CONSUMER EMPOWERMENT: ESI HOSPITALS UNDER CP ACT

ONE OF the most important milestones in the area of consumer protection in the country has been the enactment of the Consumer Protection Act, 1986 (CP Act). It is a potent and vibrant legislation that has come to the aid of consumers in various spheres of human activity. The Act being a beneficial legislation, aims to protect the interests of a consumer as understood in the business parlance. The definition of 'consumer' in the Act is wide enough and encompasses within its fold not only the goods but also the services, bought or hired for consideration. Consumer also includes any user of such goods other than the person who actually buys goods and such use is made with the approval of the purchaser. The term 'service' unambiguously indicates that its definition is not restrictive and includes within its ambit any beneficiary of such service other than the one who actually hires or avails of the service for consideration and such services are availed with the approval of such person.

As regards the applicability of the CP Act to dispensaries/hospitals run or managed by the Employees' State Insurance Corporation, the law applicable hitherto was that a beneficiary of the employees' state insurance not being a 'consumer' and the 'service' rendered by an ESI dispensary/hospital being gratuitous in nature, could not be considered to be falling under the purview of the CP Act. All that has changed now with the decision of the Supreme Court in *Kishore Lal* v. *Chairman, Employees State Insurance Corpn.*[1] The facts of the case which prompted the court to hand down such an important ruling were as follows:

The appellant, an insured employee whose monthly contribution towards the ESI scheme was being regularly deducted from his salary and deposited by his employer with the corporation, admitted his wife in the ESI dispensary, Sonepat in 1993 for treatment of diabetes. Finding her health deteriorating, he got her examined in a private hospital, which revealed that she was diagnosed and treated, incorrectly by the ESI dispensary. He filed a complaint under the CP Act before the district forum seeking (i) compensation towards mental agony, harassment, physical torture, pain, suffering and monetary loss for the

1. 2007 (6) SCALE 660.

negligence of the authorities; (ii) direction for removal or and improvement in the deficiencies; and (iii) direction for payment of interest on the amount of reimbursement bills.

The corporation contended that the complaint was not maintainable as the complainant was neither a 'consumer' nor the facility of medical treatment provided at the ESI dispensary a 'service' under the CP Act. It was also contended that by virtue of section 75 of the ESI Act, the dispute was to be decided by the Employees' Insurance Court established under section 74 of the ESI Act and as such the consumer forum had no jurisdiction to decide the matter.

The district forum, relying on *Birbal Singh* v. *ESI Corpn.*,[2] which under similar fact situations had held that the complainant did not come within the definition of 'consumer' because of the gratuitous nature of the medical services provided by the ESI dispensary, dismissed the complaint. The state commission as also the national commission agreed with the district forum. Hence he approached the Supreme Court by special leave to appeal.

The twin questions the apex court framed for consideration were: (a) whether the service rendered by an ESI hospital is gratuitous or not and consequently whether it falls within the ambit of 'service' as defined in the Consumer Protection Act, 1986; and (b) whether section 74 read with section 75 of the Employees' State Insurance Act, 1948 ousts the jurisdiction of the consumer forum as regards issues involved for consideration in the case.

An analysis of the ESI Act would show that all employees in a factory or establishment where the Act applies are required to be insured under the insurance scheme.[3] The contribution which is required to be paid to the ESI corporation for the insurance scheme shall comprise of the contribution payable by the employer and the employee and shall be at such rates as may be prescribed by the central government.[4] The principal employer is liable to pay both these contributions, employer's as well as employees' and he may recover the contribution made for the employees by deducting the same from their wages.[5] The ESI corporation is, with the approval of the state government, required to establish and maintain in a state such hospitals, dispensaries and other medical and surgical services as it may think fit for the benefit of the insured persons and their family members.[6]

The apex court, after a detailed interpretation of the definitions of 'consumer' and 'service' and the matters that are to be decided by the

2. 1993 (II) CPJ 1028.
3. Employees' State Insurance Act, 1948, s. 38.
4. *Id.*, s. 39.
5. *Id.*, s. 40.
6. *Id.*, s. 50.

employees' insurance court under section 75 of the CP Act, allowed the appeal. It was held that the appellant was a 'consumer' within the ambit of section 2(1)(d) and the medical service rendered in the ESI dispensary by the respondent corporation fell within the scope of 'service' as defined under section 2(1)(o) of the CP Act and as such the consumer forum had jurisdiction to adjudicate upon the case of the appellant. According to the court, ESI scheme is an insurance scheme and it contributes for the medical service rendered by the ESI hospitals/ dispensaries. Therefore, such service rendered therein to a member of the scheme or his family could not be treated as gratuitous in the sense that the expenses incurred for the service availed of in the hospital would be borne from the contributions made to the insurance scheme by the employer and the employee.

