

(2008) 01 GUJ CK 0087

In the Gujarat High Court

Case No : Special Civil Application No. 1007 of 2008

Medical Officer and Another

APPELLANT

Vs

Naranbhai Dharmabhai Prajapati

RESPONDENT

Date of Decision : 25-01-2008

Acts Referred:

Constitution of India, 1950 — Article 136, 226, 227
Industrial Disputes (Gujarat) Rules, 1966 — Rule 26A, 26A(1), 26A(2), 26B
Industrial Disputes Act, 1947 — Section 1(3), 10, 30

Citation : (2008) 1 GLH 328 : (2008) 1 GLR 821

Hon'ble Judges : H.K. Rathod, J

Bench : Single Bench

Advocate : H.S. Munshaw, Petitioners 1-2, for the Appellant; None for Respondent 1, for the Respondent

Final Decision : Dismissed

Judgement

H.K. Rathod, J.—Leave to amend to change the designation of petitioner No. 2 Chief District Health Officer, Gandhinagar District Panchayat, Gandhinagar.

2. Heard learned Advocate Mr. HS Munshaw for the petitioners.

3. Through this petition under Article 227 of the Constitution of India, the petitioners are challenging ex parte award made by the labour Court, Kalol in Reference No. 435 of 1999 dated 29.1.2007 wherein the labour court has granted reinstatement with of the respondent workman on his original post with full back wages and costs of Rs. 1000.00. In the said reference, statement of claim was filed by the respondent on 18.1.2000. Date of termination as mentioned is 7th June, 1989. Date of joining is 1st June, 1988. In reference, the labour court had issued notice to the petitioner vide Exh. 3 which was served on the petitioner but no one had remained present on behalf of the petitioner before the labour court in response to the notice issued by the labour court and, thereafter, no reply was filed by the petitioner before the labour court in the said reference. Thereafter, the labour court had taken on record affidavit of the

workman vide Exh. 11 and there was no cross examination of the workman by the petitioner, therefore, in view of these facts, labour court was having no option but to believe the statement of claim supported by the affidavit of the workman which had remained uncontroverted by the petitioner as not cross examined by the petitioner and therefore, labour court came to the conclusion that the services of the respondent were terminated illegally and, therefore, labour court granted full relief of reinstatement with full back wages for interim period with costs of Rs. 1000.00 to be paid by the petitioner to the respondent workman. Said award is challenged by the petitioner before this Court through this petition.

4. Learned Advocate Mr. HS Munshaw for the petitioner submits that when the dispute was raised, at that time, Primary Health Centre was covered by village Itadara, Mehsana and thereafter, there was bifurcation and in the said bifurcation, it has gone in Gandhinagar District. Accordingly, learned Advocate Mr. Munshaw submitted that during one and two hearing, Medical Officer, Itodara had remained present and produced statement of working days of the workman but it was not considered by the labour court. I have gone through the award made by the labour court which being ex parte, there is no reference to that effect made by the labour court. Normally, court record has to be considered as correct and must have to be believed by the court and if something is incorrect, then, it is the duty of the party who is feeling so to approach the labour court by pointing out the facts with a prayer to record true and correct things in the award but in this case, no such efforts have been made by the petitioner by approaching the labour court mentioning aforesaid facts and produced statement of working days and pay bills for eight months alone. In statement of claim, date of appointment mentioned is June, 1988 and termination June, 1989. Labour court granted 100 per cent back wages as there was nothing on record to disbelieve the statement of claim filed by workman supported by the affidavit of the workman. According to the petitioner, respondent was appointed in the year 1998 and terminated on 7th May, 1999. If the year of engagement of workman 1988 and date of termination 1989 is considered, then, there is a delay of ten years in raising of an industrial dispute and, therefore, such reference is bad as per his submission. It amounts to second termination. As per his submission, award of reinstatement with full back wages is creating heavy financial burden upon the petitioner and the respondent driver is a skilled workman and, therefore, such amount cannot be granted in favour of the respondent workman. He submitted that the latest judgment of the apex court are to the effect that in such circumstances, full back wages cannot be granted and at present, they have a general feeling that if the Miscellaneous application under Rule 26A and 26/B of the Industrial Disputes (Gujarat) Rules, 1966 is filed, no purpose would be served. He also referred to the documents annexed to the petition but they are not forming part and parcel of the record before the labour court and, therefore, such record should not have to be taken into account by this Court. Except these submissions, no other submission has been made by the learned Advocate Mr.

