

Kdk Software (India) Pvt. Ltd. vs Rakesh Kumar Gupta on 6 May, 2015

Daily Order

STATE CONSUMER DISPUTES REDRESSAL COMMISSION,

U.T., CHANDIGARH

First Appeal No. : 79 of 2015

Date of Institution : 06.04.2015

Date of Decision : 06.05.2015

[1] KDK Software (India) Pvt. Limited, Corporate Office - Goyal Villa, A-40, Shyam Na

[2] Sh. Kapil Goyal (Managing Director), KDK Software (India) Pvt. Ltd., Goyal Villa,

.....Appellants/Opposite Parties.

Versus

Rakesh Kumar Gupta R/o Flat No.385, AOT Complex, Sector 48-A, Chandigarh.

....Respondent/Complainant.

Appeal under Section 15 of the Consumer Protection Act, 1986.

BEFORE: JUSTICE SHAM SUNDER (RETD.), PRESIDENT.

SH. DEV RAJ, MEMBER.

SMT. PADMA PANDEY, MEMBER.

Argued by:

Sh. Prakul Khurana, Advocate alongwith Sh. Abhineet Taneja, Advocate for the appellants.

Sh. Rakesh Kumar Gupta, respondent in person.

PER DEV RAJ, MEMBER.

This appeal is directed against the order dated 23.02.2015, rendered by the District Consumer Disputes Redressal Forum-I, U.T., Chandigarh (hereinafter to be called as the District Forum only), vide which it allowed the complaint of the complainant (now respondent) and directed the Opposite Parties (now appellants) as under:-

"12. In the light of above observations, we are of the concerted view that the Opposite Parties are found deficient in giving proper service to the complainant. Hence, the present complaint of the Complainant deserves to succeed against the Opposite Parties, and the same is partly allowed, qua them. The Opposite Parties are directed, jointly and severally, to:-

[a] To pay Rs.10,000/- on account of deficiency in service and causing mental and physical harassment to the Complainant;

[b] To pay Rs.7,000/- as costs of litigation;

13. The above said order shall be complied within 30 days of its receipt by the Opposite Parties; thereafter, they shall be liable for an interest @12% per annum on the amount mentioned in sub-para [a] above from the date of institution of this complaint, till it is paid, apart from costs of litigation of Rs.7,000/-."

2. The facts, in brief, are that the complainant, being a Chartered Accountant by profession, purchased a Software "Spectrum", from the Opposite Parties in the month of July, 2013, for a total consideration Rs.5,800/-, for discharging his professional function in preparation and e-filing of Tax Audit Reports. It was stated that in the first week of Sept. 2013, on facing problem in preparation of Tax Audit Reports and uploading thereof at Income Tax Department's site, the complainant apprised the Opposite Parties immediately about the shortcoming in the software, in question, but they failed to resolve the issue till 27.9.2013, when just three days were left for the last date of filing the Tax Audit Reports and, by that time, he could not file even a single Tax Audit Report. It was further stated that the problem was in the main Tax Audit format i.e. Form 3 CA (Tax Auditor Report on Accounts, which had been audited under any other Law), which was an integral part of Form 3CD. It was further stated that this covered cases where statutory audit of accounts was carried out under laws other than Companies Act like Punjab Cooperative Societies Act, 1961 and, in such cases, Tax Auditor u/s 44AB of Income Tax Act and Statutory Auditor for conducting Audit of Accounts may be different Chartered Accountant/Professional. It was further stated that even after rectification on 27.9.2013, the same problem persisted, due to which the complainant had to file the reports of his clients using alternate mode of e-filing. It was further stated that during all these three weeks' time in Sept. 2013, the Opposite Parties kept on misleading the complainant to believe that correction was being made in their software whereas no serious attempts were made on their part to rectify the fault in the software, resulting in tremendous tension to him (complainant), loss of his 25 years of professional reputation etc. It was further stated that eventually, the complainant served a legal notice 14.4.2014 upon the Opposite Parties, which was evasively replied to by them on 06.05.2014. It was further stated that the aforesaid acts of the Opposite Parties, amounted to

deficiency, in rendering service, as also indulgence into unfair trade practice.

