THE 'SERVICE CHARGE' DEBATE & THE 'WATER BOTTLE' JUDGMENT

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INTRODUCTION

According to Section 2 (1) (o) of the Consumer Protection Act, 1986, the term 'service' means service of any description which is made available to potential users and includes, but not limited to the provision of facilities in connection with banking, financing, insurance, transport, processing, supply of electrical or other energy, board or lodging or both, housing construction, entertainment, amusement or the purveying of news or other information, but does not include the rendering of any service free of charge or under a contract of personal service. Thus, the definition of the term 'service' as per the Consumer Protection Act, 1986 is not only broad and elastic but is rather extensive and far-reaching. Deliberating upon the concept of 'deficiency in service', the Hon'ble Supreme Court of India in the matter of: ***Consumer Unity and Trust Society* v. *Bank of Baroda*, (1997) 2 Comp LJ 192 (SC)**, held that, 'deficiency' means any fault, imperfection, shortcoming or inadequacy in the quality, nature and manner of performance which is required to be maintained by or under any law for the time being in force or has been undertaken to be performed by a person in pursuance of a contract or otherwise in relation to any service.

CONTRACT OF PERSONAL SERVICE FALLS OUTSIDE THE PERIPHERY OF DEFINITIONAL SCOPE OF THE TERM 'SERVICE' AS CONTAINED IN SECTION 2 (1) (O) OF THE CONSUMER PROTECTION ACT, 1986

Personal service stems from a master and servant relationship which is totally different from any professional or technical relationship. The reason for excluding the rendering of service under a contract of personal service from the definition of 'service' under the Consumer Protection Act, 1986 is quite obvious. As an employee in a master-servant relationship can be turned out of service by the master at will, therefore, no occasion can arise for the master to complain about the deficiency in the rendering of service by the employee.

'Contract for Service' and 'Contract of Service': In the matter of: ***Kishori Lal* v. *Chairman, ESI Corporation,* AIR 2007 SC 1819**, the Hon'ble Supreme Court of India drawing a distinction between 'contract for service' and 'contract of service' held that, a 'contract for service' implies a contract whereby one party undertakes to render service (professional or technical) to or for another in the performance of which he is not subject to detailed direction and control and exercises professional or technical skill and uses his own knowledge and discretion, whereas a 'contract of service' implies relationship of master and servant and involves an obligation to obey orders in the work to be performed and as to its mode and manner of performance.

Thus, the test laid down by Hilbery, J. in ***Collins* v. *Hertfordshire County Council*, 1947 KB 598 (615)** still holds the field to the effect that: "*A contract to render services is not the same thing as a 'contract of service'; the latter implies some relationship of master and servant and involves an obligation to obey orders in the work to be performed and as to its mode and manner of performance.*"

PAYMENT OF SERVICE CHARGE IS 'DISCRETIONARY'

Often hotels and restaurants charge tips and gratuities from consumers without their express consent, shelving such tips and gratuities under the slab of 'service charge'. Moreover on numerous occasions consumers end up paying the service charge levied upon them by the hotels and restaurants under the mistaken believe that the service charge levied upon them are a part of taxes the payment of which is unavoidable. Sometimes consumers pay tips to waiters in addition to the service charge levied under the mistaken impression that service charge levied upon them is not inclusive of the tips/gratuities that are occasionally given to the waiters post the meal. Few hotels and restaurants go to the extent of restraining consumers from entering the premises of their respective eateries if they are not in prior agreement to pay the mandatory service charge levied by such hotels and restaurants. That recently in order to curb the practice of mandatory levying of service charge by hotels and restaurants, the Government of India (Ministry of Consumer Affairs, Food and Public Distribution) vide notification (J-24/0/2014-CPU) dated 21.04.2017 issued the following directions under the caption 'Guidelines on fair trade practices related to charging of service charge from consumers by hotels/restaurants':

i. A component of service is inherent in provision of food and beverages ordered by a customer and therefore, pricing of the product is expected to cover both the goods and service components.
ii. Placing of an order by a customer amounts to his/her agreement to pay the prices displayed on the menu card along with the applicable taxes. Charging for anything other than the aforementioned, without express consent of the customer amounts to unfair trade practice.
iii. Tip or gratuity paid by a customer is towards hospitality received by him/her beyond the basic minimum service already contracted between him/her and the hotel management. It is a separate transaction between the customer and the staff of the hotel or restaurant, which is entered into, at the customer's discretion.
iv. The point of time when a customer decides to give a tip/gratuity is not when he/she enters the hotel/restaurant and also not when he/she places his/her order. It is only after completing the meal that the customer is in a position to assess

quality of service, and decide whether or not to pay a tip/gratuity and if so, how much. Therefore, if a hotel/restaurant considers that entry of a customer to a hotel/restaurant amounts to his/her implied consent to pay a fixed amount of service charge, it is not correct. Further, any restriction on entry based on this amounts to a trade practice which imposes an unjustified cost on the customer by way of forcing him/her to pay service charge as condition precedent to placing order of food and beverages, and as such it falls under restrictive trade practice as defined under Section 2 (1) (nnn) of the Consumer Protection Act, 1986.

v. The bill/invoice presented to the customer should clearly display that service charge is voluntary, and the service charge column of the bill should be left blank for the customer to fill up before making payment.

vi. A customer is entitled to exercise his/her rights as a consumer, to be heard and redressed under provisions of the Consumer Protection Act, 1986 in case of unfair/restrictive trade practices, and can approach a Consumer Disputes Redressal Commission/Forum of appropriate jurisdiction.

