

**HON'BLE SRI JUSTICE SANJAY KUMAR
AND
HON'BLE Dr. JUSTICE B.SIVA SANKARA RAO**

W.P.No.41543 of 2015

ORDER: (per Hon'ble Dr.Justice B.Siva Sankara Rao)

The writ petitioners are the respondents in C.C.No.157 of 2015 before the 1st respondent namely Telangana State Consumer Disputes Redressal Commission (for short, 'the State Commission'), maintained by the 2nd respondent by name Veeraghanta Subbarao.

Pending the C.C.No.157 of 2015, the 2nd respondent herein as complainant-petitioner therein, filed an application I.A.No.308 of 2015 for the purposes to assess, note down, value the works done and the works still kept pending by the writ petitioners in the premises in question, with the help and assistance of a technical person like an engineer. Said application was resisted by filing counter by the writ petitioners as respondents therein. However, one K.V.Nageshwar Reddy, said to be an engineer, was appointed by the State Commission by allowing I.A.No.308 of 2015, dated 09.12.2015. The warrant issued to Sri K.V.Nageshwar Reddy reads as follows:-

“Whereas, it is deemed requisite, for the purposes of this case to assess, note down, value the works done and the works still kept pending etc., by the respondents/Opposite parties hereto with respect to their job in the premises bearing Plot No.2435, measuring 250sq.yards, Old MIG, BHEL, Lingampally, Ramachandra Puram Mandal, Hyderabad, that a commission for the above purpose should be issued.

You are hereby appointed Technical Expert for the above purpose to visit the schedule building and report factual features of the building as to the works already done and the works that are remaining to be done in the presence of counsels for both the parties in the premises bearing Plot No.2435, 250sq.yards, Old MIG, BHEL, Lingampally, Ramachandra Puram Mandal, Hyderabad.”

2. Now, impugning the same, present writ petition is filed with the prayer as follows:-

“to issue a Writ or Order or direction more particularly in the nature of Writ of Certiorari calling for the records in respect of C.C.No.157 of 2015 pending on the file of the Telangana State Commission Disputes Redressal Commission at Hyderabad, consequently quash the order dated 09.12.2015 in I.A.No.308 of 2015 in C.C.No.157 of 2015 passed by the Telangana State Consumer Disputes Redressal Commission at Hyderabad as it is illegal and without jurisdiction and to pass such other order or orders as the Hon'ble Court deems fit and proper in the circumstances of the case.”

3. In the Writ Petition, while ordering notice before admission, an interim order, dated 22.12.2015 was passed in favour of the writ petitioners that reads as follows:-

“Learned counsel for the petitioners relied on the judgment dated 30.01.2009 rendered by a Division Bench of this Court in W.P.No.18735 of 2008 reported in 2009(2) ALD 589 (DB), wherein it was held that an Advocate-Commissioner cannot be appointed as contemplated under Order XXVI Rule 9 of C.P.C. by the State Commission, and submits that the said judgment is squarely applicable to the facts of the present case.

Hence, notice before admission.

There shall be interim stay, as prayed for.

Post after four weeks.”

4. The 2nd respondent herein filed W.V.M.P.No.186 of 2016 with supporting affidavit as counter to the stay petition seeking to vacate the interim stay order supra, granted in the writ petition.

5. In the case on hand as referred supra from the warrant directions, the purposes of the commission is practically for local inspection and noting of physical features of work completed, and to be completed, but not for any involvement of the expertise within the purview of Section 13(4) (iv) of the Consumer Protection Act, 1986 (for short, 'the Act'), by requisition of the report of the concerned analysis or test from the appropriate laboratory or from another relevant sources.

6. It is the contention of the Writ Petitioner therefrom that the State Commission has not acted in accordance with the provisions of Section 13 of the Act and exceeded its jurisdiction in passing the order which is not sanctioned by law so to pass by appointing a commissioner for local inspection and thereby same is liable to be set aside.

