

CASE NO.:
Appeal (civil) 2339 of 2008

PETITIONER:
Godfrey Phillips India ltd

RESPONDENT:
Ajay Kumar

DATE OF JUDGMENT: 01/04/2008

BENCH:
Dr. ARIJIT PASAYAT & P. SATHASIVAM

JUDGMENT:
J U D G M E N T

CIVIL APPEAL NO. 2339 OF 2008
(Arising out of SLP (C) No.532 of 2007)
(With Civil Appeal 2340 of 2008 @ SLP (C) No.5051 of 2007)

Dr. ARIJIT PASAYAT, J.

1. Leave granted.
2. Challenge in these appeals is to the order of National Consumer Disputes Redressal Commission, New Delhi (in short the 'National Commission'). One order was passed in exercise of revisional jurisdiction against the concurrent finding of the District Consumer Disputes Redressal Forum, Yamuna Nagar (in short 'District Forum') and State Consumer Disputes Redressal Commission (in short 'State Commission') dated 11.5.2001 and 12.7.2001 respectively. Commission has also issued directions.
3. The review petition filed was also dismissed, which also forms subject matter of challenge.
4. Background facts in a nutshell are as follows:

The respondent filed a complaint in respect of an advertisement given by the appellant, alleging unfair trade practices. The advertisement was issued in newspapers and magazines in 1999 for the cigarettes manufactured and sold by it under the brand name of "Red & White" in respect of which the directions have been issued.

The impugned advertisement apart from showing the packet of cigarettes with the aforesaid brand name stated "Red & White smokers are one of a kind". The advertisement also shows the smiling face of actor Akshay Kumar holding a cigarette. It also contains the statutory warning "Cigarette smoking is injurious to health" as well as price of the pack. The complaint was dismissed by the District Forum as the complainant had also filed a suit in relation to the impugned advertisement in the Civil Court. It was therefore held by the District Forum that parallel proceedings in the District Forum by way of Public Interest Litigation could not be entertained. In appeal, the State Commission affirmed the order of the District Forum. Thereafter, complainant withdrew the suit, but filed Revision Petition before the National Commission.

The National Commission held that the slogan in the advertisement that "Red & White smokers are one of a kind" showing the image of Akshay Kumar indicated that "\005\005smokers of Red & White cigarettes could be super actor performing all the film stunts without duplicates". According to the appellant, no evidence was led in the case by the complainant either with regard to the ability of film star Akshay Kumar to carry out stunts without duplicate or with regard to the alleged impression created by the impugned advertisement upon the complainant. Interestingly, the complainant admitted that he continues to smoke cigarette for more than two decades. The National Commission held as follows:

"The case of the complainant is that smoking of cigarette by Akshay Kumar with the slogans used in advertisement would detract the people from the statutory warning. Seeing comparative size of the letters etc. the statutory warning in our view loses its prominence which is usurped by more prominent and attractive Akshay Kumar et al and is sufficient to detract the attention of the viewers from the statutory warning to the image of Akshay Kumar with the slogan indicating smokers of Red and White cigarette could be super actor performing all the film stunts without duplicates."

This according to the National Commission was sufficient to hold that the impugned advertisement amounted the unfair trade practices. On the basis of the aforesaid finding, the National Commission gave the following directions:

"(i) to discontinue forthwith the unfair trade practice of detracting from the statutorily specified warning and not publish any advertisements like Ext. 'R-1' in any language giving any impression that a person who smokes Red and White Cigarette could perform such acts as could be performed by Akshay Kumar in films and thereby detracting from the specified warning; and

(ii) to issue corrective advertisements of equal size in all the newspapers in which advertisements in Hindu & English like Ext. R-1 were published to neutralize the effect of the said impugned misleading advertisements.

(iii) Shri Ajay Kumar, the petitioner, shall be paid a sum of Rs.20,000/- by way of compensation and Rs.5,000/- as cost."

5. According to the appellant the direction (ii) as quoted above was passed on the basis of provisions of the Consumer Protection Act, 1986 (in short the 'Act') which was not applicable and was not in force at the time of publication of the impugned advertisement in the year 1999. Such a direction could not have been issued in dis-regard of the applicable provision of law. Therefore, a Review Petition was filed. In the Review Petition the appellant had contended that direction (iii) to award compensation of Rs.20,000/- to the complainant was passed without any claim for compensation made in the complaint. With regard to direction (i) to discontinue unfair trade practice and not to publish any

advertisement like the impugned advertisement, the appellant took the stand that when direction was given by order dated 20.2.2006 an enactment being the Cigarettes and other Tobacco Products (Prohibition of Advertisement and Regulation of Trade and Commerce, Production, Supply and Distribution) Act, 2003 (in short 'Advertisement Act') had already come into force w.e.f. 18.5.2003 by which all advertisements in relation to cigarettes had already been prohibited. As such there was no need for issuing such direction.

6. The Review Petition was dismissed without considering the specific contentions by merely stating that there was no ground for review.

