

EXAMINING THE POWER OF CONSUMER DISPUTE REDRESSAL AGENCIES TO RECALL AND REVIEW ORDERS : LEGAL POSITION AND POSSIBLE REFORMS

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INTRODUCTION: STATUTORY PROVISIONS

Prior to the Amendment in the Consumer Protection Act, 1986¹ (hereinafter 'the Act') there were no express provisions pertaining to the power of Consumer Dispute Redressal Agencies with regard to the ability to recall their own orders. The Consumer Protection (Amendment) Act, 2002 led to the insertion of Section 22A in the Consumer Protection Act,² which may be read as follows –

“22A. Where an order is passed by the National Commission ex parte against the opposite party or a complainant, as the case may be, the aggrieved party may apply to the Commission to set aside the said order in the interest of justice.”

Section 22 was also replaced with following proviso:

“22 (1) Provisions of sections 12, 13 and 14 and the rules made there under for the disposal of complaints by the District Forum shall, with such modifications as may be considered necessary by the Commission, be applicable to the disposal of disputes by the National Commission.

(2) Without prejudice to the provisions contained in sub-section (1), the National Commission shall have the power to review any order made by it, when there is an error apparent on the face of record.”

A bare reading of the aforementioned provision makes it amply clear that the National Consumer Disputes Redressal Commission, (hereinafter referred as the 'National

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¹ The Consumer Protection (Amendment 2003) Act 1986.

² The Consumer Protection (Amendment) Act 2002, s 20.

Commission') has been vested with the power of setting aside an ex parte order in the interests of justice and to restore complaints dismissed in default. However, no corresponding amendment has been made with respect to the State Commission and District Forum. At this point, it becomes essential to draw attention to Order IX, Rule 13 of the Civil Procedure Code, 1908,³ which reads as under:

"13. Setting aside decree ex parte against defendant. - In any case in which a decree is passed ex parte against a defendant, he may apply to the court by which the decree was passed for an Order to set it aside; and if he satisfies the court that the summons was not duly served, or that he was prevented by any sufficient cause from appearing when the suit was called on for hearing, the court shall make an Order setting aside the decree as against him upon such terms as to costs, payment into court or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit:

Provided that where the decree is of such a nature that it cannot be set aside as against such defendant only it may be sent aside as against all or any of the other defendant also:

Provided further that no court shall set aside a decree passed ex parte merely on the ground that there has been an irregularity in the service of summons, if it is satisfied that the defendant had notice of the date of hearing and had sufficient time to appear and answer the plaintiff's claim.

Explanation: Where there has been an appeal against a decree passed ex parte under this rule, and the appeal has been disposed of on any ground other than the ground that the appellant has withdrawn the appeal, no application shall lie under this rule of setting aside the ex parte decree."

Meanwhile, Order IX, Rule 4 of the Civil Procedure Code provides for restoration of a suit that has been dismissed:⁴

"4. Plaintiff may bring fresh suit or Court may restore suit to file— Where a suit is dismissed under rule 2 or rule 3, the plaintiff may (subject to the law of limitation) bring a fresh suit, or he may apply for an order to set the dismissal aside, and if he satisfies the Court that there was sufficient cause for such failure as is referred to in rule 2, or for his non-appearance, as the case may be, the Court shall make an order setting aside the dismissal and shall appoint a day for proceeding with the suit."

³ The Code of Civil Procedure 1908, order IX rule 13.

⁴ The Code of Civil Procedure 1908, order IX rule 4.

Thus, it becomes essential to examine to what extent the District Forum and State Commission have been empowered to exercise the powers of a civil court, particularly with regard to the Civil Procedure Code. Section 13(4) of the Consumer Protection Act, 1986 reads as follows – ⁵

“13(4) For the purposes of this section, the District Forum shall have the same powers as are vested in a civil court under Code of Civil Procedure, 1908 while trying a suit in respect of the following matters, namely: –

- (i) the summoning and enforcing the attendance of any defendant or witness and examining the witness on oath;
- (ii) the discovery and production of any document or other material object producible as evidence;
- (iii) the reception of evidence on affidavits;
- (iv) the requisitioning of the report of the concerned analysis or test from the appropriate laboratory or from any other relevant source;
- (v) issuing of any commission for the examination of any witness, and
- (vi) any other matter which may be prescribed.”

The aforesaid provision has also been made applicable to the State and National Commissions.⁶ It is also necessary to draw attention to Section 26(1) of the Consumer Protection Regulations, 2005, which reads as under:

“26. Miscellaneous – (1) In all proceedings before the Consumer Forum, endeavour shall be made by the parties and their counsel to avoid the use of provisions of Code of Civil Procedure, 1908 (5 of 1908):

Provided that the provisions of the Code of Civil Procedure, 1908 may be applied which have been referred to in the Act or in the rules made there under.”

