

M/S. PREMIER ENGINEERS
v.
M/S. TAJ RUBBER INDUSTRIES AND ANR.

AUGUST 12, 2005

[ASHOK BHAN AND S.B. SINHA, JJ.]

Monopolies and Restrictive Trade Practices Act, 1960.

Sections 2(w), 12-B, 36-A—Unfair Trade Practice—Complaint filed alleging unfair trade practice—Cryptic application lacking particulars—Complaint not disclosing any actual loss or injury caused to complainant—Held, to plead and prove actual loss or injury caused to consumer is sine qua non for invoking the provisions of Section 36-A—In the facts, order of commission awarding compensation set aside.

Respondent no. 1 through its predecessor-in-interest company placed an order with appellant in December, 1980 for supply of one rubber mixing machine of size 14" x 36" which was required to be fitted with certain input components to be supplied by respondent no. 1. Due to certain reasons, the machine could not be supplied till May, 1990 and was ultimately supplied in October, 1990. Respondent filed application under Section 12-B of the Monopolies and Restrictive Trade Practices Act, 1960 against the appellant alleging unfair trade practice under Section 36-A(1) of the MRTP Act on the ground that the machine was supplied after considerable delay; that it was defective, non-working and old/second hand machine fitted with old/second hand parts; and that 'oil system' was not fitted in the machine. MRTP Commission held appellant guilty of unfair trade practice as there was abnormal and unconscionable delay in supplying the machine by almost 10 years and that the machine did not work even for a single day and was defective and directed appellant to refund Rs. 1,04,164 to the respondent with interest @ 18% per annum and also awarded Rs. 5000 by way of compensation for mental agony and harassment suffered. Hence this appeal.

Allowing the appeal, the Court

HELD : 1. To aver as well as prove that actually any loss or injury was caused to the consumer is the *sine qua non* for invoking the provisions

A of Section 36-A of the Monopolies and Restrictive Trade Practices Act, 1960. [602-F-G]

Colgate Palmolive (India) Ltd. v. MRTP Commission & Ors., [2003] 1 SCC 129 and *Hindustan Ciba Geigy v. Union of India & Ors.*, [2003] 1 SCC 134, relied on.

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2. In the application filed by the applicant/respondent apart from saying that the defective machinery fitted with old/second hand parts had been supplied after considerable delay the respondent did not say a word regarding the actual loss and injury or a notional loss caused to the respondent. There is nothing on the record to suggest that any actual loss or injury was caused to the respondent. The application filed by the applicant/respondent was not only cryptic but lacked in particulars to fall within the definition of unfair trade practice as defined in Section 36-A read with Section 2(u) of the MRTP Act. The MRTP Commission has also not recorded any finding as to whether any actual loss or injury or a notional loss was caused to the respondent. [602-C-E]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 3640 of 1998.

E

From the Judgment and Order dated 16.5.97 of the Monopolies and Restrictive Trade Practices Commission, New Delhi in Compensation Application No. 53 of 1993.

Sanjay Parikh, A.N. Singh and A.K. Mishra for the Appellant.

Irshad Ahmad for the Respondent No. 1.

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Ashok Bhan, Ms. Sunita Sharma, D.S. Mahra, P. Parmeswaran for the Respondent No. 2.

The Judgment of the Court was delivered by

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BHAN, J. : This appeal by grant of leave is directed against the order dated 16.5.1997 passed by the Monopolies and Restrictive Trade Practices Commission [for short "the MRTP Commission"] in Compensation Application No. 53 of 1993 wherein it has allowed the application for compensation under Section 12-B of the Monopolies and Restrictive Trade Practices Act, 1960 [for short "the MRTP Act"] filed by the Respondent No. 1 and has directed the appellant to refund to the first respondent a sum of Rs. 1,04,164 with

interest @ 18% per annum plus compensation of Rs. 5,000.

Shortly stated the facts are:

M/s N.A. Rubber Industries through its partner Shri Nasiruddin, a partner of the applicant firm - respondent as well, placed an order in December, 1980 for the supply of one rubber mixing machine of size 14" x 36". Appellant agreed to supply the said machine to the respondent by its letter dated 10.12.1980. In terms of acceptance, the appellant was to supply the said machine for Rs. 55,000 ex-factory price by May 1981 and the respondent was to supply certain input components like electric motor, reduction gear box and fluid coupling to be fitted to the machine by the appellant as these input components were not manufactured by the appellant. Respondent paid a sum of Rs. 2,000 for which a receipt was given by the appellant. Later on a sum of Rs. 5,000 was also paid by the respondent on 16.3.1981. N.A. Rubber Industries was closed and thereafter respondent firm M/s Taj Rubber Industries was started in its place. On 21.2.1985 the appellant informed the respondent that the machine would be ready and supplied within a week. The respondent thereafter paid Rs. 50,000 in May 1985 and approached the appellant for taking delivery of the machine. Due to certain reasons which were accepted by both the parties the machine could not be supplied till May 1990. Ultimately, the machine was supplied in the month of October, 1990. According to the respondent the aggregate amount of Rs. 80,184 was paid by it to the appellant. It was alleged that the respondent had paid Rs. 23,980 for procuring and supplying the electric motor, fluid coupling, reduction gear box etc..

