

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL No. 4140 OF 2006

BRITISH AIRWAYS PLC. ... Appellant(s)

Versus

M/S. ABSOLUTE AROMATICS LTD. ... Respondent(s)

O R D E R

1. British Airways PLC- appellant (for short, 'the Carrier') has challenged the order dated September 27, 2005 passed by Monopolies Restrictive Trade Practices Commission, New Delhi (for short 'the Commission') in this appeal by special leave.

2. M/s. Absolute Aromatics Limited (for short 'the Shipper') initiated two proceedings before the Commission; one by way of complaint under Sections 36, 36A, 36B and 36D read with Sections 2(i) and 10(a) (i) of the Monopolies and Restrictive Trade Practices Act, 1969 (for short 'MRTP Act') for instituting enquiry against the Carrier for various monopolistic, restrictive and unfair trade practices and for passing 'Cease and Desist' order directing the Carrier not to repeat or continue similar practices and the other by way of application under Section 12B of the MRTP Act for award of compensation amounting to US\$ 6,16,174,43.

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3. These proceedings were broadly based on the following facts:

The Shipper manufactures various products including Peppermint Oil. Based on the advertisements issued by the Carrier in various newspapers that they provide prompt, excellent and fast cargo services to international

destinations, the Shipper claims to have booked 40 drums of Peppermint oil for export to M/s. Amigo & Arditi, Fernando De La Moard, Paraguay, through the Carrier's agent Trade Wings Ltd. , New Delhi on March 31, 1997 vide Air Way Bill No. 125-5452-6566 (for Short 'AWB 6566'). The airport of destination as per AWB 6566 was Sao Paulo. The value of the

goods was declared as US\$ 1,00,080.00 and the freight of Rs. 9,79,130/- was paid by the Shipper to the Carrier.

According to the Shipper, these goods were never delivered

to the consignee. On April, 11, 1997 a second consignment of 40 drums of the Peppermint Oil was booked with the Carrier vide Air way Bill No. 125-5452-6570 (for short, 'AWB 6570') for export to the same consignee. The value of the second consignment was also declared as US\$ 1,00,080.00 and the freight of Rs. 9,79,130/- was paid. The airport of

destination was Ascuncion. The said consignment according

to the Shipper was delayed and delivered to the consignee on

June, 6, 1997. The Shipper averred that the Carrier was

highly negligent and the services rendered by them were

deficient and there was unusual delay in delivery of the

second consignment and the first consignment was never delivered.

4. The Commission issued notice of inquiry in the complaint made for unfair trade practice adopted by the Carrier and also issued notice on the compensation application.

5. The Carrier responded to the notices issued by the Commission and raised the objection about the maintainability of the complaint and the compensation application. The Carrier set up the case that they have

not indulged in any unfair trade practice or restrictive trade practice. They averred that both consignments were promptly carried to the destination and since there were

fresh instructions received from the Shipper in respect of change of destination as well as consignee, some delay might have occurred. Moreover, the goods were not cleared by the Brazilian Customs promptly. No sooner the goods were cleared by the Brazilian Customs, these were delivered to the consignee. it was also the stand of the Carrier that even if there was some delay in delivery of the goods, that would not constitute monopolistic and restrictive or unfair trade practice.

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6. Both parties produced documentary evidence including the correspondence exchanged between them in support of their stand set up before the Commission.

7. The Commission in the impugned order held that the Carrier indulged in unfair trade practice and awarded compensation to the Shipper in the sum of US\$ 1,00,080 with 6% interest from the date of application + Rs. 9,79,130/- with interest @ 6% from the date of application till the date of payment.

8. It may be noted here that in view of the interim order passed by this Court, the Carrier has deposited the awarded amount with the Registry of this Court and the same has been invested in the fixed deposit.

9. Having heard Mr. M.N.Krishnamani, learned senior counsel for the appellant-Carrier and Mr. Vivek Kohli, learned counsel for the respondent-Shipper and on thoughtful consideration of the entire matter, we are of the opinion that the impugned order cannot be sustained since the Commission has not adverted to the diverse aspects having bearing in the matter. Particularly, the conditions of the contract have not at all been considered. The question as to whether delay or non-delivery of goods can be condemned as an unfair trade practice was required to be examined in the light of the law laid down by this Court which the

Commission failed to do.

