

SUPREME COURT OF INDIA

REPORTABLE

Bench: Justices Pamidighantam Sri Narasimha, Aravind Kumar

Date of Decision: 22nd April 2024

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL No. 4422/2024 (ARISING OUT OF SLP (C) No. 14475/2021)

YASH RAJ FILMS PRIVATE LIMITED ...APPELLANT(S)

VERSUS

AFREEN FATIMA ZAIDI & ANR. ...RESPONDENT(S)

Legislation:

Section 2 of the Consumer Protection Act, 1986

Indian Contract Act, 1872

Constitution of India, Articles 19(1)(a) and 19(2)

Subject:

The appeal concerns whether promotional trailers or teasers create contractual obligations or qualify as unfair trade practices when their content is not included in the final movie.

Headnotes:

Consumer Law - Promotional Trailers – Legal Nature – Analysis – Supreme Court clarifies that promotional trailers, including those for movies, are unilateral communications and do not constitute offers or contracts enforceable by law. Promotional trailers designed to entice potential viewers do not create a contractual relationship or obligations akin to it. [Paras 1, 13-14]

Unfair Trade Practice – Consumer Protection Act, 1986 – Findings – Held that the facts do not support a finding of unfair

trade practice under the Consumer Protection Act, 1986. A promotional trailer lacking a specific component in the actual movie, such as a song, does not amount to a deceptive practice unless a promise to include it in the movie is explicitly made. [Paras 16, 18]

Consumer Protection – Entertainment Services – Application – Supreme Court finds no deficiency of service in the context of entertainment services where a song shown in a movie's promotional trailer was not included in the movie. The mere inclusion of a song in a trailer does not constitute a promise that it will be featured in the movie, nor does it form an implied contract with the viewers. [Paras 9, 10, 14]

Judicial Approach to Promotional Content – Court emphasizes that promotional content in artistic services, like movies, inherently involves artistic freedom and discretion, which should be considered when assessing claims of misleading or deceptive practices. [Paras 19-20]

Decision – The Supreme Court sets aside the lower courts' findings of deficiency of service and unfair trade practice, vindicating the appellant film producer. Finds that no contractual obligation was formed based on the promotional trailer, and the trailer's content not appearing in the film does not constitute an unfair trade practice. [Paras 20-21]

Referred Cases:

- Tata Press Ltd v. Mahanagar Telephone Nigam Limited, (1995) 5 SCC 139
- Lakhanpal National Ltd v. MRTP Commission, (1989) 3 SCC 251
- KLM Royal Dutch Airlines v. Director General of Investigation and Registration, (2009) 1 SCC 230
- Ludhiana Improvement Trust, Ludhiana v. Shakti Cooperative House Building Society Ltd, (2009) 12 SCC 369

J U D G M E N T

PAMIDIGHANTAM SRI NARASIMHA, J.

1. What are the legal implications of a promotional trailer, popularly known as a ‘promo’, or a teaser that is circulated before the release of a movie? Does it create any contractual relationship or obligations akin to it? Is it an unfair trade practice if the contents of the promotional trailer are not shown in the movie? These questions have arisen in the context of a consumer dispute wherein the consumer courts have allowed the complaint alleging deficiency of service based on a ‘contractual obligation’ and ‘unfair trade practice’. For the reasons to follow, we have held that promotional trailers are unilateral and do not qualify as offers eliciting acceptance, and as such they do not transform into Promises, much less agreements enforceable by law. We have also held that the facts do not indicate adoption of an unfair trade practice under the Consumer Protection Act, 1986. Before we delve into the analysis to draw our conclusions, the short facts necessary for the case are as follows.

2. The appellant is a known film producer. It produced a film called ‘Fan’ in the year 2016. Before the release of the film, the appellant circulated a promotional trailer, both on television and online, which contained a song in the form of a video.

