

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
NAGPUR BENCH, NAGPUR.**

CRIMINAL WRIT PETITION NO. 292 OF 2022

Shakeel Ahmad Mohd. Sabir,
Aged about 65 yrs., Occ. Business,
Prop. Shubham Farms,
R/o. Behind Khushbu Motors,
Kalamna Road, Yerkheda, Kemptee,
Dist. Nagpur.

.... **PETITIONER.**

// VERSUS //

Smt. Madhuri W/o. Shrikant Modi,
Aged 60 yrs., Occ. : Private,
R/o. Flat No.503, Amruta Manor,
R.T.Marg, Civil Lines, Nagpur-01.

.... **RESPONDENT.**

Shri J.M.Gandhi, Advocate for Petitioner.
Mr. Kunal Nalamwar, Advocate for Respondent.

CORAM : ANIL S. KILOR, J.

DATE OF RESERVING THE JUDGMENT : 15/11/2022

DATE OF PRONOUNCING THE JUDGMENT: 08/03/2023

JUDGMENT :

1. Heard.

2. **RULE.** Rule made returnable forthwith. Heard finally by consent of the learned counsel for the parties.

3. The present writ petition is arising out of the judgment and order dated 29/07/2019 passed by Additional District Consumer Disputes Redressal Commission, Nagpur directing the petitioner to repay back the amount of Rs.6,00,000/-, received by the petitioner towards sale consideration of Plot Nos.116 and 119, along with interest @ 18% per annum from 29/06/2016 till its realization along with Rs.30,000/- towards physical and mental harassment and Rs.5,000/- towards costs. The petitioner is also challenging the order dated 29/03/2022 passed by the Additional District Consumer Disputes Redressal Commission rejecting the application moved by the petitioner for holding the trial in accordance with Section 27 of the Consumer Protection Act, 1986 (hereinafter referred to as “the Act of 1986”)

4. The brief facts of the present case are as under:

The petitioner is a proprietor of Shubham Farms, who entered into an agreement of Sale of plots bearing Nos.116 and 119 with the respondent, in a layout situated at Mouza : Patgowari, Tahsil :

Ramtek, District : Nagpur in Khasra No.279/1 and 279/2, admeasuring 4758 sq.ft. and 6953 sq.ft. respectively at the rate of Rs.168/- per sq.ft. i.e. for total consideration of Rs.19,67,000/-, out of which the respondent paid Rs.6,000/- time to time.

5. It is the case of the petitioner that respondent did not pay the installments on due dates and because of some statutory impediments the sale deed could not be executed and therefore, the complaint was lodged by the respondent on 28/02/2018 with the Additional District Consumer Disputes Redressal Commission, Nagpur (hereinafter referred to as "Commission").

6. The learned Commission has allowed the complaint vide order dated 29/07/2019 directing the petitioner to repay the amount of Rs.6,00,000/- received by the petitioner, along with interest @ 18%.

7. On non-compliance of the above referred order dated 29/07/2019 the respondent filed an application for execution of the said order to which the petitioner submitted his statement of defence on 22/03/2022. Thereafter on 29/03/2022 the petitioner moved an

application for holding the trial in accordance with the provisions of Section 27 of the Act of 1986, which came to be rejected vide order dated 29/03/2022. Hence, this petition.

8. Shri Gandhi, learned counsel for the petitioner, submits that the impugned orders dated 29/07/2019 and 29/03/2022 are erroneous as the Commission has failed to appreciate the fact that the dispute is in respect of open plots, which does not fall within the purview of the Act of 1986. It is submitted that the learned Commission ought not to have entertained the proceedings filed by the respondent.

9. It is further submitted that no opportunity was granted to the petitioner to cross-examine the respondent and to adduce evidence in defence and thus, the impugned judgment and order dated 29/07/2019 is in violation of the principles of natural justice.

10. The learned counsel for the petitioner further submits that the complaint was barred by limitation and despite this, without condoning the delay, the complaint was entertained. The learned counsel for the petitioner in support of his submission, has placed

reliance on the judgment of the Hon'ble Supreme Court of India in the case of *SBI ...vs.. B.S. Agriculture Industries (I)*, reported in **(2009) 5 SCC 121** and the judgment in the case of *Kandimalla Raghavaiah & co. ..vs.. National Insurance Co.* reported in **(2009) 7 SCC 768**.

11. On merit, the learned counsel for the petitioner submits that the learned Commission failed to consider the defaults committed by the respondent and as the respondent breached the conditions of the agreement, the learned Commission ought not to have allowed the appeal.

12. On the other hand, the learned counsel for the respondent strongly opposed the present writ petition, firstly, on the ground that the present writ petition is not tenable in view of alternate remedy available to the petitioner by way of a statutory appeal provided under the Act of 1986 and secondly on the ground of delay and laches. In support of his submission he has placed reliance on the judgments of Hon'ble Supreme Court of India in the case of *Cicily Kallarackal ..vs.. Vehicle Factory*, reported in **(2012)8 SCC 524** and in the case of *Royal Orchid Hotels ..vs.. G. Jayarama Reddy*, reported in **(2011) 10 SCC 608**.

