

**(2009) 07 MAD CK 0031**

**In the Madras High Court**

**Case No :** Writ Petition (MAD.) No. 6090 of 2009 and M.P. (MAD.) No. 1 of 2009

N. Narayanan

APPELLANT

Vs

Securities and Exchange Board of India

RESPONDENT

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**Date of Decision :** 24-07-2009

**Acts Referred:**

Constitution of India, 1950 — Article 226  
Securities and Exchange Board of India (Substantial Acquisition of Shares and  
Takeovers) Regulations, 1997 — Regulation 42, 46  
Securities and Exchange Board of India Act, 1992 — Section 15(2)

**Citation :** (2009) 8 MLJ 960 : (2009) 94 SCL 206

**Hon'ble Judges :** R.S. Ramanathan, J

**Bench :** Single Bench

**Advocate :** AR.L. Sundaresan, for the Appellant; P.S. Raman, T.K. Baskaran, K.  
Govindarajan and Devaraj Ashok, for the Respondent

**Final Decision :** Dismissed

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## **Judgement**

R.S. Ramanathan, J.—The above writ petition came up for admission on 14-7-2009 and on being satisfied prima facie about the merits of

the case, this Court admitted the writ petition and passed an order of interim injunction.

2. At the instance of the learned Senior Counsel, Mr. P.S. Raman appearing for the 2nd respondent, the matter was listed on 21-7-2009 and the

learned Senior Counsel submitted that the petitioner without disclosing that there is a statutory appeal available against the order of the 1st

respondent under the Securities and Exchange Board of India Act, 1992 and as per 46 of the Regulation, an appeal lies to the Securities Appellate

Tribunal, which is presided over by a retired Judge of the High Court and hence, the writ petition should not have been entertained.

3. The learned Senior Counsel appearing for the 2nd respondent further submitted that he does not want to argue the case on merits as he has not filed any counter affidavit to vacate the stay granted by this Court and by virtue of the order of interim injunction granted by this Court, thousands of investors were affected and the 2nd respondent is not able to proceed with the acquisition of shares as per the public announcement and therefore, he confines his contention only to the availability of the statutory remedy, which is efficacious and hence, prayed for dismissing the writ petition.

4. Mr. AR. L. Sundaresan, the learned Senior Counsel, appearing for the petitioner, raised two preliminary objections that the writ has been admitted and rule nisi has been ordered and the Court on being satisfied prima facie, passed an order of injunction and hence, without calling for the records from the 1st respondent and without disclosing their defence, the 2nd respondent is not at all entitled to raise the plea of maintainability in the writ petition on the ground of availability of alternative remedy.

5. The learned Senior Counsel appearing for the petitioner further submitted that the 2nd respondent has not filed the vakalat and hence, the 2nd respondent should not be heard. He further contended that the writ petition is against the order of the 1st respondent and the 1st respondent has not filed any counter-affidavit and the other respondents have not come forward to vacate the injunction order and in such circumstances, in the absence of proper authorisation given by the 2nd respondent, the argument of the learned Senior Counsel should not be entertained.

6. Mr. P.S. Raman, the learned Senior Counsel appearing for the 2nd respondent, in reply submitted that the 2nd respondent has in fact sent the vakalat, but as the 2nd respondent is in Japan, the vakalat could not be attested in accordance with law and therefore, the same could not be filed in Court. He further submitted that even in the absence of vakalat, advocates on instruction are entitled to appear before this Court and after informing the Court that the advocates have undertaken to file vakalat, the Court can hear the matter and in this case, Mr. T.K. Baskaran and Mr.

K. Govindarajan have undertaken to file vakalat on behalf of the 2nd respondent and hence, there is no legal bar to hear the 2nd respondent.

7. As regards, the contention of the learned Senior Counsel Mr. AR. L.

Sundaresan, appearing for the petitioner that after the rule nisi has been issued and without calling for records, the Court should not proceed further, Mr. P.S. Raman, learned Senior Counsel appearing for the 2nd respondent submitted that he has only brought to the notice of the Court about the availability of alternative remedy, which is efficacious and statutorily provided and only on that ground, the writ petition is not maintainable and therefore, irrespective of the issuance of rule nisi, the Court can entertain the plea of the 2nd respondent.

8. Though, this Court admitted the writ petition and issued the rule nisi and also granted injunction, having regard to the nature of the plea that has been made by the learned Senior Counsel Mr. P.S. Raman appearing for the 2nd respondent about the maintainability of the writ petition itself, this Court can go into their aspects and heard the parties about the maintainability of the writ petition on the ground of availability of alternative remedies.

