

SHELL GAS LANKA LTD.
v
CONSUMER AFFAIRS AUTHORITY AND OTHERS

COURT OF APPEAL
SRISKANDARAJAH, J.
CA 1495/2005
FEBRUARY 25, 2008
MARCH 24, 2008.

Consumer Affairs Act No. 9 of 2003 – Section 3 (4), section 13 (1) – Leaking gas cylinder – Complaint to Authority – Compensation ordered – Quorum – Authority not properly constituted – Legality of the award?

The 3rd respondent complained to the 1st respondent in relation to the sale of LPG as the gas cylinders were leaking and it is dangerous and not suitable for use, and claimed compensation. After inquiry the Authority awarded compensation.

The petitioner company sought to quash the order on the basis that the order was made by the 1st respondent Authority which was not properly constituted as there was no quorum. The order was made by three members when the quorum was four.

Held

- (1) The power to inquire into complaints and to make an order under section 13 is vested in the Consumer Affairs Authority. The lawful exercise of the power of the Authority has to be made according to the provisions of the said Act.
- (2) Section 3 (4) in its schedule contemplates that the quorum for any meeting of the authority shall be four members. This is mandatory and in order to have legal force of any decision made by the 1st respondent Authority must have been made at least by four members of the Authority.

The inquiry was held by three inquiring officers and the order was made by them and they have signed the said order. In the absence of a quorum the order is devoid of any legal effect.

APPLICATION for a *writ of certiorari*.

Cases referred to:-

- (1) *Moosajees Ltd v Eksath Engineru Saha Samanya Kamkaru Samithiya* – 79 (1) NLR 1285 at 288.
- (2) *Sarath Hulangamuwa v Siriwardene, Principal Vishaka Vidyalaya, Colombo and five others* – 1981 – 1 Sri LR 275 at 281.
- (3) *Shell Gas Lanka Ltd v Consumer Affairs Authority and two others* – CA 604/2006 – CAM 05.03.2007.

Chanaka de Silva for petitioner.

Vikum de Abrew SC for 1st and 2nd respondents.

Kuvera de Soysa with Dilumi de Alwis for 3rd respondent.

Cur.adv.vult.

May 15, 2008

SRISKANDARAJAH, J.

The petitioner is a body corporate incorporated in Sri Lanka. The petitioner supplies and distributes Liquid Petroleum Gas (LPG) in Sri Lanka. The LPG is sold in Sri Lanka for domestic consumption in cylinders of two categories, namely, 12.5 Kg and 2.3 Kg. The gas cylinders are imported by the petitioners from internationally reputed manufacturers.

The 1st respondent is a body corporate incorporated by the Consumer Affairs Authority Act, No.9 of 2003. The 3rd respondent had made a complaint to the 1st respondent in relation to the sale of LPG as it was leaking and it is dangerous and not suitable for use. The said complaint was made under section 13 of the Consumer Affairs Authority Act.

It provides:

13. (1) The Authority may inquire into complaints regarding:

- (a) the production, manufacture, supply, storage, transportation or sale of any goods and to the supply of any services which does not conform to the standards and specifications determined under section 12; and
- (b) the manufacture or sale of any goods which does not conform to the warranty or guarantee given by implication or otherwise, by the manufacturer or trader.

(2) A complaint under subsection (1) which relates to the sale of any goods or to the provision of any service shall be made to the Authority in writing within three months of the sale of such goods or the provisions of such service, as the case may be.

(3) At any inquiry held in to a complaint under subsection (1), the Authority shall give the manufacturer or trader against whom such complaint is made an opportunity of being heard either in person or by an agent nominated in that behalf.

(4) Where after an inquiry into a complaint, the Authority is of opinion that a manufacture or sale of any goods or the provision of any services has been made which does not conform to the standards or specifications determined or deemed to be determined by the Authority, or that a manufacture or sale has been made of any goods not conforming to any warranty or guarantee given by implication or otherwise by the manufacturer or trader, it shall order the manufacturer or trader to pay compensation to the aggrieved party or to replace such goods or to refund the amount paid for such goods or the provision of such service, as the case may be.

(5) ...

(6)...

The 1st respondent held a preliminary discussion on 15th December 2004 in the presence of the parties. At the discussion the said gas cylinder was examined in the presence of the petitioner's representatives and the statements were recorded. When the 3rd respondent gave her statement she claimed for compensation. The statement is marked as 2R1.

The 1st respondent laid down certain conditions and the steps that have to be taken by the petitioner before 21st December 2004 namely:

- a) Improve the quality of consumer service,
- b) Implement a dealer training programme,
- c) Initiate action to protect the quality of the product (inform the relevant authorities on illegal import and filling of cylinder)
- d) Publish an advertisement on the safe use of gas by the consumer.

On the 22nd of January 2005 the petitioner provided a replacement cylinder to the 3rd respondent.

