

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL WRIT PETITION NO.1303 OF 2017

M/s.Safire Hotels Pvt.Ltd.

Petitioner

versus

Vijaykant Motilal Kothari and another

Respondents

Mr.Pramod P. Jog i/by Mr.Nikhil Chavan, Advocate for petitioner.

Mr.Abhishekh Pungalia for respondent no.1.

Mr.A.R.Kapadnis, APP, for Respondent-State.

CORAM : PRAKASH D. NAIK, J.

DATE : 28th August 2017

PC :

1. The petitioner has invoked the supervisory jurisdiction of this Court under Article 227 of the Constitution of India as well as inherent powers under Section 482 of Code of Criminal Procedure, 1973. The petitioner has challenged the proceedings in the application filed by respondent no.1 before the District Consumer Disputes Redressal Forum under Section 27 of Consumer Protection Act and the order dated 18th May 2016 passed by the said Forum rejecting the application preferred by the petitioner with regards to the maintainability of the aforesaid complaint.

2. Brief facts as alleged in the application under challenge are as follows :-

(a) The complainant (respondent no.1) had filed a complaint viz. PDF/242/2005. The said complaint was decided by the District Consumer Disputes Redressal Forum, Pune vide order dated 16th April 2008, whereby the complaint was partly allowed;

(b) The said order was challenged by the complainant before the higher forum by preferring an appeal, which was dismissed on 12th January 2010. Thereafter the complainant preferred a revision application challenging the said orders before the National Consumers Disputes Redressal Commission, which was also dismissed vide order dated 4th April 2013;

(c) The opponent never challenged the order dated 16th April 2008 before any forum and the said order attained finality. The opponent did not comply with the directions issued in the said order and thereby the opponent liable to be punished in terms of Section 27 of the Consumer Protection Act. Hence, the respondent no.1 filed Execution Application No.20 of 2013 under Section 27 of Consumer Protection Act;

3. The District Consumer Disputes Redressal Forum took cognizance of the said application. The petitioner thereafter preferred an application before the said forum challenging the maintainability of the said execution application and prayed for dismissal of the same. The said application was preferred on 24th September 2015. The forum decided the said application and by order dated 18th May 2016, rejected the same for the reasons stated in the said order.

4. In the light of the issues involved in this petition, it would be necessary to refer to the factual aspects leading to filing of present petition, which are as follows :-

(a) The respondent no.1 filed a complaint under the provisions of Consumer Protection Act before the district forum. In

the said complaint it was alleged that opponent (petitioner) agreed to sell the complainant (respondent no.1) shop in the building constructed by the said opponent. The opponent executed separate agreement in favour of the complainant which was registered with the Sub Registrar of Assurances on 30th December 2000. The consideration for the said sale was also set out which was paid by the complainant to the opponent. The opponent agreed to provide amenities as stated in the annexure to the agreement and also agreed to arrange and construct from the front of the plot up to the shop two drive-ways as per the specifications and design furnished by the complainant. The opponent also agreed to provide separate Maharashtra State Electricity Distribution Company's meter to the shop;

(b) The opponent also agreed to form an association of apartment holders/a co-operative housing society as required under the laws. It is the case of the complainant that the opponent had represented that he would be prompt in executing the conveyance. However, when the possession was handed over of the shop premises, it was noticed that there was no separate electricity meter nor there were drive-ways constructed though agreed. Other compliances were also not done by the opponent. Hence, the complainant filed a complaint before the District Forum at Pune;

(c) The District Forum, Pune allowed the complaint partly by order dated 16th April 2008. The interim order passed in the said proceeding on 31st January 2008 was confirmed. It was further directed that subject to the complainant depositing with the opposite party the requisite amount towards legal charges, share money,

stamp duty and registration charges, within a period of two months from the date of order, the opposite party was directed to form and register a co-operative housing society, a condominium of the apartment holders or a company and to further execute conveyance in favour of such legal entity within a period of four months from the date of receipt of amount, as ordered. The opponent was also directed to construct drive-ways to the shop of complainant as specified in the agreement within a period of two months from the date of order. It was also made clear that in case opposite party has already provided the drive-ways to the complainant's shop, the order would automatically stand vacated. The complainant was granted liberty to obtain separate electricity meter from Maharashtra State Electricity Distribution Company by preferring appropriate application. The opponent was directed to give no objection certificate to complainant subject to recovery of all the dues towards electricity charges. In the order dated 31st January 2008, the complainant was directed to pay to the opposite party Rs.8,57,858/- on or before 15th February 2008. In the event complainant fails to deposit the said amount, the interim order dated 23rd January 2008 shall automatically stand vacated. As per the order dated 23rd January 2008, the application preferred by the complainant seeking interim relief was allowed and the opponent was directed to restore the electricity supply to the complainant from the common meter forthwith.

