

Gujarat High Court

Whether Reporters Of Local Papers ... vs Union Of India & 4 on 12 February, 2015

C/CA/12567/2014

JUDGMENT

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CIVIL APPLICATION (FOR ORDERS) NO. 12567 of 2014

In

WRIT PETITION (PIL) NO. 69 of 2011

With

WRIT PETITION (PIL) NO. 69 of 2011

With

CIVIL APPLICATION NO. 2555 of 2013

In

SPECIAL CIVIL APPLICATION NO. 8742 of 2009

With

SPECIAL CIVIL APPLICATION NO. 4630 of 2009

With

SPECIAL CIVIL APPLICATION NO. 8742 of 2009

With

SPECIAL CIVIL APPLICATION NO. 36 of 2012

TO

SPECIAL CIVIL APPLICATION NO. 50 of 2012

FOR APPROVAL AND SIGNATURE:

HONOURABLE THE ACTING CHIEF JUSTICE
MR. VIJAY MANOHAR SAHAI

Sd/-

and

HONOURABLE MR. JUSTICE R.P. DHOLARIA Sd/-

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- 1. Whether Reporters of Local Papers may be YES allowed to see the judgment ?
- 2. To be referred to the Reporter or not ? YES
- 3. Whether their Lordships wish to see the fair copy of the judgment ? NO
- 4. Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ? NO
- 5. Whether it is to be circulated to the Civil Judge ? NO

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SALAYA MACHHIMAR BOAT ASSOCIATION THROUGH VICE
PRESIDENT....Applicant
Versus
UNION OF INDIA & 4....Respondents

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Appearance :

MR JITENDRA MALKAN, ADVOCATE for the Applicant.

MS. KHUSHBOO V MALKAN, ADVOCATE for the Applicant.

MR UTKARSH SHARMA, AGP for the Respondent No.2.

MR PR NANAVALI, ADVOCATE for the Respondent No.3.

MR SHAKEEL A QURESHI, CENTRAL GOVERNMENT STANDING COUNSEL
for the Respondent No.1.

Mr. Mihir Joshi, learned Sr. Advocate appearing with Mr.Keyur Gandhi and Mr.
Nisarg Desai for NANAVALI ASSOCIATES, ADVOCATE for the Respondent No.4.

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CORAM: HONOURABLE THE ACTING CHIEF JUSTICE
MR. VIJAY MANOHAR SAHAI
and
HONOURABLE MR.JUSTICE R.P.DHOLARIA

Date : 12/02/2015
COMMON ORAL JUDGMENT

(PER : HONOURABLE THE ACTING CHIEF JUSTICE MR. VIJAY MANOHAR SAHAI)

1. The short question that arise for consideration in Civil Application No. 12567 of 2014 is that in view of paragraph-39 of the decision of the Apex Court in the case of Bhopal Gas Peedith Mahila Udyog Sangathan and others vs. Union of India and others, reported in AIR 2012 SC 3081 and in view of the provisions of the National Green Tribunal Act, 2010, if a writ petition is filed in the year 2011 after the National Green Tribunal Act, 2010 came into force on 18.10.2010, wherein an order dated 17.8.2009 granting coastal regulations zone clearance had been challenged, whether such petition could be transferred to the National Green Tribunal or not ?

2. We have heard Mr. Jitendra Malkan, learned counsel assisted by Ms. Khushboo Malkan, appearing on behalf of the applicant/petitioner in Civil Application No.12567 of 2014 as well as in WP[PIL] No. 69 of 2011, Ms. Dharita Malkan, learned counsel appearing for the petitioner in Special Civil Application Nos. 36 of C/CA/12567/2014 JUDGMENT 2012 to 50 of 2012, Ms. Sonal D. Vyas, learned counsel for the applicant/petitioner in Civil Application No.2555 of 2013 as well as in Special Civil Application No.8742 of 2009, Mr. Shakeel A. Qureshi, learned Central Government Standing Counsel for Union of India, Mr. Utkarsh Sharma, leaned AGP, Mr. P.R. Nanavati, Mr. Mihir Joshi, learned Sr. Advocate assisted by Mr. Keyur Gandhi and Mr. Nisarg Desai, learned advocates for Nanavati Associates, Mr. Rituraj M. Meena and Mr. Dhaval D. Vyas, learned counsel appearing on behalf of the respective respondents in the respective matters.

