

**(2007) 05 SHI CK 0015**  
**In the High Court Of Himachal Pradesh**

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|--------------------------|----|------------|
| Sita Ram                 | Vs | APPELLANT  |
| Bank of India and Others |    | RESPONDENT |

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**Date of Decision :** 24-05-2007

**Acts Referred:**

Government of India Act, 1935 — Section 240(3)

**Citation :** (2007) 2 ShimLC 371

**Hon'ble Judges :** Rajiv Sharma, J

**Bench :** Single Bench

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**Judgement**

Rajiv Sharma, J.—By way of this petition, the petitioner has challenged orders dated 21st January, 2004, 9th February, 2004 and appellate order dated 23rd July, 2004.

Shorn of the unnecessary details, the bare facts for the adjudication of this petition are that the disciplinary proceedings were initiated against the petitioner. The copy of the inquiry report dated 22.8.2003 has been placed on record and marked as Annexure P-5. The Inquiry Officer has recorded the following findings against the petitioner as reproduced below:

Findings:

Charge A - That the customer had given a cheque for Rs. 30,000 to Shri Sita Ram for taking payment on her behalf.

Proved

Charge B - Shri Sita Ram received the payment of the Cheque dated 13.1.2003 for Rs. 30,000/-.

Proved

Charge C - Shri Sita Ram did not hand over the payment to the customer.

Proved.

2. As a sequel to the inquiry report dated 22.8.2003, the petitioner was served with show-cause (punishment) notice by the disciplinary authority on 21st January, 2004. Thereafter the disciplinary authority has awarded the penalty of punishment "compulsory retirement from bank"s service under Clause 6 (C) of the bipartite settlement dated 10.4.2002. The petitioner feeling aggrieved by the imposition of the penalty awarded vide order dated 9th February, 2004 filed an appeal before the appellate authority. The appellate authority dismissed the appeal of the petitioner vide order 23rd July, 2004.

3. A. Mr. Vivek Thakur, Advocate appearing on behalf of the petitioner has strenuously contended that the initiation, continuation and culmination of the disciplinary proceedings in the imposition of penalty of "compulsory retirement" imposed upon the petitioner is not sustainable in the eyes of law. The main contention of Mr. Vivek Thakur, Advocate was that petitioner has not been supplied with the copy of the inquiry report dated 22.8.2003 before the imposition of penalty. Mr. Thakur has further elaborated his submission by submitting that it was incumbent upon the disciplinary authority to supply the petitioner with a copy of inquiry report to enable him to point out discrepancies/ shortcomings in the inquiry report before the issuance of letter dated 21.1.2004. The disciplinary authority, thereafter had to consider the representation made by the petitioner against the inquiry report and only thereafter the show-cause notice could have been issued to the petitioner.

4. Mr. Rakamant Sharma, Advocate appearing on behalf of the Bank strenuously contended that no prejudice has been caused to the petitioner by not supplying him with a copy of the inquiry report. Mr. Ramakant has also submitted that the petitioner was a workman within the meaning of Industrial Disputes Act, 1947 and alternative remedy was available to him under the Act.

A. have heard the parties and perused the record.

5. There is substance in the submissions made by Mr. Vivek Thakur, Advocate that the petitioner was entitled to receive the copy of the inquiry report dated 22.8.2003. The question whether the copy of the inquiry report is to be supplied to the delinquent or not before the imposition of penalty is no more res-integra in view of the law laid down by the Hon"ble Supreme Court in Managing Director, ECIL, Hyderabad, Vs. Karunakar, etc. etc., Their Lordships of the Hon"ble Supreme Court have held as under:

In Uttar Pradesh Government v. Sabir Hussain, it was held that in the absence of furnishing the copy of the report of the enquiry officer, the plaintiff had been denied a reasonable opportunity of showing cause against his removal. It was also held that although Section 240(3) of the GOI Act did not cover a case of "removal", it did not mean that the protection given by the said Section did not cover the case of "removal" From the constitutional standpoint "removal" and "dismissal" stand on the same footing except as to future employment. In the context of Section 240 (3), removal and dismissal are synonymous terms the

former being only species of the latter. The broad test of "reasonable opportunity" is whether in the given case the show-cause notice issued to the delinquent servant contained or was accompanied by so much information as was necessary to enable him to clear himself of the guilt, if possible, even at that stage or in the alternative to show that the penalty proposed was much too harsh and disproportionate to the nature of the charge established against him.

