
(2016) 04 J&K CK 0045

In the Jammu And Kashmir High Court

Case No : Others Writ Petition (OWP) No. 513 of 2016 and MP No. 01 of 2016

Nazir Ahmad Dalal

APPELLANT

Vs

Union of India

RESPONDENT

Date of Decision : 27-04-2016

Acts Referred:

Constitution of India, 1950 — Article 14, Article 21, Article 226
Constitution of Jammu and Kashmir, 1956 — Section 103

Citation : (2016) 2 JKJ 506

Hon'ble Judges : Mr. Tashi Rabstan, J.

Bench : Single Bench

Advocate : Mr. Javed Iqbal, Advocate, for the Respondents No. 5 to 9; None, for the Respondents No. 3 and 4; Mr. P. Imroz, Advocate, for the Appellants/Petitioners; Mr. S.A. Makroo, ASGI, for the Respondents No. 1 and 2

Final Decision : Dismissed

Judgement

Mr. Tashi Rabstan, J. - This writ petition came up for consideration on 6th April 2016. During course of argument, its maintainability was a

starting-point preliminary objection fervently taken by learned counsel for respondents. Having taken preliminary objection as regards

maintainability of writ petition and on consensus of learned counsel for parties, the writ petition was heard and reserved for orders.

2. Instant Writ Petition has been filed under Article 226 of the Constitution of India and Section 103 of the Constitution of Jammu and Kashmir.

Petitioners seek issuance of writ of certiorari to quash order dated 28th May 2014 passed by Chief Judicial Magistrate, Srinagar, (for brevity

Trial Magistrate""), besides other reliefs. It would be advantageous to reproduce the relief sought by petitioners in writ petition:

(a) Issue a writ of certiorari [or] any other appropriate writ to the Hon'ble CBI

Court, Srinagar, to quash the aforesaid decision/order dated 28th May 2014;

(b) Issue a writ of mandamus directing the Court of Inquiry to transfer the proceedings to the CBI Court for taking cognizance;

(c) Direct the CBI Court to resume jurisdiction subject to the procedure established by law;

(d) Issue a writ of mandamus or any other appropriate writ to the CBI to comply with directions given by Hon'ble Supreme Court by making an

application to the Central Government for grant of sanction within four weeks;

(e) Issue a writ of mandamus or any other appropriate writ to the Central Government and the Army to get them to cooperate with the criminal

justice system and assist the Hon'ble Sessions Court in bringing the accused to trial before the Sessions Court.

3. Shorn off discussions concerning factual background of the case as the writ petition has been taken up for final disposal on preliminary issue-

whether it is maintainable or not in the present form.

4. Under challenge in writ petition on hand is order dated 28th May 2014, passed by Chief Judicial Magistrate, Srinagar, on application filed by

petitioner no. 1 here. Learned counsel for respondents' first objection as regards maintainability of writ petition on hand, and rightly said, is that

alternative remedy is available to petitioners under Section 435 Cr.P.C., under which they could have thrown challenge to impugned order instead

of knocking at portals of this Court with instant writ petition. Learned counsel for respondents also stoutly urge that it would have been advisable

and convenient for the petitioners, besides in the interests of proceedings, to approach the concerned Sessions Court against order impugned

dated 28th May 2014. In this regard they refer to decision rendered in Cr. Revision No. 115/2005, titled Nisar Ahmad Nengroo v. Khalida

and others reported in 2010 (4) JKJ 405 [HC] It would be advantageous to reproduce relevant portion of the said judgment hereunder:

Before concluding, however, it would be appropriate to observe that the present revision petition which arises out of an order of Judicial

Magistrate, Anantnag could and perhaps should well have been instituted in the Sessions Court at Anantnag where respondents would find it easy

to prosecute their case rather than in this Court which must have put them to

greater inconvenience and expenditure. ..Given that it would perhaps be advisable that as a matter of practise institution of revision petitions against Magisterial orders be restricted to courts of Sessions, which besides being convenient for the parties would also be in the interests of proceedings because being nearer to ground realities the court of Sessions can ascertain facts and circumstances of a particular case more clearly, and if necessary from parties directly

5. It is well settled that 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. Constitution Benches of the Hon'ble

Supreme Court in K.S. Rashid and Sons v. Income Tax Investigation Commission and Ors., AIR (1954) SC 207; Sangram Singh v.

Election Tribunal, Kotah and Ors., AIR (1955) SC 425; Union of India v. T.R. Varma, AIR (1957) SC 882; State of U.P. and Ors. v.

