

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE THE CHIEF JUSTICE MR.ASHOK BHUSHAN
&
THE HONOURABLE MR.JUSTICE A.M.SHAFFIQUE

FRIDAY, THE 31ST DAY OF JULY 2015/9TH SRAVANA, 1937

WA.NO. 1522 OF 2015 () IN WP(C).5668/2015

AGAINST THE ORDER/JUDGMENT IN WP(C) 5668/2015 OF
HIGH COURT OF KERALA DATED 23-02-2015

APPELLANT(S)/RESPONDENTS 2 AND 3:

1. B. REGHU, S/O.BHASKARAN, HILL VIEW,
AMRITHA BHAVAN, T.C. NO.65/8151,
THIRUVALLAM, THIRUVANANTHAPURAM.
2. O.R. SHEEJA, W/O. REGHU, HILL VIEW,
AMRITHA BHAVAN, T.C. NO.65/8151,
THIRUVALLAM, THIRUVANANTHAPURAM.

BY ADV. SRI.C.M.STEPHEN

RESPONDENT(S)/PETITIONER/1ST RESPONDENT:

1. STATE BANK OF TRAVANCORE,
STRESSED ASSETS RESOLUTION CENTRE
SECOND FLOOR, CHANDRASEKHARAN NAIR
STADIUM COMPLEX, PALAYAM, VIKAS BHAVAN P.O.,
THIRUVANANTHAPURAM - 695 033.
2. STATE CONSUMER DISPUTES REDERESSAL COMMISSION,
VAZHUTHACAUD, THIRUVANANTHAPURAM - 695 010.

R BY SRI.SANTHOSH MATHEW

R BY SRI.SATHISH NINAN

THIS WRIT APPEAL HAVING BEEN FINALLY HEARD ON
31.07.2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

“C.R.”

ASHOK BHUSHAN, C.J.

and

A.M. SHAFFIQUE, J.

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W.A. No.1522 of 2015

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Dated this the 31st day of July, 2015

J U D G M E N T

Ashok Bhushan, C.J.

This Writ Appeal has been filed against the judgment dated 23.02.2015 in W.P(C) No.5668 of 2015 by which judgment, the Writ Petition filed by the State Bank of Travancore, respondent No.1 to this appeal, has been allowed setting aside the interim order passed by the Kerala State Consumer Redressal Commission (for short, “Commission”) dated 25.11.2014.

2. The parties shall be referred to as arrayed in the Writ Petition.

3. Brief facts giving rise to the Writ Petition are: Respondent Nos.2 and 3 had availed a housing loan of Rs.8 lakhs on 22.12.2003. Further on 04.10.2005,

respondent No.2 availed a cash credit facility of Rs.20 lakhs from the petitioner. When both the accounts, i.e., housing loan account and cash credit account became non-performing assets, the petitioner issued notice on 04.04.2012 under Section 13(2) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (hereinafter referred to as "the 2002 Act") demanding Rs.33,15,463/-. Respondent Nos.2 and 3 claimed that the amount as shown in the statement of accounts be accepted and loan account be closed. The petitioner claimed that the said statement did not include the interest thereon after the accounts have been declared NPA. On 24.04.2014 respondent Nos.2 and 3 filed a petition before the Commission, being C.C. No.49 of 2014 in which the following prayers have been made:

"a) Direct the First Opposite Party to close Account No.57004950536 by receiving Rs.6,16,977/- (Rupees Six Lakhs Sixteen Thousand Nine Hundred and Seventy Seven

only) and release all collateral documents and charges.

b) Direct the First Opposite Party to close loan Account NO.67003185208 by receiving Rs.13,566/- (Rupees Thirteen Thousand Five hundred and Sixty Six only) and release all collateral documents and charges.

c) Direct the First Opposite Party to pay a compensation of Rs.25,00,000/- (Rupees Twenty Five Lakhs only), to the Complainants for torture, loss and mental agony suffered, out of their deficiency of service and/or unfair trade practice.

d) Direct the First Opposite Party to pay the entire cost of this proceedings.

e) To pass any other order and/or direction that deems fit and proper in the facts and circumstances of this case.”

