

Indian Consumer: A Losing Identity

Kritika Rastogi*

The recent judgment of General Manage Telecom v. M. Krishnan and Anr. states that if there is a claim regarding telephone bills, then the special remedy provided in Section 7B of the Indian Telegraph Act, 1885 is applicable and the remedy under the Consumer Protection Act is by implication barred and hence, the claim in the instant case has been said to be governed by the Indian Telegraph Act to be resolved by Arbitration.

Introduction

The recent judgment of *General Manage Telecom v. M. Krishnan and Anr.*¹ is not one of its kind. The judgment essentially states that if there is a claim regarding telephone bills, then the special remedy provided in Section 7B² of the Indian Telegraph Act, 1885 is applicable and the remedy under the Consumer Protection Act is by implication barred. The Bench, consisting of Hon'ble Judges Markandey Katju and Asok Kumar Ganguly, relied upon the judgment of Chairman, Thiruvalluvar Transport Corporation v. Consumer Protection Council³ where the Supreme Court had stated that "the National Commission has no jurisdiction to adjudicate upon claims for compensation arising out of motor vehicles accidents." And hence, the claim in the instant case has been said to be governed by the Indian Telegraph Act to be resolved by Arbitration.

Although this judgment relies on the principle of *Generalia specialibus non derogant*,⁴ it does not address to the principle of harmonious construction or the doctrine of election which means that "Validity of plural remedies, if available under the law, cannot be doubted. If any standard book on the subject is examined, it will be found that the debate is directed to the application of the principle of election, where two or more remedies are available to a person. Even if the two remedies happen to be inconsistent, they continue for the person concerned to choose from, until he elects one of them, commencing an action accordingly".⁵

The perennial load of expectation that a Court of justice faces day in and day out does not relate to the delivery of justice simpliciter. It is actually the expectation of each and everyone of us that the justice should manifestly and undoubtedly, be seen to be done. In other words, the real meaning of justice moves way beyond the simple laid down textbook words of law but in turn acquire a meaning that is much deeper and in turn punctuated with a unique and distinct tradition of its own. Justice therefore is not done if the Court fails to see the two adversaries in the same light or fails put them at the same pedestal or fails to provide them an equal opportunity not simply in terms of hearing but also in terms of approaching the forum concerned. Thus, the question that we face today in light of the present judgment is whether arbitration is a feasible option to redress the claims of a common poor man of India? What we cannot at any instance forget is the impact of telecom boom or revolution has on one hand brought the technology and the ability of communication not only to the far flung areas of this country but also to even to a poor

* Student, III YEAR, National Law Institute University, Bhopal

¹ MANU/SC/1597/2009: AIR 2010 SC 90

² Section 7B Arbitration of Disputes:

(1) Except as otherwise expressly provided in this Act, if any dispute concerning any telegraph line, appliance or apparatus arises between the telegraph authority and the person or whose benefit the line, appliance or apparatus is, or has been provided, the dispute shall be determined by arbitration and shall, for the purpose of such determination, be referred to an arbitrator appointed by the Central Government either specifically for the determination of that dispute or generally for the determination of disputes under this Section.

(2) The award of the arbitrator appointed under Sub-section (1) shall be conclusive between the parties to the dispute and shall not be questioned in any Court.

³ MANU/SC/0263/1995: (1995) 2 SCC 479: AIR 1995 SC 1384: 1995 (1) UJ 463 (SC)

⁴ When a matter falls under any specific provision then it must be governed by that provision and not by general provisions

⁵ *The Bihar State Co-operative Marketing Union Ltd. v. Uma Shankar Sharan and Anr.* MANU/SC/0184/1993: AIR 1993 SC 1222: 1992 (2) UJ 625 (SC): (1992) 4 SCC 196

rikshaw-wala or Sabjiwala. At the same time, it has also opened up, as a natural repercussion, a window of exploitation of the poor and unable at the hands of Rich, powerful companies. For instance, if a middle class man has a claim of INR 500 against a big-shot private telecom company, then will he be willing to spend a fortune on arbitration to recover that claim, or will he be more willing to approach the National Consumer Dispute Redressal Commission (NCDRC)? Will the telecom company not have an advantage over the consumer where it will have the power to influence and set precedents in its favour? Thus the bigger question is this judgment an attempt made towards achieving Justice in its true spirit?

