

(1979) 04 KAR CK 0020
In the Karnataka High Court
Case No : WP. 2567/79

R. Venkatesh and Others

APPELLANT

Vs

State of Karnataka and Others

RESPONDENT

Date of Decision : 12-04-1979

Acts Referred:

Constitution of India, 1950 — Article 226(3)

Karnataka Co-operative Societies Act, 1959 — Section 30(1)

Citation : (1980) 1 KarLJ 48

Hon'ble Judges : Swami, J

Judgement

1. The petitioners who are the elected directors of the Board of Management of the Simson & Group Companies Employees Co-operative Society Ltd., Bangalore, have, in this writ petition under Art. 226(1)(b) and (c) of the Constitution of India, challenged the validity of the order dated 27-2-1979 passed by the second respondent under Section 30(1) of the Karnataka Co-operative Societies Act, 1959 (hereinafter referred to as "the Act") superseding the Board of Management consisting of the petitioners and other nominees and appointing the 3rd respondent as an Administrator of the Society.

2. Shri V.C. Brahmarayappa, the learned High Court Government Advocate appearing for Respondents 1 to 3, raised a preliminary objection that the petitioners have got a right of appeal against the order impugned in this writ petition under Section 106 of the Act and that being so, the writ petition preferred by the petitioners under Article 226(1)(b) and (c) of the Constitution is not maintainable in view of the bar contained in Article 226(3) of the Constitution.

3. Shri B. Thilak Hegde, the learned Counsel appearing for the petitioners contended that the remedy provided under Section 106 of the Act, could not be availed of because as per the case of the petitioners, the order under Section 30 of the Act challenged in the writ petition came to be passed by the second respondent, at the instance of the Hon'ble Minister for Co-operation; therefore, it is futile for the petitioners to prefer an appeal to the Government. It was also

contended that the Rule having been issued in the writ petition after hearing the respondents, it is not open for respondents 1 to 3 to contend at the final hearing that the petition is not maintainable. It was also further contended that the order prima facie being without jurisdiction, it is unnecessary for the petitioners to avail the remedy by way of an appeal.

4. In view of these contentions of the parties, the points that arise for consideration in this writ petition are:

(i) Whether the Writ Petition under Article 226(1)(b) and (c) of the Constitution, is maintainable in view of the remedy available to the petitioners by way of an appeal under Section 106 of the Act?

(ii) Whether it is open for the respondents to raise an objection regarding the maintainability of the writ petition at the time of final bearing; in view of the fact that the Rule Nisi was issued in the case after hearing the Counsel for the respondents?

(iii) Whether the petitioners have established their contention that the order impugned in the writ petition came to be passed at the instance of the Hon"ble Minister for Co-operation? If so, the petitioners are still required to avail the remedy by way of an appeal to the Government?

5. Taking the last point first, the case of the petitioners is that the order under Section 30 of the Act, came to be passed by the second respondent at the instance of the Minister for Co-operation and it was further submitted that no justice can be expected from the Minister who was instrumental for passing the order by the second respondent. The respondents have filed the statement of objections, in which apart from denying the allegations made by the petitioners in this regard, it has been specifically stated that the 2nd respondent was not instructed by the Hon"ble Minister for Co-operation and the allegations in this regard have no basis whatsoever. The relevant portion of the statement of objections reads as follows:

"The Hon"ble Minister for Co-operation did not issue any instructions or suggestions whatsoever to the 2nd respondent in the matter. The petitioners have made these allegations without verifying the truth of them and they are liable to be rejected. However, it is submitted that these allegations do not lift the bar imposed by the provisions of Clause 3 of Article 226 of the Constitution of India. The availability of a remedy under the provisions of a statute completely disentitles the petitioners to invoke the jurisdiction of this Hon"ble Court under Art. 226 of the Constitution of India."

