

**NATIONAL CONSUMER DISPUTES REDRESSAL COMMISSION
NEW DELHI**

FIRST APPEAL NO. 285 OF 2012

(Against the Order dated 25/01/2012 in Complaint No. 7/2007 of the State Commission Goa)

1. PARKHYATT GOA RESORT & SPA & ANR.

Arrosim, Cansaulim, Salcete,

GOA

2. BLUE COAST HOTELS AND RESORTS

C/o Parkhyatt Goa Resort & SPA Arrosim, Cansaulim, Salcete

GOA

.....Appellant(s)

Versus

1. VINAY RAJKUMAR RAJPAL

Major Businessman, R/o. Flat No. 41-A, Maker Towers, Cuffe
Parade,

MUMBAI-400005

.....Respondent(s)

BEFORE:

**HON'BLE MR. SUBHASH CHANDRA, PRESIDING MEMBER
HON'BLE DR. SADHNA SHANKER, MEMBER**

FOR THE APPELLANT : MR. SANGRAM PATNAIK, ADVOCATE WITH
 MRS. SWYAM SIDHA PATNAIK, ADVOCATE
 MR. SOHEL RISHABH, ADVOCATE

FOR THE RESPONDENT : MS. SRISHTI GUPTA, ADVOCATE

Dated : 19 August 2024

ORDER

Dr. SADHNA SHANKER, MEMBER

1. The present appeal has been filed under Section 19 of the Consumer Protection Act, 1986 (for short "the Act") by Parkhyatt Goa Resort & Spa and Blue Coast Hotels and Resorts (hereinafter referred to as the "opposite parties no. 1 and 2, respectively") assailing the Order dated 25.01.2012 passed by the State Consumer Disputes Redressal Commission, Chandigarh (hereinafter referred to as the "State Commission") in Complaint No. 07 of 2007 whereby the complaint was allowed.

2. The facts, in brief, are that the complainant, aged about 29 years, along with his wife Mrs. Ravina Rajpal were invitees for the wedding of Mr. Siddharth Bhimrajka, who had booked several rooms in opposite party No.1, a Five Star hotel belonging to opposite party no.2. The complainant along with his wife checked in on 07-07-2005 and was allotted room No. 321 on the ground floor. On his arrival, the complainant was welcomed and one of the hotel staff escorted him to the said room and showed the complainant the basic features of the said room. The complainant found the room to be nice and pleasant. The complainant

also saw the bathroom and he & his wife found that the bathroom was peculiar but chose not to raise any concern with opposite parties' authorities regarding its peculiar nature or show his willingness to shift to another room. The complainant attended the pool side lunch party in the afternoon on 09.07.2005 during which alcohol was served but according to the complainant the complainant did not consume any alcohol. The complainant returned to the room around 2.30 to 3.00 p.m. and entered the bathroom to take a shower bath. The bathroom had three steps to go down to the bathing area and there was a handle bar to the right. When the complainant took the second step, the complainant slipped with great force, fell down and suffered injuries. The complainant was attended to by doctors and as per their advice the complainant was taken to Apollo Victor hospital where the complainant was administered immediate first aid and treatment. The complainant consulted some doctors from Mumbai and on their advice the complainant was flown to Mumbai by a chartered flight of Air Ambulance Service. The complainant was admitted to Jaslok Hospital and was operated upon on the next day i.e. on 10-07-2005 at about 4.00 p.m. and was discharged on 16-07-2005. It is alleged that though the complainant claims that his mouth was kept closed upto 19-07-2005 and he was unable to do his normal duties for a period of one year. The complainant sent a notice dated 30-08-2006 through his Advocate Shri C.B. Wadhwa asking the opposite parties to compensate the complainant, which notice was followed by reminders dated 07/10/2005, 30/10/05, and 09/01/06, 16/05/2006 and 23/06/2005. The last two letters were sent through his Advocate M/s Thakore Jariwala & Associates. The complainant also received two replies sent by the insurers of the opposite parties through M/s Tuli & Company dated 14/06/2006 and 28/06/2006 contesting the claim of the complainant and denying any negligence and inaction on the part of the opposite parties.

3. Being aggrieved, the complainant filed a complaint before the State Commission with the following prayer:

- a. That the State Forum be pleased to hold that the opposite parties (jointly and/or severally) are directly and wholly responsible for the said accident that was suffered by the complainant on 09.07.2005
- b. That Hon'ble Commission by judgment and order be pleased to direct the opposite parties jointly and/or severally to pay to the complainant a sum of Rs.30,00,000/- together with interest at the rate of 15% p.a. from 09.07.2005 till the disposal of the complaint on account the said accident.
- c. The Hon'ble Commission be pleased to order the payment of cost of present complaint and all expenses incurred towards litigation.

