

SUPREME COURT OF INDIA

KLM Royal Dutch Airlines

Vs.

Director General of Investigation & Registration

C.A.Nos.815-816 of 2002

(Tarun Chatterjee and Dr. Mukundakam Sharma JJ.)

03.10.2008

JUDGMENT

Dr. Mukundakam Sharma, J.

1. Challenge is made in the present appeals under Section 55 of the *Monopolies and Restrictive Trade Practices Act, 1969* (for short "MRTP Act"), whereby the final judgment and orders dated 11.10.2001 and 12.11.2001 passed by the Monopolies and Restrictive Trade Practices Commission, New Delhi (for short 'MRTP Commission') are being questioned. The appellant is aggrieved by the order and direction issued against them by the MRTP Commission and also by dismissal of the miscellaneous application filed by them holding that there is no apparent error on the face of the record.

2. The appellant is a worldwide airlines company with its headquarters at Amsterdam, Netherlands. A complaint was filed by M/s. Maharajah & Co. (hereinafter also referred to as 'Complainant') contending inter alia that they booked a consignment with the appellant airlines vide Airway Bill dated 21.09.1995. The said consignment comprised three parcels containing Badges and Crests, which were to be used on very specific tournaments/meetings/conference dates. The consignment was booked for carriage from New Delhi to New Orleans, USA. It was stated in the said complaint that on 26.09.1995 the complainant received a message from the appellant airlines that two out of the three parcels were missing. This message of 26.09.1995 was followed by another message of 03.10.1995 informing the complainant that in spite of efforts made by the appellant, the baggage could not be found and therefore it was suggested to the complainant that a claim could be filed with the underwriters if the aforesaid shipment was covered by insurance. The appellant airlines also asked the complainant to furnish necessary documents to process the claim. Near about the same time, the appellant airlines traced out the said two missing parcels and informed the complainant through its letter dated 24.10.1995, contending inter alia that the aforesaid two parcels have been traced out and the same have since been forwarded to the destination on 20.10.1995.

“A stand was, however, taken on behalf of the complainant that the aforesaid delivery of the two parcels after the event was over was of no use to the customer in USA. The complainant also took up a plea that it had already lost goodwill due to delay in the delivery of goods to the buyer. The complainant, therefore, made a claim of Rs. 6 lakh from the appellant on account of its negligence and deficiency in service. It may be stated here that the complainant has also filed a separate complaint before the Delhi State Consumer Redressal Forum for payment of compensation in terms of the Consumer Protection Act, 1986, which is pending for disposal till date.”

3. On receipt of the aforesaid complaint filed by M/s. Maharajah & Co. the respondent issued a notice to the appellant on 22.01.1996 calling for its comments on the complaint along with other information and documents. The appellant furnished its reply contending inter alia that the rules relating to loss, damage or delay to cargo and compensation for the same in international air transportation is governed by the Carriage by Air Act, 1972 and the Schedule attached thereto and in terms of the said Act the liability of the carrier is subject to the rules relating to liability established by Warsaw Convention, 1929. After receiving the aforesaid reply the respondent, which is a statutory authority, came to the prima facie conclusion that the appellant failed to render services which were expected from it and that the trade practice carried on by the appellant thus constitutes an unfair trade practice falling under clauses (ii), (iv) and (vi) of Section 36A (1) of the MRTP Act. Consequently, the respondent filed an application for registration and investigation before the MRTP Commission, New Delhi, in terms of the provisions of Section 36 (B) of the MRTP Act.

4. The Commission after receipt of the aforesaid application took up the same for consideration and issued notice and thereafter heard the aforesaid application. By the impugned judgment and orders the MRTP Commission found the appellant guilty of adoption of and indulgence in unfair trade practices to the extent that there was deficiency in service. Having held thus, the Commission issued a direction to the appellant to cease the aforesaid trade practice and also file an affidavit stating that the appellant would desist from the same in future. Being aggrieved by the aforesaid order passed by the MRTP Commission, the present appeals have been preferred as statutory appeals in terms of the provisions of Section 55 of the MRTP Act.