Thus, in view of the categorical statement made by the 2nd respondent and in the absence of the particulars given by the petitioners as to in what manner and how and when the Minister for Co-operation instructed the 2nd respondent and was instrumental in passing the impugned order, the case of the petitioners in this regard cannot be accepted. The allegations in this regard are very vague.

That being so, there is no reason to reject the aforesaid statement made by the 2nd respondent. Accordingly, it is held that the petitioners have failed to establish that the order in question came to be passed by the 2nd respondent at the instance of the Hon"ble Minister for Co-operation. In view of the aforesaid conclusion reached by me on point No. 3, it is clear that it is open for the petitioners to avail of the remedy by way of an appeal under Section 106 of the Act.

6. Now, taking the 1st point, it is to be seen as to whether the remedy available to the petitioners by way of an appeal is a bar to entertain the writ petition under Article 226(1)(b) and (c) of the Constitution. The contention of the petitioners in this regard is that they are the elected directors of the Managing Committee of the Simson and Group Companies Employees Co-operative Society Ltd., and that they having been elected in the election which took place in October 1973 and the notice for superseding the managing Committee came to be issued subsequent, to October 1978 in respect of the misdeeds alleged to have been committed by the previous directors, and as such it was submitted that no order could have been passed against the petitioners who have not committed any misdeeds so as to bring an action against them under Section 30 of the Act as the entire Board of Directors to the Managing Committee came to be elected and there was no continuation of the previous Body of directors and as such, the action taken by the second respondent against them, is without jurisdiction and as such the petitioners can approach this Court under Article 226(1)(b) and (c) of the Constitution without availing the remedy by way of an appeal. In this regard, the learned Counsel relied upon the Full Bench decision of the Gujarat High. Court in *Bad Cotton Mrg. Co. v. Union of India*, AIR 1977 Guj. 113. In this connection, it is to be noticed that this is not a petition under Article 226(1)(a) of the Constitution for the enforcement of any of the rights conferred by the provisions of Part III of the Constitution. Therefore, what is to be seen is that whether the relief sought for by the petitioners in the writ petition can be said to be available to them in the appeal tinder Section 30 of the Act. In the writ petition, the petitioners have sought for quashing of the order passed by the 2nd respondent and the petitioners can very well get the same relief in the appeal inasmuch as the appellate authority can also set aside the order passed by the 2nd respondent challenged in the writ petition. Thus the other remedy available to the petitioners is equally efficacious and adequate and the petitioners can very well get the same relief both qualitatively and quantitatively from the appellate authority. Before amendment to Article 226 of the Constitution (42nd Amendment) Act, 1976, normally the relief under Article 226 of the Constitution was not granted to the party who had a right of appeal against the order challenged. That being so, it should be more so after the introduction of sub-clause (3) in Article 226 of the Constitution. Hitherto, the bar onthe ground of an alternative remedy was only a self imposed restriction and now it has become a restriction imposed by the Constitution itself in the case of the petitions falling under Article 226(1)(b) and (c) of the Constitution.

7. In the aforesaid decision of the High Court of Gujarat, the Trade Notice issued by the Deputy Collector of Central Excise, No. 195/76 dated 9.8.1976, which sought to change the entire basis of assessment of levy of excise duty, was challenged among other grounds that the said notice was without the authority of law and therefore, violative of Article 31(1) of the Constitution. The Full Bench came to the conclusion that a prima facie case was made out, both of invasion of fundamental rights and the order of the authority being ex facie without jurisdiction or a purported order was issued in violation of the principles of natural justice and accordingly, it was held that Article 226(3) of the Constitution did not come in the way of the petitioners to approach the High Court directly without exhausting the other remedy. During the course of the judgment, it has been held at para 22, as follows:

"Therefore, the principle which emerges from these decisions is that when the petitioner is to be asked to exhaust his alternative remedies provided under the Act before entertaining the Writ petition, this distinction would always be material where the order is a nullity as being ex facie without jurisdiction or in non-compliance with the provisions of the Act or the essential principles of justice or on any other ground as explained in Tarachand Gupta's case or Bhopal Sugar Industries case or Mohd. Nooh's case (supra) and is, therefore, a purported order or a nullity. In such a context the alternative remedy would be a futile remedy because it did not affect the inherent nullity in the challenged decision, which would result in material distinction that the party may appeal against such decision but he was not bound to do so".