3. When the grievance of the complainant, was not redressed, left with no alternative, a complaint under Section 12 of the Consumer Protection Act, 1986 (hereinafter to be called as the Act only), was filed, seeking directions to the Opposite Parties, to pay Rs.5,800/- as cost of defective goods supplied; Rs.5 Lacs as compensation for stress, mental agony and loss of 35 years of professional reputation; substantial cost incurred in last minute running around for accomplishing the voluminous task of arranging alternate mode for electronic entering data of all the clients and ultimate e-filing of their Tax Audit Reports during the last 3 days only; and cost incurred on legal consultation and issuing legal notice.

4. The Opposite Parties, in their written version, stated that after using the Software, the complainant wanted certain enhancements and improvements in the same. It was further stated that the complainant purchased the Software after taking the demonstration and after being satisfied with it by knowing all its features and on knowing that the software was sold on "as is" basis. It was further stated that there was no problem or complaint with regard to the usage of the Software. It was further stated that Opposite Party No.1, looking to the high standards of customer satisfaction and on request of the complainant, made several changes in the Software and after several processes of internal research and development provided changes in the software and informed him (complainant) to download the updated version of the software on 27.9.2013. It was further stated that the Opposite Parties acted on the request of the complainant and provided him a solution within 20 days which itself speaks volumes about their dedication towards satisfaction of their customers. It was denied that there were only three days left for the last date of filing of tax audit reports because the CBDT had already extended the due date till 31.10.2013 which fact had malafidely been concealed by the complainant to extract undue monetary benefits from the Opposite Parties. It was further stated that the complainant was not liable to get any refund. It was further stated that neither there was any deficiency, in rendering service, on the part of the Opposite Parties, nor they indulged into unfair trade practice. The remaining averments, contained in the complaint, were denied being wrong.

5. The complainant filed replication, wherein he reiterated all the averments, contained in the complaint, and repudiated the same, contained in the written version of the Opposite Parties.

6. The parties led evidence, in support of their case.

7. After hearing the Counsel for the parties, and, on going through the evidence, and record of the case, the District Forum, allowed the complaint, in the manner, referred to, in the opening para of the instant order.

8. Feeling aggrieved, the instant appeal, has been filed by the appellants/Opposite Parties.

9. The respondent/complainant, on notice of the appeal, was served and he put in appearance, in person, on 28.04.2015. As both the Counsel for the appellants and the respondent in person were ready for arguments, the same were heard on 28.04.2015 itself.

10. We have heard the Counsel for the appellants, the respondent in person, and, have gone through the evidence and record of the case.

11. The Counsel for the appellants/Opposite Parties submitted that the District Forum over-looked the fact that the respondent/complainant suppressed/concealed vital and material facts. He further submitted that the respondent/complainant by suppressing the vital fact stated that 30th September 2013 was the last date whereas the CBDT had extended the date and his grievance was only regarding filing of one return and no damage was caused. He further submitted that as per ZEN License Agreement, which was a valid contract, as per Section 10A of the Information Technology Act, 2000, only the Courts at Jaipur had the exclusive jurisdiction to entertain any dispute with regard to the software. He further submitted that the respondent/complainant was not a consumer as per Section 2(1)(d) of the Act, as the software was being used for professional activities, which amounted to commercial purpose. He further submitted that the standard product without any warranty was sold for Rs.5,800/- on 'As is basis'. He further submitted that the respondent/complainant could file the return through Income Tax Portal.

12. The respondent/complainant, in person, submitted that the CBDT Notification extending the date to 31.10.2013 was not in the public domain, and was not known to the Chartered Accountants. He further submitted that the major defect in the software related to the main Tax Audit format i.e. in Form 3 CA (Tax Auditor Report on Accounts, audited under any other Law) which was an integral part of Form 3CD and the same could not be filed. He further submitted that he had to file ten returns. He further submitted that he purchased the software at Chandigarh and the service was provided to him at Chandigarh and, therefore, the cause of action arose to him at Chandigarh within the territorial jurisdiction of the District Forum. He further submitted that he lodged complaint in the first week of September 2013 but the appellants/Opposite Parties did not respond up-till 27.09.2013, which clearly amounted to deficiency.

13. It is evident from Zen License Agreement (Annexure - a) that the respondent/complainant purchased a software from the appellants/Opposite Parties in July 2013 vide License No.1106031 against Customer ID 49583.

