

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Date of decision: 01st NOVEMBER, 2022

IN THE MATTER OF:

+ **LPA 576/2022 & CM APPL. 44189/2022**

SUNIL KUMAR PANDEY AND ANR

..... Appellants

Through: Mr. Aditya Parolia, Mr. Piyush Singh,
Mr. Akshay Srivastava and Mr. Akhil
Kukreja, Advocates.

versus

UNION OF INDIA AND ORS

..... Respondents

Through: Mr. Subhash Tanwar, CGSC with Mr.
Sandeep Mishra, Advocate for UOI.
Mr. Gorang Goyal, Ms. Sangeeta
Sondhi and Mr. Shashwat Roy,
Advocates for R-4 & R-6.
Mr. Kumar Vinayakam Gupta and Mr.
Chandrashekhar Chakallali,
Advocates for R-5.

CORAM:

HON'BLE THE CHIEF JUSTICE

HON'BLE MR. JUSTICE SUBRAMONIUM PRASAD

J U D G M E N T

SUBRAMONIUM PRASAD, J.

1. The instant Letters Patent Appeal has been filed by one, Mr. Sunil Kumar Pandey and his wife (“**Appellant**”) seeking setting aside of the Order dated 21.09.2022 passed by the Ld. Single Judge in W.P.(C) 11865/2022 (“**Impugned Order**”). *Vide* the Impugned Order, the Ld. Single Judge dismissed W.P.(C) 11865/2022, while giving the Petitioner therein i.e the

Appellant herein the liberty to pursue the civil suit instituted by the Petitioners themselves.

2. The Appellants have placed on record the following facts to show that they have been defrauded by one builder, *namely*, Kunal Structural Developers & Industries Pvt. Ltd. (“**Respondent No. 3/Respondent Builder**”) in collusion with Indiabulls Housing Finance Limited (“**Respondent No. 4**”): -

- a) The Appellants are homebuyers who had booked residential flats in a Project *namely*, ‘Nikhil Woodland Apartment’ situated at Agra, Uttar Pradesh (hereinafter referred to as the “*Project*”) of Respondent No. 3, by paying an amount of Rs. 7 Lacs as booking fees.
- b) Pursuant thereto, the Appellants were given allotment letters in 2014 and 2015. Thereafter, the Petitioners also executed Builder Buyer Agreements in favour of the Appellants with respect to their allotted unit.
- c) On 21.01.2015, the Appellants and Respondent Nos. 3 and 4 entered into a tripartite agreement which recorded that the Appellants had sought a loan of about 30 Lacs from the Bank i.e Respondent No. 4, and that Appellants were to pay monthly EMI, and pre-EMI to the Bank in pursuance thereof.
- d) Thereafter, on 25.05.2015, a Memorandum of Understanding (“**MOU**”) was entered into between the Appellants and Respondent Builder. This MOU recorded two things. *First*, that the Appellants were to avail of a housing loan from Respondent No. 4. *Second*, that upon the disbursement of the loan, Respondent No. 3 would pay a mutually agreed upon assured return. It also noted that the Builder

would advance to the Appellants the monthly EMI, and Pre-EMI, which was to be paid by the Appellants to the Bank.

- e) However, by 2017, the situation changed. Respondent No. 3 stopped paying the said EMI to the Appellants. Further, the homebuyers, including the Appellants, were not handed over their units by this point as well. The Appellants have also brought to light other transgressions committed by the Respondent No. 3 including that Respondent No. 3 has sold plots in the Project to multiple buyers.
- f) The Appellants have also alleged of collusion between the Respondent Builder and Bank, which, according to the Appellants is borne out from the fact that Respondent No. 4 did not carry out the requisite due diligence before giving loans to prospective home-buyers.
- g) Placing these facts on record, the Appellants approached the Hon'ble State Consumer Disputes Redressal Commission in *Sunil Kumar Pandey v. Kunal Structural Developers & Industries Pvt. Ltd. & Anr.* (CC No. 1402 of 2017).
- h) *Vide* Order dated 10.09.2020, Respondent No. 3 has been directed to return the amount of Rs. 7 Lacs advanced by the Appellant as booking fee. Furthermore, the Respondent No. 3 herein has also been directed to pay the EMIs paid by the Appellants to Respondent No. 4, and pay pending EMIs, if any, to Respondent No. 4 as well.
- i) As this final order was not complied with, the Appellants initiated execution proceedings against the Respondent Builder. The Appellants even obtained an execution order dated 05.04.2022, wherein the Hon'ble State Commission issued warrants of attachments of immovable properties for an amount of Rs. 54,64,128/-. However, the

same could not executed through the District Magistrate as the Respondent Builder Company underwent insolvency proceedings.