The court approvingly quoted the observations in *Indian Medical Association* v. *V.P. Shantha*,[7] to the effect that the service rendered by a medical practitioner or hospital/nursing home cannot be regarded as service rendered free of charge, if the person availing of the service has taken an insurance policy for medical care whereunder the charges for consultation, diagnosis and medical treatment are borne by the insurance company, since such service would fall within the ambit of 'service' under the Act.[8] And similarly, where as a part of the conditions of service the employer bears the expenses of medical treatment of an employee and his family members dependent on him, then the service rendered by a medical practitioner or a hospital/nursing home would not be treated to be free of charge and would constitute 'service' under section 2(1)(o) of the Act.[9]

As regards the jurisdiction of the consumer forum to entertain the complaint, the court held that in the instant case since the appellant's claim was for damages for the negligence on the part of the ESI dispensary and the doctors working therein and none of the provisions of section 75(1)[10] which lay down matters to be decided by the employees' insurance court speak about medical negligence, the jurisdiction of the consumer forum has not been ousted. The contention

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7. (1995) 6 SCC 651.
8. *Id.* at 682.
9. *Ibid.*
10. "*Matters to be decided by Employees' Insurance Court :-* (1) If any question or dispute arises as to (a) whether any person is an employee within the meaning of this Act or whether he is liable to pay the employee's contribution, or (b) the rate of wages or average daily wages of an employee for the purpose of this Act, or …..(e) the right of any person to any benefit and as to the amount and duration thereof, or …. shall be decided by the Employees' Insurance Court in accordance with the provisions of this Act."

of the respondent that the claim for damages for negligence of doctors in the ESI hospital/dispensary would tantamount to claiming benefit under sub-section (e) of section 75(1) of the ESI Act and, therefore, it was the employees' insurance court alone which had jurisdiction to decide the matter was negated by the court. The court held that the benefit, which has been referred to in the said sub-section, has reference to the benefits under the Act as provided under the rules *viz*., maternity benefits; disablement benefits; dependents' benefits; medical benefits to insured persons who cease to be in an insurable employment on account of permanent disablement; and medical benefits to retired insured persons.[11] The appellant's claim for damages for the negligence on the part of the ESI hospital/dispensary and the doctors working therein has no relation to any of the benefits, which are provided in the rules and, therefore, insurance court has no jurisdiction.

According to the court, a cause of action for negligence arises only when damage occurs and thus the claimant has to satisfy the court on the evidence that three ingredients of negligence, namely (a) existence of duty to take care; (b) failure to attain that standard of care; and (c) damage suffered on account of breach of duty, are present for the defendant to be held liable for negligence.[12] These issues could not be adjudicated upon by the employees' insurance court which has been given specific matters for adjudication and decision. Thus, the court held that the claim for damages for negligence of the doctors or the ESI hospital/dispensary is clearly beyond the jurisdictional power of the employees' insurance court.

After referring to various cases[13] the court observed that "the trend of the decisions of this Court is that the jurisdiction of the consumer forum should not and would not be curtailed unless there is an express provision prohibiting the consumer forum to take up the matter which falls within the jurisdiction of civil court or any other forum as established under some enactment. The court had gone to the extent of saying that if two different fora have jurisdiction to entertain the dispute in regard to the same subject, the jurisdiction of the consumer forum would not be barred and the power of the consumer forum to adjudicate upon the dispute could not be negated."[14]

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11. See, Employees' State Insurance (Central) Rules, 1950, rules 56, 57, 58, 60 and 61, respectively.