Munshaw before this Court and no decision was cited by him in support of the submissions recorded herein above.

5. I have considered the submissions made by the learned Advocate Mr. HS Munshaw before this Court. It is not in dispute that the notice issued by the labour court was served on the petitioner. If the notice has been served as admitted by the learned Advocate Mr. Munshaw, then, burden is upon the petitioner to remain present before the labour court or to engage advocate and if that has not been done by the petitioner, then, the petitioner has to face consequences thereof and has to thank himself for the same. Court cannot wait for the petitioner and Court will not go in the office of the petitioner to call him to appear in the proceedings. The attitude on the part of the petitioner is that they are not supposed to remain present before the labour court even after service of notice but they should have to be called by the labour court personally and only then, they will appear before the labour court. Since the petitioner is challenging the ex parte award made by the labour court, submissions made by the learned Advocate Mr. Munshaw on merits of the matter cannot be considered by this Court. There is nothing on record in respect of the submissions on merits made by the learned Advocate Mr. Munshaw before this Court. No reply was filed by petitioner. Workman was not cross examined by the petitioner and the statement of claim of the workman supported by affidavit of the workman remained uncontroverted and unchallenged before the labour court. After service of the notice, if the other side is remaining absent and not remaining present, then, the Court is having no option but to pass appropriate orders after considering the material on record and in doing so, the labour court has not committed any error. If the reference is bad as submitted by the learned Advocate Mr. HS Munshaw, then, it is open for the petitioner to challenge the same before the higher forum but no such challenge was made by the petitioner before the higher forum. If the second termination is to be considered, then, petitioner is having right to raise such contention before the labour court. 100% back wages has been granted by the labour court because no defence was raised by the petitioner before the labour court and no evidence whatsoever was produced by the petitioner before the labour court for proving gainful employment of the workman. Latest view as referred to by learned Advocate Mr. HS Munshaw must have to be applied on the basis of the facts and not in air.

6. Further, as per Rule 26/A and 26/B of the Industrial Disputes (Gujarat) Rules, 1966, petitioner is having an alternative equally efficacious remedy before the labour court for setting aside such an ex parte award by filing miscellaneous application and in view of availability of such an alternative equally efficacious remedy under the said Gujarat Rules, 1966, petition against an ex parte award made by the labour court cannot be entertained by this Court and therefore, such petition is not maintainable in view of availability of such an alternative remedy in favour of the petitioner. Relevant provisions of Rule 26A and 26B of the Industrial Disputes (Gujarat) Rules, 1966 are reproduced as under:

26A. Setting aside ex parte Orders, Awards and Reports.- (1) On an application made within thirty days from the date knowing of an ex parte order, award or report by the party concerned, the Board, Court, Labour Court or Tribunal or Arbitrator may, for sufficient cause, set aside, after notice to the opposite party, such order, award or report as the case may be.

(2) The Board, Court, Labour Court or Tribunal or Arbitrator may, on sufficient cause being shown, extend the period referred to in Sub-rule (1).

(3) An application under Sub-rule (1) shall be supported by an affidavit.

26B. Stay of operations of Awards.-The Labour Court, Tribunal or Arbitrator shall have the power to stay the operation of an award, conditionally or otherwise in appropriate cases until the application for setting aside ex parte orders is disposed of finally.

7. Substance of the submissions made by the learned Advocate Mr. HS Munshaw before this Court is that the petitioner, being a public body, may be permitted to by-pass such alternative remedy by entertaining this petition against ex parte award as openly mentioned by the learned Advocate Mr. Munshaw that there is no purpose to file such application before the labour court under the aforesaid Rules because it may not be entertained by labour court in view of delay in filing of such application before the labour court for setting aside the ex parte award, meaning thereby, there is no purpose in enacting law by the legislation giving opportunity to the persons in whose absence such an ex parte award has been made by the labour court. If the contention of the learned Advocate is accepted by entertaining this petition against ex parte award by ignoring Rule 26/A and 26/B of the ID (Gujarat) Rules, 1966, that no purpose will be served in making such application, then, the provisions made under the Rules would become redundant because labour court has power under Rule 26/A and 26/B to set aside ex parte award and to grant stay in such proceedings against ex parte award and also to condone delay as per the said rules and it can condone such delay if it is satisfied that there are sufficient ground for condonation of such delay. Therefore, such submission cannot be accepted and the remedy available as per law cannot be by-passed because even for delay because as per Rule 26A(1), labour court can for sufficient cause, set aside the ex parte award after hearing the other side and as per Rule 26A(2), it can extend the period referred to in Sub-rule (1) and, therefore, in view of such provisions, apprehension voiced by the learned Advocate Mr. Munshaw that there is no meaning in making such application in view of delay is ill founded and same is therefore rejected. If such petitions are entertained, then, this Court will be converted into labour court. While exercising powers under Article 227 of the Constitution of India, this Court cannot consider any additional material as this Court is not examining the merits of the matter or merits of the award in view of the availability of an alternative remedy to the petitioner. It is more so when the labour court has also not made the award on merits but has made it ex parte against petitioner in view of non participation of the petitioner in the proceedings before the labour court. Therefore, whatever

