

35.

* IN THE HIGH COURT OF DELHI AT NEW DELHI

+ RFA 237/2009

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Judgment Delivered on: 3.03.2011

ST. JOHN AMBULANCE BRIGADE

..... Appellant

Through : Ms. Arti Bansal, Mr. Ajay Digpaul and
Ms. Neeru Gupta, Advs.

versus

BANK OF INDIA & ANR.

..... Respondent

Through : Ms. Soma Mullick and Mr. A.K. Mullick,
Advs. for respondent no.1.
Ms. Ruchi Kapur, Adv. for respondent
no.2.

CORAM:

HON'BLE MR. JUSTICE G.S.SISTANI

1. Whether the Reporters of local papers may be allowed to see the judgment?
2. To be referred to Reporter or not?
3. Whether the judgment should be reported in the Digest?

G.S.SISTANI, J. (ORAL)

1. With the consent of counsel for the parties, present appeal is set down for final hearing and disposal.
2. The appellant had filed a suit for recovery against the respondents in the sum of ₹4,58,500/- on 4.6.2002. A preliminary issue was framed by the trial court on 23.1.2003, which reads as under:

"PRELIMINARY ISSUE NO.1**"Whether the suit is not barred by the limitation as alleged in the plaint?" OPP"**

3. The facts of the case, as noticed by the trial court, are that appellant is a voluntary, non-sectarian and non-profit humanitarian organization with international affiliation. The appellant was established in the year 1901 and it renders first-

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aid and para-medical services through dedicated volunteers, who are solely motivated in mitigating human suffering whenever and wherever found. The appellant was operating a saving bank account no.1989 with respondent no.1 Bank for more than 25 years. The said account was closed after the appellant discovered that nine fraudulent withdrawals amounting to ₹2.85 lakhs were made from the said account on the basis of forged cheques within a period of two years. A new account was opened by the appellant. The matter of fraudulent withdrawals of the said amount came to the knowledge of the appellant on 24.5.1997 while reconciling the accounts with the bank statement. It was then discovered that certain amounts had been illegally withdrawn. The appellant forwarded necessary documents to the handwriting experts, M/s Ace Bureau of Investigating and Document Examination, for examining the authenticity of the signatures and handwriting as appeared on the cheques, in question. A report was obtained from M/s Ace Bureau regarding the cheques, in question, according to which, the said cheques were forged and fabricated. The appellant thereafter lodged an FIR No.218/2007 on 1.6.1997 at Police Station Parliament Street. The police filed charge sheet only against respondent no.2 herein, who is an employee of the appellant herein, but no criminal case was registered against respondent no.1 Bank. Appellant thereafter issued a legal notice to the respondent. Since the notice issued to respondent no.1, for reimbursing the financial loss suffered

on account of negligence and deficient service of respondent no.1 was not responded to, the appellant filed a complaint before District Consumer Disputes Redressal Forum for redressal of its grievances on the ground of deficiency of service within the scope of Section 2(g) of Consumer Protection Act, 1986. Respondent no.1 Bank contested the complaint of the appellant on the ground, *inter alia*, that the complaint was not maintainable since service of the bank does not fall under the purview of the Consumer Protection Act and that the complaint involved various intricacies in it and also highly disputed questions of fact and law, which would require recording of evidence of witnesses and scrutiny of documents. The complaint filed by the appellant was dismissed on 9.11.2001 on the ground that the matter involves examination of documents and witnesses including handwriting experts and the forum was not able to do justice in the summary proceedings and directed the appellant to approach the civil court for deciding the matter.

4. Learned counsel for the appellant contends that similar view has been expressed by State Consumer Dispute Redressal Commission, New Delhi, and, thus, the appellant found it proper to withdraw the appeal and filed a civil suit. Counsel further submits that the period spent by the appellant in pursuing the matter before District Consumer Disputes Redressal Forum and State Consumer Disputes Redressal Commission ought to have been excluded in view of Section 14 of the Limitation Act.

Counsel also submits that in fact District Consumer Disputes Redressal Forum had granted liberty to the petitioner for approaching the civil court, which fact has been ignored by the learned trial court while deciding the preliminary issue.

