THE DOCTRINE OF ALTERNATIVE REMEDY AND THE SCOPE OF ARTICLE 226

Written by ***Blaisy Babby P***

Ist Year BA LLB Student, CHRIST (Deemed to be University), Bangalore. Karnataka, India

ABSTRACT

High Courts are empowered to exercise writ jurisdiction under Article 226 of the Constitution however, it is bound by the principle of exhaustion of alternative remedy. The principle mandates the petitioner to avail of the other statutory remedies available before seeking a writ remedy. This article analyses the scope of Article 226 by focusing on the general rule of exhaustion of alternative remedies and the deviance from this rule based on the decisions taken by the apex court in a number of cases. Depending on the facts and circumstances of the case and after considering the four exceptions laid down by the Hon'ble Supreme Court in Whirlpool Corporation v. Registrar of Trademarks, Mumbai, the High Court can decide the admissibility of writ petition where an alternative statutory remedy is at hand. If the remedy available is efficient and adequate and serves justice, then High Court cannot exercise writ jurisdiction. This article examines the extent to which the rule of exhaustion of alternate remedies affects the scope of Article 226.

Keywords: Article 226, Doctrine of Alternate Remedy, Exhaustion of Remedy, Adequacy and Efficacy

INTRODUCTION

Article 226 of the Constitution empowers the High Courts to issue writs for the protection of fundamental rights and the other legal rights of any person irrespective of being a citizen of India. The writ jurisdiction of the high court is discretionary in nature since the issuance of a writ for the enforcement of non-fundamental rights is left to the discretion of the High Court and also the power of the High Court to issue writs is limited via the principle of exhaustion of equal and efficacious alternate statutory remedies. The stability between this judicial discretion and limitation determines the scope of Article 226. The general principle says that the exhaustion of adequate and efficacious alternative statutory remedies is mandatory to invoke the writ jurisdiction of High Courts. However, Supreme Court held that "exceptions to the rule of alternate remedy arise where (a) the writ petition has been filed for the enforcement of a fundamental right protected by Part III of the Constitution; (b) there has been a violation of the principles of natural justice; (c) the order or proceedings are whole without jurisdiction, or (d) the vires of legislation is challenged"[i]. In these circumstances, the High Courts have the jurisdiction to exercise writ jurisdiction despite the availability of an alternate remedy.

THE DOCTRINE OF EXHAUSTION OF ALTERNATIVE REMEDY

The general principle states that the writ petitions are not maintainable before the High Court under Article 226 where an equal, efficient, and adequate alternative remedy is available. Therefore, Article 226 provides for a discretionary remedy and the high court has the power to refuse the grant of any writ if it is satisfied that the aggrieved party has an adequate alternative remedy unless there are exceptional circumstances. Remedies provided under this article can't be used as a substitute for other remedies. The apex court in many, cases including the following cases reiterated this principle.

The Supreme Court in *Union of India v. T R Verma*[ii] held that "it is well settled 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"[iii]. The Court further stated that "when such remedy exists, it will be a sound exercise of discretion to refuse to interfere in a petition under Article 226, unless there are good grounds,

therefore"[iv]. In another case, *Seth Chand Ratan v. Pandit Durga Prasad*[v], it was argued on behalf of the appellant that in view of the statutory provision of the appeal, the writ petition ought not to have been entertained. The apex court observed that "the Division Bench brushed aside the argument by merely observing that the existence of an alternative remedy does not divest the High Court of its jurisdiction to entertain a petition under Articles 226 and 227 of the Constitution. In our opinion, the Division Bench failed to notice that the Statute itself provided a regular appeal to the High Court against the judgment and order of the Court (First Additional District Judge) which was deemed to be a decree, and the said remedy had already been availed of by the writ petitioner by filing an appeal which had been dismissed, and the result whereof was that the judgment and order of the Court attained finality between the parties"[vi]. In this case, the party had recourse to file an appeal in the High Court itself (not in any other tribunal or forum) by virtue of the provisions of the statute and therefore, filing of a writ petition under Articles 226 and 227 of the Constitution is not maintainable. The apex court set aside the writ granted by the High Court as an equal and efficacious alternative remedy was available.

