

**Right To Choose Forum For Redressal Of Grievance Does Not Permit Choice Of Two Forums For Same Reliefs: J&K High Court Imposes 50K Cost**

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IN THE HIGH COURT OF JAMMU & KASHMIR AND LADAKH AT SRINAGAR  
**WASIM SADIQ NARGAL; J.**

WP(C) No. 1197/2022 & CM No. 2955/2022; 29.10.2022

**Tanzeem Khursheed Zargar versus J&K Special Tribunal & Ors.**

*Petitioner(s) through: Mr. A.Hanan Kalwal, Advocate.*

*Respondent(s) through: Mr. Moomin Khan, Adv. for no. 2 to 4. Mr. Azhar ul Amin, Adv. for no. 5 to 8.*

**J U D G M E N T**

1. Petitioner is aggrieved of the order dated 02.05.2022 passed by Respondent No.1-J&K Special Tribunal Srinagar, whereby the Tribunal has rejected the Application of the petitioner for not impleading him as a necessary party and has allowed the appeal by directing the Municipal authorities to consider the regularization of the minor deviations, if any, made by the private respondents 5 to 8 under the enabling provision of Master Plan-2035 and the J&K Unified Building Bye-Laws.

**FACTS**

2. Brief facts of the case, which led to filing of the present writ petition under Article 226 of the Constitution of India by the petitioner is that the petitioner and the private respondents are living in the close vicinity of each other and are in possession of the proprietary land. The case of the petitioner is that in the year 2021, the private respondents 5 to 8 started dumping of building material for renovation of their old structure and feeling aggrieved of the same, the petitioner approached the civil court by way of the suit and the learned court directed the parties to maintain *status quo*. However, the private respondents subsequently produced the permission/sanction granted by Municipal Corporation vide order No.235 of 2021 dated 17.07.2021, which reads as under:-

***“...for restoration of existing double storey with attic residential house over existing parameters without any change in shape size height and without dismantling the structure on the plot of land compromising survey No. 894/2. And the total built up area 805.0 s.fts. & attic floor 402.0 s.fts....”***

3. Further stand of the petitioner is that the private respondents under the garb of the permission started to dismantle the existing structure and started to construct the new structure without adhering to the terms and conditions of the building permission by dismantling first the existing structure and then by building the structure upto 1200 sq.fts built up area and by increasing the height of the structure there by violating the privacy of the petitioner resulting in infringement of the right to privacy.

4. Pursuant to the complaint of the petitioner, the official respondents took note of the violation of the building permission granted to the private respondents, and issued demolition notice under Section 235(1) of J&K Municipal Corporation Act, 2000 vide No. SMC/Enf/1890-95 dated 24.11.2021. Feeling aggrieved of the same, the private respondents herein assailed the demolition notice by way of appeal before the J&K Special Tribunal, Srinagar. As per the stand of the petitioner, the petitioner feeling aggrieved of the violation of the permission granted to the private respondents because of the change in shape, size and height of the existing structure and being

affected party, filed an application in the aforementioned appeal seeking impleadment in the proceedings as being necessary party.

5. It is the specific case of the petitioner that the Tribunal without hearing the petitioner has passed the impugned order that too without deciding the application seeking his impleadment and allowing the appeal leaving no option to the petitioner but to challenge the order impugned dated 02.05.2022 by way of the present writ petition.

6. Learned counsel for the petitioner urged that the order impugned dated 02.05.2022 passed by the J&K Special Tribunal Srinagar be set aside on the ground that the same has been passed with nonapplication of mind and in violation of the rules governing the field. Learned counsel argued that the private respondents have violated the building permission granted to them and accordingly, the order impugned cannot sustain the test of law and deserves to be set aside. It has further been urged that the deviations are of such nature that if regularized same will be fatal to the rights of the petitioner.

