

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% **Reserved on : 17th February, 2010**
Date of decision: 18th March, 2011

+ **W.P.(C) No.5288/2010**

Mohammad Amir Mohammad Khan ... Petitioner
Through: Mr.V. Giri, Sr. Advocate with
Mrs.Anjali K. Varma, Mr.Niraj Gupta,
Mr. Sushant Sharma and Mr.Mohd.
Sadiq, Advocates.

Versus
Union of India & Anr. ... Respondents
Through: Mr.G.E. Vahanvati, Attorney General,
Mr. A.S. Chandhiok, ASG with
Mr.Atul Nanda, Sr. Advocate, Mr.
Jatan Singh, standing counsel, Ms.
Rameeza Hakeem, Advocate for the
UOI.

CORAM:
HON'BLE THE CHIEF JUSTICE
HON'BLE MR. JUSTICE SANJIV KHANNA

1. Whether reporters of the local papers be allowed to see the judgment? Yes
2. To be referred to the Reporter or not? Yes
3. Whether the judgment should be reported in the Digest? Yes

DIPAK MISRA, CJ

By this writ petition preferred under Article 226 of the Constitution of India the petitioner has prayed for declaring the Enemy Property (Amendment and Validation) Ordinance, 2010 (for short 'the Ordinance') by which subsection 3 of Section 5 of the Enemy Property Act, 1968 (for brevity 'the Act') and Sections 18A, 18B and 26 of the Act were inserted as unconstitutional, void and inoperative.

2. At the very inception, we are obliged to state that this Court while issuing notice had passed the following order:

“As an ad-interim measure it is directed that any action taken in pursuance to the ordinance shall be subject to result of this writ petition and that apart the respondent shall not create any third party interest even remotely so that while ultimately disposing of the writ petitioner no impediment is created and the problems beyond control do not crop up.

It is further clarified if any possession is taken pursuant to the ordinance the inventory of the same shall be done in presence of the petitioner or his representative which shall be signed by both the parties.

Dasti.”

3. Thereafter, the counter affidavits were filed and the writ petition was amended. In the meantime, with efflux of time the ordinance lapsed and no fresh ordinance was issued. This Court heard learned counsel for the parties for some time with regard to the consequence and the sequitur and on a lapse of an ordinance in a case of this nature. When the matter was listed on 8.2.2011, Mr.G.E. Vahanvati, learned Attorney General for Union of India raised a preliminary objection on the foundation that this Court should not entertain and hear the writ petition regard being had to the reliefs sought, pleadings put forth and the stand taken on the ground that the petitioner is a resident of Lucknow and the properties which have been described vide Annexure P-3 (collectively) are situate in Lucknow. It is urged by him that the sole challenge is to the constitutional validity of the Ordinance 4 of 2010 by which sub-section 3 of Section 5 of the Enemy Properties Act, 1968 has been amended. To bolster his submission, he has commended us to the decision in *Kusum Ingots and Alloys Ltd. Vs. Union of India and Another* (2004) 6 SCC 254.

4. Thereafter, the matter was heard on the question of preliminary objection and Mr. V. Giri, learned senior counsel appearing for the petitioner and the learned Attorney General fairly conceded that this Court may pronounce the judgment on the territorial jurisdiction first and thereafter other aspects / spectrums may be debated. Hence, we proceed to deal with the factum of jurisdiction.

5. After we reserved the order, a written note of submissions was filed as undertaken by the learned counsel for the petitioner. In the written note of submissions, after referring to the factual matrix, learned counsel for the petitioner has relied upon the decision rendered in ***Ltd. Col. Khajoor Singh v. The Union of India & Another, AIR 1961 SC 532.***

6. Reliance has also been placed on the decisions rendered in ***Navinchandra N. Majithia v. State of Maharashtra and others, (2000) 7 SCC 640, Alchemist Ltd. and Anr. v. State Bank of Sikkim and ors., (2007) 11 SCC 335*** and a Full Bench decision of this Court in ***New India Assurance Company Limited v. Union of India and others, AIR 2010 Delhi 43 (FB).***

7. Before we advert to the said decisions, we must take note of fact in the written note of submissions the power of judicial review and the power of issuance of ordinance and various other aspects have been highlighted on the touchstone of the decisions rendered in ***A.K. Roy v. Union of India, (1982) 1 SCC 271, S.R. Bommai v. Union of India, (1994) 3 SCC 1, Indra Sawhney II v. Union of India, (2000) 1 SCC 168*** and ***T. Venkata Reddy and others v.***

State of Andhra Pradesh, AIR 1985 SC 724.

