

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY,  
NAGPUR BENCH, NAGPUR.**

**LETTERS PATENT APPEAL NO.63/2010 IN WRIT PETITION NO.3710/2005 (D)  
WITH  
C.A.Z. NO.6/2019**

1. Ramdayal S/o Gulabchand Khandelwal,  
Aged about 77 years, Occu-Cultivator, R/o Pusala,  
Tahsil-Warud, District Amravati (Maharashtra State).
2. Ramakant Radhakisan Khandelwal,  
Aged about 64 years, Occu-Cultivator, R/o Pusala,  
Tahsil-Warud, District Amravati (Maharashtra State).
3. Sau.Urmila Rameshchandra Khandelwal,  
Aged about 60 years, Occu-Household Work,  
R/o Kharsoli, Tah-Narkhed, District Nagpur  
(Maharashtra State).
4. Prakash Motilal Khandelwal,  
Aged 58 years, Occu-Cultivator & Trader.
5. Rajendra Motilal Khandelwal,  
Aged 48 years, Occu-Cultivator & Trader.
6. Virendra Motilal Khandelwal,  
Aged 44 years, Occu-Cultivator & Trader.
7. Shailendra Motilal Khandelwal,  
Aged 42 years, Occu-Cultivator & Trader.
8. Sanjay Motilal Khandelwal,  
Aged 40 years, Occu-Cultivator & Trader.

Appellant No.4 to 8 all resident of Warud, Tahsil -  
Warud, District-Amravati (Maharashtra State).

9. Mamta W/o Mohanlal Khandelwal,  
Aged 46 years, Occu-Household Work,  
R/o Khandwa, Tahsil & District Khandwa.

Appellant No.1 to 9 by Mukhtyar Prakash Motilal  
Khandelwal, Petitioner No.4, resident of Warud,  
Tah – Warud, Dist-Amraoti.

**APPELLANTS**

**.....VERSUS.....**

1. Mahendra S/o Badrinarayan Khandelwal,  
Aged – Adult, Occu-Business, R/o Rajan  
Complex, Pandhurna Chowk, At Post Warud,  
District Amravati. (Maharashtra State).
2. Narendra S/o Badrinarayan Khandelwal,  
Aged – Adult, Occu-Business,  
R/o Ring Road, At Post Warud,  
District-Amravati (Maharashtra State).
3. Yogendra S/o Badrinarayan Khandelwal,  
Aged – Adult, Occu-Not Known,  
R/o H.P. Petrol Pump Approach Road, At  
Post Warud, District-Amravati (Maharashtra State).
4. Smt.Shashikala W/o Shivnarayan Khandelwal,  
Aged – Adult, Occu-Not Known,  
R/o C/o Shivnarayan Omkarlal Khandelwal,  
At Post Ambagadh Chowki,  
District-Rajnandgaon (Madhya Pradesh).
5. Smt.Maya W/o Shyamji Khandelwal,  
Aged – Adult, Occu-Not Known,  
R/o Shyamji Madanlal Khandelwal  
(Sandalpurwale) Chaman Chowk, At Post  
Khatgaon District Devas (Madhya Pradesh).
6. Smt.Manjudevi W/o Rajkumar Khandelwal,  
Aged – Adult, Occu-Business, R/o Main Road,  
Adilabad-504001 (Andhra Pradesh).
7. Sau.Alka W/o Arunji Khandelwal,  
Aged – Adult, Occu-Business,  
R/o Amdapur, Tahsil-Chikhali,  
District Buldana (Maharashtra State).

**RESPONDENTS**

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Shri H.D. Dangre, counsel for the appellants.  
Shri J.T. Gilda, Senior Advocate with Shri A.J. Gilda, counsel for the  
respondents.