In the complaint, respondent Nos.2 and 3 filed I.A. No.396 where they prayed for staying all recovery proceedings in the aforesaid two accounts pending disposal of the complaint. The petitioner had invoked Section 13(4) of the 2002 Act by filing an application before the Chief Judicial Magistrate, Thiruvananthapuram under Section 14 of the 2002 Act for taking possession of the property. The learned Chief

Judicial Magistrate appointed an Advocate Commissioner to take possession of the property. Advocate Commissioner issued notice for taking possession on 31.10.2014. In the meantime sale notice was published in which 17.11.2014 was fixed as the date of sale by the petitioner. Respondent Nos.2 and 3 approached this Court by filing W.P(C) No.28335 of 2014 to quash the order passed by the learned Chief Judicial Magistrate and also the sale notice. The learned Single Judge by judgment dated 14.11.2014 dismissed the Writ Petition observing that the factual issue regarding quantum cannot be examined in a proceeding under Article 226 of the Constitution of India. However while dismissing the Writ Petition, the learned Single Judge observed that the Writ Petition is dismissed without prejudice to the rights and liberties of the petitioners to pursue other appropriate remedy, in accordance with law. After dismissal of the Writ Petition

respondent Nos.2 and 3 proceeded with I.A. No.396 of 2014 filed in C.C. No.49 of 2014. The State Commission passed an order on 25.11.2014 which was to the following effect:

“The complainant is directed to remit Rs.6,16,977/- and Rs.13,566/- to the Opposite Party Bank. On such payment the Recovery Proceedings shall be stayed till the disposal of the complaint”.

The only recovery proceedings which were initiated by the petitioner was proceedings under the 2002 Act. The effect of the interim order was to stay the proceedings under the 2002 Act on the condition as mentioned in the order. Respondent Nos.2 and 3 claimed that they have complied with the said condition and the entire proceedings ought to have been stayed.

4. The Petitioner-Bank aggrieved by the order passed by the Commission filed W.P(C) No.5668 of 2015 praying for quashing the proceedings in C.C. No.49 of 2014 as well as the order dated 25.11.2014

passed by the Commission in I.A. No.396 of 2014. The learned Single Judge heard the Writ Petition and relying on the judgment of this Court in **Punjab National Bank v. Consumer Disputes Redressal Forum** (2011 [3] KLT 616) allowed the Writ Petition setting aside Ext.P5 order dated 25.11.2014 staying the recovery proceedings. Aggrieved by the said judgment, respondent Nos.2 and 3 have come up in this appeal.

5. Shri C.M. Stephen learned counsel for respondent Nos.2 and 3/appellants in support of the Writ Appeal contended that against the order passed by the Commission dated 25.11.2014 the petitioner had a statutory alternate remedy under The Consumer Protection Act, 1986, hence the Writ Petition ought not have been entertained by the learned Single Judge. He further submitted that remedy of the petitioner was to take up the matter in appeal before the National Commission or to approach the Commission to modify

the interim order. He further submitted that remedy under Section 17 of the 2002 Act is not available to respondent Nos.2 and 3 in view of the fact that the said remedy can be availed only when respondent Nos.2 and 3 are deprived of the actual physical possession of the property. It is submitted that the learned Single Judge has allowed the Writ Petition without issuing notice to respondent Nos.2 and 3.