In *Venkateswaran v. Wadhwani*[vii], the Court examined the maintainability of the writ of mandamus in the phase of an alternative statutory remedy. The court held that "normally a writ of mandamus is not issued if other remedies are available. There would be a stronger reason for following this rule where the obligation sought to be enforced by the writ is created by a statute and that statute itself provides the remedy for its breach. It should be the duty of the courts to see that the statutory provisions are observed and, therefore, that the statutory authorities are given the opportunity to decide the question which the statute requires them to decide." Further in the case of *Sangitha Vilas Ingle v. the State of Maharashtra*[viii], the court observed that "the petition involves various questions of fact. As such we are not inclined to invoke extraordinary jurisdiction either under Article 226 of the Constitution or under Section 482 of the Code of Criminal Procedure. In any case, if the petitioner has an efficacious alternative remedy of filing compliant before the learned Judicial Magistrate, I Class, in that view of the matter, we are not inclined to entertain this petition. The petition is rejected relegating the petitioner to the alternate remedy available in law." The apex court set aside the writ of mandamus issued by the High Court to the respondents in *Swamy Atmananda v. Swamy*

Bodhananda & Ors.[ix] ruling that a civil order under the Code of Civil Procedure is the appropriate remedy and not the writ of mandamus.

In another landmark case, *Punjab National Bank v. O C Krishnan*[x], a suit was filed by the appellant for recovery of money from the principal debtor as well as the guarantors. The case was decided by the Debt Recovery Tribunal, Calcutta, against the principal debtor as well as against the guarantors. The Calcutta High Court granted a writ petition invoking its jurisdiction under Articles 226 & 227. The Supreme Court held that the order of the tribunal is appealable under the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 and the High Court must not have exercised its writ jurisdiction. The Supreme Court observed the following;

- *"the act of the Recovery of Debts Due to Banks and Financial Institutions was enacted to provide a special procedure for recovery of bank debts and debts due to the financial institutions, and there is a proper hierarchy of appeal procedures provided under the act and such procedure should not be diverted either by the recourse procedure under Article 226 and 227 or by filing a civil suit, which is expressly barred.*
- *Where there are an alternate remedy available judicial prudence demands that the court should refrain itself from exercising its jurisdiction under the said constitutional provision.*
- *In this case the high court must not have exercised its jurisdiction and must have directed the respondent to take recourse to the appeal mechanism provided by the Act"*[xi].

The apex court concluded that the exhaustion of alternative remedies that are equal, just, and effective is a must before moving to the High Court for the issuance of the writs.

Exceptions to the Doctrine of Exhaustion of Alternative Remedy

Over time, the general rule of "exhaustion of alternative remedies before moving to the High Court for issuance of writs" was diluted by the apex court. In *Whirlpool Corporation v. Registrar of Trademarks*[xii]*, Mumbai* the Supreme Court ruled that a writ petition can be granted even in the phase of availability of an alternative remedy if there are exceptional circumstances

including the violation of fundamental rights, violation of principles of natural justice, proceedings exceeding the jurisdiction, or the vires of legislation are challenged. Thereby the court upheld that the availability of alternative remedies is not an absolute bar to the granting of writs under Article 226[xiii].

The apex court in *Whirlpool Corporation v. Registrar of Trademarks, Mumbai*[xiv] held that depending on the facts and circumstances the High Court has the discretion to exercise writ jurisdiction despite the availability of an alternative remedy. The court observed and decided the matter in the following way, *"under Article 226 of the Constitution, the High Court, having regard to the facts of the case, has the discretion to entertain or not to entertain a writ petition. But the High Court has imposed upon itself certain restrictions one of which is that if an effective and efficacious remedy is available, the High Court would not normally exercise its jurisdiction. But the alternative remedy has been consistently held by this Court not to operate as a bar in at least three contingencies, namely, where the writ petition has been filed for the enforcement of any of the Fundamental Rights or where there has been a violation of the principle of natural justice or where the order or proceedings are wholly without jurisdiction or the vires of an Act is challenged."*[xv]