6. In the present case, the inquiry report for the first time has been sent to the petitioner with a show-cause notice dated 21st January, 2004 and at the same time, the disciplinary authority had made up its mind to inflict upon the petitioner the punishment of "compulsory retirement from bank's service" under Clause 6(C) of the bipartite settlement dated. 10.4.2002. In view of the law laid down by the Hon''ble Supreme Court, it was incumbent upon the disciplinary authority to supply the copy of the inquiry report to the petitioner. The petitioner has not been supplied with a copy of the inquiry report before the issuance of show-cause notice causing serious prejudice to the petitioner. Consequently the memorandum of punishment of "compulsory retirement from bank's service" under Clause 6 (C) of the bipartite settlement dated 10.4.2002 is not sustainable in the eye of law. Had the petitioner been supplied with a copy of the inquiry report before the issuance of show-cause notice dated 21st January, 2004, he could have pointed out the shortcomings/discrepancies in the inquiry report. The petitioner has not been afforded with a reasonable opportunity of being heard before the issuance of show-cause notice dated 21st January, 2004 and as such the punishment of compulsory retirement from bank's service" under Clause 6(C) of the bipartite settlement dated 10.4.2002 is not tenable. Since the imposition of penalty vide order dated 9.2.2004 is against the principles of natural justice, the appellate order dated July 23, 2004 is also not sustainable in the eye of law.

7. This Court is of the opinion that the non-supply of the copy of the inquiry report to the petitioner has seriously prejudiced him. The charges levelled against the petitioner were of grave nature and as such the petitioner was to be afforded opportunity to make representation against the inquiry report.

8. Mr. Ramakant Sharma, Advocate has submitted that the plea of non-supply of the copy of inquiry report has been raised for the first time before this Court. The plea raised by Mr. Ramakant Sharma is untenable. The plea raised by the petitioner is purely a question of law and that too based on the law laid down by the Hon''ble Supreme Court as quoted hereinabove.

9. This petition was entertained and admitted on 22.12.2004. Once the petition has been admitted and is pending adjudication before this Court since 22nd December, 2004, the parties cannot be directed to avail alternative remedy which might be available to him.

10. It is settled law that this Court has the jurisdiction to entertain and adjudicate upon \*a writ petition even though alternative remedy is available. The

Hon''ble Supreme Court has held in a number of cases the circumstances in which the petitioners can approach the Court directly without being relegated to avail the alternative remedy.

11. Hon''ble Supreme Court has held in *U.P. State v. Mohd. Nooh* AIR 1958 SC 86 that there is no rule with regard to certiorari as there is mandamus that it will lie only where there is no equally effective remedy. Provided the requisite grounds exist, certiorari will lie although a right has been conferred by statute. The Hon''ble Supreme Court has opined as under:

In the next place it must be borne in mind that there is no rule, with regard to certiorari as there is with mandamus, that it will be only where there is no other equally effective remedy. It is well established that, provided the requisite grounds exist, certiorari will lie although a right has been conferred by statute, (Halsbury''s Laws of England, 3rd Edn; Vol. II, p. 130 and the cases cited there). The fact that the aggrieved party has another and adequate remedy may be taken into consideration by the superior Court in arriving at a conclusion as to whether it should, in exercise of its discretion, issue a writ of certiorari to quash the proceedings and decisions of inferior Courts subordinate to it and ordinarily the superior Court will decline to interfere until the aggrieved party has exhausted his other statutory remedies, if any. But this rule requiring the exhaustion of statutory remedies before the writ will be granted is a rule of policy, convenience and discretion rather than a rule of law and instances are numerous where a writ of certiorari has been issued in spite of the fact that the aggrieved party had other adequate legal remedies. In the *Kind v. Postmaster General*; *Ex parte Car-michael* 1928 1 KB 291 a certiorari was issued although the aggrieved party had an alternative remedy by way of appeal. It has been held that the superior Court will readily issue a certiorari in a case where there has been a denial of natural justice before a Court of summary jurisdiction. The case of *Rex v. Wandsworth Justices*; *Ex parte Read* 1942 1 KB 281 is an authority in point. In that case a man had been convicted in a Court summary jurisdiction without giving him an opportunity of being heard. It was held that his remedy was not by a case stated or by an appeal before the quarter sessions but by application to the High Court for an order of certiorari to remove and quash the conviction. At p. 284 Viscount Caldecote, C.J. observed:

It remains to consider the argument that the remedy of certiorari is not open to the applicant because others were available. It would be ludicrous in such a case as the present for the convicted person to ask for a case to be stated. It would mean asking this Court to consider as a question of law whether justices were right in convicting a man without hearing his evidence. That is so extravagant an argument as not to merit a moment''s consideration. As to the right of appeal to quarter sessions, it may be that the applicant could have had his remedy if he had pursued that course, but I am not aware of any reason why, if in such circumstances as these, he preferred to apply for an order of certiorari to quash his conviction, the Court should be debarred from granting his application.