2.1 The respondent no. 1 (‘complainant’), a teacher in a school in Aurangabad, states that having watched the promotional trailer of the film, she decided to go to watch the movie on the silver screen with her family. However, she found that the movie did not contain the song, even though the song was widely circulated for promoting and publicising the movie. She filed a consumer complaint before the District Consumer Redressal Forum wherein she has stated that she decided to

watch the movie after watching the song in the promotional trailer, with the expectation of watching the song in the theatre. However, to her disappointment, she found that the song was not played in the movie. She alleges that due to this, she felt cheated and deceived by the appellants and has undergone mental agony. In view of the above, she claimed Rs. 60,550 as damages.

3. In a short order dated 29.04.2016, the District Consumer Redressal Forum dismissed the complaint on the ground that there is no relationship of consumer and service provider.

3.1 Against the above order, the complainant filed an appeal before the State Commission, which was allowed by order dated 22.09.2017. The State Commission held that entertainment services are covered under the definition of 'service' and the appellant is a service provider. Apart from holding that there is deficiency in service, the State Commission held that the appellant has engaged in an unfair trade practice as the song in the promotional trailer was widely circulated but not shown in the film. Under these circumstances, the State Commission awarded Rs. 10,000 as compensation for mental harassment and Rs. 5,000 as cost to the complainant.

3.2 The appellant carried the matter to the National Consumer Disputes Redressal Commission¹. By the order impugned,² the NCDRC held that a consumer would feel deceived if a song that is shown in the promotional trailer is not played in the film, thereby amounting to an unfair trade practice. Further, there is deficiency of service as playing the song in the trailer leads to an implied

¹ Hereinafter 'NCDRC'.

² In Revision Petition No. 156 of 2018, order dated 18.02.2020.

promise that it will be played in the film. In its own words, the NCDRC held as follows:

“7. When the producer of a movie shows the promos of the said movie on TV Channels, etc. and such promos include a song, any person watching the promo would be justified in believing that the movie would contain the song shown in the said promos, unless the promo itself contains a disclaimer that the song will not be a part of the movie. If a person likes the song shown in the promo and based upon such liking decides to visit a cinema hall for watching the said movie for a consideration, he is bound to feel deceived, disappointed and dejected if the song shown in the promo is not found in the film. The practice of including a song in the promo of a film shown widely on TV Channels but excluding the said song while exhibiting the movie, in my opinion, constitutes an unfair trade practice. The obvious purpose behind such an unfair trade practice is to draw the potential viewers to the cinema hall by luring them with the song which forms part of the promo and thereby making gain at the cost of the viewer if the song does not form part of the movie for which consideration is paid by the viewer. The exclusion of the song from the movie will also constitute a deficiency, as defined in Section 2(1)(g) of the C.P. Act, if the song is impliedly promised, but is later omitted while exhibiting the movie.”

4. Before we proceed to delineating and applying the test for ‘deficiency of service’ and ‘unfair trade practice’ under the Consumer Protection Act, 1986³, it is necessary to set out the context in which a promotional trailer would or would not create a contractual relationship or any other right or liability between the producer and the consumer.

5. A promotional trailer is an advertisement for a film. It is a settled position of law that commercial speech, which includes

3 Hereinafter 'the Act'. advertisements, is protected through freedom of speech under Article 19(1)(a) of the Constitution, subject to the reasonable restrictions in Article 19(2).⁴ It is also a settled position that commercial speech that is deceptive, unfair, misleading, and untruthful is excluded from such constitutional protection and can be regulated and prohibited by the State.⁵ Subject to these restrictions, the producer/ advertiser has the freedom to creatively and artistically promote his goods and services.

6. Information dissemination is one of the primary purposes of advertising: an advertisement informs existing and potential consumers about the presence and availability of certain goods and services in the market, their features and qualities, and their uniqueness and comparability with market competitors and substitutes. However, that is not the only purpose of an advertisement. An advertisement is not only informational but also a means of creative and artistic expression. It can allure, entice, capture the attention, and pique the interest of consumers through features that may not directly relate to information about the product or service. Advertisements build brand loyalty and reputation, and promote an image and ethos of not only the

⁴ *Tata Press Ltd v. Mahanagar Telephone Nigam Limited*, (1995)

⁵ SCC 139, paras 17-18 and 25.

