

(2015) 05 NCDRC CK 0155

In the National Consumer Disputes Redressal Commission

Case No : 696 of 2008

SMT. DAMAYANTI KANTILAL SHAH

APPELLANT

Vs

RASHMI GRUHA NIRMAN LTD. & ORS.

RESPONDENT

Date of Decision : 25-05-2015

Acts Referred:

Constitution of India, Article 142, Article 129 - Enforcement of decrees and orders of Supreme Court and orders as to discovery, etc - Supreme Court to be a Court of record
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Citation : (2015) 05 NCDRC CK 0155

Hon'ble Judges : K.S. Chaudhari, B.C. Gupta

Advocate : Braj K. Mishra, Vijay Kumar, R.P. Bhatt, S.K. Sharma

Judgement

K.S. CHAUDHARI

1. Both these revision petitions arise out of the common order passed by learned State Commission; hence, both revision petitions are decided by common order.

2. These revision petitions have been filed by the petitioners/complainants against the order dated 29.11.2007 passed by the Maharashtra State Consumer Disputes Redressal Commission, Mumbai (in short, "the State Commission") in Appeal Nos. 1724 & 1725 of 2003 - Smt. Damyanti Kantilal Shah vs. Rashmi Griha Nirman Ltd. & Ors. & Mr. Kantilal G. Shah vs. Rashmi gruha Nirman Ltd. & Ors. by which, while allowing appeal order of District Forum allowing complaint was set aside.

3. Brief facts of the case are that complainants/petitioners booked flat no. 219 & 224 measuring about 850 sq. ft. of built up area on the 2nd floor of C Wing in Rashmi Enclave, Mira Road, District Thane for total consideration of Rs.6,80,000/- respectively with Opposite Party No. 1 and its two directors/ Respondents No. 1 to 3. Opposite party executed Agreement of Sale on 24-04-1999. Possession of the flat was to be given on 11-08- 2001. Opposite parties failed to hand over possession and returned the amount. Alleging

deficiency on the part of the opposite party, complainants filed complaint before District Forum with a prayer to direct opposite parties to hand over possession of flats and further pay interest and compensation. Opposite party no. 3 was proceeded ex-parte. Opposite party No. 1&2 resisted complaint and submitted that District Forum had no territorial jurisdiction and complaint was barred by limitation. It was further submitted that complainants have nowhere pleaded deficiency in service and they had already filed Civil Suit No. 368/2002 & 369/2002 on 24-05-2002 for possession, hence complaints are not maintainable and prayed for dismissal of complaints. Learned District Forum after hearing both the parties allowed complaints and directed opposite parties to hand over possession of respective flats and further allowed interest, compensation and cost. Appeals filed by the opposite parties were allowed by learned State Commission vide impugned order against which these revision petitions have been filed.

4. None appeared for Respondent No. 3 and he was proceeded ex-parte.

5. Heard learned counsel for the parties and perused record.

6. Learned counsel for the petitioners submitted that learned State Commission has committed error in allowing appeal only on the ground of double jeopardy as Civil Suits had already been withdrawn during pendency of complaints before District Forum, hence revision petition be allowed and impugned order be set aside and order of District Forum be restored. On the other hand, learned counsel for the respondents submitted that order passed by the learned State Commission is in accordance with law, hence revision petition be dismissed.

7. It is not disputed that complainants filed Civil Suits on 24-05-2002 before the Civil Court for decree for possession and injunction. Later on, complainants filed complaint before District Forum on 10-06-2003 with the same main prayer regarding possession of flats along with compensation. It is also not disputed that during pendency of complaint Civil Suits were withdrawn on 29-03-2004 and complainants proceed with their complaints which were decided in their favor and appeal filed by opposite party was allowed by learned State Commission and complaints were dismissed.