material placed on record by the petitioner before this Court cannot be considered by this Court while exercising powers under Article 227 of the Constitution of India simply on the ground that it is additional material which was not before the labour court. It is not a petition under Article 226 but it is a petition under Article 227 of the Constitution of India because there is no averment made in the petition that any fundamental right of the petitioner has been infringed and there is also no averment in the petition that any legal and statutory right of the petitioner has been violated. In absence of such challenge, petition cannot be entertained under Article 227 of the Constitution of India and in that circumstances, this Court cannot consider any additional material which was not forming part and parcel of the record before the labour court. In view of such circumstances, it is not proper or desirable for this Court to entertain such petition and, therefore, same is liable to be rejected.

8. Law on this subject is very much clear that the ID Act, 1947 and the Rules framed thereunder are complete in itself providing remedy for each and every aspects and in view of that, it cannot be said that the petitioner is having no remedy because as per Rule 26A(1) and (2), petitioner can pray for setting aside ex parte award and also pray for condonation of delay and in the mean time, as per Rule 26B of the said Rules, petitioner can pray for stay of the award and, therefore, considering the provisions of Rule 26A/26B of the ID (Gujarat) Rules, 1966, such direct petition cannot be entertained by this Court, otherwise also, the petition is not maintainable in law because labour court is having power to entertain application against such ex parte award under Rule 26A/26B of the ID (Gujarat) Rules, 1966. As the petitioner is having remedy even in case of delay as per Sub-rule (2) of Rule 26A of the ID (Gujarat) Rules, 1966 and as the petitioner can pray for stay of the award as per Rule 26B of the said Rules, submission of learned Advocate Mr. Munshaw that the remedy is of no use to the petitioner in view of delay is ill founded and cannot be accepted but in view of delay, petitioner has to assign proper cause to the labour court as to why petitioner was prevented from approaching the labour court within thirty days against the ex parte award from the date of receipt of copy of the ex parte award. Therefore, submissions made by the learned Advocate that there is no purpose in making such application cannot be accepted as they are aware about such remedy and yet making such submission before this Court. Therefore, such direct petition cannot be entertained by this Court. Similarly when statutory provisions have been made for appeal against the order of authority, and if there is time limit prescribed for appeal and that limit has been over, then also, such petition is not maintainable. For example, if the party is aggrieved by an order passed by the Commissioner under the Workmen's Compensation Act, statutory appeal is available u/s 30 and time limit is also prescribed but if that time limit has been over, then, person aggrieved by such order cannot file direct petition before this Court because remedy is available under the law. In case of Payment of Wages Act, Minimum Wages Act and other provisions also, when alternative specific remedy has been provided under law, that remedy cannot be by passed

by the party deliberately and purposefully and this Court cannot encourage such practice by a public body and, therefore, considering the aforesaid circumstances, submissions made by the learned Advocate Mr. Munshaw cannot be accepted and according to my opinion, petition cannot be entertained by this Court and, therefore, discretionary power is not exercised by this Court in favour of the petitioner in view of availability of alternative equally efficacious remedy under Rule 26A/26B of the ID (Gujarat) Rules, 1966.

