IN THE HIGH COURT OF JUDICATURE AT PATNA
Civil Writ Jurisdiction Case No. 10543 of 2021

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Saurav Kumar Sharma, age about 49 years (Male), Son of Late Bipin Bihari Das, Resident of Salona Kunj, Near Paani Tanki Kidwaipuri, Buddha Colony, PS-Kotwali, District-Patna-800001 presently residing at Flat no.604, Mani Orchid Apartment, Above Amway Office, Near Neelkanth Sweets, RPS More, Bailey Road, Patna-801503.

... ... Petitioner/s

Versus

1. The State of Bihar through the Principal Secretary, Urban Development Department, Government of Bihar, Patna.
2. The Adjudicating Officer Real Estate Regulatory Authority (RERA), Bihar, Patna.
3. Om Prakash Son of unknown, Resident of 306 SS Vihar Apartment (South of Rly Super Speciality Hospital), Karbigahia, Patna-800001.
4. Prashant Kumar Son of Unknown, Resident of 201 SS Vihar Apartment (South of Rly Super Speciality Hospital), Karbigahia, Patna-800001.
5. Rani Kumari, Wife of Amarendra Kumar Srivastava, Resident of 406 SS Vihar Apartment (South of Rly Super Speciality Hospital), Karbigahia, Patna-800001.
6. Raghwendra Kumar Singh, Son of Unknown, Resident of 304 SS Vihar Apartment (South of Rly Super Speciality Hospital), Karbigahia, Patna-800001.
7. M/s Meridian Construction India Ltd., through its Chairman Cum Managing Director Mr. Abu Dojana having its registered office at Haroon Nagar, Sector-II, PS-Phulwari Sharif, District-Patna.

... ... Respondent/s

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Appearance :

For the Petitioner/s	:	Ms. Shama Sinha, Advocate
For the State/R1	:	Mr. Raj Kishore Roy, (Advocate) GP 18 with Ms. Prerana Anand, (Advocate) AC to GP 18
For the RERA/R2	:	Mr. Vikash Kumar, Advocate

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CORAM: HONOURABLE MR. JUSTICE AHSANUDDIN AMANULLAH

ORAL JUDGMENT

Date : 17-06-2021

The matter has been heard *via* video-conferencing.

2. Heard Ms. Shama Sinha, learned counsel for the petitioner; Mr. Raj Kishore Roy, learned Government Pleader 18

along with Ms. Prerana Anand, learned Assistant Counsel to Government Pleader 18 for the State/Respondent No. 1 and Mr. Vikash Kumar, learned counsel for the Bihar Real Estate Regulatory Authority (hereinafter referred to as 'RERA')/Respondent No. 2.

3. The petitioner has moved the Court for the following reliefs:

> *"(i) For quashing of the part of the second direction passed in operating part of the order dated 29.04.2021 (para 45) by Real Estate Regulatory Authority, Bihar (herein after authority) whereby it has decided the question of title of land (hotel in about 1 katha) of the petitioner over which the Petitioner's family had exclusive title and peaceful uninterrupted possession since the year 1970. The authority vide order dated 29.04.2021 has directed to demolish the Petitioner's hotel and to handover the possession to the developer/ builder inspite of the statement made by the builder/developer that the land belongs to the landowner and the developer cannot interfere with regard to the title of the said land. The Petitioner could not obtain certified copy of the impugned order as the authority is not functioning since 24.04.2021 and will not function till 16 May 2021 due to Covid-19 pandemic restrictions.*
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> *(ii) For protection from the demolition order dated 29.04.2021 passed by Real Estate Regulatory Authority, Bihar against the landowner during the period when neither the authority nor the appellate Tribunals are functioning and COVID-19 pandemic restrictions are enforced.*
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> *(iii) For any other relief(s), which this Hon'ble Court may deem fit and proper in the facts and circumstances of the case."*

4. At the outset, learned counsel for the RERA raised a preliminary objection. He submitted that in view of the Bihar Real Estate Appellate Tribunal (hereinafter referred to as the 'Appellate Tribunal') being functional, to which an appeal lies against the impugned order, the present writ petition may not be entertained by the Court.

