

(2019) 03 CAL CK 0004

In the Calcutta High Court

Case No : Application (Civil) No. 107 Of 2018 With Mandamus Appeal (Ma) No. 041 Of 2018

Banasree Saha

APPELLANT

Vs

Suman Saha & Ors

RESPONDENT

Date of Decision : 04-03-2019

Acts Referred:

Food Safety And Standards Act, 2006 — Section 32(3), 32(4)
Constitution Of India, 1950 — Article 32, 226

Citation : (2019) 03 CAL CK 0004

Hon'ble Judges : Arijit Banerjee, J;Amrita Sinha, J

Bench : Division Bench

Advocate : Gopala Binnu Kumar, S.K. Mandal, S.C. Mishra, K.M.B Jayapal

Final Decision : Disposed Off

Judgement

Arijit Banerjee, J

1. This is an appeal against the judgement and order dated 8 August, 2018 passed by a learned Single Judge allowing WP No. 163 of 2018 and setting aside the order No. 13 dated 26 July, 2018 passed by the Designated Officer, South Andaman District, Office of the Deputy Commissioner, South Andaman, in exercise of power under section 32 (3) of the Food Safety and Standards Act, 2006 (FSS Act) cancelling the licence issued in favour of the writ petitioner/respondent No.1 on the strength of which he carried on the business of running a sweet shop under the name and style of 'THE CALCUTTA SWEET STALL' at Junglighat, Port Blair.

2. The said licence was issued in favour of the writ petitioner on 29 July, 2015 and the same was stated to be valid till 28 July, 2020. An order dated 1 December, 2017 was passed by the Joint Commissioner (FS)/Adjudicating Officer, Office of the Deputy Commissioner of Food Safety, South Andaman, cancelling the said licence on the basis of a complaint lodged by the added respondent/appellant. Such cancellation order was challenged by the writ petitioner by filing

WP No. 447 of 2017. By an order dated 8 December, 2017 a Single Judge of this Court set aside the cancellation order on the ground that the Adjudicating Officer did not have the jurisdiction to issue such order. The matter was sent back for consideration by the Designated Officer.

3. The Designated Officer, South Andaman District passed an order dated 15 January, 2018 under Section 32 (3) of the FSS Act again cancelling the said licence of the writ petitioner. It appears that in the meantime a civil suit had been filed by the writ petitioner against the added respondent/appellant being OS No. 106 of 2017 in the court of the Civil Judge, Junior Division - I at Port Blair concerning the premises wherefrom the writ petitioner carries on his business. In the said suit an interim order was passed restraining the defendant from interfering with the peaceful possession of the plaintiff/writ petitioner. Accordingly, in the order dated 15th January, 2018 it was stated, inter alia, as follows:-

"However, Shri. Suman Saha's food business activities and peaceful possession of the premises will not be disturbed till the final outcome of Civil Suit O.S. No. 106/2017 in the court of Civil Judge Junior Division -1 at Port Blair."

4. The said order was challenged by the writ petitioner by filing WP No. 044 of 2018 which was disposed by a learned Single Judge by an order dated 15 June, 2018 by setting aside the impugned order primarily on the ground that no opportunity of personal hearing was given by the Designated Officer to the writ petitioner before passing the impugned order.

5. Subsequently, the Designated Officer gave a hearing to the writ petitioner and passed an order dated 26 July, 2018 under Section 32 (3) of the FSS Act again cancelling the writ petitioner's licence. This order was challenged by the writ petitioner by filing WP No. 163 of 2018 on which the order impugned in this appeal was passed.

The appellant was initially not a party respondent but got herself impleaded in the writ petition. The appellant is aggrieved with the order impugned and has accordingly filed this appeal.

6. Learned counsel for the appellant supported by the learned Government Pleader appearing for the Administration submitted that the learned Single Judge ought not to have entertained the writ petition in view of the availability of an efficacious alternative remedy. Our attention was drawn to section 32 (4) of the FSS Act which provides that any person who is aggrieved by, inter alia, cancellation of licence under the Act, may appeal to the Commissioner of Food Safety. Learned counsel placed reliance on the decisions of the Hon'ble Supreme Court in the cases of Commissioner of Income Tax & Ors vs. Chhabil Dass Agarwal reported in (2014) 1 SCC 603 and Authorised Officer, State Bank of Travancore and another vs. Mathew K.C. reported in AIR 2018 SC 676.

7. Learned counsel for the writ petitioner/ respondent submitted that one of the

grounds of challenging the impugned order of the Designated Officer was that the same was issued in breach of the principle of natural justice and hence existence of alternative remedy would not stand in the way of the writ petitioner maintaining an application under Article 226 of the Constitution.

8. We are of the view that the learned Judge should have declined to entertain the writ petition in view of the statutory remedy being available to the writ petitioner. In the impugned judgement and order the learned Judge observed that the two decisions referred to above have got no manner of application in the facts of the present case and refrained from dealing with those decisions without indicating why the principles of law laid down in the said decisions would not apply to the facts of the present case. Further, the learned Judge held that the Adjudicating Officer had passed the order impugned also in his capacity as Joint Commissioner. This is also factually incorrect. The order was passed by the Designated Authority.

