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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL WRIT PETITION NO.71 OF 2020

Shaffiq Ahmed Hasan Khan
Age: 60 Yrs., occ. Business,
Residing at Vanta Textile Silk
Mill Compound, Paithan Road,
Aurangabad – 431005
Dist. Aurangabad

= PETITIONER

VERSUS

- 1) The State of Maharashtra
- 2) The Secretary,
Ministry of Consumer Affairs
Food & Public Distribution
MS (deleted as per court's
order dt. 17.1.2020)
- 3) Sayed Abdul Wasay s/o Sayed
Jahangir, Age: 60 Yrs.,
occ. Retired.
- 4) Mrs. Hamida Tabasum w/o
Sayed Abdul Wasay
Age: 55 Yrs., occu. Household,

(Resp.Nos. 3 & 4 residing
at Plot No. 15, Ahbad Colony,
Katkot Gate, Aurangabad 431001) = RESPONDENTS

Mr.KC Sant, i/b Mr.HA Patankar, Advocate for
Petitioner;

Mr.AA Jagatkar, APP for Respondent No.1-State;

Respondent No.2 is deleted as per court's order dt.
17.1.2020.

Mr.UB Bilolikar, Adv. For Resp.Nos. 3 & 4.

(2)

CORAM : SMT.VIBHA KANKANWADI,J.

DATE : 12th March, 2020.

ORAL JUDGMENT

1. Rule. Rule is made returnable forthwith with the consent of learned Advocates appearing for the respective parties.

2. Present petition has been filed by original Respondent No.3, invoking constitutional powers of this court under Article 21 and 227 of the Constitution of India as well as invoking inherent powers of this court, under section 482 of the Code of Criminal Procedure (for short, Cr.P.C.) to challenge order dated 10.8.2017 passed by District Consumer Redressal Forum, Aurangabad (herein after referred to as the Forum) in Execution Application No. 117/2017 in Consumer Case No.15/2004, so also to challenge the order dated 16.12.2019 passed by the Forum in EA No. 117/2017 in Consumer Case No.15/2004.

3. The brief facts, giving rise to the present petition are that, - present respondent Nos.3 and 4 have filed Execution Application No.117/2017. It was arising out of Consumer case No.15/2004 filed before the forum. The

(3)

Execution Application alleges disobedience of the order dated 7.6.2005 passed by the forum in the said case.

. The petitioner is Director of a public limited company, viz. Vatan Textile Ltd. Consumer complaint/case No.15/2004 was filed by Respondent Nos.3 and 4 herein for recovery of the amount invested by them with the company and the dividend. It is stated that the present petitioner had contested the said case, contending that Respondent Nos. 3 and 4 cannot be termed as 'consumers' within the meaning of Section 2(1)(d) of the Consumer Protection Act (herein after referred to as the said Act), so also he had taken the defence that, the application/complaint was barred by limitation, as provided under Section 24(A) of the said Act. However, the said case came to be allowed on 7.6.2005.

. The petitioner had challenged the said judgment and order before the appellate forum, i.e. State Commission. The appellate forum had dismissed First Appeal No.2116/2005 on 23.11.2015. The said decision was further challenged by the present petitioner before the National Commission in Revision Petition No.426/2016. It is stated that the said matter is still pending and notices have been issued to the respondents in the said matter.

(4)

Respondent Nos. 3 and 4 have appeared in the matter. It is a categorical statement of the petitioner that the judgment and order passed by the State Commission is still subjudice before the National Consumer Disputes Redressal Commission and, therefore, the decision given by the Forum in Case No.15/2004 has not attained finality. It is further stated that in spite of that still Respondent Nos.3 and 4 have filed Execution Petition before the Forum and under the penal provisions of Section 27 of the said Act, the action has been taken.

4. The petitioner further contends that after he had appeared in the matter, he had filed an application dated 7.2.2019 for closing the proceedings or stopping the said proceedings. Respondent Nos. 3 and 4 have filed their say and the Forum has decided the application on 26.7.2019. At the time of when that application was filed, the petitioner had not mentioned the registration of the proceedings before the National Commission and, therefore, on that ground, that application came to be rejected. It has been further contended that in the said Execution petition, accused No.2 is yet to be served. The petitioner is accused No.3 and he remained present on each and every dates that