⁵ *ibid*, para 17.

product being advertised but also the manufacturer/ service provider. Advertisements contain unique taglines, jingles, visuals, etc. that are intended to grab the attention of the viewer and become associated and synonymous with the product or service itself.

7. A song, dialogue, or a short visual in a promotional trailer may be seen in the context of the multifarious uses of advertisements. These could be used to popularise or to create a buzz about the release of the film, rather than to purely represent information about the contents of the film. Viewers could associate these with the film and may be interested or encouraged to watch the film. However, the kind of right or liability a promotional trailer creates would entirely depend on the civil and statutory legal regime. The complainant has invoked the jurisdiction of the consumer court and therefore, it is necessary to analyse the issues in view of the provisions of the Consumer Protection Act, 1986.

8. The Consumer Protection Act has been enacted to protect the interests of consumers and for that purpose, to establish authorities for the settlement of consumer disputes. A 'consumer' has been defined in Section 2(1)(d) as a consumer of goods or services. A consumer of goods is one who buys any goods, and a consumer of a service is one who hires or avails of any service, for a consideration, except when such goods or services are for a commercial purpose.⁶ A consumer can file a 'complaint', which is defined in Section 2(1)(c) of the Act,⁷ alleging *inter alia* 'deficiency in service' and 'unfair trade practice'.

9. *Deficiency of Service*: In this context, the definition of 'deficiency' and 'service' are important. The term 'service' has been defined in Section 2(1)(o) of the Act as follows:

"2. Definitions.—(1) In this Act, unless the context otherwise requires,—

(o) "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

⁶ Section 2(1)(d) of the Act defines ‘consumer’ as follows’:

“2. Definitions.—(1) In this Act, unless the context otherwise requires,—

(d) “consumer” means any person who,—

(i) buys any goods for a consideration which has been paid or promised or partly paid and partly promised, or under any system of deferred payment and includes any user of such goods other than the person who buys such goods for consideration paid or promised or partly paid or partly promised, or under any system of deferred payment, when such use is made with the approval of such person, but does not include a person who obtains such goods for resale or for any commercial purpose; or

(ii) hires or avails of any services for a consideration which has been paid or promised or partly paid and partly promised, or under any system of deferred payment and includes any beneficiary of such services other than the person who hires or avails of the services for consideration paid or promised, or partly paid and partly promised, or under any system of deferred payment, when such services are availed of with the approval of the first mentioned person but does not include a person who avails of such services for any commercial purpose”

⁷ The relevant portion of Section 2(1)(c) of the Act defining ‘complaint’ is as follows’: **“(c) “complaint” means any allegation in writing made by a complainant that—**

(i) an unfair trade practice or a restrictive trade practice has been adopted by any trader or service provider;

(iii) the services hired or availed of or agreed to be hired or availed of by him suffer from deficiency in any

respect;

*with a view to obtaining any relief provided by or under this Act;”
include the rendering of any service free of charge or
under a contract of personal service;”*

There is no doubt about the fact that any person watching a movie after remitting the necessary consideration becomes a consumer of service. The service in this case is that of entertainment.

10. The question for our consideration is whether there is any ‘deficiency’ in the provision of the entertainment service that the consumer has availed by paying the consideration through the purchase of a ticket. The complainant alleges that there is ‘deficiency’ in the service because what was shown in the film was not as per what was promised. Now, the definition of ‘deficiency’ becomes relevant and it is defined in Section 2(1)(g) of the Act as follows:

“2. Definitions.—(1) In this Act, unless the context otherwise requires,—

(g) “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;”

11. As per the definition, there is deficiency when there is a fault, imperfection, shortcoming or inadequacy in the quality, nature, and manner of performance that is required to be maintained *either in terms of a law or in terms of a contract.*⁸ To appreciate the allegation of deficiency, it is necessary to refer to certain portions of the complaint:

“3. The Complainant states that, her children are big fans of Shahrukh Khan and after watching the promos of the song ‘Jabra Fan’ they decided to go to the movie ‘Fan’ to watch the song ‘Jabra Fan’ on silver screen.