10. Clauses 8.1, 11,12.1 and 12.2. of the Contract read as under:-

Clause 8.1

Carrier undertakes to complete the carriage hereunder with reasonable dispatch. Carrier may use alternate carriers or aircraft and may without notice and with due regard to the

interests of the shipper use other means of transportation. Carrier is authorised by shipper to select the routing and all intermediate stopping places that it deems appropriate or to change or deviate from the routing shown on the face hereof.

Clause 11

Notice of arrival of good will be given promptly to the consignee or to the person indicted on the face thereof as the person to be notified. On arrival of the goods at the place of destination, subject to the acceptance

of other instructions from the shipper prior to arrival of the goods at the place of destination, delivery will be made to, or in accordance with the instructions of the consignee. If the consignee declines to accept the goods or cannot be communicated with, destination will be in accordance with instructions of the shipper.

Clause 12.1

The person entitled to delivery must make a complaint to the carrier in writing in the case:

12.1.1: of visible damage to the goods, immediately after discovery of the damage and the latest within fourteen days from the receipt of the goods.

12.1.2: of other damage to the goods, within 14 days from the date of receipt of the goods.

12.1.3: of delay, within 21 days of the date

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the goods are placed at his disposal and

12.1.4: of non-delivery of the goods, within 120 days from the date of the issue of Airway bill.

12.2: for the purpose of 12.1 complaint in writing may be made to the carrier whose Airways bill was used or to the first carrier or to the last carrier or to the carrier who performed the transportation during which the loss, damage or delay took place.

11. Under Clause 8.1 it is obligatory upon the Carrier to

complete the carriage with reasonable dispatch.

Clause 11

provides that notice of arrival of goods will be given promptly to the consignee or to the person indicated in the Air way bill. It also provides that subject to the instructions that may be received from the Shipper and accepted by the Carrier prior to the arrival of the goods at the place of destination, the delivery will be made on arrival of the goods at the place of the destination to the consignee.

12. Clause 12.1 is very material. It provides that the person entitled to delivery (i.e. consignee) must make a complaint to the Carrier in writing in case of delay within 21 days of the date of the goods are delivered to him and in case of non delivery of the goods within 120 days from the date of the issue of Air way bill. Clause 12.2 provides that complaint may be made by the consignee to the Carrier whose Air way bill was used or to the first Carrier or to the last Carrier or to the Carrier who performed transportation during which the loss, damage or delay took place.

13. Para 27 of the second Schedule appended to The Carriage by Air Act, 1972 (for short '1972 Act') reads thus:-

27 (1) Receipt by the person entitled to delivery of baggage or cargo without complaint is prima facie evidence that the same has been delivered in good condition and in accordance with the document of carriage.

(2) In the case of damage, the person entitled to delivery must complain to the carrier forthwith after the discovery of the damage, and, at the latest, within seven days from the date of receipt in the case of baggage and fourteen days from the date of

receipt in the case of cargo. In the case of delay the complaint must be made at the latest within twenty-one days from the date on which the baggage or cargo have been placed at his disposal.

(3) Every document of carriage or by separate notice in writing dispatched within the time aforesaid.

(4) Failing complaint within the times aforesaid, no action shall lie against the carrier, save in the case of fraud on his part.

14. Para 27 thus mandates that in case of delay the complaint must be made at the latest within 21 days from the date of receipt of the baggage or cargo by the person who is entitled to delivery.

15. We refrain from giving any final opinion concerning the conditions of the contract between the parties and the

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effect of Para 27 of the second Schedule appended to 1972

Act as these aspects need proper consideration by the Commission in the light of the pleadings of the parties and the evidence produced by them. Surely these aspects have bearing on the outcome of the case.

16. It is pertinent to notice that the Commission, in its order, has recorded a finding that the Carrier has not indulged into restrictive trade practice. The Commission also recorded a finding that there is no evidence that it is the character of the Carrier to carry such unfair trade practice or it is being generally indulged by the Carrier.

As a matter of fact, the Commission held that there is no evidence to show that such unfair trade practice was indulged by the Carrier in respect of any other consignment. However, the Commission held that this was a case of single act of unfair trade practice. But, surprisingly the Commission failed to consider as to whether the alleged delay in delivery of the goods or non-delivery can be condemned as unfair trade practice envisaged under Section 36A of the MRTP Act. As a matter of fact, there is no

finding at all by the Commission that the representations contained in the advertisements were false statements and were misleading. In the case of Rajasthan Housing Board Vs.

