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2004 3 CLT 584 : 2004 3 CPR 640 : 2004 4 CPJ 263

NATIONAL CONSUMER DISPUTES REDRESSAL COMMISSION

Case No: None

VIJAYALEKSHMI GOPINATH	APPELLANT
Vs	
P. S. DHARMANGATHAN	RESPONDENT

Date of Decision: Sept. 22, 2003

Citation: 2004 3 CLT 584 : 2004 3 CPR 640 : 2004 4 CPJ 263

Hon'ble Judges: T.M.Hassan Pillai , R.Vijayakrishnan , A.Radha J.

Final Decision: Appeal allowed

Judgement

1. THE complainant on 18.4.1993 purchased a IInd hand (used) photostat machine from the opposite party, for an amount or Rs. 40,000/- and an agreement of sale has been executed. After taking a machine to his place of business, it was got tested by a technician who reported that the machine was not in a working condition, not repairable and parts were not available locally. Alleging these facts the Forum below was approached for reliefs prayed for in the complaint.

2. OPPOSING the claim the opposite party contended that the machine was sold to complainant for Rs. 75,000/- (not for Rs. 40,000/- as asserted by the complainant) along with the papers. But the complainant paid only Rs. 30,000/- and balance is outstanding. The complaint is false, frivolous and is filed for escaping from the liability of making payment of balance amount due.

The parties led evidence before the Forum below and after evaluating the evidence on record, Forum below accepted the case of the complainant and directed the opposite

party to refund purchase price of Rs. 40,000/- and further ordered that the opposite party to pay Rs. 5,000/- as repair charges, Rs. 15,000/- as damages and Rs. 2,500/- as costs.

Aggrieved by the order passed by the District Forum opposite party has come up in appeal. Appellant/opposite party assailed the order of the District Forum mainly on two grounds-maintainability of the complaint and unsustainability of the order on merit.

3. WE will first proceed to deal with the contention that no such complaint is maintainable before the Forum below and the complaint is not entertainable by the Forum below. Learned Counsel for appellant submitted that the appellant is not a "trader" as defined under Section 2(1)(d) of the Consumer Protection Act, 1986 and the appellant was never engaged in the trade of selling 2nd hand machines. Counsel contended that the complaint is not maintainable and the complainant is not a consumer. Counsel submitted that there is no case for parties that the appellant is a dealer or manufacturer of the machine or she is engaged in selling such machines. He submitted that the sale was of a machine which was in the use of the complainant and the sale was affected by an agreement. Counsel argued that there is no case for complainant that warranty was given and the agreement indicated to service conditions or after sale service. Counsel submitted vehemently that the finding of unfair trade practice recorded by District Forum is not sustainable.

Reasoning of the Forum below for the conclusion, arrived at by it is reproduced below:

"It is contended that a second hand machine bears no guarantee and it has taken delivery by the purchaser in an as is where is condition, and afterwards if there is any general repair or damage that ought to have been examined at the cost of the purchaser. A person buying even a second hand machine is believing that it will be in working condition or that it can be made into working condition after some repairs. The purchase is to use it and not for fun". Lower Forum further observed "In this case my learned Brother Mr. P. Vasudeyakurup, Member is taking a different view that it is not a consumer dispute as this is only a private transaction between two individuals and also because this is a case of sale of second hand machine. Such wholesale view will totally unsettle the concept of consumer dispute. The finding and conclusion of the District Forum was that the opposite party is bound to repair the machine purchased as per an agreement even where there is no such obligation in the agreement and even in the absence of warranty".

4. MOST important point for consideration in this appeal is whether the complainant is a consumer within the meaning of Consumer Protection Act, 1986. Complaint is maintainable if the goods purchased for consideration suffer from any defect or if the services hired or availed of for consideration are found to be defective. In order to satisfy the definition of term consumer as defined in Section 2(1)(d)(ii) a person should hire the services for consideration paid or promised, etc. There is no case for complainant that the complainant hired the services of the opposite party.

The grievance urged by complainant before District Forum was that the machine was defective and not repairable. Asserting these facts he approached the Forum below for a direction for refund of purchase price and compensation. District Forum found that unfair trade practice was adopted by opposite party and ordered refund of purchase price along with damages.

The fact of payment of consideration (part of consideration) is not disputed and, therefore, we can say that the complainant satisfied the definition of the term "consumer" as defined in Section 2(1)(d)(i).

5. WE find force in the submission of the learned Counsel for appellant that when a sale of machine, as is where is condition is made by a person who is not a trader to another not as part of any trade, finding of unfair trade practice recorded by the Forum below is clearly erroneous and unreasonable.

6. NOW let us consider the contention urged before us that the mutual rights are to be determined by the terms and conditions of the agreement.

Materials on record clearly prove the fact that the complainant purchased the photocopier as per an agreement. The transaction was between by one Vijayalekshmy, T.C. No. 2/2062, Trivandrum (opposite party) and Dharmangadan, P.S., Poomangalathu Veedu, Panthaplavu, P.O., (complainant) and they are described in the agreement as seller and buyer. In the agreement Ext. P1(a) the description of the machine sold is given (the make, model and number of the equipment). There is no case for the complainant that a model different from the one described in the agreement was actually sold to him. Ext. P1(a) contains clear recital regarding handing over of the documents (customs duty paper, insurance paper, etc.) to the complainant.