(5)

have been given. Whenever he is unable to attend the forum, his advocate has filed an application seeking exemption. He never avoided any proceedings. It is further stated that the Forum has not undertaken proper procedure and though he along with his advocate had remained present before the forum on 13.12.2019; yet warrant came to be issued against him. He had immediately applied for cancellation of the warrant, however, the forum has not inclined to cancel it, rather expressed the view that he would be sent to jail, which has resulted in chest pain to the petitioner and, therefore, he went to Dr. Nitin Sancheti for medical check-up, who had then advised the petitioner not to take any mental stress or any such activity which will result in generating stress. Instead of cancelling the warrant, the forum has adjourned the matter on 16.12.2019. When the petitioner failed to appear due to medical ground and attached the medical certificate issued by Dr.Sancheti, the forum rejected the application and issued Non-bailable warrant (NBW) against him and further called an explanation from Dr. Sancheti about the health and treatment of the petitioner. It has been specifically contended that since proper procedure has not been adopted and as the proceedings are pending before the

(6)

National Commission and the order has not attained finality, the execution could not have been pressed into service. Therefore, the petitioner has prayed for quashing and setting aside the order dated 10th August, 2017 as well as 16.12.2019 passed by the Forum regarding issuing the warrant against him.

5. Affidavit in reply has been filed by Respondent Nos.3 and 4. As regards the factual aspects; filing of the complaint; challenge to the same; pendency of the revision before the National Commission, are admitted. However, it is stated that there is no stay to the judgment and order passed by the forum and the petitioner has not complied with the said Award. Action under Section 27 of the Act has been taken. Perusal of the *Roznama* would make it clear about the conduct of the petitioner before the Forum. He is adopting delaying tactics and seeking exemptions on unnecessary grounds. It can be seen that on 13.12.2019, after the court work was over, advocate for the petitioner appeared and filed an application for exemption. Application for issuing warrant was filed on behalf of Respondent Nos. 3 and 4. The forum heard the matter and while dictating the order, within few minutes, the petitioner has appeared. This

(7)

falsifies the contents of the application for exemption given by learned Advocate for the petitioner himself. An opportunity was also given to the petitioner to produce the stay order from the National Commission, but he has not produced the same. Thereafter on 16.12.2019, the earlier advocate appearing for the petitioner had given a letter of authority to a different advocate and then filed an application for exemption on medical ground. Taking into consideration the behaviour of the petitioner, the forum issued notice to the concerned doctor. When the petitioner is playing delaying tactics to prolong the matter, though original judgment was pronounced in 2005, the forum was justified in issuing NBW against the petitioner.

6. Heard learned Advocates appearing for the respective parties.

7. It has been vehemently submitted on behalf of the petitioner that the impugned order as well as the *Roznama* before the forum would make it clear that appropriate procedure has not been adopted by the forum. Though accused No.2 is yet to be served, without adopting the proper procedure under Cr.P.C., it appears that trial has

been separated and further proceeding has been taken up of recording plea of accused No.3. In spite of separating his trial, it appears that thereafter summons was issued to accused No.2 at the behest of Respondent Nos.3 and 4. When accused No.3 was unable to remain present personally, he has filed an application for his exemption; yet the forum has doubted the bonafides of the petitioner. Further, it appears that the forum is bent upon recovering the amount from accused No.3 only and indications have been given to that extent.

8. Reliance has been placed on the decision in the case of Kishorebhai Narayandas Maherchandani Vs. State of Gujarat - 2019 Cri.LJ 2849. Learned Single Judge of Gujrat High Court, taking into consideration the decision in the case of Kamlesh Aggarwal Vs. Narain Singh Dabbas and Anr. - 2015 (11) SCC 661 and other cases decided by the Hon'ble Apex court, had remanded the case for adopting proper procedure. It was held that the forum should follow the procedure, contemplated for summary trial under Cr.P.C. and in that case maximum punishment, that can be awarded, is of three months. It was specifically observed that liberty of a person cannot be curtailed without following

due process of law.

9. Further reliance has been placed on Abhay Narayan Raje Vs. State of Maharashtra and Ors. (in group of matters of Criminal Application No.3790/2018 decided by this Court on 9.7.2019,) invoking inherent powers of this court under Section 482 of Cr.P.C.; to set aside the order of issuance of NBW and remitting the applicant to custody and refusing to grant bail. In this case also, it was found that the forum has not adopted the due process of law. It was held that, though bailable warrant was issued against the applicant, the same was executed and the applicant was arrested and, therefore, this procedure was considered by this court as contrary to law.

