
CONSTITUTIONAL LAW II

WRIT JURISDICTION OF SUPREME COURT AND HIGH COURT



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CHAPTER 1.

INTRODUCTION

Blackstone defines writ as a mandatory letter from the king in parliament, sealed with his great seal and directed to the sheriff of the county wherein the injury is committed or supposed so to be, requiring him to command the wrongdoer or party accused, either to do justice to the complainant or else to appear in court and answer the accusation against him.

Carter defines a writ as follows, it was the king's order to his liege, written on parchment and sealed with the royal seal and disobedience of the writ was a contempt of the royal authority and punishable as such.

In whartons law dictionary a writ has been stated to mean, A court's written order in the name of a state or other competent legal authority commanding the addressee to do or refrain from doing some specified act.

Writs have a long history and one can trace their formal origin to the Anglo-Saxon formulae by which the king used to communicate his pleasure to persons and courts. The Anglo-Norman writs which we meet with after the conquest are substantially the Anglo-Saxon writs formed into Latin but what is new is the much greater use of them owing to the increase of royal power which came with the conquest.

Under the above status of the law of writs, our country got independence and the constitution of free India came into force. The law of writs as inherited from the English colonial regimes was having a limited scope but its effectiveness was time-tested. Therefore, the constitutional forefathers decided to retain the concept as such in its nature as a broad parameter, but its scope was enlarged by adding some new words to it and it was left open-ended also. This was essential also keeping in view the hopes and aspirations of the people. The people had suffered the peril of the foreign yoke for centuries and their faith and confidence in the new set-up was bubbling with spontaneous feelings of freedom wherein they dreamt of endless liberties. However, it was not to be allowed to go as a dream only and to fulfill these hopes a vast scope of liberty, justice and equality was provided in the constitution. The fundamental rights were incorporated in the

constitution, which fully ensured the basic human liberties. to fructify these rights into actual liberties, a detailed legal provisions was incorporated in the constitution itself to safeguard these rights. under article 32 the enforceability to these rights was included as a fundamental right and an almost parallel provisions was provided under article 226 as a constitutional right to understand these two provisions in their true spirit and context, it would be desirable to first see them in their liberal context.

Supervisory Nature

The writ jurisdiction is supervisory in nature and it is different from appellate or revision jurisdiction. The basic purpose of writs is to supply the defects of justice and for that matter while exercising the writ jurisdiction the court has to examine the application of law rather than facts. The court has to see the conduct of the body or authority whose actions are under challenge before the court. The court has to enforce the right and not to create a right. Similarly, it has to enforce the law and not to enact law. The writ jurisdiction supervises the proceedings of the subordinate courts or authorities in the application of law, the jurisdiction of such bodies or authorities exercising the judicial and quasi judicial functions. B.P. Singh, J. so observed,

"The jurisdiction under Article 226 of the Constitution is limited to seeing that the judicial or quasi-judicial tribunals or administrative bodies exercising quasi-judicial powers, do not exercise their powers in excess of their statutory jurisdiction, but correctly administer the law within the ambit of the statute creating them or entrusting those functions to them.

That is why when a particular action is challenged before the court in a writ, it is the validity of that particular action which is examined by the court and not the validity of law under which such action is taken. The limited point to be seen in writs is whether the law is allowed to take its own course or not. The rule of law has to be ensured.

Original Jurisdiction

It is the original jurisdiction of the High Court as well as that of the Supreme Court. Even if the decision of a tribunal is challenged in writ petition, it would be the original and initial jurisdiction of the court and it is not a continuation of the proceedings of the earlier court or tribunal. It is because of the fact that it is different from appellate jurisdiction wherein the facts

of the case and appreciation of evidence have to be re-examined. The conclusions reached at by the lower authority or tribunal have to be appreciated in view of the evidence and other related record of that particular matter. The court may change the decision in appeal and appreciation of evidence, including the quantum of penalty or sentence may be varied. But in writ jurisdiction, it is none of the function of the court. The facts and evidence are not relevant for the court in writs. The only thing which is important, to be seen by the court, is the appreciation of application of law and the jurisdiction and competency of such application. Therefore, the position of the court is that of a sentinel. Even if a wrong appreciation of fact has led to a wrong conclusion by the lower court or tribunal, the court may not give its decision on this issue and such issues are left for the appellate court to take appropriate decision if approached by the aggrieved party.

Summary Proceedings

Since no detailed appreciation of facts and evidence are involved in writs, its proceedings are summary in nature. The pleadings in the court are entertained in the form of affidavits and on the basis of these pleadings and after hearing the arguments of the advocates for both the parties, the writ petitions are decided. In exceptional cases, where the court finds that a disputed fact is involved and the court simultaneously feels that it is necessary to decide the matter in the interest of justice, the court may record evidence or refer it to some subordinate court, to give its findings on the disputed fact after recording due evidence. Sometimes, the court may appoint commissions also to verify the veracity of facts produced before it. But these are all exceptional proceedings and normally not applied in writ petitions.

Suo motu Jurisdiction

With the development and growth of law of writs in the country, the courts have become increasingly conscious of the rights of the people. Now the courts in certain cases don't wait for the writ petitions to be filed. The courts may take suo motu notice of the violation of rights and law and accordingly, suo motu jurisdiction is exercised in such matters. In these matters, if the court comes across a matter, where there is blatant violation of law affecting the public at large adversely, the court issues notice to the respondents at their level itself and the respondents have to explain the courts their position and if required, the court may direct them to repair the damage by way of a writ of mandamus. Recently, during the past few years, the problem related

to the pollution of environment in some major metros of India including the national capital region had made the court to take suo motu notice of such problems. The traffic pollution in Delhi has been mitigated to a considerable extent by converting the diesel operated buses to CNG operation under the orders of the court.

All necessary persons should be made parties to the Writ Petition

If necessary parties are not impleaded in the writ, then writ is bad Udit Narain Singh vs. Additional Member, Board of Revenue¹ If no relief is claimed against a party then he need not be made a party and if on the other hand relief is claimed from a party then he is necessary party. Sayyad Hussain vs. Sayyad Siddiqui². Necessary party is one without whom no order can be made effectively. Udit Narain Singh vs. Additional Member, Board of Revenue

Writ should be filed at the earliest stage, When the validity of the rule or law is questioned,

When an action against an employee is initiated under a certain Regulation, and the employee seeks to question the validity of the Regulation itself, then the Enquiry Officer appointed under the Regulation cannot decide the validity of the Regulation, because the Enquiry officer is appointed under the very regulations. The appropriate course would be to file a writ petition seeking a writ of prohibition prohibiting the respondents from holding the threatened enquiry.

Delay in Filing writ

No period of limitation has been prescribed for the institution of a petition for a writ, but it must be filed within a reasonable time. This is based on the principle of equity that delay defeats equity. Law is there to help only those who are alert, and not those who are carefree or negligent. It was held that unexplained delay of three months was fatal to the writ petition. The same principle is followed if the petition is filed in the Supreme Court under Article 32 of the Constitution of India. In the absence of any period of limitation utmost expedition is the *sin qua non* for such claims. The party aggrieved must move the Court at the earliest possible time and explain satisfactorily all semblance of delay.

¹ AIR 1963 SC 786

² AIR 1959 RAJ 177

CHAPTER 2.

NATURE AND SCOPE OF WRIT JURISDICTION—A HISTORICAL PROSPECTIVE

Origins in England

In the 17th century the foundations for *habeas corpus* were "wrongly thought" to have originated in Magna Carta. This charter declared that:

No Freeman shall be taken or imprisoned, or be disseized of his Freehold, or Liberties, or free Customs, or be outlawed, or exiled, or any other wise destroyed; nor will We not pass upon him, nor condemn him, but by lawful judgment of his Peers, or by the Law of the land.

the origin of writs took place in English judicial system, with the development of English law from folk courts—moots to the formal courts of common law. the law of writs originated from orders passed by the king's bench in England. Writ was precisely a royal order, which was issued under the royal seal.

In common law, a **writ** is a formal written order issued by a body with administrative or judicial jurisdiction; in modern usage, this body is generally a court. Warrants, prerogative writs and subpoenas are common types of writs but there are many others.

History

Originally, a writ became necessary, in most cases, to have a case heard in one of the Royal Courts, such as the King's Bench or Common Pleas. Some franchise courts, especially in the Counties Palatine, had their own system of writs that often reflected or anticipated the common law writs. The writ would act as a command that the case be brought before the court issuing the writ, or it might command some other act on the part of the recipient.

Where a plaintiff wished to have a case heard by a local court, or by an Eyre if one happened to be visiting the County, there would be no need to obtain a writ. Actions in local courts could usually be started by an informal complaint, which did not necessarily need to be written down.

However, if a plaintiff wished to avail himself of Royal — and by implication superior — justice in one of the King's courts, then he would need a writ, a command of the King, to enable him to do this. Initially for common law, recourse to the King's courts was unusual, and something for which a plaintiff would have to pay. For most Royal Courts, the writ would usually have been purchased from the Chancery, although the court of the Exchequer, being in essence another government department, was able to issue its own writs.

While originally writs were exceptional, or at least non-routine devices, Maitland suggests that by the time of Henry II, the use of writs had become a regular part of the system of royal justice in England.

At first, new writs could be drafted to fit new situations, although in practice the clerks of the Chancery would re-use old forms, and there were many books that were collections of forms of writ, much as in modern times lawyers frequently use fixed precedents or boilerplate, rather than re-inventing the wording of a legal document each time they wish to create one. The problem with this approach was that the ability to create new writs amounted to the ability to create new forms of action. Plaintiffs' rights would be defined, and in most cases limited, by the writs available to them. Thus, the ability to create new writs was close to the ability to create new rights, a form of legislation. Moreover, a writ, if one could be found fitting the plaintiff's case, provided the legal means to remove the dispute from the jurisdiction of the local court, often controlled by a lesser noble, and instead have it heard by the King's judges. The nobility thus saw the creation of new writs as an erosion of their influence.