8. Learned counsel for the petitioners submitted that merely by filing civil suit prior to filing complaint, which was withdrawn during pendency of complaint, complainants cannot be left

without remedy and learned State Commission has committed error in allowing appeal and dismissing complaint. In support of its contention, he has placed reliance on judgment of Hon'ble Apex Court reported in (2010) 14 SCC 274 Ashish Ranjan vs. Anupma Tandon & Anr., in which it was observed in para 11 as under:-- "The submission made by Shri Shukla, learned counsel for the respondents, that the writ petition filed by the applicant seeking the same relief stood dismissed and thus, no relief can be granted to him is preposterous. It stood dismissed more than 15 months ago, wherein the applicants had appeared

in person. The niceties of law cannot come in the way of this Court while deciding an issue of such a delicate nature. More so, the writ petition could not be maintainable for the relief sought herein. Be that as it may be, it is settled legal proposition that a party cannot be rendered remediless."

9. We agree with the law laid down by Hon"ble Apex Court that a party cannot be rendered remediless but this judgment does not help to the petitioners. In the aforesaid case, the question of custody of child was between the husband and the wife and Hon"ble Apex Court observed that Supreme Court has power under Article 129 and 142 of Constitution and also under Contempt of Courts Acts to enforce its order or any undertaking given before it by parties in case of violation thereof and also issue further orders/directions with a view to do complete justice between the parties. Hon"ble Apex Court has unlimited powers under the Constitution but in the cases in hand complainants have instituted suit before Civil Court and complaint before District Forum for the same relief, which cannot be permitted. Learned State Commission in Para 12 rightly observed as under:-- "We reiterate that when two three authorities are available to any person to file judicial proceeding for the Redressal of his grievance, propriety demands that he has to choose one and pursue the remedy to the hilt or to the logical end, but he cannot be permitted to file civil suit in the Civil Court and for the same relief file consumer complaint in the District Consumer Forum. This is nothing but a blatant misuse of provisions of consumer protection act, 1986 and the Code of civil procedure. We have already mentioned above that jurisdiction of the consumer forum is in addition to the jurisdiction of other authorities particularly, civil court functioning in the State of Maharashtra or for that matter all over India. But once party chooses to approach civil court for the same relief, he cannot be permitted to file consumer complaint pending the civil suit; he has already filed for the same reliefs. It is for this reason we cannot allow the orders passed by District Consumer Forum in favor of complainants to sustain in law. Complainants Mr. Kantilal Shah & Mrs. Damyanti K. Shah having already approached Civil Court in the year 2002 were not permitted in law to file consumer complaints in the year 2003 for the same reliefs, which they had claimed by filing civil suits in the court of Civil Judge, Senior Division, Thane."

10. It is immaterial that complaint contains additional reliefs regarding interest and compensation, which was not claimed in the civil suit. When no interest or compensation was claimed in the suit, the complainant was precluded from claiming interest or compensation in the complaint as per provision of O.2 r.2 of CPC. A party cannot be allowed to pursue two remedies simultaneously and withdraw one remedy after grant of another remedy. In the case in hand learned District Forum allowed complaints in September, 2003 and after institution of appeals by opposite party, complainant withdrew civil suits on 29-03- 2004, which was filed before institution of complaint before District Forum.

11. Perusal of the complaints reveals that complainants have not disclosed in their complaint that civil suit for the same relief had already been filed before

Civil Court. Complainants have not

come with clean hands before District Forum. Complainants ought to have mentioned in the complaint that civil suit has already been filed for the same relief before the Civil Court. As complainants have suppressed the material fact in the complaint and have not come with clean hands, complaint was liable to be dismissed.

12. Once complainant approach Civil Court for relief of possession of the flat, complaint for the same relief before District Forum was not maintainable and merely because civil suit has been withdrawn after decision of the complaint in favor of the complainants, complaint filed by the complainants cannot be held maintainable and learned State Commission has not committed any error in allowing appeal. We do not find any illegality, irregularity or jurisdiction error in the impugned order and revision petitions are liable to be dismissed.

