

**NATIONAL CONSUMER DISPUTES REDRESSAL COMMISSION
NEW DELHI**

FIRST APPEAL NO. 433 OF 2024

(Against the Order dated 24/04/2024 in Complaint No. CC/21/171 of the State Commission
Maharashtra)

1. ERA REALTORS PVT. LTD.

POPULAR METAL WORKS, TATYA TOPE MARG,
JOGLEKARWADI, SION FISH MKT. SION(E), MUMBAI-
400022, MAHARASHTRA

2. M/S OMKAR REALTORS AND DEVELOPERS PVT. LTD.

POPULAR METAL WORKS, TATYA TOPE MARG,
JOGLEKARWADI, SION FISH MKT. SION (E), MUMBAI-
400022, MHARASHTRA

.....Appellant(s)

Versus

1. NEERAJ SAXENA

301, SANKALP GARDEN, JANKALYAN NAGAR, OFF
MARVE ROAD, MALAD WEST, MUMBAI 400095,
MAHARASHTRA

2. MAYADEVI SAXENA

301, SANKALP GARDEN, JANKALYAN NAGAR, OFF
MARVE ROAD, MALAD WEST, MUMBAI-400095,
MHARASHTRA

3. ICICI HOME FINANCE COMPANY LTD.

RPG TOWER, ANDHERI KURLA ROAD, J.B. NAGAR,
METRO STATION, ANDHERI EAST, MUMBAI-400059,
MHARASHTRA

.....Respondent(s)

BEFORE:

HON'BLE MR. JUSTICE A. P. SAHI, PRESIDENT

FOR THE APPELLANT :

FOR THE APPELLANTS : MR. ADITYA KUMAR, ADVOCATE
MS. ILA NATH, ADVOCATE
MS. ANJANA NIGAM, ADVOCATE

FOR THE RESPONDENT :

FOR THE RESPONDENTS/ CAVEATOR : MR. MAYANK SAPRA,
ADVOCATE
MR. SULAIMAN BHIMANI, ADVOCATE
MS. LALIMA DAS, ADVOCATE
MR. PRASENJIT SINGH, ADVOCATE

Dated : 27 June 2024

ORDER

IA/8847/2024

1. Heard learned counsel for the appellants and the learned counsel for the respondents/
caveators. The delay in the filing of the appeal has been explained and the same is

sufficient. The delay is condoned. The application is allowed and the appeal shall be treated to be within time.

Appeal

2. Since this appeal raises a very small issue pertaining to the rejection of an application filed by the appellants in a bunch of complaints filed before the State Consumer Disputes Redressal Commission, Maharashtra, Mumbai, learned counsel for the parties have advanced their submissions at the admission stage itself and therefore the appeal is being disposed of finally.

3. The order impugned in this appeal dated 24.04.2024 rejects the application moved by the appellants on 23.04.2024, which is filed as Annexure A-5 and is extracted herein under:

“APPLICATION TO FILE AFFIDAVIT IN LIEU OF EXAMINATION IN CHIEF ON BEHALF OF OPPOSITE PARTY NOS.1 AND 2 ABOVENAMED:-

I, Ketan Shinde, an Adult of Mumbai Indian Inhabitant, an Authorized Signatory of Opposite Party No.1 and one of the Directors of Opposite Party No.2 abovenamed, having office at Omkar House Off. Eastern Express Highway, Opp. Sion - Chunnabhatti Signal, Mumbai - 400 022, do hereby state on solemn affirmation as under:-

I say that I am well conversant with the facts and circumstances leading to the present case and therefore, I seek to file this application to

3. By an Order dated 25th November 2022 wherein it is mentioned in Para 10 of the said order, that as per the Roznama dated 4th October 2022 the Opposite Parties were not allowed to file the Written Statement. The Opposite Parties submit that this particular Application is not being filed in any manner to cover up any lacuna or bring about any new case, it is only being file to bring the facts to the attention of the court which is evident from the pleadings in the Complaint as well as from the documents which are available in the public domain and which would even otherwise be available to this particular Opposite Parties to confront the witness with. The Complainant's witness is not available for cross-examination in light of the practice followed by this Tribunal. In light of that, there is no other manner in which the said witness can be confronted with the counter documents and therefore, the filing of this Affidavit in lieu of Examination in Chief becomes essential. It is most humbly submitted that the Hon'ble Apex Court as well as various High Courts have from time to time held that a party whose opportunity to file Written Statement has been foreclosed does not necessarily lose his powers to file an Affidavit in Lieu of Examination in Chief or to argue the case on the basis of the documents which are already on record.

