

(2022) 07 J&K CK 0037

In the Jammu And Kashmir High Court

Case No : Writ Petition (C) No. 1451 Of 2022, Civil Miscellaneous No. 3500 Of 2022

Haleema Bano And Others

APPELLANT

Vs

UT Of J&K And Ors

RESPONDENT

Date of Decision : 20-07-2022

Acts Referred:

Constitution Of India, 1950 — Article 32, 32(2), 226, 227
Jammu And Kashmir Land Revenue Act, 1996 — Section 11B, 17, 23(1), 23(3), 24, 133C(3)

Citation : (2022) 07 J&K CK 0037

Hon'ble Judges : Sanjeev Kumar, J

Bench : Single Bench

Advocate : M.A.Qayoom, Insha Rashid

Judgement

Sanjeev Kumar, J

1 The petitioners are aggrieved and have called in question the following orders:

(i). Order dated 01.12.2021 passed by the Tehsildar, Kulgam whereby Abdul Rashid Shah and others including petitioner No.2 have been directed to remove the encroachment on 12 feet wide pathway and canal falling under Survey No.211 at village Laroo Khalisa;

(ii). Order dated 19.04.2022 passed by the Assistant Collector, Class 1st, Kulgam whereby Abdul Rashid Shah and others including petitioner No.2 have been proceeded under Section 133-C (3) of J&K Land Revenue Act, 1939 ["the Act of 1939 "]

and directed the removal of contravention on State/Kahcharai/common land falling under Survey No. 211 situate at village Laroo, Kulgam;

(iii). Order dated 10.05.2022 passed by the Tehsildar, Kulgam whereby the Tehsildar, in pursuance of directions of Additional Deputy Commissioner, Kulgam dated 19.03.2022, has constituted a team of Revenue Offices to remove the

encroachment on shamilat land (gairmumkin kohl); and,

(iv). Notice dated 24.6.2022 issued by the Tehsildar Kulgam whereby Mr. Abdul Rashid Shah and petitioner No.2 Mohd Shafi Bhat have been directed to remove the encroachment.

2 Apart from seeking quashment of the impugned orders aforesaid, the petitioners have also prayed for a direction to the respondents not to interfere with the peaceful possession, occupation and enjoyment of the petitioners over the land measuring 15 marlas and 3 sarsai falling under Survey No.211 situated at Laroo, Kulgam, in any manner whatsoever. The writs prayed for in this petition are sought in the context of following factual antecedents:

FACTS

(i). Abdul Rehman Bhat, the predecessor-in-interest of the petitioners was in possession of land measuring 17 marlas covered by Survey No. 201 along with adjoining shamilat land measuring 8 marlas falling in Survey No. 211 situate at Mouza village Laroo, Tehsil and District Kulgam [“the subject land ”]. It is claimed that land measuring 17 marlas falling under Survey No. 201 along with subject land originally belonged to one Abdul Rashid Ganai, who had sold the same to Abdul Rehman Bhat for a consideration of Rs. 10.00 lacs. Abdul Rehman Bhat and after his demise, the petitioners herein have been in continuous possession of the subject land for the last several decades, though there was no formal document of conveyance ever executed by the erstwhile owner Abdul Rashid Ganai in their favour. To give sanctity to the transfer of the subject land in favour of the petitioners, an agreement claims to have been executed by the erstwhile owner Abdul Rashid Ganai in favour of predecessor-in-interest of the petitioners on 20.03.2002.

(ii). The revenue record, in particular, Fard-i-Partial conducted by the revenue authorities before execution of the agreement also indicates that Abdul Rehman Bhat was in possession of 17 marlas of land covered by Survey No. 201 min. It is claimed that the revenue authorities have also shown the predecessor-in-interest of the petitioners in possession of 8 marlas of shamilat land covered by Survey No. 211 in the khasra Girdawari of Kharif 2003. It is submitted that in the khasra girdwari of kharif 2005, the revenue authorities have shown the predecessor-in-interest of the petitioners in possession of land measuring 15 marlas and 3 sarsai under Survey No. 201 and 8 marlas of Shamilat Deh land under Survey No. 211. There is also a note by the revenue authorities indicating that the petitioners have also laid foundation on the shamilat land for raising the shopping complex. It is further the case of the petitioners that while their predecessor-in-interest, who was in peaceful possession of the subject land was raising the construction of shopping complex, a Civil Suit came to be filed by some of the legal heirs of Mst. Zeba, the mother of the erstwhile owner, namely Abdul Rashid Ganai in the Court of Sub Judge Kulgam. The said suit was disposed of by the Court of Sub-Judge Kulgam by holding that the land situated at Laroo under Survey No. 201

measuring 15 marlas and 3 sarsai along with Shamilat land appended to it, was in the exclusive possession and within the share of erstwhile owner Abdul Rashid Ganai, who had transferred his possession in favour of predecessor-in-interest of the petitioner, namely Abdul Rehman Bhat, which stood affirmed by an agreement to sell dated 20.03.2002. The petitioners, who were also party defendants in the suit, were held entitled to hold the possession of 15 marlas and 3 sarsai of land under khasra No. 201 along with appended shamilat land situated at village Laroo. Consequent upon the judgment and decree dated 31.08.2020, a mutation bearing No. 197 dated 10.10.2020 came to be attested by the Tehsildar, Kulgam. An entry with regard to the aforesaid mutation was also reflected by the revenue authorities in the Fard-e-Intikhabi Misal Hakiyat/Jamabandi of 1996-97 and also in khasra Girdwari for Rabi 2020 and Kharif 2022.