This article aims to address the aforesaid issues in light of this judgment as to whether the purpose of the NCDRC is really being fulfilled here not.

The Big Picture

In the instant case, a consumer had a claim of INR 5,000 against the telecom service provider on the grounds of discontinuation of service. Hence, the petitioner is a consumer⁶ who has a dispute⁷ against the service⁸ provided as to a defect⁹ or deficiency¹⁰ and hence has a remedy to approach the consumer forum.¹¹ Therefore, we may easily construe that the said case lies within the ambit of the Consumer Protection Act. From the Preamble and the various provisions of the 1986 Act it becomes clear that whenever a complaint in relation to any goods sold or delivered or agreed to be sold or delivered or any service provided or agreed to be provided arises, the complainant, i.e. the consumer or any voluntary consumer association or the Central or any State Government can move the appropriate Forum under the statute for redressal. The Act further states 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.”¹²

⁶ The Consumer Protection Act of 1986 defines a “consumer” under section 2(d) as:

“Consumer means any person who - (i) buys any goods for a consideration which has been paid or promised or partly paid and partly promised, or under any system of deferred payment and includes any user of such goods other than the person who buys such goods for consideration paid or promised or partly paid or partly promised, or under any system of deferred payment when such use is made with the approval of such person, but does not include a person who obtains such goods for resale or for any commercial purpose; or

(ii) hires or avails of any services for a consideration which has been paid or promised or partly paid and partly promised, or under any system of deferred payment and includes any beneficiary of such services other than the person who hires or avails of the services for consideration paid or promised, or partly paid and partly promised, or under any system of deferred payment, when such services are availed of with the approval of the first mentioned person.

⁷ Section 2(e) states:

“consumer dispute means a dispute where the person against whom a complaint has been made, denies or disputes the allegations contained in the complaint.”

⁸ Section 2(o) states:

“service means service of any description which is made available to potential users and includes the provision of facilities in connection with banking, financing, insurance, transport, processing, supply of electrical or other energy, board or lodging or both housing construction, 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.”

⁹ Section 2(f) states:

“defect means any fault, imperfection or shortcoming in the quality, quantity, potency, purity or standard expected to be maintained by or under any law by a trader in any manner whatsoever in relation to any goods”

¹⁰ Section 2(g) states:

“deficiency means any fault, imperfection, shortcoming or inadequacy in the quality, nature and manner of performance which is required to be maintained by or under any law for the time being in force or has been undertaken to be performed by a person.”

¹¹ Section 12 *inter alia* provides that a complaint in relation to any goods sold or delivered or agreed to be sold or delivered or any service provided or agreed to be provided may be filed with a District Forum by the consumer to whom such goods are sold or delivered or agreed to be sold or delivered or such service provided or agreed to be provided or by any recognised consumer association whether the consumer concerned is a member of such association or not. The explanation to the section states that a “recognised consumer association” means any voluntary consumer association registered under the Companies Act, 1956 or any other law for the time being in force.

¹² Section 3 of the Consumer Protection Act, 1986

On the other hand, the Rule 413 of the Telegraph Rules provides that all services relating to telephone are subject to Telegraph Rules and Section 7B of the Indian Telegraph Act refers such matters to arbitration.

In *Prem Jeet Kumar v. Surender Gandotra and Ors.*¹³, the Supreme Court held that just because two provisions are inconsistent with each other does not mean that the Court relies on one and ignores the other. A harmonious construction of the two provisions is to be made so that both the provisions are satisfied. In the case of *Contonment Board, Mhow v. M.P. State Road Transport Corporation*,¹⁴ the Supreme Court held “The conflict between the two provisions has to be resolved by proper interpretation of the provisions of the statute and the intent of the legislature.”