VERIFICATION

I, Ketan Shinde, the Authorized Signatory of Opposite Party No.1 and one of the Directors of Opposite Party No.2 abovenamed, having office at Omkar House, Off Eastern Express Highway, Opp. Sion - Chunnabhatti signal, Mumbai - 400 022, do hereby affirm that whatever stated in the foregoing paragraphs of the Affidavit are true and correct from the best of my knowledge, personal belief, information gathered and records maintained.”

The same has been disallowed by the State Commission by the following order:

“Advocate Sulaiman Bhimani a/w Sharon Fernandes present for the complainant. Advocate Kinjal Upadhyay i./b Advocate Jayesh Vyas is present for the opponent 1 & 2. None present for opponent No.3. Advocate for opponent Nos. 1 & 2 (no written version) filed an application to file affidavit of evidence on record. Advocate for the complainant has strong objection on the same. Perused record and proceeding. It reveals that no written version order is passed on 04/10/2022 against opponent Nos. 1 and 2. Advocate for the opponent Nos.1 and 2 seeks time to file citation in support of the application to which Advocate for the complainant has strong objection and submitted that sufficient time was granted to the opponent Nos. 1 and 2 to file written argument on law points but to delay the matter present application is filed. Hence, the application be rejected. Advocate for the complainant submitted that on 15/02/2024 this Commission has directed the opponent Nos.1 and 2 to file written argument on law points only and copy of which be submitted to the complainant 7 days in advance. But the opponent Nos.1 and 2 failed to comply the same. Today also they have not filed the written argument on law points. Hence, the application is hereby rejected. Last chance is given to the opponent Nos.1 and 2 to file written argument on law points only copy of which be submitted one week in advance to the complainant. Adjourn for final hearing. Parties to paginate and rearrange the file two days prior to the date of final hearing. S/O to 06/04/2024.”

4. The background in which the aforesaid order was passed is that on 25.11.2022, the Maharashtra State Consumer Disputes Redressal Commission passed an order declining to condone the delay in filing of the written version by the appellants against which the appellants had approached this Commission by filing First Appeal No. 17 of 2023. This Commission on 24.01.2023 upheld the order of the State Commission and the appeal was dismissed holding that the appellants had forfeited their right to file the written version as it had been filed beyond the prescribed time as provided under the statute. The order dated 24.01.2023 is extracted herein under:

“M/s. Era Realtors Pvt. Ltd. and M/s. Omkar Realtors and Developers Pvt. Ltd., two Appellants herein have preferred these First Appeals under Section 51 (1) of the Consumer Protection Act, 2019 against the Order dated 25.11.2022 passed by the Maharashtra State Consumer Disputes Redressal Commission, Mumbai (hereinafter referred to as ‘the State Commission’) in Consumer Complaints No. CC/21/171 to CC/21/176 and CC/21/193 whereby the State Commission had declined to condone the delay in filing the Written Version and had directed the Matter to be proceeded without Written Version of the Opposite Parties.

I have heard the learned Counsel appearing for the Appellants and perused the Impugned Order dated 25.11.2022 passed by the State Commission as also grounds taken in the Memo of Appeal and documents filed along with it.

*The learned Counsel for the Appellants submitted that the Written Version was not sworn by the concerned person and therefore it could not be filed. Be that as it may, it is not in dispute that the notices which were issued by the State Commission in the month of September/October 2021 had been served on the Appellants on 01.11.2021. Time was being granted to the Appellants for filing the Written Version but for the reasons best known to them it could not be filed. Even if the Order passed by the Hon'ble Supreme Court in **Suo Motu Writ Petition (Civil) No. 3 of 2020 in re: Cognizance for Extension of Limitation** wherein the period of limitation has been suspended for filing petitions/applications/suits/appeals/all other quasi proceedings before any Courts/Tribunals or any Authority due to Covid-19 pandemic with effect from 15.03.2020 till 28.02.2022 is taken into consideration, the Written Version ought to have been filed within 90 days from the date of the Order of the Hon'ble Supreme Court to be counted from 01.03.2022 which expired on 30.05.2022 but the Written Version could not be filed till then.*