Mohammad Nooh, AIR (1958) SC 86 and M/s K.S. Venkataraman and Co. (P) Ltd. v. State of Madras, AIR (1966) SC 1089 have

held that Article 226 of the Constitution of India confers on all High Courts a very wide power in the matter of issuing writs. However, remedy of

writ is an absolutely discretionary and the High Court has always the discretion to refuse to grant any writ if the aggrieved party has an adequate or

suitable relief elsewhere. So is the case here. In the present case though petitioners have alternative remedy available they have not availed it.

6. The Constitution Bench of the Supreme Court in State of Madhya Pradesh and Anr. v. Bhailal Bhai etc. etc., AIR (1964) SC 1006 has

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 reiterated in N.T. Veluswami Thevar v. G. Raja Nainar and Ors., AIR (1959) SC 422; Municipal Council, Khurai and

Anr. v. Kamal Kumar and Anr., AIR (1965) SC 1321; Siliguri Municipality and Ors. v. Amalendu Das and Ors., AIR (1984) SC 653;

S.T. Muthusami v. K. Natarajan and Ors., AIR (1988) SC 616; R.S.R.T.C and Anr. v. Krishna Kant and Ors., AIR (1995) SC 1715;

Kerala State Electricity Board and Anr. v. Kurien E. Kalathil and Ors., AIR (2000) SC 2573; A. Venkatasubbiah Naidu v. S.

Chellappan and Ors., [2000] 7 SCC 695 and L.L. Sudhakar Reddy and Ors. v. State of Andhra Pradesh and Ors., [2001] 6 SCC 634;

Shri Sant Sadguru Janardan Swami (Moingiri Mahaiaj) Sahakari Dugdha Utpadak Sanstha and Anr. v. State of Maharashtra and

Ors., [2001] 8 SCC 509; Pratap Singh and Anr. v. State of Haryana, [2002] 7 SCC 484 and G.K.N. Driveshafts (India) Ltd. v. Income

Tax Officer and Ors., [2003] 1 SCC 72. In that view of matter opposite for petitioners was to avail of alternative remedy that they have not

made use of and have straightway come to this Court with writ petition on hand.

7. In G. Veerappa Pillai v. Raman and Raman Ltd. AIR (1952) SC 192; Assistant Collector of Central Excise v. Dunlop India Ltd.,

AIR (1985) SC 330; Ramendra Kishore Biswas v. State of Tripura, AIR (1999) SC 294; Shivgonda Anna Patil and Ors. v. State of

Maharashtra and Ors., AIR (1999) SC 2281; CA. Abraham v. I.T.O. Kottayam and Ors., AIR (1961) SC 609; Titaghur Paper Mills

Co. Ltd. v. State of Orissa and Anr., AIR (1983) SC 603; H.B. Gandhi v. M/s Gopinath and Sons, [1992] Suppl. 2 SCC 312; Whirlpool

Corporation v. Registrar of Trade Marks and Ors., AIR (1999) SC 22; Tin Plate Co. of India Ltd. v. State of Bihar and Ors., AIR

(1999) SC 74; Sheela Devi v. Jaspal Singh, [1999] 1 SCC 209 and Punjab National Bank v. O.C. Krishnan and Ors. [2001] 6 SCC 569

the Supreme Court has held that where hierarchy of appeals is provided by the Statute, party must exhaust the statutory remedies before resorting

to writ jurisdiction. However, in the present case instead of exhausting the remedy available to petitioners, they have resorted to filing of instant

writ.

8. Apart from above discussion, it has been observed by the Hon'ble Supreme Court that serious problems in the administration of justice is

caused due to frequent interference by the High Courts either under Article 226 or 227 of the Constitution, with pending civil and at times criminal

cases. The Hon'ble Supreme Court in Radhey Shyam and another v. Chhabi Nath and others (AIR 2015 SC 3269) has observed:

..We make it clear that though despite the curtailment of revisional jurisdiction

under Section 115 CPC by Act 46 of 1999, jurisdiction of the High

Court under Article 227 remains unaffected, it has been wrongly assumed in certain quarters that the said jurisdiction has been expanded. Scope of

Article 227 has been explained in several decisions including Waryam Singh and another v. Amarnath and another (AIR 1954 SC 215);

Ouseph Mathai v. M. Abdul Khadir (2002 (1) SCC 319); Shalini Shyam Shetty Rajendra Shankar Patil (2010 (8) SCC 329) and

Sameer Suresh Gupta v. Rahul Kumar Agarwal (2013 (9) SCC 374) In Shalini Shyam Shetty, this Court observed:

64. However, this Court unfortunately discerns that of late there is a growing trend amongst several High Courts to entertain writ petition in cases

of pure property disputes. Disputes relating to partition suits, matters relating to execution of a decree, in cases of dispute between landlord and

tenant and also in a case of money decree and in various other cases where disputed questions of property are involved, writ courts are

entertaining such disputes. In some cases the High Courts, in a routine manner, entertain petitions under Article 227 over such disputes and such

petitions are treated as writ petitions.

