.S.C.Medical College Hospital, Kolencherry - 682 311 (BY Adv.Sri.RaynoldFernandez.N& Adv.Sri.Manu George Kuruvila) JUDGMENT

SRI.T.S.P.MOOSATH : JUDICIAL MEMBER The opposite parties in CC.No.297/2012 of the Consumer Disputes Redressal Forum, Ernakulam, in short, the district forum has filed the appeal against the order passed by the district forum by which they were directed to pay Rs 1,63,320/- with interest at the rate of 12% per annum from the date of the complaint, to pay Rs 1,00,000/- as compensation and Rs 10,000/- as cost of the proceedings to the complainant.

2. The averments contained in the complaint are in brief as follows. The complainant is a doctor in a private Medical College in Ernakulam District. The complainant chose to take a club membership with the opposite party company during March 2011. An amount of Rs 1,63,320/- was paid to the opposite parties on their demand towards membership in instalments. The complainant was allotted the membership No.2261001. Thereafter the complainant requested for a holiday package to Ootty on 02.02.2012. However that was rejected by the opposite parties without showing adequate reasons. Thereafter also the complainant had contacted the opposite parties for other packages. But those requests were also rejected. Thoroughly dissatisfied with the services of the opposite parties the complainant contacted the opposite parties over telephone and expressed their intention to withdraw their membership. E mail communication was also sent on the above subject. Instead of receiving the amount paid by the complainant the opposite parties sent a reply demanding further payment of Rs 1,06,244/- to withdraw from the services which is arbitrary and clearly illegal. According to the opposite parties, the complainant was bound to comply with the one sided contracts signed at the time of enrollment. The complainant has not even availed any services rendered by the opposite parties and still the opposite parties are not willing to refund the amount that they are holding and that is inequitable. The complainant was given a television as gift at the time of enrolment as member to the opposite parties. According to the opposite parties the gift was worth Rs 22,500/-. The complainant is entitled to get refund of the entire amount paid to the opposite parties. The complainant is ready and willing to return the gift given by the opposite parties or the value of the gift may be deducted from the amount to be refunded to the complainant. The complainant had issued a registered lawyer notice stating of these facts to the opposite parties which was received by them on 28.03.2012. The reply was sent on 04.04.2012 denying the allegations. In the reply notice it was stated that since the complainant had signed the membership application form on 14.03.2011, the complainant is not entitled to get any refund or the amount already paid by him as there are some clauses to that effect. This is illegal and opposed to natural justice. According to the opposite parties the total membership fee was Rs 3,67,788/- and the period

of package commences only 01.07.2012. However, the opposite parties admitted that the complainant had so far not availed any of the services from them and they are holding Rs 1,63,320/- already paid by the complainant. Therefore the complainant seeks refund of the entire amount paid by him with interest at the rate of 12% per annum and to pay costs of the proceedings.

3. The opposite parties filed version raising the following contentions. The complainant and opposite parties are governed by terms and conditions of the agreement signed by the complainant. The complaint is frivolous and vexatious. There was no deficiency in service on the part of the opposite parties. The complainant has suppressed several facts from the Forum and therefore are not entitled to claim any relief. The subject matter of the case does not come within the purview of the consumer disputes. The compensation under section 14 (1) (d) of the Consumer Protection Act can be awarded to the complainant only for loss or injury suffered by the complainant due to negligence of the opposite parties. The complainant has no locus standi to initiate the present proceedings and is liable to be dismissed under section 26 of the Consumer Protection Act. As per clause 13.3. of the contract entered into between the complainant and the opposite parties, only Civil Court in Chennai shall have jurisdiction to the exclusion of all other courts. Since the parties have agreed to confer jurisdiction on a particular court, this forum is not having any jurisdiction of the Consumer Disputes Redressal Forum. The complainant can avail relief only in the district forum at Chennai. In order to become a member every individual has to execute a valid membership agreement on payment of the required membership fee. Privileges and enjoyments of the resorts of the opposite parties are strictly based on completing payment of the membership fee and other charges without any dues as on date availing the holidays. As per the agreement there are four seasons for the enjoyment vacations, they are purple, red, blue and white. A member is entitled to the vacation at the resorts of the opposite parties on the basis of the occasion regarding choice of the seasons exercised by only purple season member can enjoy holidays throughout the year. The complainant had approached the opposite parties and became a member during month of March 2012 and membership no. allotted to the complainant was 2261001. The complainant had approached the opposite parties in the Hyderabad Branch and had opted for the product 'red season' with a total membership fee amounting to Rs 3,67,788/-. The complainant had agreed to pay the agreement amount by way of EMI payable in 48 instalments with EMI amounting to Rs 8,860/- per month. Later the complainant had requested the opposite parties to change the payment schedule from 48 instalments to 24 instalments by virtue of the clauses in processes in the agreement the complainant was entitled to have a holiday plan from 1st January 2012. The complainant had made a request to the opposite parties on 07.10.2011 for holidaying at the resorts of the opposite parties at Thekkady. As per the e-mail received by the opposite parties this was a period wherein the complainant was not entitled to make any reservation and it was not within the holiday commencement plan. Despite the above plan the opposite parties have responded to the member stating that which holiday eligibility commences from 01.07.2012 and opposite parties had provide two other options namely 1. Club Mahindra Tusker Trails - Thekkady 2. Club Mahindra Kodagu Valley - Coorg. The opposite parties had provided a check in and check out to the complainants, however the complainant did not respond. The complainant did not make a request for holiday at Ootty during 02.02.2012 as alleged. The refund of the amount paid by the

