

**HIGH COURT OF JAMMU AND KASHMIR AND LADAKH AT
JAMMU**

Reserved on : 15.11.2022
Pronounced on : 15.12.2022

OWP No. 680/2013
IA Nos. 299/2014
& 931/2013

Akona Engineering Private Ltd.

..... Petitioner(s)...

Through:-Mr. Rahul Pant, Sr. Advocate with Mr. Anirudh
Sharma, Advocate

Vs.

Pal Construction and another

.....Respondent(s)...

Through:- None

CORAM: HON'BLE THE CHIEF JUSTICE (ACTING)
HON'BLE MR. JUSTICE MOHAN LAL, JUDGE

JUDGEMENT

1. The petitioner in the present petition has questioned the order dated 02.04.2013 passed by the J&K State Consumer Disputes Redressal Commission, Jammu in complaint No. 3324/22/09/2011 titled Pal Construction Company Vs. Akona Engineering Private Limited whereby the complaint, which was dismissed on 16.01.2013, has been restored back.

2. The limited question that arises for consideration and on which the present petition has been filed, is as to whether the J&K State Consumer Disputes Redressal Commission, has the power to review its ex parte order and to restore the petition dismissed for non-appearance.
3. Objections to the writ petition have been filed by the respondents, but, none has appeared to argue the matter.
4. The issue involved in the present petition has already been decided by the Hon'ble Supreme Court in its judgment reported in **(2011) 9 SCC 541** titled **Rajeev Hitendra Pathank and others Vs. Achyut Kasinath Karekar and another**. As a matter of fact, initially the Hon'ble Supreme Court had taken a view in **Jyotsana Arvind Kumar Shah and others Vs. Bombay Hospital Trust (1999)4 SCC 325** in which it was held that the State Commission did not have power to review or recall its ex parte order, but, in a subsequent judgment reported in **(2000) 3 SCC 242** titled **New India Assurance Co.Ltd. Vs. R. Srinivasan**, the Hon'ble Supreme Court had taken a different view. But subsequently, the issue involved, was referred to the larger Bench to consider the question as to whether the State Commission has the power to recall the ex parte order and the Larger Bench vide its judgment in case reported in **(2011) 9 SCC 541** titled **Rajeev Hitendra Pathank and others Vs. Achyut Kasinath Karekar and another**, has held that District Forums and State Commission had not been given any powers to set aside ex parte orders and power of review and the powers, which have not been especially given by the Statute, cannot be exercised. The relevant paragraph No.10 of the judgment is reproduced as under:-

“10. In the instant case, a two-Judge Bench of this Court vide judgment and order dated 17.9.2007 reported in 2007 (11) SCALE 166 noted the controversy and observed as under:

"5. In Jyotsana's case it was observed at para 7 as follows:

"We heard the learned counsel on both sides for quite some time. When we asked the learned counsel appearing for the respondent to point out the provision in the Act which enables the State Commission to set aside the reasoned order passed, though ex parte, he could not lay his hands on any of the provisions in the Act. As a matter of fact, before the State Commission the appellants brought to its notice the two orders, one passed by the Bihar State Commission in Court Master, UCO Bank v. Ram Govind Agarwal 1996 (1) CPR 351 and the other passed by the National Commission in Director, Forest Research Institute v. Sunshine Enterprises 1997 (1) CPR 42 holding that the redressal agencies have no power to recall or review their ex parte order. The State Commission had distinguished the abovesaid orders on the ground that in those two cases the opponents had not only not appeared but also failed to put in their written statements. In other words, in the case on hand, according to the State Commission, the opponent (respondent) having filed the written statements, the failure to consider the same by the State Commission before passing the order would be a valid ground for setting aside the ex parte order. The State Commission, however, fell into an error in not bearing in mind that the Act under which it is functioning has not provided it with any jurisdiction to set aside the ex parte reasoned order. It is also seen from the order of the State Commission that it was influenced by the concluding portion of the judgment of the Bombay High Court to the effect that the respondent (writ petitioner) could approach the appellate authority or make an appropriate application before the State Commission for setting aside the ex parte order, if permissible under the law. Here again, the State Commission failed to appreciate that the observation of the High Court would help the respondent, if permissible under the law. If the law does not permit the respondent to move the application for setting aside the ex parte order, which appears to be the position, the order of the State Commission setting aside the ex parte order cannot be sustained. As stated earlier, there is no dispute that there is no provision in the Act enabling the State Commission to set aside an ex parte order."

6. Subsequently, in New India Assurance case this Court appears to have taken a different view as it is evident from what has been stated in para 18, the same reads as follows:

"We only intend to invoke the spirit of the principle behind the above dictum in support of our view that every court or judicial body or authority, which has a duty to decide a lis between two parties, inherently possesses the power to dismiss a case in default. Where a case is called up for hearing and the party is not present, the court or the judicial or quasi-judicial body is under no obligation to keep the matter pending before it or to pursue the matter on behalf of the complainant who had instituted the proceedings. That is not the function of the court or, for that matter of a judicial or quasi-judicial body. In the absence of the complainant, therefore, the court will be well within its jurisdiction to dismiss the complaint for non-prosecution. So also, it would have the inherent power and jurisdiction to restore the complaint on good cause being shown for the non- appearance of the complainant."

7. In the latter case i.e. New India Assurance case reference was not made to the earlier decision in Jyotsana case. Further the effect of the amendment to the Act in 2003 whereby Section 22A was introduced has the effect of conferment of power of restoration on the National Commission, but not to the State Commission. In view of the divergence of views expressed by coordinate Benches, we refer the matter to a larger Bench to consider the question whether the State Commission has the power to recall the ex parte order. Records be placed before the Hon'ble Chief Justice of India for appropriate orders."

5. We have heard learned counsel for the petitioner and gone through the pleading and also perused the provisions of J&K State Consumer Protection Act, 1987.
6. The provisions of J&K State Consumer Protection Act, 1987 shows that the Commission does not have any power at all to restore the complaint dismissed for non-prosecution.
7. In view of the aforesaid position of law as settled by the Apex Court and the provisions of the J&K State Consumer Protection Act, 1987, the order passed by the State Commission, impugned in the present petition dated 02.04.2013 is not sustainable.
8. A perusal of the order impugned in the petition will further show that it refers to the fact that same has been passed with the agreement of the counsel for the other side, i.e. petitioner herein, but, the said fact is disputed by the petitioner by filing an affidavit of the counsel along with present petition and it is stated that the counsel had never agreed for restoration of the complaint but had requested for adjournment in the matter.
9. Without going into the aforesaid controversy, otherwise also, the consent of a counsel will not give jurisdiction to the State Commission where it otherwise does not have it. The petition, as such, is liable to be allowed

and the same is allowed. Order impugned dated 02.04.2013 passed by the J&K State Consumer Dispute Redressal Commission, Jammu in Complaint No.3324/22/09/2011 titled Pal Construction Company Vs. Akona Engineering Private Limited, is set aside.

Jammu
15.12.2022
(Madan-PS)

(Mohan Lal)
Judge

(Tashi Rabstan)
Chief Justice (Acting)

Whether the order is speaking : Yes/No.
Whether the order is reportable : Yes/No.