65. We would like to make it clear that in view of the law referred to above in cases of property rights and in disputes between private individuals

writ court should not interfere unless there is any infraction of statute or it can be shown that a private individual is acting in collusion with a

statutory authority.

66. We may also observe that in some High Courts there is a tendency of entertaining petitions under Article 227 of the Constitution by terming

them as writ petitions. This is sought to be justified on an erroneous appreciation of the ratio in Surya Dev and in view of the recent amendment to

Section 115 of the Civil Procedure Code by the Civil Procedure Code (Amendment) Act, 1999. It is urged that as a result of the amendment,

scope of Section 115 CPC has been curtailed. In our view, even if the scope of Section 115 CPC is curtailed that has not resulted in expanding

the High Court's power of superintendence. It is too well known to be reiterated that in exercising its jurisdiction, High Court must follow the

regime of law.

67. As a result of frequent interference by the Hon'ble High Court either under

Article 226 or 227 of the Constitution with pending civil and at times criminal cases, the disposal of cases by the civil and criminal courts gets further impeded and thus causing serious problems in the administration of justice. This Court hopes and trusts that in exercising its power either under Article 226 or 227, the Hon'ble High Court will follow the time honoured principles discussed above. Those principles have been formulated by this Court for ends of justice and the High Courts as the highest courts of justice within their jurisdiction will adhere to them strictly.

(Emphasis added)

23. Thus, we are of the view that judicial orders of civil courts are not amenable to a writ of certiorari under Article 226. We are also in agreement with the view of the referring Bench that a writ of mandamus does not lie against a private person not discharging any public duty. Scope of Article 227 is different from Article 226.

9. A judgment awarding sentence is not open to challenge on the ground of violation of Articles 14 and 21 of the Constitution in a writ petition. In this respect the principle characterised in *Triveniben v. State of Gujarat* reported in 1989 (1) SCC 678 was reiterated by the Hon'ble Supreme Court in *Rupa Ashok Hurra v. Ashok Hurra* and another reported in 2002 (4) SCC 388 It was observed:

It is well settled now that a judgment of court can never be challenged under Articles 14 or 21 and therefore the judgment of the court awarding the sentence of death is not open to challenge as violating Article 14 or Article 21 as has been laid down by this Court in *Naresh Shridhar*

Mirajkar v. State of Maharashtra (supra) and also in *A.R. Antulay R.S. Nayak* [(1988) 2 SCC 602] the only jurisdiction which could be

sought to be exercised by a prisoner for infringement of his rights can be to challenge the subsequent events after the final judicial verdict is

pronounced and it is because of this that on the ground of long or inordinate delay a condemned prisoner could approach this Court and that is

what has consistently been held by this Court. But it will not be open to this Court in exercise of jurisdiction under Article 32 to go behind or to

examine the final verdict reached by a competent court convicting and sentencing the condemned prisoner and even while considering the

circumstances in order to reach a conclusion as to whether the inordinate delay coupled with subsequent circumstances could be held to be

sufficient for coming to a conclusion that execution of the sentence of death will not be just and proper.

10. Even if a revision petition is barred, no writ petition would lie under Article 226 of the Constitution for the reason that a mere wrong decision

without anything more is not enough to attract jurisdiction of the High Court under Article 226 of the Constitution. Same are the observations of the

Hon'ble Supreme Court in *Sadhana Lodh National Insurance Co. Ltd.* Reported in 2003 (3) SCC 524 The Supreme Court while

considering the question whether remedy of writ will be available when remedy of appeal was on limited grounds, held:

6. The right of appeal is a statutory right and where the law provides remedy by filing an appeal on limited grounds, the grounds of challenge

cannot be enlarged by filing a petition under Articles 226/227 of the Constitution on the premise that the insurer has limited grounds available for

challenging the award given by the Tribunal. Section 149(2) of the Act limits the insurer to file an appeal on those enumerated grounds and the

appeal being a product of the statute it is not open to an insurer to take any plea other than those provided under Section 149(2) of the Act (see

National Insurance Co. Ltd. Nicolletta Rohtagi [2002 (7) SCC 456] This being the legal position, the petition filed under Article 227 of the

Constitution by the insurer was wholly misconceived. Where a statutory right to file an appeal has been provided for, it is not open to the High

Court to entertain a petition under Article 227 of the Constitution. Even if where a remedy by way of an appeal has not been provided for against

the order and judgment of a District Judge, the remedy available to the aggrieved person is to file a revision before the High Court under Section

115 of the Code of Civil Procedure. Where remedy for filing a revision before the High Court under Section 115 CPC has been expressly barred

by a State enactment, only in such case a petition under Article 227 of the Constitution would lie and not under Article 226 of the Constitution. As

a matter of illustration, where a trial court in a civil suit refused to grant temporary injunction and an appeal against refusal to grant injunction has

been rejected, and a State enactment has barred the remedy of filing revision under Section 115 CPC, in such a situation a writ petition under

Article 227 would lie and not under Article 226 of the Constitution. Thus, where the State Legislature has barred a remedy of filing a revision

petition before the High Court under Section 115 CPC, no petition under Article 226 of the Constitution would lie for the reason that a mere

wrong decision without anything more is not enough to attract jurisdiction of the High Court under Article 226 of the Constitution.