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**CORAM : A. S. CHANDURKAR AND SMT.PUSHPA V. GANEDIWALA, JJ.**

**DATE ON WHICH ARGUMENTS WERE HEARD : 24<sup>TH</sup> JUNE, 2021.**

**DATE ON WHICH JUDGMENT IS PRONOUNCED : 29<sup>TH</sup> JUNE, 2021.**

**JUDGMENT (PER : A.S. CHANDURKAR, J.)**

In this letters patent appeal filed under Clause 15 of the Letters Patent, the judgment of the learned Single Judge in Writ Petition No.3710 of 2005 decided on 19.12.2008 has been challenged. By the said judgment, the writ petition has been dismissed consequently upholding the order passed by the learned Civil Judge (Junior Division), Morshi in execution proceedings on 03.10.1988 holding the decree in question to be inexecutable. C.A.Z. No.6 of 2019 has been filed by the respondents seeking dismissal of the letters patent appeal on the ground that the same is not maintainable.

2. For considering the objection raised by the respondents to the maintainability of the letters patent appeal, it would be necessary to refer to certain relevant facts. The predecessors of the appellants had filed Regular Civil Suit No.134 of 1967 against the predecessor of the respondents who was described as a licensee for his eviction alongwith a further prayer for restoration of possession of the suit property which consisted of a tiled room alongwith kitchen. During the pendency of the said suit the parties entered into a compromise by which it was undertaken by the defendant that in Diwali-1987 he would vacate the suit premises. On failure to vacate the same the plaintiffs were entitled to execute the said decree and recover possession. The compromise decree was accordingly

passed in terms of the compromise. Since the defendant did not vacate the suit premises as per the compromise-deed the plaintiffs filed execution proceedings being Regular Darkhast No.10 of 1988. In the said execution proceedings the judgment debtor raised an objection to the maintainability of the execution proceedings, reasons for which are not required to be gone into. In short, it was the case of the judgment debtor that the decree passed on compromise was not executable and hence the execution proceedings were liable to be dismissed. On 03.10.1988 the learned Judge of the Executing Court upheld that objection and dismissed the execution proceedings by holding the same to be not maintainable in view of the fact that the decree was not executable. The decree holders challenged that order before the Appellate Court but that appeal was dismissed as not maintainable.

3. The decree holders then filed Writ Petition No.3710 of 2005 under Articles 226 and 227 of the Constitution of India challenging the order passed by the Executing Court. Prayer (1) in the said writ petition reads as under:-

*“1. Quash order dated 20.2.1995 passed by the District Judge, Amravati in Regular Civil Appeal No.318/88 arising out of order dated 3.10.1988 passed by the Civil Judge, Junior Division Morshi in Regular Execution Case 10/1988.”*

The learned Single Judge by his judgment dated 19.12.2008 upheld the order passed by the Executing Court and consequently dismissed the said writ petition. The aforesaid judgment of the learned Single Judge has been challenged in this letters patent appeal. The appeal was admitted on 28.01.2010. It is thereafter that the respondents filed C.A.Z. No.6 of 2019 seeking dismissal of the letters patent appeal on the ground that it was not maintainable.

4. Shri J.T. Gilda, learned Senior Advocate for the respondents submitted that what was impugned in the writ petition was an order passed by the Civil Court in execution proceedings. The jurisdiction exercised by the learned Single Judge while entertaining and thereafter dismissing the writ petition was under Article 227 of the Constitution of India especially in view of the fact that the order impugned in that writ petition was one passed by the Civil Court. It was his submission that as exception to the order passed by the Civil Court was taken in the writ petition the jurisdiction exercised while entertaining the same was under Article 227 of the Constitution of India and hence the intra-Court appeal challenging that adjudication was not maintainable. Placing reliance on the decision in *Jogendrasinhji Vijaysinghji Versus State of Gujarat & Others* [(2015) 9 SCC 1], it was his submission that as it was held that no writ could be issued against the order passed by the Civil Court, the

letters patent appeal was not maintainable. Further reference was made to the order dated 10.06.2015 passed by the Division Bench of this Court in **C.A.Z. No.24 of 2015** [*Abdul Khalil S/o Sheikh Mohammad Versus Gopal Radhakisan Kabra*]. It was thus urged that as the letters patent appeal was not maintainable, the prayer made in the civil application was liable to be granted and the letters patent appeal ought to be dismissed as not maintainable.