(d) The complainant was aggrieved by the order dated 16th April 2008, although complaint was partly allowed, and therefore, the complainant filed an appeal before the said Commission. In the said appeal it was contended that there is deviation between the

pleadings and proof at the instance of opponent. The opponent has not provided the drive-ways and that he has not registered the relevant housing society or a company and not conveyed the property to the users of the property. The said appeal was dismissed by the said Commission vide order dated 12th January 2010. It was observed that the District Forum has passed the order giving appropriate directions after taking into consideration the pleadings of both parties and there is nothing wrong in the said order.

(e) The complainant thereafter preferred revision petition before the National Commission challenging the aforesaid orders. The National Commission dismissed the said revision petition and also imposed cost upon the complainant in the sum of Rs.10,000/- which was to be paid to the opponent. It was observed that there is no illegality in the order passed by the said commission. The revision petition is barred by limitation as well as having no merit and without any legal basis.

(f) Thereafter impugned complaint was filed by respondent no.1 before the District Forum, wherein the contentions, as stated hereinabove, were raised. The Consumer Forum took cognizance of the said complaint. Thereafter, an application was preferred by the petitioner about the maintainability of the complaint. The said application was rejected on 18th May 2016.

5. Learned advocate for the petitioner submitted that the petitioner has not avoided or failed to comply any executable order. The application was, therefore, not maintainable under Section 27 of the Consumer Protection Act. The said provision can be invoked

only in the case of failure or omission to comply the executable order. It is submitted that issue of drive-ways with reference to the agreement, was considered by the authorities and no executable order was passed pertaining to the drive-ways. It is submitted that in the order passed by the District Forum dated 16th April 2008, it was observed that photograph shown by the opposite party prima facie shown that the drive-ways are duly constructed and the same are being used by the complainant. It was also observed that the drive-ways have been duly constructed and therefore, there was a finding given by the District Forum. It is submitted that there is no violation of the order dated 16th April 2008 and therefore, the impugned complaint dated 4th June 2013 ought not to have been entertained by the forum. It is submitted that the forum had erroneously rejected the application regarding maintainability of the complaint vide order dated 18th May 2016. It is submitted that respondent no.1 has not complied his obligations vis-a-vis directions issued in the order dated 16th April 2008. The respondent no.1 had challenged the said order before the said commission as well as National Commission. It is therefore, apparent that respondent no.1 was aggrieved by the said order. The National Commission had dismissed the revision petition preferred by the respondent no.1 by imposing cost. Learned counsel relied upon the decision of this Court delivered in Criminal Writ Petition No.721 of 2015 in the case of M/s.Aadinath Developers Vs. Manish Thorat. It is submitted that in the said decision, the Court has observed that the decree which is subject matter of the said proceeding, had been rendered in-executable. Once it is found that the decree is rendered in-executable, the only conclusion that is possible would be that no offence is constituted, there being no obligation remaining on the part of the opponent therein to be

discharged under the law. The proceedings initiated under Section 27 of the Consumer Protection Act were quashed and set aside. He, therefore, submitted that the said decision is applicable in the present case and hence the impugned proceedings be quashed and set aside. Learned counsel for petitioner also filed the compilation of documents and relied upon the said documents which includes photographs showing the present status of the property, the affidavit filed by the witnesses for Respondent no.1 and various demands that is issued by the respondent. It is submitted that the complainant had failed to bring out any particular order which is executable in the eyes of law.

6. Learned counsel for respondent no.1 submitted that first order was passed by the District Forum on 16th April 2008 and the same has not been complied with by the petitioner. There is no ground to arrive at a conclusion that the order is not executable. The petitioner had not challenged the said order and there was no bar for him to not to comply with the directions issued in the said order on the ground that respondent no.1 had challenged the order dated 16th April 2008 before the higher forums. It is not open to the petitioner to argue that the order is rendered in-executable. The observations of the District Forum that the opponent had constructed the drive-ways were made on the basis of photographs shown by the petitioner. It is submitted that in spite of that the District Forum had passed an order that the petitioner shall provide the drive-ways, if not provided by the Petitioner. Other directions issued in the said order are also not complied with by the petitioner. The grounds raised by the petitioner are based on the disputed questions of facts and the same cannot be considered in exercise of writ jurisdiction or

inherent powers of this Court under Section 482 of Code of Criminal Procedure. There was no provision to prefer an application for dismissal of the complaint on the ground of maintainability before the District Forum. It is submitted that the judgment relied upon by the petitioner is not applicable in this case. It is further submitted that the proceedings before the District Forum had commenced as the respondent no.1 had tendered an affidavit of the witness in respect of his application and the case was due for cross examination of the witnesses. It is submitted that the petition is devoid of merits and the same may be dismissed.

