

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH : NAGPUR

C.A.Z. NO. 291/12 IN L.P.A. ST. NO. 5131/12 IN WRIT PETITION NO. 4222 OF
2002.

Smt. Rampyaribai Sukhdeo Daga & others .vs. Neeladevi Narayandas Jakhotiya
& others

Office Notes, Office Memoranda of
Coram, appearances, Court's orders Court's or Judge's orders
or directions and Registrar's orders.

Mr. S.R. Deshpande, Advocate for applicants/appellants,
Mr. M.G. Bhangde, Senior Counsel for respondent no. 2.

CORAM : B.R. GAVAI & INDIRA K. JAIN, JJ.

DATED : JUNE 11, 2015.

For the reasons stated, the application is allowed.
The delay is condoned.

L.P.A. ST. NO. 5131/12 :

1] The appeal is taken up for admission.

2] Mr. M.G. Bhagde, learned Senior Counsel appearing on behalf of respondent no. 2, has raised a preliminary objection with regard to the tenability of the appeal. The learned Senior Counsel relying on the judgment of the Apex Court in the case of **Radhey Shyam & another .vs. Chhabi Nath & others reported in 2015(3) SCALE 88** submits that in view of the said judgment, an order passed under Code of civil jurisdiction can be challenged before this Court only under Article 227 of the Constitution of India and not under Article 226

of the Constitution of India. The learned Senior Counsel, therefore, submits that if the jurisdiction as exercised by the learned Single Judge is only under Article 227, the Letters Patent Appeal would not be tenable. The learned Senior Counsel further submits that the view taken by the Apex Court in the case of Radhey Shyam and another (cited supra) is on the basis of the judgment of the Constitution Bench of the Apex Court consisting of Seven Hon'ble Judges in the case of **Naresh Shridhar Mirajkar .vs. State of Maharashtra and another reported in AIR 1967 SC 1.**

3] Per contra, Mr. S.R. Deshpande, learned Advocate for applicants/appellants, referring to the observations of the Constitution Bench consisting of five Hon'ble Judges in the case of **Province of Bombay .vs. Kusaldas S. Advani and others reported in AIR (37) 1950 SC 222** submits that a writ of certiorari would lie against an inferior Court and if the jurisdiction can be exercised by the learned Single Judge of issuance of writ of certiorari under Article 227, the appeal would be tenable.

4] The question that fell before the Apex Court in the case of Radhey Shyam and another has directly considered the question as to whether a challenge to the order passed by the Court exercising civil jurisdiction could be made in this Court under Article 226 of it can only be made under Article 227 of the Constitution. The Bench of Hon'ble two Judges before which the matter was placed had disagreed with the earlier view taken by the Apex Court in the case of **Surya Dev Rai vs.**

Ram Chander Rai reported in (2003) 6 SCC 675 and as such, the matter was referred to a larger Bench. The Hon'ble Apex Court after considering the judgment of the Constitution Bench consisting of nine Hon'ble Judges in the case of Naresh Shridhar Mirajkar (cited supra) has categorically held that judicial orders of the Civil Courts are not amenable to the writ of certiorari under Article 226 of the Constitution of India.

5] The Constitution Bench of the Apex Court in the case of **Naresh Shridhar Mirajkar (cited supra)** has in paragraph no. 63 observed thus :-

“63. Whilst we are dealing with this aspect of the matter, we may incidentally refer to the relevant observations made by Halsbury on this point. “In the case of judgments of inferior Courts of civil jurisdiction”, says Halsbury in the footnote,

“it has been suggested that certiorari might be granted to quash them for want of jurisdiction (Kemp v. Balne (1844), 1 Dow. & L. 885, at p. 887), inasmuch as an error did not lie upon that ground. But there appears to be no reported case in which the jurisdiction has been quashed on certiorari, either for want of jurisdiction, or on any other ground.”

The ultimate proposition is set out in the terms : “Certiorari does not lie to quash the judgments of inferior Courts of civil jurisdiction”. These observations would indicate that in England the

judicial orders passed by civil Courts of plenary jurisdiction in or in relation to matters brought before them are not held to be amenable to the jurisdiction to issue writs of certiorari.”

It can thus be seen that the Constitution Bench consisting of nine Hon'ble Judges has categorically held that certiorari does not lie to quash the judgments of inferior Courts of civil jurisdiction.

6] In so far as the judgment of the Apex Court in the case of **Province of Bombay .vs. Kusaldas S. Advani (cited supra)** relied on by Shri Deshpande is concerned, the question that arose for consideration therein was as to whether a writ of certiorari would lie to the Province of Bombay to quash an order of eviction of certain premises. It could thus be seen that the subject matter which fell for consideration therein was with regard to issuance of writ to the State Government. The subject matter was not as to whether a writ of certiorari could be issued to correct an order passed by the inferior Court exercising jurisdiction. No doubt that His Lordship Fazl Ali, J. in his judgment in the said matter has observed thus :-

“It is well settled that a writ of certiorari can be issued only against inferior courts or persons or authorities who are required by law to act judicially or quasi-judicially, in those cases where they act in excess of their legal authority. Such a writ is not available to remove or correct executive or administrative acts.

The first question therefore to be decided in this case is whether the order passed by the Government of Bombay requisitioning the premises in question is a judicial or quasi-judicial order or an executive or administrative order.”

The aforesaid observations made by the Constitution Bench, though otherwise would have been binding on this Court, inasmuch as even an obiter of Supreme Court binds this Court, however, in view of clear pronouncement of law by a larger Bench consisting of nine Hon'ble Judges, we would be bound to follow the law laid down in the case of Radhey Shyam which has pronounced the law on the basis of judgment of Constitution Bench consisting of nine Hon'ble Judges.

7] In that view of the matter, the objection is upheld. Since the challenge to the order before the learned Single Judge could have been entertained only under Article 227 and not under Article 226, the appeal will have to be held to be not tenable.

8] The appeal is, therefore, dismissed on the ground of tenability.

Judge

Judge

J.