5. Learned counsel for the petitioner submitted that at the time when the writ petition was filed, the Appellate Tribunal was not fully functional and because of the urgency involved, she had preferred the present writ petition. However, in view of the stand of learned counsel for RERA that the Appellate Tribunal was functioning now, it was submitted that the petitioner may be permitted to move before the Appellate Tribunal.

6. Learned counsel also submitted that the Court may lay down a time-frame where at least a first hearing be granted by the Appellate Tribunal, inasmuch as the question of interim protection/relief is concerned.

7. Learned counsel for RERA does not object to the aforesaid request(s) by the petitioner.

8. It is not out of place to note Sections 44 and 58 of the Real Estate (Regulation and Development) Act, 2016 (hereinafter referred to as the 'Act'):

‘***44. Application for settlement of disputes and appeals to Appellate Tribunal.***— *(1) The appropriate Government or the competent authority or any person aggrieved by any direction or order or decision of the Authority or the adjudicating officer may prefer an appeal to the Appellate Tribunal.*

(2) Every appeal made under sub-section (1) shall be preferred within a period of sixty days from the date on which a copy of the direction or order or decision made by the Authority or the adjudicating officer is received by the appropriate Government or the competent authority or the aggrieved person and it shall be in such form and accompanied by such fee, as may be prescribed:

Provided that the Appellate Tribunal may entertain any appeal after the expiry of sixty days if it is satisfied that there was sufficient cause for not filling it within that period.

(3) On receipt of an appeal under sub-section (1), the Appellate Tribunal may after giving the parties an opportunity of being heard, pass such orders, including interim orders, as it thinks fit.

(4) The Appellate Tribunal shall send a copy of every order made by it to the parties and to the Authority or the adjudicating officer, as the case may be.

(5) The appeal preferred under sub-section (1), shall be dealt with by it as expeditiously as possible and endeavour shall be made by it to dispose of the appeal within a period of sixty days from the date of receipt of appeal:

Provided that where any such appeal could not be disposed of within the said period of sixty days, the Appellate Tribunal shall record its reasons in writing for not disposing of the appeal within that period.

(6) The Appellate Tribunal may, for the purpose of examining the legality or propriety or correctness of any order or decision of the Authority or the adjudicating officer, on its own motion or otherwise,

call for the records relevant to deposing of such appeal and make such orders as it thinks fit.

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***58. Appeal to High Court**.— (1) Any person aggrieved by any decision or order of the Appellate Tribunal, may, file an appeal to the High Court, within a period of sixty days from the date of communication of the decision or order of the Appellate Tribunal, to him, on any one or more of the grounds specified in Section 100 of the Code of Civil Procedure, 1908 (5 of 1908):*

Provided that the High Court may entertain the appeal after the expiry of the said period of sixty days, if it is satisfied that the appellant was prevented by sufficient cause from preferring the appeal in time.

Explanation.— The expression "High Court" means the High Court of a State or Union Territory where the real estate project is situated.

(2) No appeal shall lie against any decision or order made by the Appellate Tribunal with the consent of the parties.'

9. Thus, a bare perusal of the afore-extracted provisions of the Act make clear the Scheme of the Act – that an appeal from an order of the RERA or the Adjudicating Officer, as the case may be, would lie to the Appellate Tribunal under Section 44, and; an appeal from the Appellate Tribunal would lie to the High Court under Section 58.

10. There is no cavil with the proposition that when a statutory remedy of appeal is provided under any enactment, ordinarily, the High Court ought to be circumspect in interfering under Article 226 of the Constitution of India. However, it is no

longer *res integra* that any such circumspection and/or restraint is merely self-imposed and is not, nor can it be, construed as a total bar to exercise of powers in extraordinary writ jurisdiction.