5. Counsel next submits that learned trial court has arrived at an erroneous finding that appellant had not been diligently pursuing the remedy whereas the facts point out that the appellant was diligently pressing the remedy and took sufficient care and based on legal advice filed a complaint before District Consumer Disputes Redressal Forum and thereafter before the State Consumer Dispute Redressal Commission in good faith. Learned counsel for the appellant submits that appellant was not barred by any law from filing a complaint and, thus, it cannot be said that appellant was not diligently pursuing the matter despite the objection having been taken in the written statement filed by the respondent.
6. It is submitted by Ms. Bansal, counsel for the appellant, that learned trial court had wrongly placed reliance on the case of **Satnam Singh v Balari Mal & Sons & Ors**, reported at 1994 (31) DRJ 644. It is further submitted that the case of **Satnam Singh** (supra) is not applicable to the facts of this case and is distinguishable both on facts as well as on law. It is also submitted that in the case of **Satnam Singh** (supra) the petitioner had wrongly filed an appeal when the appeal was not maintainable in law and he kept pressing the appeal inspite of the preliminary objections raised by the respondent that in fact

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a revision petition was maintainable and not an appeal. It is next submitted that since there was no legal bar in filing a complaint before District Consumer Disputes Redressal Forum the case of **Satnam Singh** (supra) would not be applicable to the facts of the present case, as different views have been taken by the Apex Court with regard to the decision of the cases arising out of the Consumer Protection Act, which is evident from the case of **Dr. J.J. Merchant & Ors. v Shrinath Chaturvedi**, reported at III (2002) CPJ 8 (SC). In the aforesaid case the Apex Court has taken a view that even the complicated questions of fact and law can be decided by the Consumer Forum and since the National Commission is headed by a retired Supreme Court Judge and the State Commission is headed by a retired High Court Judge, both of whom are competent to decide such complicated questions of fact and law. An earlier decision referred to by the Supreme Court in the case of **Dr. J.J. Merchant & Ors.** (supra), is a decision pertaining to the year 1995, wherein it has been held that Consumer Protection Act is meant for speedy disposal of complaint and in case of complicated issues requiring recording of evidence of experts, complainant should be directed to approach the Civil Court.

7. Present appeal has been opposed by learned counsel for respondents. Learned counsel for respondent no.2 submits that neither before District Consumer Disputes Redressal Forum nor before State Consumer Disputes Redressal Commission

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respondent no.2 was made a party and, thus, it cannot be said that appellant was pursuing a wrong remedy qua respondent no.2. Learned counsel for the appellant does not dispute that respondent no.2 was not made a party either before the District Consumer Disputes Redressal Forum or State Consumer Disputes Redressal Commission and, thus, it cannot be said that appellant was pursuing a wrong remedy against respondent no.2. The suit filed against respondent no.2 is hopelessly barred by limitation and there is no infirmity in the order of the trial court on this account.

8. Learned counsel for respondent no.1 has opposed this appeal primarily on the ground that list of dates would show that appellant had come to know about the alleged fraud on 24.5.1997; an FIR was lodged by the appellant with Police Station Parliament Street on 1.6.1997; and thereafter a complaint was filed by the appellant before District Consumer Disputes Redressal Forum on 31.3.1998. Respondent no.1 filed its written statement on 26.10.1998, in which a preliminary objection was taken with regard to maintainability of the complaint before District Consumer Disputes Redressal Forum on the ground that complaint raised complicated question of fact and law, which required examination of witnesses and documents including evidence of handwriting experts, which cannot be decided by District Consumer Disputes Redressal Forum. Counsel for respondent no.1 further submits that District Consumer Disputes Redressal Forum found force in the

objection taken by respondent no.1, which is evident from the order, which was passed finally dismissing the complaint of the appellant on the said ground. Counsel also submits that even at that point of time the appellant did not choose to approach the civil court but filed an appeal against that order before the State Commission, which appeal was subsequently dismissed as withdrawn on 23.1.2002. Counsel next submits that once this objection was taken the subsequent time spent by the appellant in pursuing the complaint before District Consumer Disputes Redressal Forum and State Consumer Disputes Redressal Commission cannot be excluded from the period of limitation and the appellant cannot take benefit of Section 14 of Limitation Act. Counsel submits that the view of the Apex Court has been consistent that complicated questions of fact and law cannot be decided by the fora under the Consumer Protection Act.

9. Learned counsel for respondent no.1 relies on in the case of ***Indian Medical Association v V.P. Shantha and Others***, reported at (1995) 6 Supreme Court Cases 651, more particularly head note 'E':

"E. Consumer Protection Act, 1986 – Ss. 13 and 3 – Procedure followed by the Redressal Agencies – Meant for speedy disposal of complaints – in cases of complicated issues requiring recording of evidence of experts complainant can be directed to approach civil court."

