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### FULL BENCH OF THE BOMBAY HIGH COURT CLARIFIES IMPORTANT ASPECTS OF WRIT OF CERTIORARI UNDER ARTICLE 226

12 December 2019

#### Introduction

On 21 November 2019, a full bench of the Nagpur Bench of the Bombay High Court (Court) in its judgement in *Motilal s/o Khamdeo Rokde & Ors v Balkrushna Baliram Lokhande & Ors* (Letters Patent Appeal No 177 of 2012), clarified two crucial aspects regarding the maintainability of petitions seeking a writ of certiorari, under Article 226 of the Constitution of India (Article 226), namely: (a) the maintainability of such writ petitions against orders of lower civil/judicial courts; and (b) whether the lower civil court / the judges passing the said orders are required to be made parties to the writ petitions under Article 226 or Article 227 of the Constitution (Article 227).

#### Factual Matrix

The aforesaid questions of law came up through a reference made by the division bench to the full bench of the Court, regarding the judgment of the full bench of the Court in *Ramachandra Dagoji Rangari v Vishwanath Champat Naik* (2011 (5) Mh.L.J. 193) (Ramachandra). The Court in *Ramachandra* held that in a writ petition filed under Article 226, for the quashing of an order of an inferior court (including any tribunal/authority), the court / judge / authority passing the order is a necessary party to the writ petition.

The Court enlisted the aid of an *amicus curiae* and posed (and answered) two primary questions:

- Is a writ petition for the quashing of an order passed by a lower court maintainable (writ of certiorari) under Article 226? If the answer to the same is negative, then the question of impleadment (making a person/body a party to the litigation) of the court / its judges does not arise.
- Is the impleadment of the judge / lower court necessary in a petition seeking the quashing of the order of a lower court is filed under Article 227?

#### Question 1: Is a Certiorari writ petition under Article 226 maintainable?

A Certiorari Writ is one of the high prerogative writs which High Courts and the Supreme Court are empowered to issue under the Constitution. The Supreme Court's power with respect to such writ is under Article 32 in the case of a breach of a fundamental right whereas the power of the High Court is derived principally under

Article 226 and also Article 227. The scope of remedy of certiorari writ can be invoked under patently erroneous or without jurisdictional order of tribunal or authorities or inferior courts. By issuing a writ of certiorari, the Court issuing the certiorari writ technically calls for the record of the case before the subordinate jurisdictional authority and after considering the same quashes or set aside the order passed by the subordinate authority.

In the present case, the Court was of the opinion that Article 226 does not contemplate the quashing of an order passed by a subordinate civil court. As stated above, certiorari pertains to the orders of an “inferior court or tribunal or authority”. The court held after considering various judgments of the Supreme Court that it is well accepted position that though the Civil Courts are subordinate to the High Courts, they are not “inferior courts” and therefore not amenable to a writ of certiorari under Article 226. The Court held that the expression “inferior Court” applies only to tribunals or quasi judicial authorities whose orders can be quashed or set aside by the High Court in exercise of its power under Article 226. However, the Court made it clear that High Courts in exercise of its supervisory jurisdiction conferred on them under Article 227 may quash the orders of subordinate civil courts. The Court relied on larger bench judgment of the Supreme Court in *Radhey Shyam & Anr v Chhabi Nath & Ors* ((2015) 5 SCC 423) as well as *Shri Jogendrasinhji Vijaysinghji v State of Gujarat & Ors* (AIR 2015 SC 3623) (*Jogendrasinhji*).

Accordingly, the Court held that the underlying assumption in *Ramachandra*, i.e., that a petition seeking a writ of certiorari against the order of a lower civil court is maintainable, is erroneous. Therefore, the question of impleading the court or judge passing the order does not arise in a writ petition filed under Article 226. However, the Court still examined the possibility of impleadment of a court or judge in a petition maintainable under Article 227, that seeks relief through the constitutional supervisory jurisdiction of a High Court. *Ramachandra*, regardless of its underlying assumption, states that a petition assailing the order of a lower court must necessarily have the court / judge responsible impleaded in order to be maintainable.

## **Question 2: Is the judge a necessary party to a petition seeking the quashing of the order of a lower court is filed under Article 227?**

The primary answer of the Court to this question, basis the Supreme Court’s decision in *Jogendrasinhji*, was in the negative. The Court was firmly of the opinion that the court / authority that passed the order in question is not a necessary party to the litigation. On the contrary, repeatedly impleading of judges and tribunal members will impair both the functioning of such courts and authorities, and the independence of the judiciary. Instead, keeping in mind that in terms of the Constitution, lower courts are courts of record, even if their orders are to be quashed, there is no need for those that pass the order to be represented in court. Instead, the records and proceedings of the order in question can easily be called for by the High Court, and the lower court need not be present to defend the same.

## **Exceptions**

Of course, the Court carved out some objections to this blanket rule:

- *Firstly*, even if the lower court / authority is not a necessary party, it would still be a proper party;
- *Secondly*, when the authority in question is the sort that must necessarily defend its order, it is a necessary party. An illustration of this would be how in cases involving the quashing of orders of authorities like municipal corporations, income tax commissioners, they customarily defend the orders they pass, and are impleaded in such petitions. This stems from the underlying fact that their function is executive, not judicial.

- *Thirdly*, and most importantly, when the order sought to be quashed has allegedly been rendered basis factors like bias, *mala fide*, etc., the authority / court which passes the order must necessarily defend the *mens rea* being alleged. The issues at hand cannot be overcome basis the records of the court, and human agency is a condition precedent.

## Comment

The first question posed before the Court may seem like it is settled law. However, in practice, despite the catena of judgements to the contrary, most advocates necessarily file writ petitions for quashing of civil/judicial orders under *both* Article 226 and 227, as opposed to just the latter, even while challenging the validity of an order of a civil/judicial court. It will be interesting to see if this judgement of the Court affects the way the registries of the Bombay High Court and its benches in Nagpur and Aurangabad start raising objections to filing such petitions under Article 226, or judges make observations regarding the same even if it is not the question of law raised.

Further, with respect to the second question, it seems unlikely that this will in any way lessen the instances of impleadment of the judges of the lower courts, because such writ petitions invariably contain allegations of *mala fide* and bias regardless of whether they are merited. However, in petitions where the judges passing orders have not been impleaded (and correctly so), this judgment may serve as a useful precedent to get around the primary objection raised regarding the maintainability thereof.

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