Over time, opposition to the creation of new writs by the Chancery increased. For example, in 1256, a court was asked to quash a writ as "novel, unheard of, and against reason" **Abbot of Lilleshall v Harcourt**³. Ultimately, in 1258, the King was forced to accept the Provisions of Oxford, which prohibited, among other things, the creation of new forms of writ without the sanction of the King's council. New writs were created after that time, but only by the express sanction of Parliament, and the forms of writ remained essentially static, each writ defining a particular form of action.

³ (1256) 96 SS xxix 44)

With the abolition of the Forms of Action in 1832 and 1833, a profusion of writs was no longer needed, and one uniform writ came to be used. After 1852, the need to state the name of the form of action was also abolished. In 1875, the form of writ was altered so that it conformed more to the subpoena that had been in use in the Chancery. A writ was a summons from the Crown, to the parties to the action, with on its back the substance of the action set out, together with a 'prayer' requesting a remedy from the court (for example damages). In 1980, the need for writs to be written in the name of the Crown was ended. From that time, a writ simply required the parties to appear.

Writs applied to claims that were to be issued in one of the courts that eventually formed a part of the High Court of Justice. The procedure in a County Court, which was established by statute, was to issue a 'summons'.

In 1999 the Woolf Reforms unified most of the procedure of the Supreme Court and the County Court in civil matters. These reforms ushered in the Civil Procedure Rules. Under these almost all civil actions, other than those connected with insolvency, are now begun by the completion of a 'Claim Form' as opposed to a 'Writ', 'Originating Application', or 'Summons': see Rules 7 and 8 of the Civil Procedure Rules.

In India

Under the Indian legal system, jurisdiction to issue 'prerogative writs' is given to the Supreme Court, and to the High Courts of Judicature of all Indian states. Parts of the law relating to writs are set forth in the Constitution of India. The Supreme Court, the highest in the country, may issue writs under Article 32 of the Constitution for enforcement of Fundamental Rights and under Articles 139 for enforcement of rights other than Fundamental Rights, while High Courts, the superior courts of the States, may issue writs under Articles 226. The Constitution broadly provides for five kinds of "prerogative" writs: habeas corpus, certiorari, mandamus, quo warranto and prohibition.

A writ means an order. A warrant is also a type of writ. Anything that is issued under an authority is a writ. In this sense, using the power conferred by Article 32, the Supreme Court

issues directions, orders or writs. As we know that Article 32(3) confers the power to parliament to make law empowering any court to issue these writs. But this power has not been used and only Supreme Court by Article 32 (2) and High Courts (Article 226) can issue writs. Meaning of habeas corpus, mandamus, prohibition, quo warranto and certiorari Habeas corpus, mandamus quo warranto and certiorari are Latin words. They have different meaning and different implications.

The Indian judiciary has dispensed with the traditional doctrine of locus standi, so that if a detained person is not in a position to file a petition, it can be moved on his behalf by any other person. The scope of habeas relief has expanded in recent times by actions of the Indian judiciary.⁴

⁴ www.leadthecompetition.in/GKT/gkttopics.html

CHAPTER 3.

1. THE SCOPE OF JUDICIAL REVIEW AND THE WRIT JURISDICTION

The Indian Constitution provides a perfect system of governance and all the three organs of the Government have been entrusted with defined role to pave the path of democracy. The main role of law making has been left with the legislature and its implementation and execution has been given to the executive. However, the judiciary has been given a special role to act as a watchdog over the two wings of the Government. The Constitution of India envisages a specific philosophy based on democracy, secularism and federalism where rule of law has been given a prime place to enforce the principles of fair play and natural justice. The basic principles of equality, liberty, fraternity and justice, coupled with the dignity of individual and integrity of the nation are enshrined in the Constitution and have been duly reflected in its preamble. The fabric of the Constitution is pregnant with rich and cherished values which the country awaited for many centuries under the foreign rule. It is this philosophy of the Constitution which gives a specific direction to the mode of governance in the country. Although the use of the words - "we the people of India" connotes that it was the people of India by whom and for whom the Constitution was enacted and adopted, but once the people adopted the Constitution, it became the fountainhead of all rights, privileges and powers for the people. Whatever the Constitution conceived for the people was available through it and not above or beyond it.

Thus, the Indian Constitution became the fountain of rights for the people as well as the source of all powers and privileges for the governance of the country. Every action in this process has to be as per the constitutional provisions. The main actors of governance under the Constitution thus became the legislature and the executives who were to enact laws and execute the same in practice. However, to keep these organs in the defined constitutional path, the third organ of the government - the judiciary has been given a supervisory role to regulate the system, to ensure rule of law and to enforce the Constitution. The judiciary has to strike a balance between the democratic spirit and the rule of law which are the cherished chapters of the constitutional

philosophy. The main role of judiciary is to scrutinise the constitutionality of the laws enacted by the legislature and the decisions taken by the executive consequent upon such enactments. The Constitution clearly mandates the judiciary to consider the validity and legality of each and every act and enactment of the executive and the legislature. It is this scrutiny of executive and legislative actions by the High Courts and the Supreme Court which is the main subject of judicial review under the Constitution. The Constitution envisages the doctrine of judicial review to check the acts of omissions and commissions of the executive and the legislative transgressions of the legislature.

Express Power of Judicial Review

The power of judicial review has been expressly available under Article 226 with the High Courts and under Article 32 with the Supreme Court. The Constitution provides wide and open powers of judicial review under writ jurisdiction to the High Courts and the Supreme Court of India. Here the Indian Courts are placed in an advantageous position in comparison to the American Supreme Court where no express powers of judicial review are available in the Constitution in the same terms as it is available in the Indian Constitution. However, under much hyped "due process" clause, the American Supreme Court has assumed extensive powers of reviewing legislative acts. But in our country, this power has been entrusted to the High Courts and the Supreme Court through express provisions of the Constitution. The Supreme Court while indicating the purpose of the powers of judicial review had thus observed at a very early stage of constitutional democracy;

"If, then, the courts in this country face up to such important and none too easy task, it is not out of any desire to tilt at legislative authority in a crusader's spirit, but in discharge of a duty plainly laid upon them by the Constitution. This is especially true as regards the "fundamental rights" as to which this court has been assigned the role of a sentinel on the qui vive. While the court naturally attaches great weight to the legislative judgment, it cannot desert its own duty to determine finally the constitutionality of an impugned statute."!

Therefore, the courts in India exercising the powers of judicial review are doing it under the specific mandate of the Constitution to safeguard the fundamental rights and to keep the legislature and the executive within the limits drawn by the Constitution.

Limited Scope of Judicial Review

However, the scope of the judicial review under Article 226 and Article 32 over the judicial courts and tribunals is limited to certain conditions and established practices. The High Court under Article 226 should not upset any finding of the tribunal without holding that the conclusion was irrational or perverse. The very fact that the courts and tribunals exercise their due jurisdiction and they are authorised to appreciate the evidence placed before them as per their wisdom, gives their judgments a credibility and strength. The court of judicial review have limited jurisdiction to see whether the law applied in the judgment or order of the tribunal has been rightly applied or not? Whether there is violation of jurisdiction? Whether there is violation of natural justice? Whether the decision impugned before the court holding the judicial review is irrational or perverse and it suffers from the arbitrariness or bias? These are some of the issues which have to be seen while conducting the judicial review. The Supreme Court⁵ held that the High Court should not upset the finding without holding that the conclusion was irrational or perverse.

Another issue, while reviewing the orders of the tribunal by the High Court, has to be seen that the issues which were not raised before the tribunals cannot be raised in the writ before the High Court under Article 226. The Supreme Court in J.H. Jadhao's case (supra) refused to allow the validity of the issue raised before the High Court which was not raised before the tribunal. This is more in consonance with the law laid down by the Supreme Court in L. Chandra Kumar's case (supra), wherein the tribunals were recognised as the courts of first instance and approach to the tribunals was made mandatory before approaching the High Court. In the same spirit, it is logical to conclude that when an issue was not raised in the courts of first instance, the same could not be allowed to be raised in the judicial review before the High Court.

The Supreme Court in **State of Uttar Pradesh v. Johri Mal**⁵ analysed the scope of judicial review under Article 226 of the Constitution by the High Court. The Apex Court in the judgment observed as follows:-

⁵ AIR 2004 SC 3800

The scope and extent of power of the judicial review of the High Court contained in Article 226 of the Constitution of India would vary from case to case, the nature of the order, the relevant statute as also the other relevant factors including the nature of power exercised by the public authorities namely, whether the power is statutory, quasi-judicial or administrative. The power of judicial review is not intended to assume a supervisory role or done the robes of omnipresent. The power is intended neither to review governance under the rule of law nor do the courts step into the areas exclusively reserved by the supreme lex to other organs of the state.

Decisions and actions which do not have adjudicative disposition may not strictly fall for consideration before a judicial review court. The limited scope of judicial review succinctly put is:

- (i) Courts, while exercising the power of judicial review, do not sit in appeal over the decisions of administrative bodies.
- (ii) A petition for a judicial review would lie only on certain well-defined grounds.
- (iii) An order passed by an administrative authority exercising discretion vested in it, cannot be interfered in judicial review unless it is shown that exercise of discretion itself is perverse or illegal.
- (iv) A mere wrong decision without anything more is not enough to attract the power of judicial review; the supervisory jurisdiction conferred on a court is limited to seeing that tribunal functions within the limits of its authority and that its decisions do not occasion miscarriage of justice.
- (v) The courts cannot be called upon to undertake the Government duties and functions. The court shall not ordinarily interfere with a policy decision of the State. Social and economic belief of a judge should not be invoked as a substitute for the judgment of the legislative bodies."