5. Mr. A.K. Ganguly, learned senior counsel appearing for the appellant brought to our notice various provisions of the MRTP Act and drew our attention to the correspondence between the parties, which is a part of the record and on the basis thereof submitted that the order passed by the MRTP Commission is illegal and without jurisdiction as there was no allegation anywhere by the respondent before the MRTP Commission that there was any fraudulent representation on the part of the appellant. He also submitted that none of the sub-clauses of Section 36 A is applicable in the present case, and therefore, the impugned order holding the appellant to be guilty of the said provision is illegal and unjustified.

6. Mr. V. Shekhar, learned senior counsel appearing for the Director General of Investigation and Registration, vehemently supported the order passed by the MRTP Commission on the basis of the complaint. He drew our attention to the contents of the complaint filed by the

Director General before the MRTP Commission to bring home his point that the appellant is guilty of unfair trade practices.

7. In the light of the aforesaid submissions we proceed to deal with the contentions raised before us. The Director General in his application filed before the MRTP Commission alleged violation of clauses (ii), (iv) and (vi) of Section 36A (1) of the MRTP Act. In that view of the matter, we would like to extract the said provisions along with other relevant provisions for better appreciation of the issues arising for our consideration. The said provisions read as under:-

“Section 36A - Definition of unfair trade practice – In this Part, unless the context otherwise requires, "unfair trade practice" means a trade practice which, for the purpose of promoting the sale, use or supply of any good or for the provision of any services, adopts any unfair method or unfair or deceptive practice including any of the following practices, namely:-

(1) the practice of making any statement, whether orally or in writing or by visible representation which,-

(i) xxxxxxxxx

(ii) falsely represents that the services are of a particular standard, quality or grade;

(iii) xxxxxxxx

(iv) represents that the goods or services have sponsorship, approval, performance, characteristics, accessories, uses or benefits which such goods or services do not have;

(v) xxxxxxxxx

(vi) makes a false or misleading representation concerning the need for, or the usefulness of, any goods or services;

36B. Inquiry into unfair trade practices by Commission.- The Commission may inquire into any unfair trade practice,-

(a) xxxxxxxxx

(b) xxxxxxxx

(c) upon an application to it by the Director General; or

(d) xxxxxxxx

36D. Powers which may be exercised by the Commission inquiring into an unfair trade practice.-

(1) The Commission may inquire into any unfair trade practice which may come before it for inquiry and, if, after such inquiry, it is of opinion that the practice is prejudicial to the public interest, or to the interest of any consumer or consumers generally, it may, by order direct that-

(a) the practice shall be discontinued or shall not be repeated;

(b) any agreement reliant to such unfair trade practice shall be void or shall stand modified in respect thereof in such manner as may be specified in the order;

(c) any information, statement or advertisement relating to such unfair trade practice shall be disclosed, issued or published, as the case may be, in such manner as may be specified in the order.

(2) xxxxx

(3) xxxxx

48C. Penalty for contravention of order made by Commission relating to unfair trade practices.-

If any person contravenes any order made by the Commission under section 36D, he shall be punishable with imprisonment for a term which shall not be less than six months but which may extend to three years and with fine which may extend to ten lakh rupees;

Provided that the court may, for reasons to be recorded in writing, impose a sentence of imprisonment for a term lesser than the minimum term specified in this section."

8. There is no dispute with regard to the fact that the consignment of three parcels were booked for carriage by the original complainant, namely, M/s. Maharajah & Co., out of which two parcels were missing and could not be delivered to the addressee immediately. The said missing parcels were, however, traced out and were forwarded to destination on 20.10.1995. Allegations have been made that due to the missing of the aforesaid two parcels in the course of transmission the complainant suffered a loss. In the aforesaid application, which was filed by the Director General before the MRTP Commission, complaint is only about the deficiency of service and whether or not any compensation is to be paid for the aforesaid loss suffered, is a subject matter which is being enquired into by the Delhi State Consumer Redressal Forum. In the aforesaid application, the MRTP Commission directed the appellant to cease and desist from unfair trade practice in terms of the prayer made in the application, wherein it was prayed that a direction be issued against the appellant airlines directing it to cease and desist from indulgence in the unfair trade practice and not to repeat

the same in future. The aforesaid application was filed by the Director General giving the factual position. In paragraph 4 of the said application, sum and substance of the allegation and accusations has been made out by the Director General against the appellant in the following manner:

"4. It would be observed from the aforesaid information collected during the course of investigation that the respondent has admitted its liability caused to the complainant due to loss, damage or delay in transportation of the goods booked by the complainant. The services of the respondent have not been found to be of the standard and quality of an international transporter. Its services do not have uses or benefits for the customers. There is an implied representation that the services of the respondent would be useful to the customers and the respondent would transport the goods booked by the customers within a reasonable time without causing any damage to the goods. It is clear that the respondent has failed to render services which were expected of it. It has admitted its liability in causing loss to the complainant. The trade practice carried on by the respondent thus constitutes an unfair trade practice falling under clauses (ii), (iv) and (vi) of Section 36A (1) of the MRTP Act, 1969."