11. In ***M. P. State Agro Industries Development Corpn. Ltd. v Jahan Khan,*** **(2007) 10 SCC 88**, the Hon'ble Supreme Court opined:

> '*12. Before parting with the case, we may also deal with the submission of learned counsel for the appellants that a remedy by way of an appeal being available to the respondent, the High Court ought not to have entertained his petition filed under Articles 226/227 of the Constitution.* ***There is no gainsaying that in a given case, the High Court may not entertain a writ petition under Article 226 of the Constitution on the ground of availability of an alternative remedy, but the said rule cannot be said to be of universal application. The rule of exclusion of writ jurisdiction due to availability of an alternative remedy is a rule of discretion and not one of compulsion.*** *In an appropriate case, in spite of the availability of an alternative remedy, a writ court may still exercise its discretionary jurisdiction of judicial review, in at least three contingencies, namely, (i) where the writ petition seeks enforcement of any of the fundamental rights; (ii) where there is failure of principles of natural justice; or (iii) where the orders or proceedings are wholly without jurisdiction or the vires of an Act is challenged. In these circumstances, an alternative remedy does not operate as a bar. (See Whirlpool Corpn. v. Registrar of Trade Marks [(1998) 8 SCC 1], Harbanslal Sahnia v. Indian Oil Corpn. Ltd. [(2003) 2 SCC 107], State of H.P. v. Gujarat Ambuja Cement Ltd. [(2005) 6 SCC 499] and Sanjana M. Wig v. Hindustan Petroleum Corpn. Ltd. [(2005) 8 SCC 242])'*
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> (emphasis supplied)

12. The principles governing exercise of writ jurisdiction under Article 226, even in the face of other or alternative remedies, have been considered by the Hon'ble Supreme Court, *inter alia*, in ***State of Uttar Pradesh v Mohammad Nooh,*** **1958 SCR 595** and ***Maharashtra Chess Association v Union of India*****, (2020) 13 SCC 285**.

13. This Court had the occasion to consider the said issue, and following the *dicta* in *Mohammad Nooh* (*supra*) and *Maharashtra Chess Association* (*supra*) in Order dated 22.12.2020 in ***Lalit Narain Mithila University & Anr. v National Council for Teacher Education & Ors.,*** **CWJC No.9421 of 2020** (since reported as **MANU/BH/0888/2020**) opined:

> '*16.1. In this context, it is appropriate to refer to the Constitution Bench judgment in State of Uttar Pradesh v. Mohammad Nooh, MANU/SC/0125/1957: 1958 SCR 595, the relevant paragraph reading:*
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> *'10. In the next place it must be borne in mind that there is no rule with regard to certiorari as there is with mandamus, that it will lie only where there is no other equally effective remedy. It is well established that, provided the requisite grounds exist, certiorari will lie although a right of appeal has been conferred by statute, (Halsbury's Laws of England, 3rd Edn., Vol. 11, p. 130 and the cases cited there).* ***The fact that the aggrieved party has another and adequate remedy may be taken into consideration by the superior court in arriving at a conclusion as to whether it should, in exercise of its discretion, issue a writ*** *of certiorari to quash the proceedings and decisions of inferior courts subordinate to it and* ***ordinarily the superior court will decline to***

***interfere until the aggrieved party has exhausted his other statutory remedies**, if any. **But <u>this rule requiring the exhaustion of statutory remedies before the writ will be granted is a rule of policy, convenience and discretion rather than a rule of law</u>** and instances are numerous where a writ of certiorari has been issued in spite of the fact that the aggrieved party had other adequate legal remedies...'*

(emphasis supplied)

16.2. The aforesaid paragraph from Mohammad Nooh (supra) has been approvingly referred to by the Hon'ble Supreme Court in Maharashtra Chess Association v. Union of India, 2019 SCC OnLine SC 932, in the following words:

'24. <u>The principle that the writ jurisdiction of a High Court can be exercised where no adequate alternative remedies exist can be traced even further back to the decision of the Constitution Bench of this Court in State of Uttar Pradesh v. Mohammad Nooh</u>...'

(emphasis supplied)

17. It is not required, in present, to cite further authorities of the Hon'ble Supreme Court on this subject. Suffice it will to state the following settled principles of law:

(i) Powers under Article 226, being discretionary, may not be exercised if there exists an alternative efficacious remedy. However, this is merely a self-imposed restraint.

(ii) In appropriate situations, the High Court in its writ jurisdiction can entertain writ petitions even if there exists an alternative efficacious remedy. There is no, nor can there be, an absolute bar to such exercise of power.

(iii) A fortiori, in the absence of an alternative efficacious remedy, or, where no remedy lies, recourse to writ jurisdiction of the High Court would always be available to an aggrieved party.'