*The Constitution Bench of the Hon'ble Supreme Court in the case of **New India Assurance Company Limited vs. Hilli Multipurpose Cold Storage Private Ltd & Ors. (2020) 5 SCC 757** has held that the Consumer Forums under the Consumer Protection Act, 1986 now replaced by the Consumer Protection Act, 2019, have no power to condone the delay in filing of the Written Statement if it is filed beyond 45 (30+15) days of the date of receipt of the notice/summon as provided under Section 13 (1) (a) of the said Act. However, the said decision was to operate prospectively from the date of decision on 04.03.2020. The same principle would apply to the Section 38 (2) (a) of the Consumer Protection Act, 2019 as both the provisions are in pari materia. The State Commission had rightly applied the decision of the Hon'ble Supreme Court in the Case of **New India Assurance Company Limited vs. Hilli Multipurpose Cold Storage Private Ltd & Ors.(Supra)**. Thus, there is no error in the Impugned Order dated 25.11.2022 passed by the State Commission. The Appeals fail and the same are dismissed.”*

5. The appellant approached the Apex Court by filing Special Leave to Appeal No. 5473 of 2023 that was dismissed on 17.04.2023 by the following order:

“1. We are not inclined to interfere with the impugned judgment and order passed by the High Court. The special leave petition(s) stand(s) accordingly.

2. pending application(s), if any, stand(s) disposed of.”

6. Thus the right to file the written version stood foreclosed and it is in this background that the application was moved which was objected to by the contesting respondents/complainants urging that the application was designed only to delay the matter.

7. It is also indicated in the impugned order that further time was granted on 15.02.2024 to the parties to file written arguments but the same has not been done.

8. Consequently, for all the reasons hereinabove, the impugned order was passed on 24.04.2024, that has been assailed in this appeal, where the contention is that the appellants are being seriously prejudiced on account of the impugned order, in as much as, the appellants framed their application contending that since the complainants' witness was not available for cross examination, there was no other manner to proceed with the matter hence an affidavit should be allowed to be filed in lieu of examination in chief which is essential.

9. Learned counsel for the appellants relied on judgment of the Apex Court in the case of Nanda Dulal Pradhan and Another Vs. Dibakar Pradhan and Another, 2022 SCC OnLine SC 822, to urge that the ratio of the said judgment allows an opportunity, affording the aggrieved party to adduce material for confronting the witness. He has relied on paragraph 4 of the said judgment, which is extracted herein under:

“4. Having heard learned counsel for the respective parties and considering the order passed by the First Appellate Court setting aside the ex-parte judgment and decree and observing that on restoration of the suit the same be disposed of after affording opportunities to the parties to adduce their respective evidence and rebuttal evidence, the same was absolutely in consonance with the law laid down by this Court in the case of Sangram Singh v. Election Tribunal, AIR 1955 SC 425 and Arjun Singh v. Mohindra Kumar, AIR 1964 SC 993.”

10. The second submission is that the State Commission had confined the filing of the written arguments only on law points and hence the appellants are prejudiced.

11. The case before the State Commission seems to have been listed on 04.06.2024 when the following order was passed:

“Advocate Sulaiman Bhimani a/w Sharon Fernandes and Richa Srivastav i/b The Law Suits is present for the complainant. Advocate Jamshed Master a/w Advocate Kinjal Upadhyay & Advocate Prajapati i/b Advocate Jayesh Vyas is present for the opposite party 1. Advocate for the opponent No.1 submitted that the opponent No.1 had preferred appeal against the order dated 24/04/2024 passed by this Commission before the Hon'ble National Commission, which is listed on 27/06/2024 and requested to keep the matter after 27/06/2024. Adjourn for final hearing by way of last chance. Parties to paginate and rearrange the file two days prior to the date of final hearing. S/o to 01/07/2024.”

12. Learned counsel for the caveators/ respondents has advanced his submissions urging that the appellants are trying to circumvent the procedure and delay the hearing by attempting to introduce pleadings under the garb of evidence. He submits that this cannot be permitted as the appellants cannot be allowed to adduce any evidence in the absence of any pleading as their right to file the written version stands forfeited. Thus there being no pleading accepted on record, the appellants cannot now through this diverted method be allowed to introduce any material, much less an evidence. Learned counsel has cited the

judgment of the Apex Court in the case of Biraji v. Surya Pratap, (2020) 10 SCC 729, where a three member Bench of the Apex Court in paragraph 8 has observed as under:

“8..... It is fairly well settled that in absence of pleading, any amount of evidence will not help the party.....”

13. Having heard learned counsel for the parties, the contention of the learned counsel for the appellants that he has the right to lead evidence without pleading even at this stage is unfounded and against the law laid down by the Apex Court in several decisions including the one cited on behalf of the respondents and quoted hereinabove.

14. The aforesaid view has been reiterated by the Apex Court in the case of Ram Sarup Gupta v. Bishun Narain Inter College, (1987) 2 SCC 555, to the following effect in paragraph 6:

“6. It is well settled that in the absence of pleading, evidence, if any, produced by the parties cannot be considered.....”