9. I am also fortified by the judgment of the Hon"ble Supreme Court in the case of State of Uttar Pradesh v. Uttar Pradesh Rajaya Khanki Vikas Nigam Sangharsh Samiti [2008] 12 SCC 675 wherein it has been held in para 38 that:

True it is that issuance of rule nisi or passing of interim orders is a relevant consideration for not dismissing a petition if it appears to the High Court that the matter could be decided by a writ court. It has been so held even by this Court in several cases that even if alternative remedy is available, it cannot be held that a writ petition is not maintainable. In our judgment, however, it cannot be laid down as a proposition of law that once a petition is admitted, it could never be dismissed on the ground of alternative remedy. If such bald contention is upheld even this Court cannot order dismissal of a writ petition which ought not to have been entertained by the High Court under Article 226 of the Constitution in view of availability of alternative and equally efficacious remedy to the aggrieved party, once the High Court has entertained a writ petition albeit wrongly and granted the relief to the petitioner.

Therefore, in my opinion, even after the writ petition was admitted and rule nisi was ordered, this Court can entertain the plea whether the writ is maintainable on the ground of availability of alternative remedy.

10. Mr. AR. L. Sundaresan, the learned Senior Counsel appearing for the petitioner, submitted that even though under the Regulation 46, appeal is

provided to the Securities Appellate Tribunal, the writ petition is maintainable as the order was passed violating the principles of natural justice. The

learned Senior Counsel appearing for the petitioner with his rich experience, has brought to my notice the following judgments of the Hon"ble

Supreme Court and this Court to that effect that even in the presence of any statutory appeal available to the parties, the High Court can entertain

the writ petition and the availability of alternative remedy is not a bar.

1. Whirlpool Corporation Vs. Registrar of Trade Marks, Mumbai and Others, ;

2. Dhampur Sugar Mills Ltd. v. State of U.P. AIR 2007 SCW 6072;

3. STATE OF TRIPURA v. MANORANJAN CHAKRABORTY AND OTHERS, (2001) 10 SCC 740 ;

4. State of H.P. v. Gujarat Ambuja Cements Ltd. 2005 (6) SCC 499;

5. Swedish Match AB and Another Vs. Securities and Exchange Board, India and Another, ;

6. Titaghur Paper Mills Co. Ltd. and Another Vs. State of Orissa and Others, ;

7. L.K. Verma Vs. H.M.T. Ltd. and Another, ;

8. Uttar Pradesh Rajya Khanki Vikas Nigam Sangharsh Samiti's case (supra);

9. M.P. State Agro Industries Development Corporation Ltd. and Another Vs. Jahan Khan, ;

10. Chemplast Sankar Ltd. v. Appellate Authority 2008 (4) CTC 793;

11. Morgan Stanley Mutual Fund v. Kartik Dos [1994] 1 SCL 19 (SC).

11. According to the learned Senior Counsel, the availability of the alternative remedy is only a rule of discretion and not one of compulsion and in

proper cases, even in the case of availability of alternative remedy, the High Court can still exercise its writ jurisdiction in atleast three

contingencies.

(i) where the writ petition seeks enforcement of any of the fundamental rights;

(ii) where there is failure of principles of natural justice; or

(iii) where the orders or proceedings are wholly without jurisdiction or the vires of an Act.

12. A perusal of those judgments, no doubt would make it clear that the

availability of alternative remedy is not a bar for invoking the writ

jurisdiction of this Court and in proper cases, the High Court can entertain the writ petition if there is violation of three principles as stated above.

13. According to the learned Senior Counsel appearing for the petitioner, Mr. AR. L. Sundaresan, in this case there is violation of principles of

natural justice and therefore, the writ petition is maintainable.

14. The learned Senior Counsel further elaborated his argument and brought to the notice of this Court, how there is violation of principles of

natural justice in passing the impugned order. According to the learned Senior Counsel, Mr. AR. L. Sundaresan, appearing for the petitioner,

without giving opportunity to the petitioner to submit his argument, order was passed by the 6th respondent and the matter was heard by the 7th

respondent and an order was passed by the 6th respondent without considering the objection of the petitioner.

15. Before going into the contention of the learned Senior Counsel appearing for the petitioner, that there was violation of principles of natural

justice, I would like to state the ingredients of principles of natural justice and whether there were violated in this case.

16. There are two essential elements, which constitute the principles of natural justice. One is ""No Man shall be Judge in his own case"" and the

second is ""Audi Alteram Partem"" which means no one should be condemned unheard.