2. PUBLIC INTEREST LITIGATION

The above traditional rule of locus standi that a petition u/a 32 can only be filed by a person whose fundamental rights is infringed has now been considerably relaxed by the supreme court in its recent rulings. The court now permits the Public Interest Litigations or Social Interest Litigations at the instance of Public Spirited Citizens for the enforcement of constitutional and other legal rights of any person or group of persons who because of their poverty or socially or economically disadvantaged position are unable to approach the court for relief.

The concept of Public Interest Litigation, though came into existence by way of judicial intervention to cater to the needs of under-privileged class of society, it is the outcome of the philosophy enshrined in the Indian Constitution. The independence of the country was the result of the prolonged struggle comprising of the participation of all sections of the society. Therefore, the Constitution of India was enacted as a document which could meet with the aspirations of all sections of the society. The entire scheme and structure of the Constitution takes due care of the welfare of downtrodden and depressed class of the society. The Preamble of the Constitution forecasts liberty, equality, justice and fraternity for all citizens of the country. It is not a statement in isolation, but it embodies an enormous scope of growth for everybody who is governed by this constitution

WRITS AND PUBLIC INTEREST LITIGATION

One of the important results of the writ jurisdiction, under Article 32 and Article 226 of the Constitution is the advent of Public Interest Litigation. The powers under the writ jurisdiction are so enormous that our pro-active higher judiciary forged a new tool in the form of PIL to mitigate the sufferings of the poor millions who had not got the means or capacity to approach these courts against the violation of their fundamental rights. Krishna Iyer, J. observed,

"Even Article 226 viewed in wider perspective, may be amenable to ventilation of collective or common grievances, as distinguished from assertion of individual rights, although the traditional view, backed by precedents, has opted for the narrower alternative. Public interest is promoted by a spacious construction of locus standi in our socio-economic circumstances and conceptual latitudinarians permit taking liberties with individualization of the right to invoke the higher

courts where the remedy is shared by a considerable number, particularly, when they are weaker. Less litigation, consistent with fair process, is the aim of adjectival law."

The courts under compulsion of the circumstances invented this concept of jurisprudence. It was an attempt by the court to 'infuse the language of the soul' into the mouths of these 'dumb pale and meek'. Their hearts have been given the language of humanity; this was possible only on account of the new concepts and meaning given to the traditional procedural terms. The concept of standing or Locus Standi was changed due to the requirement of the circumstances. The court no longer waited for a person to petition before it regarding a particular problem. If the court was satisfied that the fundamental rights of a group or class of people were being infringed and the state was not taking any steps to restore these rights, the court left the traditional procedure of standing and allowed any public spirited person, who may represent the masses suffering from the infringement of their rights. Not only this, in certain cases, the court activated itself only on the basis of a letter written to one of the judges of the court. Even in certain other cases, the court took cognizance of the reports appearing in the press or the media and issued suo motu notices. Thus this was the novel method of jurisprudence invented by the court to protect the human rights including the fundamental rights from blatant violations.

This was more convenient for the court to apply this new tool, in view of the open procedural powers available under writ jurisdiction in the constitution. Both Article 32 and Article 226 of the Constitution speak of the powers and their purpose and nature to issue writs, but neither of these articles speak of the procedure to use these powers. The framers of the Constitution were well aware of the fact that the enormity of powers given under these articles could not be bound down in a fixed procedure. The protection of fundamental rights of the people of such a large country may pose unvisualised and unanticipated problems to the court and under such a situation, the court may be left to invent and apply its own procedures to protect the dignity beauty and worth of human existence. Bhagwati, J. has also observed,

"We do not think we would be justified in imposing any restriction on the power of the Supreme Court to adopt such procedure as it thinks fit in exercise of its new jurisdiction, by engrafting adversarial procedure on it, when the Constitution makers have deliberately chosen not to insist on any such requirement and instead, left it open to the Supreme Court to follow such procedure

as it thinks appropriate for the purpose of securing the end for which the power is conferred namely, enforcement of a fundamental rights."

Moreover, the court speaks of appropriate proceedings and the propriety of these proceedings is directly proportionate to the basic purpose i.e. the protection of fundamental rights that is why the traditional concept of locus standi has been given up in the cases involving public interest.

Another fact, which supports this new concept of justice, is that Public Interest Litigation normally does not involve a contest. The basic issue involved in such litigation is a problem violating the rights of a group or class of people at large and the basic purpose of such litigation is not to get somebody punished but to restore the infringed rights. Therefore, practically there is no adversary in the matter. The respondent in such cases is the State or an instrumentality of state as provided under Article 12 and the state has to give their version of the problem and their plan to mitigate such problem. This is practically a win-win situation for all. The public gets due relief through such litigation and the state in due course gets rid of a problem which was the responsibility of the state.

In Bihar Legal Support Society v/s Chief Justice of India⁶

In this case the court made it clear that the strategy of Public Interest Litigation has been evolved by this court with the view to bringing justice within the easy reach of the poor and disadvantage sections of the community

This element of public interest has also resulted in a rapid growth of writ jurisdiction in various fields of life. The court has reinvented its powers in uncharted lands which were so far not barren but virgin. The growth of Article 21 and the role of the directive principles in the making of the nation has treaded unseen paths and attained new heights in this process. The concept of human dignity as enshrined in the Preamble of the Constitution has been given a new incarnation. The human rights have been elevated to a new status and the court has come to the rescue of the people and their rights, as and when the circumstances so required.

⁶ (1986) 4 SCC 767

Gavrav Jain v/s Union Of India⁷

Therefore, the writ jurisdiction has to be exercised with a self imposed restraint and discipline. Notwithstanding the enormity of powers and wide discretion available with the court, it should not allow these powers to behave like a 'bull in the china shop' to tread the forbidden path of recklessness. All factors attached to a particular matter have to be duly considered before exercising this jurisdiction.

The grant of interim relief is one of the salient reliefs available there. But interim relief is ancillary to the final relief. Once the interim relief is granted, the matter has to be necessarily decided on merits. The interim order finally merges and sinks into the final order. If interim order is allowed to be sustained without deciding the matter finally on merits, it is the misuse of jurisdiction under the law of writs.

3. WRITS AND NATURAL JUSTICE

The law of writs is mainly based on the principles of natural justice, equity, good conscience and fair play. It is because of the fact that the purpose of writs is to deliver efficacious and speedy justice; no formal rules of procedure can something, which may regulate and direct the proceedings of the court. The principles of fair play and natural justice have thus become guiding stars in the law of writs. Since writs are public remedy, it is naturally expected that any decision in the writ must appeal to the conscience of a common man. In other words, the decision of the court must be equitable and fair. The fair play is an informal concept, which cannot be reduced to particular parameters. Without any legal procedures attached to it is still may be called an embodiment of justice, equity and good conscience. the elements or concept of fair play cannot be the same for each case. It is the facts and circumstances of each case, which would determine the role of fair play. Thus the writs have to be decided with fair play in mind wherein justice may be the ultimate goal. It is not a question of gain or loss for the parties but the justice should remain victorious in each case. One such example could be the case of **Hira Nath Mishra v.**

⁷ AIR 1990 SC 292

Principal Rajendra Medical College, Ranchi,⁸ wherein the element of fair play went even beyond the principles of natural justice. The victim girl students were not in position to depose in the presence of the petitioner. The court approved their evidence to be recorded in the absence of the petitioner and on the basis of the evidence of the girls, the petitioner was punished. The court rejected the plea of natural justice in this matter and held that the course of action taken by the authorities was appropriate in the interest of justice. Thus the element of fair play has a dominant role in the writ jurisdiction.

Natural justice is analogous to fair play, though it is broader in concept and it is more or less defined within the parameters of law. Its basic purpose is also the delivery of justice in a fair and judicious manner. The first ingredient of natural justice is that no one shall be a judge in his own cause. It speaks of impartiality and fairness. The judge should have no interest in the matter to be placed before him for decision. It is of fundamental importance that justice should not only be done but it should manifestly and undoubtedly be seen to have been done. The concept of fair play also means the same thing. The message of justice should go clear and straight and nobody should be allowed to even remotely think that any personal interest could influence it overtly or covertly. Even an implied signal of such interest or bias would affect the credibility of justice. That is why any element of pecuniary bias even if doubted on the part of the judge, notwithstanding its actual application, the judge has no option but to isolate himself from such decision. If the pecuniary interests were even remotely involved in the matter, the judge would lose the right to decide the matter. It does not leave the scope of further inquiry as to whether or not the mind was actually biased by such interest or not. Once the fact of such interest is established, its impact goes without saying.

However, if the interest of bias is other than pecuniary, a real likelihood of bias has to be shown. Such bias could be in the form of close personal or business relations, strong personal animosity or friendship or in the form of employer and employee or that of an advocate or client. The judge or whosoever has to adjudicate upon, should not hear evidence or receive representation from one side behind the back of the other. The court would not go into the likelihood of prejudices but even the risk of it is enough. It is because of the fact that no one who loses the case would believe that he was fairly treated, if the other side had access to the judge without his knowing.

⁸ AIR 1973 SC 1260

While deciding a writ petition, this aspect of natural justice has to be duly taken care of. It is being observed in the High Court meticulously. The judge normally does not hear the matter involving his earlier client when he was working as an advocate before elevation to the bench. Similarly, the close relatives of the judges, if work as advocates in the same High Court, do not appear before their relative judges. In the matters wherein a judge had earlier been an advocate representing one party, such judge dissociates himself from the matter. Thus apparently the High Court is very careful in such matters to sustain the faith of the people in the judicial system. However, a remote possibility of personal bias cannot be ruled out when an advocate after elevation as a judge in the same High Court deals with his old advocate colleagues with whom he had remained associated for years. Similarly, while dealing with the close relatives of the brother judges or the relatives of the judges of the Supreme Court, the element of personal bias may vitiate the mind of a common man coming to the court and losing a case against such relation advocates, notwithstanding the actual existence of such bias.