The above-discussed decision was reiterated in *Harbans Lal Sahnia v. Indian Oil Corporation Ltd*[xvi]. The Supreme Court observed that *"in an appropriate case, in spite of the availability of the alternative remedy, the High Court may still exercise its writ jurisdiction in at least three contingencies: (i) where the writ petition seeks enforcement of any of the fundamental rights; (ii) where there is a failure of principles of natural justice; or (iii) where the orders or proceedings are whole without jurisdiction or the vires of an Act is challenged."*[xvii]

Further in *Radha Krishna Industries v. State of Himachal Pradesh*[xviii], an appeal has been filed against the dismissal of the writ petition by the High Court on the basis of an effective alternative remedy being available under law, where the division bench of the Supreme Court placed reliance on *Whirlpool Corporation v. Registrar of Trademarks, Mumbai*[xix] and *Harbanslal Sahnia v. Indian Oil Corporation Ltd.*[xx] and held that;

(i) *"The power under Article 226 of the Constitution to issue writs can be exercised not only for the enforcement of fundamental rights but for any other purpose as well;*

(ii) *The High Court has the discretion not to entertain a writ petition. One of the restrictions placed on the power of the High Court is where an effective alternative remedy is available to the aggrieved person;*

(iii) *Exceptions to the rule of alternate remedy arise where (a) the writ petition has been filed for the enforcement of a fundamental right protected by Part III of the Constitution; (b) there has been a violation of the principles of natural justice; (c) the order or proceedings are whole without jurisdiction, or (d) the vires of legislation is challenged;*

(iv) *An alternate remedy by itself does not divest the High Court of its powers under Article 226 of the Constitution in an appropriate case though ordinarily, a writ petition should not be entertained when an efficacious alternate remedy is provided by law;*

(v) *When a right is created by a statute, which itself prescribes the remedy or procedure for enforcing the right or liability, resort must be had to that particular statutory remedy before invoking the discretionary remedy under Article 226 of the Constitution. This rule of exhaustion of statutory remedies is a rule of policy, convenience and discretion; and*

(vi) *In cases where there are disputed questions of fact, the High Court may decide to decline jurisdiction in a writ petition. However, if the High Court is objective of the view that the nature of the controversy requires the exercise of its writ jurisdiction, such a view would not readily be interfered with"*[xxi].

In *Rajasthan State Electricity Board v. Union of India*[xxii], the apex court observed that *"now it is a well-settled principle of law that the availability of alternative remedy is not an absolute bar for granting relief in the exercise of power under Article 226 of the Constitution"*[xxiii]. An appeal was filed to the Supreme Court against the order passed by the Bombay High Court dismissing the writ petition filed by the appellants, on the grounds of alternative remedies being available in the Railway Claims Tribunal. But the apex court held that since the respondent had admitted the liability, the High Court can neither dismiss the writ petition nor direct the appellants to seek an alternative remedy.

In *the State of Bombay v. The United Motors India Ltd.*[xxiv], the Hon'ble Supreme Court observed that the High Court cannot deny writ in cases where a person comes before the court

with an allegation of infringement of a fundamental right, where the remedy provided by the Act is of an onerous and burdensome character. Therefore, it was held that the bar to issue writ when an adequate alternative remedy available is not absolute in nature. Further, the apex court in *L Hirday Narain v. Income Tax Officer*[xxv], held that "if the High Court had entertained a petition despite the availability of alternative remedy and heard the parties on merits it would be ordinarily unjustifiable for the High Court to dismiss the same on the ground of non-exhaustion of statutory remedies unless the High Court finds that factual disputes are involved and it would not desire to deal with them in a writ petition"[xxvi].