13. Consequently, revision petitions filed by the petitioners are dismissed with no order as to costs. DATED : 29.08.2014

PER DR. B.C. GUPTA

1. These two revision petitions have been filed by the petitioners/complainants against the impugned order dated 29.11.2007, passed by the Maharashtra State Consumer Disputes Redressal Commission (in short, "the State Commission") in Appeal Nos. 1724-1725 of 2003, Smt. Damyanti Kantilal Shah vs. Rashmi Griha Nirman Ltd. & Ors. & Mr. Kantilal G. Shah vs. Rashmi Griha Nirman Ltd. & Ors., vide which, while allowing the appeals, the order passed by the District Forum, allowing consumer complaints in question, was set aside.

2. Since I am not in agreement with the order recorded by my learned brother, Justice K. S. Chaudhari, Presiding Member, I am writing this order separately.

3. The main issue involved in the present case is that the complainants filed the consumer complaints in question before the District Forum, even when the matter was pending before a civil court. When the District Forum decided the case in their favour, they withdrew the case from the civil court. The State Commission, on appeal filed before them, set aside the order of the District

Forum only on the ground that the complainants were not entitled to institute the consumer complaints in question, when the matter was already being heard by a civil court. In the process, therefore, the complainants have been left remediless by virtue of the impugned order and consequently, the alleged act of omission or commission on the part of OPs has been left without judicial scrutiny. The question for consideration is whether a party can be left remediless, just because they decided to approach a consumer forum, when the matter was already pending before a civil court.

4. Briefly stated, the facts of these cases are that the complainants/petitioners booked flats no. 219 and 224, measuring about 850 sq. ft. each, in the Project of

the respondents/opposite parties for a consideration of Rs. 6,80,000/- each, and agreements of sale to this effect were executed on 24.04.1999. The possession of the flats was to be given by 11.08.2001 as per letter issued separately, but the opposite parties failed to hand over the possession by that date. The complainants/petitioners have alleged that they approached the OPs many times and requested to handover the possession of the said flats, but their efforts did not yield any result. They also came to know from reliable sources that the OPs were contemplating selling the said flats to a third party. The complainants went to the office of the OPs on 22.05.2002, when they found that the OPs were negotiating with a third party in respect of the said flats. The complainants/petitioners then filed civil suits no. 368 and 369 of 2002 on 24.05.2002 (i.e., just after two days) in the court of Civil Judge (Senior Division) Thane, along with an application under Order 39, Rule 1 & 2 of the Civil Procedure Code, 1908, seeking injunction against the OPs from alienating the said flats in favour of a third party. The Civil Court vide their order passed on 24.05.2002 itself, granted ad-interim injunction against the OPs restraining them to create a third party interest in the said flats and not to deliver possession to anybody else till appearance in the suit. It has further been stated by the complainants/petitioners that they filed consumer complaints no. 193 and 194 / 2002 on 09.09.2002 under the provisions of the Consumer Protection Act, 1986, alleging deficiency in service against the OPs and with a prayer that the OPs should be directed to perform the obligations under the agreement dated 24.4.1999 for completing the transaction of sale of the said flats and handing over the possession of the same. The said consumer complaints were decided by the District Forum in their favour on 01.01.2003 and the OPs were directed to hand over the possession of the said flats to the petitioners/complainants and also to pay interest @2% per month on the deposited amount of Rs._6,80,000/- from 11.08.2001 till the date of handing over the possession of the flats to the complainants. The OPs filed appeals no. 452 and 453/2003 before the State Commission against the order dated 1.01.2003 of the District Forum. The said appeals were decided in favour of the OPs saying that the District Forum did not have the pecuniary jurisdiction to take cognizance of the matter, when complaints no. 193 and 194/2002 were filed before them. The State Commission, however, gave liberty to the complainants/petitioners to file fresh complaints before the District Forum on the same cause of action, because the pecuniary jurisdiction of the District Forum had since been increased from Rs. 5 lakh to Rs. 20 lakh by virtue of an amendment in the Consumer Protection Act, 1986, made effective from 15.03.2003. The complainants/petitioners then filed consumer complaints no. 109 and 110/2003 before the District Forum which were decided by the said Forum in their favour on 20.09.2003. The District Forum passed orders in their favour, even though the OPs had brought to the notice of the District Forum in their written reply that civil suits were already pending between the parties. The said order of the District Forum dated 20.09.2003 was challenged before the State Commission which allowed the said appeals vide impugned order and the consumer complaints no. 109 and 110 of

