

RAJEEV HITENDRA PATHAN AND ORS.
v.
ACHYUT KASHINATH KAREKAR AND ANR.

SEPTEMBER 17, 2007

[DR. ARIJIT PASAYAT AND LOKESHWAR SINGH PANTA, JJ.]

Consumer Protection Act, 1986: s. 22(A)—Power of State Commission to restore complaint which was dismissed for default—Divergent view of coordinate benches—Matter referred to larger bench to consider the issue.

The question which has arisen for consideration in the present appeal is whether the National Commission was right in holding that the State Commission has the power to restore the complaint which was dismissed for default.

In appeal to this Court, appellant contended that the view contrary to what has been stated in **New India Assurance's* case has been taken in ***Jyotsana's* case. Further, Consumer Protection Act, 1986 was amended in 2003 and by the newly introduced Section 22A, National Commission was given power of restoration but no such power was conferred on the State Commission.

Referring the matter to the larger bench, the Court

HELD: In the latter case i.e. **New India Assurance's* case, reference was not made to the earlier decision in ***Jyotsana's* case. Further the effect of the amendment to the Act in 2003 whereby s. 22(A) was introduced has the effect of conferment of power of restoration on National Commission, but not to the State Commission. In view of the divergence of views expressed by coordinate Benches, the matter is referred to larger bench to consider the question whether the State Commission has the power to recall the *ex-parte* order. [Para 7] [1060-C]

**New India Assurance Co. Ltd. v. R. Srinivasan*, [2000] 3 SCC 242;
***Jyotsana Arvindkumar Shah and Ors. v. Bombay Hospital Trust*, [1999] 4 SCC 325, referred to.

A CIVIL APPELLATE JURISDICTION : Civil Appeal No. 4307 of 2007.

From the Judgment and Order dated 16.11.2005 of the National Consumer Disputes Redressal Commission, New Delhi in Revision Petition No. 551 of 2005.

B Siddharth Bhatnagar and V.D. Khanna for the Appellants.

Ravindra Keshavrao Adsure for the Respondents.

The Judgment of the Court was delivered by

C DR. ARIJIT PASAYAT, J. 1. Leave granted.

2. Challenge in this appeal is to the order passed by the National Consumer Disputes Redressal Commission, New Delhi (in short 'National Commission') holding that the State Commission has the power to restore the complaint which was dismissed for default. For coming to the aforesaid conclusion the National Commission relied upon the decision of this Court in *New India Assurance Co. Ltd. v. R. Srinivasan*, [2000] 3 SCC 242.

3. Learned counsel for the appellant submitted that the view contrary to what has been stated in *New India Assurance's* case (supra) has been taken in *Jyotsana Arvindkumar Shah and Ors. v. Bombay Hospital Trust*, [1999] 4 SCC 325. Further, Consumer Protection Act, 1986 (in short the 'Act') was amended in 2003 and by the newly introduced Section 22A, National Commission was given power of restoration but no such power has been conferred on the State Commission.

4. Learned Counsel for the respondents on the other hand submitted that the National Commission has referred the case to the factual position and, therefore, held that restoration was permissible.

5. In *Jyotsana's* case (supra) it was observed at para 7 as follows:

G "We heard learned Counsel on both sides for quite some time. When we asked the learned Counsel appearing for the respondent to point out the provision in the Act which enables the State Commission to set aside the reasoned order passed, though *ex parte*, he could not lay his hands on any of the provisions in the Act. As a matter of fact, before the State Commission the appellants brought to its notice the two orders, one passed by the Bihar State Commission in *Chief*

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Manager, UCO Bank v. Ram Govind Agarwal, (1996) 1 CPR 351 and the other passed by the National Commission in *Director, Forest Research Institute v. Sunshine Enterprises*, (1997) 1 CPR 42 holding that the redressal agencies have no power to recall or review their *ex parte* order. The State Commission had distinguished the above said orders on the ground that in those two cases the opponents had not only not appeared but also failed to put in their written statements. In other words, in the case on hand, according to the State Commission, the opponent (respondent) having filed the written statements, the failure to consider the same by the State Commission before passing the order would be a valid ground for setting aside the *ex parte* order. The State Commission, however, fell into an error in not bearing in mind that the Act under which it is functioning has not provided it with any jurisdiction to set aside the *ex parte* reasoned order. It is also seen from the order of the State Commission that it was influenced by the concluding portion of the judgment of the Bombay High Court to the effect that the respondent (writ petitioner) could approach the appellate authority or make an appropriate application before the State Commission for setting aside the *ex parte* order, if permissible under the law. Here again, the State Commission failed to appreciate that the observation of the High Court would help the respondent, if permissible under the law. If the law does not permit the respondent to move the application for setting aside the *ex parte* order, which appears to be the position, the order of the State Commission setting aside the *ex parte* order cannot be sustained. As stated earlier, there is no dispute that there is no provision in the Act enabling the State Commission to set aside an *ex parte* order."

6. Subsequently, in *New India Assurance's* case (supra) this Court appears to have taken a different view as it is evident from what has been stated in paragraph 18, the same reads as follows:

"We only intend to invoke the spirit of the principle behind the above dictum in support of our view that every court or judicial body or authority, which has a duty to decide a lis between two parties, inherently possesses the power to dismiss a case in default. Where a case is called up for hearing and the party is not present, the court or the judicial or quasi judicial body is under no obligation to keep the matter pending before it or to pursue the matter on behalf of the complainant who had instituted the proceedings. That is not the

A function of the court or, for that matter of a judicial or quasi judicial body. In the absence of the complainant, therefore, the court will be well within its jurisdiction to dismiss the complaint, for non-prosecution. So also, it would have the inherent power and jurisdiction to restore the complaint on good cause being shown for the non-appearance of the complainant."

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7. In the latter case i.e. *New India Assurance's* case (supra) reference was not made to the earlier decision in *Jyotsana's* case (supra). Further the effect of the amendment to the Act in 2003 whereby Section 22(A) was introduced has the effect of conferment of power of restoration on National Commission, but not to the State Commission. In view of the divergence of views expressed by coordinate Benches, we refer the matter to a larger Bench to consider the question whether the State Commission has the power to recall the *ex parte* order. Records be placed before the Hon'ble Chief Justice of India for appropriate orders.

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D D.G.

Referred to larger Bench.