SUPREME COURT OF INDIA

Star India (P) Ltd.

Vs.

Society of Catalysts

C.A.No.6597 of 2008

(Mohan M.Shantanagoudar and R.Subhash Reddy,JJ.,)

23.01.2020

JUDGMENT

Mohan M.Shantanagoudar,J.,

1. These appeals arise out of the judgment dated 11.9.2008 of the National Consumer Disputes Redressal Commission ("National sg,,a,ureCommission") allowing the consumer complaint filed by Respondent No. 1 in both these appeals against the Appellants.

2. The brief facts giving rise to these appeals are as follows:

> 2.1 Star India (P) Ltd., the Appellant in C.A. No. 6597/2008 (hereinafter "Star India") used to broadcast the programme 'Kaun Banega Crorepati' ("KBC") between 22.1.2007 and 19.4.2007. The programme was sponsored by Bharti Airtel Limited, the Appellant in C.A. No. 6645/2008 (hereinafter "Airtel"), amongst others. During the telecast of this programme, a contest called 'Har Seat Hot Seat' ("HSHS contest") was conducted, in which the viewers of KBC were invited to participate. An objective-type question with four possible answers was displayed on the screen during each episode, and viewers who wished to participate were required to send in the correct answer, inter alia through SMS services, offered by Airtel, MTNL and BSNL, to a specified number.
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> 2.2 The winner for each episode was randomly selected out of the persons who had sent in the correct answers, and awarded a prize money of Rs. 2 lakhs. There was no entry fee for the HSHS contest. However, it is not disputed that participants in the HSHS contest were required to pay Rs. 2.40 per SMS message to Airtel, which was higher than the normal rate for SMSes. Hence, Respondent No. 1, which is a consumer society (hereinafter "the complainant"), filed a complaint before the National Commission against Star India and Airtel (but not against BSNL and MTNL), contending that they were committing an 'unfair trade practice' within the meaning of Section 2(1)(r)(3)(a) of the Consumer Protection Act, 1986 ("the 1986 Act"). It was alleged that the Appellants had created a false impression in viewers'

minds that participation in the HSHS contest was free of cost, whereas the cost of organizing the contest as well the prize money was being reimbursed from the increased rate of SMS charges, and the profits from these charges were being shared by Airtel with Star India.

2.3 Further, it was alleged that an unfair trade practice had also been committed inasmuch as the contest was essentially a lottery as the questions were simple, and the winners were finally picked by random selection. The purpose of this contest was to promote the business interests of the Appellants by increasing the viewership and Television Rating Points (TRP's) of the KBC programme, and thus to command higher advertising charges, and also by increasing the revenue earned from SMS messages. Hence the Appellants were culpable for conducting a lottery-like contest to promote their business interests under Section 2(1)(r)(3)(b) of the 1986 Act.

2.4 It is relevant to note that the complainant is only a voluntary consumer organization which has filed this complaint as part of its objective of furthering the consumer protection movement. It is not their case that they have participated in the HSHS contest and incurred any loss on account thereof. It is further relevant to note that the complainant's assertions are solely based on a survey which it had carried out, in which the majority of participants apparently stated that they were under the impression that participation in the HSHS contest was free and the SMS charges were retained only by the service provider, i.e. Airtel and most of the viewers felt that the contest was carried out to increase the popularity of the KBC programme. The conclusions of this survey were apparently confirmed by a newspaper report dated 15.7.2007 published by the Hindustan Times. As per this newspaper report, Airtel received 58 million SMS messages, and the revenue earned from the SMSes was shared by Star India and Airtel.

3. The National Commission in the impugned judgment observed that though the Appellants had not disclosed the revenue earned from the HSHS contest on grounds of confidentiality of proprietary information, it was apparent that they had created an impression that the prize money was being given free of charge, even though they had not disputed that the prize money for the HSHS contest was paid out of the money collected through SMS charges. The Commission relied upon the figures stated in the newspaper article dated 15.7.2007 (supra), and found that since the Appellants had not denied that they had received 58 million SMSes, they would have collected Rs. 13.92 crore from the participants of the HSHS contest for such messages, whereas a total sum of only Rs. 1.04 crores was paid as prize money. Thus, the gross earnings of the Appellants were disproportionate to the cost of the prizes offered.

