

M/S. Kurji Holy Family Hospital vs M/S. Boehringer Mannheim India Ltd. on 6 August, 2007

Equivalent citations: AIR 2007 (NOC) 2556 (NCC) (N.C.D.R.C., NEW DELHI), 2007 (6) ALJ (NOC) 965 (NCC) (N.C.D.R.C., NEW DELHI)

NCDRC

NATIONAL CONSUMER DISPUTES REDRESSAL
COMMISSION

NEW DELHI

FIRST APPEAL NO. 23
OF 2001

(From the order dated 28.2.2000 in Complaint Case 13/98 of the

State Commission, Bihar)

M/s. Kurji Holy Family Hospital

Through: the
Administrator,

P.O. Sadaquat Ashram, Kurji

Patna 800010, Bihar
Appellant

Vs.

1. M/s. Boehringer Mannheim India Ltd.

54-A, Mathura Das Vasanjee
Road

Chakala, Andheri (East)

Mumbai-400 093.

2. M/s. Sanwalia
Enterprises,

31, Agarwal
Hotel

Fraser Road, Patna 800 001

3. Mr. K. Ravi Shankar

Zonal
Manager,

M/s. Boehringer Mannheim India Ltd.

20/56, Indira Nagar

Lucknow-226
016

4. Mr. Sanjoy Ghosh

Sales Manager
(East)

M/s, Boehringer
Mannheim India Ltd

Aftab Mansion

118, Dr. Sundari
Mohan Avenue

Calcutta-700 014.
Respondents

BEFORE :

HONBLE MR. JUSTICE M.B. SHAH, PRESIDENT

MRS. RAJYALAKSHMI RAO, MEMBER

For
Appellant Mr. M.P. Raju, Advocate with

Ms.
Mary Searia, Advocate

For the Respondents Mr. H.N. Haksar, Sr. Advocate

With
Mr. R. Sudhinder and

Mr. Udyan
Jain, Advocates

Dated the 6th August, 2007

O R D E R

M.B.SHAH, J. PRESIDENT.

As agreed between the learned Counsel for the parties, the only question requiring consideration in this appeal is: - Whether M/s. Kurji Holy Family Hospital (Appellant) is entitled to file a complaint under the Consumer Protection Act, 1986 in case the machine (Swelab Auto Counter AC 920-11 Haematology Analyzer, in short Swelab) purchased by it, is found to be non-functional during the warranty period?

It is contended that the complaint was not maintainable as the machine is used for commercial purpose.

As against this, it is contended by the Appellant that complaint is maintainable during the warranty period because for effective functioning of the machine, there is a warranty to provide services for its repair or replacement.

In our view, considering the facts of the case for the reasons recorded hereinafter the complaint is maintainable in the present case.

Facts:

In the present case, it is not disputed that on the basis of the agreement to purchase the Swelab entered into between Appellant/Complainant and the Respondents (Opposite Parties), the Respondents have installed Swelab Auto Counter AC 920-11 Haematology Analyzer (in short Swelab), in the hospital of the Complainant on 18.9.1996. Within a few days, i.e. on 25.9.1996, the Complainant informed the Opposite Parties that the machine was not working properly. As the mechanics sent by the Respondent could not repair the machine, a stand-by machine was supplied to the Complainant on 30.1.1997. The stand-by machine was also defective. Hence, a number of complaints were lodged with the manufacturer with regard to the defective functioning of the machine before the expiry of the warranty period in respect of the machine supplied. A notice (letter dated 12.8.1997) was sent on 12.8.1997, requesting the Opposite Parties to refund the sum of Rs.9,99,000/-, failing which they might be compelled to take the matter to the law courts. Thereafter, letter dated 17.9.1997, was also sent by the Complainant to the same effect, and further reiterated that it would resort to legal action in case there is no positive response from the Opposite Parties. On 18.09.1997 the warranty period was to expire.

As there was no proper response, the Complainant approached the State Consumer Disputes Redressal Commission, Bihar, by filing Complaint Case No.13 of 1998 on 16th September, 1997 and prayed that purchase price be refunded with interest and compensation. The State Commission dismissed the complaint by order dated 28.2.2000 on the ground that the complaint is not maintainable as the Complainant

is not a consumer within the meaning of the term as defined in Section 2(1)(d) of the Consumer Protection Act, 1986.

