
(2022) 12 DEL CK 0104

In the Delhi High Court

Case No : Letter Patent Appeal No. 124 Of 2020, Civil Miscellaneous Application No. 8226 Of 2020, 28067 Of 2020, 10605 Of 2021

Magnum International Tradingcompany Pvt. Ltd.

APPELLANT

Vs

Vikas Dhawan & Ors

RESPONDENT

Date of Decision : 15-12-2022

Acts Referred:

Constitution Of India, 1950 — Article 226, 227
Consumer Protection Act, 1986 — Section 21, 23

Citation : (2022) 12 DEL CK 0104

Hon'ble Judges : Vibhu Bakhru, J;Purushaindra Kumar, J

Bench : Division Bench

Advocate : Debesh Panda, Udbhav Gady, Vikash Verma, Sambit Nanda, Koushal Dogra

Final Decision : Dismissed

Judgement

Vibhu Bakhru, J

1. Magnum International Trading Company Private Limited, a company engaged in business of real estate development, has filed the present appeal impugning an order dated 13.11.2019 (hereafter 'the impugned order'), passed by the learned Single, whereby the learned Single Judge had declined to entertain the petition on the ground of existence of an equally efficacious alternative remedy.

2. The appellant had filed a writ petition challenging certain orders passed by the National Consumer Dispute Redressal Commission, New Delhi (hereafter 'the NCDRC') in Consumer Case No.42 of 2018 captioned Vikas Dhawan & Anr. v. Magnum International Trading Company Private Limited. The appellant contends that the proceedings before the learned NCDRC are without jurisdiction, inter alia, on the ground that the subject matter is below the pecuniary jurisdiction of the learned NCDRC.

3. On 27.05.2012, the appellant entered into an Apartment Buyer's Agreement

(hereafter 'the Agreement') with Mr. Vikas Dhawan (respondent no.1) and Mrs. Superna Dhawan (respondent no.2) for allotment of an apartment.

4. In terms of clause 12.1 of the Agreement, the construction of the apartment was expected to be completed within a period of thirty-six months. Respondent nos.1 and 2 claimed that the appellant failed to complete the construction within the stipulated period.

5. On 18.01.2018, respondent nos.1 and 2 filed a complaint under Section 21 of the Consumer Protection Act, 1986 (being Consumer Case No.42/2018).

6. The appellant contested the said complaint, inter alia, on the ground that the learned NCDRC did not have the jurisdiction to entertain the said complaint because the value of the claim was less than Rs. 1 crore.

7. The learned NCDRC passed an interim order dated 11.09.2018, directing the appellant to deliver possession of the flat in question to the complainants (respondents) subject to the disputed amount being deposited with the learned NCDRC, which would be kept in a fixed deposit receipt with the nationalised bank during the pendency of the complaint.

8. The appellant challenged the said order amongst others, by filing a writ petition before this Court [being W.P.(C) 11639/2018]. It was the petitioner's case that the learned NCDRC had passed orders without recording its objection regarding jurisdiction and without deciding the same. The said petition was dismissed by the Single Judge of this Court (one of us – Vibhu Bakhru, J). The Court also rejected the contention that it was necessary for the learned NCDRC to first decide the issue of jurisdiction before proceeding further with the claim. The Court further observed that it would be open for the learned NCDRC to decide the complaint finally, including the issue of jurisdiction and it was not open for the petitioner to insist that the complaint be decided in a piecemeal manner.

9. Aggrieved by the order dated 11.09.2018, the appellant preferred an appeal before the Division Bench of this Court (LPA No.693/2018). The said appeal was dismissed by a consent order dated 28.01.2019, which reads as under:

"During the course of hearing, parties agree that the National Consumer Disputes Redressal Commission may decide the issue of its jurisdiction as a preliminary issue and thereafter, it may proceed in accordance with law. Accordingly, we dispose of the appeal and connected applications with the request to the learned National Consumer Disputes Redressal Commission to decide the question of its jurisdiction as a preliminary issue, preferably within a period of four weeks from today."