7. The main plank of argument raised by learned counsel for the petitioner is that the order impugned dated 02.05.2022 deserves to be quashed and set aside on the ground that the petitioner is an affected party and the Tribunal has brushed aside his contention raised in the application. The Tribunal has not touched this aspect of the matter nor has his application been accorded any consideration and, accordingly, submitted that the order impugned cannot sustain the test of law and is liable to be set aside.

8. Per contra, Azhar-ul-Amin, learned counsel for private respondents 5 to 8 has raised an issue with regard to maintainability of the present writ petition in light of the fact that the petitioner has already availed the remedy of filing the suit before the civil court and had obtained *status quo* order on misrepresentation of the fact that the construction has been undertaken by the private respondents without any sanction/permission. Learned counsel further argued that permission has already been granted in favour of the private respondents by the competent authority, the petitioner immediately withdrew the said suit as not pressed after the private respondents filed the written statement and brought the permission/sanction on record. He further argued that the permission for restoration/re-construction on the existing parameters was granted vide order No.235 of 2021 dated 19.07.2021. Learned counsel has also argued that the Tribunal has discharged the caveat on the ground of the petitioner having no locus standi and had recorded the finding that the houses of the petitioner and the private respondents are separated by 11 feet public pathway and this was precisely the reason the caveat was discharged as the petitioner has no locus in the present proceedings. His further argument is that the Tribunal has only directed the Srinagar Municipal Corporation to decide the case of the private respondents for regularization of minor deviations, if any, under permissible norms within a period of two weeks from passing of order dated 31.05.2022, as such the writ petition is not maintainable.

9. It is the specific case of private respondents that the petitioner immediately after the dismissal of his caveat filed appeal before the civil court against the order of withdrawal of suit filed by him, which is pending adjudication before the court of learned 3<sup>rd</sup> Additional District & Sessions Judge, Srinagar and this aspect of the matter has been deliberately concealed by the petitioner by filing the present writ petition with

a view to mislead this Court and had played fraud with this Court to get interim order passed in his favour. Learned counsel further argued that the present writ petition is not maintainable as the remedy in the form of present writ petition is not available to him as he is stranger to the proceedings which has culminated in the issuance of impugned order which is called in question by way of present writ petition filed under Article 226 of the Constitution of India.

**10.** It has been further argued by the counsel for the private respondents that the learned Tribunal by virtue of impugned order has decided nothing but directed the statutory authority to decide the case of private respondents under enabling provisions of the statute and the writ petition which is preferred by the petitioners seeks direction contrary to the statute, which is not maintainable. It is the further stand of the private respondents that the present writ petition is sheer abuse of process of law as the petitioner has filed the present writ petition and initiated the parallel proceedings when already he has availed the remedy of filing appeal against the suit which the petitioner has later on withdrawn. It is the specific case of the private respondents that there is alternate and efficacious remedy provided under Section 401 of J&K Municipal Corporation Act, 2000, and the present writ petition is barred, as such. Lastly the learned counsel has argued that the present writ petition is not maintainable, as by virtue of the aforesaid writ petition, challenge has been thrown to the building permission granted by the statutory authority in favour of the private respondents and the official respondents were directed to restrain to act under the enabling provisions of the statute, which is not permissible.

**11.** This Court vide Order dated 07.09.2022, granted last and final opportunity to the official respondent Nos. 2 to 4, to file reply within four weeks but in spite of this, reply has not been filed till date.

**12.** When the case was taken up today, Mr. Moomin Khan, learned counsel for the respondent Nos. 2 to 4 submits that he does not wish to file reply and sought permission of this Court to address arguments in absence of the reply. He was permitted to make submissions, accordingly, he argued that the writ petition is not maintainable and is liable to be dismissed as the petitioner has no locus to call in question the order passed by the Tribunal wherein he was not the party in the proceedings. Besides, he has also argued that the petitioner has an alternate and efficacious remedy available under the statute. In case if he is aggrieved of passing of the order of Tribunal, writ petition under Article 226 of the Constitution of India is not the remedy to call in question the order passed by the Tribunal. Since the petitioner has not availed the remedy provided under the statute, the present writ petition is liable to be dismissed. Besides, learned counsel argued that the official respondents were directed by the Tribunal to consider the regularization of the minor deviations, if any, in the existing structure of the private respondents under the enabling provisions of Master Plan-2035 and the J&K Unified Building Bye-Laws and have been directed to issue completion certificate in favour of the private respondents in accordance with law, and because of the rider by virtue of interim order dated 14.06.2022, the official respondents are not in a position to proceed in the matter and, accordingly, has prayed for dismissal of the writ petition and vacation of the interim order. He has further projected that the caveat application filed by the petitioner before the Tribunal was dismissed and the caveat was discharged and thus, it has been observed by the Tribunal that the present controversy appears to be outcome of some personal enmity between the two neighbors i.e. appellant and the caveator.