Parvati Devi, AIR 2000 SC 1940, this Court, while dealing with Section 36A of the MRTP Act, stated the legal position

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as under:

"For deciding such question, the Commission has to find out whether a particular act can be condemned as an unfair trade practice; whether representation contained a false statement and was misleading and what was the effect of such a representation made to the common man. The issue cannot be resolved by merely holding that representation was made to hand over the possession within stipulated period and the same is not complied with or some lesser constructed area is given after the construction of the building. The Commission has to find out whether the representation, complained of contains the element of misleading the buyer and whether buyers are misled or they are informed in

advance that there is likelihood of delay in delivering the possession of constructed building and also increase in the cost. For this purpose, terms and conditions of the agreement are required to be examined by the Commission. Not only this, the Commission is required to consider whether the Board has adopted unfair method or deceptive practice for the purpose of promoting the sale, use or supply of any goods or for the provisions of any services. Unless there is finding on this issue, appellant Board cannot be penalised for unfair trade practice."

17. But while deciding the question of unfair trade practice, the commission overlooked the aspects highlighted

by this Court in Parvati Devi's case (supra). The Commission

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also failed to consider whether the Carrier adopted unfair method or deceptive practice for the purpose of promoting its services. Unless the findings were recorded by the Commission on these aspects on examination of the conditions of the agreement, the Carrier could not have been held guilty of unfair trade practice.

18. Considering the infirmities and flaws in the impugned order and lack of consideration of all relevant aspects by the Commission, we are satisfied that the impugned order

cannot be sustained and the matter has to be remanded for fresh consideration on all issues, factual as well as legal, raised by the parties in their pleadings.

19. For the foregoing reasons, we allow this appeal and set aside the impugned order passed by the Monopolies and

Restrictive Trade Practices Commission, New Delhi and remand the matter (UTPE No. 433/97 and Application No. 15/98) to the National Consumer Disputes Redressal Commission (for short, 'National Commission') for fresh hearing and decision in accordance with law. The matter has been remanded to the National Commission in view of repeal of the MRTP Act and abolition of MRTP Commission. All contentions of the parties are kept open to be agitated before the National Commission.

Since the matter is quite old, we request the National Commission to decide these proceedings as early as may be

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possible. We are informed that the amount deposited by the appellant has been invested in a fixed deposit and that the maturity date of the said fixed deposit is 10.11.2010. In case, the National Commission decides the matter before 10.11.2010, the amount deposited by the appellant along with accrued interest shall be paid to the successful party. However, if the National Commission is unable to decide the matter before 10.11.2010, the Registry shall return the amount deposited by the appellant along with the accrued interest to the appellant. The parties shall appear before the National Commission on 12th July, 2010. No order as to costs.

20. The original record received from the Commission shall be transmitted to the National Commission immediately.

.....J.
(R.M.LODHA)

.....J.
(A.K.PATNAIK)

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New Delhi,
June 23, 2010.

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ITEM NO.101
(P.H.)

Court No.4

SECTION XVII

S U P R E M E C O U R T O F I N D I A
RECORD OF PROCEEDINGS

CIVIL APPEAL NO(s). 4140 OF 2006

BRITISH AIRWAYS PLC.

Appellant (s)

VERSUS

M/S. ABSOLUTE AROMATICS LTD.

Respondent(s)

Date: 23/06/2010 This Appeal was called on for hearing today.

CORAM :

HON'BLE MR. JUSTICE R.M. LODHA
HON'BLE MR. JUSTICE A.K. PATNAIK
(VACATION BENCH)

For Appellant(s) Mr. M.N.Krishnamani, Sr. Adv.
Mr. H.Wadhvani, Adv.
Mr. Amit Kumar, Adv.
Mr. Preet Pal Singh, Adv.
Mr. Sanjeev Sachdeva, Adv.

For Respondent(s) Mr. Vivek Kohli, Adv.
Mr. Lokesh Bhala, Adv.
Mr. Rohit Tandon, Adv.
Ms. Jasmeet Kaur, Adv.
Mr. Subramonium Prasad, Adv.

UPON hearing counsel the Court made the following
O R D E R

The appeal is allowed in terms of the signed order.

(Shashi Sareen)
Court Master

(Indu Satija)
Court Master

(Signed order is placed on the file)