(underlining in original; emphasis supplied)

14. The reasoning in *Lalit Narain Mithila University* (*supra*) has been followed by this Court in Judgement dated 04.03.2021 in ***Sonalika Rani v The Central Board of Secondary Education, New Delhi & Ors.,*** **CWJC No. 8887 of 2020** [since reported as **MANU/BH/0148/2021** and **2021 (2) BLJ 699**]. That apart, while paragraph 21 of *Maharashtra Chess Association* (*supra*) has been noticed in *Lalit Narain Mithila University* (*supra*), the following paragraphs, additionally, from *Maharashtra Chess Association* (*supra*) are instructive:

> *'11. Article 226(1) of the Constitution confers on High Courts the power to issue writs, and consequently, the jurisdiction to entertain actions for the issuance of writs. ["226. Power of High Courts to issue certain writs.—(1) Notwithstanding anything in Article 32, every High Court shall have power, throughout the territories in relation to which it exercises jurisdiction, to issue to any person or authority, including in appropriate cases, any Government, within those territories directions, orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, or any of them, for the enforcement of any of the rights conferred by Part III and for any other purpose."] The text of Article 226(1) provides that a High Court may issue writs for the enforcement of the fundamental rights in Part III of the Constitution, or "for any other purpose". **A citizen may seek out the writ jurisdiction of the High Court not only in cases where her fundamental right may be infringed, but a much wider array of situations.** Lord Coke, commenting on the use of writs by courts in England stated:*

*"**The Court of King's Bench hath not only the authority to correct errors in judicial proceedings, but other errors and misdemeanours** […] tending to the breach of peace, or oppression of the subjects, or raising of faction, controversy, debate or any other manner of misgovernment; **so that no wrong or injury, public or private, can be done, but that this shall be reformed or punished by due course of law.** …" [James Bagg's case, (1572) 11 Co Rep 93b : 77 ER 1271]*

12. Echoing the sentiments of Lord Coke, this Court in U.P. State Sugar Corpn. Ltd. v. Kamal Swaroop Tondon [U.P. State Sugar Corpn. Ltd. v. Kamal Swaroop Tondon, (2008) 2 SCC 41 : (2008) 1 SCC (L&S) 352] observed that: (SCC p. 53, para 35)

*"35. … **It is well settled that the jurisdiction of the High Court under Article 226 of the Constitution is equitable and discretionary. The power under that Article can be exercised by the High Court "to reach injustice wherever it is found".**"*

*13. **The role of the High Court under the Constitution is crucial to ensuring the rule of law throughout its territorial jurisdiction. In order to achieve these transcendental goals, the powers of the High Court under its writ jurisdiction are necessarily broad. They are conferred in aid of justice. This Court has repeatedly held that no limitation can be placed on the powers of the High Court in exercise of its writ jurisdiction.** In A.V. Venkateswaran v. Ramchand Sobhraj Wadhwani [A.V. Venkateswaran v. Ramchand Sobhraj Wadhwani, (1962) 1 SCR 753 : AIR 1961 SC 1506] a Constitution Bench of this Court held that the nature of power exercised by the High Court under its writ jurisdiction is inherently dependent on the threat to the rule of law arising in the case before it: (AIR p. 1510, para 10)*

*"10. … **We need only add that the broad lines of the general principles on which the court should act having been clearly laid down, their application to***

the facts of each particular case must necessarily be dependent on a variety of individual facts which must govern the proper exercise of the discretion of the Court, and that in a matter which is thus pre-eminently one of discretion, it is not possible or even if it were, it would not be desirable to lay down inflexible rules which should be applied with rigidity in every case which comes up before the court."

The powers of the High Court in exercise of its writ jurisdiction cannot be circumscribed by strict legal principles so as to hobble the High Court in fulfilling its mandate to uphold the rule of law.