17. In the case of Union of India and Another Vs. Tulsiram Patel and Others, it has been held that by process of judicial interpretation two rules

have been evolved as representing the principles of natural justice in judicial process, including therein quasi-judicial and administrative process and

they are no man shall be judge in his own case and hear the other side viz., ""Audi Alteram Partem"". It can be further expanded to include that the

party to the action is entitled to be heard in his presence, he is entitled to know about the opponent case and be permitted to submit his own reply

to his opponent case and lastly, he is entitled to know the reasons of the decision rendered by the authority.

18. Therefore, in the light of the above principles, the submissions of the learned Senior Counsel, Mr. AR.L. Sundaresan, appearing for the

petitioner can be considered whether there is violation of principles of natural

justice in this case so that the writ petition is maintainable on that ground even though there is an alternative remedy.

19. The learned Senior Counsel, Mr. AR.L. Sundaresan, appearing for the petitioner, further submitted that on 5-3-2009 he complained to the 1st respondent about the faulty price open offer made by the 2nd respondent followed by another representation dated 25-4-2009 wherein he has narrated how the price is fixed by the 1st respondent is not proper and the 1st respondent ought to have fixed the price at Rs. 160 per share.

20. The petitioner has also submitted a letter dated 7-5-2009 to the 1st respondent. According to the learned Senior Counsel for the petitioner that he made his submissions before Mr. Sharma and the 6th respondent, who passed the impugned order did not hear him and without hearing him, the 6th respondent has passed the order. Therefore, there is violation of natural justice.

21. It is seen from the various correspondence sent by the petitioner that he informed the 1st respondent that he would attend the personal hearing with his lawyers and on 4-5-2009 his submissions were heard by Mr. Santhosh Kumar Sharma and he was permitted to make his submission in the presence of his lawyers. Further, it is admitted by the petitioner in his letter dated 7-5-2009 that the petitioner was also informed about the response to the complaint of the petitioner made by the ICICI Securities Limited and Mr. Sharma informed the petitioner that the 1st respondent had examined the various issues highlighted in the complaint and also the response of the ICICI Securities Limited, who are managers to the captioned offer. The 1st respondent further permitted the petitioner to make further submissions, if required. Thereafter, the petitioner by his letter dated 7-5-2009 submitted the additional submissions in support of the complaint. Thereafter, the 1st respondent considered all those submissions made by the complainant and passed the impugned order. In the impugned order, the 1st respondent has considered the various points raised by the petitioner and came to the conclusion that in their opinion, no prima facie case is made out by the petitioner to intervene in the matter.

22. At this juncture, I want to make it clear that I am not passing any order on merits and I have referred to the impugned order only for the limited purpose of pointing out that the contentions of the petitioner were considered by

the 1st respondent. Therefore, from the admission of the petitioner, in his letter dated 7-5-2009, it is made clear that he was given opportunity to submit his case and the opponent objection was also given to him and the petitioner was permitted to submit his explanation to the opponent's objection and thereafter, the impugned order was passed. Therefore, the main principles of natural justice, which are stated above have been complied with by the authority in letter and spirit viz., the 1st respondent and therefore, the petitioner cannot complain in this case, that there is violation of principle of natural justice.

23. Mr. P.S. Raman, the learned Senior Counsel appearing for the 2nd respondent would submit that once the authority has given ample opportunity to the petitioner and passed orders by giving reasons, it cannot be stated that the pleas of the petitioner were not properly appreciated by the authority and hence, there is violation of principles of natural justice.

24. According to him, once the authority has taken into consideration the pleas of the parties and passed orders, which may not be legally correct that would not lead to the presumption that there is violation of principles of natural justice.

25. Therefore, having regard to the facts as disclosed in the typed set of papers, I am of the view that the petitioner was given sufficient opportunity to represent his case and the impugned order was passed after considering the submissions made by the petitioner. Hence, the argument of the learned Senior Counsel, Mr. AR.L. Sundaresan for the petitioner that the principles of natural justice was violated in this case and therefore, the writ petition is maintainable cannot be accepted.

26. The learned Senior Counsel, Mr. P.S. Raman, appearing for the 2nd respondent, relied upon the judgment of the Hon"ble Supreme Court in Union of India (UOI) Vs. T.R. Varma, wherein, it has been held ""It is well settled that when an alternative and equally efficacious remedy is open to a litigant, he should be required to pursue that remedy and not invoke the special jurisdiction of the High Court to issue a prerogative writ. It is true that the existence of another remedy does not affect the jurisdiction of the Court to issue a writ. But the existence of an adequate legal remedy is a thing to be taken into consideration in the matter of granting writs. And where such remedy exists, it will be a sound exercise of discretion to

refuse to interfere in a petition under Article 226, unless there are good grounds therefor.