The next important component of natural justice is the due opportunity of being heard. Nobody can be condemned or punished unheard. When a matter comes before the court or the authority exercising judicial or quasi-judicial powers, the prime duty of such court or authority is to ensure judicious proceedings. Under this principle of natural justice, both the parties have to be provided an equal and sufficient opportunity of being heard. Right from the service of notice to the delivery of final decision in the matter a continuous association of both the parties has to be ensured in the proceedings. Not only in judicial proceedings, even in disciplinary proceedings including the departmental inquiries, the opportunity of being heard is an essential element of such proceedings.

But unlike the provisions of the civil procedure code, the concept of natural justice is flexible and resilient to acclimatize itself as per the facts and circumstances of the case. The pendulum of natural justice should not be allowed to swing too far to one side so as to ignore the requirement of administrative efficiency and dispatch. Thus with due recognition to the requirement of natural justice and fair play, the remedy of a particular problem would have to be sought in the circumstances of the case itself. It is because of the fact that too often the people who have done wrong seek to invoke the rules of natural justice to avoid the consequences of their own misdeeds. Our Constitution has taken a due care of such circumstances and the provisions of

Article 311(2) of the Constitution reflect such an intention wherein the requirement of inquiry has been done away with, under the circumstances explained in the said Article. It is thus not possible to bind the concept of natural justice by laying down rigid rules regarding its application; everything depends on the facts and circumstances of the matter. The only requirement of natural justice is that the procedure before any tribunal which is acting judicially has to be fair under all circumstances and it would not be fair that this general principle is degenerated into a series of hard and fast rules. There must be a balance between the need for expedition and the need to give full opportunity to the defendant to see the material against him.

However, except the circumstantial requirement in individual cases, it would be contrary to the natural justice for a judicial determination, affecting a person's rights and liabilities to be made without an opportunity of being heard or without making a written representation in that regard.

CHAPTER 4.

1. WRIT JURISDICTION OF THE SUPREME COURT

The Supreme Court has original, appellate and advisory jurisdiction. Its exclusive original jurisdiction extends to any dispute between the Government of India and one or more States or between the Government of India and any State or States on one side and one or more States on the other or between two or more States, if and insofar as the dispute involves any question (whether of law or of fact) on which the existence or extent of a legal right depends. In addition, Article 32 of the Constitution gives an extensive original jurisdiction to the Supreme Court in regard to enforcement of Fundamental Rights. It is empowered to issue directions, orders or writs, **including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari to enforce them.** The Supreme Court has been conferred with power to direct transfer of any civil or criminal case from one State High Court to another State High Court or from a Court subordinate to another State High Court. The Supreme Court, if satisfied that cases involving the same or substantially the same questions of law are pending before it and one or more High Courts or before two or more High Courts and that such questions are substantial questions of general importance, may withdraw a case or cases pending before the High Court or High Courts and dispose of all such cases itself. Under the Arbitration and Conciliation Act, 1996, International Commercial Arbitration can also be initiated in the Supreme Court.⁹

Article 32(1) Guarantees the right to move the supreme court by Appropriate Proceedings for the enforcement of fundamental rights conferred in Part III of the constitution. Clause 2 of Article 32 confers power on the supreme court to issue appropriate Directions or orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo-warranto and certiorari for the enforcement of any of the rights conferred by Part III of the constitution. under clause 3 of Article 32 Parliament may by law empower any other court to exercise within the local limits of its jurisdiction all or of the powers exercisable by the supreme court under clause 2. clause 4 says

⁹ supremecourtofindia.nic.in/outtoday/W.P.

that the right guaranteed by Article 32 thus provide for an expeditious and inexpensive remedy for the protection of fundamental rights from legislative and executive interference.

The appellate jurisdiction of the Supreme Court can be invoked by a certificate granted by the High Court concerned under Article 132(1), 133(1) or 134 of the Constitution in respect of any judgment, decree or final order of a High Court in both civil and criminal cases, involving substantial questions of law as to the interpretation of the Constitution. Appeals also lie to the Supreme Court in civil matters if the High Court concerned certifies : (a) that the case involves a substantial question of law of general importance, and (b) that, in the opinion of the High Court, the said question needs to be decided by the Supreme Court. In criminal cases, an appeal lies to the Supreme Court if the High Court (a) has on appeal reversed an order of acquittal of an accused person and sentenced him to death or to imprisonment for life or for a period of not less than 10 years, or (b) has withdrawn for trial before itself any case from any Court subordinate to its authority and has in such trial convicted the accused and sentenced him to death or to imprisonment for life or for a period of not less than 10 years, or (c) certified that the case is a fit one for appeal to the Supreme Court. Parliament is authorized to confer on the Supreme Court any further powers to entertain and hear appeals from any judgment, final order or sentence in a criminal proceeding of a High Court.

Under Articles 129 and 142 of the Constitution the Supreme Court has been vested with power to punish for contempt of Court including the power to punish for contempt of itself. In case of contempt other than the contempt referred to in Rule 2, Part-I of the Rules to Regulate Proceedings for Contempt of the Supreme Court, 1975, the Court may take action (a) Suo motu, or (b) on a petition made by Attorney General, or Solicitor General, or (c) on a petition made by any person, and in the case of a criminal contempt with the consent in writing of the Attorney General or the Solicitor General.

Under Order XL of the Supreme Court Rules the Supreme Court may review its judgment or order but no application for review is to be entertained in a civil proceeding except on the

grounds mentioned in Order XLVII, Rule 1 of the Code of Civil Procedure and in a criminal proceeding except on the ground of an error apparent on the face of the record.¹⁰

In Daryao V/S State Of U.P¹¹

In this case it was held that the granting of an appropriate relief under article 32 is not discretionary. the citizens are ordinarily entitled to appropriate relief under article 32, once it is shown that their fundamental rights have been illegally or unconstitutionally violated.

2. WRIT JURISDICTION OF HIGH COURT

(1) Notwithstanding anything in Article 32 every High Court shall have powers, throughout the territories in relation to which it exercise jurisdiction, to issue to any person or authority, including in appropriate cases, any Government, within those territories directions, orders or writs, including writs in the nature of habeas corpus, mandamus, prohibitions, quo warranto and certiorari, or any of them, for the enforcement of any of the rights conferred by Part III and for any other purpose

(2) The power conferred by clause (1) to issue directions, orders or writs to any Government, authority or person may also be exercised by any High Court exercising jurisdiction in relation to the territories within which the cause of action, wholly or in part, arises for the exercise of such power, notwithstanding that the seat of such Government or authority or the residence of such person is not within those territories

(3) Where any party against whom an interim order, whether by way of injunction or stay or in any other manner, is made on, or in any proceedings relating to, a petition under clause (1), without

(a) furnishing to such party copies of such petition and all documents in support of the plea for such interim order; and

¹⁰ <http://cacscorporatelaw.blogspot.in/2010/08/writ-petitions-under-constitution-of.html>

¹¹ AIR 1961 SC 1457

(b) giving such party an opportunity of being heard, makes an application to the High Court for the vacation of such order and furnishes a copy of such application to the party in whose favour such order has been made or the counsel of such party, the High Court shall dispose of the application within a period of two weeks from the date on which it is received or from the date on which the copy of such application is so furnished, whichever is later, or where the High Court is closed on the last day of that period, before the expiry of the next day afterwards on which the High Court is open; and if the application is not so disposed of, the interim order shall, on the expiry of that period, or, as the case may be, the expiry of the aid next day, stand vacated

(4) The power conferred on a High Court by the constitution of india.

As per Sub-clause (1) of Article 226 the relief under writ powers of the High Court is available in respect of the following two contingencies:

1. For the enforcement of any fundamental right conferred by Part III of the Constitution, and
2. For any other purpose.

The relief in a writ proceeding can be claimed as a matter of right where infringement of fundamental rights and violation article 311(1) are concerned. In other cases contemplated by the words "for any other purpose" the relief is discretionary.

The Article 226 empowers High Courts to issue directions, orders or writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari. Such directions, orders or writs may be issued for the enforcement of fundamental rights or for any other purpose. It is well established that the remedy provided for in Article 226 of the Constitution of India is a discretionary remedy and the High Court has always the discretion to refuse to grant such a relief in certain circumstances even though a legal right might have been infringed. Availability of an alternative remedy is one of such considerations which the High Court may take into account to refuse to exercise its jurisdiction, but this principle does not apply to the enforcement of fundamental rights either under Article 32 or under Article 226 of the Constitution.

The Supreme Court in **Mohd. Yasin v Town Area Committee**¹² held that an alternative remedy is not a bar to move a writ petition in the High Court to enforce a fundamental right. This is the only exception.

In all other cases where no fundamental right is involved, it has been ruled that the High Court would not exercise its jurisdiction under Article 226 when an alternative, adequate, and efficacious legal remedy is available and the petitioner has not availed of the same before coming to the High Court. Of course, Article 226 is silent on this point; it does not say in so many words anything about this matter, but the Courts have themselves evolved this rule as a kind of self imposed restriction on their jurisdiction under Article 226.

The rule of exhaustion of a remedy before invoking jurisdiction under Article 226 has been characterised as a rule of policy, convenience and discretion rather than a rule of law, as per decision of the Supreme Court in **State of Uttar Pradesh v Md. Nooh**¹³ and Baburam Prakash Chandra **Maheshwari v Antarim Zila Parishad**¹⁴. The rule has been justified on the ground that persons should not be encouraged to circumvent.

The High Court stands at the head of a State's judicial administration. There are 18 High Courts in the country, three having jurisdiction over more than one State. Among the Union Territories Delhi alone has a High Court of its own. Other six Union Territories come under the jurisdiction of different State High Courts. Each High Court comprises of a Chief Justice and such other Judges as the President may, from time to time, appoint. The Chief Justice of a High Court is appointed by the President in consultation with the Chief Justice of India and the Governor of the State. The procedure for appointing puisne Judges is the same except that the Chief Justice of the High Court concerned is also consulted. They hold office until the age of 62 years and are removable in the same manner as a Judge of the Supreme Court. To be eligible for appointment as a Judge one must be a citizen of India and have held a judicial office in India for ten years or must have practised as an Advocate of a High Court or two or more such Courts in succession for a similar period.

