

AFR

HIGH COURT OF CHHATTISGARH, BILASPUR**WA No. 274 of 2021**

- Dr. Khursheed Khan S/o Ataullah Khan Aged About 50 Years Resident Of Turrappara, Ward No. 4, Dharamjaigarh, District Raigarh Chhattisgarh.,

---- Appellant**Versus**

1. State Of Chhattisgarh Through The Secretary Ministry Of Home, Secretariat, Capital Complex, Mahanadi Bhawan, Atal Nagar, Naya Raipur, District Raipur Chhattisgarh
2. The Station House Officer Police Station Anusuchit Janjati Kalyan (AJAK) Raigarh Chhattisgarh.
3. Charmati W/o Gharsay Aged About 56 Years Resident Of Village Khamhar, Police Station And Tahsil Dharamjaigarh, District Raigarh Chhattisgarh

---- Respondents

For Appellant	:	Shri B.P.Sharma and Ms. Trishna Das, Advocates
For State	:	Shri Gagan Tiwari, Dy.G.A.
For Respondent No.3	:	Shri Hari Agrawal, Advocate

D.B.:- Hon'ble Shri Justice Manindra Mohan Shrivastava
Hon'ble Smt. Justice Vimla Singh Kapoor

C A V Order**05/10/2021**

Heard on admission.

This appeal is directed against order dated 16/08/2021 passed by the learned Single Judge whereby objection with regard to maintainability of the petition under Article 226 of the Constitution of India in so far as prayer for issuance of writ of certiorari against judicial order is concerned, has been sustained and the petitioner has been directed to amend the prayer clause by deleting prayer for issuance of writ of certiorari.

2. Learned counsel for the appellant would argue that the learned Single Judge wrongly placed reliance upon the decision of the Supreme Court in the case of **Radhey Shyam and anr. v. Chhabi Nath and ors., (2015) 5 SCC 423** as the said decision is distinguishable. According to learned counsel for the appellant, the said judgment is an authority for the proposition of law that against an order of the Civil Court, writ of certiorari will not lie under Article 226 of the Constitution of India whereas in the present case, order passed by the Criminal Court is challenged and prayer for writ of certiorari has been sought.

3. Learned counsel for the appellant would further argue that since registration of FIR affects right of liberty and the appellant has assailed the order as violative of its fundamental right guaranteed under Article 21 of the Constitution of India, writ of certiorari would be available. Lastly, it is submitted that as the petitioner has prayed both for writ of certiorari and also seeks to invoke supervisory jurisdiction, the objection was liable to be rejected as the petition is otherwise maintainable under Article 227 of the Constitution of India.

4. Submission of learned counsel for the appellant that the principles laid down in the case of **Radhey Shyam** (supra) will not apply in a case where the order is passed by the Criminal Courts and will be applicable only when orders passed by the Civil Court, cannot be accepted in view of what has been stated in the aforesaid decision, relevant part of which we shall hereinafter referred to.

In the case of **Radhey Shyam** (supra), the Larger Bench of the Supreme Court considered correctness of the law laid down in the case of **Surya Dev Rai v. Ram Chander Rai, (2003) 6 SCC 675**. The issue involved maintainability of the petition seeking issuance of writ of certiorari against an order passed by the Civil Court.

While tracing the history of prerogative writs, Constitutional provisions and

long line decisions of the Supreme Court, Their Lordships observed -

“11. It is necessary to clarify that expression "judicial acts" is not meant to refer to judicial orders of civil courts as the matter before this Court arose out of the order of Election Tribunal and no direct decision of this Court, except **Surya Dev Rai** (supra), has been brought to our notice where writ of certiorari may have been issued against an order of a judicial court. In fact, when the question as to scope of jurisdiction arose in subsequent decisions, it was clarified that orders of judicial courts stood on different footing from the quasi-judicial orders of authorities or tribunals.”

5. The aforesaid observations are not confined to the order passed by the Civil Court only but Their Lordships referred to judicial Courts. It was further observed -

“16. This Court then dealt with the legal position in England on the question of scope of writ of certiorari against a judicial order. Noting that the writ of certiorari did not lie against a judicial order, it was observed : [**Naresh Shridhar Mirajkar v. State of Maharashtra, AIR 1967 SC 1**].

"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 judgment of an inferior court of civil jurisdiction has been quashed on certiorari, either for want of jurisdiction or on any other ground [Halsbury Laws of England Vol.I 1, p.129]*". 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.