6. Shri Sathish Ninan, learned counsel for the petitioner refuting the submissions of the learned counsel for respondent Nos.2 and 3 contended that the order passed by the Commission was without jurisdiction since the Commission has no jurisdiction to stay the proceedings under the 2002 Act. He submitted that as per Section 34 of the 2002 Act jurisdiction of the civil court or any other authority to grant injunction against the proceedings under the 2002 Act is barred. He submitted that when the order passed by the

Commission was without jurisdiction, petitioner had every right to approach this Court under Article 226 of the Constitution of India. It is submitted that the case was covered by one of the exceptions recognised for entertainability of the proceedings when alternate remedy is available. It is submitted that respondent Nos.2 and 3 unsuccessfully challenged the proceedings under the 2002 Act by which the petitioner proceeded to take possession under Section 14 of the 2002 Act as well as issuance of sale notice. He submitted that only after the dismissal of the Writ Petition, respondent Nos.2 and 3 pursued I.A. No.396 of 2014 and obtained interim order from the State Commission. It is submitted that the Writ Petition challenging the proceedings under the 2002 Act having been dismissed on 14.11.2014, there was no jurisdiction for the Commission to grant any interim order staying the SARFAESI proceedings.

7. We have heard learned counsel for the

parties and perused the records. Learned counsel for the parties placed reliance on various judgments which we shall refer to while considering the submissions in detail.

8. The first submission made by the learned counsel for respondent Nos.2 and 3 is that the alternate remedy of filing appeal being available to the petitioner, the Writ Petition ought not have been entertained. Learned counsel relied on the judgment in **Cicily Kallarackal v. Vehicle Factory** ([2012] 8 SCC 524). In the above case Writ Petition was filed challenging the order of the National Consumer Disputes Redressal Commission. The Apex Court in the said case held that the order passed by the National Commission can only be challenged before the Supreme Court in view of the specific provision of Section 23 of The Consumer Protection Act, 1986. It is useful to refer to paragraphs 1 and 7 of the said judgment which is quoted below:

“1. These special leave petitions have been filed against the impugned judgments and orders dated 16/09/2008 in Writ Appeal No. 2518 of 2007 and 17/12/2009 in Review Petition No. 380 of 2009. In order to decide the controversy it is not necessary to make the reference to the factual controversy involved herein.

The basic issue has been raised in the petitions that the Kerala High Court did not have jurisdiction to entertain the writ petition against the judgment and order passed by the National Consumer Disputes Redressal Commission (hereinafter called 'the Commission'). The said order could be challenged only before this Court in view of the provisions of National Consumer Protection Act, 1986, thus, the order passed by the High Court impugned herein is a nullity for want of jurisdiction.

7. While declining to interfere in the present Special Leave Petition preferred against the order passed by the High Court in exercise of its extraordinary jurisdiction under Art.226 of the Constitution of India, we hereby make it clear that the order of the Commission are incapable of being questioned under the writ jurisdiction of the High Court, as a statutory appeal in terms of S.27A(1)(c) lies to this Court. Therefore, we have no hesitation in issuing a direction of caution that it will not be proper exercise of jurisdiction by the High Courts to entertain writ petitions against such orders of the Commission.

A copy of this order may be sent to the Registrar General of all the High Courts, for bringing the same to the notice of Hon'ble the Chief Justices and Hon'ble Judges of the respective High Courts.”

In the above case the challenge was to an order passed by the National Commission against which order statutory appeal lies only to the Supreme Court. In the above case the Supreme Court held that the High Court ought not have been entertained the Writ Petition under Article 226. The said case is clearly distinguishable and not applicable to the facts of the present case since in the present case order passed by the Commission is under challenge in the Writ Petition under Article 226.