13. It is submitted that the application moved by the petitioner for trial under Section 27 of the Act of 1986 is misconceived as it is a settled law that the executing Court cannot go behind the decree. For this purpose he has placed reliance on the judgment of the Hon'ble Supreme Court of India in the case of *State of Karnataka ..vs.. Vishwabharathi House Building Coop. Society*, reported in (2003) 2 SCC 412 and the judgment of *National Commission in the case of Rajendra Properties & Industries vs.. R.S. Nandwani*, reported in (1999) 2 CPJ 31 (NC).

14. In reply, Shri Gandhi, learned counsel for the petitioner has argued that there is no complete bar to entertain the writ petition even in case where the alternate remedy is provided. He therefore, submits that the present writ petition is maintainable as the impugned orders passed by the learned Commission are without jurisdiction. For this purpose, he has placed reliance on a judgment of Hon'ble Supreme Court of India in the case of *M.P.State Agro Industries Development Corpn. Ltd...vs.. Jahan Khan*, reported in 2007(10) SCC 88.

15. In light of the rival submissions I have perused the petition, the reply, the documents filed on record, the impugned orders and the authorities cited.

16. As the preliminary objection to the tenability of the present petition is raised on two counts, i.e. on the ground of alternate remedy and delay and laches, before examining the matter on merit, it would be appropriate to consider the preliminary objection, first.

17. The Hon'ble Supreme Court of India in *M.P. State Agro Industries* (supra) has held thus :

“12. Before parting with the case, we may also deal with the submission of learned counsel for the appellants that a remedy by way of an appeal being available to the respondent, the High Court ought not to have entertained his petition filed under Articles 226/227 of the Constitution. There is no gainsaying that in a given case, the High Court may not entertain a writ petition under Article 226 of the Constitution on the ground of availability of an alternative remedy, but the said rule cannot be said to be of universal application. The rule of exclusion of writ jurisdiction due to availability of an alternative remedy is a rule of discretion and not one of compulsion. In an appropriate case, in spite of the availability of an alternative remedy, a writ court may still exercise its discretionary jurisdiction of judicial review, in at least three contingencies, namely, (i) where the writ petition seeks enforcement of any of the fundamental rights; (ii) where there is failure of

principles of natural justice or (iii) where the orders or proceedings are wholly without jurisdiction or the vires of an Act is challenged. In these circumstances, an alternative remedy does not operate as a bar. (See: Whirpool Corpn. Vs. Registrar of Trade Marks, Harbanslal Sahnia Vs. Indian Oil Corpn. Ltd., State of H.P. Vs. Gujarat Ambuja Cement Ltd. and Sanjana M. Wig Vs. Hindustan Petroleum Corpn. Ltd.).”

18. From the above observations, it is evident that the Rule of Exclusion of writ jurisdiction due to availability of an alternative remedy is a Rule of Discretion and not one of Compulsion. In an appropriate case, inspite of the availability of an alternate remedy, writ court may still exercise its discretionary jurisdiction of judicial review in the contingencies namely where the writ is filed for enforcement of any fundamental right, on failure to follow principles of natural justice or where the proceedings are wholly without jurisdiction or the vires of an act is under challenge.

19. The Hon’ble Supreme Court of India in the case of *Cicily* (supra) had an occasion to deal with a situation similar with the present matter as regards the alternate remedy by way of appeal provided under the Act of 1986 and after examining the law in this regard, has observed thus :

“4. Despite this, we cannot help but state in absolute terms that it is not appropriate for the High Courts to entertain writ petitions under Article 226 of the Constitution of India against the orders passed by the Commission, as a statutory appeal is provided and lies to this Court under the provisions of the Consumer Protection Act, 1986. Once the legislature has provided for a statutory appeal to a higher court, it cannot be proper exercise of jurisdiction to permit the parties to bypass the statutory appeal to such higher court and entertain petitions in exercise of its powers under Article 226 of the Constitution of India. Even in the present case, the High Court has not exercised its jurisdiction in accordance with law. The case is one of improper exercise of jurisdiction. It is not expected of us to deal with this issue at any greater length as we are dismissing this petition on other grounds.” (Emphasis supplied)

20. Thus, from the above referred observations of the Hon’ble Supreme Court, it is clear that it is not appropriate to entertain writ petition under Article 226 of the Constitution of India against the orders passed by the Commission as a statutory appeal is provided. It is further held that once the legislature has provided for a statutory appeal to higher Court, it cannot be proper exercise of jurisdiction to permit the parties to by-pass the statutory appeal to such higher Court and entertain petitions in exercise of powers under Article 226 of the Constitution of India and such cases are of improper exercise of jurisdiction.

21. In the teeth of above referred observations of the Hon'ble Supreme Court of India in the case of *M.P. State Agro Industries* (supra) and *Cicily* (supra), I revert back to the facts of the present case.