With great respect to their Lordships of the Gujarat High Court, I feel that the aforesaid exposition of law with regard to the bar contained in Art. 226(3) of the Constitution is too widely stated in respect of the cases falling under Art. 226(1) (b) and (c) of the Constitution. This in my View is clearly opposed to the provisions contained in Art. 226(3) of the Constitution. When it is clearly laid down by Art. 226(3) of the Constitution that no petition for the redress of any injury referred to in subclause (b) or sub-clause (c) of clause (1) shall be entertained if any other remedy for such redress is provided for by or under any other law for the time being in force. It should not make any difference whether the order impugned was the one passed without jurisdiction or in violation of the principles of natural justice inasmuch as, such orders can very well be set aside by the appellate authority. In this connection, Shri Brahmarayappa, the learned High Court Government Advocate appearing for respondents 1 to 3, relied upon the decision of this Court reported in *Patre S. Rudramurthy v. Karnataka Board of Wakfs*, (1977) 1 Kar. L.J. 342. In that decision, the division Bench of this Court, while considering the effect of Art. 226(3) of the Constitution held at para 8, as follows:

"In view of the above it is clear that in pursuance of the impugned order, the Board could recover possession of the suit property only through the agency of the Civil Court and thus there is no immediate threat to the possession of the

petitioner over the property in question. That being the position, then no question of enforcement of any fundamental right arises in this petition and accordingly the petition is maintainable, only under Cls. (b) and (c) of Art. 226. In that case Cl. (3) of the Art. 226 is a complete bar to the maintainability of this petition in, view of there being alternative remedy of civil suit being available to the petitioner in terms of sub-sec. (2) of S. 27 of the Act. This is so, despite the contention of the learned Counsel for the petitioner that the impugned order was passed by the Board without any jurisdiction under S. 27 of the Act, as the dispute is over a property between the Wakf and a stranger to the Wakf and his reliance in this regard on the decision of this Court in *The Corporation of the City of Bangalore v. Mysore State Board of Wakfs* (AIR 1973 Mys. 189=1973(1) Mys. L.J. 103) and *Mysore State Board of Wakfs v. Dr. M. Channabasavaiah* (AIR 1973 Mys. 312=1973 (1) Mys. L.J. 514) for, in our view so long the Court or an authority is competent to pass an order, it matters little whether the order is challenged as being merely illegal or without jurisdiction for the purpose of seeing as whether the provisions of Cl. (3) of Art. 226 are attracted or not. If the petitioner has an alternative remedy available to him to get redress against the order and if the petitioner does not seek to enforce any of the fundamental rights then the provisions of Cl. (3) of Art. 226 would completely bar such a petition whatever may be the the nature of the order."

8. In the instant case also, the second respondent had an authority to pass the impugned order. The challenge, made to the said order on the ground of illegality and without jurisdiction, cannot affect the bar contained in Art. 226(3) of the Constitution as long as the petitioners do not seek to enforce any of the fundamental rights guaranteed under Part III of the Constitution.

9. Shri B. Thilak Hegde, the learned Counsel appearing for the petitioners further relied upon the Full Bench decision of The Andhra Pradesh High Court in *Government of India v. National Tobacco Company*, AIR 1977 AP. 250. The said decision also does not support the contention of the petitioners in this petition. On the contrary, in the said decision, it has been specifically laid down that the other remedy stated in Clause (3) of Article 226 of the Constitution, is a remedy provided for by or under any law for the time being in force and the suit cannot be excluded from this wide amplitude of other remedy and the remedy provided under other law shall not be illusory As already pointed out, the remedy available to the petitioners is by way of an appeal and the petitioners can very well get the relief which they can get under Art. 226(1)(b) and (c) of the Constitution. Thus, it is clear that the petitioners cannot maintain the writ petition, in view of the other remedy available to them by way of an appeal under Section 106 of the Act, in view of the bar contained in Art. 226(3) of the Constitution.