14. The first question, which falls for consideration, is, as to whether the respondent/complainant falls within the definition of a consumer as defined in Section 2(1)(d) of the Act or not. It is the case of the appellants/Opposite Parties that since the software was purchased by the respondent/complainant for commercial purpose, therefore, he is not a consumer. On the other hand, the respondent/complainant specifically stated in his complaint that he is a Chartered Accountant by profession and for facilitating the discharge of his professional functions, he purchased the software, in question, from the Opposite Parties. It is commonly understood that being a Chartered Accountant, the respondent/complainant is earning his livelihood from the said profession and, if he purchased a software from the appellants/Opposite Parties, in order to assist himself and make his professional functioning more accurate and reliable, it cannot be said that he purchased the said software for commercial activity. Had the respondent/complainant been earning his livelihood by doing some other job and apart from that job, he would have been doing this work of e-filing, then the matter would have been different. Thus, this objection of the

appellants/Opposite Parties, being devoid of any merit, is rejected.

15. The next question, which falls for consideration, is, as to whether, the District Forum at Chandigarh had the territorial jurisdiction to entertain and decide the complaint, keeping in view existence of a clause in the Zen License (Annexure-1), placed on record by the appellants/Opposite Parties, to the effect that only the at Courts at Jaipur shall have the exclusive jurisdiction. Section 17(2) of the Act, being relevant, is extracted hereunder:-

(2)A complaint shall be instituted in a State Commission within the limits of whose jurisdiction,--

(a) the opposite party or each of the opposite parties, where there are more than one, at the time of the institution of the complaint, actually and voluntarily resides or carries on business or has a branch office or personally works for gain; or

(b) any of the opposite parties, where there are more than one, at the time of the institution of the complaint, actually and voluntarily resides, or carries on business or has a branch office or personally works for gain, provided that in such case either the permission of the State Commission is given or the opposite parties who do not reside or carry on business or have a branch office or personally work for gain, as the case may be, acquiesce in such institution; or

(c) the cause of action, wholly or in part, arises.

The respondent/complainant, in his rejoinder, clarified that the software was sold to him by the Sales Representative of the Opposite Parties, namely, Sh. Sunil Marval having Mobile No.9357268288 at Chandigarh in his office and the said Sales Representative himself uploaded the software in the computer system of the respondent/complainant and collected the sale consideration thereof vide cheque No.369043 dated 28.07.2013 of Canara Bank in the sum of Rs.5,800/-. The respondent/complainant also annexed copy of receipt issued by the said Sales Representative as Annexure-ii (Page 73) alongwith the rejoinder. The appellants/Opposite Parties, failed to rebut this document, by producing, on record, any cogent or convincing evidence to the effect that Sh. Sunil Marval was not their agent and the payment was also not received by him at Chandigarh. Had the appellants/Opposite Parties denied receipt of consideration against the purchase of the software at Chandigarh, the matter would have been different. As such, a part of cause of action definitely accrued to the complainant, for filing the complaint, against the Opposite Parties, at Chandigarh. The District Forum at Chandigarh, therefore, had a territorial jurisdiction to entertain and decide the complaint. The submission of the Counsel for the appellants/Opposite Parties, being devoid of merit, is rejected.

16. Admittedly, the respondent/complainant reported problem in the software in the first week of September 2013, which fact is proved by the acknowledgement of the appellants/Opposite Parties

(Annexures 3 and 4). Though the appellants/Opposite Parties, claimed to have resolved the problem in the software on 27.09.2013, the same (software) still did not work and the problem persisted. The respondent/complainant had to do the job by an alternate mode. The deficiency, in rendering service, on the part of the appellants/Opposite Parties, is clearly established. When the appellants/Opposite Parties were clearly deficient, the extension of date by CBDT, which as per the respondent/complainant, was not in the public domain, does not wash out the deficiency attributable to the appellants/Opposite Parties. The respondent/complainant had purchased the software, in question, to facilitate his professional working but the deficiency in the same (software) and in solving the problem, caused him (respondent/complainant) a lot of tension, physical harassment and mental agony. The District Forum, thus, rightly held that ".....In our opinion, it was due to the irresponsible attitude of the Opposite Parties of non-providing the services, well within time, ignoring the importance of the occasion, the Complainant had to face tremendous tension and last minute running for accomplishing the voluminous task of arranging alternate mode. Therefore, non-providing of prompt services to the Complainant, inspite of his repeated reminders and requests, prove deficiency in service on the part of the Opposite Parties....." It (District Forum), therefore, rightly allowed the complaint of the respondent/complainant and directed the appellants/Opposite Parties to pay Rs.10,000/- on account of deficiency in service and causing mental and physical harassment to the respondent/complainant besides Rs.7,000/- as cost of litigation.