## **ANALYSIS:-**

13. I have heard learned counsel for the parties at length and perused the record.

14. It is clear that the petitioner after having failed before the civil court has chosen to withdraw the suit filed by him before the court of learned Civil Subordinate Judge/Municipal Srinagar and has initiated parallel proceedings by way of filing the present petition under Article 226 of the Constitution of India. The petitioner threw challenge to the order impugned passed by the Tribunal dated 02.05.2022, by virtue of which the caveat application filed by the petitioner was dismissed and the caveat was discharged.

15. In *K.S. Rashid and Sons v. Income Tax Investigation Commission*, AIR 1954 SC 207, a Constitution Bench of the Hon'ble Supreme Court considered the issue that when the remedy under Section 8(5) of the Taxation of Income Tax (Investigation Commission) Act, 1947 has been pending, whether the High Court could entertain the writ petition. The Hon'ble Apex Court held that a person may choose/effect where it will proceed with the alternative remedy or with the writ petition, but both cannot be pursued simultaneously. It would be advantageous to reproduce paragraph 4 of the aforesaid judgment hereunder:

*4. So far as the second point is concerned, the High Court relies upon the ordinary rule of construction that where the legislature has passed a new statute giving a new remedy, that remedy is the only one which could be pursued. It is said that the Taxation on Income (Investigation Commission) Act, 1947, itself provides a remedy against any wrong or illegal order of the Investigating Commission and under Section 8(5) of the Act, the aggrieved party can apply to the appropriate Commissioner of Income Tax to refer to the High Court any question of law arising out of such order and thereupon the provisions of Sections 66 and 66-A of the Indian Income Tax Act shall apply with this modification that the reference shall be heard by a Bench of not less than three Judges of the High Court. We think that it is not necessary for us to express any final opinion in this case as to whether Section 8(5) of the Act is to be regarded as providing the only remedy available to the aggrieved party and that it excludes altogether the remedy provided for under Article 226 of the Constitution. For purposes of this case it is enough to state that the remedy provided for in Article 226 of the Constitution is a discretionary remedy and the High Court has always the discretion, to refuse to grant any writ if it is satiated that the aggrieved party can have an adequate or suitable relief elsewhere. So far as the present case is concerned, it has been brought to our notice that the appellants before-us have already availed themselves of the remedy provided for in Section 8(5) of the Investigation Commission Act and that a reference has been made to the High Court of Allahabad in terms of that provision which is awaiting decision. In these circumstances, we think that, it would not be proper to allow the appellants to invoke the discretionary jurisdiction under Article 226 of the Constitution at the present stage, and on this ground alone, we would refuse to interfere with the orders made by the High Court. Dr Tek Chand argues that the Income Tax authorities have not referred all the matters to the High Court which the appellants wanted them to do. But for this there is a remedy provided in the Act itself and in case a proceeding occasions a gross miscarriage of justice, there is always the jurisdiction in this court to interfere by way of special leave. In the result, we dismiss the appeals but in the circumstances of the case make no order as to costs.*

16. A Constitution Bench of the Hon'ble Supreme Court in *A.V. Venkateswaran, Collector of Customs, Bombay v. Ramchand Sobhraj Wadhvani*, AIR 1961 SC 1506 held that even where a party has approached the alternative forum, the Court should entertain a writ petition or not, a straitjacket formula cannot be formulated. The Court may examine the facts and circumstances of the case and decide as to whether it was

to entertain the petition or not. However, where the petitioner has already approached the alternative forum for appropriate relief, it is not appropriate that the writ petition should be entertained. The rule is based on public policy and motivating factor is that of existence of the parallel jurisdiction in another Court.