2003 were

ordered to be dismissed only on the ground that once a party had approached the civil court for same relief, they could not be allowed to file consumer complaint under the Consumer Protection Act. It is against this order that the present petitions have been made.

5. The learned counsel for the petitioners stated during arguments that they had filed the civil suits in question for obtaining interim injunction in the matter as the OPs were found negotiating with a third party for selling the flats in question. According to the petitioners, the consumer fora, at that time, had no powers to grant interim injunction. He, further, stated that the State Commission had not decided the appeals on merits, but had taken the view that since civil suits, asking for the same relief, were pending before a civil court, the consumer complaints were not maintainable. The learned counsel stated that since the petitioners/complainants had already withdrawn the civil suits, they had been rendered remediless in the matter. The learned counsel also stated that the principle of *resjudicata*, as contained in section 11 of the Civil Procedure Code is applicable only when a case is heard and finally decided. In this case, since the civil court has not taken any decision, the principle of *resjudicata* is not applicable. The learned counsel has drawn attention to a judgement of the Hon'ble Apex Court in *Ashish Ranjan vs. Anupma Tandon & Anr.*, as reported in 2010(14) SCC 274, saying that a party could not be held remediless simply because they had already approached the civil court.

6. In reply, the learned counsel for the respondents stated that the factum of pendency of civil suit between the parties had not been disclosed by the complainants in the consumer complaints filed by them. The learned counsel has drawn attention to orders passed by this Commission in *M/s. Special Machines, Karnal vs. Punjab National Bank & Ors.*, as reported in I(1991) CPJ 78, saying that it had been held that when the subject matter of a complaint was subjudice before a civil court, the Commission could not interfere. A similar view has been taken in *Lilly Chaoyin vs. CMD, Tamilnadu Industrial Investment Corporation & Ors.* by the Tamilnadu State Commission, as reported in II(1995) CPJ 209. The learned counsel also stated that the prayer made by the complainant in the civil suit and before the consumer forum were identical. The petitioners had not come before the consumer fora with clean hands. The State Commission had, therefore, rightly held that the matter could not have been heard by the consumer forum.

7. I have examined the entire material on record and given a thoughtful consideration to the arguments advanced by the parties. It is clearly borne out from record that the complainants/petitioners filed civil suits before a Civil Court on 24.05.2002 apprehending that the OPs were contemplating selling the flats in question to a third party. The civil court granted an ad-interim injunction in favour of the petitioners/complainants vide their order dated 24.05.2002 itself. Later on, the petitioners/complainants approached the District Forum also by filing

consumer complaints under the Consumer Protection Act, 1986. The District Consumer Forum passed orders in their favour following which the "civil suits" in question were withdrawn. However, the State Commission vide impugned order set aside the orders of the District Forum only on the ground that they could not have approached the consumer fora when the civil suits were pending before a civil court. At the present juncture, therefore, it is clear that the consumer complaint in question has been dismissed as per the impugned order of the State Commission and

the civil suits also stand withdrawn, with the implication that the complainants have been rendered remediless on the ground that they should not have approached the consumer fora since the civil suits were already pending. It is evident, therefore, that the alleged act of omission or commission on the part of the OPs has not been subjected to any judicial scrutiny, based on technical grounds only.