9. In terms of the allegations and accusation in paragraph 4 of the application the Director General has submitted that the unfair trade practice carried on by the appellant is prejudicial to the public interest, and therefore, a direction should be issued to the appellant airlines to cease and desist from indulging in the unfair trade practice and not to repeat the same in future.

10. We have already extracted the definition of "unfair trade practice" and also other relevant provisions. There is no definition of "deficiency of service" or "deficiency" provided in the MRTP Act but expression "service" has been defined in Section 2(r). In term of such definition, "service" means which is made available to potential users and includes the provision of facilities in connection with banking, financing, insurance, chit fun, real estate, transport, processing, supply of electrical or other energy, board or lodging or both, entertainment, amusement or the purveying of news or other information, but does not include the rendering of any service free of charge or under a contract of personal service.

11. The appellant herein is engaged in the business of transportation of goods by airlines, and therefore, there could be no dispute with regard to the fact that they were providing service when they accept baggages to be carried by air. A representation is also made that the cargo would be delivered at the destination with all promptness. If there is a failure in carrying out the said representation there would be a case of deficiency in their service. Negligence in providing prompt service or service as expected may also be presumed if they fail to deliver the said goods within a reasonable time at the destination. But the issue in the present case is as to whether any such deficiency in service could be said to amount an unfair trade practice as envisaged under the provisions of the aforesaid MRTP Act.

12. The Act, particularly, the provisions of Section 36A envisage that in order to be a case of unfair trade practice there has to be unfair method or deceptive practice indulging in false

representation of the kinds mentioned in various clauses of Section 36A of the MRTP Act. What is sought to be attracted in the present case by the Director General are clauses (ii), (iv) and (vi) of Section 36A (1) of the MRTP Act, clauses (ii) and (vi) deal with cases of false representation and also a false and misleading representation whereas clause (iv) envisages of making a representation that the goods or services have sponsorship, approval, performance, characteristics, accessories, uses or benefits which such goods or services do not have. The aforesaid provisions cannot be said to be attracted in the present case for there is no allegation either by M/s Maharajah and Co. or by the Director General that any such representation was made by the appellant airlines regarding their performance, uses or benefits which their services do not have. So far as other two clauses are concerned and in order to make out a case for attracting the said provision, there has to be a case of false statement and a case of misleading representation made by the service provider. We have carefully perused the entire contents of the application filed by the Director General and on such perusal, we find that there is no allegation that there was any false representation or misleading representation by the appellant airlines regarding their services.

13. In *Lakhanpal National Ltd. v. M.R.T.P. Commission*¹ a Bench of this Court held that the object of Section 36-A of the MRTP Act is to bring honesty and truth in the relationship between the manufacturer and the consumer and that when a problem arises as to whether a particular act can be condemned as an unfair trade practice or not, the key to the solution would be to examine whether it contains a false statement and is misleading and further what is the effect of such a representation made by the manufacturer on the common man. This Court also stated that there could be another question posed as to whether an act leads a reasonable person in the position of a buyer to a wrong conclusion. This Court finally held that the issue cannot be resolved by merely examining whether the representation is correct or incorrect in the literal sense. The same ratio came to be reiterated in a subsequent decision of this Court in *Rajasthan Housing Board v. Parvati Devi*² In the said case this Court has held that to decide whether or not there is unfair trade practice the Commission has to find out whether a particular act can be condemned as an unfair trade practice; whether representation contained a false statement and was misleading and also what was the effect of such a representation made to the common man.

14. In the case of *Colgate Palmolive (India) Ltd. v. MRTP Commission*³ this Court laid down five ingredients which have to be established before a trade practice can be said to be an unfair trade practice, the Court laid the ingredients in following manner:

"16. A bare perusal of the aforementioned provision would clearly indicate that the following five ingredients are necessary to constitute an unfair trade practice:

1. There must be a trade practice within the 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 provision 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."