12. See *Jacob Mathew* v. *State of Punjab and Another*, (2005) 6 SCC 1.

13. *M/s Spring Meadows Hospital and Another* v. *Harjol Ahluwalia and Another*, AIR 1998 SC 1801; *State of Karnataka* v. *Vishwabarathi House Building Co-op. Society and Others*, AIR 2003 SC 1043; and *Thirumurugan Cooperative Agricultural Credit Society* v. *M. Lalitha and Others*, (2004) 1 SCC 305.

14. *Supra* note 1 at 671.

The court, thus, while allowing the appeal and setting aside the impugned order, remitted the matter to the district forum for decision in accordance with law as laid down.

Earlier, the apex court in *Regional Provident Fund Commissioner* v. *Shiv Kumar Joshi*[15] was called upon to decide a similar question like the one in *Kishore Lal*, whether a member of the employees provident fund scheme could invoke the provisions of the CP Act against the provident fund commissioner. It was contended on behalf of the commissioner that the provisions of the Act was not applicable because the provident fund scheme could not be held to be a service; the respondent was not a consumer and delay in payment of provident fund claim did not amount to deficiency in service. Disagreeing, the court held that the definition of 'consumer' in the Act is wide enough and covers in its ambit not only the goods but also services bought or hired for consideration. The contention that the respondent was not a consumer as there was no consideration paid by him since the employer was paying the administrative charges was without substance. The payment of contribution includes payment of administrative charges. If the employer who is otherwise not a member of the scheme is obliged to contribute under the scheme at the rates specified therein, it is because of the fact that he is working with him. But for his employment there would be no obligation on the employer to pay his part of the contribution to the scheme. Therefore, it is immaterial as to whether such charges are deducted actually from the wages of the employee or paid by the employer on his behalf.[16]

The court further held that the administrative charges are in lieu of the membership of the employee and for the services rendered under the scheme. It cannot be held that even though the employee is the member of the scheme, yet the employer would only be deemed to be a 'consumer' for having made payments of the administrative charges. Admittedly, no service is rendered to the employer under the scheme, which is framed for the benefit of the employee.

According to the court, if the contention of the appellant is accepted that as no part of the administrative charges are deducted from the actual wages of the employee, he cannot be deemed to be hiring the services of the scheme, it would frustrate the object of the scheme as in that event the employer will have no obligation to pay the contribution payable by the employee along with the administrative charges. The scheme has to be achieved by it keeping in view the objects of the Act.[17]

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15. 2000 LLR 217 (SC).
16. *Id*. at 222.
17. *Ibid.*

In this case the court also refused to accept the contention of the appellant that the regional provident fund commissioner, being central government cannot be held to be rendering 'service' within the meaning and scheme of the Act. According to the court the commissioner discharges statutory functions for running the scheme. He has not been delegated with sovereign powers of the state so as to hold it as a central government. Being a separate and legal entity, it cannot legally be said that the facilities provided by the scheme are no 'service' or that the benefit being provided are free of charge. The definition of 'consumer' includes not only the person who hires 'services' for consideration but also the beneficiary, for whose benefit such services are hired. In view of the comprehensive definition of the term 'consumer' even a member of the family would become a 'consumer'.[18]

Thus, the court while dismissing the appeal agreed with the concurrent findings of the district forum, state commission and the national commission in holding that the respondent was a consumer, the provident fund scheme was a service and the CP Act was applicable to the case.

It is difficult to understand why the court in *Kishore Lal* had to send the case back to the district forum for a fresh decision. It had taken more than 13 years for the appellant to get a favourable decision. The purpose of enacting the consumer protection law was to create a framework for speedy disposal of consumer disputes and to remove the existing evil of the ordinary court system. By sending back the case to the district consumer forum, the appellant has to start all over again. Considering the spirit of the appellant to fight the case right up to the apex court (since he lost at all the three forums), and the years that have gone by fighting the case, the court should have decided the matter and done complete justice to the appellant under article 142 of the Constitution.

However, this is the first case of its kind wherein the Supreme Court has brought ESI hospitals under the ambit of the Consumer Protection Act, enabling an employee covered under the employees' state insurance scheme to sue ESI hospitals in case of medical negligence. It can thus be said that slowly but steadily and surely the courts are recognizing the sovereignty of the consumer.

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18. *Id.* at 223.

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