64. In *R. v. Chancellor of St. Edmundsbury and Ipswich Diocese, ex p White* [(1945) 1 KBD 195] the question which arose was whether certiorari would lie from the Court of King's Bench to an ecclesiastical Court; and the answer rendered by the court was that certiorari would not lie against the decision of an ecclesiastical court. In dealing with this question, Wrottesley, L.J. has elaborately considered the history of the writ jurisdiction and has dealt with the question about the meaning of the word 'inferior' as applied to courts of law in England in discussing the problem as to the issue of the writ in regard to decisions of certain courts. "The more this matter was investigated," says Wrottesley, L.J.:

'..... the clearer it became that the word "inferior" as applied to courts of law in England had been used with at least two very different meanings. If, as some assert, the question of inferiority is determined by ascertaining whether the court in question can be stopped from exceeding its jurisdiction by a writ of prohibition issuing from the King's Bench, then not only the ecclesiastical courts, but also palatine courts and admiralty courts are inferior courts. But there is another test, well recognised by lawyers, by which to distinguish a superior from an inferior court, namely, whether in its proceedings, and in particular in its judgments, it must appear that the court was acting within its jurisdiction. This is the characteristic of an inferior court, whereas in the proceedings of a superior court it will be presumed that it acted within its jurisdiction unless the contrary should appear either on the face of the proceedings or aliunde.'

Mr Sen relied upon this decision to show that even the High Court of Bombay can be said to be an inferior court for the purpose of exercising jurisdiction by this Court under Article 32(2) to issue a writ of certiorari in respect of the impugned order passed by it. We are unable to see how this decision can

support Mr Sen's contentions."

6. The position was further clarified as below -

"18. While the above judgments dealt with the question whether judicial order could violate a fundamental right, it was clearly laid down that challenge to judicial orders could lie by way of appeal or revision or under Article 227 and not by way of a writ under Articles 226 and 32."

7. Though on facts, *Radhey Shyam's* case related to issue with regard to maintainability of writ petition under Article 226 of the Constitution of India against an order passed by the Civil Court, the principle evolved in the aforesaid decision is on a much wider basis that a writ petition under Article 226 of the Constitution of India seeking issuance of writ of certiorari will not lie against order of Judicial Courts. Therefore, irrespective of whether the order has been passed by the Civil Court or Criminal Court, petition under Article 226 of the Constitution of India seeking issuance of writ of certiorari will definitely not lie.

8. As far as second submission that an order of the Court could be challenged under Article 226 of the Constitution of India as it may involve violation of fundamental right was also answered by Their Lordships in the case of **Radhey Shyam** (supra) referring to earlier precedence as below –

12. In **Ujjam Bai v. State of U.P., AIR 1962 SC 1621**, matter was referred to a Bench of seven Judges on the scope of writ of certiorari against an order of assessment under the provisions of Sales Tax law passed in violation of a fundamental right. Majority of six Judges took the view that except an order under a void law or an 'ultra vires' or 'without jurisdiction' order, there could be no violation of fundamental right by a quasi-judicial order or a statutory authority and such order could not be challenged under Article 32. A writ of certiorari could however, lie against a patently erroneous order under Article 226. It was observed that judicial orders of Courts stood on different footing. Ayyangar, J. observed :

"155. Before concluding it is necessary to advert to one matter which was just touched on in the course of the arguments as one which might be reserved for consideration when it actually arose, and this related to the question whether the decision or order of a regular ordinary Court of law as distinguished from a tribunal or quasi-judicial authority constituted or created under particular statutes could be complained of as violating a fundamental right. It is a salutary principle that this Court should not pronounce on points which are not involved in the questions raised before it and that is the reason why I am not dealing with it in any fullness and am certainly not expressing any decided opinion on it. Without doing either however, I consider it proper to make these observations. There is not any substantial identity between a Court of law adjudicating on the rights of parties in the lis before it and designed as the High Courts and this Court are to investigate inter alia whether any fundamental rights are infringed and vested with power to protect them, and quasi-judicial authorities which are created under particular statutes and with a view to implement and administer their provisions. I shall be content to leave the topic at this."