(iii). It is pleaded that the judgment and decree dated 31.08.2020 passed by the sub Judge Kulgam was challenged by the plaintiffs of the suit before the Principal District Judge Kulgam, who vide his judgment and decree dated 31.12.221 set aside the judgment and decree dated 31.08.2020 passed by the Sub-Judge Kulgam. Aggrieved, the petitioners challenged the judgment and decree of the Principal District Judge, Kulgam before this Court in a Civil Second Appeal i.e RSA No. 1/2022. The said appeal stands admitted to hearing by this Court in terms of its order dated 17.01.2022 and the judgment and decree passed by the Principal District Judge, Kulgam has been stayed. The parties have been directed to maintain status quo on spot. While the Civil Second Appeal is pending adjudication in this Court and there is an order of status quo passed by this Court on 17.1.2022, the Tehsildar Kulgam has passed the impugned orders directing removal of the encroachment from the Shamilat land (Gain Mumkin kohl). It is in this backdrop, the petitioners have assailed the impugned orders on several grounds enumerated in the petition from page No. 22 to 34.

PRELUDE:

3. The impugned orders passed and the notice issued by the Tehsildar Kulgam have been challenged, inter alia, on the ground that the same are without jurisdiction and have been passed/issued in violation of principles of natural justice.

4. It is in view of the aforesaid two grounds of challenge, the petitioners claim that they are entitled to maintain this petition despite the availability of statutory alternative remedies available under the Land Revenue Act.

ARGUMENTS & ANALYSIS

5. Having heard learned counsel for the parties and perused the material on record, this Court is of the firm opinion that the instant case is one where writ petitioners ought to be relegated to the alternative statutory remedies of appeal and revision provided under the J&K Land Revenue Act, 1939 ["the Act of 1939"]. However, having regard to the fact that the respondents have initiated multiple proceedings for eviction of the petitioners from the subject land,

relegating them to alternative remedy may result in multiplication of litigation. It is, thus, thought appropriate to exercise discretion and entertain this petition, availability of alternative statutory and equally efficacious remedy notwithstanding.

6. Having adopted the aforesaid course, this Court should have felt relieved of the agony of determining oftenly debated question i.e whether the High Court should entertain a petition under Article 226 of the Constitution of India, if an effective alternative remedy is available to the aggrieved person ?

7. No doubt, the aforesaid question has been debated and decided on more than one occasion by this Court. Besides, there is a plethora of precedents from the Apex Court available for reference, yet some of the learned counsel feel that there is still some scope for improvement and better enunciation of law. This is exactly how this Court is caught up in this matter. Lengthy, virulent and high voltage arguments backed by usual arrogance marked the hearing of this matter. With a genuine and benign hope that this judgment will put curtain on this "One Act Play " which is usually played in every third case, I have attempted to concretize and restate the law on the exercise of discretionary jurisdiction of this Court vested under Article 226 of the Constitution of India in the face of availability of an equally efficacious alternative remedy to the aggrieved person.

Nature of jurisdiction under Article 226 of the Constitution

8. The power to issue prerogative writs is conferred upon this Court by Article 226 of the Constitution of India and, therefore, before analyzing the nature of jurisdiction conferred upon this Court by Article 226 of the Constitution, it is necessary to set out Article 226 of the Constitution here-in- below:

"226. Power of High Courts to issue certain writs:

(1) Notwithstanding anything in Article 32 every High Court shall have powers, throughout the territories in relation to which it exercise 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, prohibitions, 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;

(2) The power conferred by clause (1) to issue directions, orders or writs to any Government, authority or person may also be exercised by any High Court exercising jurisdiction in relation to the territories within which the cause of action, wholly or in part, arises for the exercise of such power, notwithstanding that the seat of such Government or authority or the residence of such person is not within those territories

(3) Where any party against whom an interim order, whether by way of injunction or stay or in any other manner, is made on, or in any proceedings relating to, a petition under clause (1), without

(a) furnishing to such party copies of such petition and all documents in support of the plea for such interim order; and

(b) giving such party an opportunity of being heard, makes an application to the High Court for the vacation of such order and furnishes a copy of such application to the party in whose favour such order has been made or the counsel of such party, the High Court shall dispose of the application within a period of two weeks from the date on which it is received or from the date on which the copy of such application is so furnished, whichever is later, or where the High Court is closed on the last day of that period, before the expiry of the next day afterwards on which the High Court is open; and if the application is not so disposed of, the interim order shall, on the expiry of that period, or, as the case may be, the expiry of the aid next day, stand vacated

(4) The power conferred on a High Court by this article shall not be in derogation of the power conferred on the Supreme court by clause (2) of Article 32 of the Constitution”.

9. It is trite that the judicial review under Article 32 and Article 226 of the Constitution is an essential feature of the Constitution and, therefore, forms its basic structure. It is beyond the amending power of the Parliament (see: L. Chandra Kumar vs. UOI, (1997) 3 SCC 26 & S.N.Mukherjee vs Union of India (1990) 4 SCC 594).