14. ***While the powers the High Court may exercise under its writ jurisdiction are not subject to strict legal principles, two clear principles emerge with respect to when a High Court's writ jurisdiction may be engaged. First, the decision of the High Court to entertain or not entertain a particular action under its writ jurisdiction is fundamentally discretionary. Secondly, limitations placed on the court's decision to exercise or refuse to exercise its writ jurisdiction are self-imposed. It is a well-settled principle that the writ jurisdiction of a High Court cannot be completely excluded by statute. If a High Court is tasked with being the final recourse to upholding the rule of law within its territorial jurisdiction, it must necessarily have the power to examine any case before it and make a determination of whether or not its writ jurisdiction is engaged. Judicial review under Article 226 is an intrinsic feature of the basic structure of the Constitution.*** *[Minerva Mills Ltd. v. Union of India, (1980) 3 SCC 625; L. Chandra Kumar v. Union of India, (1997) 3 SCC 261 : 1997 SCC (L&S) 577]*

15. These principles are set out in the decisions of this Court in numerous cases and we need only mention a few to demonstrate the consistent manner in which they have been reiterated. In State of U.P. v. Indian Hume Pipe Co. Ltd. [State of U.P. v. Indian Hume Pipe

Co. Ltd., (1977) 2 SCC 724 : 1977 SCC (Tax) 335] this Court observed that the High Court's decision to exercise its writ jurisdiction is essentially discretionary: (SCC p. 728, para 4)

> *"4. ...* ***It is always a matter of discretion with the Court and if the discretion has been exercised by the High Court not unreasonably or perversely, it is the settled practice of this Court not to interfere with the exercise of discretion by the High Court.****"*

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19. This argument of the second respondent is misconceived. ***The existence of an alternate remedy, whether adequate or not, does not alter the fundamentally discretionary nature of the High Court's writ jurisdiction and therefore does not create an absolute legal bar on the exercise of the writ jurisdiction by a High Court. The decision whether or not to entertain an action under its writ jurisdiction remains a decision to be taken by the High Court on an examination of the facts and circumstances of a particular case.***

20. This understanding has been laid down in several decisions of this Court. In U.P. State Spg. Co. Ltd. v. R.S. Pandey [U.P. State Spg. Co. Ltd. v. R.S. Pandey, (2005) 8 SCC 264 : 2006 SCC (L&S) 78] this Court held: (SCC p. 270, para 11)

> *"11. Except for a period when Article 226 was amended by the Constitution (Forty-Second Amendment) Act, 1976,* ***the power relating to alternative remedy has been considered to be a rule of self-imposed limitation. It is essentially a rule of policy, convenience and discretion and never a rule of law. Despite the existence of an alternative remedy it is within the jurisdiction or discretion of the High Court to grant relief under Article 226 of the Constitution.*** *At the same time, it cannot be lost sight of that though the matter relating to an alternative remedy has nothing to do with the jurisdiction of the*

> *case, normally the High Court should not interfere if there is an adequate efficacious alternative remedy."*
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> *22.* ***The mere existence of alternate forums where the aggrieved party may secure relief does not create a legal bar on a High Court to exercise its writ jurisdiction. It is a factor to be taken into consideration by the High Court amongst several factors.*** *Thus, the mere fact that the High Court at Madras is capable of granting adequate relief to the appellant does not create a legal bar on the Bombay High Court exercising its writ jurisdiction in the present matter.*'
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> (emphasis supplied)

15. On a conspectus of the afore-referred authorities, it is clear that the principles culled out in Paragraph 17 of *Lalit Narain Mithila University* (*supra*) are in consonance with the law as expounded by the Hon'ble Supreme Court. As such, it would be in the discretion of the Writ Court to entertain a petition even when there exists an alternative remedy, regard being had to all relevant facts and circumstances peculiar to the concerned case. The position in law stands clarified.

16. The present writ petition was filed when, as per the petitioner, the Appellate Tribunal was not fully functional. Further, the impugned order insofar as it relates to demolition, was one which could have caused the petitioner an irreparable injury. Such being the nature and facts of the case, at the time of filing of this

writ petition, the inescapable conclusion is that the present writ petition would be entertainable by this Court in its discretion.

17. However, in view of the position of learned counsel for RERA, which is agreeable to the petitioner, the writ petition is disposed off granting liberty to the petitioner to move the Appellate Tribunal under Section 44 of the Act. Learned counsel for the petitioner undertakes that the same will be done within a week from today. Thereafter, the Appellate Tribunal will take up the matter within a week from the date of filing of the statutory appeal and consider the prayer for interim protection, if raised, by the petitioner.

18. It is clarified that the Court has neither delved into nor examined the merits of the matter.

(Ahsanuddin Amanullah, J.)

P. Kumar

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