10. Further reliance has been placed on the decision in the case of State of Karnataka Vs. Paramjeet Singh & Ors. - AIR 2006 SC 1408. In fact, this decision relates to the position of law prior to amendment to Section 27 proviso (prior to 2002 amendment). By the said amendment, now the forum has been empowered with the powers of Judicial Magistrate of First Class.

11. Further reliance has also been placed in the case of Maytas Properties Ltd. Vs. AP State Consumer Dispute Redressal Commission and Ors. - AIR 2013 AP 93, wherein it has been observed thus, -

“ the object of the Act is to provide speedy and simple redressal to consumer disputes and the procedure to be followed for settlement of consumer disputes is summary in nature. However, having regard to the fact that [Section 27](#) is a penal provision under which non-compliance of the order of the District Forum or the State/National Commission would be punishable by way of imprisonment or fine, we are of the opinion that [Section 27](#) cannot be equated with the other provisions of the Act providing for settlement of consumer disputes by the District Forum and State/National Commission. Therefore, the penal proceedings under [Section 27](#) cannot be allowed to be taken recourse to even before the order of the District Forum or State/National Commission attains finality merely on the ground that the Act provides for speedy and simple redressal to consumer disputes. In fact, the language of [Section 24](#) of the Act is plain and unambiguous and makes it clear that the order of a District Forum or State/National Commission shall be final only if no appeal has been preferred against such order. Thus, [Section 27](#) can be taken

(11)

recourse to only by way of last resort after the order attains finality as provided under [Section 24](#) of the Act. Thus, penal proceedings under Section 27 of the Act cannot be entertained while an appeal is pending before the National Commission against the order of State Commission.”

12. Per contra, learned Advocate appearing for Respondent Nos.3 and 4, submitted that though the proceedings are pending before the National Commission; yet no stay has been granted to the execution of the judgment and order passed in Consumer Case No.15/2004. In fact, the case was decided way back in 2005; yet after so many years, the petitioner has not complied with the Award. The hard-earned money of the Respondents has not been returned by the petitioner and his company. Taking into consideration the fact that it is causing delay in securing presence of accused No.2, trial of accused No.3 has been separated and thereafter the plea of accused No.3 has been recorded. When the case has come for leading evidence, since then, the present petitioner is protracting the matter on one or the other pretext. The impugned order passed by the forum would show that it was the usual practice of the petitioner and his advocate to come to the court after the court work of the forum is over. The conduct of the

(12)

petitioner is very much visible from the contents of the Roznama as well as the orders those have been passed in this matter. The forum found doubts over the medical certificate issued by Dr. Sancheti and, therefore, his explanation has been called. It was specifically observed in the order dated 16.12.2019 that when accused No.3 had appeared around 4.12 pm on 13.12.2019, it could be noticed that he was physically fit. Under such circumstance, as to how the medical certificate, stating about the state of health of the petitioner, came to be issued by Dr.Sancheti, was required to be revealed from him. No fault can be found in the said order as the forum was exercising its powers. The forum has adopted proper procedure and, therefore, no interference is required in the impugned order.

13. At the outset, it can be observed that the petitioner approached the National Consumer Dispute Redressal Commission and, as aforesaid, there is no stay. It appears that only notice has been issued. The first and foremost question, that is also required to be considered by the forum, is as to whether Respondent Nos.3 and 4, without seeking execution of the Award and taking steps thereunder, can invoke penal provisions of Section 27 of

(13)

the Consumer Protection Act. No doubt, when the proceedings are initiated under Section 27 of the said Act, it has to be tried as summary trial. However, when section 27 of the said Act provides for penalty then it is imperative on the part of the forum to consider as to whether or not the Award, that has been passed, has attained finality and whether any efforts were made to get the said Award executed. In order to consider this point, it is necessary to have look at provisions contained in Section 27 of the Act, which read thus, -

27. Penalties.—

(1) Where a trader or a person against whom a complaint is made or the complainant fails or omits to comply with any order made by the District Forum, the State Commission or the National Commission, as the case may be, such trader or person or complainant shall be punishable with imprisonment for a term which shall not be less than one month but which may extend to three years, or with fine which shall not be less than two thousands rupees but which may extend to ten thousand rupees, or with both:

[\[\(2\)](#) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), the District Forum or the State Commission or the National Commission, as the case may be, shall have the power of a Judicial Magistrate of the first class for the trial of offences under this Act, and on such conferment of powers, the District Forum or the State Commission or the National Commission, as the

(14)

case may be, on whom the powers are so conferred, shall be deemed to be a Judicial Magistrate of the first class for the purpose of the Code of Criminal Procedure, 1973 (2 of 1974).