9. In this petition, ex parte award made by the labour Court, Kalol is under challenge, therefore, it is purely a petition under Article 227 of the Constitution of India. Notice issued by the labour court was received by the petitioner and that aspect is not in dispute before this Court. Opportunity was given by the labour court to the petitioner by issuing notice to the petitioner but that opportunity was not availed by the petitioner and, therefore, question of violation of the principles of natural justice does not arise. Labour Court has power to pass ex parte award in case if the petitioner is remaining absent during the pendency of reference proceedings, therefore, there is no jurisdictional error committed by the labour court in passing the award in question. Merits are referred to by the learned Advocate Mr. Munshaw and necessary documents are annexed to the petition which, being a disputed question of fact in light of the statement of claim of the workman before the labour court, cannot be considered by this Court. It is more so when the impugned award made by the labour court is not on merits but it is an ex parte award. Such disputed question of fact cannot be decided by this Court merely on affidavit of respective parties. It requires appreciation of evidence, both oral and documentary to be led before the labour court by the parties and such opportunity given by the labour court was not availed by the petitioner. For delay in filing of an application for setting aside an ex parte award also, oral and documentary evidence would be necessary for justifying and establishing that there was sufficient cause which prevented the petitioner from approaching the labour court immediately for setting aside the ex parte award. Labour Court can condone delay after satisfying itself about sufficient cause irrespective of length of delay and has only to consider sufficient cause for remaining absent by the petitioner. Labour Court has power to grant ex parte stay against the implementation of the ex parte award. It is not the case of the petitioner before this Court that the labour court has committed jurisdictional error in making the award in question and that is also not the submission made by the learned advocate Mr. Munshaw before this Court. It is also not the case of the petitioner that the award has been made without giving opportunity to the petitioner and no fundamental and/or statutory rights are violated by the labour court. Against such an ex parte awards/orders, complete machinery has been provided under the Industrial Disputes (Gujarat) Rules, 1966 empowering the labour court to set aside such award and in the mean time, to stay operation thereof and also to condone delay if sufficient cause is established by the parties. On the next date itself, petitioner can approach the labour court which is at the distance of only half km and file such application and obtain appropriate orders.

Questions raised by the petitioner in this petition are disputed questions of facts and mixed questions of law and facts which cannot be appropriately dealt with and decided by this Court in a petition under Article 227 of the Constitution of India. Such disputed questions of facts and mixed questions of law and facts can be decided by the court only after appreciation of oral and documentary evidence in that regard. Writ of certiorari is neither a writ of cause nor a writ of right but is one which rests at the sole discretion of the court. Question of availability of an alternative efficacious remedy may affect the courts' decision as to whether or not to grant an order of certiorari. Normally, being a general rule, writ of certiorari will not be issued if the alternative remedy is available to the petitioner. This principle has been accepted by the apex court in number of decisions. Remedy which is available to the petitioner is not merely an illusory but effective and statutory. Writ petition cannot be entertained if there is alternative and equally efficacious remedy available to the petitioner more particularly when the remedy which reads almost in mandatory terms. Availability of an alternative remedy ordinarily be exhausted by the parties before invoking the writ jurisdiction. No doubt this is not a rule of law but a rule of practice, policy and convenience. Availability of an alternative remedy is not creating bar against the exercise of writ jurisdiction but the writ court has to consider that if such kind of petitions are entertained by the writ court, then, on each and every occasion of an ex parte award, direct petition will be filed by the parties aggrieved of such an ex parte award without exhausting the remedy provided in law and in such a situation, two fact would be there, one statutory provisions would become redundant and that would unnecessary create burden on the courts exercising writ jurisdiction and at the same time, forums available as per the alternative remedy would be without such work. Therefore, it being a rule of policy and policy, such kind of petition is not entertained by this Court. It is always a matter of discretion for the court which has to be exercised reasonably, judiciously and in the interest of justice. If this petition is entertained by this Court by ignoring availability of the remedy available to the petitioner under Rule 26A/26B of the ID (Gujarat) Rules, 1966, then, the respondent workman will be required to engage advocate for representing himself before this Court and for that, respondent workman will have to incur the additional expenses. After entertaining the petition, ultimately, this Court will not be able to decide merits of the matter in view of the involvement of disputed questions of facts and law in this petition and also in view of the fact that the impugned award has not been made by the labour court on merits. Ultimately, after entertaining the petition on merits also, this Court will have to remand the matter back to the labour court for adjudicating the reference on the basis of oral and documentary evidence that may be led by the parties before it. Now, if this petition is not entertained by this Court and the petitioner is asked to avail the remedy available to petitioner under Rule 26A/26B of the ID (Gujarat) Rules, 1966, then, the workman will not be required to engage any other advocate but will be able to ask the same advocate for appearing in such proceedings. Over and above that, being a local resident of the area of the labour court, the workman will also be able to attend

