

(2010) 04 J&K CK 0043

In the Jammu And Kashmir High Court

Case No : Others Writ Petition (OWP) No. 1105 of 2009 c/w Others Writ Petition (OWP) No. 309 of 2009

Villagers of Jawbera and Others

APPELLANT

Vs

State and Others

RESPONDENT

Date of Decision : 06-04-2010

Acts Referred:

Water (Prevention and Control of Pollution) Act, 1974 — Section 25, 26

Citation : (2011) 1 JKJ 14

Hon'ble Judges : Mohd. Yaqoob Mir, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

Mohd. Yaqoob Mir, Judge

1. Respondent Ghulam Mohammad Lone, proprietor of A.M.L. Contractors and Engineers, Jawbera Awantipora, Pulwama intended to establish

Hot Mix plant at Jawbera. The inhabitants of village Jawbera opposed the same and complained to the District Development Commissioner,

Pulwama as well as to the Minister of Rural Development and at the same time filed the writ petition OWP No. 309/2009. In the accompanying

CMP, interim direction to the following effect was issued.

Notice in the CMP also. In the meanwhile, subject to objections from other side and till next date of hearing respondents no. 1 to 6 are directed to

restrain respondent no. 7 from installing the Macdam plant at village Jawbera-Awantipora, Tehsil Pulwama provided he is not holding requisite

documents and permission as required under law.

2. During the pendency of the said petition, respondent State Pollution Control Board (SPCB-J&K) has issued the consent order where under the

consent has been granted for the manufacture of product/by-produce i.e. BITUME CONCRETE (HOT MIX) with capital investment (plant and machinery) of Rs. 99.76 lacs.

3. Aggrieved thereof, one more petition i.e. OWP No. 1105/2009 has been filed by the villagers in representative capacity. After leave, petition

has been entertained and while considering the accompanying CMP vide order dated 31st of December' 2009, it has been provided that subject

to objections, position prevalent on spot shall be maintained i.e. Macdum plant shall not be established /installed on spot.

4. Objections have been filed by respondent no.5 (Deputy Commissioner), respondent no. 7 (General Manager, District Industries Centre, Pulwama) and respondent no.11 (Ghulam Mohammad Lone).

5. Learned counsel appearing for the respondents no. 5, 7 & 11 contended that the petition is not worth to be entertained on two counts. First,

that the alternate remedy as against the consent order impugned is available. Second, the writ petitioners in OWP No. 1105/2009 have concealed

the facts, which dis-entitles them from obtaining any relief from this Court. Learned counsel appearing for the respondents, more particularly

counsel for the respondent no.11, contended that the earlier writ petition OWP No. 309/2009 was filed by as many as eighteen persons among

whom Abdul Khaliq Wani and Sona Ullah Gassi figure as petitioner no. 1 & 4 whereas their two sons namely Mohammad Amin Wani and Fayaz

Ahmad Gassi are the writ petitioners in OWP No. 1105/2009. It would indicate that first the fathers of the petitioners no. 1 & 2 and others filed

the writ petition and the petitioners in OWP No. 1105/2009 would say that others have filed the writ petition not mentioning that their fathers are

the writ petitioners therein. This infact appears to be a calculated attempt to conceal the real facts with the sole object of stopping the respondent-

Ghulam Mohammad Lone by all means from establishing the Macdum plant. The conduct of the writ petitioners in OWP No. 1105/2009 cannot

be said to be free from blame. So dis-entitle their, from claiming the equitable relief.

6. The most important question is as to whether writ is to be maintained when the alternate remedy is available. The consent order issued by the

SPCB under Sections 25/26 of the Water (Prevention and Control of Pollution)

Act, 1974, as amended, [hereinafter referred to as Water Act]

and u/s 31 of the Air (Prevention and Control of Pollution) Act, 1981 [hereinafter referred to as Air Act]. Under the Water Act, a person

aggrieved by an order made by the State Board under Sections 25/26 of the Act, has a right to prefer an appeal before the appellate authority as

constituted by the State Government. Likewise, in terms of Section 31 of the Air Act, a person aggrieved by an order made by the State Board

under the Act, has a right, to prefer an appeal to such authority as shall be constituted by the State Government.

7. In exercise of the powers vested under Sections 28 of the Water Act and Section 31 of the Air Act, the Government vide notification dated

26th of April' 2007 has constituted the appellate authority, which means that the forum for challenging the consent order impugned is available to

the petitioners.

8. It is no more res-integra that availability of the alternate remedy is not an absolute bar for granting relief in exercise of powers under Article 226

of the Constitution. It is also well settled that alternate remedy available shall be efficacious. When it is efficacious, then resort has to be had to the

same remedy. It shall be quite useful to notice as to what law has been laid down by the Hon'ble Apex Court in the judgments as have been

referred to in support of the respective contentions by the learned counsel for the parties.

9. In the judgment Titaghur Paper Mills Co. Ltd. and Another Vs. State of Orissa and Others, two orders of assessment passed by the Assistant

Sales Tax Officer were challenged before the Hon'ble High Court of Orissa, but both the petitions were dismissed by holding that ""petitioners

therein had an efficacious remedy by way of an appeal."" Hon'ble Apex Court concluded that under the Scheme of the Sales Tax Act, there is

hierarchy of authorities before which the petitioners can get adequate redress against the Act complained of. It has been held that ""petitioners have

right to prefer an appeal before the prescribed authority and then in case of dissatisfaction with the decision in the appeal, they can prefer further

appeal before the Tribunal."" Finally concluded that the Sales Tax Act provides adequate safeguards against the arbitrary or unjust assessment.