complainant is subjected to membership rules signed by the complainant. The opposite parties had explained the salient features and benefits of the membership and also with regard to the membership rules signed by the complainant. The complainant had signed the said membership application confirming that he had read the terms and conditions governing the members. The complainant cannot now feel ignorance as to the contents of the agreement signed by him. Clause 1.5 of the membership rules definite membership fee as the full fees payable towards club Mahindra Membership and that the membership fee is a non-refundable one time admission fee for enrolling into the scheme. Any termination after the recession period deleted to the done as per clause 6 of the agreement. As per that clause the withdrawal application should have been submitted within the recession fee is provided such request was made in writing by the member concerned. In the event of withdrawal of application the applicant shall not be eligible for any refund of the amount paid by him. As per Clause 6.2 upon termination there are provisions for deduction of certain amounts as well. Therefore the opposite parties submit that in the event of termination by the member as per clause 6.2 the opposite party was entitled to deduct the amount as per the rules. The complainant decided to terminate the membership only after the recession period such the terms mentioned in clause 6.2 would be applicable. Accordingly the 60% of the total admission fee of Rs 3,67,788/- which is equal to 2,20,672/- would be appropriated towards admission fee and it is non refundable. The complainant had admittedly paid only Rs 1,63,320/- which is far below the amount of Rs 2,27,672/-. Therefore the complainant is not entitled to get any refund. There was no cause of action for the complainant as there has been no deficiency in service. In the above circumstances the complaint is sought to be dismissed. Subsequently, the wife of the complainant was impleaded as second complainant.

4. PW1 and PW2 were examined and Exts.A1 to A12 were marked on the side of the complainant. In order of the district forum it is stated that the opposite parties did not give any evidence. However certain documents were seen produced by the opposite parties along with written version. Those documents produced also the forum part of enquiry though marked as specific documents.

5. The district forum, considering the evidence adduced by the parties and hearing both sides passed the impugned order. Aggrieved by the order passed by the district forum the opposite parties have filed the present appeal.

6. Heard both sides. Perused the records.

7. It is contended by the opposite parties that the complaint is not maintainable before the forum as per Clause 13 of the Membership Rules. The Clauses 13.1 and 13.2 of the membership rules contain an arbitration clause, that the dispute or difference between the parties shall be settled by arbitration, by the sole Arbitrator and the award passed by the Arbitrator shall be final and it will be binding on the parties. Clause 13.3 of the membership rules states that in respect of matters pertaining to the transaction only the Civil court in Chennai city shall have the jurisdiction to the exclusion of other courts. The question of maintainability was considered as a preliminary issue and by the Order dated 12.11.2012 the district forum rejected the contention of the opposite parties and it was found that the complaint is maintainable. The said finding is challenged by the appellants in the appeal. The Hon'ble Apex Court in 'Fair Air Engineers Pvt Limited Vs N.K.Modi (1996 CTJ 749 CP) held that the arbitration clause in the agreement will not come in the way of a consumer dispute except where there is a statutory bar. Further Section 3 of the Consumer Protection Act provides remedy under the Act in addition to the other remedies provided under the other Acts. Unless there is a clear bar (Secretary, Thirumurugan, Co-operative Agricultural Credit Society VS V.M.Lalitha, AIR 2004 SC 448). The district forum held that the Apex court as early as in 1989 in ABC laminate (P) Limited Vs AP Agencies had observed that mere presence of a clause in an invoice, warranty or cash memo ousting the jurisdiction of the competitive courts and vesting the same in a particular court will not be valid. Such statutory bar not being mentioned, how such clause would stand is yet to be seen. Admittedly, as per the provisions contain in section 11(2) of the Consumer Protection Act, the district forum, Ernakulam has jurisdiction to entertain and consider the complaint. We consider that there is no reason / ground to interfere with the finding of the district forum that the complaint is maintainable before the district forum.