3. As the common issue relating to environment is involved in these matters, the same are heard and decided together by this common judgment.

4. We have taken up Civil Application No.12567 of 2014 in WP[PIL] 69 of 2011 as lead matter.

5. Mr. Jitendra Malkan, learned counsel appearing in Civil Application No. 12567 of 2014 as well as the main WP[PIL] No. 69 of 2011 urged that the mandate of the Apex Court in paragraph-39 of the aforesaid judgment vests a discretion in the High Court to transfer any matter which was pending prior to coming into force of the National Green Tribunal Act, 2010 ['the Act' for short] to the National Green Tribunal ('NGT' for short), therefore, the petition be transferred to NGT.

6. On the other hand, Mr. Mihir Joshi, learned Senior Advocate appearing with Mr. Keyur Gandhi and Mr. Nisarg Desai, learned counsel for Nanavati Associates, appearing on behalf of the respondent no.4 has raised a serious objection to the transfer of the matter to the National Green Tribunal and he has vehemently urged that the judgment of the Apex Court in the case of Bhopal C/CA/12567/2014 JUDGMENT Gas Peedith Mahila Udyog Sangathan [supra] cannot be read as a mandate depriving the High Court of its constitutional powers under Articles 226 and 227 of the Constitution of India. The second contention of Mr. Joshi is that the petitioner having filed the present petition after coming into force of the Act himself cannot seek transfer of the writ petition to the NGT. The third contention of Mr. Joshi is that paragraph-38 of the judgment of the Apex Court would be applicable and paragraph-39 of the said judgment would not be applicable to the facts of the instant case and the challenge to the environmental clearance certificate dated 17th August, 2009 being the only prayer in the writ petition, the same cannot be raised before NGT in view of Section 16 [h] of the Act. The last contention of Mr. Joshi is that instead of getting the writ petition transferred to the NGT, it is always open to the petitioner to withdraw the writ petition and file a petition before the NGT. The other respondents had adopted the argument of Mr. Joshi and urged that the civil application deserves to be dismissed.

7. The first contention raised by Mr. Joshi is the judgment of the Apex Court in the case of Bhopal Gas Peedith Mahila Udyog Sangathan and others [supra] cannot be read as a mandate denuding the High Court of its constitutional powers under Articles 226 and 227 of the Constitution of India. In other words, the Act cannot take away the writ jurisdiction of the High Court under Articles 226 and 227 of the Constitution. This submission that the High Court's power of writ jurisdiction cannot be taken away by setting up of the Tribunal lacks merit as the validity of the Act had not been challenged by the petitioner in the writ petition or civil application. We leave this question open to be decided in an appropriate petition where such question is pleaded and vires of the Act is challenged.

8. So far as the second and third arguments of Mr. Joshi C/CA/12567/2014 JUDGMENT are concerned, it is true that the order dated 17 th August, 2009 granting environmental clearance to Essar Bulk Terminal (Salaya) Limited, the respondent no.4 was challenged in the writ petition being WP[PIL] 69 of 2011 which was filed after the Act had come into force. The dispute raised by the petitioner was with regard to the construction of a jetty by the respondent no.4 in the marine sanctuary or marine national park by destroying the mangroves and coral reefs and the same would

result in disturbance of marine life and marine sanctuary. The environmental clearance certificate granted to the respondent no.4 was challenged on the above ground.

8.1 Section 16 of the Act provides that all issues mentioned in Section 16 could be raised before the NGT which have arisen on or after the said Act has come into force. Therefore, Section 16, in our opinion, would not apply to the cases where any order has been passed prior to coming into force of the Act and prior to establishment of the NGT. The question arises where an order dated 17.8.2009 granting coastal regulations zone clearance could be challenged after the Act had come into force on 18.10.2010, either before the NGT or before the environmental Bench of the High Court in writ jurisdiction under Article 226 of the Constitution. It would be relevant to extract paragraphs 38 and 39 of the judgment of the Apex Court in the case of Bhopal Gas Peedith Mahila Udyog Sangathan and others [supra] hereunder:-

"38. Keeping in view the provisions and scheme of the National Green Tribunal Act, 2010 [for short the 'NGT Act'] particularly Sections 14, 29 30 and 38[5], it can safely be concluded that the environmental issues and matters covered under the NGT Act, Schedule I should be instituted and litigated before the National Green Tribunal [for short 'NGT']. Such approach may be necessary to avoid likelihood of conflict of orders between the High Courts and the NGT. Thus, in unambiguous C/CA/12567/2014 JUDGMENT terms, we direct that all the matters instituted after coming into force of the NGT Act and which are covered under the provisions of the NGT Act and/or in Schedule I to the NGT Act shall stand transferred and can be instituted only before the NGT. This will help in rendering expeditious and specialized justice in the field of environment to all concerned.