"3.1 The Commission further found that no viewer could discern from the on-screen advertisements that the costs of the contest were being met through the SMS charges, and the Appellants had clearly not notified viewers about the same. It found a contradiction

between the Appellants' stances as to whether the HSHS contest was advertised as 'free' or not. It was also observed that the Appellants had not brought any evidence on record to show that the transmission of SMS messages for the HSHS contest was a value added service such that the higher SMS cost was justified, and hence the same could not be construed as a value added service. It was presumed by the National Commission that the special business relationship between Star India and Airtel included an undisclosed revenue sharing agreement.

3.2 Hence, it was held that since the prize money for the HSHS contest was fully or partly covered by the revenue earned from increased SMS charges, the Appellants had committed an unfair trade practice under Section 2(1)(r)(3)(a) of the 1986 Act. In light of this finding, the National Commission found it unnecessary to deal with the complainant's contention regarding commission of an unfair trade practice under Section 2(1)(r)(3)(b).

3.3 The National Commission additionally held that the complaint was maintainable under the 1986 Act and need not have been preferred before the Telecom Disputes Settlement and Appellate Tribunal ("TDSAT") under the Telecom Regulatory Authority of India Act, 1997 ("TRAI Act"). Further, it was held that the complaint was not bad for non-joinder of parties as there was nothing on record to suggest that BSNL and MTNL had also recovered large amounts from the SMS charges for the HSHS contest and that the amount so recovered by them was used for sharing the cost of the prize money.

3.4 Hence, the complaint was accordingly allowed by the National Commission. Since the complainant is only a consumer organization, the National Commission observed that there were no grounds for granting compensation. However, it awarded punitive damages of Rs. 1 crore under the Proviso to Section 14(1)(d) of the 1986 Act, for which both Appellants were held jointly and severally liable. The National Commission also directed them to pay litigation costs of Rs. 50,000 to the complainant. Hence these appeals before us."

4. Learned senior counsel for Star India, Shri Gaurav Pachnanda, submitted that the entire finding of 'unfair trade practice' was based on inferences and speculation, and on reliance on a newspaper report without corroboration of its contents, which was impermissible. He disputed the finding of the National Commission that the Appellant had admitted that the prize money was paid out of the revenue earned from increased SMS rates. It was stressed that the National Commission had omitted to inquire into the source of the prize money. It was also stressed that Airtel had not shared the revenue earned from the increased SMS rates with Star India at all. The only monetary flow between them was a fixed periodic lumpsum to be paid by Airtel under the services-cum- sponsorship agreement between them, which bore no relation to the revenue received from the SMSes, and that there was no evidence to suggest that the SMS revenue was used to pay the prize money. The learned counsel emphatically argued that the expression "covered by the amount charged in the transaction as a whole" under Section 2(1)(r)(3)(a) of the 1986 Act only meant direct

recovery from the price paid for the transaction, and not from advertisements or sponsorship, citing the decision of this Court in *HMM Ltd. v. Director General, Monopolies & Restrictive Trade Practices Commission*[1],.

> 4.1 It was further submitted that Airtel was entitled to charge a higher rate for the SMSes sent in pursuance of the HSHS contest, since the transmission of SMSes to register options in a multiple choice question game required a special software, the use of which constituted a value-added service; and that Star India had complied with the relevant TRAI regulations mandating that such increased tariff be displayed on the television screen as well as on the KBC programme website. Therefore, though the participants bore the cost of sending the SMS messages, they were duly informed of the same, while participation in the contest itself remained free of charge. In such circumstances, the National Commission could not have attributed recovery of prize money to the increased tariff rate of the SMSes without even inquiring into the breakup of cost, value addition and profit in the tariff.
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> 4.2 The learned counsel also challenged the award of damages, for lack of proof of loss or legal injury to the participants in the contest, which he submitted was required as per Section 14(1)(d) of the 1986 Act. Lastly, he argued that "punitive damages" could not have been awarded without a specific prayer for the same in the complaint.