10. Undoubtedly, the exercise of extraordinary writ jurisdiction is discretionary, but such discretion must be exercised on sound judicial principles. Prerogative writs can not only be issued to enforce fundamental rights, but can also be issued for any other purpose. This is evident from a plain language of Article 226 of the Constitution. Writ jurisdiction conferred on the Constitutional Courts is vast, extraordinary and cannot be hedged or circumscribed by any Act of legislature or Parliament. However, the Constitutional Courts will certainly have regard to the legislative intent evidenced by the provisions of the said Act and would exercise jurisdiction consistent with provisions of the Act. It is relevant to bear in mind that there is one fundamental difference between the right of a person to invoke Article 32 of the Constitution for enforcement of fundamental rights and right of a person to invoke writ jurisdiction of the High Court under Article 226 of the Constitution. While the former Article in itself is a fundamental right, but later is not. So, no fundamental right can be claimed by any person to move the High Court under Article 226 of the Constitution. The argument that if the case of the petitioners falls in one or more of the exceptions carved out by the Supreme Court for exercise of writ jurisdiction despite availability of alternative remedy, the High Court, when approached, is bound to exercise jurisdiction stems from inherent fallacy and inchoate understanding of discretionary nature of extraordinary writ jurisdiction. Equally fallacious is the argument that the writ jurisdiction is a panacea for all ills and decision to choose between Constitutional remedy and alternative statutory remedy is a matter of choice and sheer convenience of the litigant and his learned counsel.

JUDICIAL PRECEDENTS:

11. The Supreme Court in the case of Kanaiyalal Lalchand Sachdev and others vs. State of Maharashtra and ors, (2011) 2 SCC 782, in paras (23) & (24) beautifully discussed the issue. For reference, paras (23) & (24) of the judgment are reproduced hereunder:

"23. In our opinion, therefore, the High Court rightly dismissed the petition on the ground that an efficacious remedy was available to the appellants under Section 17 of the Act. It is well settled that ordinarily relief under Articles 226/227 of the Constitution of India is not available if an efficacious alternative remedy is available to any aggrieved person. (See: *Sadhana Lodh Vs. National Insurance Co. Ltd. & Anr.*, *Surya Dev Rai Vs. Ram Chander Rai & Ors.*, & *State Bank of India Vs. Allied Chemical Laboratories*).

24. In *City and Industrial Development Corporation Vs. Dosu Aardeshir Bhiwandiwalla*, this Court had observed that:

"30. The Court while exercising its jurisdiction under Article 226 is duty bound to consider whether:

(a) adjudication of writ petition involves any complex and disputed questions of facts and whether they can be satisfactorily resolved;

(b) the petition reveals all material facts;

(c) the petitioner has any alternative or effective remedy for the resolution of the dispute;

(d) person invoking the jurisdiction is guilty of unexplained delay and laches;

(e) ex facie barred by any laws of limitation;

(f) grant of relief is against public policy or barred by any valid law; and host of other factors."

12. In a case of *Thansingh Nathmal vs. Superintendent of Taxes*, AIR 1964 SC 1419, a Constitution Bench of the Supreme Court in para (7) of the judgment has discussed the issue in the following manner:

"7. Against the order of the Commissioner an order for reference could have been claimed if the appellants satisfied the Commissioner or the High Court that a question of law arose out of the order. But the procedure provided by the Act to invoke the jurisdiction of the High Court was bypassed. The appellants moved the High Court challenging the competence of the Provincial Legislature to extend the concept of sale, and invoked the extraordinary jurisdiction of the High Court under Article 226 and sought to reopen the decision of the taxing authorities on questions of fact. The jurisdiction of the High Court under Article 226 of the Constitution is couched in wide terms and the exercise thereof is not subject to any restrictions except the territorial restrictions which are expressly provided in the Article. But the exercise of the jurisdiction is discretionary; it is not exercised

merely because it is lawful to do so. The very amplitude of the jurisdiction demands that it will ordinarily be exercised subject to certain self-imposed limitations. Resort to that jurisdiction is not intended as an alternative remedy for relief which may be obtained in a suit or other mode prescribed by statute. Ordinarily the Court will not entertain a petition for a writ under Article 226, where the petitioner has an alternative remedy which, without being unduly onerous, provides an equally efficacious remedy. Again the High Court does not generally enter upon a determination of questions which demand an elaborate examination of evidence to establish the right to enforce which the writ is claimed. 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 by-passed, and will leave the party applying to it to seek resort to the machinery so set up”.