10. In compliance with the said order, the learned NCDRC decided the appellant's objections with regard to jurisdiction. The appellant had questioned the jurisdiction of the learned NCDRC on various grounds. First, it had contended that the learned NCDRC did not have the pecuniary jurisdiction as the value of

the claim was below Rs. 1 crore. Second, the appellant contended that the learned NCDRC did not have the jurisdiction to issue directions in the nature of specific performance and the complainants (respondent) had sought relief to the aforesaid effect. Third, the appellant contended that the complainants "were not consumers" and therefore, their complaint was without jurisdiction. Fourth, they claimed that it was a colourable exercise of jurisdiction to entertain a complaint qua matters in the realm of State laws, particularly those referable to Entry 18, List II of the Constitution of India. Fifth, the appellant claimed that the Learned NCDRC did not have jurisdiction to entertain the complaint in view of the arbitration agreement between the parties and the decision of the Supreme Court in *Emaar MGF Land Ltd. v. Aftab Singh*: (2019) 12 SCC 751; was required to be reconsidered. The appellant claimed that said decision was "per incuriam and had no precedent before this Hon'ble Commission (learned NCDRC)"; and lastly, the appellant contended that the complaint is barred by limitation.

11. The learned NCDRC passed an order dated 18.03.2019, rejecting the contentions advanced by the petitioners. The learned NCDRC also rejected the contention that the jurisdiction of the learned NCDRC was barred by virtue of the agreement and held that the issue was covered by the decision of the Supreme Court in Review Petition (C) Nos. 2629-2630 of 2018 in Civil Appeal Nos. 23512-23513 of 2017 captioned *M/s Emaar MGF Land Limited v. Aftab Singh*. The learned NCDRC did not entertain the contention that the said decision was wrongly decided and held that it was bound by the same. Insofar as the appellant's contention that the claim value was below the pecuniary jurisdiction of the learned NCDRC, the learned NCDRC held that the issue was covered by a three member Bench of the learned NCDRC in *Ambrish Kumar Shukla v. Ferrous Infrastructure*: (2017) 1 CPJ 1 (NC).

12. The petitioner filed a petition seeking review of the said order which was dismissed by the learned NCDRC on 25.04.2019.

13. The appellant once again approached this Court by filing a writ petition [W.P. (C) 7637/2019]. The appellant challenged the orders dated 18.03.2019 as well as the order dated 25.04.2019 rejecting the appellant's contention regarding maintainability of the complaint, as well as the order dated 25.04.2019, rejecting the appellant's application for review of the said order [Review Application No.135/2019]. It is important to note that in the writ petition, the appellant also impugned the order dated 11.09.2018 and other orders passed prior to that date, which were also subject matter of challenge in the earlier writ petition [W.P. (C) 11639/2018].

14. The appellant also sought stay of the proceedings before the learned NCDRC in CC No. 42/2018. However, that application was rejected by the learned Single Judge by an order dated 17.07.2019.

15. The appellant filed an appeal against the order dated 17.07.2019, rejecting its application for stay of proceedings before the learned NCDRC [LPA

No.483/2019]. In the said appeal, the appellant also submitted that the decision of the Bench of three members of the learned NCDRC in *Ambrish Kumar Shukla v. Ferrous Infrastructure* (supra) – which was relied upon by the learned NCDRC in rejecting the appellant's contention regarding pecuniary value of the jurisdiction – had been referred to a Bench of five members of the learned NCDRC.

16. The learned Division Bench of this Court dismissed the said appeal [LPA No. 483/2019] by an order dated 20.08.2019. The operative part of the said order is set out below:

"3. The aforementioned writ petition is already pending and the learned Single Judge has not granted stay against further proceedings by NCDRC and hence this appeal has been preferred. We have heard the counsel appearing for the appellant and counsel for the respondents and it is submitted that in Consumer Case No.97/2016 titled as *Ambrish Kumar Shukla & Ors.vs. Ferrous Infrastructure Pvt. Ltd.* which was decided by NCDRC vide order dated 7th October 2016 by the bench of three members is now referred to a bench of five members. This judgment was referred by NCDRC in the impugned order dated 18th March, 2019 (Annexure A-8 to the memo of this appeal), which is under challenge in W.P.(C) 7637/2019, preferred by this appellant (original petitioner) and the same is pending before the learned Single Judge. Hence, we find no reason to entertain this appeal at this stage mainly for the following reasons:

(a) Issue about reference is now being made by NCDRC to the larger bench of five members, especially to consider/reconsider the *Ambrish Kumar Shukla* case (supra) can be agitated by the appellant (original petitioner) before the learned Single Judge in W.P.(C) 7637/2019.