9. We are conscious that existence of an alternative remedy is not an absolute bar to the maintainability of a writ petition. It is a rule of discretion. It is a limitation that the writ Court has imposed on itself. Ordinarily, the writ Court shall require an aggrieved person to exhaust any available alternative remedy unless the same is not efficacious or illusory or the impugned action or order is without jurisdiction or suffers from the vice of having been passed in breach of the principles of natural justice. In a catena of decisions, the Hon'ble Supreme Court has emphasised that it will be a sound exercise of discretion not to entertain an application under Article 226 of the Constitution if an efficacious alternative remedy is available to the aggrieved party. In the present case, the order impugned records that hearing was given to the writ petitioner and this could not be disputed by Learned Counsel appearing for him. Hence the order was not passed in breach of the principles of natural justice.

10. In *Commissioner of Income Tax & Ors vs. Chhabil Dass Agarwal* (supra) at paragraphs 15 to 17 of the judgement, Hon'ble Supreme Court has observed as follows:-

"15. Before discussing the fact proposition, we would notice the principle of law as laid down by this Court. It is settled law that non-entertainment of petitions under writ jurisdiction by the High Court when an efficacious alternative remedy is available is a rule of self-imposed limitation. It is essentially a rule of policy, convenience and discretion rather than a rule of law. Undoubtedly, it is within the discretion of the High Court to grant relief under Article 226 despite the existence of an alternative remedy.

However, the High Court must not interfere if there is an adequate efficacious alternative remedy available to the petitioner and he has approached the High Court without availing the same unless he has made out an exceptional case warranting such interference or there exist sufficient grounds to invoke the extraordinary jurisdiction under Article 226. (See: *State of U.P. vs. Mohammad*

Nooh, AIR 1958 SC 86; Titaghur Paper Mills Co. Ltd. vs. State of Orissa, (1983) 2 SCC 433; Harbanslal Sahnia vs. Indian Oil Corpn. Ltd., (2003) 2 SCC 107; State of H.P. vs. Gujarat Ambuja Cement Ltd., (2005) 6 SCC 499).

16. The Constitution Benches of this Court in K.S. Rashid and Sons vs. Income Tax Investigation Commission, AIR 1954 SC 207; Sangram Singh vs. Election Tribunal, Kotah, AIR 1955 SC 425; Union of India vs. T.R. Varma, AIR 1957 SC 882; State of U.P. vs. Mohd. Nooh, AIR 1958 SC 86 and K.S. Venkataraman and Co. (P) Ltd. vs. State of Madras, AIR 1966 SC 1089 have held that though Article 226 confers a very wide powers in the matter of issuing writs on the High Court, the remedy of writ absolutely discretionary in character. If the High Court is satisfied that the aggrieved party can have an adequate or suitable relief elsewhere, it can refuse to exercise its jurisdiction. The Court, in extraordinary circumstances, may exercise the power if it comes to the conclusion that there has been a breach of principles of natural justice or procedure required for decision has not been adopted.

(See: N.T. Veluswami Thevar vs. G. Raja Nainar, AIR 1959 SC 422; Municipal Council, Khurai vs. Kamal Kumar, (1965) 2 SCR 653; Siliguri Municipality vs. Amalendu Das, (1984) 2 SCC 436; S.T. Muthusami vs. K. Natarajan, (1988) 1 SCC 572; Rajasthan SRTC vs. Krishna Kant, (1995) 5 SCC 75; Kerala SEB vs. Kurien E. Kalathil, (2000) 6 SCC 293; A. Venkatasubbiah Naidu vs. S. Chellappan, (2000) 7 SCC 695; L.L. Sudhakar Reddy vs. State of A.P., (2001) 6 SCC 634; Shri Sant Sadguru Janardan Swami (Moingiri Maharaj) Sahakari Dugdha Utpadak Sanstha vs. State of Maharashtra, (2001) 8 SCC 509; Pratap Singh vs. State of Haryana, (2002) 7 SCC 484 and GKN Driveshafts (India) Ltd. vs. ITO, (2003) 1 SCC 72).

17. In Nivedita Sharma vs. Cellular Operators Assn. of India, (2011) 14 SCC 337, this Court has held that where hierarchy of appeals is provided by the statute, party must exhaust the statutory remedies before resorting to writ jurisdiction for relief and observed as follows:

"12. In Thansingh Nathmal v. Supdt. of Taxes, AIR 1964 SC 1419 this Court adverted to the rule of self-imposed restraint that the writ petition will not be entertained if an effective remedy is available to the aggrieved person and observed: (AIR p. 1423, para 7).

"7. ... The High Court does not therefore act as a court of appeal against the decision of a court or tribunal, to correct errors of fact, and does not by assuming jurisdiction under Article 226 trench upon an alternative remedy provided by statute for obtaining relief. Where it is open to the aggrieved petitioner to move another tribunal, or even itself in another jurisdiction for obtaining redress in the manner provided by a statute, the High Court normally will not permit by entertaining a petition under Article 226 of the Constitution the machinery created under the statute to be bypassed, and will leave the party applying to it to seek resort to the machinery so set up."