13. In *Mirajkar* (supra), a nine Judge Bench judgment, a judicial order of High Court was challenged as being violative of fundamental right. This Court by majority held that a judicial order of a competent court could not violate a fundamental right. Even if there was incidental violation, it could not be held to be violative of fundamental right. Gajendragaddkar, CJ, observed :

"38. The argument that the impugned order affects the fundamental rights of the petitioners under Article 19(1), is based on a complete misconception about the true nature and character of judicial process and of judicial decisions. When a Judge deals with matters brought before him for his adjudication, he first decides questions of fact on which the parties are at issue, and then applies the relevant law to the said facts. Whether the findings of fact recorded by the Judge are right or wrong, and whether the conclusion of law drawn by

him suffers from any infirmity, can be considered and decided if the party aggrieved by the decision of the Judge takes the matter up before the appellate court. But it is singularly inappropriate to assume that a judicial decision pronounced by a Judge of competent jurisdiction in or in relation to a matter brought before him for adjudication can affect the fundamental rights of the citizens under Article 19(1). What the judicial decision purports to do is to decide the controversy between the parties brought before the court and nothing more. If this basic and essential aspect of the judicial process is borne in mind, it would be plain that the judicial verdict pronounced by court in or in relation to a matter brought before it for its decision cannot be said to affect the fundamental rights of citizens under Article 19(1).

39..... Just as an order passed by the court on the merits of the dispute before it can be challenged only in appeal and cannot be said to contravene the fundamental rights of the litigants before the Court, so could the impugned order be challenged in appeal under Article 136 of the Constitution, but it cannot be said to affect the fundamental rights of the petitioners. The character of the judicial order remains the same whether it is passed in a matter directly in issue between the parties, or is passed incidentally to make the adjudication of the dispute between the parties fair and effective. On this view of the matter, it seems to us that the whole attack against the impugned order based on the assumption that it infringes the petitioners' fundamental rights under Article 19(1), must fail.

42. It is true that the opinion thus expressed by Kania, C.J., in the case of A.K Gopalan [1950 SCR 88] had not received the concurrence of the other learned Judges who heard the said case. Subsequently, however, in Ram Singh v. State of Delhi [1951 SCR 451], the said observations were cited with approval by the Full Court. The same principle has been accepted by this Court in *Express Newspapers (Private) Ltd. v. Union of India* [1959 SCR 12], and by the majority judgment in *Atiabari Tea Co., Ltd. v. State of Assam* [1961 (1) SCR 809]."

14. Explaining the observations in the earlier judgments in *Budhan Choudhry v. State of Bihar* [AIR 1955 SC 191] and *Parbhani Transport Coop. Society Ltd. v. Regional Transport Authority* [AIR 1960 SC 801] that a judicial order could be violative of Article 14, it was observed : (Mirajkar case)

"46. Naturally, the principal contention which was urged on their behalf before this Court was that Section 30 CrPC, infringed the fundamental right guaranteed by Article 14, and was, therefore, invalid. This contention was repelled by this Court. Then, alternatively, the appellants argued that though the section itself may not be discriminatory, it may lend itself to abuse bringing about a discrimination between persons accused of offences of the same kind, for the police may send up a person accused of an offence under Section 366 to a Section 30 Magistrate and the police may send another person accused of an offence under the same section to a Magistrate who can commit the accused to the Court of Session. This alternative contention was examined and it was also rejected. That incidentally raised the question as to whether the judicial decision could itself be said to offend Article 14. S.R. Das, J., as he then was, who spoke for the Court considered this contention, referred with approval to the observations made by Frankfurter, J., and Stone, C.J., of the Supreme Court of the United States in *Snowden v. Hughes* [(1944) 321 US1] and observed that the judicial decision must of necessity depend on the facts and circumstances of each particular case and what may superficially appear to be an unequal application of the law may not necessarily amount to a denial of equal protection of law unless there is shown to be present in it an element of intentional and purposeful discrimination. Having made this observation which at best may be said to assume that a judicial decision may conceivably contravene Article 14, the learned Judge took the precaution of adding that the discretion of judicial officers is not arbitrary and the law provides for revision by superior courts of orders passed by the subordinate Courts. In such circumstances, there is hardly any ground for apprehending any capricious discrimination by judicial

tribunals.

