

(2018) 10 BOM CK 0181

In the Bombay High Court

Case No : Civil Writ Petition No.8181 Of 2018

**Anand Gram Society Hansens Disease (Leprosy) Rehabilitation Centre
Through Its Authorised Officer APPELLANT @Hash Shri. Ramesh Maloji
Arge And Ors.**

Date of Decision : 30-10-2018

Acts Referred:

Indian Forest Act, 1878 — Section 19
National Green Tribunal Act, 2010 — Section 22
Code of Civil Procedure, 1908 — Section 100
Constitution of India, 1950 — Article 226
National Green Tribunal (Practice and Procedure) Rules, 2011 — Rule 5, 5(1)

Citation : (2018) 10 BOM CK 0181

Hon'ble Judges : Naresh H. Patil, C.J;G.S. Kulkarni, J

Bench : Division Bench

Advocate : Tejesh Dande, Bharat Gadhavi, P.N.Diwan

Final Decision : Dismissed

Judgement

Â S.

No.",Nme of village,Forest S.No./Gat No.,"Area

encroach",Of what encroachment

1,Dongargao n,399/67,6,Road made from forest land

2,Burkegaon,20/63,10,Construction of India Precaste Co

3,Lonikand Fulgaon,275/71341/199,6,Road made from forest land (Stones & Murum for transportation

4,Bhavadi,/66,7,From the forest land road for goods transportation & houses

5,Dudulgaon,78 & 190,14,"Stones mines for cons. Of RCC f or cons.of houses & transportation from forest land

,,Total,43,

6.As this petition was urgently moved, the division bench on 30.7.2018 passed an order whereby the respondents were restrained from taking any",,,,,

action in respect of the property in possession of the petitioner and structures thereon, on the basis of the order dated 26.5.2017 and 23.1.2018 passed",,,,,

by the NGT in notice dated 20.11.2017 and a subsequent notice dated 25.7.2018 of the Forest Department.,,,,,

7.It is the petitioner's contention that the second order dated 23.1.2018 is passed by the single member of the National Green Tribunal and considering,,,,

the provisions of Rule 5 of the National Green Tribunal (Practice and Procedure Rules, 2011 (for short 'NGT' Rules) the learned Single member",,,,,

would have no jurisdiction to pass such an order. It is thus, submitted that the said orders passed by the learned single member is required to be set",,,,,

aside. Rule 5 reads thus:,,,,

â??5. Minimum number of members who shall hear application or appealÂ?Â?,,,,

(1)The Tribunal shall hear an application or appeal, as the case may be, consisting of at least by a Judicial and an Expert Member.",,,,,

(2)Where the Chairperson considers it necessary that a particular case or cases be heard and decided by the Tribunal consisting of more than two,,,,

members he may by order in writing direct that such case or cases, be heard by such members of the Tribunal as may be specified in that order. â??",,,,,

8.The contention of the petitioner referring to rule 5 of the NGT Rules, surely has substance considering the rule 5 (1). However, this argument would",,,,,

have a bearing in the context of the second order dated 23.1.2018 passed by the learned single member of the tribunal if the Single learned member of,,,,

the NGT was considering an application or appeal, which rule 5 (1) contemplates would be required to be heard by a bench consisting of at least of a",,,,,

Judicial and an Expert member. Although, from a plain reading of the order dated 23.1.2018, it appears that the learned member was considering",,,,,

compliance of the earlier order dated 26.5.2017 passed by the Division Bench of the tribunal, the real cause for the petitioner to be aggrieved, is by the",,,,,

order passed by the Division Bench on 23.1.2018 which is a substantive order.,,,,,