12. The Hon"ble Supreme Court has held in Baburam Prakash Chandra Maheshwari Vs. Antarim Zila Parishad now Zila Parishad, Muzaffarnagar, , that existence of alternative remedy is no bar to writ petition where it is alleged that Tribunal acted under provisions of law which was ultra virus or where it is alleged that it acted in violation of principles of natural justice. The Hon"ble Supreme Court has opined as under:

It is a well established proposition of law that when an alternative and equally efficacious remedy is open to a litigant he should be required to pursue that remedy and not to invoke the special jurisdiction of the High Court to issue a prerogative writ. It is true that the existence of a statutory remedy does not affect the jurisdiction of the High Court to issue a writ. But, as observed by this Court in Rashid Ahmed Vs. The Municipal Board, Kairana, , "the existence of an adequate legal remedy is a thing to be taken into consideration in the matter of granting writs" and where such a remedy exists it will be a sound exercise of discretion to refuse to interfere in a writ petition unless there are good grounds therefore. But it should be remembered that the rule of exhaustion of statutory remedies before a writ is granted is a rule of self-imposed limitation, a rule of policy, and discretion rather than a rule of law and the Court may therefore in exceptional cases issue a writ such as a writ of certiorari notwithstanding the fact that the statutory remedies have not been exhausted. In The State of Uttar Pradesh Vs. Mohammad Nooh, S.R. Dass, C.J.; speaking for the Court, observed:

In the next place it must be borne in mind that there is no rule, with regard to certiorari as there is with mandamus, that it will be only where there is no other equally effective remedy. It is well established that, provided the requisite grounds exist, certiorari will lie although a right has been conferred by statute, (Halsbury's Laws of England, 3rd Edn.; Vol.11, p. 130 and the cases cited there). The fact that the aggrieved party has another and adequate remedy may be taken into consideration by the superior Court in arriving at a conclusion as to whether it should, in exercise of its discretion, issue a writ of certiorari to quash the proceedings and decisions of inferior Courts subordinate to it and ordinarily the superior Court will decline to interfere until the aggrieved party has exhausted his other statutory remedies, if any. But this rule requiring the exhaustion of statutory remedies before the writ will be granted is a rule of policy, convenience and discretion rather than a rule of law and instances are numerous where a writ of certiorari has been issued inspite of the fact that the aggrieved party had other adequate legal remedies. In the Kind v. Postmaster General; Ex parte Car-michael 1928 1 KB 291 a certiorari was issued although the aggrieved party had an alternative remedy by way of appeal. It has been held that the superior Court will readily issue a certiorari in a case where there has been a denial of natural justice before a Court of summary jurisdiction. The case of Rex v. Wandsworth Justices; Ex parte Read 1942 1 KB 281 is an authority in point. In that case a man had been convicted in a Court summary jurisdiction without giving him an opportunity of being heard. It was held that his remedy was not by a case stated or by an appeal before the quarter sessions but by

application to the High Court for an order of certiorari to remove and quash the conviction.

There are at least two well-recognised exceptions to the doctrine with regard to the exhaustion of statutory remedies. In the first place, it is well settled that where proceedings are taken before a Tribunal under a provision of law, which is ultra vires it is open to a party aggrieved thereby to move the High Court under Article 226 for issuing appropriate writs for quashing them on the ground that they are incompetent, without his being obliged to wait until those proceedings run their full course.

13. The Hon"ble Supreme Court in *L. Hirday Narain Vs. Income Tax Officer, Bareilly*, , has held that the High Court would not be justified in dismissing as not maintainable the petition which was entertained and was heard on merits though the petitioner could file revision before the Commissioner of Income Tax:

An order u/s 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 u/s 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 High Court observed that u/s 35 of the Indian Income Tax Act, 1922, the jurisdiction of the Income Tax Officer is discretionary. If thereby it is intended that the Income Tax Officer has discretion to exercise or not to exercise the power to rectify, that view is in our Judgment erroneous. Section 35 enacts that the Commissioner or Appellate Assistant Commissioner or the Income Tax Officer may rectify any mistake apparent from the record. If a statute invests a public officer with authority to do an act in a specified set of circumstances, it is imperative upon him to exercise his authority in a manner appropriate to the case when a party interested and having a right to apply moves in that behalf and circumstances for exercise of authority are shown to exist. Even if the words used in the statute are prima facie enabling the Courts will readily infer a duty to exercise power which is invested in aid of enforcement of a right-public or private-of a citizen.