5. Per contra, Shri H.D. Dangre, learned counsel for the appellants referred to the proceedings that were initiated with the filing of Regular Civil Suit No.134 of 1967. According to the learned counsel in view of Clause 8 of the compromise-deed that was executed between the parties a right was given to the plaintiffs to execute the decree if the defendant failed to vacate the premises at the end of Diwali-1987. As possession was not handed over the execution proceedings were rightly filed and the Executing Court by failing to entertain the same had refused to exercise jurisdiction that was duly vested in it. This very objection based on failure on the part of the Executing Court to exercise jurisdiction was raised in the writ petition that was filed under Articles 226 and 227 of the Constitution of India. The learned counsel invited our attention to the averments as well as prayers made in the writ petition and submitted that since it was pleaded that a writ of certiorari was liable to be issued in

the facts of the case and the petitioners having invoked Articles 226 and 227 of the Constitution of India, the letters patent appeal was clearly maintainable. In that regard, he placed reliance on the judgment of the Full Bench in *M/s Advani Oerlikon Ltd. Versus Machindra Govind Makasare & Others* [2011 (2) Mh.L.J. 916] and especially the answers given to the questions that were formulated while answering the reference. It was his contention that since there was a jurisdictional error committed by the learned Judge of the Executing Court in refusing to entertain the execution proceedings, the petitioners had invoked certiorari jurisdiction before the learned Single Judge and in terms of the judgment of the Full Bench, the letters patent appeal was maintainable. He then submitted that while the jurisdictional aspect had been discussed in detail by the Full Bench in *M/s Advani Oerlikon Ltd.* (supra) this aspect did not fall for consideration before the Hon'ble Supreme Court in *Jogendrasinhji* (supra). In the light of the judgment of the Full Bench, the letters patent appeal was maintainable and hence it ought to be adjudicated on merits. He also urged that the letters patent appeal having been admitted in the year 2010, the objection as to maintainability could not be permitted to be raised at a belated stage especially when the appeal was ripe for being finally heard. He therefore submitted that the civil application filed by the respondents was liable to be rejected.

6. We have heard the learned counsel for the parties on the question of maintainability of the letters patent appeal at length. We have also given due consideration to the rival submissions. In our view the objection raised to the maintainability of the letters patent appeal deserves to be upheld as the letters patent appeal is not maintainable.

The factual aspects referred to above are undisputed and it is common ground that before Executing Court the appellants – decree holders had sought execution of the compromise decree passed in Regular Civil Suit No.134 of 1987. The Executing Court held that compromise decree to be inexecutable and consequently dismissed the execution proceedings. It is thus clear that what was impugned in Writ Petition No.3710 of 2005 was the order dated 03.10.1988 passed by the learned Civil Judge (Junior Division), Morshi in Execution Case No.10 of 1988. In other words, an order passed by the Civil Court was challenged in the aforesaid writ petition that was filed under Articles 226 and 227 of the Constitution of India. The question therefore that has to be considered while deciding the objection raised by the respondents to the maintainability of the letters patent appeal is whether a letters patent appeal challenging the order passed by the learned Single Judge in a writ petition filed under Articles 226 and 227 of the Constitution of India in which an order passed by the Civil Court was impugned, is maintainable?

7. In *Surya Dev Rai Versus Ram Chander Rai* [2004 (1) Mh.L.J. 633 (SC)], it was held by a Bench of two Hon'ble Judges of the Hon'ble Supreme Court that an order passed by the Civil Court was amenable to writ jurisdiction under Article 226 of the Constitution of India. On a reference made as regards the correctness of that view in *Radhey Shyam & Another Versus Chhabi Nath & Others* [2015 (3) Mh.L.J. 296 (SC)] a larger Bench of the Hon'ble Supreme Court answered the same by holding that judicial orders of the Civil Court were not amenable to writ jurisdiction under Article 226 of the Constitution of India and that the jurisdiction under Article 227 of the Constitution of India which was distinct from the jurisdiction under Article 226 of the Constitution of India could alone be exercised. The view as taken in *Surya Dev Rai* (supra) was overruled. Thereafter in *Jogendrasinhji* (supra) the question of maintainability of letters patent appeal was again considered and after referring to the judgment of the larger Bench in *Radhey Shyam* (supra), it was held in paragraph 18 as under:-

