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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
WRIT PETITION NO. 2193 OF 2018

Anthony Raphael Kallarakkal	..Petitioner
Vs.	
National Company Law Tribunal, Mumbai Bench & ors.	.. Respondents

WITH
NOTICE OF MOTION (L) NO. 475 OF 2018
IN
WRIT PETITION NO. 2193 OF 2018
WITH
NOTICE OF MOTION (ST) NO. 543 OF 2018
IN
NOTICE OF MOTION (L) NO. 475 OF 2018
WITH
WRIT PETITION NO. 2193 OF 2018

Anthony Raphael Kallarakkal	..Applicant (Org. Petitioner)
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IN THE MATTER BETWEEN

Anthony Raphael Kallarakkal	..Petitioner
Vs.	
National Company Law Tribunal, Mumbai Bench & ors.	.. Respondents

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Mr. Mathew Nedumpara along with Mr. Devang Parmar and Ms. Shashikala Mahamuni I/by Mr. R.R. Nair for the petitioner.

Mr. Darryl Pereira along with Mr. Ravi R. Gadagkar for respondent No. 3.

Mr. P.A.Narayanan for respondent No.4.

Mr. Vishal C. Ghosalkar for respondent Nos. 5 and 6.

**CORAM : B.R.GAVAI &
M.S. KARNIK, JJ.**

DATE : 7th SEPTEMBER , 2018

P.C. :

The petitioner has approached this Court basically challenging the order dated 18th August, 2017 passed by the National Company Law Tribunal, Mumbai Bench, as being without jurisdiction and in violation of the principles of natural justice and also in violation of Section 91 and Section 91A of the Maharashtra Co-operative Societies Act.

2. When the matter was called out, initially Shri Pereira appearing on behalf of the respondent No.3 raised preliminary objection to the tenability of the petition on the ground that petitioner has alternate efficacious remedy in view of Section 61 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as “said Code”) to prefer an appeal before the National Company Law Tribunal. It is submitted that the petition, therefore, without having taken recourse of Appellate Tribunal is not permissible in law. When we permitted learned

Counsel for respondent No.3 to raise his preliminary objection, Shri Nedumpara, learned Counsel for the petitioner objected to the procedure of the Court permitting the respondent No.3 to raise the preliminary objection. He submitted that the petitioner is *dominus litus* and he has a right of first audience.

3. We informed Shri Nedumpara that when the party respondent has raised a preliminary objection regarding the tenability of the petition, it is such a party who raises such an objection will have to be heard first and after such a party makes out a case for non exercise of the jurisdiction under Article 226 of the Constitution of India on the ground of availability of alternate remedy, the petitioner will have to reply to that. Be that as it may, Shri Nedumpara was kind enough to allow respondent No.3 to make out his preliminary objection after our suggestion.

4. After the preliminary objection was argued by the respondent, the petitioner was heard for some time and

we expressed that the petition deserves to be dismissed on the ground of availability of alternate remedy, Shri Nedumpara insisted that he should be granted opportunity of hearing and he would conclude his arguments within 10 minutes. As such we granted the request of Shri Nedumpara and clarified to him that his arguments will not be interrupted for 10 minutes. He was granted time to argue for 10 minutes i.e. from 1.32 p.m. upto 1.42 p.m. At 1.42 p.m., when we invited his attention towards the watch he submits that his arguments are not yet over and he should be given further time to make arguments. We have refused his request for granting him further time. A Court burdened with more than 100 admissions per day cannot have the luxury of hearing the arguments endlessly only to satisfy the lawyer. He thereafter requested the Court that the Court should at least record that after 10 minutes he was not permitted to argue. We do record that after granting 10 minutes without interrupting his argument, we did not permit Shri Nedumpara from advancing further arguments.

5. Shri Nedumpara relying upon the Constitution Bench judgment of the Apex Court in the case of **A.R. Anthulay vs. R.S. Nayak and another** reported in [(1988) 2 SCC 602] basically submitted that the petitioner has not only a remedy of an appeal under the provisions of the said Code, but he can also raise the issue to which he is entitled to either in a suit or even before this Court in its exercise in the jurisdiction of this Court under Article 226 of the Constitution of India.

6. No doubt, this Court is not powerless to entertain the petition under Article 226 of the Constitution of India even if the party has an alternate remedy. Non exercise of the jurisdiction of this Court under Article 226 on the ground of availability of alternate remedy is a self imposed restraint. This Court entertains the petition under Article 226 of the Constitution of India when the petitioner has no alternate efficacious remedy provided to him by a Statute. In a given case when exceptional facts and circumstances are made out, the Court is not powerless in exercising its jurisdiction under Article 226 inspite of

availability of alternate remedy. However, we find that in the present case the party has not only one but two alternate remedies available. One remedy that is available is under Section 61 of the said Code to prefer an appeal before the National Company Law Appellate Tribunal. The party has also further remedy under Section 62 of the said Code to prefer an appeal if it is aggrieved by an order of the Appellate Tribunal, before the Hon'ble Supreme Court on question of law. Upon perusal of pleadings and prayer clauses of the petition it would reveal that petition is based on various questions of law that have been framed by the petitioner. Even if the petitioner fails before the learned Appellate Tribunal, the petitioner can very well raise the questions of law which are sought to be raised in the present petition, before the Hon'ble Supreme Court.

7. We, at the cost of repetition mention here that when the Court is flooded with thousands of petitions, we do not expect the petitioner to approach this Court under Article 226 of the Constitution of India. The Court cannot have the luxury to

entertain the petition when the petitioner has not only alternate but equally efficacious remedy in law. Hence the petition is dismissed on the ground of availability of alternate remedy in law.

8. At this stage Shri Nedumpara prays for stay of the order passed by us. We do not understand as to for what purpose the stay is to be granted. Perusal of the record would reveal that there is no interim protection granted by the earlier Bench when the petition was entertained. Shri Nedumpara states that there was no written order passed by the Court but one of the Bench granted oral protection. The Court proceeds on the basis of the record that is available before it. The Court does not proceed on the basis of the oral communication across the bar between the Court and the Counsel. Apart from that, the learned Counsel for respondent No. 3 states that the statement as made is totally incorrect and no such oral protection is passed by any of the Court. Hence the prayer is rejected.

9. In view of the disposal of the Writ Petition, nothing survives in the Notice of Motions. Notice of Motions are disposed of accordingly.

(M.S. KARNIK, J.)

(B.R.GAVAI, J.)