In the case of the *Thiruvalluvar Transport Corporation*, a consumer, using a bus service, passed away when the bus met with an accident. The bus driver was trying to overtake a bullock cart and while doing so, the bullocks got frightened, due to which the driver had to take a sharp turn which resulted in an accident.

Here, the Claimant is a consumer who was using a service and due to a defect on the part of the driver, an accident was caused which proved fatal to him. Had the bus driver not been driving recklessly, the bullocks would not have been frightened and the accident could have been avoided. Hence, the Claimant had a remedy under the Consumer Protection Act.

The Motor Vehicles Act, 1988; however, states that such a complaint would be governed by Section 165 of the Act which states for the constitution of a Motor Accidents Claim Tribunal, and hence the Hon'ble Court held that the Claimant could claim only under the Motor Vehicles Act and not under the Consumer Protection Act.

Also, similarly in the case of *Union of India and Anr. v. M. Adair Kalam II*¹⁵ the National Commission held that it had no jurisdiction to entertain complaints of loss, destruction, damage or non-delivery of goods by railway on account of deficiency in service since such claims fell within the exclusive jurisdiction of the Railway Claims Tribunal constituted under the Railway Claims Tribunal Act, 1987.

The real question here arises is that when the claims in the abovementioned cases are being governed by both, the Consumer Protection Act and their respective special laws, then why is only the principle of *Generalia specialibus non derogant* being applied and not the doctrine of election which enables the consumer to choose a remedy which suits him better? Why is the consumer being denied of this choice?

Special Law Versus General Law

Section 41 of the Indian Penal Code, 1860 states: A “special law” is a law applicable to a particular subject.

Section 42 of the Indian Penal Code, 1860 states: A “local law” is a law applicable only to a particular part of India.

This means that acts like the Indian Telegraph Act, 1885, the Motor Vehicles Act, 1988, or the Railway Claims Tribunal constituted under the Railway Claims Tribunal Act, 1987 are all special acts as they pertain to particular subjects while the Consumer Protection Act, 1986 is a local law or a general law which pertains to the general guidelines to be followed in consumer disputes. The principle of *Generalia specialibus non derogant* applies in the interpretation of statutes. It means that when there is a conflict between a local law and a special law, then the provisions of the special law apply. But Section 3 of the Consumer Protection Act also states 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.

It was held in *Kalyani Sales Company and Anr. v. Union of India and Anr.*¹⁶ that “The doctrine of election is a

¹³ MANU/SC/0489/1991: [1991] 3 SCR 782: 1991 (2) UJ 612 (SC)

¹⁴ MANU/SC/1404/1997: AIR 1997 SC 2013: (1997) 9 SCC 450

¹⁵ (1993) CPJ 145

¹⁶ MANU/PH/0505/2005: AIR 2006 P&H 107: [2006] 70 SCL 177 (Punj&Har)

rule of estoppel. It is an obligation imposed upon a party by the Court of equity to choose between two inconsistent or alternative rights or claims.....The first proviso to Section 19 gives statutory recognition to the doctrine of election which contemplates that one remedy can be taken in respect of one action. It is not open to the bank or the financial institution to avail of both the remedies simultaneously.”

The Bombay High in the matter of *Wardhaman Shamjibhai Dharamsi v. Bank of Maharashtra*,¹⁷ held that (Para 11 of CLC) “.... a creditor has to elect to move either under one of the two Acts in case of multiplicity of proceedings”

Relying on the above two judgments, in the case of *Tensile Steel Ltd. and Anr. v. Punjab and Sind Bank and Ors.*¹⁸, it was held that, “the principles of interpretation of statute do not permit a Court of law to take a view which would lead to multiplicity of proceedings but a choice of election of law is permissible”

Although, it was held in *Dy. Chief General Manager, Eastern Railway v. Dr. D. K. Sharma*¹⁹ “Consumer forums cannot curtail the jurisdiction of the Railway Tribunal or any quasi-judicial body but can supplement the jurisdiction of these bodies in appropriate cases.

