

IN THE STATE COMMISSION: DELHI
(Constituted under Section 9 of the Consumer Protection Act, 1986)

Date of Decision:01.05.2017

First Appeal- 549/2015

(Arising out of the order dated 31.10.2015 passed in Complainant Case No. 53/2013 by the District Consumer Disputes Redressal Forum (Central), Kashmere Gate, Delhi)

M/s. Emami Ltd.,
Registered Office:
Emami Tower, 687,
Anandapur, E.M. Bypass,
Kolkata-700107.

Also at 2E/26,
Jhandewalan Extension,
New Delhi-110055.

.....Appellant

Versus

Nikhil Jain,
B-9/3, Vallabh Vihar Society,
Sector-13, Rohini,
Delhi-110085.

.....Respondent

CORAM

Justice Veena Birbal, President
Salma Noor, Member

1. Whether reporters of local newspaper be allowed to see the judgment?
2. To be referred to the reporter or not?

Justice Veena Birbal, President

1. This is an appeal under Section 15 of the Consumer Protection Act (in short, 'the Act') wherein challenge is made to order dated 31.10.2015

passed by the District Consumer Dispute Redressal Forum (Central), Kashmere Gate, District New Delhi (in short, the District Forum) in CC No. 53/2013 whereby the aforesaid complaint case has been allowed.

2. Briefly the facts relevant for the disposal of the present appeal are that the respondent herein i.e. complainant before the District Forum had filed a complaint under section 12 of the Act alleging therein that the appellant/OP had adopted unfair trade practice by selling its product **Fair and Handsome Cream, World's No.1 Fairness Cream for Men** (hereinafter referred as "the Product"). The said Product is manufactured, sold and distributed by appellant/OP. It was alleged that the respondent/complainant was highly influenced by the advertisements broadcasted on television whereby the appellant/OP had used famous actor Shahrukh Khan as its Brand Ambassador for promotion of the said product by making false claims and promises. It had been falsely claimed that the aforesaid product was providing fairness to men in just 3 weeks.

3. It was alleged that the said Product was purchased by respondent/complainant from M/s KB Fair Price Shop, C-37, Ground Floor, Prashant Vihar, New Delhi wherein following benefits were given on its package:

- “1. Fast Action Lumino Peptide- Unique Lumino Peptide Complex effectively penetrates deep in to tough male skin, making it fairer in just 3 Weeks.
2. UV Block- Zinc Oxide protects skin from pigmentation caused by exposure to UVA/UVB rays, dirt and pollution.

3. Mark Free- Aloe Vera removes blemishes caused by shaving cuts and bruises.
4. Protein Booster- Smoothens skin, improves texture, reduces wrinkles and restores skin elasticity.
5. Glow Plus- Skin nourishing agents like Vitamin-E & A make the skin glow more than ever before.”

4. It was alleged that respondent/complainant had used the product as per the directions mentioned on its packaging. Despite that it had failed to show any of the desired results. The respondent/complainant brought the matter to the notice of appellant/OP through e-mails but no response was given. It was alleged that the complaint was maintainable under Section 2(f) and Section 2 (r) of the Act as the Product was not of the quality and potency as claimed by the appellant/OP. It was alleged that the appellant/OP had adopted unfair trade practice for the purpose of promoting the sale, use and supply of the aforesaid product by falsely representing that it had characteristics and benefits by making false advertisements etc. On being aggrieved by the false claims and misrepresentation about alleged effectiveness of the product, the respondent/complainant had filed the aforesaid complaint before the Ld. District Forum praying that the appellant/OP be ordered to discontinue the unfair trade practice as per Section 14 of the Act and to give an advertisement in newspapers, for a period of one year, across the country in English and Hindi and vernacular languages that such products did not provide any fairness to the men and to pay a sum of Rs. 19, 90,000/- as

compensation along with Rs. 10,000/- as litigation cost as it had played with the emotion of respondent/complainant by making false claims.

