

QAMAR JAHAN AND ANOTHER

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v.

NISAR AHMAD TYAGI AND OTHERS

(Civil Appeal Nos. 76-77 of 2011)

MARCH 24, 2015.

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**[KURIAN JOSEPH AND R.K. AGRAWAL, JJ.]**

*Consumer Protection Act, 1986 – s.13(4)(iii) – Complaint before National Commission – The Commission closed the right to file rejoinder and also right to file affidavit in chief examination on the ground of delay in filing rejoinder and dismissed the complaint for want of evidence – Held: The question of affidavit in chief examination arises only after the pleadings are complete – Due to non-filing of the rejoinder, the National Commission, at best could have forfeited the permission to file rejoinder and should have granted opportunity to lead the evidence holding that in absence of the rejoinder, the pleadings would be deemed to be complete – Therefore, though the complainants are not entitled to file rejoinder, THEY are entitled to lead evidence and hence can file the affidavit in terms of s.13(4)(iii) – Appeals allowed.*

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CIVIL APPELLATE JURISDICTION: Civil Appeal Nos. 76-77 of 2011.

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From the Judgment and Order dated 26.07.2010 in O. P. No. 102 of 2000 and order dated 29.10.2010 of the National Consumer Disputes Redressal Commission, New Delhi in Miscellaneous Application No. 859 of 2010 in Original Petition No. 102 of 2000.

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Qamar Jahan (Appellant-In-Person).

Vinay Garg, Tanmay Agarwal, Uday Singh, for the Respondents.

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A The following Judgment of the Court was delivered

1. The appellants filed a complaint (Original Petition No. 102 of 2000) before the National Consumer Disputes Redressal Commission, New Delhi (for short 'National  
B Commission').

2. The issue pertains to the alleged medical negligence in treating the husband of the first appellant. It is seen, that respondent nos. 1 and 2 in the complaint had filed their  
C response to the complaint, and the appellants have also filed rejoinder thereto. As far as respondent nos. 3 and 4 are concerned, it appears, notice of the complaint was served on them only towards the end of the year 2009. They have filed their reply on 14.1.2010. Thereafter, several opportunities were  
D given to the appellants to file rejoinder to the reply filed by opposite party nos. 3 and 4 in the complaint. Finally, on 26.07.2010, the National Commission, vide its impugned order, dismissed the complaint for want of evidence. The operative part of the impugned order reads as under:

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"Complaint was filed in the year 2000 and despite repeated orders passed on the said dates the complainants have failed to file rejoinder to the written version of Ops 3 and 4 and their affidavits of evidence.  
F It is a case of medical negligence, Sri Pattjoshi states that further time may be allowed to the complainants to do the needful. However, we are not inclined to grant further time to the complainants. Right to file rejoinder and affidavits of evidence is closed. Since  
G there is no evidence in support of the complaint the complaint is dismissed for want of evidence. There is hardly any occasion to allow Sri Pattjoshi to argue the complaint. No order as to costs."

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3. Thereafter, the appellants filed miscellaneous application no. 859 of 2010 requesting the National Commission to recall the aforesaid order dated 26.7.2010. That application was also dismissed vide order dated 29.10.2010. The said order reads as under:

“Complainants have filed this application for recalling the order dated 26.7.2010 whereby the complaint was dismissed which is being contested by opposite parties no. 3 and 4. We have heard the parties counsel and have been taken through the order dated 26.7.2010. This order would show that for the reason disclose in details in the order itself the evidence of the complainant was closed and the complaint was, therefore, dismissed for want of evidence. For the reasons recorded in the order itself, we are not inclined to recall the said order and restore the complaint to its number.

Application is accordingly dismissed.”

4. Hence, these appeals have been filed before this Court at the instance of the appellants under Section 23 of the Consumer Protection Act, 1986, assailing the impugned orders passed by the National Commission dated 26.7.2010 and 29.10.2010.

5. Respondent nos. 1 and 2 are not represented before this Court. However, respondent nos. 3 and 4 are duly represented.

6. We have heard Srimati Qamar Jahan, appellant no.1 appearing in person, and Mr. Vinay Garg, learned counsel representing respondent nos. 3 and 4.

7. It can be seen from the order dated 26.7.2010 that the right to file rejoinder was closed, and right to file affidavit in

A chief examination was also closed. The question of affidavit in chief examination arises only after the pleadings are complete. On the date of passing the impugned order dated 26.7.2010, apparently, the pleadings were not complete. Therefore, on that day, the National Commission could have, at best, forfeited the permission to file rejoinder or passed an order to the effect that in the absence of any rejoinder, pleadings are deemed to be complete, and then an opportunity should have been granted to the appellants to lead evidence. Even thereafter, in case, there is no evidence, instead of dismissing the appeal for want of evidence, an opportunity of hearing to the appellants on the basis of the material already available on the record of the case should have been given by the National Commission, and then should have decided the complaint on merits. No doubt, the complaint is of the year 2000 but the fact remains that service was effected on respondent nos. 3 and 4 only towards the end of the year 2009, and they filed their written statement on 14.1.2010.

E 7. In the peculiar facts and circumstances of the case, ends of justice would require that the appellants be given an opportunity to lead evidence in the matter. As rightly held by the National Commission, the appellants will not be entitled to file rejoinder to the reply filed by respondent nos. 3 and 4.

F 8. That being the position, orders dated 26.7.2010 and 29.10.2010 passed by the National Commission are hereby set aside and the complaint filed by the appellants is restored to its original number. The appellants are free to file their affidavit in terms of Section 13(4)(iii) of the Consumer Protection Act, 1986, within two weeks from today. The parties shall appear before the National Commission on 30.04.2015. It will be open to the appellants either to appear in person or through a counsel on their behalf. We make it clear that in

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case the affidavit in evidence, as permitted by this Court, is not filed within two weeks from today, that opportunity shall stand forfeited. It is further made clear, that in case the appellants do not appear either in person or through a counsel before the National Commission on 30.04.2015, the complaint(Original Petition No.102 of 2000) shall stand dismissed. In case, the appellants appear before the National Commission on the appointed date, either in person or through a counsel, the matter shall be proceeded further depending on the steps taken by the parties thereafter.

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9. The appeals are allowed in the aforesaid terms. No costs.

Kalpana K. Tripathy

Appeals allowed.

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