¹² AIR 1952 SC 115

¹³ AIR 1958 SC 86

¹⁴ AIR 1969 SC 556

Each High Court has power to issue to any person within its jurisdiction directions, orders, or writs including writs which are in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari for enforcement of Fundamental Rights and for any other purpose. This power may also be exercised by any High Court exercising jurisdiction in relation to territories within which the cause of action, wholly or in part, arises for exercise of such power, notwithstanding that the seat of such Government or authority or residence of such person is not within those territories.

Each High Court has powers of superintendence over all Courts within its jurisdiction. It can call for returns from such Courts, make and issue general rules and prescribe forms to regulate their practice and proceedings and determine the manner and form in which book entries and accounts shall be kept.

Scope of Article 226

What it cannot Provide?

1. The High Court in its Writ jurisdiction cannot sit as a Court of Appeal against the orders of the State Governments or Union or other authorities.
2. It cannot go into disputed questions of fact and give a finding on the truth or otherwise of an allegation or a counter allegation. The questions whether there was bias, ill-will, malafide, or a due opportunity to be heard or to produce evidence in the course of departmental proceedings, are so largely questions of fact that it is difficult to decide them merely on conflicting assertions made by affidavits given by two sides, in a writ petition. It is not the practice of the Courts to decide such disputed facts in proceedings under Article 226 of the Constitution Supreme Court - Kamini Kumar Das Choudhary vs. State of West Bengal,¹⁵
3. There is no scope for oral evidence being adduced by any party on any disputed fact. Therefore the scope of writ is narrow and limited.
4. The High Court under Article 226 cannot consider the question about the sufficiency or inadequacy of evidence in support of a particular conclusion.

¹⁵ 1972 SLR 746

"It is well-settled that when an alternate and equally efficacious remedy is open to the litigant, he should be required to pursue the remedy and not invoke the special jurisdiction of the Court to issue a prerogative writ. It is true that the existence of another remedy does not affect the jurisdiction of the Court to issue a writ; but, as observed by this Court in *Rashid Ahmad vs. Municipal Board Kairana*¹⁶, the existence of adequate legal remedy is a thing to be taken into consideration in the matter of granting writs; Vide also [*K.S.Rashid and son vs. The Investigation Commission*]¹⁷. And where such remedy exists, it will be a sound exercise of discretion to refuse to interfere in a petition under Article 226, unless there is good grounds therefor. *Union of India vs. T.R. Varma*¹⁸, High Court cannot interfere in writ petition in the quantum of punishment. If a number of penalties have been inflicted on an employee, this cannot be interfered in a writ petition, because the High Court cannot go into the severity of punishment. Even if a single charge out of several charges is ultimately held to have not been established the quantum of punishment cannot be reduced because it is not a matter for the High Court exercising Writ jurisdiction.

5. The parties cannot take new points in a writ petition. The normal practice is not to permit a point to be taken for the first time in the High Court, which was not earlier taken in the departmental enquiry. (Examples -
 - The objection that enquiry officer was biased cannot be taken in the writ petition for the first time.
 - It cannot be objected for the first time in a Writ petition that the enquiry officer was not appointed by a competent authority.

Where the Writ jurisdiction can effectively provide relief-

¹⁶ AIR 1950 S.C. 566

¹⁷ AIR 1954 SC 237

1. Though the relief under writ proceedings is discretionary "for any other purpose", it can be claimed as a matter of right where infringement of fundamental rights and violation of Article 311 (1) are concerned.

Writs under Article 226 have to be issued in grave cases where the subordinate tribunal or bodies or officers act wholly without jurisdiction, or in excess of it, or in violation of the principles of natural justice or refuse to exercise a jurisdiction vested in them, or there is an error apparent on the face of the record and such act, omission, error, or excess has resulted in manifest injustice. *G.Veerappa Pillai vs. Raman and Raman Ltd.*¹⁹ Though the proof required to sustain a conviction in a criminal case, namely proof beyond reasonable doubt, should not be insisted upon in a departmental enquiry still the proof should be capable of scrutiny and should stand the test of reasonableness consistent with human conduct and probabilities. Where the finding is totally perverse on erroneous view of the evidence, it would be a case for interference by High Court, for the finding arrived at such a basis is liable to be characterised as unreasonable and perverse

Adequacy or inadequacy of evidence to support a finding is not within the jurisdiction of the High Court under Article 226; but when a complaint is made that there is no acceptable evidence at all to support the impugned conclusion of the Tribunal or that no Tribunal with a duty to weigh the evidence could possibly have come to the conclusion, it is the duty of the High Court under Article 226 to find out, whether the complaint so made is justified or not. *State of Madras vs. M.Kandaswamy*,²⁰]

2. Where during the departmental enquiry some evidence was let in respect of matters extraneous to the charge. Prejudicing the enquiry officer against the delinquent officer, and the enquiry officer based his conclusion on conjectures, the order of removal can be quashed by the High Court under Article 226 as there was no evidence to sustain the charge *State of Assam vs. Mohan Chandra Kalita and another*, 1973 (1) SLR 401
Supreme Court

¹⁹ AIR 1952 SC 192

²⁰ 1972SLR 893, Madras

3. The High Court may undoubtedly interfere where the departmental authorities have held that the proceedings against the delinquent in a manner inconsistent with the rules of natural justice or in violation of the statutory rules prescribing the mode of enquiry or where the authorities have disabled themselves from reaching a fair decision by some
4. consideration extraneous to the evidence and the merits of the case or by allowing themselves to be influenced by irrelevant considerations or where the conclusion on the very face of it so wholly arbitrary and capricious that no reasonable person could ever have arrived at that conclusion, or on similar grounds. State of Andhra Pradesh vs. Shree Rama Rao AIR 1963, SC 1723 See also; State of Orissa vs. Muralidhar AIR 1963 S.C 404]
5. Whenever an order of dismissal is challenged by a writ petition under Art. 226, it is for the High Court to consider whether the constitutional requirements of Article 311 (2) have been satisfied or not. The inquiry officer may have acted bonafide, but that does not mean that the discretionary orders passed by him are final or conclusive. Whenever it is urged before the court that as a result of such orders the Public Officer have been deprived of a reasonable opportunity, it would be open to the High Court to examine the matter and decide whether the requirements of Art 311(2) have been satisfied or not State of Madhya Pradesh vs. Chintaman Waishampayan , AIR 1961 SC 1623
6. The jurisdiction to issue a writ of certiorari under Article 226 is a supervisory jurisdiction. The High Court exercises it not as an Appellate Court. The findings of facts reached by an inferior court or tribunal as a result of the appreciation of the evidence are not reopened or questioned in writ proceedings. An error of law, which is evident on the face of it, can be corrected by a writ, but not an error of fact however grave it may appear to be. In regard to a finding of fact recorded by a tribunal, a writ can be issued, if it is shown that in recording the said finding the tribunal has erroneously refused to admit admissible evidence which was influenced the impugned finding. Again if a finding of fact is based on no evidence, that would be regarded as an error of law, which can be corrected in a writ Certiorari. A finding of fact recorded by the Tribunal cannot be challenged on the ground that the relevant and material evidence adduced before the tribunal is insufficient or inadequate to sustain a finding.

CHAPTER 5

Writ Petitions under Articles 32 and 226 of the Constitution of India

'Article 32 v. Article 226

After going through the broad contours of the powers of the Supreme Court under Article 32 and that of the High Courts under Article 226 of the Constitution, it is revealed that the nature of these powers is almost the same but still they can be distinguished in their scope. The first and foremost difference between the scope of these powers is that the powers of the Supreme Court under Article 32 of the Constitution are limited only to the enforcement of fundamental rights, whereas the High Court can exercise such powers for any other purpose also apart from the enforcement of fundamental rights. Therefore, the High Court encompasses a wider area of jurisdiction as far as the subject of the writ jurisdiction is concerned. On the other hand, the Supreme Court has a wider territorial jurisdiction than the High Courts. Although the Parliament is duly empowered under Article 139 of the Constitution to invest the Supreme Court with powers to issue writs, directions or orders for the purposes other than the enforcement of fundamental rights. But no such law has been enacted by the parliament so far. Moreover, being Apex Court of the country, it would not be practically in the interest of justice to thrust more responsibility on the Supreme Court under Article 139 of the Constitution and rightly so, the Parliament did never attempt it.

The powers of the Supreme Court are further fortified under other provisions of the Constitution apart from Article 32. If to see the powers of the Apex Court in the entirety of the constitutional provisions, including the powers being exercised by the court under Articles 32, 136 and 142 of the Constitution, it has enormous powers to safeguard the rights of the citizen in any manner and at any place. No doubt the scope of writ jurisdiction is wider with the High Courts than that of the Supreme Court, but the Supreme Court has got open and undefined powers under Article 142 to pass such decree or make such order -as is necessary for doing complete justice in any cause or matter pending before it. Therefore, Article 142 grants sort of residuary powers to the

Supreme Court under which any cause or matter may be decided by passing any decree or order. Similarly, under Article 136 of the Constitution, the Supreme Court has got powers to grant special leave to appeal from any judgment, decree, determination, sentence or order in any cause or matter, passed or made by any court or tribunal in the territory of India. The powers of the Supreme Court under Article 136 are discretionary and even an appeal against the interim orders of a court or tribunal can be entertained by the Supreme Court under this provision.' Thus practically, the Supreme Court has got wider powers of discretion than the High Court's because the High Courts have got no such powers as are with the Supreme Court under Article 136 and Article 142 of the Constitution.