7. Whereas, the 2nd respondent in support of stay vacate petition contest, submits that the State Commission did not appoint an Advocate-Commissioner, but the engineer and same is empowered under Section 13 of the Act. It is therefrom submits that the writ petition will not survive even on merits, leave about non-maintainability from the alternative and efficacious statutory remedy by appeal or revision is available to approach the National Commission. It is further contended that said engineer Sri Nageshwar Reddy wrote a letter to the State Commission on 19.12.2015 requesting to relieve him and appoint another person in his place on health grounds, from which when a memo was filed by the complainant on 21.12.2015, the State Commission after hearing both sides appointed Sri C.Naresh another expert, who received the warrant on 23.12.2015 and the writ petitioners did not even state about filing of the Writ Petition and obtaining of the interim order on 22.12.2015 supra. Later on 27.12.2015, the Commissioner executed the warrant after sending message by SMS to the writ petitioners and thereby sought for dismissing the writ petition.

8. From the respective contentions and at request of both sides, main writ petition itself is taken up for hearing to decide on merits including on maintainability. Heard both sides and perused material on record and the propositions relied upon by both sides.

9. Among the decisions placed reliance, in **Om Prakash Vs. DCM Ltd.**,^[1] the Apex Court categorically held that once there is an

efficacious statutory remedy, the writ Court could not have entertained the writ petition to impugn the order passed by the statutory Forum on merits. The same was followed by the Division Bench of this Court in **IVRCIL Assets and Holdings Limited Vs. APSRTC**^[2]. Further, in **Cicily Kallarackar Vs. Vehicle Factory**^[3] and **Nivedita Sharma Vs. Cellular Operators Association of India**^[4] the Apex Court has taken the same view that once an alternative and efficacious remedy of appeal is available to the National Commission against the orders of State Commission under Sections 19 or 21 of the Act, entertaining a writ petition in spite of rule of self-imposed restraint from availability of alternative remedy cannot be appreciated, although power of High Court to issue directions, orders or writs under Article 226 of the Constitution of India is a basic feature of the constitution and cannot be curtailed even by any parliamentary legislation. In fact as referred supra, the order passed by the State Commission is if within the statutory parameters and if correctness of the order is assailed on other merits, from the alternative remedy of revision before the National Commission is available under Section 21 of the Act, since revision is also held as alternative and efficacious remedy, Writ Petition is a bar to entertain ordinarily as held by another Division Bench of this Court in **A.P. Co-operative Housing Societies Federation Limited Vs. APSCDRC**^[5]. In the recent decision of the Apex Court in **Union of India Vs. Major General Shri kanth Sarma**^[6], no doubt not under the Act, it was held that under Sections 30 and 31 of the Armed Forces Tribunals Act, 2007, when a statutory right of appeal is provided against the case falling under Section 30(2) of the Act, with the leave of the tribunal under Section 31 of the Act, or with leave granted by the Supreme Court of India; entertaining writ petition by High Court under Article 226 of the Constitution of India, would amount to bypassing the machinery created under Sections 30 and 31 of the Act, and thereby set aside the order of the High Court holding the writ petition as not

maintainable. For that conclusion the Apex Court referred catena of expressions including **Cicily Kallarackar** and **Nivedita Sharma** supra.

10. However, availability of alternative and efficacious remedy by itself is not a total bar to entertain writ petition when the case falls under exceptional circumstances. In this regard, in **Union of India v. Guwahati Carbon Ltd.**,^[7] the Apex Court held that even alternative and efficacious remedy is available, the writ jurisdiction under Article 226 of the Constitution of India by the High Court and under Article 32 of the Constitution of India by the Supreme Court can be exercised, in exceptional circumstances where the statutory authority has not acted in accordance with the provisions of enactment in question, or has acted in defiance of fundamental principles of judicial procedure or has resorted to invoke the provisions which are repealed or when an order has been passed in total violations of principles of natural justice; though otherwise parties must exhaust statutory provisions before invoking writ jurisdiction,

11. No doubt, in **M/s. Shivashakthi Builders Vs. APSCRC**^[8] a Division Bench of this Court, observed that but for limited provisions of CPC, all the provisions are not applicable to the proceedings before the redressal Forums constituted under the Act, for only certain specific provisions enumerated under Section 13(4) of the Act, are made applicable to such proceedings. If really the legislature is intended to provide applicability of entire Order XXVI CPC, it could have said so instead of confining itself by clause 5 of Section 13(4) of the Act, for issuance of commission only for the purpose of examination of witnesses; thereby invoking Order XXVI Rule 9 CPC and seeking appointment of a Commissioner to make local inspection even along with a civil engineer and submitting of report ordered by the District Forum approved by the State Commission are held unsustainable. The expression clearly says writ lies against the order passed in

exceeding the jurisdiction conferred upon the statutory fora.