Justice Harries in *Collector of Customs v. Soorajmull Nagarmull*[xxvii] observed that "The Court can and should issue certiorari even when alternative remedies are available where a court or tribunal, which is called upon to exercise judicial or quasi-judicial functions discards all rules of natural justice and arrives at a decision contrary to all accepted principles of justice then it appears to me that the Court can and must interfere"[xxviii]. In *Khurshed Modi v. Rent Controller, Bombay*[xxix], the apex court held that "the High Court would not refuse to issue a writ of certiorari merely because there was a right of appeal. It was recognized that ordinarily, the High Court would require the petitioner to have recourse to his ordinary remedies, but if it found that there had been a breach of fundamental principles of justice, the High Court would certainly not hesitate to issue the writ of certiorari"[xxx].

The general rule that the writ jurisdiction of the High Court cannot be exercised where an effective alternative remedy is available was again diluted in the case of *K S Rashid & Son v. Income Tax Investigation Commission*[xxxi], as the court reiterated that this proposition is qualified by the words *"unless there are good grounds"*. Therefore, it can be concluded that an alternative remedy would not operate as an absolute bar and that a writ petition under Article 226 could still be entertained under exceptional circumstances. In *The State of Uttar Pradesh v. Mohammed Nooh*[xxxii], the Court laid down that "the 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"[xxxiii]. The court also observed that there are numerous cases where a writ of certiorari has been issued in spite of the fact that the aggrieved party had other adequate legal remedies.

The apex court in *Babu Ram Prakash Chandra Maheswari v. Antarim Zila Parishad*[xxxiv] held 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. The Patna High Court in *Bengal Immunity Co. v. the State of Bihar*[xxxv]observed that "the existence of an alternative remedy that is adequate and equally effective may be a matter that can be taken into consideration by the High Court in granting the writ. It is a writ of right, not a discretionary writ and the nature of a writ of prohibition is much of a corrective one rather than preventive"[xxxvi]. The presence of an alternate remedy does not impose an absolute bar on issuing the writ of prohibition. But the presence of an alternate remedy will be more relevant in the context of certiorari[xxxvii].

In *Purushottam Chandra v. State of Uttar Pradesh*[xxxviii], the petitioner was a member of the Municipal Board and he was removed from his position on objectionable grounds under section 40(3) of Uttar Pradesh Municipalities Act, 1916 and the elections for fresh appointment were likely to be conducted within a few months. The petitioner though has an alternative remedy available to file a suit in civil court but the final decision in the civil case could not be obtained before the election due to the large number of cases listed in those courts and that will debar him from contesting elections. Therefore, Allahabad High Court held that "the alternate remedy available before the petitioner is not an adequate one hence, writ jurisdiction can't be refused and he can seek relief by way of a writ petition under Article 226".

Justice Sinha in *Rakhaldas Mukherjee v. S P Ghose*[xxxix] stated that "whether the alternative remedy is equally efficacious or adequate is a question of fact that needs to be determined in each case. Therefore, an additional exclusion exists in cases where the alternative remedy is not adequate or efficacious. The alternate relief is held to be not efficient in a situation where the alternative remedy is too costly or ineffective or entails such delay that the applicant would be irreparably prejudiced that the whole object of the remedy might prove to be worthless. Hence, the Court before dismissing a writ petition on the ground of the existence of substitute relief must consider the nature of the alternative remedy available. The court should not dismiss the petition merely because it appears that an alternative remedy exists"[xl]. In this case, the court emphasized the fact that unless the alternative remedy available is adequate, efficacious, and equally capable of delivering justice, the High Court cannot deny the writ petition.

CONCLUSION

The scope of Article 226 when an equal and efficacious alternative remedy available is limited and subjected to the discretion of the High Court. The general principle states that the High Court cannot exercise writ jurisdiction unless the efficacious and adequate alternative statutory remedies available are exhausted. Where from the above analysis of various case laws, it is clear that the High Court can entertain a writ petition even if it does not conform to the doctrine of exhaustion of alternative statutory remedy provided that the case must include any of the following; such as violation of fundamental rights, violation of principles of natural justice, exceeding the jurisdiction, and legislation being challenged. Correspondingly, the High Court has the authority to allow writ petitions under these circumstances.

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