the labour court as and when required without any further expenses of travelling or for communication. All these aspects have to be considered by the writ court while considering the question as to whether the petition should be entertained or not when alternative remedy is available to the petitioner. In this case, no serious question of law is arising and petition is not challenging validity of any statute but merely petitioner wants to satisfy his ego by not approaching the labour court knowing fully well that alternative remedy is available. Such deliberate attempt on the part of the petitioner cannot be entertained by this Court while exercising the jurisdiction under Article 227 of the Constitution of India. Ex parte award is not in any manner whatsoever unlawful, unjust, arbitrary or high handed because notice was issued by the labour court upon the petitioner and it was also served upon the petitioner as stated earlier but the petitioner could not avail that opportunity. Therefore, now, the petitioner has to plead and prove as to how and why he could not avail the opportunity given by the labour court and what was the cause which prevented him from availing such opportunity given by the labour court. Bare perusal of the whole memo of petition makes it clear that no such submission has been made by the petitioner as to why and for what reason, he could not immediately approach the labour court under Rule 26A/26B for setting aside ex parte award and the petitioner has made submissions and raised contentions in the memo of petition as if it is an award on merits made by the labour court. Documents which are annexed to this petition are not before the labour court and no care has been taken by the petitioner to file reply before the labour court after service of notice by the labour court. In such lethargic approach by the public body, ultimate sufferer is the workman. Rightly or wrongly, if the decision is taken and reference is made to the labour court for adjudication of the dispute, then, petitioner ought to have challenged the order of reference and if it has chosen not to challenge the said decision, then, it ought to have participated in the proceedings before the labour court after service of notice issued by the labour court. Petitioner is answerable to the labour court to submit true and correct facts before the labour court. If the petitioner fails to do so, natural consequence must have to be followed. For that also, labour court has not committed any error in passing such an ex parte award against the petitioner. It is not the case of the petitioner that the labour court has acted without jurisdiction or that the labour court has acted in breach of the principles of natural justice. In *Basant Kumar Sarkar and Others Vs. Eagle Rolling Mills Ltd. and Others*, it was held by the apex court that as the remedy is available under the Industrial Disputes Act, matter cannot be considered under Article 226. Relevant observations made by the apex court in para 7 of the said decision are reproduced as under:

7. Before we part with these appeals, there is one more point to which reference must be made. We have already mentioned that after the notification was issued u/s 1(3) by respondent No. 3 appointing August 28, 1960 as the date on which some of the provisions of the Act should come into force in certain areas of the State of Bihar, the Chief Executive Officer of respondent No. 1 issued notices

giving effect to the State Government's notification and intimating to the appellants that by reason of the said notification, the medical benefits which were being given to them in the past would be received by them under the relevant provisions of the Act. It was urged by the appellants before the High Court that these notices were invalid and should be struck down. The argument which was urged in support of this contention was that respondents No. 1 in all the three appeals were not entitled to curtail the benefits provided to the appellants by them and that the said benefits were not similar either qualitatively or quantitatively to the benefits under the Scheme which had been brought into force under the Act. The High Court has held that the question as to whether the notices and circulars issued by respondents No. 1 were invalid, could not be considered under Article 226 of the Constitution; that is a matter which can be appropriately raised in the form of a dispute by the appellants u/s 10 of the Industrial Disputes Act. It is true that the powers conferred on the High Courts under Article 226 are very wide, but it is not suggested by Mr. Chatterjee that even these powers can take in within their sweep industrial disputes of the kind which this contention seeks to raise. Therefore, without expressing any opinion on the merits of the contention, we would confirm the finding of the High Court that the proper remedy which is available to the appellants to ventilate their grievances in respect of the said notices and circulars is to take recourse to Section 10 of the Industrial Disputes Act, or seek relief, if possible under Sections 74 and 75 of the Act.

10. In *Thansingh Nathmal and Others Vs. A. Mazid, Superintendent of Taxes*, , the apex court observed as under in para 7 of the decision:

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 extra-ordinary jurisdiction of the High Court under Article 226 and sought to re-open the decision of the taxing authorities on question 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 Articles. 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 bypassed, and will leave the party applying to it to seek resort to the machinery so set up.