8. There is no dispute to the fact that complainant had taken the club membership of the opposite parties, joined the scheme of the opposite parties in March 2011 and he had paid an amount of Rs 1,63,320/- to the opposite parties. Complainant had opted for red season which was available at that time. The complainant requested for a holiday package which was rejected by the opposite parties. There after the complainant contacted the opposite parties for other packages. But those requests were also rejected. The complainant opted to withdraw the membership and the matter was informed to the opposite parties. The opposite parties sent reply demanding further payment of Rs 1,06,244/- from the complainant. Complainant sent a lawyers notice to the opposite parties and they have sent a reply notice stating that the complainant is not entitled to get any amount from them. This case of the opposite parties is that the complainant made the request to them on 07.10.2011, for holidaying at the resorts of the opposite parties at Thekkady. That was a period where in the complainant was not entitled to make any reservation and it was not within the holiday commencement plan. His holiday eligibility commences from 01.07.2012 only. It is the case of the opposite parties that a member is entitled to vacation at the resorts of the opposite parties on the basis of the occasion regarding choice of the season exercised. Only purple season member can enjoy holidays throughout the year. As found by the district forum, even though the opposite parties had stated in the version filed by them that there are four seasons such as purple, red, white and blue, Ext.A9 produced by the complainant would go to show that there are only three seasons such as red, white and blue. On a perusal on Ext.A9 price list it can be seen that it shows a purple mark as

well. However for the purple mark it is the title such as season, classification apartment type, price etc are printed. So the contention of the opposite parties that they informed the complainants that there are four seasons, purple, red, white and blue are incorrect. The case of the opposite parties that there are four seasons such as purple, red, white and blue came up for the first time only in the version filed by them before the forum and in nowhere else any of the documents provided to the complainant. The counsel for the complainant / respondent submitted that such misrepresentation on the part of the opposite parties which was made to the complainant was an unfair trade practice warranting interference of the forum.

9. Ext.A5 e-mail communication by the complainant made to the opposite parties on 09.10.2011 to get the service from the opposite parties would go to show that repeated requests for services made by the complainant before the opposite parties failed on deaf ears. Ext.A2 is the letter issued by the complainant to the opposite parties requesting him to cancel his club Mahindra Membership with effect from 05.03.2012. The counsel for the appellant / opposite parties submitted that the complainant having signed the contract with the opposite parties agreeing the terms and conditions laid down by the opposite parties are bound by the clauses contained in the agreement / rules. The counsel for the appellants pointed out Clause 6.2 of the agreement. As observed by the district forum it is not possible to read the said clause without the help of a magnifying glass. As found by the district forum it is not possible to decipher anything with regard to the abbreviations made therein such as "EF, ASF, MHRIL, CMH membership certificate etc. The opposite parties are relying under rules 6.2 to evade the refund of the amount paid by the complainant towards part payment of the membership fee. As found by the district forum the opposite parties should have been more careful in drafting the terms and conditions to make them intelligible. As observed by the district forum there were so many abbreviations in clause 6.2 of the agreement and understand to each of such abbreviations, the prospective member who were prompt to sign the agreement would have to grope elsewhere. The district forum discussed the decision of the State Consumer Redressal Commission, Maharashtra, Mumbai in Mahendra Holidays and Resorts India Limited Vs Mr.Hemant kumar.M, in First Appeal No.11/364 wherein it was held that drafting the agreement in such a manner which would make them more intelligible to a layman would itself in our view amounts to unfair trade practice. It is an admitted fact that the complainant did not utilize any of the facilities of the club. The complainant was not shown as to what the tax was paid by the opposite parties or what was the cost incurred by the opposite parties in processing application of the complainant. The brochure which was marked as Ext.A6 would go to show that at the time of introducing the complainant to accept the membership, the opposite parties had given all sorts of promise and fine print rules were prepared unilaterally and framed in such a way to deprive the complainant of the facilities. There is no dispute to the fact that the complainant paid an amount of Rs 1,63,320/- to the opposite parties. It is an admitted fact that the complainant did not utilize any of the facilities of the club of the opposite parties. The denial of opposite parties to refund the amount paid by the complainant on flimsy ground is unfair. Considering the facts and circumstances of the case, as found by the district forum, it can be considered that the opposite parties have, by withholding the amount to the complainant, in spite of the fact that he allowed cancellation of the membership, even without obtaining any service from the opposite parties would amounts to unfair trade practice and deficiency in service. The opposite parties / appellants have not right to hold the amount paid by the complainant and the complainant is entitled to get back the

amount from the opposite parties.