(3) All offences under this Act may be tried summarily by the District Forum or the State Commission or the National Commission, as the case may be.

14. The Division Bench of the Andhra Pradesh High Court in AIR 2013 AP 93 (supra) has taken a view that, since section 27 contains penal provisions, under which, non-compliance of the order of the District Forum or the appellate forum, is made punishable, then such penal provisions cannot be allowed to be undertaken unless the Award becomes final. At the same time, note of Section 24 of the said Act was also taken, wherein it has been held that, the order of the District Forum or State/National Commission, shall be final only if no appeal has been preferred against the said order. Therefore, when in the present case the petitioner states that after he had appeared in the matter and had filed the application on 7.2.2019, it ought to have been decided first by the forum. No doubt, perusal of the Roznama would show that present accused had appeared in the matter long back, i.e. 31.10.2017 and thereafter on 20th April, 2018, the trial was separated against accused No.2, whose presence, in fact, is

not yet secured. It will not be out of place to mention here that for separation of the trial also, procedure has been prescribed and Roznama shows that that procedure has not been followed or adopted. The plea of accused No.3 has been recorded on 26.10.2018 and till then, the present petitioner had not filed any such application, which he had filed later on 7.2.2019 regarding closing or stopping of the proceedings further. Even if we consider that the said application dated 7.2.2019 ought to have been filed, even prior to order of separation of the trial of the petitioner; yet at any time, if such application has been presented, then without deciding it, further proceedings ought not to have been considered. But, it appears that the said application came to be decided on 26.7.2019. The contents of the petition are not clear as to whether the petitioner had challenged the said order dated 26.7.2019 before appropriate forum or not. It will have to be, therefore, taken that he has not challenged it and, therefore, the forum is justified in going ahead with the matter. When that order is not in question, this Court refrains itself from making any comments as to whether the proceedings before the forum are maintainable or not. That point is still kept open, to be again agitated at the appropriate stage, though

that application is rejected on the factual aspects.

15. Now, coming to the further proceedings those have been adopted, it appears that though the trial of the present petitioner/accused no.3 has been separated, simultaneous procedure has been adopted for securing presence of accused No.2. As regards the present petitioner is concerned, the Roznama would show that on most of the times, either the present petitioner was present or on the basis of application for his exemption, the matter got adjourned. After the decision on the application was given on 26.7.2019, the matter was adjourned to 20th September, 2019. But on that day, the matter was not traceable with the office of the forum and, therefore, the matter was adjourned to 4.10.2019. It appears that the original applicant was present and then application for issuance of NBW was given, which was then allowed. However, later on, advocate for accused No.3 remained present and he filed an application for exemption which was then allowed for cancelling the order of issuance of warrant. On that day, again present petitioner remained absent and no application was given for exemption. Hence, NBW came to be issued against him. On 13.12.2019, application for cancellation of

order of issuance of NBW was given. By observing the conduct of the petitioner, in order to have speedy justice, it is stated that a date, which is near to the said date on which the matter had come up, was given. But, it is specifically observed that, the accused and his advocate left the forum after giving application to cancel the warrant and then did not remain present in spite of giving call to them. Definitely, such conduct on the part of the petitioner is deprecable. He as well as his advocate cannot leave the forum without ensuring that the application is decided by the forum. Thereafter, on 16.12.2019, it appears that exemption application was given along with medical certificate. It was specifically observed that, on many occasions in the past, personal exemption was granted to accused No.3; yet the medical certificate is produced in order to cause hindrance in the judicial proceedings. By rejecting the application for exemption, explanation was called from the medical officer regarding the certificate issued by him. The contents of the Roznama dated 16.12.2019 of the forum rather appear to be harsh. Merely because a party is making efforts to protract the matter, that does not mean that threat should be given to the medical practitioner on the basis of the contents of the

medical certificate based on the the observations of the forum itself that the accused was in fit state of health and about 4.12 pm on 13.12.2019, there has to be concrete material before the court to come to a conclusion that the contents of the certificate are false. The forum has observed, ".....प्रमाणपत्र बनावट असल्याच्या निष्कर्षापर्यंत आल्यास आपल्या विरुद्धही योग्य ती कार्यवाही केली जाईल." In fact, the forum ought to have waited for the explanation and then if it would have been found that the contents are false, then, it could have exercised its powers as Magistrate. Since beginning, thereat cannot be given under a judicial order. No doubt, the forum was justified in not considering photo copy of the medical certificate and there is no explanation given by the petitioner in this petition as to why he had produced the photo copy of the medical certificate. Irony can be seen that, at one stage the forum has not accepted the photo copy of the medical certificate in order to give any kind of relief to the accused; yet on the basis of the same photo copy of the medical certificate, it has issued notice to the medical practitioner, almost threatening the medical officer that if it is found that it is false, then action will be taken against him.