5. The complaint was opposed by the appellant/OP by filing written statement wherein the purchase of the said product and the alleged use of the same by respondent/complainant as per directions given was denied. Even the alleged cash memo by which it was alleged that the respondent/complainant had purchased the product was also disputed. It was alleged that the respondent/complainant had filed a false claim to malign the goodwill and reputation of the appellant/OP i.e. a renowned manufacturer of consumer goods popular in national and international market. It was also alleged that the product in question has been manufactured after extensive scientific research. It was alleged that one of the ingredients of said product i.e. Lumino Peptide has the quality of making the skin fairer. It was alleged that the said product is basically a personal care product to keep the skin healthy. It was alleged that the skin being one of the largest organ of the human body and the facial and neck skin being largely exposed to the vagaries of nature, sunlight (ultra violet rays), dust, wind etc., the said product provides protection and nourishment to the facial and neck skin. It was alleged that the said product has been manufactured specifically for use in tropical country for providing protection from UV Rays of the sun and makes the skin soft, fairer and supple generally, adding a healthy glow. The degree of effect would obviously vary

from person to person depending upon the other variable factors. It was alleged that the advertisement was neither false nor misleading.

6. It was alleged that no evidence had been led by the respondent/complainant that he used the product regularly as per directions given for use and that his skin condition did not improve at all. It was alleged that the claim had been made without any basis and to malign the goodwill and/or image of the appellant/OP and the same was filed with ulterior motives and the complaint was liable to be dismissed. It was alleged that regular and proper use of the product would definitely enhance the skin health inter-alia by protecting and nourishing the skin. It was alleged that there was no evidence whatsoever before the Ld. District Forum that the complainant used the cream regularly and that his skin condition did not improve at all. A prayer was made for the dismissal of the complaint with exemplary cost.

7. Rejoinder was filed by the respondent/complainant denying the allegations made in the written statement and respondent/complainant had reiterated the averments made in the complaint.

8. Both the parties had filed their evidence in the form of affidavits and also filed written arguments.

9. Ld. District Forum heard both parties and also saw the advertisements of the product as CD of the same was placed on record by the respondent/complainant. The Ld. District Forum held that the advertisements given by the appellant/OP make a representation to the

general public that by use of the said product, they can achieve fair complexion. It was held that the same was in direct contrast with the defence taken by the OP in written statement. It was further held that no attempt was made on behalf of the appellant/OP to show and justify the advertisements which hold out a promise of the skin getting fairer by the use of product. It was held that advertisement was an unfair trade practice adopted by appellant/OP in order to sell its product. It was further held that appellant/OP was also guilty of deficiency in service to respondent/complainant as the product sold to him was found to be defective. Accordingly the Ld. District Forum directed the appellant/OP as under:

- “1. Pay to the complainant a sum of Rs.10,000/- (Rs Ten Thousands Only) as compensation which will also include the cost of litigation.
2. Deposit a sum of Rs.15 Lacs (Rs Fifteen Lacs Only) as punitive damages with the consumer welfare fund maintained with the State Commission, Delhi.
3. Withdraw the advertisements representing that the use of the product will change the complexion from dark to whitish or from whitish to fair.”

10. Aggrieved with the aforesaid order, the present appeal is filed.

11. Ld. Counsel for the appellant/OP has submitted that the Ld. District Forum has failed to appreciate that the respondent/complainant is not a ‘consumer’ within the meaning of Section 2(1) (d) of the Act. It is contended that the veracity of cash memo by which it is alleged that the respondent/complainant had purchased the product was challenged by