4. After appreciation of the facts of the case, the State Commission, vide its order dated 25.01.2012, allowed the complaint and directed the opposite parties to jointly and severally pay a sum of Rs.9,33,400/- to the complainant, by way of compensation with pending and future interest at the rate of 9% from the date of complaint, until payment, with costs of Rs.10,000/-.

5. Being aggrieved by the order dated 25.01.2012, the opposite parties filed appeal before this Commission with the following prayer:

“a) Set aside the impugned Order dt. 25/1/2012 passed by the Goa State Consumer Disputes Redressal Commission, Panaji (for short State Commission) in Complaint No. 7/2007;

b) Stay the execution of the impugned Order dt. 25/1/2012 passed by the Goa State Consumer Disputes Redressal Commission, Panaji (for short State Commission) in Complaint No. 7/2007.

c) Pass any other order or orders in the facts and circumstances of the case.

6. Before this Commission, counsel for the opposite parties strongly argued on complainant's contention of defective design and maintenance of bathroom. It is argued that the complainant admitted that it is not dangerous and he had no difficulty, in using the room, nor raised any concern regarding the peculiar nature of the bathroom. Moreover, no evidence of expert or otherwise was ever produced/ relied upon by the complainant to their claim of defective design. It is alleged that defective bathroom was approved by the competent authorities (Planning & Building Authorities) and the marble used in the bathroom is anti-skid Tumble Rock and not the Egyptian marble as mentioned in the impugned order. It is further alleged that neither any guest has raised any concern nor has any accident of similar nature ever occurred in past in the said hotel. In addition, standard operating procedure was followed scrupulously for maintaining the bathroom as it is cleaned twice a day and more frequently if requested by the guest. It is further alleged that neither the complainant nor any guest asked for any re- location of rooms on account of alleged defect in bathroom.

7. Further, even on the aspect of compensation awarded, learned counsel has argued that the State Commission has not assigned any plausible reasons for awarding such disproportionate amount as compensation to the complainant despite the fact that the complainant miserably failed to adduce any evidence to prove the alleged exaggerated claim. It is further argued that despite asking in cross examination, admittedly, complainant failed to give any breakup of the compensation claimed (a) medical expenses (b) Diagnostic Cost, Hospitalization, Charges of medicine, transportation, special diet, qualified (c) any kind of loss of business (d) Disability / Deformity, mental torture agony, to the complainant & his family members. It is further submitted that compensation granted by any consumer forum must give reasons while arriving at conclusions for awarding the compensation and the principles laid down in several judgments, as applied by the State Commission, are not applicable to the present case. It would give a wrong precedent that forums like State commission are allowing compensation, with some guess work. Even if one applies the provisions of motor vehicle act, the compensation ought not to be more than Rs.10,000/-. It is relevant to point out that the law is no more *res-integra*, any amount of compensation based on loss & injury cannot be presumed and the burden lies upon complainants to prove the facts alleged on the basis of which damage can be calculated. In assessing the damages, all circumstances which may be legitimately pleaded in diminution of the damages must be considered. It is not a mere guesswork neither is it the resultant effect of a compassionate attitude. Reliance was placed on:

a. *M.S. Grewal vs. Deep Chand Sood & Ors. (2001) 8 SCC 151*

b. Grand Trunk Rly. Co. of Canada v. Jennings 1915 LawSuit (UKPC) 5 decided on 20.04.1915.

8. Further, it was argued that the alleged accident did not happen due to negligence or faulty design of bathroom, but due to negligence on the part of complainant and also the influence of alcohol which was served in the lunch party before the alleged accident. Moreover, the State Commission has erred in failing to appreciate the fact that there was no technical expert opinion on record before it which could justify that design of bathroom supported by railings was faulty or a causative factor for the alleged accident.

9. It is a settled law that all consumer forums, including the State Commission and National Commission, can direct filing of affidavits in evidence of the experts wherever necessary for adjudication of a disputed question of fact and law. It is settled law that in matters of professional negligence such as the negligence in the building plan or the construction thereof should have been supported by expert evidence/ opinion of architecture and/or civil engineer. The State Commission ought to have asked for an expert opinion in the matter so as to reach a conclusion in the matter particularly in respect of faulty designs/ building plans. Reliance was placed on ***Jacob Mathew Vs. State of Punjab & Anr. (2005) 6 SCC1***. Moreover, the State Commission has also not examined the issue whether the complainant at the time of accident was under the influence of alcohol which was served during the lunch party before the accident and was attended by the complainant.