She had given 2 option (1) Jungle Book and the second one was 'Fan' to both the children namely Nabeel and Flora. Out of two option they preferred the later one because of song 'Jabra Fan' to enjoy on celluloid.

4. The Complainant states that, she accordingly convinced her mother-in-law, father-in-law, sister and brother-in-law for the movie by saying that, the film is looking great and the song 'Jabra Fan' which is now become jingle, is also there for the entertainment which will feel great on the silver screen. She bought 7 Tickets of first day first show on 15.04.2016, show time 6.10 p.m. Friday of PVR Cinema of the row G-4 to G-10 of Rs. 150/- each which cost her Rs. 1050/-. The copy of all the Tickets are dated 15.04.2016 are annexed herewith and marked as Annexure 'A'.

7. The Complainant states that, as the song was not shown in the entire movies the family members and in started teasing her that, why she planned for such a movie which is not having a single song and a song 'Jabra Fan' which become anthem is shown in promos of the film. She has gone through mental agony because of Respondents act."

It is evident from the above that the deficiency alleged in the complaint arises out of the complainant's own expectation that the song would be a part of the movie. It is assumed that there is deficiency of service as the movie did not contain the song.

8 Arulmighu Dhandayudhapaniswamy Thirukoil, Palani, Tamil Nadu v. Deptt. of Post Offices, (2011) 13 SCC 220, para 18.

12. The fallacy in this argument is in assuming that a promotional trailer is an offer or a promise. It is under this misplaced assumption that the complainant has assumed that the subsequent formation of a contract to watch the movie is not in compliance with the promise allegedly made through the promotional trailer. We will explain this in terms of the law of contracts.

13. The essential element of an 'offer' or 'proposal' for the formation of a contract has not been satisfied in the present case. A person makes an offer or 'proposal' when he signifies his willingness to do something with a view to obtain the assent of another person.⁹ When the other person signifies his assent, the proposal gets accepted and becomes a 'promise'.¹⁰ A proposal is therefore a prerequisite to a 'promise' and a 'contract'.¹¹

⁹ Section 2(a) of the Indian Contract Act, 1872 defines 'proposal' as follows:

"2. Interpretation-clause.—In this Act the following words and expressions are used in the following senses, unless a contrary intention appears from the context:—

(a) When one person signifies to another his willingness to do or to abstain from doing anything, with a view to obtaining the assent of that other to such act or abstinence, he is said to make a proposal;"

¹⁰ Section 2(b) of the Indian Contract Act, 1872 defines 'promise' as follows:

"(b) When the person to whom the proposal is made signifies his assent thereto, the proposal is said to be accepted. A proposal, when accepted, becomes a promise;"

11 Section 2(h) of the Indian Contract Act, 1872 defines ‘contract as follows: “(h) *An agreement enforceable by law is a contract;*”

‘Agreement’ has been defined in Section 2(e) as follows:

“(e) *Every promise and every set of promises, forming the consideration for each other, is an agreement;*”

14. A promotional trailer is unilateral. It is only meant to encourage a viewer to purchase the ticket to the movie, which is an independent transaction and contract from the promotional trailer. A promotional trailer by itself is not an offer and neither intends to nor can create a contractual relationship.¹² Since the promotional trailer is not an offer, there is no possibility of it becoming a promise. Therefore, there is no offer, much less a contract, between the appellant and the complainant to the effect that the song contained in the trailer would be played in the movie and if not played, it will amount to deficiency in the service. The transaction of service is only to enable the complainant to watch the movie upon the payment of consideration in the form of purchase of the movie ticket. This transaction is unconnected to the promotional trailer, which by itself does not create any kind of right of claim with respect to the content of the movie.