22. Undisputedly, in the case at hand, the petitioner has not preferred statutory appeal against the order passed by the Commission dated 29/07/2019. The validity of said order of the Commission is being questioned first time, in the present writ petition, which was filed on 04/04/2022 i.e. after 33 months. Thus, there is an inordinate delay of about 1000 days in filing the petition against the order dated 29/07/2019. The petitioner has not offered any explanation for such an inordinate delay.

23. The Hon'ble Supreme Court of India in the case of *Royal Orchid* (supra) has held thus :

“25. Although the framers of the Constitution have not prescribed any period of limitation for filing a petition under Article 226 of the Constitution of India and the power conferred upon the High Court to issue to any person or authority including any Government, directions, orders or writs including writs in the nature of habeas corpus, mandamus, prohibition, quo-warranto and certiorari is not hedged with any condition or constraint, in the last 61 years the superior Courts have evolved several rules of self-imposed restraint including

the one that the High Court may not enquire into belated or stale claim and deny relief to the petitioner if he is found guilty of laches. The principle underlying this rule is that the one who is not vigilant and does not seek intervention of the Court within reasonable time from the date of accrual of cause of action or alleged violation of the constitutional, legal or other right is not entitled to relief under Article 226 of the Constitution. Another reason for the High Court's refusal to entertain belated claim is that during the intervening period rights of third parties may have crystallized and it will be inequitable to disturb those rights at the instance of a person who has approached the Court after long lapse of time and there is no cogent explanation for the delay. We may hasten to add that no hard and fast rule can be laid down and no straightjacket formula can be evolved for deciding the question of delay/laches and each case has to be decided on its own facts.” (emphasis supplied)

24. The Hon'ble Supreme Court of India in clear terms has observed that the one who is not vigilant and does not seek intervention of the Court within reasonable time from the date of accrual of cause of action or alleged violation of constitutional, legal or other rights, is not entitled to relief under Article 226 of the Constitution.

25. It is also a settled law that the question of delay and laches has to be decided in each case on its own merit.

26. In the present matter, undoubtedly the delay is inordinate and no explanation is offered for such a huge delay.

27. If the provisions of the Act of 1986 are considered, it can be seen that a period is prescribed to decide the complaints. Therefore, considering the intention of the legislature in providing such period under the statute, in the present case, in absence of any explanation for delay and as the application under Section 27 of the Act of 1986 is pending for execution of the order dated 27/09/2019, I am not inclined to exercise discretion under Article 226 of the Constitution of India.

28. So far as the challenge raised to the order dated 29/03/2022, passed in a proceeding filed under Section 27 of the Act of 1986, the Hon'ble Supreme Court of India in the case of *State of Karnataka .vs. Vishwabharathi* (supra) has held thus :

“57. A bare perusal of Section 25 of the Act clearly shows that thereby a legal fiction has been created to the effect that an order made by District Forum/State Commission or National Commission will be deemed to be a decree or order made by a civil court in a suit. Legal fiction so created has a specific purpose, i.e., for the purpose of execution of the order passed by the Forum or Commission. Only in the event the Forum /

State Commission or the National Commission is unable to execute its order, the same may be sent to the civil court for its execution. The High Court, therefore was not correct to hold that in each and every case the order passed by the Districts Forum/ State Commission National Commission are required to be sent to the civil courts for execution thereof.

58. Furthermore, Section 27 of the Act also confers an additional power upon the Forum and the Commission to execute its order. The said provision is akin to Order 39 Rule 2-A of the Code of Civil Procedure or the provisions of the Contempt of Courts Act or Section 51 read with Order 21 Rule 37 of the Code of Civil Procedure. Section 25 should be read in conjunction with Section 27. A Parliamentary statute indisputably can create a tribunal and might say that non-compliance with its order would be punishable by way of imprisonment or fine, which can be in addition to any other mode or recovery.

59. It is well settled that the cardinal principle of interpretation of statute is that courts or tribunals must be held to possess power to execute their own order.

60. It is also well settled that a statutory Tribunal which has been conferred with the power to adjudicate a dispute and pass necessary order has also the power to implement its order. Further, the Act which is a self-contained Code, even if it has not been specifically spelt out, must be deemed to have conferred upon the Tribunal all powers in order to make its order effective.”

29. Thus, considering the scope of Section 27 of the Act of 1986 as discussed by the Hon’ble Supreme Court of India in the case of *State of Karnataka ..vs.. Vishwabharti* (supra), and the reason recorded by the Commission that filing of the said application is with an intention

to prolong or to delay the proceedings, I do not find any error committed by the Commission in rejecting the application preferred by the petitioner for holding the trial. Accordingly, the challenge raised to the order dated 29/03/2022 also needs to be rejected on the ground of alternate remedy.

30. The judgments cited by the learned counsel for the petitioner in the case of *Kandimalla* (supra) and in the case of *SBI* (supra) are of no help to the petitioner in the present petition as I have not examined the order dated 29/07/2019 on merits in view of the fact that there is an inordinate delay in filing the writ petition and also in view of the fact that statutory appeal is provided.

31. In the circumstances, I do not find any reason to entertain the present writ petition on merit, accordingly, it is dismissed. No order as to costs.

JUDGE

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