17. The judgment relied upon by the Counsel for the appellants/Opposite Parties in Re:.....Vs. Anil Kumar Jindal and others, Contempt Application (Criminal) No.3 of 2012, decided on 10.09.2012, is totally on a different aspect of the matter. In this case, the point before the High Court of Allahabad, was as regards the non-maintainability of the contempt proceedings, which were initiated against the contemnor an Advocate under Section 10 of the Contempt of Courts Act, 1971 regarding the alleged contempt committed by him of the District Consumer Forum, Muzafarnagar and the said High Court held that "...a High Court has the power of superintendence also over the District Consumer Forums and Commissions lying within its territorial jurisdiction and that being so such District Consumer Forums and Commissions established under the Consumer Protection Act are also covered within the ambit and scope of "courts subordinate to the High Court" in the context of Section 10 of the Contempts of Courts Act 1971....". The next authority, which the Counsel relied, was Rajasthan State Electricity Board Vs. Universal Petro Chemicals Ltd., (2009) 3 SCC 107, wherein there existed an arbitration clause to the effect that only Court at Jaipur would be having the jurisdiction to try and decide the proceedings arising out of the agreements, on the basis of which, the Hon'ble Apex Court held that even by virtue of Section 31(4) of Arbitration Act, 1940, Calcutta High Court would have no jurisdiction and the impugned order was set aside. He further placed reliance on Swastik Gases P. Ltd. Vs. Indian Oil Corporation Ltd. (2013) 9 SCC 32, wherein a clause existed in the agreement stating that only the Calcutta High Court had exclusive jurisdiction in respect of the application made by the appellant under Section 11 of the Arbitration and Conciliation Act, 1996 to entertain the disputes between the parties and ousting the jurisdiction of other Courts. It is pertinent to mention here that Section 3 of the Act, is worded in widest terms, and leaves no manner of doubt, that the provisions of the Act, shall be, in addition to, and not in derogation of any other law, for the time being, in force. The mere existence of an arbitration clause, in the document, would not oust the jurisdiction of the Consumer Fora, in view of the provisions of

Section 3 of the Act. Similar principle of law, was laid down, in Fair Engg. Pvt. Ltd. & another Vs. N.K.Modi (1996) 6 SCC 385 and C.C.I Chambers Coop. Housing Society Ltd. Vs Development Credit Bank Ltd. (2003) 7 SCC 233. However, in the instant case, as already observed in the preceding paragraphs, the respondent/complainant had specifically alleged deficiency, in rendering service on the part of the appellants/Opposite Parties. As such, Rajasthan State Electricity Board Vs. Universal Petro Chemicals Ltd.'s and Swastik Gases P. Ltd. Vs. Indian Oil Corporation Ltd.'s cases (supra), are not applicable to the facts of the instant case. The authorities in Ravneet Singh Bagga Vs. M/s KLM Royal Dutch Airlines & Anr. (2000) 1 SCC 666; U.T., Chandigarh Administration and Anr. Vs. Amarjeet Singh and Ors., (2009) 4 SCC 660; Shalini Vohra Vs. Akanksha Singh Bhadoriya, II (2014) CPJ 30 (NC); Cheema Engineering Services Vs. Rajan Singh, (1997) 1 SCC 131; Bhardwaj Industries Vs. Premier limited and Anr., I (2014) CPJ 146 (NC); and Ghaziabad Development Authority Vs. Yogesh Chandra Gupta, I (2005) SPJ 23 (NC), are of no help to the appellants/Opposite Parties, the same being distinguishable on facts.

18. No other point was urged by the Counsel for the parties.

19. In view of the aforesaid discussion, the appeal, being devoid of any merit, is dismissed, with no order as to costs. The order of the District Forum is upheld.

20. Certified copies of this order, be sent to the parties, free of charge.

21. The file be consigned to the Record Room, after due completion.

Pronounced.

May 06, 2015.

Sd/-

[JUSTICE SHAM SUNDER (RETD.)] PRESIDENT Sd/-

(DEV RAJ) MEMBER Sd/-

(PADMA PANDEY) MEMBER Ad