13. In *Titaghur Paper Mills Co. Ltd. v. State of Orissa*, (1983) 2 SCC 433 this Court observed: (SCC pp. 440-41, para 11)

"11. ... It is now well recognised that where a right or liability is created by a statute which gives a special remedy for enforcing it, the remedy provided by that statute only must be availed of. This rule was stated with great clarity by Willes, J. in *Wolverhampton New Waterworks Co. v. Hawkesford*, 141 ER 486 in the following passage: (ER p. 495)

'... There are three classes of cases in which a liability may be established founded upon a statute. ... But there is a third class viz. where a liability not existing at common law is created by a statute which at the same time gives a special and particular remedy for enforcing it. ... The remedy provided by the statute must be followed, and it is not competent to the party to pursue the course applicable to cases of the second class. The form given by the statute must be adopted and adhered to.'

The rule laid down in this passage was approved by the House of Lords in *Neville v. London Express Newspapers Ltd.*, 1919 AC 368 and has been reaffirmed by the Privy Council in *Attorney General of Trinidad and Tobago v. Gordon Grant and Co. Ltd.*, 1935 AC 532 (PC) and *Secy. of State v. Mask and Co.*, AIR 1940 PC 105. It has also been held to be equally applicable to enforcement of rights, and has been followed by this Court throughout. The High Court was therefore justified in dismissing the writ petitions in limine."

14. In *Mafatlal Industries Ltd. v. Union of India*, (1997) 5 SCC 536 B.P. Jeevan Reddy, J. (speaking for the majority of the larger Bench) observed: (SCC p. 607, para 77)

"77. ... So far as the jurisdiction of the High Court under Article 226-or for that matter, the jurisdiction of this Court under Article 32-is concerned, it is obvious that the provisions of the Act cannot bar and curtail these remedies. It is, however, equally obvious that while exercising the power under Article 226/Article 32, the Court would certainly take note of the legislative intent manifested in the provisions of the Act and would exercise their jurisdiction consistent with the provisions of the enactment.'" (See: *G. Veerappa Pillai v. Raman & Raman Ltd.*, AIR 1952 SC 192; *CCE v. Dunlop India Ltd.*, (1985) 1 SCC 260; *Ramendra Kishore Biswas v. State of Tripura*, (1999) 1 SCC 472; *Shivgonda Anna Patil v. State of Maharashtra*, (1999) 3 SCC 5; *C.A. Abraham v. ITO*, (1961) 2 SCR 765; *Titaghur Paper Mills Co. Ltd. v. State of Orissa*, (1983) 2 SCC 433; *H.B. Gandhi v. Gopi Nath and Sons*, 1992 Supp (2) SCC 312; *Whirlpool Corpn. v. Registrar of Trade Marks*, (1998) 8 SCC 1; *Tin Plate Co. of India Ltd. v. State of Bihar*, (1998) 8 SCC 272; *Sheela Devi v. Jaspal Singh*, (1999) 1 SCC 209 and *Punjab National Bank v. O.C. Krishnan*, (2001) 6 SCC 569)"

11. The aforesaid principle was reiterated by Hon'ble Supreme Court in its recent decision in the case of *Authorised Officer, State Bank of Travancore and another vs. Mathew K.C.* (supra).

12. We are of the considered view that the facts of the present case do not justify exercise of the high prerogative writ jurisdiction of the High Court when the writ petitioner has an efficacious alternative remedy available to him by way of a statutory appeal under Section 32 (3) of the FSS Act. The writ petitioner's case does not fall within one of the exceptions which would prompt the High Court to exercise its writ jurisdiction without requiring the writ petitioner to exhaust the alternative remedy.

13. In view of the aforesaid the order under appeal is set aside. Although the statutory period to prefer appeal under Section 32 (4) may have expired, we permit the writ petitioner/ respondent to approach the Commissioner of Food Safety with his appeal against the impugned order of the Designated Officer within four weeks from date. If such appeal is filed within the time period indicated, the Commissioner of Food Safety shall decide the same in accordance with law without being influenced by any observation in this order or in the order of the learned Single Judge which stands set aside. Such decision shall be taken as early as possible and preferably within a period of eight weeks from the date of filing of the appeal.

14. Since the business of the writ petitioner is a running one, we deem it appropriate to preserve the status quo for a certain period of time. Accordingly, we restrain the respondent authorities from interfering with the writ petitioner's business in any manner till two weeks after the decision of the Commissioner of Food Safety, in the event the writ petitioner challenges the impugned order of the Designated Officer by way of statutory appeal. If no appeal is filed within four weeks from date, the impugned order of the Designated Authority will attain finality.

15. We make it clear that we have not gone into the merits of the writ petitioner's case. If a statutory appeal is filed the appellate authority shall decide the same in accordance with law.

16. The appeal and connected stay application are accordingly disposed of.

I agree.