7. Learned counsel for the appellant has submitted that issuing a corrective advertisement was relatable to Section 14 of the Act (as it stood in 1999) which reads as follows:

"14. Finding of the District Forum -- (1) If, after the proceeding conducted under section 13, the District Forum is satisfied that the goods complained against suffer from any of the defects specified in the complaint or that any of the allegations contained in the complaint about the services are proved, it shall issue an order to the opposite party directing him to do one or more of the following things, namely:-

(a) to remove the defect pointed out by the appropriate laboratory from the goods in question;

(b) to replace the goods with new goods of similar description which shall be free from any defect,,

(c) to return to the complainant the price, or, as the case may be, the charges paid by the complainant;

(d) to pay such amount as may be awarded by it as compensation to the consumer for any loss or injury suffered by the consumer due to the negligence of the opposite party;

(e) to remove the defects or deficiencies in the services in question;

(f) to discontinue the unfair trade practice or the restrictive trade practice or not to repeat them;

(g) not to offer the hazardous goods for sale;

(h) to withdraw the hazardous goods from being offered for sale;

(i) to provide for adequate costs to parties."

8. The aforesaid Section 14 of the Act has been amended w.e.f. 15.3.2003 and following clause (hc) was added:

"(hc) to issue corrective advertisement to neutralize the effect of misleading advertisement at the cost of the Opposite Party responsible for issuing such misleading

advertisement."

9. Therefore, the direction No.(ii) as given could not have been given when no such clause existed at the time of issuance of the advertisement, and as such it could not have been invoked. The complaint was filed on 10.1.2000. The prayer was as follows:

"It is, therefore respectfully prayed that the complaint of the Complainant may kindly be accepted in the interest of the justice, equity and fair play. And the Opposite Party may kindly be directed to discontinue the said unfair trade practice and not to repeat the same and help mitigating its effects in teenagers."

10. Therefore, it is submitted that the direction to issue corrective advertisement on the basis of provision of law which was not introduced at the relevant time could not have been given and, therefore, review should have been allowed.

11. It is pointed out that Section 5(2)(a) of the Cigarettes Advertisement Act reads as follows:

"5(2)- No person, for any direct or indirect pecuniary benefit, shall (a) display, cause to display, or permit or authorize to display any advertisement of cigarettes or any other tobacco product."

12. Section 5(1) also has relevance, and reads as follows:

"5-Prohibition of advertisement of cigarettes and other tobacco products- (1) No person engaged in, or purported to be engaged in the production, supply or distribution of cigarettes or any other tobacco products shall advertise and no person having control over a medium shall cause to be advertised cigarettes or any other tobacco products through that medium and no person shall take part in any advertisement which directly or indirectly suggests or promotes the use of consumption of cigarettes or any other tobacco products."

13. It is, therefore, submitted that the order of the National Commission is unsustainable.

14. There is no appearance on behalf of the respondent in spite of service of notice.

15. As rightly contended by learned counsel for the appellant direction (i) was given without any material or evidence whatsoever and there was not even a suggestion/pleading that the advertisement was of Akshay Kumar or that he could perform certain stunts without duplicates. There was not even an allegation that the statutory warning was detracted from. When such serious allegation which was required to be established was not even specifically pleaded and when nothing specific was indicated in the complaint, the Commission should not have given the direction on pure surmises. In this context, decision of the Privy Council in *Bharat Dharma Syndicate v. Harish Chandra* (AIR 1937 PC

146) and of this Court in The Union of India v. Pandurang Kashinath More (AIR 1962 SC 630) are relevant. So far as direction No.(ii) is concerned it is to be noted that Section 5(1) and Section 5(2) of the Advertisement Act clearly prohibited issuance of any advertisement in relation to cigarettes. Therefore, the corrective advertisement as directed by the National Commission could not have been given. Further, the power for giving such direction was introduced under Section 14 of the Act w.e.f. 15.3.2003. In view of the aforesaid, direction No.(ii) cannot be sustained.

16. So far as direction No.(iii) is concerned, it is to be noted that there was no prayer for any compensation. There was no allegation that the complainant had suffered any loss. Compensation can be granted only in terms of Section 14(1)(d) of the Act. Clause (d) contemplates award of compensation to the consumer for any loss or injury suffered due to negligence of the opposite party. In the present case there was no allegation or material placed on record to show negligence.

17. Interestingly, there was no allegation or finding of loss or injury caused to the respondent on account of the advertisement issued in 1999. The complainant himself had stated that he was smoking cigarettes for the last two decades. Therefore, the impugned advertisement cannot be said to have affected the complainant and/or caused any loss to him to warrant grant of compensation.

18. Another aspect which needs to be noted is that the complainant had stated in his complaint that he had filed a complaint in public interest and had accepted that the matter was pending before the Civil Court. The District Forum and the State Commission had, therefore, dismissed the complaint of the appellant.

19. It is to be noted that the National Commission itself noted that the respondent was not representing a "Voluntary Consumer Association" registered under the Companies Act, 1956 or under any other law for the time being in force and was not entitled to file a complaint about unfair trade practice to represent other consumers. Having said so, it is not understandable as to how the National Commission even proceeded to deal with the complaint. It also noted that the complainant had not moved any application or obtained any permission under Section 13(6) of the Act and/or no such permission was granted. In the circumstances, it was not permissible for the complainant to represent others. The complainant's case right through was that he was filing a petition in public interest. After having recorded that the complaint in that manner was not entertainable, the National Commission could not have passed the impugned order.

20. Looked at from any angle, the orders of the National Commission are indefensible and are set aside. The appeals are allowed with no order as to costs.