

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

CRIMINAL WRIT PETITION NO. 390 OF 2022

Shoeb Asad S/o Shakeel Ahmad,
Aged about 36 yrs., Occ: Business,
Prop. Royal Construction Developers &
Builders, R/o: New Yerkheda, Kalamna Road,
Kamptee, Dist: Nagpur.

.... **PETITIONER.**

// VERSUS //

Smt. Sitara Nayab Khan,
Aged: 50 yrs., Occ. : Private,
R/o: MPMH Roadways, KPT Complex,
Plot No.197/198, Shop No.3, Surya Nagar,
Kalamna Market Road, Nagpur.

.... **RESPONDENT.**

Shri J.M.Gandhi, Advocate for Petitioner.
Shri H.R.Gadhia, 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 18/12/2019 passed by Additional District Consumer Disputes Redressal Commission, Nagpur directing the petitioner to repay back the amount of Rs.2,18,000/-, received by the petitioner towards sale consideration of Plot Nos.38 & 39 along with interest @ 18% per annum from 16/10/2012 and for Plot No.24-A Rs.2,10,000/- along with interest @ 18% per annum from 17/02/2011 till its realization and also directed to pay Rs.55,000/- towards physical and mental harassment and Rs.5,000/- towards costs. The petitioner is also challenging the order dated 02/06/2022 passed by the Additional District Consumer Disputes Redressal Commission rejecting the application moved by the petitioner for cancellation of Non-Bailable Warrant and forfeiture of cash security.

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

The petitioner is a proprietor of Royal Construction Developers & Builders, who entered into an agreement of Sale of Plot Nos.24-A, 38 & 39 with the respondent, in a layout situated at Mouza : Bhilgaon, Tahsil : Kamptee, District : Nagpur in Khasra Nos.98/1, 89, Patwari Halka No.15, admeasuring 5413 sq.ft. for a total consideration

of Rs.5,81,760/-, out of which the respondent has paid Rs.2,78,000/- as part payment of consideration and remaining amount was agreed to be paid in installments.

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 11/02/2019 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 18/12/2019 directing the petitioner to repay the amount of Rs.2,18,000/- and Rs.2,10,000/- received by the petitioner for Plot Nos.38, 39 and 24-A, respectively, along with interest @ 18%.

7. Thereafter, since the petitioner and his counsel were absent, the Commission issued Non-Bailable Warrant (N.B.W.) against the petitioner, therefore, the petitioner filed an application for cancellation of the N.B.W. However, the learned Commission rejected the said application. The said order dated 02/06/2022 is also under challenge in this writ petition. Hence, this petition.

8. Shri Gandhi, learned counsel for the petitioner, submits that the impugned orders dated 18/12/2019 and 02/06/2022 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 Consumer Protection Act, 1986 (hereinafter referred to as “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 18/12/2019 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 complaint.

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. 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**.

14. 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.

15. 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.

16. 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.).”

17. 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, in spite 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.

18. 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)

19. 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.

20. 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.

21. Undisputedly, in the case at hand, the petitioner has not preferred statutory appeal against the order passed by the Commission dated 18/12/2019. The validity of said order of the Commission is being questioned first time, in the present writ petition, which was filed on 21/06/2022. Thus, there is an inordinate delay in filing the petition against the order dated 18/12/2019. The petitioner has not offered any explanation for such an inordinate delay.

22. 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)

23. 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.

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

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

26. 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, I am not inclined to exercise discretion under Article 226 of the Constitution of India.

27. As far as order dated 02/06/2022 passed by the Commission rejecting the application for cancellation of Non-Bailable Warrant is concerned, the petitioner can apply afresh by surrendering before the Commission.

28. 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 18/12/2019 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.

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.

29. The petitioner is at liberty to apply for cancellation of the Non-Bailable Warrant by surrendering before the District Consumer Disputes Redressal Commission, Nagpur.

The Commission is directed to consider the request of the petitioner to cancel the Non-Bailable Warrant on the same day on which he will surrender before the Commission.

JUDGE

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