We find no merit in the contention of complainant (such a contention was also raised before the District Forum) that he was not permitted to inspect the machine before purchase on the ground that no male member was present in the house of appellant at the time and no document connected with the photocopier was handed over to him. No other explanation was given regarding the circumstance which led him to purchase the machine without inspecting the same. There is no case for parties that any amount was paid as advance; and there is no case for complainant that under threat that advance paid would be forfeited he purchased the machine without inspecting the same.

7. THOUGH the genuieness of Ext. P1(a) agreement is disputed by opposite party/appellant contending that the Ext. P1(a) agreement written in English is a fabricated one and the agreement entered into between them was written in Malayalam we are not prepared to accept the case of the appellant on the ground of lack of evidence to prove such a case. There is no reason to disbelieve the evidence given by the complainant that the agreement was typed and signed at opposite parties residence and the witnesses are complainant''s wife and his brother-in-law.

In the face of clear recital in Ext. P1(a) (Ex. P1(a) relied on by the complaint) regarding adding over of the insurance paper, customs duty paper etc. to the complainant by the opposite party complaint cannot be need to say that no such document was received by him. We are not inclined to accept the case of the complainant that he was not permitted to inspect the machine by a mechanic before purchase on the ground that it is not the case of the complainant that the sale was by description or samples, complainant took delivery of the machine on 18.4.1993 after signing the agreement and making initial payment. Relying on the fact that only on the date of delivery machine payment was made and agreement was signed it is argued before us that complainant''s case that he was not permitted to inspect the machine before purchase is true. We are not prepared to accept the assertion of complainant on that aspect on the ground that no person with ordinary prudence would purchase a thing without even checking the working of it. It may be pointed out that there is no case for complainant that contract entered into between parties is vitiated by coercion, undue influence or fraud, etc. From Ext. P1(a) agreement it is clear that entire price agreed to be paid by complainant was not paid on the date of entering into Ext. P1(a) agreement and handing over possession of the machine involved and an amount of Rs. 20,000/- payable towards price was agreed to be paid within six months of entering into the agreement. Complainant asserted that he had given a post-dated cheque without putting date. If the assertion of complainant that the machine was not working immediately after purchase is true the normal conduct of ordinary prudent man would be to give instruction to the Bank to stop payment. No such instruction was given to the bank by the complainant. The unexplainable conduct of the

complainant also renders the case of the complainant highly improbable and unacceptable.

8. COMPLAINANT"s case is that as the machine was not working immediately after purchase he has entrusted it for repairs to two firms at Madras and to prove that part of his case he has produced Ext. P5 dated 22.10.1993 issued by "Tova services" and Ext. P6 dated 16.7.1994 issued by "Mamtha Enterprises". Ext. P5 is only a receipt for servicing of the machine and contains nothing else. Ext. P16 is a quotation for service of the machine invalved wherein it is stated that turner is not available in the market.

Complainant produced a letter dated 19.6.1993 purported to have been written by him to opposite party wherein he asserted that since "Turner" is not available machine is lying idle and she was requested to supply turner or to return the purchase price. In Ext. P3 letter dated 13.7.1993 written by the opposite party to complainant she in unequivocal terms asserted her willingness to return the price on production of the machine. Complainant has not replied to this letter. No clear explanation is forthcoming from the complainant as to why he had not returned the machine as asked by opposite party in Ext. P3 dated 13.7.1993 and why he approached Tova Services on 22.10.1993 (Ext. P5) and Manta Enterprises on 16.7.1994 (Ext. P6) for servicing/repair even after receipt of Ext. P3. His conduct is unexplainable and renders his story unbelievable.

The above stated facts were not adhered to by the District Forum.

9. THE complainant has not produced any evidence to prove that the opposite party agreed to replace any defective part of the machine nor has she given any warranty. Admittedly the machine is a used one. Opposite party is not the manufacturer or dealer nor engaged in the trade of such machines. Admittedly the machine is Japanese made and Ext. P1(a) agreement contains description of the machine and also contains clear recital to the effect that customs and insurance papers were handed over to the complainant. In the light of the admitted fact that the machine is foreign made and opposite party had not agreed to repair or replace the defective or worn-out parts. She could not be made liable for non-availability of the parts locally. Further there is nothing in evidence to show that the opposite party misled the complainant by making any representation to him that the parts are available in India or she would supply new parts

for the defective parts as and when required.

10. IT was not the case of the complainant before the District Forum that there was any representation by the opposite party that the machine was of a particular quality, and supplied a machine of different quality.

Settled principle of law, in case of specific terms in a contract parties are bound by the terms of the contract and when a contract is signed, the implied warranty is excluded. No evidence was produced by the complainant in support of the alleged deficiency in service on the part of opposite party. It is highly disturbing to note that the District Forum accepted the case of the complainant without any shred of evidence in support of his case.

On a proper and careful consideration the evidence on record we are of the firm view that the order of the District Forum is unsustainable and liable to be interfered with. In the result, the appeal is allowed and the order of the District Forum is set aside. The complaint is dismissed with costs. We quantify the costs payable by the complainant/respondent to the appellant/opposite party at Rs. 1,500/-. Appeal allowed.