10. The judgment Ram and Shyam Company Vs. State of Haryana and Others,

would provide that the court in its own wisdom has imposed a restraint on its exercise of jurisdiction under Article 226 when the party concerned has an effective adequate remedy available. In the reported case in the backdrop of its own facts, it was held that "alternate remedy of appeal was not effective." It has also been laid down that appeal cannot be said to provide, in all situations, alternate remedy keeping aside the nice distinction between jurisdiction and merits.

11. In the judgment *Shyam Kishore and others Vs. Municipal Corporation of Delhi and another*, in the backdrop of peculiar facts and solution

available for redressing grievances of the petitioners therein. It has been held "that alternate remedy does not oust the jurisdiction of the High Court

Discretion has to be properly exercised.

12. From the judgment *Assistant Collector of Central Excise Vs. Jainson Hosiery Industries*, it shall be quite relevant to quote the following from

the first para.

It is correct to say that the High Court must have regard to the well established principles for the exercise of its writ jurisdiction and unless it is

satisfied that the normal statutory remedy is likely to be too dilatory or difficult to give reasonably quick relief, it should be loath to act under Art.

226.

13. From the Judgment *Assistant Collector of Central Excise, Chandan Nagar, West Bengal Vs. Dunlop India Ltd. and Others*, it shall be quite

apt to quote following portion from Para 3 of the judgment.

3. It is only where statutory remedies are entirely ill-suited to meet the demands of extraordinary situations, as for instance where the very vires of

the statute is in question or where private or public wrongs are so inextricably mixed up and the prevention of public injury and the vindication of

public justice require it that recourse may be had to Art. 226 of the Constitution. But then the Court must have good and sufficient reason to by-

pass the alternative remedy provided by statute.

14. In the judgment *Rajasthan State Electricity Board Vs. Union of India (UOI) and Others*, the Division Bench of the High Court of Bombay d

ismisses the writ petition solely on the ground that the alternate remedy was available. The Hon'ble Supreme Court noticing the factual backdrop

i.e. position of the case where under the writ petitioner therein was admittedly entitled to the sum specified therein so no dispute on question of fact.

There was no requirement of relegating the writ petitioners to alternate remedy. It shall be quite useful to quote Para no. 5 of the judgment.

5. We are clearly of the view that as the respondent Union of India has clearly admitted the liability, the High Court ought not to have relegated the appellant to its alternative remedy and should not have writ petition on that count. There is no disputed question of fact in this case. As already noted, in the present case the respondent had admitted its liability and, therefore, the question raised before the High Court being an admitted fact the High Court ought not to have directed the appellant to resort to its alternative remedy under the Act.

15. What emerges from the above is that when the alternative remedy is effective, then exercise of powers under Articles 226 & 227 has to be avoided. But incase alternative remedy is not efficacious, then exercise of such powers is permissible and the Court has to entertain the petition for exercise of its jurisdiction.

16. Viewing the case in hand on the touchstone of the principles as have been laid down, it is quite evident that the remedy of filing appeal against the consent order impugned u/s 28 of the Water Act, then also remedy of filing revision u/s 29 of the said Act is the most appropriate and efficacious remedy. Two forums available under the Water Act have ample powers to scrutinize the validity of the order impugned in the background of the norms of law pertaining to the prevention and control of pollution. Furthermore appeal against such consent order is also provided u/s 31 of the Air Act and an additional safeguard is available to the aggrieved party i.e. sub-rule 2 of rule 18 of the Air Rule provide that in case of insufficiency of the material, the appellate authority can take additional evidence and call for such further material from the appellant or the Board as it deems fit. So, it means that the appellate authority is vested with the powers to go into the disputed question of facts as may emerge from the respective contentions of the parties, same cannot be done while exercising the power under Article 226, as the writ Court cannot go into the disputed question of fact. What follows is that under the Air Act as well as Water Act adequate remedy is available for redressal of the

projected grievance.

17. While relying on the judgment A.P. Pollution Control Board Vs. Prof. M.V. Nayadu (Retd.) and Others, , learned counsel for the petitioners

contended that the appellate authority constituted does not include technical personnel. The contention, no doubt, is attractive, but learned counsel

has not been able to show as to what is the effect of such non-inclusion when in terms of Section 28 of the Water Act and Section 31 of the Air

Act Government has power to constitute the authority as it thinks fit. Petitioners have not pleaded any where the authority constituted has any

incompetence to determine the controversy in the given facts of the case.

18. The learned counsel has not been able to project as to why he has not resorted to alternate remedy available and as to how he could say that

the remedy available is not efficacious, when Rule 18 of the Air Rules would provide that the appellate authority can take additional evidence and

can call for such further material from the Board as it deems fit, same would help the petitioners in showing as to how establishment of the

proposed plant is going to cause air or water pollution.

19. In the instant case, in my view an effective/adequate remedy is available to the petitioners as against the consent order impugned. They shall be

at liberty to have resort to the same, if not already availed of and to project there grievance therein. This petition, as such, is not maintainable, so is

dismissed.

20. The interim directions issued, including the direction dated 31st of December' 2009 passed in CMP No. 2071/2009 shall cease to be in

operation.

21. Constitution of the appellate authority as the State Government has constituted in exercise of power u/s 28 of the Water Act and Section 31 of

the Air Act may in various circumstances require the assistance of a technical personnel, therefore, it would be in the better interests of the pollution

control as well as for better advancement of the object of constituting the appellate authority to include high ranking technical personnel having

knowledge and experience so as to help proper adjudication of various disputes relating to environment and pollution. State government shall take

requisite steps for such inclusion.

22. Disposed of as above.