12. The National Commission in R.P.No.215 of 2015 in **M/s. Sethi Housing (India) Pvt. Ltd., Vs. M/s. JML Motors Private Limited**, while considering the Scope of Section 13(4) of the Act particularly clause 4 among the 6 clauses envisaged therein, observed that neither of the powers given to a civil Court under CPC nor the power to appoint local commissioner for carrying out local investigation, which is available to a civil Court under Order XXVI Rule 9 CPC has been expressly conferred by the statute upon a Consumer Forum and in the absence of such a power, it would be difficult to sustain an order appointing advocate as a Court Commissioner to carry out a local investigation for the purpose of elucidation in the matter of any dispute, such as inspection of a property to ascertain whether it suffers from any defects in its construction or the construction of the buildings is complete in all respects, thereby the impugned order is liable to be set aside; however, under Section 13(4) of the Act, the consumer Court is competent to requisition the report of the analysis or test either from the appropriate Laboratory or from any other relevant source and this provision envisages appointment of an expert to carry out a test, which is in an appropriate case so also include local inspection, followed by a test and/or analysis, if felt, necessary by said Expert.

13. From the above and from what is laid down in **Gouhati Carbon Limited** supra, when the State Commission has not acted in accordance with provisions of the enactment in question, despite alternative remedy by appeal or revision is available, writ Court can interfere and the writ petition is thus maintainable in the facts of the case on hand from the exceptional circumstances made out.

14. Having regard to the above, coming back to the facts on hand, when the order passed by the State Commission even for appointment of an engineer is by invoking Order XXVI Rule 9 CPC

and practically the purpose is only for local inspection to note the physical features of the work completed and to be completed and same is not involving any analysis or test from a laboratory or from any other relevant source, the appointment of the commissioner for said purpose is not within the statutory purview of the State Commission and consequently exercising of the jurisdiction is not at all conferred by the statute, the impugned order of the State Commission is thereby liable to be set aside. Needless to say, subsequent filing of the report pursuant to the order by the so called expert engineer is also liable to be set aside. However, it is made clear from what is laid down by the National Commission in **M/s. Seth Housing India Limited** supra that the complainant got liberty to file fresh petition to seek appointment of qualified engineer or architect or other expert to carry out any investigation followed by tests/analysis and in that course, if felt necessary by such expert as part of that purpose, to note down any relevant physical features of the subject property including as to one or more of the works, if any, mentioned in the complaint are still pending execution/completion or not by the time of said inspection as part of the purpose of investigation.

15. Accordingly and in the result, the Writ Petition is allowed and the order dated 09.12.2015 passed by the State Commission in I.A.No.308 of 2015 in C.C.No.157 of 2015 is set aside, including the warrant and consequential report with plan etc., filed if any. No costs.

16. Miscellaneous petitions, if any, pending shall stand closed.

SANJAY KUMAR, J

Dr. B. SIVA SANKARA RAO, J

Dt.29.06.2016

Vvr.

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- [\[1\]](#) AIR 2010 SC 2608
 - [\[2\]](#) 2014(5) ALT 93
 - [\[3\]](#) 2012(6) SCC 859
 - [\[4\]](#) 2011 (14) SCC 337
 - [\[5\]](#) 2015(5) ALD 695
 - [\[6\]](#) (2015) 6 SCC 773 = 3 SCJ 689
 - [\[7\]](#) (2012) 11 SCC 651
 - [\[8\]](#) 2009(2) ALD 589 of DB