27. He further relied upon the judgment of the Hon<sup>ble</sup> Supreme Court in the case of Titaghur Paper Mills Co. Ltd.'s case (supra) wherein it has also been held

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 statute. But there is a third class, viz. where a liability not

existing at common law is created by a statute which at the same time gives a special and particular remedy for enforcing it, the remedy provided

by the statute must be followed, and it is not competent to the party to pursue the course applicable to cases of the second class. The form given

by the statute must be adopted and adhered to.

The rule laid down in this passage was approved by the House of Lords in *Neville v. London Express Newspapers Ltd.* 1919 All ER Rep 61 :

1919 AC 368 and has been reaffirmed by the Privy Council in *Attorney-General of Trinidad & Tobago v. Gordon Grant & Co. Ltd.* 1935 AC

532 and AIR 1940 105 (Privy Council) . It has also been held to be equally applicable to the enforcement of rights, and has been followed by this

Court throughout. The High Court was, therefore, justified in dismissing the writ petition in limine.

28. On the basis of the above judgments, the learned Senior Counsel Mr. P.S. Raman, appearing for the 2nd respondent submitted that in this

case, the statute provides for an appeal remedy and the purpose of providing appeal remedy is that the order of the 1st respondent is having wide

implication and large number of investors, who are aggrieved by the order of the 1st respondent can question the order and if they were permitted

to approach different High Courts on the basis of their domicile, then there will be writs in various High Courts, which will lead to multiplicity of

proceedings and conflict of judgments and only with a view to avoid such contingencies, appeal under Regulation 46, is provided to the Securities

Appellate Tribunal, which is also presided over a retired judgment of the High Court.

29. The learned Senior Counsel would further submit that as per the Section 15(2) of the Securities and Exchange Board of India Act, 1992,

further appeal is provided only to the Hon"ble Supreme Court against any decision rendered by the Securities Appellate Tribunal and therefore,

when the statute provides appeal remedy and further appeal to Hon"ble Supreme Court, it is not open to the petitioner to ignore those appeal

remedy and seek remedy on the ground that the appeal remedy provided under the Act is not efficacious or effective alternating remedy.

30. The learned Senior Counsel further submitted that the petitioner was not fair to the Court and in the affidavit, he has not stated that there is an

appeal remedy available under Regulation 46 and despite that he is invoking the jurisdiction of this High Court as there was violation of principles

of natural justice. The petitioner has only stated in the affidavit that the petitioner is left with no other alternative or effective remedy and hence,

approached this Court.

31. It is a fact that the petitioner has not stated in the affidavit about the availability of appeal remedy. It is also a fact that this Court was not

informed about the Regulation 46, by which, the appeal is provided against the order of the 1st respondent. I must also admit that I also did not go

through the regulation to find out whether any appeal remedy is available and I proceed on the basis that against the order of the 1st respondent no

appeal remedy is available and entertained writ. Had it been brought to my notice about the availability of alternative remedy, I would not have

entertained the writ petition.

32. In this context, the following observations of the Supreme Court made in the case of U.P. State Spinning Co. Ltd. Vs. R.S. Pandey and

Another, is relevant.

16. 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. In the instance case the writ petitioners had indicated the reasons as to why they

thought that the alternative remedy would not be efficacious. Though the High Court did not go into that plea relating to bias in detail, yet it felt that

alternative remedy would not be a bar to entertain the writ petition. Since the High Court has elaborately dealt with the question as to why the statutory remedy available was not efficacious, it would not be proper for this Court to consider the question again. When the High Court had entertained a writ petition notwithstanding existence of an alternative remedy this Court while dealing with the matter in an appeal should not permit the question to be raised unless the High Court's reasoning for entertaining the writ petition is found to be palpably unsound and irrational. Similar view was expressed by this Court in *First Income Tax Officer, Salem Vs. Short Brothers (P) Ltd.*, and *State of U.P. and Others Vs. Indian Hume Pipe Co. Ltd.*, . That being the position, we do not consider the High Court's judgment to be vulnerable on the ground that alternative remedy was not availed. There are two well-recognised 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 themselves are an abuse of process of law the High Court in an appropriate case can entertain a writ petition.

17. 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 Vs. Income Tax Officer, Bareilly*, 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.