11. It is necessary to be noted that the dispute was referred to for adjudication on 18.10.1999 and the matter remained pending before the Labour Court, Kalol for about more than seven years. The office of the petitioner is near to Kalol Labour Court. However, petitioner has not taken care about seven years and not inquired from the labour Court, Kalol as to what has happened with the reference though notice issued by the labour court was already received by the petitioner. Such careless and lethargic approach on the part of the petitioner cannot be entertained by this Court, more so, when alternative equally efficacious remedy is available to the petitioner under Rule 26A/26B of the ID (Gujarat) Rules, 1966. The petitioner remained absent for a period of about seven years. No steps were taken by the petitioner for a period in between. If the dispute was raised by the petitioner belatedly as alleged by the petitioner in this petition, then, why order of reference itself was not challenged immediately by the petitioner. The approach, attitude and conduct of the petitioner appears to be that of delaying the adjudication of the reference under the one or the other pretext because if the approach of the petitioner would have been bona fide, then, after service of notice, petitioner would have appeared and would have participated in the proceedings but that was not done but petitioner not appeared and after that resulted in ex parte award by the labour court in January, 2007, the petitioner moved this petition before this Court in January 2008 though he was aware about the alternative remedy available to the petitioner against such an ex parte award and therefore, it appears that the petitioner is having intention to delay adjudication of reference under the one or the other pretext. Though alternative remedy is available to the petitioner, petitioner has directly approached this Court as if it depends upon the choice of the petitioner to decide the forum by giving good bye to the alternative remedy available to him as per law. The negligence on the part of the petitioner is not simple but culpable and petitioner intentionally ignored the proceedings pending before the labour court, Kalol for a period of about seven years. The attitude is also that the labour court has committed error in passing ex parte award but they do not understand their error of not remaining present before the labour court after service of notice from the labour court for a period of seven years. The petitioner is not worried about workman's claim and legal right of the workman under the ID Act, 1947. Therefore, such an approach on the part of the petitioner cannot be entertained.

12. In Sanjay Sitaram Khemka Vs. State of Maharashtra and Others, the apex

court observed as under in para 10:

10. A Writ Petition, as has rightly been pointed out by the High Court, for grant of the said reliefs, was not the remedy. A matter involving a great deal of disputed questions of fact cannot be dealt with by the High Court in exercise of its power of judicial review. As the High Court or this Court cannot, in view of the nature of the controversy as also the disputed questions of fact, go into the merit of the matter; evidently no relief can be granted to the Petitioner at this stage. We are, therefore, of the opinion that the impugned judgment of the High Court does not contain any factual or legal error warranting interference by this Court in exercise of its jurisdiction under Article 136 of the Constitution.

13. In *Reliance Airport Developers Pvt. Ltd. Vs. Airports Authority of India and Others*, , the apex court has observed as under:

Discretion, Judicial is a certain latitude or liberty accorded by statute or rules to a judge as distinguished from a ministerial or administrative official, in adjudicating on matters brought before him, The use of the word judicial limits and regulates the exercise of the discretion, and prevents it from being wholly absolute, capricious, or exempt from review. But the presence of the word discretion permits the judge to consider as a judge, what are vaguely termed, all the circumstances of the case and the purpose for which he is invested with the considerations of convenience or utility or saving of expense rather than on considerations of strict law or technicalities. Such discretion is usually given on matters of procedure or punishment, or costs of administration rather than with reference to vested substantive rights. The matters which should regulate the exercise of discretion have been stated by eminent judges in somewhat different forms of words but with substantial identity. When a statute gives a judge a discretion, what is meant is a judicial discretion, regulated according to the known rules of law, and not the mere whim or caprice of the person to whom it is given on the assumption that he is discreet *Lee v. Bude Railway Co.* (1871) LR 6 CP 576, Willes, J.; and see *Morgan v. Morgan* 1869 LR 1 P & M 644, That discretion, like other judicial discretions, must be exercised according to common sense and according to justice, and if there is a miscarriage in the exercise of it, it will be reviewed; but still it is a discretion, and for my own part I think that when a tribunal is invested by Act of Parliament, or by rules, with a discretion, without any indication in the Act or rules of the grounds on which the discretion is to be exercised, it is a mistake to lay down any rules with a view of indicating the particular grooves on which the discretion would run, for if the Act or rules did not fetter the discretion of the judge, why should the Court do so *Gardner v. Jay* (1885) 29 Ch D 50 , per Bowen, L.J. (See also 5 Cal 259)

Discretion of Court. Ability to discern by the right line of law, and not by the crooked cord of private opinion, which the vulgar call discretion; freedom to act according to the judgment of the Court, or according to the rules of equity, and the nature of circumstances; judicial discretion regulated according to known rules of law; legal discretion, and not personal discretion sound discretion guided

by fixed legal principles.