(underlined by me)

13. In a latter judgment of *Titaghur Paper Mills Co. Ltd & another vs. State of Orissa and others*, (1983) 2 SCC 433, the Supreme Court, relying on *Thansingh Nathmal's case* (*supra*) has, in para (11), held thus:

“11. Under the scheme of the Act, there is a hierarchy of authorities before which the petitioners can get adequate redress against the wrongful acts complained of. The petitioners have the right to prefer an appeal before the prescribed authority under sub-section (1) of section 23 of the Act. If the petitioners are dissatisfied with the decision in the appeal, they can prefer a further appeal to the Tribunal under sub-Section (3) of section 23 of the Act, and then ask for a case to be stated upon a question of law for the opinion of the High Court under section 24 of the Act. The Act provides for a complete machinery to challenge an order of assessment and the impugned orders of assessment can only be challenged by the mode prescribed by the Act and not by a petition under Art. 226 of the Constitution. It is now well recognized 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 Water Works Co. v. Hawkesford* in the following passage:

"There are three classes of cases in which a liability may be established founded upon 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 Newspaper Ltd.* and has been reaffirmed by the Privy Council in *Attorney-General of Trinidad and Tobago v. Gordon Grant & Co. Ltd.* and *Secretary of State v. Mask & Co.* 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”.

(emphasis supplied)

14. Seven Judge Bench of the Supreme Court in the case of *Mafatlal Industries Ltd. Vs. Union of India*, (1997) 5 SCC 536 has also considered the aforesaid issue. What is stated by the majority in the judgment is summed up in paragraph No. 108(i) which, for facility of reference, is reproduced hereunder:

“108(i).The discussion in judgment yields the following propositions We may forewarn that these propositions are set out merely for the sake of convenient reference and are not supposed to be exhaustive. In case of any doubt or ambiguity in these propositions, reference must be had to the discussion and propositions in the body of the judgment.

(i) Where a refund of tax/duty is claimed on the ground that it has been collected from the petitioner/plaintiff whether before the commencement of the Central Excises and Customs Laws (Amendment) Act, 1991 or thereafter by misinterpreting or misapplying the provisions of the Central Excises and Salt Act, 1944 read with Central Excise Tariff Act, 1985 or Customs Act, 1962 read with Customs Tariff Act or by misinterpreting or misapplying any of the rules, regulations or notifications issued under the said enactments, such a claim has necessarily to be preferred under and in accordance with the provisions of the respective enactment before the authorities specified thereunder and within the period of limitation prescribed therein. No suit is maintainable in that behalf. While the jurisdiction of the High Courts under Article 226 and of this Court under Article 32 cannot be circumscribed by the provisions of the said enactments, they will certainly have due regard to the legislative intent evidenced by the provisions of the said Acts and would exercise their jurisdiction consistent with the provisions of the Act. The writ petition will be considered and disposed of in the light of and in accordance with the provisions of Section 11-B. This is for the reason that the power under Article 226 has to be exercised to effectuate the rule of law and not for abrogating it.....”

15. Summing up the legal position on the point, the Supreme Court in the case of *Nivedita Sharma vs. Cellular Operators Association of India and ors*, (2011) 14 SCC 337, in paras (13) to (16), observed thus:

“13. In *Titaghur Paper Mills Co. Ltd. v. State of Orissa*, this Court observed:

“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* in the following passage:

'..... There are three classes of cases in which a liability may be established founded upon a statute But there is a third class, ., 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.* and has been reaffirmed by the Privy Council in *Attorney General of Trinidad and Tobago v. Gordon Grant and Co. Ltd* and *Secy. of State v. Mask and Co..* 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*, B.P. Jeevan Reddy, J. (speaking for the majority of the larger Bench) observed:

"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."

15. In the judgments relied upon by Shri Vaidyanathan, which, by and large, reiterate the proposition laid down in *Baburam Prakash Chandra Maheshwari v. Antarim Zila Parishad*, it has been held that an alternative remedy is not a bar to the entertaining of writ petition filed for the enforcement of any of the fundamental rights or where there has been a violation of the principles of natural justice or where the order under challenge is wholly without jurisdiction or the vires of the statute is under challenge.

16. It can, thus, be said that this Court has recognized some exceptions to the rule of alternative remedy. However, the proposition laid down in *Thansingh Nathmal v. Superintendent of Taxes* and other similar judgments that the High Court will not entertain a petition under Article 226 of the Constitution if an effective alternative remedy is available to the aggrieved person or the statute under which the action complained of has been taken itself contains a mechanism for redressal of grievance still hold field".

(emphasis supplied)

16. At this stage, it would be appropriate to make a reference to the judgment of

the Supreme Court in CIT and ors., vs. Chhabil Dass Agarwal, (2014) 1 SCC 603. Explaining the scope of jurisdiction of the High Court under Article 226 of the Constitution, the Supreme Court, in para (11) and para (12) of the judgment has, held thus:

“11. 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, , Titaghur Paper Mills Co. Ltd. vs. State of Orissa, Harbanslal Sahnia vs. Indian Oil Corpn. Ltd., State of H.P. vs. Gujarat Ambuja Cement Ltd.,.

12. The Constitution Benches of this Court in K.S. Rashid and Sons vs. Income Tax Investigation Commission, Sangram Singh vs. Election Tribunal, Kotah, Union of India vs. T.R. Varma, State of U.P. vs. Mohd. Nooh, and K.S. Venkataraman and Co. (P) Ltd. vs. State of Madras, 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, Municipal Council, Khurai vs. Kamal Kumar, Siliguri Municipality vs. Amalendu Das, S.T. Muthusami vs. K. Natarajan, Rajasthan SRTC vs. Krishna Kant, Kerala SEB vs. Kurien E. Kalathil, A. Venkatasubbiah Naidu vs. S. Chellappan,; L.L. Sudhakar Reddy vs. State of A.P., Shri Sant Sadguru Janardan Swami (Moingiri Maharaj) Sahakari Dugdha Utpadak Sanstha vs. State of Maharashtra, Pratap Singh vs. State of Haryana, and GKN Driveshafts (India) Ltd. vs. ITO”.