5. Learned counsel for Airtel, Shri Aditya Narain, urged that as far as the commission of an unfair trade practice was concerned, the only finding rendered by the National Commission was regarding the creation of a wrongful impression that the contest was conducted free of charge, which is covered under the second part of Section 2(1)(r)(3)(a) of the 1986 Act, and that the same was not attracted in the present case. He took us through the TRAI direction regarding advertisement of premium rate services, pleading compliance with the same. Finally, he submitted that the jurisdiction of the consumer fora was ousted by Section 14(a)(iii) read with Section 15 of the TRAI Act, which provide that any dispute between telecom service providers and "a group of consumers" have to be referred to the TDSAT, and that the complainant organisation was essentially nothing but a group of consumers since it was purporting to represent the interest of consumers at large.

6. Learned Counsel for the complainant, Ms. Madhumita Bhattacharjee, on the other hand, argued in favour of the decision of the National Commission, submitting that the Appellants had given the wrongful impression to consumers that the HSHS contest prize money was not paid out of the revenue generated from increased SMS tariff rates. She also averred that the complaint contained a prayer as to punitive damages, and thus the National Commission had not erred in awarding punitive damages. Finally, she submitted that the complaint was maintainable under the 1986 Act since the complainant had filed an individual complaint under the Act, and not acted on behalf of a group of consumers, thus attracting the exemption available to individual consumers under proviso (B) to Section 14 (a)(iii) of the TRAI Act.

7. We have heard all the parties and given due consideration to the material on record.

8. It is apparent that the crucial question to be determined in the instant case is whether an unfair trade practice has been committed by the Appellants in the conduct of the HSHS contest, in terms of Section 2(1)(r)(3) of the 1986 Act. We hasten to emphasize at this juncture itself that though the complainant had also pleaded violation of Section 2(1)(r)(3)(b) of the 1986 Act in their complaint, there was no express finding rendered on this issue by the National Commission, and subsequently, no contentions were made before us in this respect. Thus, the limited question before us is whether an unfair trade practice has been committed only within the meaning of Clause (a) of Section 2(1)(r)(3). It would be useful to begin by referring to the relevant portion of the definition of "unfair trade practice" under Section 2(1)(r)(3):

> "(r) "unfair trade practice" means a trade practice which, for the purpose of promoting the sale, use or supply of any goods or for the provision of any service, adopts any unfair method or unfair or deceptive practice including any of the following practices, namely;— (3) permits-
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> (a) the offering of gifts, prizes or other items with the intention of not providing them as offered or creating impression that something is being given or offered free of charge when it is fully or partly covered by the amount charged in the transaction as a whole;..."
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> 8.1 Evidently, the mischief that the clause seeks to address may be in two forms: firstly, the offering of gifts, prizes or other items with the intention of not providing them as offered, and secondly, the creation of the impression that something (i.e. a gift, prize or other item) is being given or offered free of charge in spite of the cost of the item actually being covered either fully or partly by the amount charged in the relevant transaction, as a whole. This would be, for example, where the vendor of a good or service deceptively increases the price of the good or service being sold, and covers the cost of a prize or gift offered for 'free' along with the good or service through such increased price.
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> 8.2 In the instant matter, the controversy regarding the commission of an unfair trade practice pertains to the second part of the clause. This is because the Appellants are questioning the conclusion of the National Commission that the amount of prize money paid in the HSHS contest was in fact at least partly covered by the increased SMS tariff rate charged to participate in the contest, and that the Appellants had created a false impression to the contrary, i.e., that participation in the HSHS contest was free of charge. Thus, the primary bone of contention between the parties is the source of the funds out of which the prize money has been paid by Star India.