Therefore, we may safely understand that while interpreting statutes, the doctrine of election has to be given attention and in cases where there are multiple remedies available to the Claimant, he may be given a choice to choose a remedy which suits him the best as the main intent of the legislature is to address the claims of the aggrieved Claimant.

Why Not Arbitration?

In *Fair Air Engineers Pvt. Ltd. v. N. K. Modi*²⁰, it was held “....the legislature intended to provide a remedy in addition to the consentient arbitration which could be enforced under:

Arbitration Act or the civil action in a suit under the provisions of the Code of Civil Procedure. Section 34 of the Arbitration Act does not confer any automatic right nor create any automatic embargo on the exercise of the power by the Judicial Authority under the Consumer Protection Act. It is a matter of discretion. The District Forum, The National Commission and the State Commission are Judicial Authorities, for the purpose of Section 34 of the Arbitration Act, in view of the object of the Act and by operation of Section 3 thereof, these forums created under the Act are at liberty to proceed with the matters in accordance with the provisions of the Act rather than relegating the parties to an arbitration proceeding pursuant to a contract entered into between the parties. The reason is that the Act intends to relieve the consumers of the cumbersome arbitration proceedings or civil action unless the Forums on their own and peculiar facts and circumstances of a particular case, come to the conclusion that the appropriate Forum for adjudication of the disputes would be otherwise than those given in the Act.” These lines even are not exactly and specifically relevant if read in most strict manner but if looked from the perspective of understanding or realizing the intent of the legislature and also the Hon’ble Supreme Court point towards the position of a common man or consumer. It points towards the fact Consumer Protection Act was created with the common man or consumer at the centre of it. It was an attempt made towards parity, it was an attempt to make justice affordable and approachable. What we cannot and should not ever forget is the uniqueness of the country we live in. This country is marked with its patience and sacrifice. These are values that are being imbibed in us and thus, most of us do not by very nature fight. The consumer protection act after much attempts have created a situation where the common man has started to make attempts towards fighting with the big corporations where the justice is not only quick, cheap but also under a legislation that is made for the common man and consumer. Arbitration on the contrary is mechanism built for the people who understand the working of legal system, who can devise their own procedure and system but at a very high cost. The question again

¹⁷ 2006 (1) DRTC 339; 2005 CLC 1300

¹⁸ MANU/GJ/8188/2006; [2007] 79 SCL 570 (GUJ); AIR 2007 GUJ 126

¹⁹ 2001 CCJ 559

²⁰ 1997 CCJ (SC)

is, are we moving towards achieving justice equally for one and all?

Conclusion

From the above detailed discussion, we understand that the Consumer Protection Act has been enacted with a view to address the complaints of a consumer and to make sure that their rights are protected and promoted.²¹ For this purpose, consumers can approach a consumer commission and ask for redressal. But this being a general law is overridden by any special law which contains provisions for redressal under them, thus causing conflict of law and the prevalence of *Generalia specialibus non derogant*.

When the intent of the legislature is to address the claims to the consumer in the best possible manner, then why is the consumer not permitted to choose for himself which law he wants to be governed by? In a situation on multiplicity of laws, instead of being forced to follow the special law, why is the consumer not given a choice to be governed by the law which suits him better? An arbitration session may not be as desired by a person as compared to the NCDRC, or a Motor Accidents Claim Tribunal may not be as convenient as appearing before the NCDRC. This situation could be the other way round too, but then it will be a choice made by the consumer himself. The intention of the legislature is being fulfilled in either ways, then why not give the power to choose to the aggrieved?

The principle of *Generalia specialibus non derogant* is to be used where it is necessary to interpret the laws in case of a conflict, not to force the law on someone. Hence, when the doctrine of election is available to the Claimant, he should have an option to choose which laws he wants to be governed with. It is only then that the true intention of the legislature will be satisfied.