7. I have perused the documents on record. The District Forum had passed an order in respect to the complaint filed by respondent no.1 on 16th April 2008. It is true that the respondent no.1 had challenged the said order before the higher forums. However, there was no embargo upon the petitioner to execute the said order. Whether the order is executable or non-executable, as contended by the petitioner, will be decided by the forum while dealing with the present application/complaint preferred by respondent no.1 under Section 27 of the Consumer Protection Act. The respondent no.1 had tendered an affidavit-in-evidence of one of the witness. The said witness is an architect and in the affidavit it is stated that as per clause no.5/B/II appearing in the agreement, the promoter had agreed to construct two drive-ways to the shop. It was found that an exclusive access to the said shop between two drive-ways, assured by the promoter as per the clause mentioned, are not fully provided for the said shop. It is pertinent to note that although the district forum in the order dated 16th April 2008 had observed that the drive-ways are being constructed, the said forum had directed the opponent to

provide the drive-ways in case the same are not provided. The petitioner had not specified under what provisions the application for dismissal of the complaint was preferred before the District Forum by the petitioner on the ground of maintainability of the complaint. The contents of the application preferred by the petitioner are in the form of defence, which can be agitated during the course of hearing of the said execution application and subject to proof. It is true that respondent no.1 had approached the State Commission as well as National Commission in pursuant to order dated 16th April 2008, however, that is not the ground to absolve the petitioner from complying the said order. The petitioner did not challenge the order before any forum and the said order has attained finality. The District Forum has rightly rejected the application preferred by the petitioner vide order dated 18th May 2016. In the said order it was observed that the complaint is filed under Section 27 of the Consumer Protection Act. The proceedings have been conducted as per provisions of Code of Criminal Procedure. After issuing the process and recording the plea, there is no provision for entertaining any application as preferred by the opponent. The plea of the opponent is already recorded. This is not the regular trial and there is no question of discharge of the accused. The complainant (opponent) has filed affidavit-of-evidence on 31st September 2015 and the matter was adjourned for cross examination from time to time. The said application cannot be entertained as there is no provision to entertain the same. It is open to the opponent to take all possible defences in the cross examination. I find no reason to interfere in the order passed by the Forum rejecting the said application. Indeed, there is no such provision to entertain such an application and dismiss the complaint. The issues raised by the

petitioner herein that order is not executable or that he has fulfilled all his obligations and the complainant has not discharged his obligation, is a matter of adjudication before the forum in the complaint filed under Section 27 of the Consumer Protection Act. At the threshold the said complaint cannot be quashed. The affidavit of the witnesses to be examined by the complainant is already on record since 21st September 2015 and, therefore, the proceedings are required to be taken to logical end in accordance with law.

8. In the decision relied upon by the advocate for petitioner, the facts were distinct and the said decision cannot be applied in this case. The proceedings had commenced in the present case by recording of plea and tendering affidavit-in-evidence and at this stage the proceedings should not be quashed. In these circumstances also, the present case is distinct from the one decided by this Court in Criminal Writ Petition No.721 of 2015. Learned counsel for respondent no.1 had relied upon decision of High Court of Andhra Pradesh in the case of Varlaxmi Vs. Andhra Pradesh State Consumers Disputes Redressal Commission and the order passed by National Consumer Disputes Redressal Commission in Revision Petition No.1792 of 2012. Reliance is also placed on the Division Bench decision of this Court in case of Writ Petition No.3879 of 2012 in the case of A.G.Sawant Vs. State of Maharashtra and others. In the said decision, the issue relating to validity of Section 27(3) of the Consumer Protection Act was under challenge and the Court has held that there is no merit in the challenge to the constitutional validity of the said provision. It is not necessary to go into the said issue as the same is not raised in this petition.

9. For the reasons stated hereinabove, I am of the opinion that no case is made out to quash and set aside the impugned order as well as impugned proceedings filed by the respondent no.1 before the District Consumers Disputes Redressal Forum under Section 27 of the Consumer Protection Act.

10. Hence, I pass following order :

ORDER

- (i) Criminal Writ Petition No.1303 of 2017 is dismissed;
- (ii) Interim order granted earlier stands vacated;
- (iii) It is clarified that the observations made in this petition are only for considering the present petition and District Consumers Disputes Redressal Forum before which the proceedings are pending, shall not be influenced by the same during the adjudication of the said proceedings;
- (iv) The petition stands disposed of.

(PRAKASH D. NAIK, J.)

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