The cardinal question for enquiry is whether or not the State Commission and District Forum are empowered to set aside their own ex parte orders or recall dismissed complaints.

⁵ The Consumer Protection Act 1986, s 13(4).

⁶ The Consumer Protection Act 1986, s 18.

JUDICIAL PRONOUNCEMENTS: CEMENTING STATUTORY SHORTCOMINGS

In the case of *Court Master, UCO Bank v. Ram Govind Agarwal*,⁷ the Bihar State Commission held that the District Forum, which had set aside its own ex parte order, had no jurisdiction to do so, as the Consumer Protection Act does not empower dispute Redressal agencies to set aside or recall ex parte orders or to restore matters dismissed for default. A similar view was taken by the National Commission in *Director, Forest Research Institute v. Sunshine Enterprises*.⁸

The question finally came for consideration before the Supreme Court in the case of *Jyotsana Arvind Kumar Shah v. Bombay Hospital Trust*,⁹ wherein an appeal had been preferred against an order of the State Commission setting aside its own ex parte order. After the State Commission proceeded ex parte and awarded compensation to the complainant on merits, the respondents, instead of preferring an appeal filed a writ petition before the Bombay High Court. The High Court, whilst dismissing the writ petition observed that the respondent could prefer an appeal or make an application before the State Commission for setting aside the ex parte order, if permissible by law. On the basis of this order, the petitioner subsequently made an application to the State Commission, which set aside its previous ex parte order. An appeal was preferred by the complainant to the Supreme Court, which stated that the respondent could benefit from the observation of the High Court only if the same was 'permissible by law'. Laying reference to the aforementioned orders of the National Commission and the Bihar State Commission, it held that the order of the State Commission setting aside the ex parte decision was without jurisdiction.

However, a conflicting view on this issue emerged in the case of *New India Assurance Co. Ltd. v. R. Srinivasan*,¹⁰ where the Supreme Court held that the State Commission could recall or review its ex parte order. The original complainant, who was the respondent in the said matter, had filed a complaint with the State Commission for an insurance claim that was dismissed in default and not restored by the State Commission. Consequently, the respondent filed a fresh complaint in the District Forum, which allowed the claim. The appellant's contention that the complaint in the district forum was not maintainable since a similar complaint had been instituted and dismissed in default by the State Commission, was rejected by both the State and the National

⁷ *Court Master, UCO Bank v Ram Govind Agarwal* (1996) 1 CPR 351.

⁸ *Director, Forest Research Institute v Sunshine Enterprises* (1997) 1 CPR 42.

⁹ *Jyotsana Arvind Kumar Shah v Bombay Hospital Trust* (1999) 4 SCC 325.

¹⁰ *New India Assurance Co Ltd v R Srinivasan* (2000) 3 SCC 242.

Commission. When the matter reached the Supreme Court, it upheld the orders of the National Commission, State Commission and District Forum on the grounds that the interests of justice cannot be comprised by mere technicality, particularly since the claim of the respondent was undisputed. Whilst taking note of the fact that Order 9 of the Civil Procedure Code did not apply to proceedings before the State Commission or District Forum, the court emphatically stated that the interests of justice cannot be compromised by a rule of technicality.

It would be pertinent to note here that all of the previously mentioned judgements were passed prior to the 2002 Amendment to the Consumer Protection Act. As such, whilst they do not hold true for the National Commission, they continued to hold good for the State Commissions and District Forums.

The Supreme Court has therefore clearly taken contrary stands on this issue in the two instances that it came before it for consideration. The position of law was finally settled in *Rajeev Hitendra Patekar v. Achytut Kashinath Karekar and Another*.¹¹ In the said case, the respondent's wife had died due to alleged medical negligence on part of the appellants. However, the State Commission had dismissed the complaint for want of prosecution. Upon receiving an application for recalling the said order of dismissal from the respondent-complainant, the State Commission restored the complaint. The National Commission rejected the arguments of the appellants that the order of the State Commission was without jurisdiction, and dismissed the revision petition.