- j) It is pertinent to note that the Appellants have also filed a Civil Suit being CS SCJ 1304 of 2021 titled '*Sunil Kumar Pandey v. M/s Kunal Structural Developers and Industries Private Limited & Ors.*', seeking similar reliefs as those sought in W.P. (C) 11865/ 2022 which is pending during the moratorium under Section 14 of the Insolvency and Bankruptcy Code, 2016.
- k) Having exhausted other remedies, the Appellants filed W.P. (C) 11865/ 2022 along with an application for ad-interim ex-parte stay on the demands of the payment of Pre-EMIs and EMIs by *inter alia*, Respondent No. 4.
- l) *Vide* the Impugned Order, the Ld. Single Judge after going through the plaint of CS SCJ 1304 of 2021 titled '*Sunil Kumar Pandey v. M/s Kunal Structural Developers and Industries Private Limited & Ors.*', held as under: -

The challenge and the reliefs which are claimed in that suit also flow from the subvention scheme which has been questioned in the writ petition.

Learned counsel appearing for respondent Nos. 4 and 6 further apprises the Court that in the said suit proceedings, an application under Section 8 of the Arbitration and Conciliation Act, 1996 had been made and the same is pending consideration before the Trial Judge.

More importantly, the Court notes that the project itself is being implemented in Agra in the State of Uttar Pradesh. The developer "Kunal Structures Developing Industries Pvt. Ltd" (the third respondent) is also situate in Agra. The

mere fact that the said entity is sued through the Interim Resolution Professional who is a resident of Delhi would not justify the filing of the present writ petition before this Court.

In that view of the matter, no cause arises for this Court to continue the writ petition any further. The same shall stand dismissed with liberty reserved to the petitioner to pursue the civil suit which has been instituted.”

m) The Appellants being aggrieved by the Impugned Order have approached this Hon’ble Court *vide* the instant LPA.

3. It has been argued by the counsel for the Appellants that the learned Judge has failed to consider that the civil suit filed has been rendered infructuous on account of the moratorium imposed on Respondent No. 3 under the Insolvency and Bankruptcy Code, 2016. Further, that although an Application under Section 8 of the Arbitration and Conciliation Act, 1996 has been filed before a Trial Judge, it does not preclude this Court from entertaining the writ petition.

4. *Per contra*, the counsels for the Respondents have supported the Impugned Judgment, on the ground that the Ld. Single Judge had rightly dismissed the Petition on the ground of maintainability. The Respondents have further argued that there are several other remedies available to the Appellants and matters are already pending before other courts. Hence, the present appeal deserves to be rejected.

5. Heard the counsels for the Appellants, and Respondents and perused the material on record.

6. The Ld. Single Judge has dismissed the writ petition on the following grounds: *first*, other equitable remedies are available to the Appellants and

have been availed by the Appellants already, and *second*, that the Writ Petition ought not to have been filed before this Court owing to the lack of territorial jurisdiction.

7. The question before this Court is: whether the Appellants had rightly approached the Ld. Single Judge seeking an exercise of his discretionary powers under Article 226 of the Constitution of India. Albeit narrow, this may have implications for other petitions on similar facts as well.

8. At the outset, this Court finds it apposite to reiterate the principles governing the exercise of Article 226 when alternate remedies are available. It has time and again been noted that the remedy under Article 226 is not supposed to supersede other equitable modes of obtaining relief, including those available before a civil court. While the discretion accorded to this Court is by no stretch of imagination limited, this Court is restricted from interfering if an effective alternate remedy is available to the aggrieved person.

9. In this regard, the Hon'ble Supreme Court in Swetambar Sthanakwasi Jain Samiti v. Alleged Committee of Management Sri R.J.I. College, Agra, (1996) 3 SCC 11, has observed as under: -

“We are of the view that the High Court not only fell into patent error but also exceeded its jurisdiction under Article 226 of the Constitution of India. Though the jurisdiction of the High Court under Article 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 converted into a civil court under the ordinary law... 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 doing justice between the parties where it cannot be done in any other forum.” (emphasis supplied)

10. Furthermore, the Apex Court in Ghan Shyam Das Gupta v. Anant Kumar Sinha, (1991) 4 SCC 379, held as under: -

“8. The principle as to when the High Court should exercise its special jurisdiction under Article 226 and when to refuse to do so on the ground of availability of an alternative remedy has been settled by a long line of cases. The remedy provided under Article 226 is not intended to supersede the modes of obtaining relief before a civil court or to deny defences legitimately open in such actions...The High Court, in the present case, therefore, ought not to have embarked upon a decision of the writ petition on merits, and should have refused to exercise its special jurisdiction on the ground of alternative remedy before the civil court.” (emphasis supplied)

11. Recently, the Hon’ble Apex Court has summarised the principles governing this Court’s jurisdiction under Article 226, in Radha Krishan Industries v. State of Himachal Pradesh & Ors., 2021 SCC OnLine SC 334, as follows:-

“28. The principles of law which emerge are that:
(i) The power under Article 226 of the Constitution to issue writs can be exercised not only for the enforcement of fundamental rights, but for any other purpose as well;
(ii) The High Court has the discretion not to entertain a writ petition. One of the restrictions placed on the power of the High Court is where

an effective alternate remedy is available to the aggrieved person;

(iii) Exceptions to the rule of alternate remedy arise where (a) the writ petition has been filed for the enforcement of a fundamental right protected by Part III of the Constitution; (b) there has been a violation of the principles of natural justice; (c) the order or proceedings are wholly without jurisdiction; or (d) the vires of a legislation is challenged;