9. Another judgment relied by the learned counsel for respondent Nos.2 and 3 is **Om Prakash Saini v. DCM Ltd. and Others** ([2010] 11 SCC 622). In the above case a complaint was filed by the 1st respondent before the State Consumer Redressal Commission, Delhi under The Consumer Protection Act,

1986. The State Commission also passed an interim order and ultimately decided the complaint. Against the order of the State Commission an appeal was filed by respondent No.1 which was withdrawn and thereafter he filed Writ Petition under Article 227 of the Constitution of India which was allowed by the learned Single Judge by order dated 11.07.2007. Application was filed by the appellant to recall the judgment of the High Court which was rejected. The appellant thereafter approached the Apex Court. The Apex Court held that since respondent had availed the alternate remedy under Section 23 of the 1986 Act and during the pendency of the appeal he filed a petition under Article 227 which ought not have been entertained by the learned Single Judge. Further, dismissal of the application filed by the appellant for recalling the order was also vitiated. The following was laid down by the Supreme Court in paragraphs 13 and 14:

“13. Admittedly, respondent No.1 had availed the alternative remedy available to it under S.21 by filing an appeal against the order of the State Commission. During the pendency of the appeal, respondent No.1 chose to challenge the order of the State Commission by filing a petition under Art.227 of the Constitution, which was entertained by the learned Single Judge on the basis of the assurance given by the learned counsel that the appeal filed before the National Commission will be withdrawn. The order passed by the learned Single Judge on 21.3.2007 or the one by which the petition filed by respondent No.1 was finally disposed of does not contain any indication as to why the learned Single Judge thought it proper to make a departure from the rule that the High Court will not entertain a petition under Art.226 or 227 of the Constitution if an effective alternative remedy is available to the aggrieved person. In our view, during the pendency of the appeal filed by respondent No.1 under S.21 of the 1986 Act, the learned Single Judge was not at all justified in entertaining the petition filed under Art.227 of the Constitution merely because he thought that the State Commission did not have the jurisdiction to entertain the complaint in view of the scheme sanctioned by the Company Judge under S.391 read with S.392 and S.394 of the Companies Act.

14. The dismissal of the application filed by the appellant for recall of order dated 11.7.2007 is clearly vitiated by a patent error of law. In the petition filed by him, the appellant had averred that he could not file reply because of heart ailment and on the date of hearing he could not reach

the High Court because of failure of the public bus transport system. Respondent No.1 did not controvert these averments. Notwithstanding this, the learned Single Judge dismissed the application without even examining sufficiency of the cause shown by the appellant for his non - appearance on the date of hearing.”

The judgment of the Apex Court in the above case was on its own facts where appeal was pending against the order of the State Commission. There was no issue in the above case that order passed by the State Commission was without jurisdiction. The above case also does not help respondent Nos.2 and 3 in any manner.

10. Another judgment relied on by the learned counsel is **S.S.Jain Samiti v. Sri.R.J.I.College** ([1996] 3 SCC 11). In the said case the Apex Court held that High Court will not permit its extraordinary jurisdiction to be converted into a civil court under the ordinary law. In the above case there was a suit pending between two parties and interim injunction was also

granted by the trial court against which order a statutory appeal was available. The High Court in the above facts entertained the Writ Petition and gave a judgment. In the above context the Apex Court laid down the following in paragraph 8:

“8. We are of the view that the High Court not only fell into patent error but also exceeded its jurisdiction under Art.226 of the Constitution of India. Though the jurisdiction of the High Court under Art.226 of the Constitution is not confined to issuing the prerogative writs, there is a consensus of opinion that the High Court will not permit this extraordinary jurisdiction to be convened into a civil Court under the ordinary law. When a suit is pending between the two parties the interim and miscellaneous orders passed by the Trial Court -- against which the remedy of appeal or revision is available -- cannot be challenged by way of a writ petition under Art.226 of the Constitution of India. Where the civil Court has the jurisdiction to try a suit, the High Court cannot convert itself into an appellate or revisional Court and interfere with the interim/miscellaneous orders of the Civil Court. The writ jurisdiction is meant for lining justice between the parties where it cannot be done in any other forum.”

The above case is also distinguishable since suit between the parties was pending and against the

interim injunction parties had remedy of filing appeal.