Before it can be said that the act amount to an unfair trade practice the complainant is required to show that the trade practice was employed for the purpose of promoting the sale, use or supply of any goods or the provision of any services and also that which is the statement or advertisement which is the false representation of the kind specified in Sub-clauses of clause (1) of Section 36-A. In this regard reference may also be made to the observations made by this Court in the case of *Man Roland Druckmaschinen Ag v. Multicolour Offset Ltd.*⁴:

"12. In the case of an unfair trade practice as invoked by Respondent 1 the object of inquiry is a statement which is a false representation of the kind specified in sub-clauses (i), (ii) or (iii) of clause (1) of Section 36-A or is an advertisement of the kind specified in sub-clauses (vii) or (viii) thereof. The statement or advertisement is the trade practice. The further requirement under the section is that the trade practice complained of must be for the purpose of promoting the sale, use or supply of goods or for promoting the provision of any service. The sale, use or supply need not, for the purposes of the section, actually have taken place although it may be relied upon by the complainant to establish the falsity of the representation."

Whether a statement constitute a false or misleading representation will depend upon the facts and circumstances of each case. It is not possible to provide an exclusive list of the statements which may constitute false or misleading representation, nor can there be any strait-jacket formula evolved thereof for the said purpose. However the statements of the nature which are willfully made knowingly false, or made recklessly without honest belief in its truth, and made with the purpose to mislead or deceive will definitely constitute a false or misleading representation. In addition a failure to disclose a material fact when a duty to disclose that fact has arisen will also constitute a false or misleading representation."

15. In the backdrop of the aforesaid legal position propounded by this Court, we may now examine the facts of the present case. Neither in the complaint filed by M/s Maharajah and Co. before the Director General nor in the complaint filed by the Director General filed before the MRTP Commission there is any allegation of any false or misleading representation. None of the complaints aforesaid, in fact contains any of the aforesaid ingredients as mentioned. Unless any such allegation is made in such complaints, the MRTP Commission could not have come to a conclusion that the appellant has committed an unfair trade practice. We have carefully perused the impugned order passed by the MRTP

Commission. In the findings recorded by the MRTP Commission there is not even a single finding that there is any such false representation or misstatement by the appellant airlines regarding their services. The MRTP Act also contains provisions regarding penalties relating to unfair trade practices. Section 48C of the MRTP Act provides that if any person contravenes any order made by the MRTP Commission under section 36D, he shall be punishable with imprisonment for a term which shall not be less than six months but which may extend to three years and with fine which may extend to ten lakh rupees. The aforesaid provision is a stringent provision which provides for punishment upto three years and also fine up to ten lakh rupees. Therefore, the Commission is required to examine the allegations with due care and caution and also the essential ingredients as contained in the provisions of Section 36A of the MRTP Act and while passing the order under Section 36 D it must be fully satisfied that there is in fact contravention of any of the clauses of Section 36A.

16. It was sought to be submitted by Mr. V. Shekhar, Senior Counsel appearing for the respondent that the order which is passed by the MRTP Commission is in respect of deficiency in service and not about the compensation and the said order is passed directing the air carrier that they will in future cease and desist from the aforesaid practice of providing deficient service. The aforesaid contention, however, cannot be accepted for what is sought to be done by the MRTP Commission is to hold that the appellant is guilty of unfair trade practice which is not equal to holding a person guilty of providing deficient service. Element of unfair trade practice definitely stands at a higher and onerous platform than the deficient service. For making out a case of unfair trade practice an element is involved to the extent of making false and misleading statement and representation and in order to make a case of unfair trade practice such ingredients, which are part and parcel of the concept of unfair trade practice has to be alleged and must be proved and established. In the present case there is neither such allegation of any such false and misleading representation nor is there any proof provided by way of evidence, which also we have perused. Therefore there could be no finding by the MRTP Commission that the appellant is guilty of unfair trade practice. That being so, the order of the Commission cannot be upheld and the same is set aside.

17. Accordingly, the appeals are allowed. There is no order as to costs.

¹(1989) 3 SCC 251

²(2000) 6 SCC 10

³(2003) 1 SCC 129

⁴(2004) 7 SCC 447