
(2016) 2 JKJ 526

Jammu & Kashmir High Court

Case No: Others Writ Petition (OWP) No. 1485 of 2015 and CMP No. 01 of 2015

Adil Gaffar Beigh

APPELLANT

Vs

State of J&K

RESPONDENT

Date of Decision: March 18, 2016

Acts Referred:

- Constitution of India, 1950 - Article 226
- Jammu and Kashmir Criminal Procedure Code, 1989 - Section 133, Section 17-B, Section 435

Citation: (2016) 2 JKJ 526

Hon'ble Judges: Mr. Bansi Lal Bhat, J.

Bench: Single Bench

Advocate: None, for the Respondents No. 1 and 2.; Mr. A.M. Dar, Advocate, for the Appellant/Petitioner; Mr. M.A. Qayoom, Advocate, for the Respondent No. 3

Final Decision: Dismissed

Judgement

Mr. Bansi Lal Bhat, J. - This writ petition calls in question order dated 06.08.2015 passed by the Executive Magistrate, 1st Class/Additional

District Magistrate, Srinagar, in File No. DMS/Jud/Misc/764/2015, on an application for removal of nuisance of unlawful business establishment

running under the name and style of M/S Kashmir Business Corporation at Tengpora Bypass, Srinagar. In terms of the impugned order, the

Additional District Magistrate, Srinagar, directed the petitioner herein to close the said business establishment and shift it within ten days from the

date of the order to a place, identified and specified for such business/industrial establishments/units.

2. The petitioner apart from seeking quashing of the impugned order dated 06.08.2015, has also sought writ of mandamus to direct the

respondents to allow him to run the aforesaid business establishment with a further prayer that the private respondent be restrained from causing

any hurdle in running the business in question.

3. The facts giving rise to filing of this writ petition may briefly be adverted to. Respondent no. 3 filed an application/complaint under section 133 of

Code of Criminal Procedure before the Executive Magistrate, 1st Class, Srinagar, for restraining the petitioner from operating and running the

business establishment in question on the ground that the said business establishment was causing nuisance to respondent no. 3 and others living in

the area. He also prayed that the petitioner be directed to stop the business which, according to him, was producing fumes and creating noise

pollution and had made the life of respondent no. 3 as also the inhabitants of the area miserable with further prayer to stop the business

establishment of the petitioner as he had converted residential area into a commercial establishment.

4. On consideration of the matter and after hearing both the parties, the Executive Magistrate, Srinagar, in terms of order dated 06.08.2015,

directed the petitioner to close the business establishment, M/S Kashmir Business Corporation, Tengpora Bypass, Srinagar, and shift it to a place,

identified and specified for such business/industrial establishment/units.

5. Feeling aggrieved of the aforesaid order, the petitioner has filed this writ petition for the reliefs mentioned earlier.

6. On consideration of the matter, this Court while hearing learned counsel for the petitioner and the caveator on 25.08.2015 stayed the operation

of the impugned order subject to objections of the other side and till next date of hearing before the Bench. Respondent no. 3 has filed detailed

reply and has contested the averments made in the writ petition. It is averred that no writ petition under Article 226 of the Constitution of India

read with Section 103 of the Constitution of Jammu and Kashmir can lie against an order passed by an authority while exercising judicial powers

under the statute, especially the provisions of the Code of Criminal Procedure. It is also averred that the petitioner has created unhygienic

atmosphere in the locality and is carrying on commercial activity in residential area which is prohibited by law. It is further averred that before

passing of the order dated 06.08.2015, the petitioner was given a chance to take appropriate steps for shifting and removing the business

establishment from the vicinity of the residential area of the respondent no. 3, but he failed to do so. It is also averred that the order dated

06.08.2015 came to be passed on the directions passed by this Court in the earlier writ petition filed by the writ petitioner wherein a direction was

passed to pass appropriate orders after giving an opportunity of hearing to the petitioner which has been done as is reflected from a plain reading

of the impugned order.

7. I have heard learned counsel for the parties, perused the record and considered the matter.

8. It is well settled that writ jurisdiction under Article 226 of the Constitution of India is extra ordinary in nature and the same is not meant for

declaring the private rights of the parties. The remedy available under Article 226 is not available unless there is violation of some-statutory duty on

the part of the statutory authority. A writ petition is a remedy in public law which can be filed by any person but the main respondent should either

be the State Government, governmental functionaries, or its instrumentalities/agencies within the meaning of Article 12 of the Constitution. Private

individuals cannot be equated with State or its instrumentalities/functionaries. The person against whom writ can be issued must have some

statutory or public duty to perform. Power under Article 226 is exercised at the instance of persons or citizens for vindication of their constitutional

or statutory rights. The relief under Article 226 can be claimed ex debito justitiae or as a matter of right when there is infringement of fundamental

rights.