Since the nature of powers of the Supreme Court under Article 32 and that of High Courts under Article 226 are substantially the same to the extent they relate to the violation of fundamental rights; there is an implied element of equality also between the two to that extent. There is no bar to approach the Supreme Court directly under Article 32, but if a petition has been filed under Article 226, the Supreme Court cannot be approached if such petition is pending in the High Court. Moreover, if the High Court has decided the matter on merits, the petitioner cannot move the Supreme Court under Article 32 on the same cause of action. The only remedy in such cases could be an SLP under Article 136 of the Constitution in the Supreme Court. But there could be possibility of filing a writ petition under Article 32, in case the High Court dismisses the petition on various discretionary grounds under Article 226. The powers of the High Court under Article 226 are discretionary and a petition can be dismissed, if there is any alternative remedy available under law or if the writ petition involves a disputed question of facts, which could be better dealt with by the civil court. It may also be dismissed on account of delay and laches or on some other grounds, which in the eye of the court, is sufficient to dismiss the petition without going into the merits of the case. The petition could be dismissed in limine also by the High Court under its discretion. But the same discretion is not available with the Supreme Court under Article 32 as far as the violation of fundamental rights are concerned. Therefore, once the Supreme Court is moved on account of violation of fundamental rights, it cannot refuse to entertain the writ petition and the same is likely to be disposed of on merits. Thus the principle of res-judicata cannot be applied if the matter has not been decided by the High Court on merits. This issue was discussed at length by the Supreme Court and **Gajendra Gadkar J** thus observed on the principle of res-judicata,

"Now the rule of res-judicata as indicated in the code of civil procedure has no doubt some technical aspects, for instance the rule of constructive res-judicata may be said to be technical; but the basis on which the said rule rests is founded on considerations of public policy. It is the interest of the public at large that a finally should attach to the binding decisions pronounced by courts of competent jurisdiction and it is also in the public interest that individuals should not be vexed twice over with the same kind of litigation. If these two principles form the foundation of general rule of res-judicata they cannot be treated as irrelevant or inadmissible even in dealing with fundamental rights in petitions filed under Article 32"

In Nilabati Behera V/S State of Orrisa²¹

the supreme court has laid down the principle on which compensation is to be awarded by the court under article 32 and 226 to the victim of state action. the object to award compensation in public law proceeding under article 32 and 226 is different from compensation in private tort law proceedings. Award of compensation in proceeding under articles 32 and 226 is a remedy available in public law based on strict liability for contravention of fundamental rights to which the principle of sovereign immunity does not apply even though it may be available as a defence in private law in an action based on tort. the purpose of public law is not only to civilize power but also to assure the citizens that they live under a legal system which aims to protect their interests and preserve their rights.

Based on this importance of the principle of res-judicata, the court established a clear relation of the powers of the Supreme Court under Article 32 and that of the High Court under Article 226. It was finally held by the court in the same case,

"We hold that if a writ petition filed by a party under Article 226 is considered on the merits as a contested matter and is dismissed, the decision thus pronounced would continue to bind the parties unless it is otherwise modified. or reversed by appeal or other appropriate proceedings permissible under the constitution. It would not be open to a party to ignore the said judgment and move this court under Article 32 by an original petition made on the same facts and for obtaining the same or similar orders or writs. If the petition filed in the High Court under Article 226 is dismissed not on the merits but because of the laches of the party applying for the writ or

²¹ 1993 2 SCC 746

because it is held that the party had an alternative remedy available to it, then the dismissal of the writ petition would not constitute a bar to a subsequent petition under Article 32 except in cases where and if the facts thus found by the High Court may themselves be relevant even under Article 32.

The above findings of the Supreme Court bring the writ jurisdiction of both the courts very close to each other. In substance, they appear to be at par and the application of mind by the High Court under Article 226 on a particular matter does not require to be repeated by the Supreme Court in the same fashion on the same issue for the same relief.

But this equality of powers binds both of the courts to keep a judicial decorum to avoid mismanagement in the application of such powers. The parity of powers does not mean that the High Court can entertain the matters inspite of the fact that the Supreme Court was already seized of the matter. This would be against the norms of judicial propriety. Such matter came before the Supreme Court in **Chavi Mehrotra v. Dir. Gen. Health Services**²², In this case, when an order passed by the Supreme Court was being implemented, a writ was filed in the High Court and the same was entertained and some interim orders were passed by the High Court which interfered with the directions issued by the Supreme Court in a petition under Article 32. The Supreme Court took a serious view of it and observed,

"It is a clear case where the High Court ought not to have exercised jurisdiction under Article 226 where the matter was clearly seized of by this court in petition under Article 32 The learned Single Judge's perception of justice of the matter might have been different and the abstinence that the observance of judicial propriety, counsels might be unsatisfactory; but judicial discipline would require that in a hierarchical system, it is imperative that such conflicting exercise of jurisdiction should strictly be avoided. We restrain ourselves from saying anything more."

Thus it is the judicial propriety, which is an imperative force whereby such conflicting exercise of jurisdiction may be avoided.

²² 1995 Supp (3) SCC 434.

Though there is no such legal bar but the court may refuse a writ on the availability of alternative remedy. Similarly, if the petitioner is not being affected prejudicially, the court may refuse the writ. Such writ would not be issued if the person concerned ceases to occupy the office. However, a resignation after the notice would not stop the proceedings. Such writ would also be not issued if it is futile in the cases where the alleged defect of appointment can be cured by way of reappointment. It is a public interest writ to prevent the misuse of public office.

RES JUDICATA

Res-Judicata is a rule of Public Policy that there should be finality to binding decisions of courts of competent jurisdiction and that the parties to the litigation should not be vexed with the same litigation again. the principle is embodied in section 11 of civil procedure code. if a question has been once decided by the supreme court under article 32 the same question cannot be re-opened again under article 226 of the constitution.

In Daryao v/s state of U.P²³

it was held that where the matter had been Heard and decided by the High court under article 226 the writ under article 32 is barred by the rule of res judicata and could not be entertained.

But there is an Important exception to this rule of res judicata

In Gulam Sarvar v/s Union of India²⁴

the court held that the rule of res judicata is not applicable in the writ of Habeas corpus and where the petitioner has been refused writ from the high court he may file a petition for the same in the supreme court .

The Parallel Provisions with a Difference

Article 32 and Article 226 of the Constitution provide two separate but parallel provisions of writ jurisdiction with the Supreme Court and High Courts respectively. Article 32 has been incorporated as a fundamental right and it provides for the constitutional remedy against the violation of fundamental rights. This remedy is limited to the violation of fundamental rights

²³ AIR 1961 SC 1457

²⁴ AIR 1967 SC 1335

only under Article 32. However, it is guaranteed under Article 32(2) and as per specific provision of Article 32(4) it cannot be suspended otherwise, except, as provided under the Constitution. Therefore, the right to move the Supreme is almost an absolute right and guaranteed under the Constitution itself except in case of suspension of this right as' provided under the Constitution (emergency provisions). Though to grant relief or not to grant is absolutely the discretion of the Supreme Court but the apex court can be moved for violation of fundamental right as a matter of right.

But to this limited extent, it is a different matter with the High Court. The provision of Article 226 is a constitutional provision, but it is not a fundamental right. There is no guarantee attached to it unlike Article 32. The scope of Article 226 is wider than that of Article 32 because the operation of Article 226 is not limited to violation of fundamental rights only, but it can be operated for other purposes also. However, in entertaining the writs, the High Court enjoys wide and open powers as a matter of discretion. It is a plenary power of the High Court without any fatter from any provision of the Constitution. Since it is an extraordinary jurisdiction with the High Court, it has no! to be resorted to in routine. The basic objective of this power is to ensure justice wherever the miscarriage of justice is manifest. The High Court has to reach the remotest comer of justice to eliminate injustice. For this purpose, the court is not bound by any procedural fatter. But under Article 226 of the Constitution, the High Court is not bound to entertain every writ petition filed with it. The court has absolute discretion to accept the writ petition for adjudication or not. There could be many reasons or grounds on which the High Court can refuse to entertain a writ petition. The facts and circumstances of each and every case will have to be appreciated by the High Court before entertaining the writ petition for hearing. The preliminary hearing of the writ would apprise the High Court of the basic background of the matter and if the court does not think it appropriate to exercise writ jurisdiction, it is dismissed in limine without going into the merits of the case. Thus to this extent, the powers of the High Court in writ jurisdiction are different from that of the Supreme Court to the extent that the Supreme Court has not got this discretion to refuse jurisdiction at that stage. The right to move the Supreme Court under Article 32 is a fundamental right and the Supreme Court is bound to exercise the writ jurisdiction under Article 32 of the Constitution of India whenever there is an infringement of fundamental right and the Supreme Court is moved by way of a writ petition under this article.

The Writ Jurisdiction of Supreme Court can be invoked under **Article 32 of the Constitution** for the violation of fundamental rights guaranteed under Part – III of the Constitution. Any provision in any Constitution for Fundamental Rights is meaningless unless there are adequate safeguards to ensure enforcement of such provisions. Since the reality of such rights is tested only through the judiciary, the safeguards assume even more importance. In addition, enforcement also depends upon the degree of independence of the Judiciary and the availability of relevant instruments with the executive authority. Indian Constitution, like most of Western Constitutions, lays down certain provisions to ensure the enforcement of Fundamental Rights. These are as under:

(a) The Fundamental Rights provided in the Indian Constitution are guaranteed against any executive and legislative actions. Any executive or legislative action, which infringes upon the Fundamental Rights of any person or any group of persons, can be declared as void by the Courts under Article 13 of the Constitution.

(b) In addition, the Judiciary has the power to issue the prerogative writs. These are the extraordinary remedies provided to the citizens to get their rights enforced against any authority in the State. These writs are - Habeas corpus, Mandamus, Prohibition, Certiorari and Quo-warranto. Both, High Courts as well as the Supreme Court may issue the writs.