14. Similarly it has been held in *Durlabh Kumar Vs. The District Judge, Indore and Another*, , that if a petition is heard on merit, the same cannot be rejected on the ground that the statutory remedy was not available. The Hon"ble Division Bench has opined as under:

It was contended that as the alternative remedy of appeal, which was available

to the petitioner, was not availed by him, relief under Article 226 of the Constitution could not be granted. In *L. Hirday Narain Vs. Income Tax Officer, Bareilly*, this question was considered by the Supreme Court and it was observed that-

An order u/s 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 u/s 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 merit.

In view of the matter, it would not be right to reject this petition at this stage. Shri Kohli, appearing for the respondent-Corporation, contended that in the Supreme Court case referred to above on the date, on which the writ petition was filed in the High Court a revision could be filed, and as the High Court admitted the petition the Supreme Court felt that thereafter the petition could not be dismissed on that ground alone. But according to the learned Counsel, in the present case the time for appeal had already run out and, therefore, the alternative remedy having not been availed of, this petition could not be entertained. It is no doubt true that the time provided for an appeal had run out when this petition was filed. But if the petitioner had so chosen, he could have preferred an appeal and sought condonation. In that view of the matter, the principles laid down by the Supreme Court will fully apply to the present case also, and no distinction can be drawn only on that ground. It appears that what the Supreme Court felt was that if at the time of motion hearing the petition had not been entertained, the petitioner could have sought the alternative remedy but that not having been done, after lapse of long time it would not be fit to refuse to grant relief as now it would not be possible for the petitioner to avail of the alternative remedy also. Apart from that, the question involved in the present case is about the jurisdiction of the District Judge and by refusing to investigate into the objections raised by the petitioner the District Judge had refused to exercise jurisdiction in him by law. Consequently this is a ground on which a petition under Article 226 or even under Article 227 of the Constitution would be maintainable. Consequently the petition cannot also be thrown out on the objection of maintainability.

15. In *Malkhan Singh Vs. Union of India and others*, it has been held by the Hon'ble High Court of Judicature, Delhi that if the petition is admitted it should not be dismissed for the reasons that alternative remedy is available more particularly the petitioner had been pending for two years. Hon'ble High Court of

Judicature, Delhi has opined as under:

Furthermore, "there is no rule, with regard to certiorari as there is with mandamus, that it will lie only where there is no other equally effective remedy": See *State of U.P. v. Mohammad Nooh* AIR 1958 SC 86 . The existence of an alternative remedy is merely a factor to be taken into consideration and not a bar to relief. When there is "manifest error" or a "patent illegality" it is the duty of the High Court to interfere: see *A.V. Venkateswaran, Collector of Customs, Bombay Vs. Ramchand Sobhraj Wadhvani and Another*, and *Hindustan Aluminum Corporation Ltd. v. Controller of Aluminum and Ors.* ILR (1976) Del. 336 . Especially when quick relief is necessary; see *Calcutta Discount Company Limited Vs. Income Tax Officer, Companies District, I and Another*, And after admitting a petition for hearing on merits, it is not generally fair to dismiss it on this somewhat technical ground: see *C.A. Abraham, Uppoottil, Kottayam Vs. The Income Tax Officer, Kottayam and Another*, , *L. Hirday Narain Vs. Income Tax Officer, Bareilly*, , and the decision of a Division Bench of this Court in STR No. 3 of 1973 entitled *Goodwill India Ltd. v. The State*, decided on 20th April, 1979.

Now, applying these various propositions, how do the cases of the petitioners stand; At preliminary hearing, notice was issued to the respondents to show-cause "why rule nisi be not issued". One of the preliminary objections raised in answer was that the petitioners had an equally efficacious alternative remedy open to them, under the Industrial Disputes Act and, hence, were not entitled to invoke the extraordinary jurisdiction of this Court under Article 226. Dispute that objection, the petitions were admitted. It is reasonable to conclude that the object, did not find favour with the admitting Bench. To allow this objection now after the petitions have been pending for two years, would clearly be most unjust. It may have been fair to turn away the petitioners at the threshold, but is different at this stage.