9. The question which arises for determination and consideration is as to whether the impugned order passed by the Executive Magistrate 1st

Class, Srinagar, is perverse and suffers from any error and has occasioned a failure of justice. The case of the petitioner is that he is the proprietor

of M/S Kashmir Business Corporation and pursuant to the licence issued by the Commercial Tax Department, Government of Jammu and

Kashmir, has been authorised to carry on the business at Tengpora, Bypass, Srinagar. It is stated that the respondent no. 3 has chosen to file a

complaint before the Deputy Commissioner, Srinagar, and the respondent no. 2 has passed the impugned order dated 06.08.2015 directing him to

close the business establishment and shift it to a place, identified and specified for such business establishment/units within ten days stipulated

therein.

10. It appears from the pleadings of the parties that earlier also the petitioner had filed a writ petition, being OWP No. 1288/2015, which came to

be disposed of on 27.07.2015 by directing the Executive Magistrate, 1st Class, Srinagar, to decide the complaint filed by respondent no. 3 in

terms of Section 133 Cr.P.C. and consider the objections filed by the petitioner and after hearing both the sides, pass appropriate orders with an

opportunity of hearing to the petitioner within one week stipulated in that order.

11. The Executive Magistrate 1st Class, Srinagar, after hearing learned counsel for the parties, perusing the records placed before him as also the

order of this Court dated 27th July, 2015, returned a finding that the business unit has been established by the non-complainant (petitioner herein)

adjacent to the residential house of the complainant (respondent no. 3) and the nature of business activities undertaken by the petitioner in the said

Unit is such as to create nuisance. The Executive Magistrate came to the conclusion that the respondent no. 3 has been able to disclose a prima

facie case inasmuch as the business unit has been established by the petitioner in a residential area and has carved out a case within four corners of

provisions of Section 133 Cr. P.C. The Executive Magistrate has further held that the complainant (respondent no. 3) has established and proved

the case that the petitioner was running the business in the residential area which was producing smoke and noise and, thereby creating hazard and

nuisance for the whole area. Thus, the Magistrate directed the petitioner to close the business establishment at Tengpora Bypass, Srinagar, and

shift it to a place, identified and specified for such business / industrial establishment/units, and the Tehsildar was directed to proceed on the spot

and to ensure compliance of that order.

12. It is seen from the pleadings of the parties and the record available in the case that there is no perversity in the impugned order passed by the

Executive Magistrate, who has exercised his jurisdiction within the bounds of law.

13. Apart from what has been stated here in above, I am of the view that the order passed by the Executive Magistrate is revisable before the

Court of Sessions, as provided under Section 435 Cr. P.C. It would be profitable to reproduce the Explanation clause of sub section (1) of

Section 435 Cr. P.C. which is extracted hereunder:

Explanation:

All Magistrates, whether exercising original or appellate jurisdiction, shall be deemed to be inferior to the Sessions Judge for the purposes of this

sub-section and of section 437.

From a plain reading of the aforesaid explanation, it transpires that the orders passed by Executive Magistrates, being subordinate to Sessions

Judge as enunciated in section 17-B Cr. P.C, are amenable to Revisional jurisdiction of Sessions Judge. Section 17-B of Cr. P.C. is also

reproduced hereunder:

17-B. Courts inferior to the High Court and Court of Sessions: Courts of Sessions and Courts of Judicial and Executive Magistrates shall be

Criminal Courts inferior to the High Court and Courts of Judicial and Executive Magistrates shall be Criminal Courts inferior to the Court of

Session.

14. The Hon'ble Supreme Court while dealing with the situation as narrated above has held in *Nivedita Sharma v. Cellular Operators*

Association of India and others, reported as (2011)14 SCC 337 as under:

this Court noticed that when a statutory forum is created by law for redressal of grievances, a writ petition should not be entertained ignoring the

statutory dispensation. The Court further noticed the previous decisions of this Court wherein the Court adverted to the rule of self-restraint that

writ petition will not be entertained if an effective remedy is available to the aggrieved person as follows.

15. In *Titaghur Paper Mills Co. Ltd. v. State of Orissa*, [1983 SCC (2) 433] the Hon'ble Supreme Court observed as under:

11. 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: (ER p. 495)"". There are three classes of cases in which a liability may be established founded upon a

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.* and has been reaffirmed by the Privy Council in *Attorney*

General of Trinidad and Tobago v. Gordon Grant and Co. Ltd. and *Secy, of State v. Mask and Co.* It has also been held to be equally

applicable to enforcement of rights, and has been followed by this Court throughout. The High Court was therefore justified in dismissing the writ

petitions in limine.

16. Summing up distinction between jurisdictions and powers exercisable under Articles 226 and 227 of the Constitution, the Hon'ble Apex Court

summed up the legal position in paragraph 25 of the judgment titled Radhey Shyam v. Chhabi Nath reported in AIR 2015 SC 3269

Paragraph 25 is reproduced hereunder:

25. Accordingly, we answer the question referred as follows:

(i) Judicial orders of Civil Court are not amenable to writ jurisdiction under Article 226 of the Constitution;

(ii) Jurisdiction under Article 227 is distinct from jurisdiction under Article 226. Contrary view in Surya Dev Rai is overruled.