10. I have heard counsel for the parties and also perused the order passed by learned trial court. While deciding the preliminary issue no.1 against the appellant the trial court had placed

reliance in the case of **Satnam Singh** (supra). To appreciate the rival contentions between the parties, it will be useful to reproduce Section 14 of Limitation Act, which reads as under:

"14.Exclusion of time of proceeding bona fide in court without jurisdiction. - (1) In computing the period of limitation for any suit the time during which the plaintiff has been prosecuting with due diligence another civil proceeding, whether in a court of first instance or of appeal or revision, against the defendant shall be excluded, where the proceeding relates to the same matter in issue and is prosecuted in a good faith in a court, which from defect of jurisdiction or other cause of a like nature, is unable to entertain it.

(2) In computing the period of limitation for any application, the time during which the applicant has been prosecuting with due diligence another civil proceeding, whether in a court of first instance or of appeal or revision, against the same party for the same relief shall be excluded, where such proceeding is prosecuted in good faith in a court which, from defect of jurisdiction or other cause of a like nature, is unable to entertain it.

(3) Notwithstanding anything contained in rule 2 of Order XXXIII of the Code of Civil Procedure, 1908 (5 of 1908), the provisions of sub-section (1) shall apply in relation to a fresh suit instituted on permission granted by the court under rule 1 of that Order where such permission is granted on the ground that the first suit must fail by reason of a defect in the jurisdiction of the court or other cause of a like nature."

11. As per Section 14 of Limitation Act, in computing the period of limitation for any suit, the time taken by the plaintiff in pursuing the matter with due diligence in another civil proceedings is to be excluded. The mandatory requirement of this section is that plaintiff should have been prosecuting another civil proceedings with due diligence. Whether the appellant was pursuing the matter before the Consumer Court with due diligence is the bone of contention between the parties in this appeal.

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12. While learned counsel for the appellant has submitted that appellant after exercising due diligence and upon legal advice filed a complaint before District Consumer Disputes Redressal Forum on account of deficiency of service by respondent no.1 and thereafter the appellant filed an appeal when the complaint was dismissed; counsel for respondent no.1 submits that respondent no.1 had taken a preliminary objection with regard to maintainability of the complaint at the first opportunity available when the written statement was filed as far back as on 26.10.1998. Counsel for respondent no.1 further submits that in case the appellant exercised due diligence the appellant would have withdrawn the complaint from District Consumer Disputes Redressal Forum and filed a civil suit. Counsel also submits that filing of the complaint is not objectionable but what is objectionable according to respondent no.1 is pursuing the complaint from 26.10.1998 till withdrawal of the appeal on 23.1.2002. Counsel for respondent no.1 next submits that the case of **Satnam Singh** (supra) is fully applicable to the facts of this case as in the aforementioned case aggrieved by an order passed by Rent Controller in the proceedings arising out of Section 14(1)(a) of Delhi Rent Control Act, Satnam Singh had taken an objection with regard to maintainability of appeal at the first opportunity available to him but he did not remedy his mistake, which resulted in the dismissal of his appeal.

13. In my view the case of **Satnam Singh** (supra) is clearly distinguishable in the facts of this case in view of the fact that

as per Clause 8 of Section 25B of Delhi Rent Control Act, 1958, there is an express bar in filing of an appeal and despite the bar and the objection raised the appellant continued to press his appeal. Section 25B of Delhi Rent Control Act reads as under:

"... no appeal or second appeal shall lie against an order for the recovery of possession of any premises made by the Controller in accordance with the procedure specified in this section:

Provided that the High Court may, for the purpose of satisfying itself that an order made by the Controller under this section is according to law, call for the records of the case and pass such order in respect thereto as it thinks fit."

14. Learned counsel for respondent no.1 has failed to point out any specific bar in the Consumer Protection Act, which would bar filing of a complaint against respondent no.1 Bank for deficiency of service. In fact counsel for respondent no.1, has admitted that there is no specific bar in filing a complaint against respondent no.1 Bank. The position of law with regard to filing of the complaint where complicate question arise has also been a subject matter of various decisions rendered by the Apex Court. In the case of **Dr. J.J. Merchant & Ors.** (supra), more particularly paragraphs, 9 to 12, a three Judges Bench of the Apex Court has held as under:

9. Learned counsel for the appellant next contended that the present case involves complicated question of facts for which experts including doctors would be required to be examined and their cross-examination may be necessary, therefore also, the National Commission ought to have directed the complainant to approach the civil court. For this purpose, reliance is placed upon the decision of this Court in *Indian Medical Assn. v. V.P. Shantha*, (1995) 6 SCC 651 (para 37) and it is submitted that in the present case complicated question of fact involving negligence of doctors is to be decided and, therefore, the

complainant should be directed to approach the civil court. In the aforesaid case, the Court rejected the said contention and observed thus:

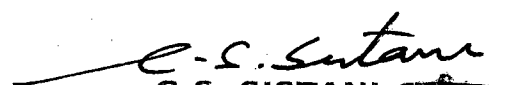
".....It has been urged that proceedings involving negligence in the matter of rendering services by a medical practitioner would raise complicated questions requiring evidence of experts to be recorded and that the procedure which is followed for determination of consumer disputes under the Act is summary in nature involving trial on the basis of affidavits and is not suitable for determination of complicated questions. It is no doubt true that sometimes complicated questions requiring recording of evidence of experts may arise in a complaint about deficiency in service based on the ground of negligence in rendering medical services by a medical practitioner; but this would not be so in all complaints about deficiency in rendering services by a medical practitioner. There may be cases which do not raise such complicated questions and the deficiency in service may be due to obvious faults which can be easily established such as removal of the wrong limb or the performance of an operation on the wrong patient or giving injection of a drug to which the patient is allergic without looking into the outpatient card containing the warning (as in *Chin Keow v. Govt. of Malaysia*, (1967) 1 WLR 813 (PC) or use of wrong gas during the course of an anaesthetic or leaving inside the patient swabs or other items of operating equipment after surgery. One often reads about such incidents in the newspapers. The issues arising in the complaints in such cases can be speedily disposed of by the procedure that is being followed by the Consumer Disputes Redressal Agencies and there is no reason why complaints regarding deficiency in service in such cases should not be adjudicated by the agencies under the Act. In complaints involving complicated issues requiring recording of evidence of experts, the complainant can be asked to approach the civil court for appropriate relief. Section 3 of the Act which prescribes that the provisions of the Act shall be in addition to and not in derogation of the provisions of any other law for the time being in force, preserves the right of the consumer to approach the civil court for necessary relief. We are, therefore, unable to hold that on the ground of composition of the

Consumer Disputes Redressal Agencies or on the ground of the procedure which is followed by the said agencies for determining the issues arising before them, the services rendered by the medical practitioners are not intended to be included in the expression 'service' as defined in Section 2(1)(o) of the Act....."

10. In the aforesaid case, the Court was dealing with a contention that services rendered by the medical practitioners are not intended to be included in the expression "service" as defined in Section 2(1)(o) of the Act. That contention was negated by the Court. Further from this decision, it is apparent that it is within the discretion of the Commission to ask the complainant to approach the civil court for appropriate relief in case the complaint involves complicated issues requiring recording of evidence of experts, which may delay the proceeding. But the court has specifically held that issues arising in the complaints in such cases can be speedily disposed of by the procedure that is being followed by the Consumer Disputes Redressal Agencies.
11. Further, under the Act the National Commission is required to be headed by a retired Judge of this Court and the State Commission is required to be headed by a retired High Court Judge. They are competent to decide complicated issues of law or facts. Hence, it would not be proper to hold that in cases where negligence of experts is alleged, consumers should be directed to approach the civil court.
12. It is next contended that such complicated questions of facts cannot be decided in summary proceedings. In our view, this submission also requires to be rejected because under the Act, for summary or speedy trial, exhaustive procedure in conformity with the principles of natural justice is provided. Therefore, merely because it is mentioned that the Commission or Forum is required to have summary trial would hardly be a ground for directing the consumer to approach the civil court. For the trial to be just and reasonable, long-drawn delayed procedure, giving ample opportunity to the litigant to harass the aggrieved other side, is not necessary. It should be kept in mind that the legislature has provided alternative, efficacious, simple, inexpensive and speedy remedy to the consumers and that should not be curtailed on such ground. It would also be a totally wrong assumption that because summary trial is provided, justice cannot be done when some questions of facts are required

to be dealt with or decided. The Act provides sufficient safeguards. For this purpose, we would refer to the procedure prescribed under the Act for disposal of the complaint."

15. In view of the fact that there was no express bar in the Consumer Protection Act, it cannot be said that appellant was not pursuing its remedy diligently. The appellant would, thus, be entitled to the benefit of Section 14 of Limitation Act. The trial court has erroneously decided the preliminary objection against the appellant.
16. At this stage, learned counsel for respondent no.1 Bank points out that out of nine cheques and one cash deposit, four cheques are patently barred by limitation.
17. It would be open for respondent no.1 Bank to raise this objection before the trial court who will decide the matter in accordance with law.
18. This court has only decided the appeal arising out of preliminary objection in filing of the suit before the trial court. The appeal is accordingly allowed in above terms. List the matter before appropriate trial court on 6.4.2011.


G.S. SISTANI, J.

March 03, 2011
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