8. Learned counsel for the petitioner submitted that there is a fundamental difference between the scope of challenge against an Act of Parliament and an Ordinance promulgated by the President of India. It is urged that both are legislative instruments which, in the enforcement of their provisions, stand on par, but the circumstances prior to enactment of a law by Parliament, and those prior to promulgation of an Ordinance by the President are altogether different. It is contended that the formation of opinion by Members of the Lok Sabha or Rajya Sabha, which is itself part of the legislative process and, therefore, not justiciable, the executive backdrop to promulgation of an Ordinance is certainly justiciable and, therefore, the situs of these executive actions undeniably is in New Delhi and, therefore, the material part of cause of action arises in Delhi and, hence, the ratio laid down in ***Kusum Ingots & Alloys Ltd.*** (supra) is not applicable.

9. Learned Attorney General to bolster the preliminary objection raised by him after referring to the introductory paragraph, Article 226(2) of the Constitution of India has referred to paragraphs 18 to 22 of the decision, which for the sake of completeness we reproduce hereunder:-

“18. The facts pleaded in the writ petition must have a nexus on the basis whereof a prayer can be granted. Those facts which have nothing to do with the prayer made therein cannot be said to give rise to a cause of action which would confer jurisdiction on the Court.

19. Passing of a legislation by itself in our opinion

does not confer any such right to file a writ petition unless a cause of action arises therefor.

20. A distinction between a legislation and executive action should be borne in mind while determining the said question.
21. A parliamentary legislation when it receives the assent of the President of India and is published in the Official Gazette, unless specifically excluded, will apply to the entire territory of India. If passing of a legislation gives rise to a cause of action, a writ petition questioning the constitutionality thereof can be filed in any High Court of the country. It is not so done because a cause of action will arise only when the provisions of the Act or some of them which were implemented shall give rise to civil or evil consequences to the petitioner. A writ court, it is well settled, would not determine a constitutional question in a vacuum.
22. The Court must have the requisite territorial jurisdiction. An order passed on a writ petition questioning the constitutionality of a parliamentary Act, whether interim or final keeping in view the provisions contained in clause (2) of Article 226 of the Constitution of India, will have effect throughout the territory of India subject of course to the applicability of the Act.”

10. In this regard, we may also refer to paragraph 24 of the aforesaid decision which reads as follows:

- “24. Learned counsel for the appellant in support of his argument would contend that situs of framing law or rule would give jurisdiction to Delhi High Court and in support of the said contention relied upon the decisions of this Court in *Nasiruddin v. STAT*, (1975) 2 SCC 671 : AIR 1976 SC 331 and *U.P. Rashtriya Chini Mill Adhikari Parishad v. State of U.P.*, (1995) 4 SCC 738. So far as the decision of this Court in *Nasiruddin v. STAT* (supra) is concerned, it is not an authority for the proposition that the situs of legislature of a State or the

authority in power to make subordinate legislation or issue a notification would confer power or jurisdiction on the High Court or a Bench of the High Court to entertain petition under Article 226 of the Constitution. In fact this Court while construing the provisions of the United Provinces High Courts (Amalgamation) Order, 1948 stated the law thus: (SCC p.683, para 37)