9. At the outset, after going through the written submissions of the Appellants before the National Commission, we are compelled to conclude that the National Commission had no

basis to hold that the Appellants had admitted that the prize money for the HSHS contest was distributed out of the revenue collected from the SMSes sent in pursuance of the contest. It is true that the Appellants had not specifically denied that the prize money was paid out of the increased SMS charges. However, they had clarified in their submissions that Airtel was merely a sponsor/advertiser of the program, and the commercial arrangement between the parties was that Airtel would pay sponsorship charges, whereas Star India would be independently liable for paying the prize money out of its pocket regardless of the revenue earned by Airtel.

10. Importantly, we further find that apart from the aforementioned facts, there is no other cogent material on record upon which the National Commission could have placed reliance to render the finding of 'unfair trade practice' under Section 2(1)(r)(3) (a)of the 1986 Act. The National Commission had sought to rely on the newspaper report dated 15.7.2007 published in the Hindustan Times (supra) regarding the amount of revenue and profit earned by the appellants from the HSHS contest. We are of the considered opinion that such reliance was unwarranted, inasmuch as there was absolutely no corroboration for the allegations therein with respect to the number of SMSes received, and the breakup of revenue earned into cost, value addition from service, and profit.

Moreover, the survey report on the basis of which these allegations were made was not even produced before the National Commission or before us.

11. It is further relevant to note that there exists a services-cum- sponsorship agreement between the Appellants, which contains the specific details of the commercial arrangement between them. They did not produce the same before the National Commission, claiming that the said agreement contained a confidentiality clause, and could only be produced in accordance with law if required. The Appellants' case is that they would have offered to produce the agreement if the National Commission had given a specific direction to that effect. However, no such direction was rendered at any point during the proceedings before the National Commission. Even the complainant did not, throughout the course of the proceedings, seek a direction to the Appellants to produce the services-cum- sponsorship agreement. Be that as it may, to establish whether there was any substance in the National Commission's conclusion that the prize money was paid out of the revenue earned from Airtel's SMS services during the HSHS contest, we deemed it fit to examine the agreement ourselves.

> 11.1 Our perusal of the services-cum-sponsorship agreement reveals that Airtel had the sole and exclusive right to charge fees or charges towards the services rendered by it to facilitate participation in the HSHS contest, through SMS, telecalling, etc., and thus, Star India had no role in determining the same. Further, Airtel was liable to pay a monthly lumpsum as fees to Star India, irrespective of whether such amount was realized from its subscribers or not. There is no provision in the agreement for revenue-sharing between the parties, or requiring Airtel to finance any part of the prize money paid by Star India towards the HSHS contest.

11.2 Thus, it is evident that Star India was liable to pay the prize money irrespective of the profits earned by Airtel. It is needless to say that the sponsorship money paid by Airtel would come from various sources of revenue, which includes the money earned from the tariff rates for the HSHS contest. Similarly, Star India may have had many sources of revenue from which the prize money could have been paid. This is a part and parcel of the ordinary business dealings of the Appellants, and the complainant has failed to establish any direct linkage between the increased SMS tariff rates and the prize money so as to show that the prize money was deceptively recovered in the guise of increased SMS rates charged to the participants.

12. Further, since the National Commission failed to conduct any inquiry whatsoever into the breakup of the price of Rs. 2.40 per SMS fixed for the purpose of participation in the HSHS contest, we are of the view that the finding of the National Commission that the SMS service offered by Airtel under the HSHS contest did not constitute a value-added service is liable to be set aside. Indeed, the services-cum-sponsorship agreement reveals that Airtel was liable to set up the hardware and software required for the HSHS contest at its own cost, which suggests that the services regarding the participation in the HSHS contest through SMSes offered by Airtel constituted a value-added services separate from its ordinary SMS service. It is reasonable to assume that such cost would have been recovered by Airtel, at least in part, through the increased cost of SMSes sent by subscribers participating in the HSHS contest. The direction on 'Premium Rate Services' dated 3.5.2005, issued by TRAI, which was referred to by the Appellants, also states that televoting and participating in quizzes, etc. through SMS constitutes a value added service, and that in most of these cases, the charges for these services are more than the normal tariff rate. The notification is reproduced below:

"F. No. 305-8/2004-QOS
TELECOM REGULATORY AUTHORITY OF INDIA
A-2/14, Safdarjung Enclave, New Delhi-110029
Dated : 3rd May, 2005

To,

All Cellular Mobile Service Providers
All Unified Access Service Providers
Subject : Direction on Premium Rate Services.