(iv) An alternate remedy by itself does not divest the High Court of its powers under Article 226 of the Constitution in an appropriate case though ordinarily, a writ petition should not be entertained when an efficacious alternate remedy is provided by law; (v) When a right is created by a statute, which itself prescribes the remedy or procedure for enforcing the right or liability, resort must be had to that particular statutory remedy before invoking the discretionary remedy under Article 226 of the Constitution. This rule of exhaustion of statutory remedies is a rule of policy, convenience and discretion; and

(v) In cases where there are disputed questions of fact, the High Court may decide to decline jurisdiction in a writ petition. However, if the High Court is objectively of the view that the nature of the controversy requires the exercise of its writ jurisdiction, such a view would not readily be interfered with.”

12. From the cases canvassed above, it is evident that this Court ought not to interfere when the Appellant can pursue an alternate remedy, such as a civil suit, although exceptions exist, as delineated under Radha Krishan Industries (Supra).

13. From a perusal of the record, it transpires that the Appellants have in fact availed of other remedies. The Appellant has already approached the Hon'ble State Consumer Disputes Redressal Commission in *Sunil Kumar Pandey v. Kunal Structural Developers & Industries Pvt. Ltd. & Anr.* (CC No. 1402 of 2017), and secured an Order in their favour. As this Order was not followed, the Appellants had also initiated execution proceedings against the Respondent Builder. An execution order was obtained on 05.04.2022. However, the same could not be executed due to the moratorium imposed under IBC, as the Respondent Builder underwent insolvency on 23.05.2022.

14. The Appellant has also filed a civil suit, being CS SCJ 1304 of 2021, whereby he has sought injunctions restraining the Respondent Bank from encashing the cheques given by the Appellants, and also, demanding the EMI from the Appellants every month. Upon a perusal of the prayers of the W.P. (C).11865/ 2022, it is evident that they are, in sum and substance, akin to the prayers sought in the civil suit.

15. It has also been admitted that there an arbitration clause in the agreement entered into between the Appellants and Respondents. Further, an Application under Section 8 of the Arbitration and Conciliation Act, 1996 has also been filed before a Trial Judge

16. It is also to be noted that the Project of Respondent No. 4 is situated in Agra, Uttar Pradesh. The Respondent No. 3 is also situated in Agra. It appears that the W.P.(C).11865/ 2022 was filed before this Court only because the Respondent No. 3 has been sued through the Interim Resolution Professional who is a resident of Delhi.

17. Considering the principles canvassed above, and the factual matrix of the instant case, the W.P.(C).11865/ 2022, was in fact not maintainable, as

alternate remedies exist and have been availed. As noted in Radha Krishan Industries (Supra), extraordinary circumstances qualify as exceptions to the rule of alternate remedy, and necessitate the interference of this Court. Such exceptions are 1) when the writ petition has been filed for the enforcement of a fundamental right protected by Part III of the Constitution; 2) violation of the principles of natural justice is made out; 3) the order or proceedings are wholly without jurisdiction; or 4) the vires of a legislation is challenged. Unfortunately, the case of the Appellants does not fall under any of these exceptions either.

18. The Appellants have claimed that the Ld. Single Judge has failed to note that the civil suit has been rendered infructuous due to the moratorium imposed upon Respondent No. 3. However, this anxiety of the Appellants is ill-founded as the moratorium operates *qua* Respondent No. 3 i.e the Builder, and not the Respondent No. 4 i.e the bank. As the prayers in the suit are sought *qua* Respondent No. 4, an equitable alternate remedy is still available to the Appellants. In any event, the moratorium will cease to exist once the proceedings under the Insolvency and Bankruptcy Code culminates. In light of this, this Court does not find any occasion to interfere with the Impugned Order.

19. While this Court is dismissing the instant LPA, it recognises that several real estate projects across the country are facing a similar situation. The grievances of the Appellants are mirrored in other petitions filed by other innocent homebuyers as well. Such petitions too are pending before this Court, other High Courts, and also, the Hon'ble Supreme Court. It is a rather unfortunate trend that builders often resort to dilatory tactics, defraud homebuyers by selling units to multiple individuals, delay the execution of

projects, and execute projects without requisite sanctions. Invariably most of such builders also undergo insolvency. The greatest loss is incurred by innocent homebuyers who are not only forced to embroil themselves in litigation but are also divested of their hard-earned savings.

20. However, it must be considered that the litigation arising out of such projects involve disputed questions of fact, ranging myriad issues. Although this Court sympathises with the Appellants, and similarly placed innocent homebuyers, Courts cannot possibly take account of all such real estate projects, and the gamut of issues arising from them.

21. With these observations, this Court is not inclined to interfere with the Impugned Order. However, Appellants are free to pursue other remedies available to them.

22. In light of the above, this Appeal is dismissed, and any pending application(s) stands disposed of.

SATISH CHANDRA SHARMA, CJ

SUBRAMONIUM PRASAD, J

NOVEMBER 01, 2022

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