"37. The conclusion as well as the reasoning of the High Court is incorrect. It is unsound because the expression 'cause of action' in an application under Article 226 would be as the expression is understood and if the cause of action arose because of the appellate order or the revisional order which came to be passed at Lucknow then Lucknow would have jurisdiction though the original order was passed at a place outside the areas in Oudh. It may be that the original order was in favour of the person applying for a writ. In such case an adverse appellate order might be the cause of action. The expression 'cause of action' is well known. If the cause of action arises wholly or in part at a place within the specified Oudh areas, the Lucknow Bench will have jurisdiction. If the cause of action arises wholly within the specified Oudh areas, it is indisputable that the Lucknow Bench would have exclusive jurisdiction in such a matter. If the cause of action arises in part within the specified areas in Oudh it would be open to the litigant who is the *dominus litis* to have his *forum conveniens*. The litigant has the right to go to a Court where part of his cause of action arises. In such cases, it is incorrect to say that the litigant chooses any particular court. The choice is by reason of the jurisdiction of the court being attracted by part of cause of action arising within the jurisdiction of the court. Similarly, if the cause of action can be said to have arisen part within specified areas in Oudh and partly outside the specified Oudh areas, the litigant will have the choice to institute proceedings either at Allahabad or

Lucknow. The court will find out in each case whether the jurisdiction of the court is rightly attracted by the alleged cause of action.”

11. The learned Attorney General has also drawn inspiration from paragraph 26 of the said decision. In the said paragraph, after referring to the decision in *U.P. Rashtriya Chini Mill Adhikari Parishad* (1995) 4 SCC 738 the Apex Court has expressed thus:-

“26. In fact, a legislation, it is trite, is not confined to a statute enacted by Parliament or the legislature of a State, which would include delegated legislation and subordinate legislation or an executive order made by the Union of India, State or any other statutory authority. In a case where the field is not covered by any statutory rule, executive instructions issued in this behalf shall also come within the purview thereof. Situs of office of Parliament, legislature of a State or authorities empowered to make subordinate legislation would not by itself constitute any cause of action or cases arising. In other words, framing of a statute, statutory rule or issue of an executive order or instruction would not confer jurisdiction upon a court only because of the situs of the office of the maker thereof.”

12. Learned Attorney General would further submit that in paragraph 29 of the said decision, the larger Bench decision in *Lt. Col Khajoor Singh Vs. Union of India*, AIR 1961 SC 532 has been distinguished on the foundation that the principle laid down therein would have no applicability while determining the jurisdiction of a writ court when constitutional validity is assailed.

13. At this stage, we may note with profit that there is no dispute that the properties are not situate in Delhi and on earlier occasion the petitioner had approached the High Court of Bombay regard being had to the fact that the office of the respondent No.2 is at Mumbai and the cause of action essentially had arisen at Mumbai.

14. From the aforesaid rivalised submissions, it is perceptible that the learned counsel for the petitioner has really made an effort to draw a difference between an enactment and an ordinance. There may be a subtle difference between the two which is not necessary to dwell upon for the purpose of dealing with the preliminary objection as we are of the considered opinion that the challenge to the constitutional validity of a Parliamentary Act or an ordinance issued as far as the jurisdiction is concerned cannot be different. Solely because the ordinance has been issued by the President of India at Delhi, it would not confer jurisdiction on the High Court of Delhi to deal with the constitutional validity of the same. As has been stated earlier, the entire property is situate in Lucknow, the competent authority is at Bombay and earlier the petitioner had approached the High Court of Bombay. The reliance on the Full Bench decision of this Court in *New India Assurance Company Limited* (supra) is of no assistance as in the said case the Full Bench had held thus:

“29. As held in Nasiruddin's case, even where part of the cause of action arose, it would be open to the litigant, who is the dominus litis to have his forum conveniens. In the present case, since the Appellate Authority is situated at New Delhi, the Delhi High Court has the jurisdiction under Article