appellant/OP. It is contended that the cash memo on record does not contain the name of the purchaser, name of the shop from where it is alleged that the product was purchased. It is contended that the District Forum has not considered the aforesaid aspect of the matter. It is further contended that even assuming the respondent/complainant is a 'consumer', there is no evidence filed by respondent/complainant that the product was used as per the directions printed on the said product. It is contended that the respondent/complainant has failed to discharge the onus as a 'complainant'. It is further contended that the product was also not placed before the District Forum. It is contended that Ld. District Forum ought to have sent the sample of the product for testing to a laboratory as per mandatory requirement under Section 13(1) (c) of the Act. It is further contended that the appellant/OP has placed on record several expert experiences/reports which had remained uncontroverted and unrebutted. The said reports have been ignored by the Ld. District Forum. It is contended that no reasoning has been given in the order by Ld. District Forum for discarding the aforesaid reports. It is further contended that there is no evidence on record that respondent/complainant had actually used the product as per the directions given on the product. It is contended that impugned order has serious consequences on the appellant/OP and the District Forum ought to have considered at least the material evidence on record before passing the impugned order. It is further contended that the respondent/complainant never appeared before the District Forum in

person. Only photograph of the respondent/complainant was produced at belated stage which was not sufficient in coming to the conclusion that the product in question is defective or that the respondent/complainant has not been benefitted by the said product.

12. AR of the respondent/complainant has submitted that the respondent/complainant had purchased the product for his personal use on the basis of promise made by an actor, Shahrukh Khan in TV advertisements on behalf of Appellant/OP that the product provides fairness to men in three weeks. It is submitted that the promise is also given in the packaging of the product. It is submitted that the Ld. District Forum has considered the promise made and words used by actor, Shahrukh Khan for promoting the product and thereafter has passed the impugned order by observing that the advertisement is making representation to the general public that by use of the product, they can achieve fair complexion which is in direct contrast with the defence taken by the appellant/OP in written statement. It is contended that in written statement, appellant/OP has claimed that the use of product improves the health and quality of skin by providing protection and nourishment to the facial and neck skin which are more exposed to the vagaries of nature, sunlight, dust, wind etc. It is contended that there is no mention in the written statement that one can achieve fair complexion by use of product. It is contended that respondent/complainant has categorically stated in the evidence by way of affidavit that by use of the product, his complexion did not improve. It is

contended that the finding of unfair trade practice adopted by appellant/OP to sell its product as observed by the Ld. District Forum is based on material on record. It is contended that the test reports produced by the appellant/OP have been prepared under a private arrangement between the appellant/OP and the concerned Experts/Labs and the same are of no help to appellant/OP. It is further contended that there is no compulsory requirement of testing a product under Section 13(1)(c) of the Act as has been contended. The respondent/complainant has relied upon the judgement of National Commission in ***Vindhya Pipes and Plastics Ltd. v. Angrej Singh and Ors., Revision Petition No.4534/2012, decided on 17.12.2014.*** It is contended that the District Forum has rightly passed the impugned order. There is no illegality in the impugned order.

13. We have considered the submission made and perused the material on record.

14. Perusal of impugned order shows that Ld. District Forum has noted different contentions of appellant/OP about the efficacy of product and that the product has all the ingredients as claimed in the advertisement. The District Forum has also noted various test reports of different labs relied upon by appellant/OP to prove that the efficacy of the product is tested. Ld. District Forum also noted about the contention of the appellant/OP that respondent/complainant is not a 'consumer' within the meaning of the Act. The contents of advertisements are also reproduced in the impugned order. However, while giving the finding on unfair trade

practice, the District Forum has taken the wordings of advertisement and chosen few lines of written statement and has held that the advertisement is in direct contrast with the defence taken by appellant/OP wherein it has only claimed that the use of product improves the health and quality of skin by providing protection and nourishment to the facial and neck skin which are more exposed to the vagaries of nature, sunlight, dust etc. It is held that no attempt is made by appellant/OP in the written statement to show and justify the advertisement, which hold a promise that use of product will make the skin fair. The relevant para of the judgement is reproduced as under:

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This is in direct contrast with the defense taken by the OP wherein it has claimed that the use of the product improves the health and quality of skin by providing protection and nourishment to the facial and neck skin which are more exposed to the vagaries of nature, sunlight, dust, wind etc. No attempt has been made on behalf of the OP to show and justify the advertisements which hold out a promise of the skin getting fairer by the use of the product.”

