

(2013) 08 CAL CK 0089
In the Calcutta High Court
Case No : C.O. No. 2086 of 2012

Chandan Banik

APPELLANT

Vs

Suparna Ganguly Bagchi and Others

RESPONDENT

Date of Decision : 21-08-2013

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 9 Rule 13
Constitution of India, 1950 — Article 227
Consumer Protection Act, 1986 — Section 13, 13(4), 17, 17(1), 19
Criminal Procedure Code, 1973 (CrPC) — Section 195

Citation : (2014) 1 CHN 622

Hon'ble Judges : Asim Kumar Mondal, J

Bench : Single Bench

Advocate : Pradip Kumar Tarafder and Mr. Joydeep Sen, for the Appellant;
Bharat Bhushan for the Respondent No. 1, for the Respondent

Final Decision : Dismissed

Judgement

Asim Kumar Mondal, J.—The case of the petitioner is that he is the youngest son and legal heirs of late Chandranath Banik and late Nirmala Banik. The proforma opposite parties are other sons of late Chandranath Banik. The petitioner most of the time resides at Thailand for business purpose. The proforma opposite parties resides at 26, Hindustan Park, Kolkata for last 20 years. Neither the petitioner nor proforma opposite parties have ever resided at 26A, Hindustan Park, Kolkata. The youngest brother of the petitioner namely Nandan Banik have been residing at 26A, Hindustan Park, Kolkata. The deceased mother of the petitioner late Nirmala was the sole owner of the premises No. 26A, Hindustan Park, Kolkata. She had entered into a development agreement with Ms. Ratnakar Properties Private Ltd. during her life time. The premises being No. 26A, Hindustan Park, Kolkata, was developed by the said developer. On 22.12.2012 the petitioner was served for a notice of execution case being No. E.A/10/11 arising out of a consumer complaint case No. SC, Case No. 08/72 before the State Consumer Disputes Redressal Commission, West Bengal. The said case has been filed by

the opposite parties No. 1 & 2 the petitioner and his two brothers have been impleaded. Petitioner's another brother Sri Nandan Banik who has been residing at the premises 26A, Hindustan Park, Kolkata has not been impleaded. Petitioner had no knowledge about the original proceedings out of which the execution case arose. Petitioner came to know that the degree has been put in execution was passed ex parte. The proforma opposite parties ever received any notice at any point of time in respect of the original consumer dispute proceeding. The notices issued by the Ld. State Commission had come back showing received of the service by the erstwhile opposite party No. 2 i.e. late Nirmala Banik in 2008 though the fact remains that the late Nirmala Banik had passed away way back in the year 2002, and advertisement was purportedly published in the Newspaper. In response thereto the developer entered appearance and filed in written statement disclosing that late Nirmala Banik had passed away. In a substitution petition filed by the opposite parties, notices have served upon legal heirs including the petitioner at the address at 26A, Hindustan Park, Kolkata. The opposite parties deliberately mention the address of the petitioner as 26A Hindustan Park, Kolkata, instead of 26, Hindustan Park, Kolkata with an intention to obtain an ex parte degree. The petitioner filed a miscellaneous petition before the Ld. State Commission inter alia praying for setting aside or recall of the ex parte degree dated 22.7.2011 which was put in execution by execution case No. E-A 10 of 2011 arising out of CC No. 08 of 72. The said miscase was registered at M.A. 53 of 2012 in the said miscase, the petitioner also raised the issue that the initially complain case was instituted against dead person and as such some was not maintainable. The Ld. State Commission's order dated 12.3.2012 dismissed the miscellaneous application being M.A. No. 53 of 2012 on the plea that there is no express provision in the Consumer Protection Act for setting aside an ex parte award.

2. Being aggrieved and dissatisfied with the order impugned the petitioner has preferred the present revisional application under article 227 of the Constitution of India on the grounds that the Ld. State Commission in passing the impugned order has failed to observe the liberties and procedures laid down in the CPC which is applicable in respect of the Consumer Protection Act unless it is specifically excluded. Thus, Ld. State Commission, has failed to exercise the inherent jurisdiction vested in it by not setting aside the ex parte degree and allowing the petitioner to contest the original complain case.

3. Mr. Pradip Kumar Sen with Mr. Joydip Sen appears for the petitioner. It is submitted and argued that the State Commission has the power under the Code of Civil Procedure. Ld. State Commission has failed to appreciate that a grave miscarriage of justice has been caused due to deliberate omission of the complainant/opposite parties in not serving the notice of the original proceedings at the correct address of the petitioner and proforma opposite parties. It is submitted that State Commission has inherent power analogous to the liberties laid down in order IX Rule 13 of the CPC to set aside the ex parte degree. Ld. Commission failed to appreciate that the Section 21 of Consumer Protection Act does not

provide adequate remedy against an ex parte order or was obtained by practising fraud. Ld. State Commission has committed a fundamental error by not appreciating that would fraud takes place in accordance of any judicial process, every judicial forum has inherent power to pass such orders to mitigate the injustice and set aside any judicial pronouncement.