10. Furthermore, his contention is that the interest @ 9% p.a. granted by the State Commission to the complainant/respondent is on high side. There is neither commercial element in the claim by the complainant/respondent nor there is any contractual rate of interest on record between the parties. Even in civil suit involving commercial transactions, the courts keeping in view the provisions under Section 34 of C.P.C, do not grant interest more than 6% pa. Therefore, the grant of interest @ 9% p.a. by the State Commission is absolutely erroneous.

11. The counsel for the complainant countered the opposite parties contention that no expert witness called for by the State Commission. While the State Commission could have exercised its' powers under Section 13 of the Act, the opposite parties also did not make any requests to present an expert witness. Moreover, they chose to present Mr. Manikandan Marar, who was not even employed during the time of the incident and admittedly had not even visited the bathroom of Room No.321 prior to his cross examination. Thus, he was not even in a position to tell the materials used in the bathroom.

12. Further, the opposite parties' contention that no such previous incident or complaint qua the design of the bathroom was rebutted by the complainant as another incident on 15.09.2007 had happened with Mr. Neeraj Goenkar, after which the anti- skid precautionary measures were taken, which also shows the callousness of the hotel as they took no steps towards the safety of their guests.

13. As the maintenance of the bathroom and ensuring safety of its guests was the duty of the opposite parties, the burden of proof was on the opposite parties to show that they have

taken all necessary measures for the same. However, multiple incidents relating to the same cause have come to light and the opposite parties are now stepping away from their duties.

14. Further, the reliance was placed on doctrine of negligence and duty of care wherein the complainant relied on the judgment of *Rajkot Vs. Manjulben Jayantilal Nakum (1997) 9 SCC 552* and *India Tourism Development Corporation Limited v. Miss Susan Leigh Beer RFA(OS) 75/2011 pronounced on 30.05.2014* and submitted that the existence of liability for negligence depends on whether the opposite parties owed a duty of care to the complainant. As it was reasonably foreseeable that any guest could suffer injury or damage by the act or omission of the opposite parties, it is correct to say that the opposite parties owed a duty of care to the complainant.

15. We have heard the learned counsel for both the parties and have gone through the material available on record.

16. The question which falls for our consideration is whether there is deficiency in service on the part of the opposite parties.

17. After considering the facts and arguments presented by both parties and examining the evidence on record, it is evident that no expert opinion was sought regarding the design of the bathroom to support the complainant's assertion of faultiness and the State Commission in this case has imputed a design defect on the basis of its own opinion proved on the basis of its photographs produced. After discussing that how the bathroom was shaped and the hand rail was small, it has concluded that the bathroom was defective. The finding of the defective design is not based on any expert opinion as required under section 13 (1)(c) of the Act which reads as follows:

13. Procedure on admission of complaint:

(i) The District Forum shall, (on admission of a complaint), if it relates to any goods...

(a)

(b)

(c) where the complaint alleges a defect in the goods which cannot be determined without proper analysis or test of the goods, the District Forum shall obtain a sample of the goods from the complainant, seal it and authenticate it in the manner prescribed and refer the sample so sealed to the appropriate laboratory along with a direction that such laboratory make an analysis or test, whichever may be necessary, with a view to finding out whether such goods suffer from any defect alleged in the complaint or from any other defect and to report its findings thereon to the District Forum within a period of forty-five days of the receipt of the reference or within such extended period as may be granted by the District Forum;

18. Only if a design defect is established in the process prescribed under this section, can a Forum under the Act issue orders for either replacement or to compensate the consumer under section 14. It is manifest from the record and the submissions of the parties that this process was neither initiated nor undertaken. Reliance is placed on:

- a. *M/s Saubhagya Kalpataru Pvt. Ltd. Vs. Sucheta Diesel Sales Services (2010 SCC Online NCDRC 1)*
- b. *Classic Automobile Vs. Lila Nand Mishra and Ors. [1 (2010) CPJ 235 (NC)]*

19. It is not in dispute that the complainant along with his wife checked in on 07.07.2005 and was escorted by one of the hotel staff. It is also admitted that the room was nice and pleasant and the complainant had not raised any concerned about the deficiency in service. It is only when the complainant fell in the bathroom. As regards, the defective design and maintenance of bathroom, the complainant has not adduced any evidence / expert opinion and only on mere saying of the complainant and in the absence of any expert opinion, it cannot be said that the bathroom had defective design and due to defective design, the complainant suffered injuries. It is also admitted that a handle bar was fixed in the bathroom to support/help the guest. We are of the opinion that the State Commission has erred in concluding that the design of the bathroom was defective and, hence, the order of the State Commission is liable to be set aside.

20. In the result, the appeal is allowed and the impugned order dated 25.01.2012 of the State Commission is set aside. Consequently, the complaint is dismissed. All pending applications, if any, stand disposed off.

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**SUBHASH CHANDRA
PRESIDING MEMBER**

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**DR. SADHNA SHANKER
MEMBER**