8. The Hon''ble Apex Court vide their judgment in the case *Ashish Ranjan vs. Anupma Tandon & Anr.* (supra) observed in para 11 as under:- "The submission made by Shri Shukla, learned counsel for the respondents, that the writ petition filed by the applicant seeking the same relief stood dismissed and thus, no relief can be granted to him is preposterous. It stood dismissed more than 15 months ago, wherein the applicants had appeared in person. The niceties of law cannot come in the way of this Court while deciding an issue of such a delicate nature. More so, the writ petition could not be maintainable for the relief sought herein. Be that as it may be, it is settled legal proposition that a party cannot be rendered remediless."

9. The Hon''ble Apex Court have stated in no uncertain terms that it is a settled legal proposition that a party cannot be rendered remediless. No doubt, the case before the Hon''ble Apex Court had different facts involving the question of custody of a child between husband and wife, but the Hon''ble Apex Court stated very clearly that a party cannot be held remediless.

10. Further, Section 3 of the Consumer Protection Act, 1986 states as follows:- "Act not in derogation of any other law.-The provisions of this Act shall be in addition to and not in derogation of the provisions of any other law for the time being in force."

11. It has been held by the Hon''ble Apex Court in a plethora of judgments that Section 3 of the Consumer Protection Act, 1986 provides an alternative remedy to the consumers to get their rights enforced through the mechanism of consumer fora. The Hon''ble Apex Court in *M/s. Fair Air Engineers Pvt. Ltd. vs. N. K. Modi*, AIR 1997 SC 533, held that the Legislature intended to provide a remedy in addition to the consentient arbitration which could be enforced under the Arbitration Act or the Civil Action in a suit under the provisions of the Code of Civil Procedure. Further, the Hon''ble Apex Court in their judgement in *Secretary, Thirumurugan Co-operative Agricultural Credit Society vs. M. Lalitha*, as reported

in AIR 2004 SC 448, took the view that the better provisions are to be interpreted broadly, positively and purposefully to give a meaning to additional/extended jurisdiction, particularly, when section 3 seeks to provide remedy under the Act, in addition to other remedies provided under other Acts unless there is clear bar. The Hon'ble Apex Court held in State of Karnataka vs. Vishwabharathi Housing Building Co-operative Society, as reported in 1(2003) CPJ 1 (SC) that the Consumer Protection Act, supplements and not supplants the jurisdiction of the Civil Courts or other statutory authorities. In

their judgement in Nizam Institute of Medical Sciences vs. Prasanth S. Dhananka, as reported in II (2009) CPJ 61 (SC), it was stated that the Act preserves the rights of the consumer to approach the Civil Court for necessary relief.

12. It is made out from the Judgements of the Hon'ble Apex Court as mentioned above that a consistent view has been taken from time to time that the remedy provided under the Consumer Protection law is an additional remedy and there is no bar in availing of the said remedy, even if a similar remedy may be available under the other laws. In the present case, therefore, if a hyper-technical view is taken that the consumer could not have approached the consumer fora at all, when his case was pending before the civil court, it shall negate the very spirit of the judgments passed by the Hon'ble Apex Court as stated above. As the facts of the case indicate, the civil suit was withdrawn by the petitioner/complainant soon after the case was decided in their favour by the District Consumer Forum. Therefore, in case, the impugned order is allowed to sustain, the petitioners shall be left absolutely without any remedy which shall amount to grave injustice with them. Merely filing the case before the District Consumer Forum when a civil suit is already pending is not that big a crime or irregularity, which may take away or snatch the entire legal remedy available to a consumer.

13. It is held, therefore, that the order passed by the State Commission suffers from a great perversity in the sense that it shall leave the petitioners/complainants totally remediless, which is neither the purpose, nor the intention of law, by any stretch of imagination. Moreover, any act of omission or commission conducted by the OPs shall remain without judicial scrutiny of any kind, which is neither the purpose, nor the objective of law.