226 of the Constitution of India and, therefore, there was no occasion for the learned single Judge to apply the principle of forum conveniens to refuse to exercise the jurisdiction. The principle of forum nonconveniens originated as a principle of international law, concerned with Comity of Nations. A domestic court in which jurisdiction is vested by law otherwise ought not to refuse exercise of jurisdiction for the reason that under the same law some other courts also have jurisdiction. However, the remedy under Article 226 being discretionary, the court may refuse to exercise jurisdiction when jurisdiction has been invoked mala fide. There is no such suggestion in the present case. Nothing has been urged that it is inconvenient to the contesting respondent to contest the writ before this Court. The counsel for the contesting respondent has not disputed the jurisdiction of this Court; his main contention is of possibility of conflict. We do not find any merit in this contention of the counsel for the contesting respondent. First, that is not the case in hand. The contesting respondent is not aggrieved by the order of the appellate authority and has not assailed the same before any High Court. Thus, there is no possibility of conflicting judgments or confusion in the present case. Secondly, even if in a given case such a situation were to arise, the same is bound to be brought to the notice of the court and the likelihood of both courts proceeding with the writ petition and conflicting judgments is remote. In such a situation, following the principle in Section 10 of the Code of Civil Procedure, the subsequently filed petition may be stayed in view of the earlier petition entailing similar questions or the court may ask the petitioner to approach the High Court where the earlier petition has been filed. In our opinion, it will be inappropriate to refuse to exercise jurisdiction merely on the basis of possibility of conflict of judgments, particularly in view of the clear language of Article 226(2).

30. Having held that this Court has jurisdiction, it cannot be said that only a insignificant or miniscule part of the cause of action has accrued within the jurisdiction of this Court or that the substantial cause of action has accrued within the

jurisdiction of the High Court of Andhra Pradesh. In fact, the sole cause of action for the writ petition is the order of the appellate authority and which cause of action has accrued entirely within the jurisdiction of this Court and this Court would be failing in its duty/function if declined to entertain the writ petition on the ground of the contesting respondent being situated within the jurisdiction of the High Court of Andhra Pradesh. Though the petition has been filed under Article 226 of the Constitution, it cannot be lost sight of that jurisdiction in such cases under Article 226 is overlapping with Article 227. Article 227 is clear in this regard. The power of superintendence over Tribunals is vested in the High Court within whose jurisdiction the Tribunal is situated. In that light of the matter also, it cannot be said that only insignificant or miniscule part of the cause of action has accrued within the jurisdiction of this Court. The appellate authority in the present case having passed the order which is impugned in the petition, being situated within the jurisdiction of this Court, even if the cause of action doctrine were to be invoked, substantial part of the cause of action has accrued within the jurisdiction of this Court only. Even the language of the impugned order giving rise to the cause of action in the writ petition, discloses significant cause of action to have accrued within the jurisdiction of this Court. This Court while deciding this writ petition is not required to issue any direction, order or writ to any person outside its jurisdiction. Section 110H of the Insurance Act provides for appeal to the Central Government, seat whereof is admittedly within the jurisdiction of this Court.

CONCLUSION

31. For the foregoing reasons, we hold that where an order is passed by an appellate authority or a revisional authority, a part of cause of (sic action) arises at that place. When the original authority is situated at one place and the appellate authority is situated at another, a writ petition would be maintainable at both the places. As the order of appellate authority constitutes a part of cause of action, a writ petition would be maintainable in the

High Court within whose jurisdiction it is situate having regard to the fact that the petitioner is dominus litis to choose his forum, and that since the original order merges into the appellate order, the place where the appellate authority is located is also forum conveniens.”

15. Thus, the said decision is not an authority for the proposition that even if a constitutional validity of a Parliamentary Act or an ordinance issued by the President of India is challenged, the Delhi High Court would have jurisdiction.

16. In view of the aforesaid analysis, we conclude and hold that this Court does not have the jurisdiction to deal with the issue of validity of the ordinance as passing of an ordinance does not confer any such right unless a cause of action arises therefor. It is for the reason the Court does not decide the validity of issue in a vacuum. Thus, while declining to entertain the writ petition we are inclined to keep the interim order passed at the stage of issuance of notice alive for a period of 45 days so that the petitioner can approach the appropriate court, as advised in law. The writ petition is disposed of accordingly. There shall be no order as to costs.

CHIEF JUSTICE

SANJIV KHANNA, J.

MARCH 18, 2011

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