The 1st respondent in terms of section 13(1) of the said Act held an inquiry on the 16th of February 2005 on the said complaint of the 3rd respondent. The inquiry was taken up on several dates and when the inquiry was finally taken up on 18th July 2005 the petitioner reiterated its position that it was not agreeable to make a money payment as it did not accept liability for the alleged leak of the cylinder. Thereafter written submissions were tendered by both parties and the 1st respondent Authority by its letter dated 31st August 2005 communicated its decision to the petitioner. The 1st respondent Authority in the said decision has made the following order:

"Having taken into consideration the above facts and the nature of seriousness, the Authority is of the view that the replacement or the refund of the price is not adequate. Therefore, the relevant respondent company, namely, Shell Gas (Lanka) Ltd is ordered to pay a sum of Rs. 75,000/- by way of compensation to the aggrieved party, namely Mrs. Devika Perera, and it is further ordered that the respondent company shall arrange to pay the said sum of Rs. 75,000/- to her on or before the 10th of September 2005."

The petitioner in this application is seeking a *writ of certiorari* to quash the aforesaid order on the basis that:

1. The Order was made by the 1st respondent Authority which was not properly constituted as there was no quorum.
2. The 1st respondent Authority in making the said Order has acted out side the scope and ambit of Consumer Affairs Authority Act and it is *ultra vires*.
3. That the Authority has not taken relevant facts into consideration in arriving at the said decision.

The 1st respondent raised a preliminary objection in this application that the petitioner in this application has suppressed material facts to this court and therefore this application has to be dismissed. The respondent contended that the petitioner in paragraph 17 of the petition and in the corresponding paragraph in the affidavit has stated that at the discussion on 15th December 2004 there is no reference to the compensation being sought by the 3rd respondent. The respondent marked the inquiry notes of the said discussion as 2R1 and the statement made by the 3rd respondent requesting for compensation is marked as 2R1 (a) and submitted that the petitioner has suppressed this material fact.

In *Moosajees Limited v Eksath Engineeru Saha Samanya Kamkaru Samithiya* ⁽¹⁾ at 288 the court held that suppression of material facts is fatal to an application and observed:

"The pleadings in their petition and affidavit do not contain a full disclosure of the real facts of the case and to say the least the petitioner has not observed the utmost good faith and has been guilty of a lack of *uberrima fides* by suppression of material facts in the pleadings. It was neither fair by this court nor by his counsel that there was no full disclosure of material facts."

The court took a similar view in *Sarath Hulangamuwa v Siriwardena, Principal, Visakha Vidyalyaya, Colombo 5 and Others*⁽²⁾ at 282 it was held:

"A petitioner who seeks relief by *writ* which is an extraordinary remedy must in fairness to this court, bare every material fact so that the discretion of this court is not wrongly invoked or exercised.

In the instant case the fact that the petitioner had a residence at Dehiwela is indeed a material fact which has an important bearing on the question of the genuineness of the residence of the petitioner at the annexe and on whether this court should exercise its discretion to quash the order complained of as unjust and discriminatory."

The suppression of facts has to be material to the determination of the application. This application is to quash an order to pay compensation which the petitioner contends is *ultra vires*. The challenge is not on the basis that the 3rd respondent has not made a request for compensation but on the vires of the powers of the 1st respondent Authority to grant such a relief. The compensation was sought by the 3rd respondent in the preliminary inquiry, even though the representative of the petitioner was present in the said preliminary inquiry the proceedings of the said inquiry was not made available to the petitioner. In these circumstances the claim made by the 3rd respondent for compensation in the said inquiry is not correctly stated in the petition cannot be considered as suppression or misrepresentation of material fact. Therefore I overrule the preliminary objection of the respondents.

The petitioner submitted that the impugned order marked 2R3(a) was made by three members of the said Authority. The quorum of any meeting of the Authority shall be four members and hence the said order was made without jurisdiction.

The power to inquire into complaints and to make an order under section 13 of the said Act is vested in the Consumer Affairs Authority. The lawful exercise of the power of the said Authority has to be made according to the provisions of the said Act. Section 3(4) of Act, No.9 of 2003 in its Schedule contemplates that the quorum for any meeting of the Authority shall be four members. Thus, it is mandatory that in order to have legal force of any decision made by the 1st respondent-Authority must have been made at least by four members of the Authority; *Shell Gas Lanka Limited v Consumer Affairs Authority and two others*.⁽³⁾

It is an admitted fact that the inquiry was held by three inquiring officers and the impugned order marked 2R3(a) was made by them and they have signed the said Order which was communicated by

the letter dated 31.08.2005 P14. The duty of the court is to see that power shall not be exercised in unlawful and arbitrary manner, when exercise of such powers affects the basic rights of individuals. The courts should be alert to see that such powers conferred by the statute are not exceeded or abused. The Authority is constituted by at least four members sitting together (the quorum). In the absence of a quorum for the meeting of the members of the Authority to hold and inquiry and to make an Order is devoid of any legal effect. Hence this court issues a *writ of certiorari* to quash the said order communicated to the petitioner by letter dated 31.08.2004 marked P14.

The application for writ of certiorari is allowed without costs.

Application allowed.