47. It is thus clear that though the observations made by Frankfurter, J. and Stone, C.J. in *Snowden v. Hughes* 88 L Ed 497 had been cited with approval, the question as to whether a judicial order can attract the jurisdiction of this Court under Article 32 (1) and (2) was not argued and did not fall to be considered at all. That question became only incidentally relevant in deciding whether the validity of the conviction which was impugned by the appellants in the case of *Budhan Choudhry* (supra) could be successfully assailed on the ground that the judicial decision under Section 30 CrPC, was capriciously rendered against the appellants. The scope of the jurisdiction of this Court in exercising its writ jurisdiction in relation to orders passed by the High Court was not and could not have been examined, because the matter had come to this Court in appeal under Article 132(1); and whether or not judicial decision can be said to affect any fundamental right merely because it incidentally and indirectly may encroach upon such right did not, therefore, call for consideration or decision in that case. In fact, the closing observations made in the judgment themselves indicate that this Court was of the view that if any judicial order was sought to be attacked on the ground that it was inconsistent with Article 14, the proper remedy to challenge such an order would be an appeal or revision as may be provided by law. We are, therefore, not prepared to accept Mr Setalvad's assumption that the observation on which he bases himself support the proposition that according to this Court, judicial decisions rendered by courts of competent jurisdiction in or in relation to matters brought before them can be assailed on the ground that they violate Article 14. It may incidentally be pointed out that the decision of the Supreme Court of the United States in *Snowden v. Hughes* (supra), was itself not concerned with the validity of any judicial decision at all.

48. On the other hand, in *Parbhani Transport Cooperative Society Ltd. v. Regional Transport Authority, Aurangabad* AIR

1960 SC 801, Sarkar, J. speaking for the Court, has observed that the decision of the Regional Transport Authority which was challenged before the Court may have been right or wrong, but that they were unable to see how that decision could offend Article 14 or any other fundamental right of the petitioner. The learned Judge further observed that the Regional Transport Authority was acting as a quasi-judicial body and if it has made any mistake in its decision there are appropriate remedies available to the petitioner for obtaining relief. It cannot complain of a breach of Article 14. It is true that in this case also the larger issue as to whether the orders passed by quasi judicial tribunals can be said to affect Article 14, does not appear to have been fully argued. It is clear that the observations made by this Court in this case unambiguously indicate that it would be inappropriate to suggest that the decision rendered by a judicial tribunal can be described as offending Article 14 at all. It may be a right or wrong decision, and if it is a wrong decision it can be corrected by appeal or revision as may be permitted by law, but it cannot be said per se to contravene Article 14. It is significant that these observations have been made while dealing with a writ petition filed by the petitioner, the Parbhani Transport Cooperative Society Ltd. under Article 32; and insofar as the point has been considered and decided the decision is against Mr Setalvad's contention."

Therefore, argument on the ground of alleged violation of fundamental right is also not maintainable in law.

9. A Full Bench judgment of the Patna High Court in the case of **Ramesh Kumar Ravi @ Ram Prasad v. State of Bihar and ors., AIR 1988 Patna 199**, applying the principles laid down in the case of **Mirajkar** (supra) held that writ of certiorari would not lie against an order passed by the Criminal Court. It was held

"31. Again, in Mirajkar's case (AIR 1967 SC 1) (supra) it had been contended that the order of the Bombay High Court barring to publish the proceedings was collateral to the lis before the Court and

was in terms not a judicial determination of the dispute before it. Even therein the Supreme Court clearly took the view that such an order was judicial in nature because it had been passed in the exercise of the Court's inherent jurisdiction to advance the interest of justice. Consequently, even such an order which was assailed as collateral was still held to be not amenable to the writ jurisdiction. Here in the present case any such infirmity is totally lacking because there is no manner of doubt that the order of the learned Chief Judicial Magistrate which was competent to and pronounced upon the issue of the grant or otherwise of bail to the petitioner was in pristine essence, a judicial order under the Code. The same would hold equally true of (he later order of the learned Additional Sessions Judge (Annexure 5). If the larger principle laid down in Mirajkar's case is that no writ would lie against the judicial process established by law, then plainly the judgments and orders of the judicial Magistrate and the Court of Session would be totally out of the purview of a writ of certiorari and amenable only to the process of appeal, revision or the inherent jurisdiction of the High Court under Section 482 of the Code and thereafter by way of a special leave to their Lordships of the Supreme Court."

10. As far as last submission is concerned, after going through the order passed by the learned Single Judge, we do not find that the petitioner has been non-suited. He was directed to amend the prayer clause. He was only directed to delete the prayer of issuance of writ of certiorari and nothing more. The petitioner has sought to invoke supervisory jurisdiction as well. The effect of the order would be that challenge to the order passed by the Criminal Court shall be examined in exercise of supervisory jurisdiction under Article 227 of the Constitution of India and not by way of writ petition under Article 226 of the Constitution of India.

11. In view of above, the appeal is dismissed.

Sd/-
(Manindra Mohan Shrivastava)
Judge

Sd/-
(Vimla Singh Kapoor)
Judge