17. Recently , a three judge Bench of the Supreme Court in the case of M/S Magadh Sugar and Energy Ltd. Vs. The State of Bihar and ors, 2021 SCC Online SC 801, was yet again confronted with the issue of maintainability of the writ petition in the face of availability of alternative remedy to the aggrieved person. The Supreme Court, after surveying the case law at some length, restated the principles of law which an earlier two Judge Bench of the Supreme Court had laid down in the case of M/S Radha Krishan Industris vs. State of Himachal Pradesh and others, AIR 2021 SC 2114 .

Para 19 of the judgment is relevant and is set out below:

"19.While a High Court would normally not exercise its writ jurisdiction under Article 226 of the Constitution if an effective and efficacious alternate remedy is available, the existence of an alternate remedy does not by itself bar the High Court from exercising its jurisdiction in certain contingencies. This principle has been crystallized by this Court in *Whirlpool Corporation v. Registrar of Trademarks*, Mumbai (1998) 8 SCC 1 and *Harbanslal Sahni v. Indian Oil Corporation Ltd* (2003) 2 SCC 107. Recently, in *Radha Krishan Industries v. State of Himachal Pradesh & Ors*, a two judge Bench of this Court of which one of us was a part of (Justice D.Y. Chandrachud) has summarized the principles governing the exercise of writ jurisdiction by the High Court in the presence of an alternate remedy. This Court has observed:

"28. The principles of law which emerge are that:

- (i) The power under Article 226 of the Constitution to issue writs can be exercised not only for the enforcement of fundamental rights, but for any other purpose as well;
- (ii) The High Court has the discretion not to entertain a writ petition. One of the restrictions placed on the power of the High Court is where an effective alternate remedy is available to the aggrieved person;
- (iii) Exceptions to the rule of alternate remedy arise where
 - (a) the writ petition has been filed for the enforcement of a fundamental right protected by Part III of the Constitution;
 - (b) there has been a violation of the principles of natural justice;
 - (c) the order or proceedings are wholly without jurisdiction; or
 - (d) the vires of a legislation is challenged;
- (iv) An alternate remedy by itself does not divest the High Court of its powers under Article 226 of the Constitution in an appropriate case though ordinarily, a writ petition should not be entertained when an efficacious alternate remedy is provided by law;
- (v) When a right is created by a statute, which itself prescribes the remedy or procedure for enforcing the right or liability, resort must be had to that particular statutory remedy before invoking the discretionary remedy under Article 226 of the Constitution. This rule of exhaustion of statutory remedies is a rule of policy, convenience and discretion;
- (vi) In cases where there are disputed questions of fact, the High Court may decide to decline jurisdiction in a writ petition. However, if the High Court is objectively of the view that the nature of the controversy requires the exercise of its writ jurisdiction, such a view would not readily be interfered with."

(emphasis supplied)

The principle of alternate remedies and its exceptions was also reiterated recently in the decision in Assistant Commissioner of State Tax v. M/s Commercial Steel Limited. In State of HP v. Gujarat Ambuja Cement Ltd., this Court has held that a writ petition is maintainable before the High Court if the taxing authorities have acted beyond the scope of their jurisdiction. This Court observed:

“23. Where under a statute there is an allegation of infringement of fundamental rights or when on the undisputed facts the taxing authorities are shown to have assumed jurisdiction which they do not possess can be the grounds on which the writ petitions can be entertained. But normally, the High Court should not entertain writ petitions unless it is shown that there is something more in a case, something going to the root of the jurisdiction of the officer, something which would show that it would be a case of palpable injustice to the writ petitioner to force him to adopt the remedies provided by the statute. It was noted by this Court in L. Hirday Narain v. ITO (1970) 2 SCC 355: AIR 1971 SC 33 that if the High Court had entertained a petition despite availability of alternative remedy and heard the parties on merits it would be ordinarily unjustifiable for the High Court to dismiss the same on the ground of non-exhaustion of statutory remedies; unless the High Court finds that factual disputes are involved and it would not be desirable to deal with them in a writ petition.”

18. In view of the above, the judgments i.e Union of India vs. Tania Construction Pvt. Ltd., (2011) 5 SCC 697, Southern Electricity Supply Co. of Orissa Ltd. v. Sri Seetaram Rice Mill, (2012) 2 SCC 108, Uttar Pradesh Power Transmission Corporation Ltd. v. CG Power and Industrial Solutions Limited, AIR 2021 SC 2411, relied upon by Mr. M.A.Qayoom, learned counsel for the petitioners lay down that mere availability of alternative remedy is not a bar to entertaining of writ petition filed for enforcement of any of the fundamental rights or where there has been violation of principles of natural justice or where the order under challenge is wholly without jurisdiction or the vires of the statute is under challenge.