9.Now coming to the first order dated 26.5.2017 passed by the Division Bench of the NGT, on a query made to the learned counsel for the petitioner,",,,,

he fairly concedes that although the order dated 26.5.2017 was passed by the division bench of the Tribunal exÂ?parte to the petitioner, the petitioner",,,,,

has not taken any steps to move the Bench of the NGT by appropriate proceedings for vacating of the said order and the petitioner, straight away has" ,,,,

approached this Court by the present proceeding.,,,,

10.On behalf of State Government (respondent nos.2,3 and 6) a reply Affidavit of Mr.Madhukar Bapurao Telang Assistant Conservator of Forests," ,,,,

Pune Forest Division, Pune is placed on record disputing the contentions of the petitioner more particularly of the petitioner having no rights on forest" ,,,,

land in question. On behalf of the State Government, it is contended that Gat no. 78 (Old survey no.11) is a reserved forest declared to be so by a" ,,,,

Government Notification (No.4375A) dated June 26, 1890, issued under section 19 of the Indian Forest Act, 1878. It is stated that since then the said" ,,,,

land has been in possession of the State Government as a reserved forest and the petitioner has falsely contended that the petitioner is owner of the," ,,,,

said land. It is further stated that the petitioner had earlier filed a civil suit before the Civil Court at Pune and the subject matter of the suit and this writ," ,,,,

petition are the same. It is stated that in view of the pendency of the civil suit, the petitioner is not entitled to any relief in this petition. It is stated that" ,,,,

on this land which is a reserved forest, the petitioner has not only committed encroachment but, has raised structures. The contents of para 21, 24 and" ,,,,

29 of the reply affidavit are required to be noted which reads thus : ,,,,

21. With reference to the contents of para no.22, I state and submit that the petitioner has already filed a regular civil suit R.C.S.No.138/2015 in" ,,,,

the Court of Civil Judge, Senior Division, Pune for permanent injunction in order to restrain the respondents from interfering with its possession over" ,,,,

the said land. I state and submit that the petitioner has not been successful in getting any temporary injunction against the respondents and as the," ,,,,

subject matter of the civil suit is the same, as that of this writ petition, the petitioner is not entitled to claim any relief in this writ petition. I state and" ,,,,

submit that there is no provision for regularization of encroachment over any reserved forest in the Forest Conservation Act, 1980 as claimed by the" ,,,,

petitioner and there is no question of deemed regularization of the illegal possession of the petitioner over the said land. I further state and submit that," ,,,,

there is no question of protecting illegal possession of the petitioners over the said land only because the possession is longstanding.,,,,

24. With reference to the contents of para.26, I state and submit that the impugned notice was issued in view of the provisions of section 26 (1A) of the Indian Forest Act, 1927 (the Act). As per section 26 (1A) of the Act, the Forest Officer is empowered to remove any encroachment over the reserved forest. The petitioner has admitted to have encroached upon the Reserved Forest. Then, the Petitioner has no right to get the encroachment regularized. Therefore the only legal step remained to be taken by the Forest Officer was to give notice of removal of encroachment and to remove the encroachment by exercising the powers given to him as per S.26 (1A) of the Act and it is not correct to say that no due process of law has been followed. The National Green Tribunal has only asked the respondents to perform their legal duty to remove encroachment on the reserved forest and there was no reason to implead the Petitioner before the National Green Tribunal. Therefore he cannot raise a grievance that he was not heard by the N.G.T.,

29. With reference to the prayer clause in para no.33, I state and submit that as the Forest Officer who issued the impugned notice is empowered to remove the encroachment committed by the Petitioner in the said land and as the petitioner has no right title or interest, in the said land which is reserved forest, the petitioner is not entitled to any relief sought for in this writ petition which deserves to be dismissed with costs and compensatory costs.â??,

11. As the issue raised in the present petition arises from the orders passed by the NGT, we called upon the learned counsel for the petitioner to address the Court on the maintainability of the petition in view of an alternate remedy available to the petitioner under section 22 of the NGT Act, which provides an appeal to the Supreme Court. Section 22 of the NGT Act reads thus:

â??22. Appeal to Supreme Court — Any person aggrieved by any award, decision or order of the tribunal, may file an appeal to the Supreme Court, within ninety days, from the date of communication of the award, decision or order of 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 Supreme Court may, entertain any appeal after the expiry of ninety days, if it is satisfied that the appellant was prevented by sufficient cause from

preferring the appeal." , , , ,

12. The learned counsel for the petitioner argued that although an appeal is provided against any order passed by the NGT under section 22 of the , , , ,

NGT Act, the jurisdiction of this Court under Article 226 of the Constitution is sacrosanct and is not ousted to grant relief as prayed by the petitioner." , , , ,

In support of his submission, learned counsel for the petitioner has drawn our attention to the decision of the Division Bench of this Court in" , , , ,

Windsor Realty Pvt. Ltd vs Secretary, Ministry of Environment and Forest 2016 SCC Online Bom 5613 to contend that in this decision, the division bench" , , , ,

considering the law laid down by the Supreme Court in L. Chandra Kumar vs Union of India (1997) 3 SCC 26 1 and in Whirlpool Corporation , , , ,

vs. Registrar of Trade Marks Mumbai (1998) 8 SCC 1 the Division Bench has held that the Court can exercise powers of judicial review, even when" , , , ,

the petitioner has an alternate remedy to file a statutory appeal. Learned counsel for the petitioner however, would fairly point out that this decision of" , , , ,

the Division Bench does not find any consideration on the consequence of the specific provision of an appeal to the Supreme Court as provided in , , , ,

section 22 of the Act. , , , ,

13. In a subsequent judgment in Anil Hoble vs Kashinath J. Shetye 2015 SC Online Bom 3699 a Division Bench of this Court was considering a similar , , , ,

issue, namely challenge to an order dated 29.5.2016 passed by the NGT (Western Zone). An objection was raised on behalf of the respondents, about" , , , ,

the maintainability of the petition in view of the statutory remedy provided in terms of NGT Act. Taking a review of the legal position on the issue , , , ,

including the decision of the Supreme Court in L. Chandrakumar (supra) the division bench specifically considering the effect of Section 22 of the NGT , , , ,

Act, held that the petition was not maintainable in view of the specific alternate remedy created by the NGT Act." , , , ,

14. We may note the background of the NGT Act. , , , ,

15. As India was a party to the decisions taken at the United Nations conference on the 'Human Environment' held at Stockholm in June 1972, calling" , , , ,

upon the States to take appropriate steps for the protection and improvement of human environment. A decision was taken in the United Nations , , , ,

Conference on Environment and Development held at Rio de Janeiro in June 1992 in which India participated, calling upon the States to provide" , , , ,

effective access to judicial and administrative proceedings, including redress and remedy and to develop national laws regarding liability and",,,,,

compensation for the victims of pollution and other environmental damage. In the judicial pronouncements in India, the right to healthy environment",,,,,

was construed as a part of the right to life under Article 21 of the Constitution. It was therefore considered expedient to implement the decisions taken,,,,,

at the aforesaid conferences and to have a National Green Tribunal in view of the involvement of multi-disciplinary issues relating to environment.,,,,,

16.The Parliament accordingly, considered Bill No.LXIII of 2009 for establishment of the National Green Tribunal for the effective and expeditious",,,,,

disposal of cases relating to environmental and forest protection and protection of other natural resources.,,,,,

17.We may observe that the NGT Act is thus a special legislation which provides for establishment of the National Green Tribunal for the effective,,,,,

and expeditious decisions in cases relating to environmental protection and conservation of forest and other natural resources, including enforcement",,,,,

of legal rights relating to environment and grant of relief of compensation and damages, to persons and property and for matters connected therewith",,,,,

and incidental thereto, as the Preamble of the Act would stipulate.",,,,,

18.It would be appropriate to refer to the relevant extract of the statement and objects and reasons which would reflect the intention of the legislature,,,,,

in the establishment of the tribunal which was to be conferred jurisdiction over all cases where a substantive rights on environment (including,,,,,

enforcement of legal rights relating to environment) are involved. The relevant extract of the Statement and Objects of the NGT Act reads thus :,,,,