39. We find it imperative to place on record a caution for consideration of the courts of competent jurisdiction that the cases filed and pending prior to coming into force of the NGT Act, involving questions of environmental laws and/or relating to any of the seven Statutes specified in Schedule I of the NGT Act, should also be dealt with by the specialized tribunal, that is the NGT, created under the provisions of the NGT Act. The Courts may be well advised to direct transfer of such cases to the NGT in its discretion, as it will be in the fitness of administration of justice."

The Apex Court in paragraph 39 had cautioned the Courts and observed that the Courts should exercise discretion as to whether it will be in fitness of administration of justice to transfer such cases which are pending before it prior to coming into force of the NGT Act involving the questions of environmental laws and/or relating to any of the seven Statutes specified in Schedule-1 of the Act. Now coming to the case in hand the order dated 17.8.2009 granting coastal regulations zone clearance could not be challenged before the NGT after the Act had come into force on 18.10.2010, in view of section 16 (h) of the Act. The writ petition was filed in the year 2011. Therefore, we explain that in paragraph 39 what the Court intended to lay down was that where an order was passed on 17.10.2010 or prior to it, had been challenged, may be in a Court after 18.10.2010, all such matters may be transferred to NGT otherwise there may be likelihood of conflict of orders between High Court and NGT. Further, the questions raised by the petitioner involve complex environmental

issues which cannot be C/CA/12567/2014 JUDGMENT decided in a writ petition by this Court under Articles 226 and 227 of the Constitution of India.

8.2 However the petitioner has filed the writ petition before this Court under Article 226 of the Constitution challenging the environmental clearance certificate issued to the respondent no.4 in the year 2009, it can only be challenged in a writ petition before this Court as it could not be challenged under section 16[h] or any provision of section 16 of the said Act before the NGT. However, since the order was passed in the year 2009 and though the petition was filed in the year 2011, such petition should also be transferred to the NGT in the High Courts' discretion as important and complex question relating to environmental laws is involved in the petition. It is necessary to extract Section 14 of the Act which reads as under:-

"14. Tribunal to settle disputes.--[1] The Tribunal shall have the jurisdiction over all civil cases where a substantial question relating to environment [including enforcement of any legal right relating to environment], is involved and such question arises out of the implementation of the enactments specified in Schedule I.

[2] The Tribunal shall hear the disputes arising from the questions referred to in sub-section [1] and settle such disputes and pass order thereon.

[3] No application for adjudication of dispute under this section shall be entertained by the Tribunal unless it is made within a period of six months from the date on which the cause of action for such dispute first arose:

Provided that the Tribunal may, if it is satisfied that the applicant was prevented by sufficient cause from filing the application within the said period, allow it to be filed within a further period not exceeding sixty days."

C/CA/12567/2014 JUDGMENT On perusal of Section 14 of the Act, it is clear that the NGT shall have the jurisdiction over all civil cases where a substantial question relating to environment [including enforcement of any legal right relating to environment] is involved.

We are not entering into the question that the words, "civil cases" would not take within its sweep writ petitions or section 29 of the Act bars the jurisdiction of Civil Court.

8.3 Sub-section (5) of Section 38 of the Act reads as under:-

"38. Repeal and savings.

(5) All cases pending before the National Environment Appellate Authority established under sub-section (1) of section 3 of the National Environment Appellate Authority Act, 1997 (22 of 1997) on or before the establishment of the National Green Tribunal under the National Green Tribunal Act, 2010, shall, on such establishment,

stand transferred to the said National Green Tribunal and the National Green Tribunal shall dispose of such cases as if they were cases filed under that Act."