(b) The reference to the larger bench by NCDRC of *Ambrish Kumar Shukla's* (supra) case can also be agitated by this appellant as and when the complaint filed by the respondents herein is to be heard by NCDRC.

(c) This appeal is against the rejection of the prayer for stay by the learned Single Judge in W.P.(C) 7637/2019 but the main writ petition is still pending before the learned Single Judge; and

(d) Any other arguments which are available with this appellant and respondents can very well be raised before the learned Single Judge as well as before NCDRC as and when the complaint of the respondents is taken for hearing by NCDRC at Delhi.

4. With the aforesaid observations, we find no reason to entertain this appeal and the same is therefore dismissed."

17. Thereafter, the appellant moved the learned NCDRC and sought a reference of the issue of jurisdiction to the larger bench of five members as according to the appellant the decision in *Ambrish Kumar Shukla v. Ferrous Infrastructure* (supra) was erroneous.

18. The learned NCDRC accepted the said request and by an order dated 03.09.2019 directed that the appellant's application be referred to a larger bench presided over by the President of NCDRC.

19. Aggrieved by the said order dated 03.09.2019, the respondents filed an appeal before the Supreme Court (Civil Appeal No.8190/2019). The same was disposed of by the Supreme Court by an order dated 04.11.2019, by recording the statement of the respondent's counsel that the respondents would file an application for de-tagging the matter before the five members bench of the learned NCDRC.

20. It is clear from the above that the appellants simultaneously agitated the question of jurisdiction before both the forums – before this Court [in W.P. (C)7637/2019] as well as the larger Bench of the learned NCDRC.

21. The appellant's petition was taken up for hearing by the learned Single Judge on 13.11.2019. The learned Single Judge referred to the decision of the Supreme Court in *Nivedita Sharma v. Cellular Operators Association of India & Ors.*: (2011) 14 SCC 337 and held that the Court should decline to entertain the petition on the ground of alternative efficacious remedy under Section 23 of the Consumer Protection Act, 1986. The relevant extract of the said decision is set out below:

"11. In *Nivedita Sharma* (Supra), the Supreme Court, in relation to the Consumer Protection Act, 1986 has held as under:

"16. It can, thus, be said that this Court has recognised some exceptions to the rules of alternative remedy. However, the proposition laid down in *Thansing Nathmal v. Supt. of Taxes* and other similar judgments that the High Court will not entertain a petition under Article 226 of the Constitution if an effective alternative remedy is available to the aggrieved person or the statute under which the action complained of has been taken itself contains a mechanism for redressal of grievance still holds the field."

12. In *Cicily Kallarackal* (supra) the Supreme Court reiterated as under:

"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.

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9. While declining to interfere in the present special leave petition preferred against the order passed by the High Court in exercise of its extra-ordinary jurisdiction under Article 226 of the Constitution of India, we hereby make it clear that the orders of the Commission are incapable of being questioned under the writ jurisdiction of the High Court, as a statutory appeal in terms of Section 27-A(1)(c) lies to this Court. Therefore, we have no hesitation in issuing a direction of caution that it will not be a proper exercise of jurisdiction by the High Courts to entertain writ petitions against such orders of the Commission."

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14. A reading of the above judgments would clearly show that in presence of an alternate efficacious remedy in form of an appeal before the Supreme Court under Section 23 of the Consumer Protection Act, 1986, this Court should not exercise its jurisdiction under Article 226 of the Constitution of India. All pleas of the petitioner can be considered by the Supreme Court in its appellate jurisdiction. It is not the case of the petitioner that the said remedy, for any reason whatsoever, would not be efficacious."

