JVS

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 6711 OF 2022

Lavino-Kapur Cotton Pvt Ltd. through its Director Vikram Kapur	}	**Petitioner**
Versus		
State of Maharashtra, through the Office of Government Pleader & Ors.	}	**Respondents**

Mr. Arshad Shaikh, Senior Advocate with Mr. Ranjit Agashe, Ms. Vinsha Acharya & Mr. Krishnan Iyer i/by Ms. Namrata Agashe for the petitioner.

Mr. M. M. Pabale, AGP for respondent no. 1/State.

Ms. Sharmila Deshmukh for respondent no. 2/MPCB.

Mr. R. D. Soni i/by Ram & Co. for respondent No. 4.

CORAM: DIPANKAR DATTA, CJ &
M. S. KARNIK, J.

DATE: JUNE 14, 2022

P.C.:

1. By instituting this writ petition dated 27th May 2022, the petitioning company takes exception to a communication dated 16th May 2022 issued by the Tarapur Environment Protection Society (hereafter "TEPS", for short). By such communication, which is in the nature of a demand notice, Rs. 6,58,225/- on account of desludging charges and Rs. 12,25,000/- on account of 30% NGT Penalty Contribution were demanded from the petitioning company within 5 (five) days of receipt thereof, failing which it was threatened that TEPS would have no alternative, but to close the SCADA Valve and effluent discharged by the petitioning company would not be accepted in the Common Effluent Treatment Plant (hereafter "CETP", for short). It was also informed to the petitioning company that it could look for alternative source to discharge its effluent.

2. Based on the pleaded case, the petitioning company seeks an appropriate writ, order or direction in the nature of mandamus calling upon TEPS to withdraw, annul and/or rescind the communication dated 16th May 2022.

3. Bare reading of the pleaded case reveals that the petitioning company has its factory at Plot No. H1, Maharashtra Industrial Development Corporation (hereafter "MIDC" for short), Boisar, District Palghar. It is engaged in production of absorbent cotton of pharmacopeial grade and is earning valuable foreign exchange for the country. TEPS is also a company which is entrusted, *inter alia*, with the work of effluent treatment through a CETP in Tarapur MIDC. The concept of CETP, *inter alia*, for MIDC Tarapur was introduced, to the knowledge of the petitioner, for environment protection of the area, the requirement being essential, since several small-scale units are engaged in work in Tarapur MIDC resulting in discharge of effluent and such units not having their own effluent treatment plants, they were discharging large amount of untreated effluent at high levels of COD.

4. The petitioning company has its own effluent treatment plant and till early 2000, it was required to discharge effluent into a drain outlet provided by the MIDC; however, after the

CETP was introduced, the MIDC diverted the drain outlet to the CETP which was meant to treat discharge of effluent of industries not having their own effluent plants. TEPS has, therefore, been delegated functions of the State having responsibility for monitoring steps towards pollution control. Essentially, TEPS is an instrumentality of the State and even otherwise, despite being a company incorporated under the Companies Act, 1956, is *ex-facie* performing a public duty and thus, amenable to the writ jurisdiction of this Court.

5. Insofar as the cause of action for invoking the writ jurisdiction of this Court is concerned, it is, *inter alia*, pleaded that though it was having an independent effluent treatment plant, the petitioning company, in or about 2005, was asked to join and contribute to the CETP. Since the petitioning company had its own effluent treatment plant installed as per the relevant guidelines, it had opposed the insistence on the part of the Maharashtra Pollution Control Board (hereafter "MPCB", for short). However, the same did not yield fruit and ultimately, the petitioning company had to contribute Rs. 15 lakh to the CETP albeit under protest. While the petitioning company was running its own effluent treatment plant and incurring cost, it had paid a sum in excess of Rs. 1.5 crore demanded by the MIDC towards treatment cost of effluent. Since the introduction of the CETP, the petitioning company has been bearing cost twice over.

6. While matters rested so, the petitioning company received a letter dated 23rd October 2020 from TEPS communicating constitution of a Monitoring Committee by the National Green Tribunal (hereafter "NGT", for short) for taking steps to prevent damage to the environment and for its restoration. The petitioning company was informed of damage caused by it for which it was liable to pay an amount of Rs. 77.513 lakh. Such amount was directed to be deposited towards "recovery of environment compensation as per Polluters Pay Principles" to the MPCB, failing which legal action would be initiated against the petitioning company. The directions contained in the letter dated 23rd October 2020 have been challenged by the petitioning company in an appeal under the provisions of section 16 read with section 18 of the National Green Tribunal Act, 2010 (hereafter "the NGT Act", for short) before the NGT (Western Zone), Pune and it is awaiting adjudication. According to the petitioning company, the issues raised in the said appeal, which would directly affect the quantum of penalties payable by it, have been indicated in the writ petition as follows: -

> "(i) Wrong categorization of the Petitioner as a red industry;
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> (ii) Forced membership of TEPS and forced contribution towards penalties levied on the CETP independently of the penalties levied on the Petitioner for the same discharge at their own ETP. In other words, dual penalty for the same offence (for lack of better word).
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> (iii) Closure directions given based on which the number of days of closure are calculated for the purpose of paying penalties both at the Petitioner's personal ETP level and contribution towards CETP. The number of days erroneously calculated as closure days for the purpose of imposing penalty. In other words, erroneous number of days of pollution and report of committee."