“18. The aforesaid authoritative pronouncement makes it clear as day that an order passed by a civil court can only be assailed under Article 227 of the Constitution of India and the parameters of challenge have been clearly laid down by this Court in series of decisions which have been referred to by a three-Judge Bench in *Radhey Shyam*, which is a binding precedent. Needless to emphasise that once it is exclusively assailable under

*Article 227 of the Constitution of India, no intra-court appeal is maintainable.”*

Thereafter in paragraph 30 it was observed as under:-

*“30. From the aforesaid pronouncements, it is graphically clear that maintainability of a letters patent appeal would depend upon the pleadings in the writ petition, the nature and character of the order passed by the learned Single Judge, the type of directions issued regard being had to the jurisdictional perspectives in the constitutional context. Barring the civil court, from which order as held by the three-Judge Bench in Radhey Shyam that a writ petition can lie only under Article 227 of the Constitution, orders from tribunals cannot always be regarded for all purposes to be under Article 227 of the Constitution. ....”*

It was thus held in paragraph 45.2 that an order passed by the Civil Court was only amenable to be scrutinized by the High Court in exercise of jurisdiction under Article 227 of the Constitution of India which was different from Article 226 of the Constitution of India and as held in *Radhey Shyam* (supra) no writ could be issued against the order passed by the Civil Court and therefore no letters patent appeal would be maintainable.

Thereafter in *Ram Kishan Fauji Versus State of Haryana & others* [(2017) 5 SCC 533] it was reiterated by a Bench of three Hon’ble Judges in paragraph 42.3 as under:-

*“42.3. A writ petition which assails the order of a civil court in the High Court has to be understood, in all circumstances, to be a challenge under Article 227 of the Constitution and determination by the High Court under the said Article and, hence, no intra-court appeal is entertainable.”*

It is thus clear that in view of aforesaid pronouncements in *Radhey Shyam, Jogendrasinhji* and *Ram Kishan Fauji* (supra) an order passed by the Civil Court could be scrutinized by the High Court in exercise of jurisdiction only under Article 227 of the Constitution of India and as no writ of certiorari could be issued for quashing the order passed by the Civil Court, a letters patent appeal challenging such adjudication by the learned Single Judge would not be maintainable.

8. Shri H.D. Dangre, learned counsel for the appellant however sought to contend that as the appellants had raised a jurisdictional challenge in the writ petition that was filed under Articles 226 and 227 of the Constitution of India and had specifically contended that the Executing Court had failed to exercise jurisdiction vested in it by invoking Articles 226 and 227 of the Constitution of India, the letters patent appeal was maintainable. Heavy reliance was placed on the decision of the Full Bench of this Court in *M/s Advani Oerlikon Ltd.* (supra). His emphasis was on the answer given to Question No.2 by the Full Bench which answer reads as under:-

“20. ....

Re:1 .....

Re:2 *It is not a correct proposition in law that jurisdictional errors or errors resulting in miscarriage of justice committed by subordinate Courts/Tribunals can only be corrected by this Court in exercise of powers under Article 227 of the Constitution. The writ of certiorari can be issued under Article 226 of the Constitution where the subordinate Court or Tribunal commits an error of jurisdiction. Where the subordinate Court or Tribunal acts without jurisdiction or in excess of it or fails to exercise jurisdiction, that error of jurisdiction can be corrected. Moreover when the Court or Tribunal has acted illegally or improperly such as in breach of the principles of natural justice the writ of certiorari is available under Article 226.”*