19. It is true that the judgments aforesaid strongly relied upon by Mr. Qayoom, learned counsel appearing for the petitioners do recognize some exceptions to the rule of alternative remedy. However, the proposition laid down in Thansingh Nathmal by a Constitution Bench and other similar judgments adverted to hereinabove that the High Court will not entertain a petition under Article 226 of the Constitution if an effective alternative remedy is available to the aggrieved person or the statute, under which the action complained of has been taken, itself contains a mechanism for redressal of grievance, still hold field. This has been affirmed by the Supreme Court in the case of Nivedita Sharma (supra).

CONCLUSIONS ON QUESTION OF LAW

20. From the above discussion and deep analysis of various judgments of the Supreme Court, following broader principles emerge:

(i). Judicial review under Article 32 and Article 226 of the Constitution is an essential feature and constitutes basic structure of the Constitution and, therefore, beyond amending power of the Parliament. In other words, no law made by the Parliament or any State legislature can take away, trample or whittle down this basic feature of the Constitution;

(ii). While a citizen has a fundamental right to invoke Article 32 of the Constitution, for, Article 32 in itself is a fundamental right contained in part III of the Constitution. However, no such fundamental right is available to a citizen to invoke the writ jurisdiction of this Court under Article 226 of the Constitution;

(iii). The remedy under Article 226 is purely discretionary and the entertaining of the writ petition is always in the discretion of the Constitutional Court. Of course, this discretion is to be exercised based on sound judicial principles. If the High Court is satisfied that the aggrieved party can have adequate or suitable relief elsewhere, it can refuse to exercise its jurisdiction which is, as said above, discretionary in character;

(iv). Bar to entertain a petition under the writ jurisdiction of the High Court is a self imposed limitation. It is essentially a rule of policy, convenience and discretion rather than a rule of law; and,

(v). The writ Court may under extraordinary and exceptional circumstances may exercise power if it comes to the following conclusions:

(a). There has been a breach of fundamental rights or the principles of natural justice;

(b). where the order under challenge is wholly without jurisdiction;

(c). Whether the vires of the statute is under challenge.

(vi). When the statutory forum/forums is/are created by law for redressal of the grievances, a writ petition should not be entertained ignoring the statutory dispensation. A constitution Bench Judgment in Thansingh Nathlal's case (supra) holding that the High Court will not entertain a petition under Article 226 of the Constitution, if an effective alternative remedy is available to the aggrieved person, or the statute under which the action complained of has been taken, itself contains a mechanism for redressal of grievance, still holds field.

(vii). The High Court may not refuse to entertain a petition merely on the ground that it involves determination of disputed questions of fact. Many a disputed questions can be determined on the basis of undisputed documentary evidence on record. However, the High Court should refuse to entertain the petitions which involve complex and disputed questions of complicated nature requiring oral evidence for their determination.

(viii). No exhaustive parameters can be laid down to guide the exercise of jurisdiction in such cases. Whether or not, writ jurisdiction should be exercised by the High Court, will depend upon facts and circumstances of each case. If the

high court is objectively of the view that the nature of controversy requires or does not require the exercise of writ jurisdiction, such a view could not be found fault with. After all, the remedy provided under article 226 of the Constitution is not only an equitable and extraordinary, but is also purely discretionary in character. Ordinarily, the High Court may not refuse to exercise its writ jurisdiction where the impugned order is challenged being passed in violation of principles of natural justice or violates any of the fundamental rights or on the ground of lack of jurisdiction. However, where question of jurisdiction of the forum/authority to pass the order under challenge or the question as to whether there is, in fact, violation of any of the fundamental rights is itself a complicated question of fact requiring determination by oral evidence, it would be open to the High Court to relegate the aggrieved party to the statutory remedy if available or to the Civil Court as the case may be.

(ix). As is beautifully put by a three Judge Bench of the Supreme Court in, *Shree Meenakshi Mills Ltd. vs Commissioner Of Income Tax*, that, in between the domains occupied respectively by question of fact and law, there is a large area, in which both these questions run into each other, forming, so to say conclave within each other. These are mixed question of law and fact. These questions involve first ascertainment of facts on evidence adduced and then determination of rights of parties on an application of appropriate principles of law to the facts ascertained. In such cases, where rights of the parties before the Court could be determined purely on questions of law without reference to the facts scenario, the remedy of filing a writ petition would not be refused. It would also be not refused if it is, *prima facie*, found by the High Court that exercise of jurisdiction by the statutory forum/forums would be an exercise in futility.

21. The aforesaid principles culled out from the various judgments of the Supreme Court are only illustrative and not exhaustive. There could still be other possible situations where the Constitutional Courts under its writ jurisdiction may feel inclined to exercise its jurisdiction, availability of alternative remedy notwithstanding.

DETERMINATION OF MERITS:

22. After having discussed the issue exhaustively, it is time to advert to the facts scenario of the case presented to this Court. Indisputably, the impugned orders are passed by the revenue officers in the exercise of their powers under the Act of 1939. The Act of 1939 is indisputably a complete code in itself on all matters pertaining to immovable property viz. land assessed to land revenue. It lays down complete and exhaustive mechanism for redressal of grievances and determination of rights and liabilities arising out of the Act. Entertaining a petition against the orders which are either appealable or revisable before the statutory authorities is not permissible in view of the settled legal position. Likewise, we have J&K Agrarian Reforms Act, 1976, The Jammu and Kashmir State Evacuees, (Administration of Property) Act, 1949, The Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and

Resettlement Act, J&K Cooperative Societies Act, 1989 and many such legislations which provide a complete and exhaustive mechanism for redressal of various grievances arising out of the infraction of rights arising under these enactments. In such matters, when an attempt is made by the aggrieved party to straightway approach this Court in its writ jurisdiction without exhausting alternative statutory remedies, this Court must relegate such party to the alternative remedies and the dispute resolution mechanism provided under the statutory enactment concerned except when the case falls in any of the exceptions carved out hereinabove.