â??5. Taking into account the large number of environmental cases pending in higher Courts and the involvement of multi disciplinary issues in such,,,,,

cases, the Supreme Court requested the Law Commission of India to consider the need for constitution of specialized environmental Courts. Pursuant",,,,,

to the same, the Law Commission has recommended the setting up of environmental Courts having both original and appellate jurisdiction relating to",,,,,

environmental laws.,,,,,

6.In view of the foregoing paragraphs, a need has been felt to establish a specialized tribunal to handle the multi disciplinary issues involved in",,,,,

environmental cases. Accordingly, it has been decided to enact a law to provide for the establishment of the National Green Tribunal for effective and",,,,,

expeditious disposal of civil cases relating to environmental protection and conservation of forests and other natural resources including enforcement,,,,,

of any legal right relating to environment.,,,,,

7. Accordingly, it has been decided to introduce the National Green Tribunal Bill, 2009 which inter alia provideÂ (e) That the Tribunal shall have the",,,,,

jurisdiction over all civil cases where a substantial question relating to environment (including enforcement of any legal right relating to environment) is,,,,,

involved and such question arises out of the implementation of the enactments specified in the Schedule I to the Bill and to,,,,,

grant relief and compensation to the victims of pollution and other environmental damage arising under the enactments specified in the Schedule I to the Bill,,,,,

and to hear appeals under certain enactments specified in the Schedule III to the Bill.â??,,,,,

19. Now as regard to the parameters of service matters and the jurisdiction of the High Court to entertain writ petitions against the orders of the,,,,,

Administrative Tribunals, we may observe that the Administrative Tribunals Act, 1985 provides for the establishment of the Central Administrative",,,,,

Tribunal and the State Administrative Tribunal to deal with service matters arising under the All India Services or State Services. The Administrative,,,,,

Tribunal Act, 1985 does not contain a specific provision conferring a right to appeal to the Supreme Court as provided under section 22 of the NGT",,,,,

Act. In fact there is no provision for a statutory appeal against the orders of the Administrative Tribunal. In L. Chandrakumar (supra), the Supreme",,,,,

Court has held that the power vested in the High Courts to exercise judicial superintendence over the decisions of all Courts and Tribunals within their,,,,,

respective jurisdictions is part of the basic structure of the Constitution.,,,,,

20. It can however be seen that the intention of the legislature in creating a specific remedy of an appeal to the Supreme Court as provided under,,,,,

section 22 of the NGT Act is a specific departure from what the legislature thought appropriate under the Administrative Tribunals Act. It may be,,,,,

important to note that Bill No. LXIII of 2009 as introduced before the Parliament for the establishment of the National Green Tribunal did not contain a,,,,,

clause akin to section 22 of the NGT Act to provide for an appeal to the Supreme Court. However, in the NGT Act, as promulgated, a provision of an appeal in terms of section 22 was incorporated.,,,,

21.No doubt, the power of a judicial review as conferred on the High Court under Article 226 and 227 of the Constitution is sacrosanct and remains",,,,

unaffected despite an appeal being provided under section 22 of the NGT Act. The Court however would be slow to interfere except in very very,,,,

exceptional cases. The law in this regard is well settled. (See Whirlpool Corporation vs Registrar of Trade Marks, Mumbai 2015 SC Online Bom 3699",,,,

and Union of India vs Major General Shrikant Sharma & anr(2015) 6 SCC 773 andM ahanadi Coalfields & anr vs Dhansar Engineering Company,,,,

Private Limited (2016)10 SCC 571.),,,,

22.The Division Bench in Anil Hoble (supra) has referred to para 43 of the decision of the Supreme Court inU nited Bank of India vs Smt.Satyawati,,,,