7. It is further revealed from the writ petition that the petitioning company had approached the Principal Bench of the NGT at New Delhi, whereupon, an order dated 24th January 2022 was passed granting liberty to it to approach the Monitoring Committee with a representation for revisiting the amount of compensation which it has been made liable to pay. The said representation is also awaiting adjudication.

8. Prior to the impugned communication dated 16th May 2022 being issued by TEPS, it appears that the petitioning company was called upon by TEPS by its letters dated 27th January 2021, 17th May 2021, 4th March 2022 and 27th April 2022 to make the requisite contribution. It is also found that by a letter dated 17th February 2022, issued by the Regional Officer, Thane, MPCB, the petitioning company was called upon to make payment of Rs. 196.794 lakh within 3 (three) months in terms of judgment dated 24th January 2022 passed by the NGT in Original Application No. 64 of 2016. Despite the aforesaid demand, the petitioning company has not paid contribution/charges and rushed to this Court for relief as noted above.

9. At the outset, we had requested Mr. Shaikh, learned senior advocate for the petitioning company to satisfy us that this writ petition, seeking substantive relief against TEPS, is maintainable.

10. Mr. Shaikh contends that TEPS is an instrumentality of the State and, therefore, a writ petition against it is maintainable. Even if TEPS is not regarded as an instrumentality of the State, since it discharges public functions, a writ petition under Article 226 of the Constitution of India would be maintainable. Several authorities were cited by Mr. Shaikh in support of his contention, to which we need not advert at this stage, for, the reason that follows.

11. Assuming that a writ petition against TEPS is maintainable, we are of the firm opinion that this writ petition ought not to be entertained bearing in mind the concepts of 'maintainability' and 'entertainability' of a writ petition as well as in view of the special facts and circumstances of this particular case.

12. Remedy under Article 226 of the Constitution is discretionary. In its quest to enforce rights, a writ court cannot exercise powers oblivious of certain self-imposed restrictions propounded by the Supreme Court in several of its decisions. Even though a writ petition could be held to be maintainable, yet, the writ court in given circumstances could refuse to entertain a writ petition in the prudent exercise of its discretion.

13. From the factual narrative, as above, it is clear that the petitioning company has approached the NGT (Western Zone), Pune by presenting an appeal under section 16 read with section 18 of the NGT Act challenging an order, whereby it was called upon to deposit an amount of Rs. 77.513 lakh towards damage caused to the environment. This demand was raised pursuant to a meeting of the Monitoring Committee. Since the petitioning company has not annexed the order of the Monitoring Committee, we are disabled to note its contents. Be that as it may, the petitioning company having further moved the Principal Bench of the NGT for a relook at the quantification of demand for damages, liberty has admittedly been given to it to approach the Monitoring

Committee again for recalculation of the amount which it has been found liable to pay. Till date, according to the petitioning company, such application has not been decided. The current demand raised by TEPS is nothing but a follow-up step of the earlier demand which was raised and not met by the petitioning company despite several reminders to it to clear its liability. It is in these circumstances that the question of entertaining this writ petition has emerged.

14. The principal issue is admittedly *sub judice* before the NGT (Western Zone), Pune in a statutory appeal; hence, we have failed to comprehend as to why the writ jurisdiction has been invoked at this stage challenging the demand raised by TEPS based on the decision of the Monitoring Committee without approaching the NGT/Monitoring Committee. TEPS, as per the admission of the petitioning company, has threatened it with legal action if it failed to make the requisite contribution/pay the quantified charges. An industry, which does not clear its liability and has even failed in its pursuit to have the quantum recalculated by the Monitoring Committee, cannot be heard by a writ court on a grievance of the present nature for grant of relief if a decision is awaited at the end of the Monitoring Committee, which has been approached on the basis of an order of the Principal Bench of the NGT. The remedy provided by the NGT Act having been availed by the petitioning company, it would not be proper to allow it to invoke the discretionary jurisdiction under Article 226 at the present stage.

15. That apart, this writ petition clearly pertains to a matter relating to environment for which the petitioning company has moved us in view of the current roster fixed by the Chief Justice.