10. Now, taking the second point for consideration that it is not open for the respondents to raise the objection regarding the maintainability of the writ petition at the time of final hearing in view of the fact that the Rule Nisi was issued in the case after hearing the Counsel for the respondents, it may be

pointed out that at the time of preliminary hearing, no decision was rendered over-ruling the objection raised on behalf of the respondents regarding the bar contained in Art. 226(3) of the Constitution. Thus, there having been no order passed by this Court with regard to the preliminary objection raised by the respondents as to the maintainability of the writ petition, it is not possible to accept the contention of the petitioners that it is not open for the respondents to raise the said objection at the time of final hearing of the matter. In support of this contention, the learned Counsel for the petitioners, relied upon the observations contained in para 12 of the decision of the Supreme Court in *Hirday Narain v. Income tax Officer Bareilly*, AIR 1971 SC. 33, the relevant portion of which reads as follows:

"An order under Section 35 of the Income-tax Act is not appealable. It is true that a petition to revise the order could be moved before the Commissioner of Income-tax. But *Hirday Narain* moved a petition in the High Court of Allahabad and the High Court entertained that petition. If the High Court had not entertained his petition, *Hirday Narain* could have moved, the Commissioner in revision, because at the date on which the petition was moved the period prescribed by Section 33-A of the Act had not expired. We are unable to hold that because a revision application could have been moved for an order correcting the order of the Income-tax Officer under Section 35, but was not moved, the High Court would be justified in dismissing as not maintainable the petition, which was entertained and was heard on the merits."

The aforesaid decision of the Supreme Court is not applicable to the facts of the present case inasmuch as in the instant case, the matter was not heard on merits and it was heard only on the ground of maintainability. Further in the instant case, the limitation for filing an appeal has not yet expired. Under Section 106(2) of the Act, the limitation for filing an appeal is 60 days from the date of the Act, decision or order. In the instant case, the impugned order was passed on 27-2-1979 and that being so, the petitioners have got sufficient time for preferring an appeal. In view of the bar contained in Article 226(3) of the Constitution, it is open for the respondents to raise the said objection at the time of final hearing as long as the said objection had not been over-ruled by a considered order. The issuing of Rule nisi is, only calling upon the opposite party to show cause as to why the Rule applied for should not be granted. If no sufficient cause is shown, the Rule is made absolute otherwise, it is discharged. Hence, it is clear that the issuing of Rule nisi even after hearing the other side will not in any way make the decision final one, the Rule becomes final only when it is confirmed. That being so, this contention of the petitioners also fails. Thus, the preliminary objection raised by the respondents deserves to be accepted. Accordingly, it is held that the petitioners have got a right of appeal against the impugned order, under Section 106 of the Act, and as such, they cannot maintain the writ petition under Article 226(1)(b) and (c) of the Constitution in view of the bar contained in Article 226(3) of the Constitution. Accordingly, this writ petition is rejected as not maintainable.

11. Shri B. Thilak Hegde, the learned Counsel for the petitioners, has filed an application under Section 151 of the Code of Civil Procedure stating that the petitioners intend to go in an appeal against the order rejecting the writ petition and as such, pending the filing of the appeal against the order passed in the writ petition, in the interest of justice and equity, an order may be passed maintaining the status quo.

12. Shri Brahmarayappa, the learned High Court Government Advocate, opposed this request in view of the contentions stated in his statement of objections and also in the application filed for vacating the interim order.

13. In view of the fact that the petitioners have got a right of appeal and that there was an interim order passed in the case, it is just and necessary to maintain the status quo as it is obtaining to-day. Hence, it is ordered that the status quo as it is obtaining to-day will continue for a period of 10 days from to-day.