10. It is an admitted fact that at the time of taking the membership on payment of the amount as mentioned above. the opposite parties had given a TV set to the complainants as a token appreciation for joining in their scheme. Before the district forum the counsel for the opposite parties submitted that if any order of refund is passed in favour of the complainant, the cost of the TV set is to be deducted from the amount in addition to the other deductions stated in the version. The district forum did not allow the prayer of the opposite parties to deduct the price of the television set from the amount ordered to be refunded to the complainant. The district forum found that the opposite parties, as part of their promotion of commercial interest has given a TV set to the complainant and it would be unfair to value a gift given by the opposite parties to the complainant.

It is to be noted that in the complainant itself it is stated by the complainant that he was given a TV as a gift at the time of enrolment as a member of the opposite parties. According to the opposite parties the gift was worth Rs 22,500/-. The complainant is ready and willing to return the gift given by the opposite parties or the value of the gift may be deducted from the amount to be refunded to the complainant. In Ext.A3 notice sent by the complainant to the opposite parties they demanded Rs 1,40,820/-, after deducting the amount of Rs 22,500/-, the price of the TV set, from the amount of Rs 1,63,320/- paid by them to the opposite parties. It is true that the opposite parties have not produced any document to show the price of the TV. But the complainants have not disputed the same. So it has to be considered that the TV is worth Rs 22,500/-. Admittedly the complainant had been using the TV given to them by the opposite parties. In these circumstances we consider it just and reasonable to deduct the amount of Rs 22,500/- the price of the TV set from the amount of Rs 1,63,320/- given by the complainant to the opposite party. The balance amount is Rs 1,40,820/-. The complainant is entitled to get that amount from the opposite parties. The district forum directed the opposite parties to pay interest at the rate of 12% per annum on the amount of Rs 1,63,320/- from the date of the complaint, 17.05.2012 till realization. We consider that the said order passed by the district forum is to be modified directing the opposite parties to pay interest at the rate of 10% on the amount of Rs 1,40,820/- from the date of the order of the district forum, on 30.07.2015.

11. The district forum directed the opposite parties to pay Rs 1,00,000/- as compensation and it was directed that the said amount shall carry interest at the rate of 18% per annum from 30 days after the order, with effect from 30.08.2015. Counsel for the appellants / opposite parties submitted that the said direction passed by the district forum regarding the compensation and payment of interest is without any basis. He pointed out that the complainant has not even asked for any amount as compensation. But since there is deficiency of service on the part of the opposite parties they are liable to pay compensation to the complainants. Considering the facts and circumstance we consider that the amount of compensation ordered by the district forum is on the higher side and it has to be reduced to Rs 25,000/-. We consider that the direction passed by the district forum to pay interest at the rate of 18% on the amount of Rs 1,00,000/- ordered as compensation from 30.08.2015 is to be set aside. We do so. The cost of Rs 10,000/- ordered by the

district forum is just and reasonable and hence no interference is called for regarding that. The order passed by the district forum is to be modified, as stated above.

In the result, the appeal is partly allowed. The order passed by the district forum is modified as follows.

Appellants / opposite parties are directed to pay Rs 1,40,820/- to the first respondent / first complainant with interest at the rate of 10% per annum from 30.07.2015, the date of the order passed by the district forum.

Appellants / opposite parties are directed to pay Rs 25,000/- as compensation to the first respondent / first complainant. The said amount will carry interest at the rate of 10% per annum if the opposite parties failed to pay the amount within 30 days from the date of receipt of the copy of the order .

Appellants / Opposite parties are directed to pay Rs 10,000/- as cost of the proceedings.

Parties are directed to suffer their respective costs.

At the time of filing of the appeal the appellants have deposited Rs 25,000/-. The first respondent / first complainant is permitted to obtain release of the said amount, on filing proper application to be adjusted /credited towards the cost and compensation ordered as above.

T.S.P.MOOSATH : JUDICIAL MEMBER

BEENA KUMARI .A : MEMBER

be/

KERALA STATE

CONSUMER DISPUTES

REDRESSAL COMMISSION

SISUVIHARLANE

VAZHUTHACADU

THIURVANANTHAPURAM

JUDGMENT DATED :08.04.2019