14. In *Star Paper Mills Ltd. v. State of UP and Ors.* 2006 AIR SCW 5782 the apex court observed as under in para 5, 6, 7, 8, 9, 10, 11, 12, 13 and 14:

5. The issues relating to entertaining writ petitions when alternative remedy is available, were examined by this Court in several cases and recently in *State of Himachal Pradesh and Ors. v. Gujarat Ambuja Cement Ltd.* and Anr. 2005 (6) SCC 499.

6. Except for a period when Article 226 was amended by the Constitution (42nd Amendment) Act, 1976, the power relating to alternative remedy has been considered to be a rule of self imposed limitation. It is essentially a rule of policy, convenience and discretion and never a rule of law. Despite the existence of an alternative remedy it is within the jurisdiction of discretion of the High Court to grant relief under Article 226 of the Constitution. At the same time, it cannot be lost sight of that though the matter relating to an alternative remedy has nothing to do with the jurisdiction of the case, normally the High Court should not interfere if there is an adequate efficacious alternative remedy. If somebody approaches the High Court without availing the alternative remedy provided the High Court should ensure that he has made out a strong case or that there exist good grounds to invoke the extra-ordinary jurisdiction.

7. Constitution Benches of this Court in *K.S. Rashid and Son Vs. The Income Tax Investigation Commission etc.*, *Sangram Singh Vs. Election Tribunal, Kotah, Bhurey Lal Baya*, ; *Union of India (UOI) Vs. T.R. Varma*, *State of U.P. and Ors. v. Mohammad Nooh* AIR 1958 SC 86 ; and *K.S. Venkataraman and Co. Vs. State of Madras*, , held that Article 226 of the Constitution confers on all the High Courts a very wide power in the matter of issuing writs. However, the remedy of writ is an absolutely discretionary remedy and the High Court has always the discretion to refuse to grant any writ if it is satisfied that the aggrieved party can have an adequate or suitable relief elsewhere. 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.

8. Another Constitution Bench of this Court in *State of Madhya Pradesh Vs. Bhailal Bhai and Others*, held that the remedy provided in a writ jurisdiction is not intended to supersede completely the modes of obtaining relief by an action in a civil court or to deny defence legitimately open in such actions. The power to give relief under Article 226 of the Constitution is a discretionary power. Similar view has been re-iterated in *N.T. Veluswami Thevar Vs. G. Raja Nainar and Others*, *Municipal Council, Khurai and Another Vs. Kamal Kumar and Another*, ; *Siliguri Municipality and Others Vs. Amalendu Das and Others*, ; *S.T. Muthusami Vs. K. Natarajan and Others*, *Rajasthan State Road Transport Corporation and Another Vs. Krishna Kant and Others*, ; *Kerala State Electricity Board and Another Vs. Kurien E. Kalathil and Others*, ; *A. Venkatasubbiah Naidu Vs. S.*

Challappan and Others, ; and L.L. Sudhakar Reddy and Others Vs. State of A.P. and Others, ; Shri Sant Sadguru Janardan Swami (Moingirid Maharaj) Sahakari Dugdha Utpadak Sanstha and Another Vs. State of Maharashtra and Others, ; Pratap Singh Vs. State of Haryana and Others and Shri Bhajan Lal and Others, and G.K.N. Driveshafts (India) Ltd. v. Income Tax Officer and Ors. 2003 (1) SCC 72.

9. In Harbanslal Sahnia and Another Vs. Indian Oil Corpn. Ltd. and Others, , this Court held that the rule of exclusion of writ jurisdiction by availability of alternative remedy is a rule of discretion and not one of compulsion and the Court must consider the pros and cons of the case and then may interfere if it comes to the conclusion that the petitioner seeks enforcement of any of the fundamental rights; where there is failure of principles of natural justice or where the orders or proceedings are wholly without jurisdiction or the vires of an Act is challenged.

