

(2016) 04 CAL CK 0067
In the Calcutta High Court
Case No : C.O. No. 4328 of 2015

Sri Tanmoy Patra

APPELLANT

Vs

Smt. Priyanka Adhikary (Bhattacharya) & Others

RESPONDENT

Date of Decision : 19-04-2016

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 115
Constitution of India, 1950 — Article 227

Citation : (2016) 3 CalHCN 99 : (2016) 2 ICC 738

Hon'ble Judges : Siddhartha Chattopadhyay, J.

Bench : Single Bench

Advocate : Amitava Das, S.S. Shee and Subrata Santra, Advocates, for the Appellant; Sandip Ghosh, Advocate, for the Respondent

Final Decision : Disposed Off

Judgement

Siddhartha Chattopadhyay, J.—Challenging the legal pregnability of the Order No. 11 dated 04.09.2015 passed by the learned District Consumer Redressal Forum, Purba Medinipur in Consumer Case No. 47 of 2015, the petitioner has filed this revisional application under Article 227 of the Constitution of India read with Section 115 of the Civil Procedure Code.

2. According to the petitioner, the learned District Consumer Redressal Forum has passed the impugned order without any application of mind and did not consider its jurisdiction under Section 12A.

3. In the application under Article 227 of the Constitution of India, the petitioner contended that learned Forum ought to have considered the facts in its proper perspectives and to consider that the case is not maintainable under the West Bengal (Regulation of Promotion of Construction and Transferred by Promoters) Act, 1993.

4. As against this learned Counsel appearing on behalf of the opposite party contended that the District Forum is the competent authority to resolve disputes

and the present petitioner ought to have moved before the State Commission against the impugned order of the District Forum. Since that is not done, the petition itself is not maintainable.

5. At the very outset, after hearing rival submissions of the parties, I am of the view if such application is maintainable or not that is to be considered first. If it is found that the application is not maintainable then there is no reason to look into the merits of the case.

6. Learned Counsel mainly relied on the decision reported in Calcutta Law Journal 2012 (3) CLJ Cal 291 (Smt. Rita Das v. Jayashri Ghosh & Ors.). Learned Counsel appearing on behalf of the respondent has relied upon the decision reported in 2011 (14) SCC 337 (Nivedita Sharma v. Cellular Operators Association.).

7. On perusal of the decision reported in connection with Smt. Rita Das v. Jayashri Ghosh & Ors. I find that the Coordinate Bench, after considering the decisions of our High Court as well as Our Apex Court namely (1) Narayan Chandra Ghosh & Anr. v. Biswajit Lahiri, 2006 (1) CHN 401, (2) General Manager, Telecom v. M. Krishnan and Anr., 2009 (8) SCC 481, (3) In re: State Transport Authority & Anr., 1991 (2) CHN 131, (4) Arvind Mills Ltd. v. Associated Roadways, 2004 (11) SCC 545, (5) Maharshi Dayanand University v. Surjeet Kaur, 2010 (11) SCC 159, (6) Faquir Chand Gulati v. Uppal Agencies Private Limited & Anr, 2008 (10) SCC 345, (7) Ratan Chand Hira Chand v. Askar Nawaz Jung (dead) by Lrs. & Ors., 1991 (3) SCC 67, (8) Suraj Lamp and Industry Pvt. Ltd. v. State of Haryana & Anr., (Unreported), (9) SBP & Company v. Patel Engineering Ltd., 2005 (8) SCC 618, (10) Mandira Mukherjee v. District Consumer Disputes Redressal Forum, 2005 (4) CHN 694, Came to the finding that since there is an embargo created under the Special Act, the Consumer Forum or the State Commission was not competent to pass the order and/or entertain the said complaint.

8. In case of Faquir Chand Gulati (supra) the Supreme Court was considering the nature of the joint venture agreement which on its violation and/or which may provide remedy before the Consumer Forum, and in course of deciding such an issue it was held at Para 34, "We may notice here that if there is a breach by the land owner of his obligations, the builder will have to approach a Civil Court as the land owner is not providing any service to the builder but merely undertakes certain obligations towards the builder, breach of which would furnish a cause of action for specific performance and or damages. On the other hand, where the builder commits breach of his obligations, the owner has two options. He has the right to enforce specific performance and/or claim damages by approaching the Civil Court, or he can approach the Forum under the Consumer Protection Act, for relief as consumer, against the builder as a service provider. Section 3 of the Act makes it clear that the remedy available under the Act is in addition to the normal remedy or other remedy that may be available to the complainant.

35. The District Forum, the State Commission and the National Commission

committed a serious error in wrongly assuming that agreements of this nature being in the nature of joint venture are outside the scope of consumer disputes."

9. Grievance of the petitioner in the said case was the non execution and non-registration of the sale deed which comes within the ambit of said act, which provides that in the event, the promoter is not complying with the terms of an agreement, then the remedy can be resorted to under the special statute. It is perhaps needless to say that Civil Court can pass a decree for specific performance of an agreement for sale of the immovable property and has further power to execute such decree in the event of non-compliance, which is not available from the Consumer Redressal Forum. In this instant case, there was no prayer for execution or enforcement of the contract held between the parties but only for refund of money that was paid by the complainant to the present petitioner No. 2. Therefore, in my humble view, that ruling will not help the present petitioner. On the contrary, there are plethora of decisions wherein it has been specifically held that if the tribunal or forum has a power to grant relief then it must have a further power to execute. In the decision reported in connection with Rita Das v. Jayashri Ghosh, the said petitioner has taken a specific plea that the Consumer Forum is not competent to grant a decree for specific performance of an agreement for sale of the immovable property. The other point which has also been taken into consideration that in the said complaint that there is an embargo created under Section 12A of the West Bengal (Regulation of Promotion of Construction and Transferred by Promoters) Act, 1993.

10. There is a decision of a Co-ordinate Bench of this High Court which has been reported in 2015 (2) CLJ (Cal) 424 in (Duli Chand Finance Limited & Lessing Limited v. Abbasur Rahaman & Anr.). The said Co-ordinate Bench has considered the decisions of our High Court reported in 2009 (1) CLJ 929 (Burdwan Co-operative Agricultural Bank v. Rural Development Bank), 2009 (2) CLJ 685 (Manager Contai Cooperative Bank Limited v. Gouri Mondal) and also considered the judgment passed by the Apex Court 2011 (14) SCC 337 (Nivedita Sharma v. Cellular Operators Association.). Considering the aforesaid judgments, the Coordinate Bench held that as there is a statutory alternative remedy of appeal provided in the Consumer Protection Act, the High Court should not have entertained an application under Article 227. In another decision reported in 2012 (3) CLJ (SC) 167 (Cicily Kallarackal v. Vehicle Factory) wherein the Hon"ble Apex Court held at Para 5, "Despite this, we cannot help but to 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."

11. Another Co-ordinate Bench of this High Court held in a case reported in 2014 (3) CHN (Cal 57) that since the decision reported in Cicily Kallarackal (supra) is the latest judgment of this point, he was bound by Article 141 of the Constitution of India. Therefore, after considering the aforesaid judgments, it appears to me if there is a statutory remedy available by way of filing an appeal, the aggrieved party may file the appeal before the competent forum i.e. in this case it would be before the State Commission.

12. Since another efficacious remedy is available, it seems to me that the application is not maintainable.

13. In the result, this civil revisional application merits rejection.

14. Let a copy of this judgment be sent to the learned Tribunal below for his information and taking necessary action in accordance with law.

15. Urgent certified photocopy of this Judgment and order, if applied for, be supplied to the parties upon compliance with all requisite formalities.