(c) The Fundamental Rights provided to the citizens by the Constitution cannot be suspended by the State, except during the period of emergency, as laid down in Article 359 of the Constitution. A Fundamental Right may also be enforced by way of normal legal procedures including a declaratory suit or by way of defence to legal proceedings.

However, Article 32 is referred to as the "**Constitutional Remedy**" for enforcement of Fundamental Rights. This provision itself has been included in the Fundamental Rights and hence it cannot be denied to any person. Dr. B.R.Ambedkar described Article 32 as the most important one, without which the Constitution would be reduced to nullity. It is also referred to as the heart and soul of the Constitution. By including Article 32 in the Fundamental Rights, the Supreme Court has been made the protector and guarantor of these Rights. An application made under Article 32 of the Constitution before the Supreme Court, cannot be refused on technical grounds. In addition to the prescribed five types of writs, the Supreme Court may pass any other

appropriate order. Moreover, only the questions pertaining to the Fundamental Rights can be determined in proceedings against Article 32. Under Article 32, the Supreme Court may issue a Writ against any person or government within the territory of India. Where the infringement of a Fundamental Right has been established, the Supreme Court cannot refuse relief on the ground that the aggrieved person may have remedy before some other court or under the ordinary law.

The relief can also not be denied on the ground that the disputed facts have to be investigated or some evidence has to be collected. Even if an aggrieved person has not asked for a particular Writ, the Supreme Court, after considering the facts and circumstances, may grant the appropriate Writ and may even modify it to suit the exigencies of the case. Normally, only the aggrieved person is allowed to move the Court. But it has been held by the Supreme Court that in social or public interest matters, any one may move the Court. A Public Interest Litigation can be filed before the Supreme Court under Article 32 of the Constitution or before the High Court of a State under Article 226 of the Constitution under their respective Writ Jurisdictions.

In P.N. Kumar V/S Municipal corporation of Delhi²⁵

A two judges bench of the supreme court held that the citizens should not come to the court directly for the enforcement of their fundamental right, but they should first seek remedy in the high court and then if the parties are dissatisfied with the judgment of the high court, they can approach the supreme court by way of appeal. In this case, the petitioners challenged the imposition of various taxes on their hotel and prayed for quashing the same. Disposing the petition the judges laid down following guidelines for the exercise of the rights under article 32—

1. The scope of article 226 is wider than article 32. the parties first seek relief in the high court and should come to the supreme court in appeal only
2. Hearing of the case at the level of high court is more convenient to the parties. it saves lot of time.
3. the high court has its own tradition. they have eminent judges, whose capacity should be utilized.

²⁵ 1987, 4 SCC 609

4. Every high court has good bar. There eminent lawyers with wide experience, handle different kind of cases. They know history of every legislation in their state.
5. The Supreme Court has no time to decide cases pending before it for the last 10 to 15 years, with the present strength of judges and will take more than 15 years to dispose of all pending cases.
6. If the cases are filed in the high court the task of supreme court acting as an original court which is time consuming can be avoided.

CHAPTER 6.

TYPES OF WRITS

- (i) Writ of Habeas Corpus,
- (ii) Writ of Mandamus,
- (iii) Writ of Certiorari,
- (iv) Writ of Prohibition,
- (v) Writ of Quo-Warranto,

(I) Writ of Habeas Corpus:

It is the most valuable writ for personal liberty. Habeas Corpus means, "Let us have the body." A person, when arrested, can move the Court for the issue of Habeas Corpus. It is an order by a Court to the detaining authority to produce the arrested person before it so that it may examine whether the person has been detained lawfully or otherwise. If the Court is convinced that the person is illegally detained, it can issue orders for his release.

A writ of habeas corpus derived from Latin word means "you may have the body" is a writ (court order) that requires a person under arrest to be brought before a judge or into court. The principle of habeas corpus ensures that a prisoner can be released from unlawful detention—that is, detention lacking sufficient cause or evidence. The remedy can be sought by the prisoner or by another person coming to the prisoner's aid. This right originated in the English legal system, and is now available in many nations. It has historically been an important legal instrument safeguarding individual freedom against arbitrary state action. It has been extended to non-police authorities, as in the 1898 Queen's Bench case of *Ex Parte Dorothy Hopkins*, which has successfully been utilized more recently in India to liberate a woman from a madrasa.

Who can apply for the writ

the general rule is that an application can be made by a person who is illegally detained. but in certain cases an application of habeas corpus can be made by any person on behalf of the prisoner, ie, a Friend or a Relatives.

A writ of habeas corpus, also known as the "great writ", is a summons with the force of a court order; it is addressed to the custodian (a prison official for example) and demands that a prisoner be taken before the court, and that the custodian present proof of authority, allowing the court to determine whether the custodian has lawful authority to detain the prisoner. If the custodian is acting beyond his authority, then the prisoner must be released. Any prisoner, or another person acting on his or her behalf, may petition the court, or a judge, for a writ of habeas corpus. One reason for the writ to be sought by a person other than the prisoner is that the detainee might be held incommunicado. Most civil law jurisdictions provide a similar remedy for those unlawfully detained, but this is not always called "habeas corpus". For example, in some Spanish-speaking nations, the equivalent remedy for unlawful imprisonment is the amparo de libertad ('protection of freedom').

Habeas corpus has certain limitations. It is technically only a procedural remedy; it is a guarantee against any detention that is forbidden by law, but it does not necessarily protect other rights, such as the entitlement to a fair trial. So if an imposition such as internment without trial is permitted by the law, then habeas corpus may not be a useful remedy. In some countries, the process has been temporarily or permanently suspended, in all of a government's jurisdictions or only some, because of what might be construed by some government institutions as a series of events of such relevance to the government as to warrant a suspension; in more recent times, such events may have been frequently referred to as "national emergencies."

When it will lie

The writ of habeas corpus will lie if the power of detention vested in an authority was exercised mala fide and is made in collateral or ulterior purposes. but if the detention is justified the high court will not grant the writ of habeas corpus.

The detention becomes unlawful if a person who is arrested is not produced before the magistrate within 24 hours of his arrest and he will be entitled to be released on the writ of habeas corpus.

The right to petition for a writ of habeas corpus has nonetheless long been celebrated as the most efficient safeguard of the liberty of the subject. The jurist Albert Venn Dicey wrote that the British Habeas Corpus Acts "declare no principle and define no rights, but they are for practical purposes worth a hundred constitutional articles guaranteeing individual liberty".

The writ of habeas corpus is one of what are called the "extraordinary", "common law", or "prerogative writs", which were historically issued by the English courts in the name of the monarch to control inferior courts and public authorities within the kingdom. The most common of the other such prerogative writs are quo warranto, prohibito, mandamus, procedendo, and certiorari. The due process for such petitions is not simply civil or criminal, because they incorporate the presumption of non-authority. The official who is the respondent must prove his authority to do or not do something. Failing this, the court must decide for the petitioner, who may be any person, not just an interested party. This differs from a motion in a civil process in which the movant must have standing, and bears the burden of proof.

In sunil Bhatra v/s delhi administration²⁶

it has been held that the writ of habeas corpus can be issued not only for releasing a person from illegal detention but also for protecting prisoners from the inhuman and barbarous treatment. the dynamic role of judicial remedies imports to the habeas corpus writ a versatile vitality and operational utility as bastion of liberty even within jails.

In veena sethi v/s state of bihar²⁷

In this case it was held that the court was informed through a letter that some prisoners, who were insane at the time of trial but subsequently declared sane, were not released due to inaction of state authorities and had to remain in jails from 20 to 30 years. the court directed they be released forthwith.

²⁶ AIR 1980 SC 1795

²⁷ AIR 1983 SC 339

In D.S Nakara v/s Union of India²⁸

in this case it was held that a registered societies, non-political, non-profit making and voluntary organizations are entitled to file a writ petition ie, habeas corpus under article 32 of the constitution for espousing the cause for the large number of old infirm pensioners who are unable to approach the court individually.

We command you, that the body of A.B. in Our prison under your custody detained, as it is said, together with the day and cause of his taking and detention, by whatever name the said A.B. may be known therein, you have at our Court ... to undergo and to receive that which our Court shall then and there consider and order in that behalf. Hereof in no way fail, at your peril. And have you then there this writ.

The habeas writ was used in the **Rajan case**, a student victim of torture in local police custody during the nationwide Emergency in India in 1976. **On 12th March 2014, Subrata Roy's** counsel approached the Chief Justice moving a habeas corpus petition. It was also filed by Panthers Party to protest the imprisonment of Anna Hazare, a social activist.

(II) The Writ of Mandamus:

Mandamus is a Latin word, which means "We Command". Mandamus is an order from a superior court to a lower court or tribunal or public authority to perform an act, which falls within its duty. It is issued to secure the performance of public duties and to enforce private rights withheld by the public authorities. Simply, it is a writ issued to a public official to do a thing which is a part of his official duty, but, which, he has failed to do, so far. This writ cannot be claimed as a matter of right. It is the discretionary power of a court to issue such writs.

The primary purpose of this writ is to make the Government machinery work properly. An order of mandamus is a command directed to any person, corporation or an inferior tribunal, requiring them to do some particular thing which pertains to their/his office and which is in the nature of a

²⁸ 1983 1 SCC 304

public duty. The public servants are responsible to the public for the lawfulness of their public duties and their actions under it. If a public authority fails to do what is required under law or does beyond what was to be done, a writ of mandamus may be issued to make him do what was required under law.

Mandamus may also be issued to a tribunal to compel it to exercise the jurisdiction vested in it, which it has refused to exercise. Mandamus may also be issued where there is a specific legal right, without specific remedy for enforcement of such right and unreasonableness has no place. The Supreme Court in various decisions has held that the doctrine of legitimate expectation is akin to natural justice, reasonableness and promissory estoppel. It primarily conceives a situation where justice and fair play get a place of pride and perfection in the delivery of justice.