16. Having regard to the decision of the Supreme Court reported in (2012) 8 SCC 326 (**Bhopal Gas Peedith Mahila Udyog Sangathan and Ors. vs. Union of India and Ors.**), in particular paragraph 40, we had called upon Mr. Shaikh to satisfy us that this writ petition could be entertained. According to him, the remedy before the NGT is an alternative remedy and, therefore, such alternative remedy does not oust the jurisdiction of the writ court to entertain a challenge to a demand which has been raised without jurisdiction. That the High Court has the power and jurisdiction to entertain a writ petition under Article 226 of the Constitution of India or even a petition under Article 227 of the Constitution of India in matters relating to environment has been contended drawing inspiration from a recent decision of the Supreme Court dated 18th May 2022 in Writ Petition (Civil) No. 433 of 2012 (**Madhya Pradesh High Court Advocates Bar Association and Anr. vs. Union of India and Anr.**).

17. Having read the decision in **Madhya Pradesh High Court Advocates Bar Association** (supra), we see no reason to hold that the same in any manner dilutes paragraph 40 of the decision in **Bhopal Gas Peedith Mahila Udyog Sangathan** (supra). In **Madhya Pradesh High Court Advocates Bar Association** (supra) the Court was, *inter alia*, called upon to decide whether the provisions contained in section 14 read with section 22 of the NGT Act have the effect of ousting the jurisdiction of the High Court. The question was answered in the negative relying upon the decision of the

Constitution Bench reported in (1997) 3 SCC 261 (**L. Chandra Kumar vs. Union of India**).

18. There can be no doubt that the NGT is a tribunal subordinate to the High Court. Not only would the Regional Bench of the NGT be amenable to judicial superintendence under Article 227 of the Constitution of India by the High Court within whose jurisdiction it is located, even the Principal Bench of the NGT would be amenable to such jurisdiction provided any part of the cause of action arises within the territorial limits of the High Court. Invocation of such jurisdiction must, however, be permitted in exceptional cases only and where no other efficacious remedy is available. Even, in an appropriate case, an order passed by the NGT could be challenged before the High Court under Article 226 of the Constitution and such challenge may also be entertained by the High Court despite availability of the remedy of an appeal before the Supreme Court, provided any of the exceptions carved out by the Supreme Court in its decision reported in (1998) 8 SCC 1 (**Whirlpool Corporation vs. Registrar of Trade Marks, Mumbai and Ors.**) is satisfied. This is our understanding of the law based on the principles laid down in **Madhya Pradesh High Court Advocates Bar Association** (supra).

19. However, here, the petitioning company has approached us challenging the communication dated 16th May 2022 without approaching the NGT. We are considering a grievance which is intrinsically related to assessment of the quantum of damages which the petitioning company is liable to bear for damage caused to the environment, such assessment having been made by none other than the Monitoring Committee constituted by the NGT (Western Zone), Pune itself. Since the petitioning company was not satisfied with the assessment made, it rightly approached the Principal Bench of the NGT and such Tribunal, by its order dated 24th January 2022, has relegated the petitioning company to the Monitoring Committee. We do not have the benefit of appreciating the reasons for which the Monitoring Committee may not have, as yet, considered the request of the petitioning company for recalculation of the quantum of damages that it is liable to bear, in the absence of any statement in that behalf contained in the writ petition. Suffice it to note, the impugned communication dated 16th May 2022 being a step taken as follow-up action for securing compliance of the decision of the Monitoring Committee, it is not the writ remedy to be pursued by the petitioning company for securing relief; granting such relief, if at all, is within the domain of the NGT/Monitoring Committee at the first instance and if the appropriate forum passes an order adverse to the interest of the petitioning company and if any of the exceptions carved out in **Whirlpool Corporation** (supra) is satisfied, the writ remedy or the remedy under Article 227 of the Constitution could be explored by it.

20. The other contention advanced by Mr. Shaikh that the remedy before the NGT is an alternative remedy has not impressed us. Having regard to what has been ruled by the Supreme Court in paragraph 40 of **Bhopal Gas Peedith Mahila Udyog Sangathan and Ors** (supra), the NGT has to be regarded as the original forum for remedy in relation to matters covered by Schedule I to the NGT Act. This, in our view, is because the Court held that matters which are covered under the provisions of the NGT Act and/or in Schedule I to the NGT Act can be instituted only before the NGT (emphasis ours). We have not been shown any subsequent decision of the Supreme Court taking a contrary view.

21. Thus, it would be proper to decline interference at this stage. If the occasion so demands and any order of the NGT affecting the petitioning company can be challenged before this Court resting on the principles laid down in **Whirlpool Corporation** (supra), it will be free to so approach.

22. The writ petition, accordingly, stands dismissed. There shall be no order as to costs.

(M. S. KARNIK, J.) **(CHIEF JUSTICE)**

PRAVIN DASHARATH PANDIT

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