14. In view of above discussion, both the petitions are ordered to be accepted and the impugned order passed by the State Commission is set aside. Both the cases are remanded to the State Commission with the direction that they should hear the two appeals on merits and take a decision based on facts and circumstances of the cases. DATED : 29.08.2014

PER JUSTICE K.S. CHAUDHARI

1. In R.P. No. 696 of 2008 - Smt. Damayanti Kantilal Shah Vs. Rashmi Grihnirman Ltd & Ors. and in R.P. No. 697 of 2008 - Shri Kantilal Ghelabhai Shah (dead) through L.Rs. Vs. Rashmi Grihnirman Ltd.& Ors. arguments were heard

on 30.01.2014 by our Bench. Judgment was dictated by Hon''ble Mr. Justice K.S. Chaudhari, Presiding Member and sent for approval of Hon''ble Dr. B.C. Gupta, Member on 11.2.2014. Hon''ble Dr. B.C. Gupta, Member sent dissenting judgment back on 27.08.2014. As Members of the Bench differ in their opinion, the matter may be placed before Hon''ble President, NCDRC under Section 20 (i) (iii) of the C.P. Act for appropriate directions. The legal question involved in this matter is: i) Whether complaint for the same relief before District Forum was maintainable when civil suit for the same relief had already been filed before Civil Court before one year?

DATED : 14-05-2015

JUSTICE V.B. GUPTA

1. Shri Vijay Kumar, Adv. for petitioners, seeks discharge in the above petitions.
2. Shri Jayant Kantilal Shah, states that there is no objection if this counsel is discharged and will argue in these matters on its own. Therefore, Shri Vijay Kumar, Adv. stand discharged.
3. Heard.
4. Earlier arguments in above petitions were heard by the Bench of Hon''ble Mr. Justice K.S. Chaudhari, Presiding Member and Hon''ble Dr. B.C. Gupta, Member. Since, there was difference of opinion amongst the Members, separate orders have been dictated by the Hon''ble Members.
5. By virtue of Provisions of Section 21(A)(iii) of Consumer Protection Act, 1986 (for short, "Act"), these petitions have been referred to the undersigned for deciding the following legal question involved in this case;

"Whether the consumer complaint for same relief filed before the District Forum is maintainable, when the civil suit for the same relief has already been filed before the Civil Court prior to the filing of the consumer complaint."
6. I had the opportunity of going through the draft orders, dictated by the Hon''ble Members.
7. After hearing both parties and going through the record, in my opinion the consumer complaint filed by the Petitioners/Complainants before the District Forum are not maintainable, when civil suit for the same relief has already been filed before the Civil Court, prior to filing of the consumer complaint.
8. Hence, I concur with the reasonings given by Hon''ble Mr. Justice K.S. Chaudhari.
9. Accordingly, this order be placed before the Bench which earlier heard the revision petitions, for pronouncement of the final order. DATED :- 25.05.2015

PER JUSTICE K.S. CHAUDHARI & DR. B.C. GUPTA

1. In R.P. No. 696 of 2008 - Smt. Damayanti Kantilal Shah Vs. Rashmi Grihnirman Ltd & Ors. and in R.P. No. 697 of 2008 - Shri Kantilal Ghelabhai Shah (dead) through L.Rs. Vs. Rashmi Grihnirman Ltd.& Ors. arguments were heard on 30.01.2014 by our Bench. Judgment was dictated by Hon''ble Mr. Justice K.S. Chaudhari, Presiding Member and sent for approval of Hon''ble Dr. B.C. Gupta, Member. Hon''ble Dr. B.C. Gupta, Member sent dissenting judgment. As Members of the Bench differed in their opinion, the matter was placed before Hon''ble President, NCDRC under Section 20(i)(iii) of the C.P. Act for appropriate directions. The Hon''ble President referred the matter to Hon''ble Mr. Justice V.B. Gupta, Member. Hon''ble Mr. Justice V.B. Gupta, Member (3rd Bench) agreed with the view of Hon''ble Mr. Justice K.S. Chaudhari, Member.

2. In the light of majority judgment, revision petitions filed by the petitioner are dismissed with no order as to costs.