11. It is well settled that availability of alternate remedy is not a bar in exercise of jurisdiction under Article 226 of the Constitution of India in a few exceptional case. Exceptions were clearly reiterated and laid down by the Apex Court in **Whirlpool Corpn. v. Registrar of Trade Marks** ([1998] 8 SCC 1). The following was laid down in paragraphs 15, 20 and 21:

“15. Under Art.226 of the Constitution, the High Court, having regard to the facts of the case, has a discretion to entertain or not to entertain a Writ Petition. But the High Court has imposed upon itself certain restrictions one of which is that if an effective and efficacious remedy is available, the High Court would not normally exercise its jurisdiction. But the alternative remedy has been consistently held by this Court not to operate as a bar in at least three contingencies, namely, where the writ petition has been filed for the enforcement of any of the Fundamental Rights or where there has been a violation of the principle of natural justice or where the order of proceedings are wholly without jurisdiction or the vires of an Act is challenged. There is a plethora of case law on this point put to cut down this circle of forensic Whirlpool, we would rely on some old decisions of the evolutionary era of the constitutional law as they still hold the field.

20. Much water has since flown beneath the bridge, but there has been no corrosive effect on these decisions which, though old, continue to hold the field with the result that law as to the jurisdiction of the High Court in entertaining a writ petition under Art.226 of the Constitution, in spite of the alternative statutory remedies, is not affected, specially in a case where the authority against whom the writ is filed is shown to have had no jurisdiction or had purported to usurp jurisdiction without any legal foundation.

21. That being so, the High Court was not justified in dismissing the writ petition at the initial stage without examining the contention that the show cause notice issued to the appellant was wholly without jurisdiction and that the Registrar, in the circumstances of the case, was not justified in acting as the "TRIBUNAL".

In the above view of the matter, we are of the view that no error was committed by the learned Single Judge while entertaining the Writ Petition under Article 226 of the Constitution of India against the order passed by the Commission on 25.11.2014 on the ground that jurisdiction of the Commission is barred under Section 34 of the 2002 Act and the Commission has no jurisdiction to stay the recovery proceedings under the

2002 Act. The first submission of learned counsel for respondents 2 and 3/appellants cannot be accepted.

12. Next submission pressed by the learned counsel for respondent Nos.2 and 3 is that in view of the law laid down by the Supreme Court in **Standard Charter Bank v. V.Noble Kumar and Others** ([2013] 9 SCC 620), remedy under Section 17 of the 2002 Act is available only when a party is deprived of possession. It is submitted that respondent Nos.2 and 3 have no remedy under Section 17. The above judgment of the Apex Court does not render any help to respondent Nos.2 and 3 in the present case due to two reasons. Firstly, respondent Nos.1 and 2 have already filed a Writ Petition challenging the action of the petitioner under Section 13(4) of the 2002 Act which Writ Petition was dismissed on 14.11.2014 and secondly, in the present case petitioner has taken measures under Section 13 (4). Apart from filing application under Section 14 of

the 2002 Act, sale notice was also issued. Thus remedy under Section 17 of the 2002 Act cannot be said to be not available to respondent Nos.2 and 3.

13. The last submission of the learned counsel is that the learned Single Judge has allowed the Writ Petition without issuing notice to respondent Nos.2 and 3. A perusal of the judgment does not indicate that any notice was issued to respondent Nos.2 and 3 or they were heard. However, in view of the fact that only legal issues were involved in the Writ Petition and all contentions of respondent Nos.2 and 3 are being considered in this appeal, we are of the view that no purpose would be served in interfering with the judgment of the learned Single Judge on this ground. We make it clear that learned Single Judge has only set aside Exhibit P5 order dated 25.11.2014 although prayer for quashing the complaint was there which has not been considered by the learned Single Judge. Thus we

make it clear that we are not expressing any opinion on the maintainability of the complaint before the Commission.

In view of the forgoing discussion, the Writ Appeal is dismissed.

**ASHOK BHUSHAN,
CHIEF JUSTICE.**

**A.M. SHAFFIQUE,
JUDGE.**

VSV