**17.** In *Jai Singh v. Union of India*, (1977) 1 SCC 1 : AIR 1977 SC 898 the Hon'ble Supreme Court considered a case wherein the petitioner filed a writ petition which was dismissed in limine. Subsequently, he filed a suit agitating the same subject-matter. The Court held that suit was not maintainable as a person cannot be permitted to pursue two parallel remedies in respect of the same subject-matter at the same time.

**18.** In *Bombay Metropolitan Region Development Authority, Bombay v. Gokak Volkart Ltd.*, (1995) 1 SCC 642 : (1995 AIR SCW 808), the petitioner therein had filed a writ petition during the pendency of the appeal before the Statutory Authority. The Hon'ble Apex Court held that such a writ was not maintainable.

**19.** Thus, from the aforementioned enunciation of law, it is clear that a person may have a right to choose the forum for redressal of his grievance, but he/she cannot be permitted to choose two forums in respect of the same subject-matter for the same relief. If parallel proceedings are allowed, they may give rise to forum hunting, wherein, a party who filed a suit and was not able to get the interim relief abandons the remedy before the civil Court and approaches the remedy of filing the writ petition, it will amount to abuse of the process of the Court by forum hunting.

**20.** In the peculiar facts and circumstances of the present case, it is emphatically clear that the present writ petition is totally an abuse of process of Court, more particularly, when the petitioner has already availed the remedy of filing appeal against the order dated 15.02.2022 by virtue of which the civil suit along-with the interim application was dismissed in a Civil Suit No. 488/N filed by the petitioner by way of misrepresentation of the facts seeking stay on the construction by urging that the construction was undertaken by private respondents without any permission. When the private respondents filed the written statement before the civil court and the sanction/permission was brought on record, the petitioner immediately withdrew the aforesaid suit as the petitioner anticipated the fate of the said suit. After having failed before the civil court, the petitioner has chosen to file the present writ petition against the order of the Tribunal, in which his caveat was discharged.

**21.** Once the petitioner has chosen to file appeal before the civil court, she, by no stretch of imagination can initiate parallel proceedings before this Court under Article 226 of the Constitution of India by abandoning the remedy before the civil Court and approach the remedy of filing the writ petition. Thus, the present writ petition tantamount to abuse of the process of Court.

**22.** The issues involved in both the proceedings i.e., present writ petition and civil court, are directly or indirectly or substantially the same and the petitioner after having availed the remedy of appeal against the order whereby his civil suit has been dismissed as not pressed, has filed the present writ petition which is not maintainable as the petitioner by no stretch of imagination can initiate the parallel proceeding on the same subject matter being a stranger to the proceedings, having no locus standi.

**23.** The petitioner was not a necessary party before the Tribunal in which the private respondents have preferred the appeal under Section 253 of J&K Municipal

Corporation Act, 2000 against the notice of demolition bearing No. SMC/Enf/1890-95 dated 24.11.2021 issued by Chief Enforcement Office, SMC Srinagar. This was precisely the reason that the Tribunal did not deem it proper to decide the application allegedly filed by the petitioner seeking impleadment as party, more particularly, when the caveat application filed by the petitioner before the Tribunal was dismissed and caveat discharged. The petitioner has no locus standi to challenge the order of the Tribunal as the petitioner was a stranger to the proceedings before the J&K Special Tribunal, Srinagar. The petitioner has filed the present writ petition challenging the order of the Tribunal, whereby no adverse order has been passed by the Tribunal, and has yet to become party and has got interim order which is harshly working against the private respondents by virtue of which the official respondents have been restrained to consider the case of the private respondents for regularization of minor deviations under the enabling provisions of the Master Plan-2035 and the Srinagar Municipal Corporation (Building) Bye-Laws. The Tribunal has also recorded the finding that the caveator (petitioner herein) has no locus standi as the houses of the petitioner and the private respondents are separated by 11 feet public pathway. This was precisely the reason that the caveat was discharged.