It was thus urged that as this aspect was not dealt with by the Hon’ble Supreme Court in the decisions relied upon by the learned counsel for the respondents and as the appellants had invoked jurisdiction under Articles 226 and 227 of the Constitution of India, the letters patent appeal was maintainable. We are not in a position to accept this contention as what has been urged by the learned counsel has not been so held by the Full Bench. The question considered by the Full Bench was as to whether jurisdictional error or errors resulting in miscarriage of justice committed by Authorities which are subordinate to it could be corrected

by invoking powers under Article 226 of the Constitution of India? Another question considered was whether jurisdictional error or errors resulting in miscarriage of justice committed by subordinate Courts/Tribunals could be corrected by the High Court in exercise of powers under Article 227 of the Constitution of India? Perusal of paragraph 7 of the Full Bench indicates that note was taken of the fact that the decision in *Surya Dev Rai* (supra) had been dissented by in *Radhey Shyam* (supra) and referred to a Larger Bench. In that context it was observed as under:-

“7. ....The referring judgment adopts the view that the aforesaid observations in *Surya Dev Rai* are not consistent with the law which has been consistently followed in earlier decisions. The reference to the larger Bench of the correctness of the decision in *Surya Dev Rai* was because the issues arose out of a properly constituted suit in a civil court for the grant of an injunction. The position that the writ of certiorari is available to correct errors of jurisdiction on the part of an inferior Court or tribunal is not affected. That the writ of certiorari under Article 226 is available to correct errors of jurisdiction of inferior Court or Tribunals is settled in view of a consistent line of authority, reading together *Hari Vishnu Kamath, Custodian of Evacuee Property, Basappa and Syed Yakoob. The decision of nine judges in Mirajkar in fact specifically cited the judgment in Basappa.*” (emphasis supplied by us)

It thus becomes clear that the Full Bench has referred to the adjudication by a Civil Court on one hand and that by an inferior Court or Tribunal on the other. It was held that the position that a writ of certiorari was available to correct the errors of jurisdiction on the part of an inferior Court or Tribunal was not affected. These observations are clearly with regard to errors of jurisdiction of inferior Courts/Tribunals as distinguished from orders of a Civil Court. The ultimate answers given by the Full Bench are in the context of errors of jurisdiction committed by the subordinate Court or Tribunal in contradiction with errors by the Civil Court. The learned counsel for the appellants is not right in contending that these observations were applicable even to adjudication by the Civil Court as that is not the ratio of the judgment of the Full Bench.

9. We may note that in paragraph 63 of the judgment of the Constitution Bench in *Naresh Shridhar Mirajkar Versus State of Maharashtra* [AIR 1967 SC 1], it was held that “certiorari does not lie to quash the judgments of inferior Courts of civil jurisdiction”. Another Full Bench judgment of this Court in *Motilal Khamdeo Rokde & Others Versus Balkrushna Baliram Lokhande (since deceased) through L.Rs. Chandan s/o Balkrishna Lokhande & Others* [2020(1) Mh.L.J. 110] has in the light of the aforesaid law held as under:-

“8. .... Though the Civil Courts are subordinate to the High Court, the expression “inferior Court” is not referable to “Judicial Court”. It is thus clear to us that the judicial orders of the Civil Court are not amenable to a writ of certiorari under Article 226 of the Constitution of India. There are no precedents in India for the High Courts to issue writs to subordinate Courts. The jurisdiction to issue a writ of certiorari under Article 226 is distinct from one under Article 227 of the Constitution of India. We, therefore, hold that a writ petition under Article 226 of the Constitution of India challenging the orders passed by the Judicial/Civil Courts, subordinate to the High Court and seeking a writ of certiorari, is not maintainable. ....”

In the light of the aforesaid position of law which is now settled, it is clear that what was impugned in the writ petition filed by the petitioners was an order passed by the Civil Court in execution proceedings for executing a decree passed by the Civil Court. Though the writ petition was titled as one under Articles 226 and 227 of the Constitution of India, in the light of the law laid down in *Radhey Shyam & another* (supra) as followed in *Jogendrasinhji* (supra) which was reiterated in *Ram Kishan Fauji* (supra) and thereafter applied in *Motilal* (supra), the letters patent appeal is not maintainable as the jurisdiction exercised by the learned Single Judge was only under Article 227 of the Constitution of India.