17. Dwelling upon the scope of powers and extent of jurisdiction of judicial courts under Articles 226 and 227 of the Constitution of India, Hon'ble

Division Bench of this Court while dealing with a similar issue at Jammu Wing of the High Court in State of Jammu and Kashmir v. J. S. Modi

(LPAOW No. 86/2015) decided on 15.03.2016 has discussed in detail the proposition of law. It would be profitable to reproduce the relevant

paragraphs of the judgment, which read hereunder:

In Shri Jogendrasinghji Vidjaysinghji v. State of Gujarat and others"" reported in AIR 2015 SC 3623, the Hon'ble Apex Court was of

the view that it would depend upon the nature, contour and character of the order and it will be the obligation of the Division Bench hearing LPA

appeal to discern and decide whether the order has been passed by the Single Judge in exercise of jurisdiction under Article 226 or 227 of the

Constitution or both. The Division Bench would be required to scrutinize whether the facts of the case justify the assertions made in the petition to

invoke the jurisdiction under both the articles and the relief prayed on the foundation. It summarized the conclusions as follows:

In view of the aforesaid analysis, we proceed to summarise our conclusions as follows:-

(A) Whether a Letters Patent Appeal would lie against the order passed by the learned Single Judge that has travelled to him from the other

tribunals or authorities would depend upon many a facet. The court-fee payable on a petition to make it under Article 226 or Article 227 or both,

would depend upon the Rules framed by the High Court.

(B) The order passed by the civil court is only amenable to be scrutinized by the High Court in exercise of jurisdiction under Article 227 of the

Constitution of India which is different from Article 226 of the Constitution and as per the pronouncement in *Radhey Shyam (supra)*, no writ can

be issued against the order passed by the civil court and, therefore, no Letters Patent Appeal would be maintainable.

(C) The writ petition can be held to be not maintainable if a tribunal or authority that is required to defend the impugned order has not been arrayed

as a party, as it is a necessary party.

(D) Tribunal being or not being party in a writ petition is not determinative of the maintainability of a Letters Patent Appeal.

The Hon'ble Apex Court had the occasion to deal with the scope of powers and exercise of jurisdiction under Article 227 of the Constitution of

India and Section 482 Cr. PC (corresponding to Section 561-A of Jammu and Kashmir Cr. PC) in *"AG v. Shiv Kumar Yadav"* reported in

AIR 2015 Supreme Court 3501 Reiterating the view taken in an earlier judgment titled *"Jasbir Singh v. State of Punjab"* reported in (2006)

8 SCC 294 it observed:

28. It will also be pertinent to mention that power of judicial superintendence under Article 227 of the Constitution and under Section 482, Cr.

PC has to be exercised sparingly when there is patent error or gross injustice in the view taken by a subordinate court.

9. The Hon'ble Apex Court was of the view that if any judicial order was sought to be assailed on the ground of inconsistency with any

fundamental right, the appropriate remedy to challenge such order would be an appeal or revision as may be provided by law. It is by now well

settled that Writ of Certiorari does not lie to quash judgments of inferior Courts and High Court cannot be termed as a Court of Inferior

jurisdiction. Summing up its conclusions in Radhey Shyam (Supra), the Hon'ble Apex Court was of the view that challenge to judicial orders could

lie by way of appeal or revision or under Article 227 and not by way of a writ under Article 226 and 32 of the Constitution. Where remedy for

filing a revision before the High Court has been expressly barred, only in such a case, a petition under Article 227 of the Constitution would lie and

not under Article 226 of the Constitution. An order of civil court could be challenged under Article 227 and not under Article 226. Proceedings

under Article 227 are only supervisory in nature. Though power conferred under this Article is akin to that of an ordinary Court of appeal, yet such

power is intended to be used sparingly and only in appropriate cases to keep the Courts and Tribunals within the bounds of their authority and not

for correcting mere errors. Such power can be exercised in cases occasioning grave injustice or failure of justice when the Court or Tribunal has

assumed a jurisdiction not vested in it or has failed to exercise a jurisdiction vested in it or the jurisdiction has been exercised in a manner which

amounts to overstepping the limits of jurisdiction. Sounding a note of caution against exercise of supervisory jurisdiction on drop of a hat, the

Hon'ble Apex Court further observed in Radhey Shyam's Case (Supra);

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 honored principles discussed above. Those principles have been formulated by this Court for ends of justice and the High court's as

the highest courts of justice within their jurisdiction will adhere to them strictly.

18. In the event of circumvention of the efficacious statutory remedy and invoking of the extraordinary writ jurisdiction, juxtaposed with the law laid

down in the aforesaid judicial pronouncements, this writ petition is found unmerited and is dismissed accordingly along with connected CMPs.

Subsisting interim direction, if any, shall stand vacated.