15. We may mention that complete defence taken in the written statement is not taken into consideration by Ld. District Forum. It is alleged in the written statement that the product in question provides nourishment which makes the skin soft and supple generally making it fairer, smoother, softer, healthier adding a healthy glow. It is also the stand of appellant/OP in the written statement that the degree of effect will obviously vary from person to person depending upon the other variable factors. The product

makes the skin fairer is also averred in the written statement. In these circumstances, it cannot be said that the District Forum has considered the entire defence of appellant/OP. Further the District Forum was not right in arriving at a conclusion that advertisement is in contrast to written statement by picking up few lines of written statement and ignoring the remaining relevant portion of it.

16. Before the District Forum, the appellant/OP has relied upon various scientific test reports/expert evidence in support of stand taken in written statement. The same are as under:

- a) **Kelkar Education Trust's Scientific Research Centre**, Cosmetology Division - Study conducted at Mumbai in the year 2011;
- b) **Mascot Spin Control Clinical Research Organisation Centre**, ISO 9001 : 2008 (Accredited 3rd Party Clinical Laboratory) - Study conducted at Mumbai in the year 2013;
- c) **IMRB International** (India's leading and most respected market research agency) - Study conducted on 600 users of the said Product, in the year 2013;
- d) **Affidavit of Professor Mr. Bijan Kumar Gupta** (Former HOD of Pharmaceutical Technology, Jadhavpur University, Kolkata; having 52 years' experience in the field of academic and research; and recipient of life-time achievement award from the Indian Pharmaceutical Association and from Ramanbhai Patel Foundation) holding degrees in Pharmaceutical Sciences, inclusive of drugs, cosmetics, food and water;
- e) **MJ Lab Pvt. Ltd., Mumbai** (NABL Accredited Lab, approved by FDA, Maharashtra; ISO 9001 : 2008 certified laboratory) - Lab Report dated 17.10.2013 certifying that *Niacinamide* is present in the said Product, which is the most widely used and safe skin lightening ingredient.

- f) **Bioneds, Karnataka** (approved drug-testing laboratory, OECD GLP certified; AAALAC accredited, pre-clinical research organisation) - Lab Report dated 21.10.2013 certifying that *Niacinamide* is present in the said Product, which is the most widely used and safe skin lightening ingredient.

- g) **Advertising Standards Council of India (ASCI)**, established in 1985 and its code being duly recognized under the Cable Television Networks (Regulation) Act, 1995 and the Rules made thereunder, committed to the cause of self-regulation in advertising, ensuring the protection of interest of the consumers - Order dated 20.11.2013, whereby the claim that the said Product gives 'fair skin' has been substantiated."

17. The aforesaid reports have been ignored while giving the finding. The stand of the appellant/OP is that the product in question is duly certified and the efficacy of product is based on proper and scientific tests. If Ld. District Forum was of the view that the aforesaid reports were not satisfactory, it also had the option of sending the sample of product for testing as provided under the Act.

18. The complainant has also not produced any expert evidence except his own affidavit by stating that he had used the cream and no effect had come on him. The burden was on the respondent/complainant to prove his case. Only self serving affidavit is given by him in the evidence. The respondent/complainant has also not appeared before the Ld. District Forum. Even the product in question is not produced before Ld. District Forum. No evidence is filed before the District Forum by the respondent/complainant about his condition of the skin prior and

subsequent to the use of the said product. The impugned order has serious consequences on the appellant/OP.

19. In view of above discussion, we find that while passing the impugned order, the Ld. District Forum has not considered the entire material on record. We, therefore, set aside the impugned order and remand back the case to the District Forum for deciding afresh after considering material on record and giving an opportunity of hearing to both the parties. The Ld. District Forum shall make all endeavours to decide the complaint within 4 months of receipt of the order.

20. Parties are directed to appear before the District Forum on 29.05.2017.

21. A copy of this order as per the statutory requirements be forwarded to the parties free of charge. The record of the District Forum be also sent back forthwith. Thereafter the file be consigned to record room.

(Justice Veena Birbal)
President

(Salma Noor)
Member

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