22. The appellant has impugned the said order in this appeal.

23. It is material to note that while the appellant has been pursuing the present appeal in this court, it was also simultaneously agitating the question of jurisdiction before the Bench of five members of the learned NCDRC. As noted above, one of the principal contentions urged by the appellant in the petition filed in this court as well as before the learned NCDRC is that the decision of the learned NCDRC in *Ambrish Kumar Shukla v. Ferrous Infrastructure: (2017) 1 CPJ 1 (NC)* was incorrectly decided. The Bench of five members of the learned NCDRC delivered judgment on various questions referred to the said Bench by a judgment pronounced on 26.10.2021. The learned NCDRC, inter alia, had held that the decision in *Ambrish Kumar Shukla v. Ferrous Infrastructure: (2017) 1 CPJ 1 (NC)* was rightly decided. It is material to note that the appellant's complaint (CC No.42/2018) was one of the matters that had been referred to the Five Member Bench and the learned counsel for the parties were duly represented and heard by the learned NCDRC.

24. Aggrieved by the said decision, the appellant has preferred an appeal before the Supreme Court. The appellant has neither placed the order passed by the learned NCDRC before this court nor a copy of the appeal filed before the Supreme Court. However, a copy of an interim order dated 12.02.2022 passed by the Supreme Court was handed over during the course of hearing. It appears from the said order that the appellant's appeal is numbered as Civil Appeal No.7574/2021 and is captioned "*Magnum International Trading Company Pvt. Ltd. v. Vikas Dhawan & Ors.*"

25. The said appeal is pending before the Supreme Court. By an ad interim order

dated 12.01.2022, passed in the said appeal, the Supreme Court has stayed further proceedings before the learned NCDRC in case no.42/2018.

26. In view of the above, this court had pointedly asked the counsel as to how the appellant agitate the question of an alternative remedy after having moved the supreme Court in appeal at least in regard to some of the questions relating to NCDRC's jurisdiction in the matter.

27. Mr. Panda, learned counsel appearing for the appellant insisted that the appellant could do so.

28. He submitted that the learned Single Judge had grossly erred in not appreciating that this Court would have the jurisdiction to entertain a petition against any order of the learned NCDRC or any tribunal, where the question of the jurisdiction of the tribunal was raised. He also relied on the decision of the learned Single Judge of the Calcutta High Court in Woods Birch Hazel Residents Association v. The Managing Director, Bengal United Credit, Belani Housing Company Ltd.: C.O. No. 1411/2018, decided on 25.04.2019. He pointed out that, in the said case, the Calcutta High Court had entertained the writ petition against an order passed by the State Consumer Dispute Redressal Commission, West Bengal. The Court had held that where there is a grave error of jurisdiction, the Court could exercise its powers under Article 227 of the Constitution of India. In that case, the Court had also faulted the decision of the learned NCDRC in the case of Ambrish Kumar Shukla v. Ferrous Infrastructure (supra).

29. It is settled law that where a petition has an equally efficacious alternative remedy, the court would refrain from exercising the extraordinary jurisdiction under Article 226 or 227 of the Constitution of India. It is also well settled that this is not because High Courts lack the jurisdiction to pass appropriate relief, but because it is a self-imposed restriction not to exercise extra-ordinary jurisdiction when statutory remedies are available.

30. It is apparent from the facts narrated above that the appellant has not permitted the proceedings by the learned NCDRC to progress by filing repeated applications/petitions. It is also apparent that the appellant has also attempted to press its challenge of the jurisdiction simultaneously before both the forums. The appellant also approached the Supreme Court and had obtained orders staying the proceedings before the learned NCDRC.

31. There is no dispute that the appellant has alternative efficacious remedy before the Supreme Court. In the facts of this case, we find no infirmity with the decision of the learned Single Judge as to not entertain the writ petition on the ground of alternative efficacious remedy.

32. Considering the judicial time spent in the matter, we also consider it apposite to impose cost. The petition is dismissed with costs quantified at Rs. 1,00,000/-.

33. The cost shall be paid within a period of two weeks from today.