10. Coming to the submission of the learned counsel for the appellants that the letters patent appeal having been admitted it ought to be heard on merits instead of deciding the question as regards its maintainability, it must be noted that the objection to maintainability of the letters patent appeal has been raised in view of the law laid down by the Hon'ble Supreme Court in *Jogendrasinhji* (supra). Objections of various nature could be raised to the maintainability of proceedings which could include the proceedings itself not being tenable or on the ground of availability of an alternate remedy. The nature of objection to the maintainability of the proceedings would be relevant. An objection to the maintainability of proceedings based on lack of jurisdiction is not one that could be waived and would warrant adjudication irrespective of the stage of the proceedings it is raised. On the other hand, an objection based on availability of an alternate remedy can be considered in the backdrop of self-imposed restrictions as laid down and discretion can be exercised by considering the stage at which such objection is raised. We may in the passing note that the proposition of law that once a petition has been admitted it could never be dismissed on the ground of alternate remedy has been held to be not an absolute proposition of law in *State of Uttar Pradesh & Another Versus Uttar Pradesh Rajya Khanij Vikas Nigam Sangharsh Samiti & Others* [(2008) 12 SCC 675]. In the present case the objection to the maintainability of the letters patent appeal is a

jurisdictional aspect that goes to the root of the matter and we therefore do not find any reason for not considering the objection raised to the maintainability of the letters patent appeal at this stage despite the fact that the letters patent appeal was admitted in the year 2010.

11. As noted above the larger Bench of the Hon'ble Supreme Court in *Jogendrasinhji* (supra) has held in clear terms that an order passed by the Civil Court is amenable to scrutiny by the High Court only in exercise of jurisdiction under Article 227 of the Constitution of India. In other words, no letters patent appeal would be maintainable against a judgment in a writ petition raising challenge to the order passed by the Civil Court as the jurisdiction exercised by the Single Judge in such proceedings is only under Article 227 of the Constitution of India. As a result of the law laid down in *Jogendrasinhji* (supra) it will have to be held that the letters patent appeal itself is not tenable. This is for the reason that what was done by the Hon'ble Supreme Court in the said decision was stating the correct position of law as regards the nature of jurisdiction exercisable in writ jurisdiction while entertaining challenge to an order passed by the civil Court.

In this regard, we may refer to the following observations in paragraph 59 of the decision in *Lily Thomas & Others Versus Union of India & Others* [(2000) 6 SCC 224]:-

“59. .... It is a settled principle that the interpretation of a provision of law relates back to the date of the law itself and cannot be prospective from the date of the judgment because concededly the Court does not legislate but only gives an interpretation to an existing law. ....”

The observations in paragraph 42 of the decision in *Assistant Commissioner, Income Tax, Rajkot Versus Saurashtra Kutch Stock Exchange Ltd.* [2008(12) Scale 582] are also relevant and the same read thus:-

“42. In our judgment, it is also well-settled that a judicial decision acts retrospectively. According to Blackstonian theory, it is not the function of the Court to pronounce a ‘new rule’ but to maintain and expound the ‘old one’. In other words, Judges do not make law, they only discover or find the correct law. The law has always been the same. If a subsequent decision alters the earlier one, it (the later decision) does not make new law. It only discovers the correct principle of law which has to be applied retrospectively. To put it differently, even where an earlier decision of the Court operated for quite some time, the decision rendered later on would have retrospective effect clarifying the legal position which was earlier not correctly understood.”

It thus becomes clear that in the light of the decision in *Jogendrasinhji* (supra) the letters patent appeal is not maintainable. Mere fact that it was admitted cannot be a reason to preclude the Court for examining the jurisdictional aspect of its tenability especially when the objection raised is that in law the letters patent appeal itself was not maintainable.

12. Accordingly, the preliminary objection raised to the maintainability of the letters patent appeal is upheld. The civil application is allowed. The letters patent appeal is dismissed as not maintainable. Needless to state that the appellants are free to seek redressal of their grievances that were raised in the letters patent appeal by initiating appropriate proceedings. All questions on merits are kept expressly open. The parties shall bear their own costs.

(SMT.PUSHPA V. GANEDIWALA, J.) (A.S. CHANDURKAR, J.)