10. In Veerappa Pillai Vs. Raman and Raman Ltd. and Others, ; Assistant Collector of Central Excise, Chandan Nagar, West Bengal Vs. Dunlop India Ltd. and Others, ; Shri Ramendra Kishore Biswas Vs. The State of Tripura and Others, ; Shivgonda Anna Patil and Others Vs. State of Maharashtra and Others, C.A. Abraham, Uppoottil, Kottayam Vs. The Income Tax Officer, Kottayam and Another, ; Titaghur Paper Mills Co. Ltd. and Another Vs. State of Orissa and Others, ; H.B. Gandhi v. Gopinath and Sons 1992 (Suppl.) 2 SCC 312 ; Whirlpool Corporation Vs. Registrar of Trade Marks, Mumbai and Others, ; Tin Plate Co. of India Ltd. Vs. State of Bihar and Others, ; Sheela Devi Vs. Jaspal Singh, and Punjab National Bank Vs. O.C. Krishnan and Others, , this Court held that where hierarchy of appeals is provided by the statute, party must exhaust the statutory remedies before resorting to writ jurisdiction.

11. If, as was noted in Ram and Shyam Company Vs. State of Haryana and Others, the appeal is from "Caesar to Caesar's wife" the existence of alternative remedy would be a mirage and an exercise in futility. There are two well recognized exceptions to the doctrine of exhaustion of statutory remedies. First is when the proceedings are taken before the forum under a provision of law which is ultra vires, it is open to a party aggrieved thereby to move the High Court for quashing the proceedings on the ground that they are incompetent without a party being obliged to wait until those proceedings run their full course. Secondly, the doctrine has no application when the impugned order has been made in violation of the principles of natural justice. We may add that where the proceedings itself are an abuse of process of law the High Court in an appropriate case can entertain a writ petition.

12. The above position was recently highlighted in U.P. State Spinning Co. Ltd. Vs. R.S. Pandey and Another,

13. This is not a case where no factual adjudication is necessary.

14. Therefore, the High Court was justified in view that the statutory remedy is

to be availed. Let the appellant file the necessary details as required under the Niyamavali within three weeks from today and place its stand before the concerned authority for consideration. The said authority shall consider the stand of the appellant and dispose of the same as expeditiously as practicable preferably within six weeks from the date when the necessary details and/or objections are filed before the authority.

15. In *Laxmikant Revchand Bhojwani and Another Vs. Pratapsing Mohansingh Pardeshi Deceased through his Heirs and Legal Representatives*, the apex court observed as under in para 9 of the judgment:

9...The High Court was not justified in extending its jurisdiction under Article 227 of the Constitution of India in the present case. The Act is a special legislation governing landlord tenant relationship and disputes. The legislature has, in its wisdom, not provided second appeal or revision to the High Court. The object is to give finality to the decision of the appellate authority. The High Court under Article 227 cannot assume unlimited prerogative to correct all species of hardship or wrong decisions. It must be restricted to cases of grave dereliction of duty and flagrant abuse of fundamental principles of law or justice, where grave injustice would be done unless the High Court interferes.

16. In *New Okhla Industrial Development Authority Vs. Kendriya Karamchari Sahkari Grih Nirman Samiti*, the apex court observed as under in para 12 and 13:

12. A High Court is not deprived of its jurisdiction to entertain a petition merely because in considering petitioner's right to relief question of fact may fall to be determined as pointed out in *Smt. Gunwant Kaur and Others Vs. Municipal Committee, Bhatinda and Others*, . In a petition under Article 226, the High Court has jurisdiction to try issues of law and fact. Where, however, the petition raises complex question of fact, the Court should not entertain the petition. In *Moti Das Vs. S.P. Sahi, The Special Officer In Charge of Hindu Religious Trusts and Others*, the High Court refused to go into the question as to whether Trusts were public or private trusts as the question had involved investigation of complicated facts and recording of evidence. The view was upheld. Thus, if there is a question on which there is a serious dispute which cannot be satisfactorily decided without taking evidence, it should not be decided in a writ proceeding. See *Union of India (UOI) Vs. T.R. Varma*, If disputed questions of fact arise and the High Court is of the view that those may not be appropriately tried in a writ petition, the High Court has jurisdiction to refuse to try those questions and relegate the party to his normal remedy to obtain redress in a suit.

13. In a petition under Article 226, the High Court has jurisdiction to try issues both of fact and law. When the petition raises complex questions of fact which may, for their determination, require oral evidence to be taken and on that account the High Court is of the view that the disputed statement may not be appropriately tried in a writ petition, the High Court should ordinarily decline to try the petition.

17. Therefore, in view of the above discussion, as the petitioner is challenging the award which is ex parte and against which, petitioner is having effective alternative remedy under Rule 26A/26B of the ID (Gujarat) Rules, 1966 and also in view of the law laid down by the apex court as referred to above, there is no substance in this petition and the same is therefore, dismissed by this Court without expressing any opinion on merits of the matter.