23. Turning to the case on hand, indisputably, the subject land as per the recorded entry in the revenue records is Shamilat (Gair Mumkin Kohl). The petitioners dispute this entry in the revenue records and submit that the subject land under their occupation is a Shamilat Deh which he has purchased from Abdul Rehman Bhat covered by survey No. 211 situate at village Laroo (subject land). The entire edifice of the case of the petitioners is built on the proposition that Shamilat Deh land in the village belongs to the land holders of the Mahal in the village on pro rata basis. The petitioners claim to have purchased the subject land along with proprietary land measuring 17 marlas covered by survey No. 201 from one Abdul Rehman Bhat for consideration. Indisputably, there is no valid deed of conveyance either from the erstwhile owner of 17 marlas of land, namely Abdul Rahsid Ganai to Abdul Rahim Bhat or from Abdul Rehman Bhat to the petitioners. There appears to be only change of possession, may be for consideration or otherwise. It may not be impertinent to say that sale of immoveable property without there being a proper deed of conveyance duly stamped and registered before the competent Registration Authority is not permissible under the Transfer of Property Act. Similarly, the Shamilat land, which is reserved for common use of the villagers like graveyard/bathing ghats/wells/pathway/grazing ground, village fair and festivals etc., is land which though, belongs to the village community is unpartitionable. That being the nature of such Shamilat land, no villager can be permitted to put this land exclusively for his personal use. Similarly, a Zimindari Kohl existing in the village from the time immemorial, either on the impartible shamilat deh or other common land of the village cannot be encroached upon or taken over by any person in the garb of staking claim on the impartible shamilat land of the village on pro rata basis i.e in proportionate to his holding in the village.

24. Speaking strictly, the petitioners, who may be in permissive possession of 17 marlas of land in survey No. 201 in pursuance of some Agreement to Sell executed in their favour by Abdul Rehman Bhat cannot claim to be the holder of proprietary land in the Mahal/village where a chunk of shamilat land both impartible and impartible is in existence. This aspect is important matter to be taken into consideration by the concerned authorities embarking upon action to rid the subject land from the alleged unauthorized occupation of the petitioners. Great emphasis was laid by learned counsel for the petitioner on the Agreement to Sell dated 20.03.2002 and the entries in the revenue record to claim that the

petitioners have not only purchased land measuring 17 marlas covered by survey No. 201, but have also purchased the subject land.

25. As is held above, since the petitioners do not have any valid title in even an inch of land in the village Laroo, as such, there is no question of the petitioners staking claim to their share of Shamilat land measuring 8 marlas. Otherwise also, a person possessing 17 marlas of proprietary land in village and staking claim on 08 marlas of Shamilat land on pro rata basis, is itself questionable.

26. In terms of Boon No.4 sanctioned by the then Maharaja of J&K, Khasla sarkar land and common land in the vicinity of the village site was reserved for the benefit of the villagers in the Kashmir Province and subsequently, the rules regarding entry of Shamilat in Kashmir Province were sanctioned by the Maharaja vide Minister-in-Waiting's No. 2439 dated 20th September, 1927 and notified by the Revenue Department vide Ailan No.2 dated 16th Kartik 1984.

27. From the reading of the two, it emerges that in a given village there could be two types of Shamilat:

(i). Shamilat under rule 4

(ii). Shamilat under rule 5

Shamilat under rule 4:

Shamilat under rule 4 is that land which is required for state purposes. It includes Shamilat land in the joint possession of the village Assamis which is reserved for common use as village roads, tanks, shrines, burning ghats, burial grounds, common village grazing and the like. It also includes Khalsa waste in which it has been declared that Nautor is permissible under the orders passed in connection with State Council Resolution No. XXII dated 25th August 1924 and Khalsa waste areas of less than two acres entirely surrounded by private holdings and all strips of Khalsa waste of not more than twenty karms width between private holdings; bedzar areas assessed to land revenue for the payment of which the Assamis are jointly responsible.

Shamilat under Rule 5:

Land in private holdings of village Abadis which is not required for state purposes was recorded as Shamilat by mutation. Land holders in a particular Mahal are entitled to have a share in the land declared as Shamilat under rule 5 pro rata their holdings and such holders possess the same rights over such Shamilat land which they possess in their individual holdings.

