B. Jayasree Vs. the Branch Manager, India Bulls Securities Ltd. and Another

B. Jayasree Vs. the Branch Manager, India Bulls Securities Ltd. and Another

SooperKanoon Citation : sooperkanoon.com/1148508

Court : Andhra Pradesh State Consumer Disputes Redressal Commission SCDRC Hyderabad

Decided On : Feb-06-2014

Judge : The Honourable Mr. R. Lakshminarasimha Rao, Member &Amp; the Honourable Mr. Thota Ashok Kumar, Member

Appeal No. : F.A.No. 310 of 2012 Against C.C. No. 179 of 2008 District Forum, Kurnool

Appellant : B. Jayasree

Respondent : The Branch Manager, India Bulls Securities Ltd. and Another

Judgement :

T. Ashok Kumar, Member

This is an appeal preferred by the complainant against the order in C.C.No.179/2011 dated 02-7-2010 on the file of District Forum, Kurnool. For convenience sake the parties as arrayed in the complaint are referred to hereunder:

The brief facts of the complaint are that the complainant averred that she deposited an amount of Rs.2,60,000/- with opposite party No.1 for earning her livelihood. In the month of June, 2006 the employee of opposite party No.1, Mr.Jammer contacted her and lured her to enter in share transactions and she opened Demat account ID.No.KL-158 with opposite party No.1 with an initial deposit of Rs.1000/-. Thereafter the complainant deposited on various dates from 20-7-2006 to 14-9-2006 a total sum of Rs.2,60,000/- and she had withdrawn Rs.33,000/- on 27-9-2006. Mr.Jameer, employee of opposite party conducted the transactions properly on her behalf by written contact notes and acknowledgements and after resignation of Mr.Jameer, another employee of opposite party No.1, Mr.ChandraSekhar Reddy contacted her and requested her to allow him continue the trading in the place of Mr.Jameer but the complainant refused for the same. In the month of November, 2006, opposite party No.1 without following the instructions of the complainant negligently transferred the entire amount of Rs.2,27,000/- to F and O unauthorizedly resulting in loss of the entire amount. It is the complainants case that had opposite party No.1 followed her instructions, she would not have suffered loss and if any customer like her agreed to trade through F and O, he should acknowledge in writing every day or atleast weekly and she never authorised opposite party No.1 for F and O trade and F and O trade is done only for brokerage and commission by opposite party and hence opposite party No.1 committed deficiency in service and unfair trade practice. The complainant sent a complaint to National Stock Exchange on 09-3-2008 and the same is pending before it. Hence the complaint for a direction to the opposite parties jointly and severally to pay Rs.2,27,000/- towards loss suffered by the complainant together with interest at 24% p.a. and Rs.50,000/- towards mental agony.

Opposite party No.1 remained exparte.

Opposite party No.2 filed written version contending that the complaint is barred by limitation as it was filed on 12th November , 2006 . and that the complainant is not a consumer since the securities transaction is a speculative transaction for commercial gains and the District Forum has no jurisdiction to entertain the present complaint as the registered office of the opposite party is situated at New Delhi. It is also alleged that the dispute of the complainant does not fall within the preview of C.P Act , 1986 and is covered by SEBI Act, 1992 and as per SEBI Act the complainant has to seek relief approaching authorities such as ombudsman, grievance cell and arbitration mechanism of exchange and since the complainant already has lodged a complaint with NSE and the same is pending adjudication this complaint is not maintainable. Opposite party contended that the complainant, a 28 years old graduate with 1.5 lakhs income p.a has willingly executed member constituent agreement (MCA) and risk disclosure document (RDD) and aware of all the risks involved in share trading and also has withdrawn a sum of Rs.34,000/- from her trading account vide cheque No. 140833 and not Rs.33,000/-. Opposite party denied that Mr. Chandra Sekhar Reddy ARM had traded in Fand O segment without the instructions of the complainant and stated that she was aware of Fand O transactions and she never raised any objections since November , 2006 and also failed to show as to how she has arrived at a sum of Rs.2,27,000/- which she is claiming . Opposite party further stated that the contract notes was also made available on its website and that he is neither the seller nor buyer, the beneficiary of the transacted shares is the complainant and it gets a little amount of brokerage and hence the claim made by the complainant is unsustainable and thus prayed for the dismissal of the complaint.

Both sides filed affidavits reiterating their respective contentions. Exs.A1 to A13 and Ex.B1 were marked on their behalf. Having heard both sides, considering the material on record and written arguments of both sides, the District Forum vide impugned order allowed the complaint directing opposite party to pay Rs.25,285.34 together with Rs.2000/- for mental agony and costs of Rs.1000/-.