15. *Unfair Trade Practice*: While we have held that no contract is formed on the basis of the promotional trailer and as such, there is no deficiency of service, there is a further question for our consideration, i.e., whether it is an ‘unfair trade practice’ giving

¹² It is well-established in contractual jurisprudence that an advertisement generally does not constitute an offer and is merely an ‘invitation to offer’ or ‘invitation to treat’. See *Halsbury’s Laws of England*, vol 22 (5th edn, LexisNexis 2012), para 240; Pollock and Mulla, *The Indian Contract and Specific Relief Acts*, vol I (14th edn, LexisNexis 2013), p. 42.

rise to a cause of action. If it is found to be an unfair trade practice, the Act provides for compensation and other remedies.

16. The term 'unfair trade practice' is defined in Section 2(1)(r) of the Act and the relevant portions are as follows:

“2. Definitions.—(1) In this Act, unless the context otherwise requires,—

(r) “unfair trade practice” means a trade practice which, for the purpose of promoting the sale, use or supply of any goods or for the provision of any service, adopts any unfair method or unfair or deceptive practice including any of the following practices, namely:—

(1) the practice of making any statement, whether orally or in writing or by visible representation which,—

(ii) falsely represents that the services are of a particular standard, quality or grade;

(iv) represents that the goods or services have sponsorship, approval, performance, characteristics, accessories, uses or benefits which such goods or services do not have;”

17. In various decisions,¹³ this Court has held that a false statement that misleads the buyer is essential for an 'unfair trade practice'.¹⁴ A false representation is one that is false in substance and in fact, and the test by which the representation must be judged is to see whether the discrepancy between the represented fact and the actual fact would be considered material by a reasonable person.¹⁵ Further, “*statements of the nature which are*

¹³ *Lakhanpal National Ltd v. MRTP Commission*, (1989) 3 SCC 251, para 7; *KLM Royal Dutch Airlines v. Director General of Investigation and Registration*, (2009) 1 SCC 230, paras 16-20; *Ludhiana Improvement Trust, Ludhiana. v. Shakti Cooperative House Building Society Ltd*, (2009) 12 SCC 369, paras 18-23.

14 *ibid.*

15 *Lakhanpal National Ltd* (supra), para 7.

wilfully made knowingly false, or made recklessly without honest belief in its truth, and made with the purpose to mislead or deceive will definitely constitute a false or misleading representation. In addition, a failure to disclose a material fact when a duty to disclose that fact has arisen will also constitute a false or misleading representation."¹⁶ Therefore, only substantive and material discrepancies are covered under 'unfair trade practice'.

18. The ingredients of 'unfair trade practice' under Section 2(1)(r)(1) are not made out in this case. The promotional trailer does not fall under any of the instances of "unfair method or unfair and deceptive practice" contained in clause (1) of Section 2(1)(r) that pertains to unfair trade practice in the promotion of goods and services. Nor does it make any false statement or intend to mislead the viewers. Furthermore, the burden is on the complainant to produce cogent evidence that proves unfair trade practice¹⁷ but nothing has been brought on record in the present case to show the same. Therefore, no case for unfair trade practice is made out in the present case.

19. There is another important distinction that we must bear in mind, i.e., the judicial precedents on this point do not relate to

¹⁶ *KLM Royal Dutch Airlines* (supra), para 20.

¹⁷ *Ludhiana Improvement Trust* (supra), para 23.

transactions of service relating to art. Services involving art necessarily involve the freedom and discretion of the service provider in their presentation. This is necessary and compelling by the very nature of such services. The variations are substantial, and rightly so. Therefore, the standard by which a court of law judges the representation, followed by the service, must be different and must account for the creative element involved in such transactions.

20. In view of the above reasons and conclusions, we set aside the findings of the impugned order that there is deficiency of service and unfair trade practice, and allow the present appeal.

21. Pending applications, if any, stand disposed of.

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