Thereafter the Revision Petition No.6/2000 filed by the Complainant for review which was also dismissed by the State Commission by order dated 4.1.2001. Against that order, the Complainant filed First Appeal No.23 of 2001 before this Commission. That appeal was dismissed vide order dated 15.3.2002 on the ground that it was barred by limitation as it was filed after a delay of 314 days.

Feeling aggrieved, the Complainant filed Civil Appeal No.9879 of 2003 before the Honble Supreme Court of India. The Apex Court vide judgment and order dated 15.12.2003 allowed the appeal and remanded the matter to the National Commission to dispose the same in accordance with law after giving opportunity to the parties.

Findings:

At the outset, it is to be stated that all throughout in the service reports dated 5.10.1996; 21.12.1996; 14.1.1997; 26.2.1997; 30.5.1997; 6.6.1997; 19.6.1997; 25.7.1997; and, 8.11.1997 given by the mechanic of the Respondents, it is mentioned that service was carried out during the warranty period and in the reports it is mentioned under warranty.

Further, at the time of hearing of this appeal, learned Counsel for the Respondents had conceded that the complaint was filed within the warranty period. Therefore, the only question which requires determination is: whether the complaint was maintainable under the Consumer Protection Act, 1986?

Firstly, it is to be stated that this Commission has taken a consistent view that even if the goods are purchased for commercial purpose, which have become defective during the warranty period, then complaint before the Consumer Fora is maintainable, because warranty agreement is service agreement.

Before referring to the judgements, we would quote the definition of the word consumer as defined in section 2(1)(d)(i) and (ii) as it stood prior to its amendment in the year 2003.

(d) consumer means any person who, -

(i) buys any goods for a consideration which has been paid or promised or partly paid and partly promised, or under any system of deferred payment and includes any user of such goods other than the person who buys such goods for consideration paid or promised or partly paid or partly promised, or under any system of deferred payment, when such use is made with the approval of such person, but does not include a person who obtains such goods for resale or for any commercial purpose; or

(ii) hires or avails of any services for a consideration which has been paid or promised or partly paid and partly promised, or under any system of deferred payment and includes any beneficiary of such services other than the person who 'hires or avails of the services for consideration paid or promised, or partly paid and partly promised, or under any system of deferred payment, when such services are availed of with the approval of the first mentioned person.

Thereafter, with effect from 15.3.2003 Section (2)(1)(d)(ii) is amended and following sentences are added to the said clause.

but does not include a person who avails of such services for any commercial purpose.

[Explanation: For the purposes of this clause, commercial purpose does not include use by a person of goods bought and used by him and services availed by him exclusively for the purposes of earning his livelihood by means of self-employment.] This would mean that prior to the coming into force of the amended provision, a person would be a consumer for the services which are to be rendered for commercial purposes. Admittedly, the complaint was filed in the year 1998, i.e. much prior to the amendment of the Act in the year 2003.

Keeping this in mind we would refer to a few judgments on the subject:- In Amtrex Ambience Ltd. vs. M/s. Alpha Radios & Anr.

I(1996) CPJ 324, this Commission observed that it had in several cases already taken the view that where the allegations of the complainant was that there was malfunctioning of the machinery/equipment during the period of warranty and when the manufacturer had undertaken to keep the machinery in good working condition, then the purchaser will certainly be a consumer under Section 2(1)(d)(ii) in respect of services rendered or to be rendered by the seller for the proper

functioning of the machinery/equipment, during the period of warranty. This would be so even if machinery/equipment is sold for commercial purpose.

Similarly, this Commission in Jay Kay Puri Engineers & Anr.

vs. Mohan Breweries & Distilleries Ltd. I (1998) CPJ 38, observed that the State Commission correctly stated the settled legal position that even where the goods were purchased for commercial purpose, if there is a warranty, as in this case, for its maintenance, the purchaser becomes a consumer in respect of the services rendered or to be rendered by the manufacturer or supplier during the warranty period.

Finally, in the case of M/s, Birla VXL Ltd. vs. National Insurance Co. Ltd. (Original Petition No.172 of 1995, decided on 29th May, 2003) , this Commission held that amendment in the definition to Section 2(1)(d)(ii) by adding but does not include a person who avails of such services for any commercial purpose came into force from 15th March, 2003 and it would not have any retrospective effect and that the amendment was prospective in nature. Therefore, pending cases are required to be decided on the basis of un-amended definition.