The court's attention was drawn to both the statutory provisions and the judgement of the Andhra Pradesh High Court in the case of *M/s Eureka Estates (P) Ltd. v. A.P. State Consumer Disputes Redressal Commission*,¹² wherein it was held that the State Commission and District Forum can only exercise those powers that have been specifically conferred on them by the Consumer Protection Act and Rules. This line of argument was further substantiated by the counsel for the appellants by placing reliance upon the Supreme Court's judgements in *Morgan Stanley Mutual Fund v. Kartick Das*¹³ and *Gulzari Lal Agarwal v. Accounts Officer*¹⁴ wherein it had laid down the principle that Consumer tribunals can derive powers only from express statutory provisions. On the other hand, the respondent contended that he had lost track of the matter due to old age and that the State Commission had rightfully restored the complaint. However, the Supreme Court ultimately held that the Tribunals are creatures of the statute, and hence the State

¹¹ *Rajeev Hitendra Patekar v Achytut Kashinath Karekar* [2011] 10 SCR 513.

¹² *M/s Eureka Estates (P) Ltd v AP State Consumer Disputes Redressal Commission* AIR 2005 AP 118.

¹³ *Morgan Stanley Mutual Fund v Kartick Das* (1994) 4 SCC 225.

¹⁴ *Gulzari Lal Agarwal v Accounts Officer* (1996) 10 SCC 590.

Commission and District Forum cannot exercise any power that has not been expressly conferred upon them. Thus, the court held the judgment in the case of *Jyotsana* to be a good law with the judgment delivered in case of *New India Assurance* to be untenable.

THE CURRENT LEGAL POSITION: A TRAVESTY OF JUSTICE?

The law, as it stands today, does not allow State Commissions and District Forums to recall their ex parte decisions or restore complaints dismissed in default. While some may hail this move as a step in the right direction, which may deter those sellers who are negligent in appearing before the tribunals and filing their written statement, the cascading effect of this position is that poor litigants, who are sometimes unable to adhere to the time frames stipulated under the Consumer Protection Act and by the Tribunals, are put in a position where they must incur the expenditure of travelling all the way to Delhi in order to get their complaints restored. The position of law, both in the statute books and as held by the Supreme Court in *Rajeev Hitendra Patekar* disadvantages the poorest of complainants, as it is the State Commission and District Forums that are unable to recall orders or restore complaints. At this point, it would be pertinent to draw attention to Article 39A of the Constitution of India. Whilst this Directive Principle of State Policy primarily deals with the issue of legal aid, it also states that the legal system must promote justice on the basis of equal opportunity. It further states that opportunities for securing justice should not be denied to any citizen by virtue of economic or other disabilities. This is also in consonance with the Preamble of the Constitution wherein the State undertakes to provide 'Justice – social, economic and political'. The current position of law ensures that the richest of litigants, having claims of over 1 Crore rupees are able to get speedy justice from the National Commission, which hears their complaints in the first instance,¹⁵ whereas poorer litigants with smaller claims are unable to avail of the same benefits from their forum of choice. Thus, this position of law not only goes against the constitutional principles enshrined in Article 39A but also defeats the very essence of the Preamble as well.

This state of affairs, if anything, only serves to defeat the very essence of the Consumer Protection Act, which seeks to give speedy and cost-effective justice to consumers, particularly the ones belonging to the sections of society which do not have the resources or time to indulge in long-drawn and expensive litigation. A mere glance at the facts of *New India Assurance*¹⁶ as well as *Rajeev Hirendra Patekar*¹⁷ will reveal that it was, in fact, the consumer who suffered because of this skewed position of law.

¹⁵ The Consumer Protection Act 1986, s 21(a)(i).

¹⁶ *New India Assurance Co Ltd v R Srinivasan* (2000) 3 SCC 242.

¹⁷ *Rajeev Hirendra Patekar v Achyut Kashinath Karekar* (2011) 9 SCC 541.

CONCLUSION: THE WAY FORWARD

Litigants, particularly consumers approaching the District Forum and State Commission, who tend to be laypersons, are often subject to supervening circumstances beyond their control. Yet, it is only the National Commission that has been vested with the power to restore complaints dismissed in default and recall ex parte decisions. The judgement in the case of *Rajeev Hirendra Patekar v. Achyut Kashinath Karekar*¹⁸ continues to be the law of the land. Of course, the inherent shortcomings of the 2002 Amendment to the Consumer Protection Act were responsible for this vexed position of law continuing to exist post-2002 in the first place. As such, the only way forward appears to be moving requisite amendments to the Consumer Protection Act and endowing District Forums and State Commissions with the power to restore complaints dismissed in default and recall ex parte decisions. However, the exercise of this power by all three dispute redressal agencies must be subject to certain caveats to safeguard the interests of consumers. Granting the power of restoring complaints dismissed in default and recalling ex parte decisions will not only further the interests of justice but also reduce revisions filed before the National Commission, thereby reducing the seemingly insurmountable pendency and arrears of cases.

¹⁸ *ibid.*