Tondon(2010) 8SCC 110 The Supreme Court has held that when a remedy is available to the aggrieved person, in all such cases, the High Court must",,,,

insist that a person must exhaust the remedies available under the relevant statute. The Division Bench in paragraph 17,18 and 20 has observed thus",,,,

:Â?,,,,

â??17. The Apex Court in the judgment reported in the case of United Bank of India v Satyawati Tondon, has observed at paras 43 and 55 thus :",,,,

â??43. Unfortunately, the High Court overlooked the settled law that the High Court will ordinarily not entertain a petition under Article 226 of the",,,,

Constitution if an effective remedy is available to the aggrieved person and that this rule applies with greater rigour in matters involving recovery of,,,,

taxes, cess, fees, other types of pubic money and the dues of banks and other financial institutions. In our view, while dealing with the petitions",,,,

involving challenge to the action taken for recovery of the public dues, etc the High Court must keep in mind that the legislations enacted by",,,,

Parliament and State Legislatures for recovery of such dues are a code unto themselves inasmuch as they not only contain comprehensive procedure,,,,

for recovery of the dues but also envisage constitution of quasiÂ judicial bodies for redressal of the grievance of any aggrieved person. Therefore, in",,,,

all such cases, the High Court must insist that before availing remedy under Article 226 of the Constitution, a person must exhaust the remedies",,,,

available under the relevant statute.â??,,,,

â??18. On perusal of the said observations of the Apex Court, a serious concern has been shown by the Apex Court with regard to the matters which",,,,

the High Court has entertained under Articles 226 and 227 when a statutory appeal is provided under the relevant statute. Dealing with the aspect that,,,,

merely because jurisdictional issue is involved, the Court may not necessarily exercise jurisdiction under Articles 226 and 227, the Andhra Pradesh",,,,

High Court in a judgment reported in AIR 1991 AP 326. In the case of Tulasi Enterprises v Andhra Pradesh State Consumer Commission, Hyderabad, ",,,,

has observed at paras 10 and 11 thus:,,,,

â??10. It is true that whenever the Legislature creates a separate tribunal with a hierarchy of appeals, the jurisdiction of the High Courts under Art.",,,,

226 of the Constitution of India to deal with the orders passed by the said Tribunals is not and cannot be ousted. It is also true that whenever questions,,,,

of jurisdiction are raised, the High Court normally permits such questions to be raised under Art. 226 of the Constitution and examines whether the",,,,

applications or the other proceedings filed before the Tribunal are within the jurisdiction of the said Tribunal or not. But the High Court has a discretion,,,,

to entertain the writ petitions and in particular to decide, for example, any questions of jurisdiction unless they involve serious or disputed questions of",,,,

fact. It is not as if the High Court is bound to entertain every writ petition which raises a question of jurisdiction of a Tribunal.,,,,

20. The Apex Court in the judgment reported in (2012) 8 SCC 524 in the case of Cicily Kallarackal v Vehicle Factory has observed at para 4 thus :,,,,

â??4. Despite this, we cannot help but 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.â??,,,,

23. Adverting to the above principles of law and considering the scope and ambit of section 22 of NGT Act, we are sure that this is not a extraÂ?",,,,

ordinary case where indulgence can be granted to the petitioner by entertaining this petition under Article 226 of the Constitution. The record reveals,,,,

that the petitioner had filed a civil suit for the same cause of action and could not succeed in getting any reliefs. Further, it was always open to the",,,,

petitioner to approach the division bench of the NGT and seek appropriate reliefs in case the petitioner felt that the petitioner was not heard. Apart,,,,

from this, a statutory remedy of an appeal under section 22 of the NGT Act was also available to the petitioner. We are therefore, certain that the",,,,

petition deserves to be dismissed as an alternate remedy is available to the petitioner.,,,,

24. However, only as a matter of indulgence, we continue the interim protection granted by this Court for a period of four weeks to enable the",,,,

petitioner to avail appropriate remedy as available in law. Dismissed. No costs.,,,,