Whether a person who is a grantee of shamilat land under the Boon, gets proprietary rights over the said land came under consideration before this Court in *Salam Rather v. Mohd Gani*, AIR 1964 J&K 46, the Court held that the land holders have proprietary rights in Shamilat land in proportion to the size of their holdings on pro rata basis. The Court observed as under:

"..... But the basic right that was granted by this Boon was that the land holders in a particular Mahal would be entitled to have a share in the land declared as Shamilat pro rata their holding. That means they had proprietary rights in shamilat land in proportion to the size of their holdings, which they would hold in common with the other land holders. The shamilat could be got partitioned and each individual land-holder gets his share of the Shamilat land in proportion to the size of his Shamilat land in proportion to the size of his holding. The trial court was not, therefore, correct in holding that all that could be transferred about Shamilat land was possessory right alone, but the right of ownership, though joint with others, can also be subject of a Shamilat land".

Whether a person holding shamilat land is entitled to any compensation in case such a land comes under acquisition, was considered by a Division Bench of this Court in *State of Jammu and Kashmir v. Smt. Hamida Begum*, AIR 1979 J&K 48. The Court observed:

"It is common knowledge that the rights and incident of Shamilat land in occupation of a person are the same as if he is the owner thereof. Had this been State Khalsa land, the position would have been different. The mere fact that Shamilat land was reserved for grazing purposes would not militate against the fact that the petitioner is the owner thereof and that she has remained in possession thereof before the samvat year 2003. Even in extreme cases where the Government grants land on certain conditions and the conditions are not enforced by the Government and the land is afterwards acquired under the Land Acquisition Act, the latter cannot refuse compensation to the possessor of the land. That is what has been observed in AIR 1968 SC 105. Then when compensation cannot be refused to a person in occupation of the land granted by the Government, which in other words means, that the land is State land, how can it be said that in the present case the petitioner is not entitled to compensation for the Shamilat land of which she is in de facto and de jure possession."

Holder of Shamilat land (which is revenue parlance is known as Shamilat dafa 5) has got the same rights in respect of the land as in the proprietary land and if a portion of Shamilat land comes under acquisition, holder thereof is entitled to its compensation in the same manner as in the case of proprietary land. (See: Revenue Manual of Land Laws in Jammu & Kashmir, authored by Justice (Retd.) Hakim Imtiyaz Hussain).

28. At this juncture, this Court would not like to delve deep into the nature of rights conferred upon the villagers qua the Shamilat land by the then Government of Maharaja and, saved by the constitution of Jammu and Kashmir and the Act of 1939. Suffice it to say that the petitioners may not have any right to occupy any land in Shamilat Deh, particularly, if it is impartible shamilat land reserved for common use of the village community, unless, they demonstrate by reference to any documentary evidence their right to own and possess the land in the village concerned proportionate to the Shamilat land under their

possession. Unfortunately, the respondents-revenue authorities have totally misdirected themselves and have issued multiple notices to the petitioners to vacate the unauthorized occupation of the subject land which has not only created confusion, but has deprived the petitioners of their right to put effective representation against the proposed action. One would also find that the Tehsildar Kulgam and the Additional Deputy Commissioner Kulgam are constituting teams of revenue officers, one after another, to effect demarcation of the land of the petitioners which may suggest that even the revenue authorities are not very clear about the status and nature of exact land under occupation of the petitioners.

DECISION & DIRECTIONS:

29. In view of the above, and having regard to the nature of facts and circumstances of this case as also to subserve the interest of justice, this petition is disposed of by providing as under:

- (i). Orders impugned in this petition are quashed;
- (ii) The Deputy Commissioner/Additional Dy. Commissioner Kulgam, who exercises the power of Collector under the Act of 1939 shall initiate fresh proceedings for eviction of the petitioners from the subject land and before coming to any conclusion provide an adequate opportunity to the petitioners to make their representation against the proposed action;
- (iii). The Deputy Commissioner, Kulgam/Addl. Deputy Commissioner, Kulgam, as the case may be, shall, for identification of the subject land, may constitute a team of revenue officers for proper demarcation to be made in the presence of the petitioners. The petitioners shall also be permitted to file objections to the demarcation report if the same goes against them;
- (iv). In case the Deputy Commissioner, Kulgam/Addl. Deputy Commissioner, Kulgam after holding a complete enquiry in compliance with the principles of natural justice determines conclusively that the subject land measuring 8 marlas falling in survey No. 211 situated at Laroo is an unpartitionable/impartible Shamilat Deh reserved for common use of the village community, he will pass appropriate orders for eviction of the petitioners, and,
- (v). If the Deputy Commissioner/Addl. Deputy Commissioner, Kulgam finds that the petitioners have occupied or encroached upon the Zimedari Kohl used by the villagers for irrigation purposes and existing on spot, he shall refer the matter to the authorities under the J&K Irrigation Act to initiate appropriate action for eviction of the petitioners for such kohl.
- (vi). If the Deputy Commissioner/Addl. Deputy Commissioner, Kulgam, as the case may be, comes to the conclusion that the petitioners legitimately hold proprietary land in the Mahal and are in occupation of partible Shamlat land to the extent of their share, the proceedings against the petitioners shall be dropped and they allowed to enjoy their possession.

30. The entire exercise, as directed above, shall be completed by the Deputy Commissioner or the Addl. Deputy Commissioner, Kulgam as the case may be, within a period of two months from the date a copy of this judgment is served upon him. Till an appropriate orders are passed by the Deputy Commissioner/ Addl. Deputy Commissioner, Kulgam, as the case may be, the parties shall maintain status quo with respect to the subject land.