From the aforesaid law, it is apparent that complaint was maintainable even though the hospital was using the machine for commercial purpose as the complaint was filed in the year 1998 i.e., prior to amendment of Section 2(1)(d)(ii).

As against this, the learned Senior Advocate, Mr.A.N.Haksar, referred to the judgement of the Supreme Court in the case of Stereocraft vs. Monotype India Ltd., II (1999) CPJ 1 (SC) wherein the Apex Court held as under:

5. We have heard learned Counsel for the Appellant. It is contended by the learned Counsel that the Appellant had not only purchased the machine from the Respondent, they had also hired and availed of the services of the Respondent for keeping the machine in defect-free condition. It is contended that since the Appellant hired and availed of the services for a consideration which had already been paid to the Respondent, the Appellant has to be treated as a consumer within the meaning of Sub-clause (ii) of Clause 1(d) of Section 2 of the Act. According to this sub-clause, a consumer would be a person who

(ii) hires or avails of any services for a consideration which has been paid or promised or partly paid and partly promised, or under any system of deferred payment and includes any beneficiary of such services other than the person who hires or avails of the service for consideration paid or promised, or partly paid and partly promised or under any system of deferred payment, when such services are availed of with the approval of the first mentioned person.

6. We are not prepared to accept the contention advanced by the appellant from the documents filed before the Commission, it appears that the manufacturer had inter alia, agreed, as part of the sale transaction, as follows:

7. Free erection and demonstration.

Where quotations provide free erection and demonstration the Corporation shall install the machinery and shall leave the same in a workable condition subject to, however, to the customers compliance with the following terms:

(a). Before the arrival of the Corporation's Engineer the customer shall unpack the complete consignment at the erection site.

(b). The customer shall supply all labour which may be required by the Corporation for carrying out the required job.

(c). To facilitate immediate commencement of the installation work the customer shall at his own cost make all necessary arrangements for electricity, water, drainage, etc.

d). In any case where in terms of the contract the Corporation is obliged to provide free erection and demonstration of the goods purchased a time limit may be stipulated as may be found reasonable by the Corporation and in case the installation work cannot be completed within stipulated time through any default on the part of the customer all salaries, cost of traveling, living and other expenses incurred by the Corporation for its employees or agents engaged in such erection and/or demonstration shall be borne by the customer provided, however that for erection and/or demonstration of machinery outside normal working hours whether before or after the expiry of the time-limit specified above the Corporation for such works reserves its rights to charge the customer extra.

8, Servicing.

After installation the costs and expenses to be incurred by the Corporation relating to all visits by the Corporation's Engineer as may be found necessary from time to time whether to service

machinery guaranteed or otherwise may be charged and realized from the customer at the discretion of the Corporation. The customer shall, be responsible for supplying at its own expense any labour lifting tackle and any other appliances which may be required by the Corporation in connection with the installation of the machinery ordered by the customer and in accepting these conditions of sale the customer will be deemed to have agreed to indemnify and keep the Corporation indemnified against any costs, expenses, claims, demands, loss or damages suffered or incurred by the Corporation in respect of any accident caused during the period of installation or subsequent to the service or repair resulting in death of or injury to be suffered, or incurred due to willful and negligent act on the part of the Corporation and/ or its servants.

.14. Guarantee:

If within twelve months from the date of invoice there appears in the goods or parts thereof (excluding Glass of every description) any defect admittedly arising out of faulty design, materials or workmanship in the said goods or parts thereof and the customer promptly gives notice thereof to the Corporation in writing, and in case such defective goods or defective parts are returned to the Corporation (if so required by the Corporation) at the cost of the customer, the Corporation shall make good the defects either by repair, or at its option, by the supply of new goods free of charge in replacement thereof. Subject, however, to the condition that the Corporation's liability in this regard will be strictly limited to the repair or replacement of such parts. Provided that the liability of the Corporation under this clause is expressed to have been given in lieu of any other liability whether under any law, warranty or condition express or implied by law or otherwise in respect of the quality or the designs or fitness of the goods or every form of liability for loss or damage direct or consequential or any accident resulting from defective material, faulty workmanship or otherwise.