THE 'WATER BOTTLE' JUDGMENT: CAN HOTELS AND RESTAURANTS CHARGE FROM CUSTOMERS AN AMOUNT MORE THAN THE MRP (MAXIMUM RETAIL PRICE) FOR SUPPLY OF PACKAGED WATER BOTTLES?

MRP is defined under the Legal Metrology (Packaged Commodities) Rules, 2011 as follows: "*The maximum price at which the commodity in packaged form may be sold to the ultimate customer and the price shall be printed on the package, in the manner Maximum or Max, retail price Rs. … inclusive of all taxes or in the form MRP Rs. … inclusive of all taxes.*"

In the matter of: ***Federation of Hotel and Restaurant Associations of India* v. *Union of India*, Civil Appeal No. 21790 of 2017 (Supreme Court of India)**, it was held that, charging prices for mineral water in excess of MRP printed on the packaging during the service of customers in hotels and restaurants does not violate any of the provisions of the Standards of Weights and

Measures Act, 1976 read with the Standards of Weights and Measures (Packaged Commodities) Rules, 1977 and the Standards of Weights and Measures (Enforcement) Act, 1985, all superseded by the Legal Metrology Act, 2009, as such an action does not constitute a sale or transfer of these commodities by the hotelier or restaurateur to its customers. The customer does not enter a hotel or a restaurant to make a simple purchase of these commodities. It may well be that a customer would order nothing beyond a bottle of water or a beverage, but his direct purpose in doing so would clearly travel to enjoying the ambience available therein and incidentally to the ordering of any article/commodity for consumption. When sale of food and drinks takes place in hotels and restaurants, there is really one indivisible contract of service coupled incidentally with sale of food and drinks.

The Constitution (Forty Sixth Amendment) Act, 1982 introduced Article 366 (29-A). According to Sub-clause (f) of Article 366 (29-A) of the Constitution of India, 1950 supply by way of or as part of any service of food or other article for human consumption is deemed to be a sale of goods by the person making the transfer, delivery or supply.

In Re: *Hotel Royal Plazo* v. *Satish Kumar* (First Appeal: 521/2017, SCDRC Rajasthan, Date of Decision: 18.05.2017)

In the above captioned matter it was held that, if a commodity is served in a restaurant then service charge can be levied as per the discretion of the customer but packaged material cannot be sold for a price more than the printed rate (MRP). Therefore as per the mandate of the Legal Metrology Act, 2009 read with the Legal Metrology (Packaged Commodities) Rules, 2011, hotels and restaurants are not allowed to put stickers over packaged commodities to charge rates higher than the MRP displayed on the original package of the commodity. Therefore if a bottle of bear is priced at Rs. 72.24/- (MRP) then an amount of Rs. 100/- cannot be charged by the hotel/restaurant/eatery by putting a sticker of Rs. 100/- over the MRP mentioned on the package of the commodity, that is, the bottle of bear.

In Re: *Big Cinemas & Anr.* v. *Manoj Kumar* (Revision Petition No. 2038/2015, NCDRC New Delhi, Date of Decision: 01.02.2016)

The question that arose for adjudication in the above captioned matter was: *Whether, a service provider, can charge more than the MRP fixed on the water bottle of 'Acquafina'?*, and, *Whether, 'service provider' in the Cinema Halls can have MRP written, different from the ordinary shops or ordinary MRP?*

The Hon'ble NCDRC held that:

i. MRP cannot be of the own making of the service provider be it a hotel, restaurant or cinema hall. MRP has to be made or sanctioned by the manufacturer in accordance with the Legal Metrology Act, 2009 read with the Legal Metrology (Packaged Commodities) Rules, 2011.

ii. A service provider cannot charge an amount more than the MRP but can certainly levy 'service charge' payment of which is discretionary regards being had to the volition of the consumer.

iii. There cannot be two MRPs except in accordance with the law. According to Clause (c) of Explanation 2 to Sub-section 4 of Section 4A of the Central Excise Act, 1944: "…*Where different retail sale prices are declared on different packages for the sale of any excisable goods in packaged form in different areas, each such retail sale price shall be the retail sale price for the purposes of valuation of the excisable goods intended to be sold in the area to which the retail sale price relates*…"

TAKEAWAYS

i. Payment of service charge is discretionary and depends on the volition of the customer. No customer can be compelled to pay service charge.

ii. A service provider cannot charge its customers an amount more than the MRP as mentioned on the carton of the pre-packaged good or commodity.

iii. In the matter of: ***Pallavi Refractories & Ors* v. *Singareni Collieries Co. Ltd.*, 2005 (2) SCC 227**, it was observed that, "…*There is no such law that a particular commodity cannot have a dual fixation of price. Dual fixation*

of price based on reasonable classification from different types of customers has met with approval from the courts. Monopolistic organisations, like Electricity Boards, Petroleum Corporations are having dual price fixation. It is a common feature that Electricity Boards which generate power sell the power at different rates to different types of customers, such as, domestic, agricultural and industrial consumers. Even different types of industries are charged different rates…"