4. Further it is submitted relying upon the ratio of Supreme Court reported in AIR 1997 Supreme Court 533 that District Forums, State Commission and National Commission have all the trapping of a Civil Court and Judicial Authority. The proceedings before them are legal proceedings.

5. Relying upon the reported decision of Supreme Court (reported in 1996 Vol-V, SCC 550) Mr. Sen submits that the State Commission can review its own judgment and order sought on the ground of fraud/forgery committed by the complainant. It has inherent powers to recall its judgment and order if found to be obtained by practising fraud. The State Forum being a Judicial Authority has inherent power of Court to grant relief. Ram Chandra Singh Vs. Savitri Devi and Others,

6. Inreply Mr. Arindam Banerjee with Mr. Bharat Bhushan appears on behalf of the respondent No. 1 submits that the instant revisional application under Article 227 of the Constitution of India is not maintainable at all. Mr. Banerjee raised preliminary objection as to the maintainability of the instant application on the grounds that the issues raised by the petitioners are to be adjudicated by the appropriate appellate forum. This Court cannot be a fact finding Court under Article 227 of the Constitution of India. High Court should not have taken cognizance in the matter. The forum is created for investigate a complaint filed before them with a very limited special power of CPC forum cannot have all the powers as vested under the Civil Procedure Code. In view of the provisions u/s 13(4) of the Consumer Protection Act, the State Commission has no power to review its own order.

7. The petitioners have certainly the remedy before the appellate forum. The petitioner can have challenged the order of ex parte degree before the appellate forum i.e. the National Commission or petitioner can have challenged the order of refusal to recall before appropriate forum.

8. In support of his submission Mr. Sen relied upon the decision of Supreme Court reported in Jyotsana Arvindkumar Shah and Others Vs. Bombay Hospital Trust, It is submitted that the Supreme Court in so many cases has categorically stated that High Court should not have entertained writ petition and directed them to avail remedy of appeal u/s 19 of 1986 Act, instead of availing alternative remedy of appeal u/s 19 of 1986 Act.

9. Mr. Sen, appearing on behalf of the petitioner submits and argued at length on the point of fraud practice upon the State Commission by the opposite parties to obtain the ex parte degree by practising of fraud allegedly a mixed question of fact and law. Some facts have been alleged in the present petition showing how

the fraud has been practised by the respondents. Ld. Members of the State Forum has stated in details as to the practice of fraud upon the petitioners but has refused to recall or set aside the ex parte degree passed by the Commission on the ground that High Court has set aside the order passed by the Commission where in recalling original order has been made. It is observed by the Ld. Members in the impugned order that the Commission has got no jurisdiction to recall its own order.

10. Section 17(1) of the Consumer Protection Act, outline jurisdiction of the State Commission and Section 19 of the Said Act has provided for an appeal against the order of the State Commission. Section 19 of the Said Act, deals with the provisions of appeals. Section 19 provides that any person aggrieved by and order made by the State Commission in exercise of its powers conferred by said Clause (i) of the Clause (a) of Section 17 may prefer an appeal against such order to the National Commission within a period of 30 days. Section 19 of the Act provides for remedy of appeal against an order made by the State Commission in exercise of its powers under state Clause (i) of Clause (a) of Section 17.

11. The application of the provisions of CPC is, in fact, limited as provided u/s 13 Sub-section 4 of the Act. In view of the said provisions, the District Forum shall be deemed to be a Civil Court for the purpose of Section 195 and Chapter XXVI of the Code of Criminal Procedure 1973.

12. In view of the ratio reported in (1999)4 Supreme Court cases 325 the State Commission has got no jurisdiction to set aside the ex parte reason order. The order impugned is appealable before the appellate forum. There is no provision like as Order IX Rule 13 of the CPC in the Consumer Protection Act, empowering the State Commission to set aside or recall its own order.

13. In a limited jurisdiction under Article 227 of the Constitution of India this Court should not interfere with the facts as urged in the present application to decide a mixed question of law and facts as this Court is not fact finding Court. On careful perusal of the order impugned I do not find any irregularity or illegality to hold that Ld. State Commission has failed to exercise its proper jurisdiction in passing the order impugned.

14. I do not find any merit in the present revisional application which warrant interference of this Court as there is an alternative remedy provided in the Act which could have been availed by the petitioners to get reliefs as prayed for in the present application.

15. Thus, in my opinion the present application is liable to be dismissed. I make it clear that this Court have not gone through the merit of the petition filed by the petitioner being No. M.A. 53 of 2012 before the State Commission. Petitioner is given liberty to challenge the order impugned of the State Commission by availing the alternative remedy to appeal u/s 19 of the Act. Urgent Photostat certified copy of this order if applied for be given to the parties on priority basis.