24. Furthermore, the petitioner, with a view to mislead this Court and to get the interim order, has deliberately suppressed the factum of filing appeal before the civil court against the order of withdrawal of the suit and the said appeal is pending disposal as on date before the court of learned 3<sup>rd</sup> Additional District & Sessions Judge Srinagar.

25. On the aspect of suppression, equity, clean hands and fraud, the law is well settled in the following decisions:-

a. In *Prestige Lights Ltd., v. State Bank of India* [(2007) 8 SCC 449], at paragraphs 33, 34 and 35, the Hon'ble Supreme Court held as follows:

*"33. It is thus clear that though the appellant Company had approached the High Court under Article 226 of the Constitution, it had not candidly stated all the facts to the Court. The High Court is exercising discretionary and extraordinary jurisdiction under Article 226 of the Constitution. Over and above, a Court of Law is also a Court of Equity. It is, therefore, of utmost necessity that when a party approaches a High Court, he must place all the facts before the Court without any reservation. If there is suppression of material facts on the part of the applicant or twisted facts have been placed before the Court, the Writ Court may refuse to entertain the petition and dismiss it without entering into the merits of the matter.*

*34. The object underlying the above principle has been succinctly stated by Scrutton, L.J., in R v. Kensington Income Tax Commissioners, [(1917) 1 KB 486 : 86 LJ KB 257 : 116 LT 136], in the following words: "(I)t has been for many years the rule of the Court, and one which it is of the greatest importance to maintain, that when an applicant comes to the Court to obtain relief on an ex parte statement he should make a full and fair disclosure of all the material facts, not law. He must not misstate the law if he can help the Court is supposed to know the law. But it knows nothing about the facts, and the applicant must state fully and fairly the facts, and the penalty by which the Court enforces that obligation is that if it finds out that the facts have not been fully and fairly stated to it, the Court will set aside, any action which it has taken on the faith of the imperfect statement".*

*35. It is well settled that a prerogative remedy is not a matter of course. In exercising extraordinary power, therefore, a Writ Court will indeed bear in mind the conduct of the party who is invoking such jurisdiction. If the applicant does not disclose full facts or suppresses relevant materials or is otherwise guilty of misleading the Court, the Court may dismiss the*

*action without adjudicating the matter. The rule has been evolved in larger public interest to deter unscrupulous litigants from abusing the process of Court by deceiving it. The very basis of the writ jurisdiction rests in disclosure of true, complete and correct facts. If the material facts are not candidly stated or are suppressed or are distorted, the very functioning of the writ courts would become impossible."*

b. In *Udyami Evam Khadi Gramodyog Welfare Sanstha and another v. State of Uttar Pradesh* [(2008) 1 SCC 560], at paragraphs 16 and 17, the Hon'ble Apex Court, held as follows:

*"16. A writ remedy is an equitable one. A person approaching a superior court must come with a pair of clean hands. It not only should not suppress any material fact, but also should not take recourse to the legal proceedings over and over again which amounts to abuse of the process of law. In Advocate General, State of Bihar v. M.P. Khair Industries[(1980) 3 SCC 311], this Court was of the opinion that such a repeated filing of writ petitions amounts to criminal contempt.*

*17. For the reasons aforementioned, there is no merit in this appeal which is dismissed accordingly with costs. Counsel's fee quantified at Rs.50,000."*

c. In *Shrisht Dhawan Vs M/s Shah Brothers* (AIR 1992 SC 1555) at paragraph 20, the Hon'ble Apex Court, held as follows:

*"20. Fraud and collusion vitiate even the most solemn proceedings in any civilized system of jurisprudence. It is a concept descriptive of human conduct....."*

d. In *S.P. Chengalvaraya Naidu V/S. Jagannath* (AIR 1994 SC 853) at paragraph 8, the Hon'ble Apex Court, held as follows:

*8. ....A fraud is an act of deliberate deception with the design of securing something by taking unfair advantage of another. It is a deception in order to gain by another's loss. It is a cheating intended to get an advantage.....*

e. Lastly, in the case of *Ramrameshwari Devi & Ors vs Nirmala Devi & Ors*, the Hon'ble Apex Court emphasized upon the need for curbing unscrupulous litigation. At paragraphs 43, 54 and 55, the Hon'ble Apex Court, held as follows:

**43.** *We have carefully examined the written submissions of the learned amicus curiae and the learned counsel for the parties. We are clearly of the view that unless we ensure that wrongdoers are denied profit or undue benefit from the frivolous litigation, it would be difficult to control frivolous and uncalled for litigations. In order to curb uncalled for and frivolous litigation, the courts have to ensure that there is no incentive or motive for uncalled for litigation. It is a matter of common experience that court's otherwise scarce and valuable time is consumed or more appropriately, wasted in a large number of uncalled for cases.*

**54.** *While imposing costs we have to take into consideration pragmatic realities and be realistic as to what the defendants or the respondents had to actually incur in contesting the litigation before different courts. We have to also broadly take into consideration the prevalent fee structure of the lawyers and other miscellaneous expenses which have to be incurred towards drafting and filing of the counter-affidavit, miscellaneous charges towards typing, photocopying, court fee, etc.*

**55.** *The other factor which should not be forgotten while imposing costs is for how long the defendants or respondents were compelled to contest and defend the litigation in various courts. The appellants in the instant case have harassed the respondents to the hilt for four decades in a totally frivolous and dishonest litigation in various courts. The appellants have also wasted judicial time of the various courts for the last 40 years.*

26. Thus, from the aforementioned pronouncements, the law has been settled that suppression of any material fact amounts to abuse of the process of law and amounts to fraud and would deprive an unscrupulous litigant from availing equitable or discretionary remedies under Article 226 of the Constitution of India. In the present case, the petitioner, with a view to mislead this Court and to get the interim order, has deliberately suppressed the factum of filing appeal before the civil court against the order of withdrawal of the suit and the said appeal is pending disposal as on date before the court of learned 3<sup>rd</sup> Additional District & Sessions Judge Srinagar. In these circumstances, the petitioner is not entitled to claim the discretionary remedy available under Article 226 of the Constitution of India.

**CONCLUSION:-**

27. For what has been stated hereinabove and in the light of the settled legal position: -

I. I, hold that the present writ petition is not maintainable and is liable to be dismissed as the same is sheer abuse of process of the Court as the petitioner has already initiated parallel proceedings by way of filing appeal against the order passed by the court of learned 3<sup>rd</sup> Additional District & Sessions Judge Srinagar, which is pending adjudication before the said court involving the same issue in question, which is subject matter of the present writ petition. The petitioner has no locus to call in question the order passed by the Tribunal, wherein the appeal has been preferred by the private respondents against the order of demolition issued by the Srinagar Municipal Corporation, in which the petitioner is not a party and wherein no adverse order has been passed against the petitioner.

II. The petitioner has deliberately suppressed the material fact of filing appeal before the court of learned 3<sup>rd</sup> Additional District & Sessions Judge Srinagar against the dismissal/withdrawal of the suit filed by him with a view to mislead this Court and to get interim order. It clearly proves that the petitioner has not come to this Court with clean hands. The petitioner has, accordingly, abused the process of court by filing the writ petition and accordingly, this is a fit case where cost of Rs.50,000/- is imposed upon the petitioner to deprecate such practice of forum hunting and suppression of material facts, which shall be payable by the petitioner to the private respondents within a period of four weeks from today as they are the real sufferers of the interim order passed by this Court which is harshly working against the private respondents and thus, they need to be compensated.

III. Accordingly, the present Writ Petition stands dismissed. Interim direction shall also stand vacated.