16. Taking into consideration the contents of the

Roznama, it will have to be observed that, the conduct of the petitioner is definitely deprecable. Taking into consideration the various reasons given by him, almost 20 times, he has been exempted by the forum from personal appearance. Each time, the petitioner cannot create a ground to seek personal exemption.

17. It is to be noted that in the present case the petitioner has challenged the order passed by the forum on 10.8.2017. However, a copy of the said order has not been annexed. The petitioner is relying upon the Roznama of that date wherein it is mentioned that verification statement of the applicant has been recorded and summons has been issued to the accused. At the outset, it can be seen that when the petitioner had filed a specific application for stopping the proceedings on 7.2.2018 and it came to be decided on 26.7.2019 and the same has not been challenged by him, now he cannot challenge order dated 10.8.2017. Further, it can be said that he appeared in the matter and taken some part including that his plea was recorded. Under such circumstance, the petition as regards challenge to that order is concerned, suffers from delay and laches. Further, as regards order dated 16.12.2019 is

concerned, it appears that the action taken by the forum is harsh and, therefore, to that extent, interference is required. However, at the same time, the petitioner will have to be warned that unless he adopts a proper procedure and that if he wants to pursue his revision before the National Commission, then he should pursue his own remedy of seeking stay to the judgment and order passed by the Forum on 7.2.2005. He may not be then able to get further relief. Further, it is also required to be directed to the District Consumer Forum that it should adopt proper procedure for separating the trial and it cannot be insisted that penal action would be taken only against one of the accused, when it comes to non-compliance of the order passed against both the accused.

18. As regards the decision relied on by the petitioner in the case of Kishorbhai Narayandas Maherchandani 2019 Cri.LJ 2849, is concerned, the basic procedure itself was not adopted. The District Forum in the penal action under Section 27 of the Consumer Protection Act, it appears, forgot that it is a summary trial wherein maximum punishment prescribed is of three months; yet it imposed the sentence to undergo imprisonment for three years and,

therefore, the said matter was remanded. In the present case, the proceedings are still pending and, therefore, definitely the Forum would adopt proper procedure. Further so far as decision in the case of Abhay Raje (supra) is concerned, the facts of that case were different. Order of arrest and detaining the applicant in prison was passed in execution proceedings and, therefore, this Court held that such procedure cannot be adopted. In the instant case, admittedly, the proceedings under Section 27 of the Act itself are filed and the proceedings are going on as per the summons trial, though, as aforesaid, as regards separation of trial proper procedure is not adopted.

19. In the case of Chandrakant Hari Badhe Vs. The State of Maharashtra (decided by this court) (Criminal application No. 5196/2017 decided on 3.11.2017) also the facts are different.

20. With the aforesaid observations, the writ petition deserves to be partly allowed to the extent of the order passed by the District Consumer Forum on 16.12.2019 only, with direction to it that proper procedure should be adopted and also directing the petitioner to remain present on each

and every day of proceeding. Hence, the following order, -

ORDER

- i. The impugned order dated 16.12.2019 passed by the District Consumer Redressal Forum, Aurangabad in Execution Application No.117/2017, is hereby set aside;
- ii. The order of issuing Non-bailable warrant against the present petitioner is quashed and set aside.
- iii. The District Consumer Redressal Forum, Aurangabad is directed to adopt proper procedure in respect of securing presence of accused No.2 and then to proceed further.
- iv. The petitioner in this petition is hereby directed to remain present before the Forum on each and every day and he shall not seek personal exemption unless there arises any extreme emergency.
- v. The prayer as regards setting aside order dated 10.8.2017 is hereby rejected.
- vi. At this stage, on the request of learned Advocate for Respondent Nos. 3 and 4, it is observed that, if the forum finds it legal and

(23)

proper, it may allow Respondent Nos. 3 and 4 to withdraw the amount which was deposited by the petitioner before the forum.

vii. Rule is made absolute in the aforesaid terms.

(SMT. VIBHA KANKANWADI, J.)

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