Respondent filed an application under Section 12-B of the MRTP Act against the appellant alleging therein that the machine supplied after a considerable delay and it was defective, non- working and old/second hand machine. It was fitted with old and second hand parts and it has failed to fit the "oil system" and thereby appellant has indulged in unfair trade practice under Section 36 A (1) of the MRTP Act.

Appellant in its detailed reply apart from replying on merits took five preliminary objections:

1. That since the order was placed on the appellant in the year 1980 i.e. before the amendment of MRTP Act relating to unfair trade practice (Section 36-A) and compensation (Section 12-B) which

- A were inserted with effect from 1st August, 1984, the action was not maintainable as these amendments do not have retrospective operation and, therefore, the compensation application was not maintainable.
- B 2. The order of machine in question was not placed by the applicant but by the N.A. Rubber Industries. There being no privity of contract between the applicant and the appellant firm, the compensation application was not maintainable.
- C 3. There is "not even a single averment disclosing any unfair trade practice."
- D 4. The controversy must be adjudicated upon by a civil court, as it relates to enforcement or breach of contract between the parties.
5. An earlier application of the applicant had been closed by the Commissioner and thus the present application was barred by the principle of *res judicata*.

On merits, the allegations made against the appellant were controverted and the appellant denied its liability to compensate the respondent.

E The MRTP Commission overruled the preliminary objections raised by the appellant and came to the conclusion that the appellant had indulged in unfair trade practices as there was abnormal and unconscionable delay in supplying the machine by almost ten years and that the machine did not work even for a single day and was suffering from various defects. Allegations made that old second hand parts had been fitted in the machine were also accepted. Based on these findings the MRTP Commission directed the appellant to refund a sum of Rs. 1,04,164 to the respondent with interest at the rate of Rs. 18% per annum w.e.f. 16.10.1990 upto the date of its payment. Rs. 5,000 was awarded by way of compensation for mental agony and harassment suffered by the partner of the respondent firm.

G Aggrieved against the order of MRTP Commission the present appeal has been filed.

Counsels for the parties have been heard at length.

H Counsel appearing for the appellant reiterated the submissions made on

behalf of the appellant that the order of the MRTP Commission deserve to be set aside and the application filed by the respondent under Section 12-B dismissed. Without going into the preliminary objections which have been raised, this appeal deserves to be allowed on another point as in *Colgate Palmolive (India) Ltd. v. MRTP Commission & Ors.*, [2003] 1 SCC 129, in which one of us [Justice Sinha] was a member, analysed the Section 36-A of the MRTP Act and observed that a bare perusal of Section 36-A would clearly indicate that the following five ingredients are necessary to constitute an unfair trade practice:

1. There must be a trade practice [within a meaning of Section 2 (u) of the Monopolies and Restrictive Trade Practices Act].
2. The trade practice must be employed for the purpose of promoting the sale, use or supply of any goods or the provisions of any services.
3. The trade practice should fall within the ambit of one or more of the categories enumerated in clauses (1) to (5) of Section 36-A.
4. The trade practice should cause loss or injury to the consumers of goods or services.
5. The trade practice under clause (1) should involve making a 'statement' whether orally or in writing or by visible representation."

After having observed so the Court set aside the order of the MRTP Commission in which the Commission had held that actual loss and injury are not the essential ingredients of the unfair trade practice. It was observed that causation of loss or injury thus is a *sine qua non* for invoking the principles of Section 36-A of the MRTP Act.

In *Hindustan Ciba Geigy v. Union of India & Ors.*, [2003] 1 SCC 134, again Sinha, J. sitting in a combination of three-Judge Bench held that causation of loss or injury to the consumer was a must for attracting the provisions of Section 36-A of the MRTP Act. The order passed by the Commission was set aside wherein the Commission had taken the contrary view. It was observed:

"7. A bare perusal of the aforementioned provision would clearly

A go to show that an unfair trade practice would mean a trade practice
which for the purpose of promoting the sale, use or supply of any
goods or for the provision of any services, adopts one or more the
practices specified therein adopted and as a result thereof loss of
injury has been caused to the consumers of such goods or services,
B either by eliminating or restricting competition or otherwise. It
would furthermore clearly go to show that the two conditions
precedent mentioned therein are required to be read conjunctively
and not disjunctively.”

C After having said so this Court observed that the Commission had
committed a manifest error in holding that the actual loss or injury
need not be caused to the consumers.

D In the present case, we find that in the application filed by the applicant/
respondent apart from saying that the defective machinery fitted with old/
second hand parts had been supplied after considerable delay the respondent
did not say a word regarding the actual loss and injury or a notional loss
caused to the respondent. There is nothing on the record to suggest that any
actual loss or injury was caused to the respondent. The application filed by
the applicant/respondent was not only cryptic but lacked in particulars to fall
within the definition of unfair trade practice as defined in Section 36-A read
E with Section 2 (u) of the MRTP Act. The MRTP Commission in its order
has not adverted to this fact and has not recorded a finding as to the any actual
loss or injury caused to the respondent.

F Since the respondent in the present case failed to *aver* as well as prove
that actually any loss or injury was caused to it which was the *sine qua non*
for invoking the provisions of Section 36-A, this appeal is accepted. The
MRTP Commission has also not recorded any finding as to whether any
actual loss or injury or a notional loss was caused to the respondent.
Accordingly, impugned order is set aside and the appeal is allowed. There
shall be no order as to costs.

G A.K.T.

Appeal allowed.