Feeling aggrieved by the said order, the complainant preferred this appeal contending that the District Forum failed to peruse the questionnaire furnished by the complainant and the replies given by the opposite parties and the opposite parties except stating as per MCA (Member constituent Agreement) they have acted, nothing is placed to vouchsafe their actions. The documents in A series clearly show that she made deposits with opposite party No.1 firm to a tune of Rs.2,60,000/- out of which she withdrew Rs.33,000/- and the Forum failed to give credence to Exs.A5 and A10 where the complainant made endorsement in writing and also consider that the opposite parties failed to place any proof other than Exs.A5 to A10 authorising them to continue the trading on her behalf and without there being a written contract notes after 11-8-2006 how opposite party No.1 conducted trading on her behalf and after Mr.Jameer, no authorization was given to the respondent to continue trading on her behalf and prayed to allow the appeal.

The learned counsel for the complainant filed written arguments.

Now the point for consideration is whether the order of the District Forum is vitiated either in law or on facts?

It is the case of the complainant deposited a sum of Rs.2,60,000/- on various dates from 20-7-2006 to 14-9-2006 as per Exs.A1 to A3 and the said fact is not disputed by the opposite parties except contending that she withdrew Rs.34,000/- and not Rs.33,000/- as alleged by the complainant.It is her case that after resignation of Mr.Jameer, she had not authorized opposite parties to continuetrading on her behalf and without there being a written contract notes after 11-8-2006.

The complainant sought to mark documents i) shares value issued by the respondent/opposite party dated 08-11-2006, ii) Indian Express market in brief column dt.07-11-2006, iii) Eenadu (telugu daily) dt.08-11-2006 shares quotation column, iv) Deccan chronicle daily dt.08-11-2006 and the same were received as Exs.A14 to A17 as additional evidence.

As could be seen from the record, the complainant averred in the complaint that she had sent a complaint bearing No.0805220875600170/004 to the National Stock Exchange against opposite party No.1 and the same is pending adjudication. The complainant filed the complaint before the District Forum when such a complaint was pending before the National Stock Exchange and having resorted to efficacious remedy, she ought not to have filed the consumer complaint and thus the consumer complaint is not maintainable. Before lodging such a complaint, had the complainant filed the present complaint, the things would have been different.

The complainant relied on the decision reported in **II (2012) CPJ 382 (NC) in India Bulls Financial Services and another v. Varghese Sakaria** and another wherein the National Commission held that if purpose of investing money in share is to earn livelihood after retirement, it does not amount to commercial transaction. Basing on the aforementioned decision, the learned counsel for the complainant contended that the complainant invested her hard earned savings, gifts from her parents and also borrowed the amounts from others deposited Rs.2,60,000/- with the opposite party for earning her livelihood and therefore she comes within the definition of consumer.

On the other hand the learned counsel for the opposite parties contended that the complainant is engaged in trading of shares which is speculative transaction as held in the decisions reported in **II (2012) CPJ 181 (NC) in Vijay Kumar v. Indu Sind Bank, R.P.No.2821/2012 dated 10-4-2013 in Sri Chandrasekhar Mishra vs. Indiabulls securities Limited and others and R.P.Nos.719/2012 and batch dated 08-1-2014** and as such the consumer complaint is not maintainable.

In Revision petition No.2821/2012 aforesaid, several other decisions of National Commission were referred to and the substance of the said decisions is also that where the complainant was engaged in trading of shares, it is a speculative transaction and Consumer Protection Act is not applicable for entertaining or compensating losses in the speculative transactions, such cases have to be filed before competent authorities before SBEL Act. Referring to a decision **in Gautam Das V. Sun Pharmaceuticals Industries Ltd., reported in 2010(4) CPR (NC),** the National Commission held that the complainant, a share holder, cannot be the consumer within the meaning of Section 2(1)(d) (ii) of the Consumer Protection Act, 1986.

Though the complainant contended in the complaint that she purchased the shares for her livelihood, no where she clarified that she is an unemployee and invested the money for livelihood under self employment. It appears that deliberately she suppressed her occupation in the complaint etc., and by using the word for earning her livelihood she designed the complaint to file it before the consumer Forum.

In view of the legal position, we are convinced to hold that the consumer complaint is not maintainable for want of inherent jurisdiction and in such circumstances factual aspects need not be gone into. Thus the impugned order is not sustainable and liable to be set aside and when the order is not sustainable, the question of enhancing the amount also does not arise and in such circumstances documents received as additional evidence under Exs.A14 to A17 are not helpful to the complainant.

In the result, the appeal is disposed of setting aside the order of the District Forum. Consequently, the complaint is dismissed with liberty to approach the competent forum. In the event the complainant approach such a competent forum the time spent between the filing of the complaint before the District Forum and the disposal of the appeal by this Commission will be excluded under Section 14 of the Limitation Act, 1963 in the light of the decision of the Honble Supreme Court in œTrai Foods Ltd vs National Insurance Company Ltd and others? reported in III (2012) CPJ 17 (SC)?.