33. Further in the aforesaid judgment, it was further held in

18. At this juncture, it would be appropriate to take note of the few expressions in *R. v. Hillington*, London Borough Counsel 1974 (1) QB 720

which seems to bring out the position well. Lord Widgery, C.J., stated in this case (All ER pp. 648f-649b).

It has always been a principle that certiorari will go only where there is no other equally effective and convenient remedy.

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The statutory system of appeals is more effective and more convenient than application for certiorari and the principal reason when it may prove

itself more convenient and more effective is that an appeal to (say) the Secretary of State can be disposed of at one hearing whether the issue

between them is a matter of law or fact or policy or opinion or a combination of some or all of these... whereas of course an appeal for certiorari is

limited to cases where the issue is a matter of law and then only it is a matter of law appearing on the face of the order.

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An application for certiorari has however this advantage that it is speedier and cheaper than the other methods and in a proper case therefore it

may well be right to allow it to be used... I would, however, define a proper case as being one where the decision in question is liable to be upset

as a matter of law because on its face it is clearly made without jurisdiction or in consequence of an error of law.

Finally it has been stated in ""20. In a catena of decisions, it has been held that writ petition under Article 226 of the Constitution should not be

entertained when the statutory remedy is available under the Act, unless exceptional circumstances are made out.

34. As stated supra, when the writ petition was entertained it was neither pleaded in the writ petition nor brought to my notice that appeal remedy

is available and despite the same the petitioner has approached this Court stating that the 1st respondent without giving any opportunity or hearing

the plea of the petitioner, passed an order.

35. The learned Senior Counsel, Mr. P.S. Raman, appearing for the 2nd respondent also brought to my notice the judgment of this Court rendered

in W.P. (MD) No. 1954 of 2009 in respect of the same matter wherein one R. Guruswamy filed the writ of Mandamus directing the 1st

respondent to take action on the complaint of the petitioner therein, by which he questioned the price fixation of the share by the 1st respondent at

Rs. 113.62 and in that writ petition after hearing the parties, this Court has held that having regard to the appellate remedy, the writ petition is not

maintainable and it has been held in the above judgment as follows :

9. The prayer in the writ petition is to take action on the complaint preferred by the petitioner dated 21-1-2009. The stand taken by the learned

Counsel for respondents 1 and 2 is that investigation has been done and a finding has also been given. But the same has not been communicated to

the petitioner. Though the learned Senior Counsel for the petitioner relied on Regulation 42 of SEBI Regulations, 1997 to contend that the result of

the investigation has to be communicated to the person concerned, but, as rightly contended by the learned Senior Counsel, Regulation 42 only

contemplated that the result of the investigation has to be communicated to the acquirer or seller or target company or merchant bankers, as the

case may be. As far as the petitioner is concerned, as on date, his status is only as a shareholder of the 3rd respondent company and he cannot be

termed as a acquirer or a seller or a target company or as a merchant banker. Yet another factor to be noted, as rightly submitted by the learned

Senior Counsel for R5 and the counsel for R1 and R2, is that certain companies have millions of shareholders. It would be practically impossible to

go into each and every complaint made by the shareholders and conduct investigation unless a prima facie case is made out. Even if a prima facie

case is made out, there is no provision under the regulations which states that copy of the investigation report has to be communicated to the

petitioner.

10. Yet another factor to be noted in this case is that the price per share at Rs. 113.62 is fixed by the order of SEBI dated 18-6-2009. Under

Regulation 46 of the SEBI regulations, petitioner is having an appeal remedy before the Securities Appellate Tribunal. According to the learned

Senior Counsel for the petitioner, since the copy of the order dated 18-6-2009 has not been furnished to the petitioner, he is not in a position to

file an appeal.

The learned Counsel for SEBI agrees to mark a copy of the order dated 18-6-2009 fixing the price of the shares of the 3rd respondent company

at Rs. 113.62 per share, within a week from the date of receipt of a copy of this order to the petitioner. On receipt of the same, the petitioner is at

liberty to take further steps in this regard.

36. In this case as stated supra, not only the petitioner was given sufficient opportunity he was also given the order copy of the 1st respondent,

which the 1st respondent was not obliged, according to the 2nd respondent.

37. Therefore, having regard to the fact that alternative remedy is available to the petitioner and that alternative remedy is effective and efficacious

as the Securities Appellate Tribunal is presided over by a retired Judge of High Court and two persons, having full expertise in respect of securities

and further appeal remedy is provided to the Hon"ble Supreme Court against the decision of the Tribunal, the present writ petition filed by the

petitioner cannot be entertained and hence, it is dismissed. Consequently, connected Miscellaneous Petition is also dismissed. No costs.