7. After installation of the machinery, in the business premises of the appellant, it was found to be defective. The defects were reported to the respondent as part of the sale transaction and in terms of clauses 7,8,10 and 14 quoted above, the respondent rendered the services to the appellant. But even then, as the appellant says the machinery could not work properly. Since the service was rendered by the respondent was in compliance of Clauses 7 and 8 of the sale transaction between the appellant and the manufacturer, it could not be said that the appellant had hired the services of respondent for consideration. Consequently, the appellant cannot be treated as consumer within the meaning of Sub-clause (ii) of Clause (d) (1) of Section 2 of the Act. The appellant on his own showing had worked the machinery for about three years from 17.8.1984 when it was installed at its premises upto at least 23.3.1987. After having worked the machinery for such a long period the appellant could not legally claim the replacement of the machinery or compensation, for the reason that the machinery had not run for 12500 hours which was the least run

expected by the appellant.

From the aforesaid reasoning, it is apparent that the Complainant had not hired and availed of the services of the manufacturer for keeping the machine in defective free condition. The Apex Court has given this interpretation to the sale transaction after taking its terms into consideration. This is made clear in the afore-quoted para 7 of the judgment.

Further, clause 14 thereof provided guarantee for replacement of defective goods or parts at the cost of the customer for a period of 12 months. It is also provided that it was optional to the manufacturer to supply new goods free of charge in replacement thereof.

The aforesaid clause cannot be considered to be a warranty clause providing free service during the warranty period. Further, the judgment is based on facts that the machine was used for more than 3 years. And, that is why, the Court arrived at the conclusion that such person cannot be treated as a consumer within the meaning of Sub-clause (ii) of Clause (1)(d) of Section 2 of the Act.

In the present case, service agreement is part of the sale transaction, and the sale transaction is in two parts : (i) for sale of the machine; and, (ii) for rendering of service during specified period.

Dealing with the similar terms of the sale agreement, in the case of *Indochem Electronic & Anr. Vs. Additional Collector of Customs, A.P.*, (2006) 3 SCC 721, the Apex Court held as under:

22. The deficiencies in EPABX system supplied by the appellants were such as were required to be attended to immediately. If the appellants had not been able to attend thereto immediately, there would be a deficiency of services on the part of the appellants as immediate attention to such complaints was a part of the contract.

23. The State Commission as well as the National Commission have arrived at findings of fact as regards nature of deficiencies of service complained of by the respondent in terms of the provisions of the contract. If such breaches of conditions of warranty admittedly had taken place during the period of warranty, no exception can be taken to the judgment and order passed by the State Commission as also the National Commission.

24. The appellant had all along been aware that the system installed by it had not been functioning properly. On its own showing, it had been attending to the complaints made by the respondent relating to the functioning of the system. It has categorically been stated by the appellant itself that despite expiry of the period of warranty it had been attending to the complaints as and when made by the respondent which were of serious nature.

Similar is the position in the present case. Admittedly, the Swelab was not functioning since the initial stage. Therefore, the Respondents replaced it by another Swelab. That also was not functioning despite its being repaired by the respondents mechanics on a number of occasions. And, in such cases it would be a deficiency in service as defined in Section 2(1)(g) of the Consumer Protection Act, 1986. It is also to be stated that the Swelab Auto Counter AC 920-11 Haematology Analyzer cannot be used by the hospital, if it is defective or not functioning properly, because, in such case, the pathological reports will be inaccurate which will have adverse effect on diagnosis and treatment.

In such a situation compensation is required to be awarded and measurement of the compensation would be the price of the machine. Hence, there is no alternative but to direct the refund of the amount paid by the complaint for purchase of the Swelab Auto Counter AC 920-11 Haematology Analyzer. That price is mentioned in the complaint at Rs.9,99,000/-.

In the result, the complaint is allowed. The Respondents are directed to refund the amount of Rs.9,99,000/- with interest at the rate of 10% p.a. from the date of the order of the State Commission, i.e. 28.2.2000 till the date of payment. There shall be no order as to costs.

Sd/-

J (M.B. SHAH) PRESIDENT Sd/-

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(RAJYALAKSHMI RAO) MEMBER