Given the above law laid down by the Apex Court, writ petition under Article 226 of the Constitution, assailing order of the Trial Court, is not

maintainable.

11. Again the Supreme Court in *Jogendrasinhji Vijaysinghji v. State of Gujarat and Ors.* reported in 2015 (9) SCC 1 has held that the

authoritative pronouncement in *Radhey Shyam* (supra) makes it clear that an order passed by a civil court can only be assailed under Article 227

of the Constitution of India and the parameters of challenge have been clearly laid down in series of decisions, referred to in *Radhey Shyam*

(supra), which is a binding precedent.

12. The instant writ petition has been filed under Section 103 of the Constitution of Jammu and Kashmir read with Article 226 of the Constitution

of India, seeking issuance of writ of certiorari for quashing order dated 28th May 2014, passed by Chief Judicial Magistrate, Srinagar. The case in

hand is squarely governed by law laid down by Hon'ble Supreme Court in *Radhey Shyam's* case (supra) and therefore, writ petition on hand is

without any merit.

13. Insofar as other reliefs, viz. directing transfer of proceedings to the CBI Court from the Court of Inquiry and resumption of jurisdiction by CBI

Court as also directing CBI to comply with direction given by Hon'ble Supreme Court by making an application to Central Government for grant

of sanction within four weeks, exhorted by petitioners are concerned, the same have been set at rest by the Hon'ble Supreme Court in judgment

dated 1st May 2012 passed in Criminal Appeal No. 257 of 2011 titled *General Officer Commanding v. CBI and Anr.* The Criminal

Appeal No. 257 of 2011, was preferred against judgment and order dated 10th July 2007, passed by this Court in petitions under Section 561-A

No. 78/2006 and 80/2006. What is important to be seen is that the petitions under Section 561-A Cr.P.C. filed before this Court were with

respect to the same subject matter that has been taken in instant writ petition. The Hon'ble Supreme Court while disposing of the appeals passed

following directions:

I. The competent authority in the Army shall take a decision within a period of eight weeks from today as to whether the trial would be by the

criminal court or by a court-martial and communicated the same to the Chief Judicial Magistrate concerned immediately thereafter.

II. In case the option is made to try the case by a court-martial, the said proceedings would commence immediately and would be concluded

strictly in accordance with law expeditiously.

III. In case the option is made that the accused would be tried by the criminal court, the CBI shall make an application to the Central Government

for grant of sanction within four weeks from the receipt of such option and in case such an application is filed, the Central Government shall take a

final decision on the said application within a period of three months from the date of receipt of such an application.

14. The reliefs sought by petitioners in writ petition concerning cognisance by CBI Court and resumption of jurisdiction by CBI Court, with further

prayer to direct CBI to make an application to Central Government for grant of sanction within four weeks, have already been decided by the

Supreme Court. The Supreme Court has given liberty to competent authority in Army to take decision as regards convening of court martial or

adjudication of trial by criminal court. The competent authority in Army opted to try the case by a court-martial. Once an option and liberty was

given by the Supreme Court, thereby deciding the matter as regards trial to be conducted by court martial or criminal court, the same issue is not

permissible to be opened and taken up again and again. If petitioners are aggrieved of order impugned passed by Trial Magistrate or for that

matter of any decision and order of court martial, petitioners are free to avail of appropriate remedy available under applicable rules and law.

15. The Trial Court after application was filed by petitioner no. 1 here and objections received, heard counsel for both sides and framed three

issues for deciding the application of petitioner no. 1. The Trial Court rightly discussed the issues and held that petitioner ""is at liberty to approach

the concerned forum to seek copy of the judgment because same is a public

document and no such direction can be given on behalf of the complainant by this court being of concurrent jurisdiction, more so when effectual proceedings have been filed by the Military authority"". Thus there is no ground muchless cogent or material one to make interference with the findings returned by the Trial Court. As a sequel thereof, the writ petition is not maintainable and liable to be dismissed in limine.

16. For the reasons discussed writ petition is dismissed. However, petitioners would be at liberty to avail appropriate remedy, if any, available under law.

17. Dismissed.