

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

CRIMINAL WRIT PETITION NO. 677 OF 2022

Amit s/o Vasantryao Zade,
Aged about 42 yrs., Occ. Agri. & Business,
Prop. Shri Bhagyalaxmi Infrastructure
R/o: Plot No.41, Saubhagya Nagar,
Hudkeshwar Road, Nagpur-440034.

.... **PETITIONER.**

// VERSUS //

Mohammad Azhar Sadique,
Aged: 32 yrs., Occ. : Private,
R/o. Plot No.24, Rose Colony,
Near Ring Road, Nagpur-440013.

.... **RESPONDENT.**

Shri J.M.Gandhi, Advocate for Petitioner.
Shri M.M.Awade, 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 02/12/2021 passed by Additional District Consumer Disputes Redressal Commission, Nagpur directing the petitioner to repay back the amount of Rs.1,10,400/-, received by the petitioner towards sale consideration of Plot Nos.97 & 106 along with interest @ 18% per annum from 25/05/2017 till its realization and also directed to pay Rs.30,000/- towards physical and mental harassment and Rs.10,000/- towards costs.

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

The petitioner is a proprietor of Bhagyalaxmi Infrastructure, who entered into an agreement of Sale of Plot Nos.97 & 106 with the respondent, in a layout situated at Mouza : Aakola, Tahsil : Umrer, District:Nagpur in Khasra Nos.198/1/123, Patwari Halka No.15, admeasuring 2001 sq.ft. and later on offered alternate Plot Nos.130 & 135, admeasuring 2001 sq.ft. at Mouza : Gaosut, Khasra No.33/1, 2/A, 2/A/1, Tahsil:Umrer, District: Nagpur for a total consideration of Rs.1,22,076/-, out of which the respondent has paid Rs.1,10,400/- 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 08/03/2021 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 02/12/2021 directing the petitioner to repay the amount of Rs.1,10,400/- received by the petitioner for Plot Nos.97 and 106, respectively, along with interest @ 18%.

7. On non-compliance of the above referred order dated 02/12/2021 the respondent filed applications under Sections 71 and 72 of the Act of 1986 for execution of the said Award on 14/02/2022 thereupon the Commission had issued Non-Bailable Warrants against the petitioner, which came to be cancelled after appearance of the petitioner, on payment of cash security and penalty for cancellation of warrant. The petitioner has prayed for dismissal of the proceedings under Sections 71 and 72 of the Consumer Protection Act, 1986 (hereinafter referred to as “the Act of 1986”). Hence, this petition.

8. Shri Gandhi, learned counsel for the petitioner, submits that the impugned order dated 02/12/2021 and the process adopted by the Commission in entertaining the applications under Sections 71 and 72 of the Act of 1986 is illegal, unwarranted and contrary to law. 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 02/12/2021 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 order passed by the learned Commission is 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 documents filed on record, the impugned order 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 02/12/2021. The validity of said order of the Commission is being questioned first time, in the present writ petition, which was filed on 27/09/2022. Thus, there is an inordinate delay in filing the petition. 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. 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 02/12/2021 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.

28. As regards the proceedings under Sections 71 and 72 of the Act of 1986 and issuance of Non-Bailable Warrant is concerned, the petitioner can avail alternate remedy as available under the Act and since alternate remedy is available, no interference is warranted.

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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