1. The Authority has observed that in the last few months, a number of operators and also some independent agencies have started providing value added services like quiz, ringtones, televoting etc. through SMS. In most of these cases, the charges for these services are more than the normal published tariffs. The customers are informed about these value added premium rate services through SMS, advertisements in newspaper or T.V. But in this communication, the cost implication of the service is not intimated. Sometimes the messages are only

followed by wordings "T&C Apply".

2. In the present multi-operator multi service scenario, such premium rate services have increased considerably. The service provider is aware of the pulse rate for these services as either the service provider is providing such services or it has an agreement with the provider of such premium services. However, the cost for such premium services is generally known to the customer only after the service has been utilized and the bill is received. This practice of service providers is against the interest of the consumers.

3. In view of the above, in the consumer's interest, the Authority in exercise of its power conferred upon it under Section 13 read with Section 11(1) (b) (i) and (v) of the Telecom Regulatory Authority of India Act, 1997 and clause 9 and 11 of the Telecommunication Tariff Order 1999 hereby directs all the Cellular Mobile Service Providers and Unified Access Service Providers to publish in all communications/advertisements relating to premium rate services, the pulse rate/tariff for the service.

This issues with the approval of the Authority.
(Sudhir Gupta)
Advisor (QOS)"

13. However, we need not dwell on this issue much longer, since not much turns upon it with regard to the determination of the commission of an unfair trade practice, except to note that the transmission of SMSes for the purpose of the HSHS contest being a value added service, the Appellants had also taken care to comply with the TRAI direction dated 3.5.2005 (supra) which mandated the communication/advertisement of any increase in the cost of cellular services on account of the rendering of such a value-added service. Thus, even if the SMS charge is taken as the 'cost' of participating in the contest for the purpose of Section 2(1)(r)(3)(a) of the 1986 Act, it cannot be said that the Appellants had wrongfully advertised the charges for the same.

14. Hence, we find that the complainant has clearly failed to discharge the burden to prove that the prize money was paid out of SMS revenue, and its averments on this aspect appear to be based on pure conjecture and surmise. We are of the view that there is no basis to conclude that the prize money for the HSHS contest was paid directly out of the SMS revenue earned by Airtel, or that Airtel and Star India had colluded to increase the SMS rates so as to finance the prize money and share the SMS revenue, and the finding of the commission of an "unfair trade practice" rendered by the National Commission on this basis is liable to be set aside.

15. With regard to the award of punitive damages made by the National Commission, the same could not have been done in as much as the complainant in the present case had not prayed for punitive damages in the complaint or proved that any actual loss was suffered by consumers (See *General Motors (India) Private Limited v. Ashok Ramnik Lal Tolat*[2],

However, we need not delve further into this aspect since we have found that there was no unfair trade practice committed by the Appellants in the first place.

16. On an ancillary note, it was briefly contended before us by the learned counsels for the Appellants, as mentioned supra, that the National Commission did not have jurisdiction over the complaint and it should have been referred to the TDSAT. However, this argument was not seriously pressed by either of the parties. Hence, we do not find it relevant to adjudicate upon this issue for the purpose of the present matter. However, the question of law, as regards the maintainability of complaints filed by consumer organizations against telecom service providers before consumer fora may be kept open.

17. Thus, we find that the finding of the commission of an unfair trade practice under Section 2(1)(r)(3)(a) in the impugned judgment is bad in law. The appeals are allowed and the impugned judgment is set aside in the aforesaid terms.

Judgment Referred.

[1]*(1998) 6 SCC 0485*
[2]*(2015) 1 SCC 0429*