Section 38 (5) clearly provided that prior to the enforcement of the Act and establishment of NGT, all cases relating to the Environmental Act and other disputes were heard before National Environment Appellate Authority established under sub-section (1) of Section 3 of the National Environment Appellate Authority Act, 1997 and all cases stood transferred to the NGT and in law it was to be treated as if they were cases filed under the Act. Applying the same analogy, if a writ petition was filed in the year 2011, wherein an order was challenged which was passed before the Act came into force should also stand transferred to the NGT as if they were the cases which could be filed before NGT under the Act. In this case, we are of the considered opinion that substantial question relating to environment is involved which is complex C/CA/12567/2014 JUDGMENT environmental issues that cannot be decided in a writ petition by this Court under Articles 226 and 227 of the Constitution of India as the answer of the question would depend on the evidence of parties.

9. The fourth contention of Mr. Joshi is that if the petitioner is permitted to get the matter transferred to the NGT, it would amount to circumventing the period of limitation prescribed under the Act. We do not find any force in the contention of Mr. Joshi as the petition was filed before this Court and was entertained and interim order was also passed by this Court. The relevant portion of the said interim order dated 6th September, 2011 passed by Division Bench of this Court in WP[PIL] No. 69 of 2011 is extracted here and reads as under:-

"Until further order, respondent no.4 will not make any construction over the Marine Sanctuary and shall not destruct any marine life, flora and fauna of Salaya Marine National Park and Sanctuary. They are prohibited from cutting the mangrove trees from any of the areas including the area for which the permission has been granted and shall not fill up any area affecting the mangrove trees. They are also prohibited from doing any activity in or around the Salaya Marine National Park and Sanctuary."

9.1 Though the petitioner has contended that the respondent no.4 has flouted the interim order passed by this Court and has made construction illegally and contemptuously, we are not entering into the said issue as we are of the opinion that the matter has to be decided by the NGT.

9.2 The writ petition was entertained by this Court and remained pending for about four years and Civil Application No.12567 of 2014 is pending since the year 2014, in our opinion, C/CA/12567/2014 JUDGMENT there was no attempt on the part of the petitioner to circumvent the provision of limitation. If the judgment of the Apex Court grants procedural benefit to the petitioner, then grant of such benefit claimed by the petitioner would not amount to circumventing the provisions of the law of limitation. Moreover, the limitation would not come in the way of the petitioner in view of Section 14 of the Indian Limitation Act as the petitioner was prosecuting his remedy diligently and bonafidely by filing the writ petition in this Court in the year 2011. Benefit of Section 14 of the Limitation Act may be available to the petitioner for getting the delay condoned.

10. Mr. Shakeel A. Qureshi, learned counsel appearing on behalf of the Union of India, on instructions from Mr. Malhotra, Director, Regional Office, Bhopal, has informed the Court that since the Western Bench of the National Green Tribunal is situated at Pune, WP [PIL] No. 69 of 2011 shall be transmitted to the Western Bench of the National Green Tribunal, Pune and the National Green Tribunal, Pune, in turn, will send intimation to the National Green Tribunal, New Delhi.

11. For the foregoing reasons, we are of the considered opinion that the writ petition should be transferred to the National Green Tribunal for adjudication. In the result, Civil Application No.12567 of 2014 is allowed. WP [PIL] No. 69 of 2011 shall stand transferred to the National Green Tribunal, Western Bench, Pune, Maharashtra.

12. In view of the above judgment, all other connected petitions shall be transmitted to the National Green Tribunal, Western Bench, Pune, Maharashtra.

C/CA/12567/2014 JUDGMENT

13. All the petitions as stated above shall be transmitted to National Green Tribunal, Western Bench, Pune, Maharashtra, within six weeks from today.

14. In view of the above judgment, Civil Application No. 2555 of 2013 has become infructuous and the same is disposed of.

Sd/-

(V.M.SAHAI, ACJ.) Sd/-

(R.P.DHOLARIA,J.)

15. After the judgment was dictated in open Court, Mr. Mihir Joshi, learned Senior counsel appearing on behalf of respondent no.4 prayed to stay this judgment for a period of one month, stating that the matter is of paramount importance. The prayer is accepted. Implementation of this judgment shall remain stayed for a period of one month from today. Copy of this judgment be issued to the parties by 16th February, 2015 on payment of usual charges.

Sd/-

(V.M.SAHAI, ACJ.) Sd/-

(R.P.DHOLARIA,J.) pirzada