16. The Hon"ble Supreme Court in *Assam Sillimanite Ltd. and another Vs. Union of India and others*, , has held that pendency of the petition for considerable long period is also one of the exceptions for not directing the parties to avail the alternative remedy. The Hon"ble Supreme Court has held as under:

The next question is regarding the relief to be granted to the petitioner. Shri Datar submits that in the writ petition the only prayer made by the petitioners is for the quashing of the order dated December 7, 1972 and that no further claim has been made in the writ petition. He submits that if the petitioners are aggrieved because of the premature termination of the leases, it is open to them to file a suit or take other appropriate remedies for obtaining compensation in respect of the unlawful termination. We do not think that this is a fair course to be adopted in this case. The writ petition was filed by the petitioner company as early as in February 1973 and has been pending in this Court for about 17 years. It is true that the petitioner could have filed a suit for the same purpose with a prayer for additional relief by way of compensation or damages. But we do not think that it should now be asked to go back to file a suit for compensation or



damages which may be barred by limitation. After the lapse of such a long time, in our opinion, the proper course is to adopt some method for deciding the quantum of relief that could be granted to the petitioner by way of compensation and damages, which can at once be simple and expeditious and which will avoid further unnecessary litigation. We think that the request of the learned Counsel that the matter may be referred to arbitration is a fair one and indeed this course is also not seriously resisted by the respondents. The short question that remains to be decided is whether the petitioners have suffered any damages as a result of the premature termination of the three leases in their favour either in the shape of loss of profits for the unexpired periods of the leases or in any other material respect. We, however, direct that, having regard to the circumstances of the case, the compensation/damages should be restricted to a period of five years, from the date of termination of the leases or up to the date of expiry of the original lease deeds referred to above whichever is less and not for the entire unexpired period of all the leases. We refer this issue to arbitration.

17. The Hon"ble Supreme Court in *S.J.S. Business Enterprises (P) Ltd. Vs. State of Bihar and Others*, , has held that existence of alternative remedy does not impinge on the jurisdiction of the High Court to hear the matter if it is otherwise possible. Hon"ble Supreme Court has opined as under:

The existence of an adequate or suitable alternative remedy available to a litigant is merely a factor which a Court entertaining an application under Article 226 will consider for exercising the discretion to issue a writ under Article 226. But the existence of such remedy does not impinge upon the jurisdiction of the High Court to deal with the matter itself if it is in a position to do so on the basis of the affidavits filed. If, however, a party has already availed of the alternative remedy while invoking the jurisdiction under Article 226, it would not be appropriate for the Court to entertain the writ petition. The rule is based on public policy but the motivating factor is the existence of a parallel jurisdiction in another Court. But even when an alternative remedy has been availed of by a party but not pursued, the party could prosecute proceedings under Article 226 for the same relief. Instead of dismissing the writ petition on the ground that the alternative remedy had been availed of, the Court may call upon the party to elect whether it will proceed with the alternative remedy or with the application under Article 226. Therefore, the fact that a suit had already been filed by the appellant was not such a fact the suppression of which could have affected the final disposal of the writ petition on merits.

18. Hon"ble Supreme Court has held in *Durga Enterprises (P) Ltd. and Anr. v. Principal Secretary, Government of H.P. and Ors.* (2004) 13 SCC 665 that High Court having entertained the writ petition in which the pleadings were also complete ought to have decided the case on merits instead of relegating the parties to a civil suit. Hon"ble Supreme Court has held as under:

By the impugned order the writ petition, which was pending for a long period of thirteen years, has been summarily dismissed on the ground that there is

remedy of civil suit. The dispute between the parties was concerning exercise of the respondents' alleged right of re-entry on the disputed property in accordance with Sub-rules (2) and (3) of Rule 5 of the Land Acquisition (Companies) Rules, 1963. The aforesaid Rules contain a mechanism for adjudication of a dispute relating to the alleged breach of terms of the agreement and the manner in which it is to be resolved.

The High Court, having entertained the writ petition, in which pleadings were also complete, ought to have decided the case on merits instead of relegating the parties to a civil suit.

We, therefore, set aside the impugned order of the High Court and remit the matter to it for taking a decision on merits, after hearing the parties, within the earliest possible period.

19. Accordingly this petition is allowed. Annexure P-15 dated 21.1.2004, Annexure P-16 dated 9.2.2004 and appellate order Annexure P-18 dated 23rd July, 2004 are quashed and set aside. The petitioner will be reinstated by the respondent-bank within a period of four weeks on the receipt of copy of this judgment and thereafter he will be permitted to make a representation against the inquiry report dated 22.8.2003 and after taking into consideration the representation made to the inquiry report, the suitable order will be passed by the disciplinary authority. The disciplinary authority, if so desired, can put the petitioner under suspension after reinstatement during the pendency of the proceedings.

There shall be no order as to costs.