15. This view in the context of an election petition, in a matter arising out of an election petition was dealt with by the Apex Court in the case of Kalyan Singh Chouhan v. C.P. Joshi, (2011) 11 SCC 786, where in paragraph 28 it was observed as under:

“28..... It is therefore, not permissible for the court to allow the party to lead evidence which is not in the line of the pleading.....”

16. It is by now well settled by several judgments that no evidence can be permitted to be introduced in the absence of any pleading. Reference be also had to the latest pronouncement of the Apex Court in the case of Damodhar Narayan Sawale v. Tejrao Bajirao Mhaske, 2023 SCC OnLine SC 566, where in paragraph 28 it has been observed as follows:

“28..... This is because the well-nigh settled position of law is that one could be permitted to let in evidence only in tune with his pleadings. We shall not also be oblivious of the basic rule of law of pleadings, founded on the principle of secundum allegata et probate, that a party is not allowed to succeed where he has not set up the case which he wants to substantiate.”

17. The same principle has been reiterated in a different way by the Apex Court in paragraph 25 in the case of Srinivas Raghavendrarao Desai v. Kumar Vamanrao, 2024 SCC OnLine SC 226, which is as follows:

“25. There is no quarrel with the proposition of law that no evidence could be led beyond pleadings.....”

18. The appellants' conduct as indicated above in attempting to delay the proceedings has also been emphasised upon by the learned counsel for the respondents. The impugned order also indicates the adjournments that were being sought on one account or the other and contesting the matter up to the Apex Court.

19. The judgment in the case of *Nanda Dulal Pradhan & Anr. (Supra)* as relied on by the learned counsel for the appellants are not even vaguely applicable on the issue raised in the present appeal. The said case was with regard to the restoration of a suit under Order 9 Rule 13 of the Civil Procedure Code. In the present case, it is the issue of the right of the appellants to file the written version that stands foreclosed with an ultimate order being passed by the Apex Court arising out of the order dated 04.10.2022. The same has attained finality in terms of Section 68 of the Consumer Protection Act, 2019, consequently, any attempt to reopen the introduction of any material by the appellants does not arise. It is trite law that what cannot be permitted directly cannot be permitted indirectly.

20. Even otherwise any general principle of the Civil Procedure Code cannot be permitted to be invoked as Regulation 26 of the Consumer Protection (Consumer Commission Procedure) Regulations, 2020 provides as under in Sub-Regulation 1 thereof:

“26. Miscellaneous.-(1) In all proceedings before the Consumer Commission, endeavour shall be made by the parties and their agent to avoid the use of provisions of Code of Civil Procedure, 1908 (5 of 1908):

Provided that the provisions of the Code of Civil Procedure, 1908 may be applied which have been referred to in the Act or in the rules made thereunder.”

21. Coming to the second argument advanced on behalf of the appellants Regulation 13 of the 2020 Regulations provides under Sub-Regulation 2 as follows:

“13. Arguments-

(2) *Where a party is represented by a counsel, it shall be mandatory to file a brief of written arguments two days before the matter is fixed for arguments.*”

22. It is evident from the impugned order that a last chance has been given for filing of the written arguments. Learned counsel for the appellants urged that it is only on the law point for which the permission has been granted, whereas the appellants has the right to question the correctness of the facts pleaded by the complainants, by pointing it out from the facts already pleaded by the complainants on record. Needless to mention that the State Commission has not prevented the appellants from raising any arguments on the facts already pleaded and which have not been rebutted by the appellants. The parties are entitled to a reasonable opportunity to address oral arguments on merits or file their written arguments in accordance with law and the appellant is therefore not prejudiced at all by the impugned order. The non-filing of the written version does not preclude the appellants from addressing arguments on merits or file written arguments as already permitted by the State Commission which aspect has also been observed by the Apex Court in the case of *ARN Infrastructure India Limited Vs. Hara Prasad Ghosh, 2023 LiveLaw (SC) 763, Civil Appeal Diary No(s). 31182/2023 dated 04.09.2023.*

23. Nonetheless, the State Commission despite non-filing of the written version, will have to decide the matter on the basis of the pleadings that are on record. The complainants have to prove the facts pleaded by them in the complaint which the Commission has to assess and pass orders accordingly. For all the reasons recorded hereinabove none of the grounds raised and argued make out any case to interfere with the impugned order either on facts or on law. Accordingly, the order dated 24.04.2024 is perfectly justified and is upheld. The appeal is dismissed.

.....J
A. P. SAHI
PRESIDENT