A writ of mandamus is an order issued by a superior court to a lower court or other entity commanding the lower court, corporation or public authority to perform or not perform specific acts. Rules applying to a mandamus include: The requested act must be used as a judicial remedy. The act must conform to statutorily-authorized provisions. The writ must be judicially enforceable and protect a legal right. Three types of mandamus are utilized, depending upon the legal circumstances.

- The alternative mandamus demands a defendant to appear before court, perform an act or show cause for not having done so.
- The peremptory mandamus is used when a defendant fails to comply with an alternative mandamus and which is an absolute command for performance.
- Third, the continuing mandamus requests an officer or authority to perform its activities expeditiously for an indefinite period of time in order to prevent a miscarriage of justice.

When it will lie

Thus the writ or order in the nature of mandamus would be issued when there is a failure to perform a mandatory duty. but even in the cases of alleged breaches of mandatory duty the party must show that he has made a distinct demand to enforce that duty and demand was met with refusal.

1. the writ of mandamus can only be granted when there is in the applicant a right to compel the performance of some duty cast upon the authority. the duty sought to be enforced must be a public duty and not a private duty.
2. Thus writ of mandamus can be issued to public authority to restrain it from acting under a law which has been declared unconstitutional.
3. the writ of mandamus can be granted only in cases where there is a statutory duty imposed upon the officer concerned, and there is a failure on the part of that officer to discharge the statutory obligation.

When it will not lie

the writ of mandamus cannot be granted in case of following circumstances

1. when the duty is merely discretionary
2. against a private individual or any private organization because they are not entrusted with public duty.
3. A writ of mandamus cannot be granted to enforce an obligation arising out of contract.

(Practical example is the case of **the Kanchi Shankaracharya** who got entangled in a criminal case. Looks like the police froze the accounts of the trust he runs and subsequently, the writ mandamus was filed and upheld by the Chennai High Court.)

(III) The Writ of Certiorari:

Literally, Certiorari means to be certified. The Writ of Certiorari is issued by the Supreme Court to some inferior court or tribunal to transfer the matter to it or to some other superior authority for proper consideration. The Writ of Certiorari can be issued by the Supreme Court or any High Court for quashing the order already passed by an inferior court. In other words, while the prohibition is available at the earlier stage, Certiorari is available on similar grounds at a later stage. It can also be said that the Writ of prohibition is available during the tendency of proceedings before a sub-ordinate court, Certiorari can be resorted to only after the order or decision has been announced.

In Province of Bombay v/s Khushaldas²⁹

In this case it was held that whenever any body of person having legal authority to determine questions affecting the rights of subjects and having the duty to act judicially acts in excess of their legal authority, a writ of certiorari will lie. It does not lie to remove merely ministerial act or to remove or cancel executive administrative acts.

Writ lies on Judicial bodies

one of the fundamental principles in regard to the issuing of a writ of certiorari is that the writ can be availed of only to remove or to adjudicate upon the validity of judicial acts. The expression judicial acts includes the exercise of quasi-judicial functions by administrative bodies or authorities or persons obliged to exercise such functions and is used in contrast with which are purely ministerial acts.

The supreme court has laid down two propositions for ascertaining whether an authority is to act judicially--

1. if a statute empowers a authority to decide disputes arising out of claim made by one party under the statute, which claim is opposed by another party, then prima facie and in the absence of anything in the statute to the contrary is the duty of the authority to act judicially and the decision of authority is a quasi judicial act.
2. if a statutory authority has power to do any act which will prejudicially affect the subject then although there are not two parties apart from the authority and the final determination of authority will be a quasi-judicial act provided that the authority is required by the statute to act judicially.

²⁹ AIR 1950 SC 22

Grounds on which writ can be issued.

the writ of certiorari can be issued to judicial and quasi-judicial body on the following grounds

1. where there is want or excess of jurisdiction

The writ of certiorari is issued to a body performing judicial or quasi judicial function for correcting errors of the jurisdiction, as when an inferior court or tribunal acts without jurisdiction or in excess of it or fails to exercise it. the want of jurisdiction may arise from the nature of subject matter so that the inferior court has no authority to enter on the inquiry or upon some part of it. want of jurisdiction may also arise from absence of some preliminary proceeding or upon the existence of some particular facts which are necessary to the exercise of the courts power and the court wrongly assume that the particular condition exists.

2. For correcting error of law apparent on the face of record

the writ is also issued for correcting an error of law apparent on the face of record. it cannot be issued to correct an error of fact. what is an error of law apparent on the face of record is to be decided by the courts on the facts of each case.

In Hari Vishnu v/s Ahmed Ishaque³⁰

the supreme court held that no error could be said to be error on the face of record if it was not self-evident and it required an examination and argument to establish it. an error of law which is apparent on the face of the record can be corrected by a writ of certiorari but not an error of fact, howsoever grave it may appear to be. the reason for rule is that the court issuing a writ of certiorari acts in a supervisory jurisdiction and not appellate jurisdiction. accordingly it cannot substitute its own decision on the merits of the case or give direction to be complied with by the inferior court or tribunal.

³⁰ AIR 1955 SC 223

3. Disregard of principle of natural justice

A writ of certiorari also lies against a court or tribunal when it acts in violation of the principles of natural justice.

two principles of natural justice are generally accepted—

1. the court or tribunal should be free from bias and interest—the principles that the adjudicator should not have an interest and bias in the case that no man shall be a judge in his own case and justice should not be done but manifestly and undoubtedly seen to be done.
2. Audi Alteram Partem ie, the parties must be heard before the decision is given.

when it will not lie

the writ of certiorari cannot be issued against a private body, co-operative electricity supply society limited incorporated under the co-operative societies act, is a private body and not a public body discharging public duties or functions and the writ petition is therefore not maintainable against such a private society.

"The second essential feature of a writ of 'certiorari' is that the control which is exercised through it over judicial or quasi-judicial tribunals or bodies is not in an appellate but supervisory capacity. In granting a writ of 'certiorari', the superior court does not exercise the powers of an appellate tribunal. It does not review or re-weigh the evidence upon which the determination of the inferior tribunal purports to be based. It demolishes the order which it considers to be without jurisdiction or palpably erroneous but does not substitute its own views for those of the inferior tribunal."

It is a writ (order) of a higher court to a lower court to send all the documents in a case to it so the higher court can review the lower court's decision. Appellate review of a case that is granted by the issuance of certiorari is sometimes called an appeal, although such review is at the discretion of the appellate court. A party, the petitioner, files a petition for certiorari with the appellate court after a judgment has been rendered against him in the inferior court.

However, unlike a writ of prohibition, superior courts issue writs of certiorari to review decisions which inferior courts have already made. The writ of prohibition is the counterpart of the writ to certiorari which too is issued against the action of an inferior court. The difference between the two was explained by Justice Venkatarama Ayyar of the Supreme Court in the following terms:

“When an inferior court takes up for hearing a matter over which it has no jurisdiction, the person against whom the proceedings are taken can move the superior court for a writ of prohibition and on that an order will issue forbidding the inferior court from continuing the proceedings.

On the other hand, if the court hears the cause or matter and gives a decision, the party aggrieved would have to move the superior court for a writ of certiorari and on that an order will be made quashing the decision on the ground of want of jurisdiction.”

(IV) The Writ of Prohibition:

Writ of prohibition means to forbid or to stop and it is popularly known as 'Stay Order'. This Writ is issued when a lower court or a body tries to transgress the limits or powers vested in it. It is a Writ issued by a superior court to lower court or a tribunal forbidding it to perform an act outside its jurisdiction. After the issue of this Writ proceedings in the lower court etc. come to a stop. The Writ of prohibition is issued by any High Court or the Supreme Court to any inferior court, prohibiting the latter to continue proceedings in a particular case, where it has no legal jurisdiction of trial. While the Writ of mandamus commands doing of particular thing, the Writ of prohibition is essentially addressed to a subordinate court commanding inactivity. Writ of prohibition is, thus, not available against a public officer not vested with judicial or quasi-judicial powers. The Supreme Court can issue this Writ only where a fundamental right is affected.

A **writ of prohibition** is a writ directing a subordinate to stop doing something the law prohibits. In practice, the Court directs the Clerk to issue the Writ, and directs the Sheriff to serve it on the subordinate, and the Clerk prepares the Writ and gives it to the Sheriff, who serves it. This writ is normally issued by a superior court to the lower court asking it not to proceed with a case which does not fall under its jurisdiction.

These Writs are issued as "alternative" or "peremptory". An alternative Writ directs the recipient to immediately act, or desist, and "Show Cause" why the directive should not be made permanent. A peremptory Writ directs the recipient to immediately act, or desist, and "return" the Writ, with certification of its compliance, within a certain time.

When an agency of an official body is the target of the Writ of Prohibition, the Writ is directed to the official body over which the court has direct jurisdiction, ordering the official body to cause the agency to desist.

Although the rest of this article speaks to judicial processes, a writ of prohibition may be directed by any court of record (i.e., higher than a misdemeanor court) toward any official body, whether a court or a county, city or town government, that is within the court's jurisdiction.

A writ of prohibition is issued primarily to prevent an inferior court from exceeding its jurisdiction, or acting contrary to the rule of natural justice, for example, to restrain a Judge from hearing a case in which he is personally interested.

The term "inferior courts" comprehends special tribunals, commissions, magistrates and officers who exercise judicial powers, affecting the property or rights of the citizen and act in a summary way or in a new course different from the common law. It is well established that the writ lies only against a body exercising public functions of a judicial or quasi-judicial character and cannot in the nature of things be utilized to restrain legislative powers.

These Writs are issued as "alternative" or "peremptory." An alternative Writ directs the recipient to immediately act, or desist, and "Show Cause" why the directive should not be made permanent. A peremptory Writ directs the recipient to immediately act, or desist, and "return" the Writ, with certification of its compliance, within a certain time.

The writ can be issued only when the proceedings are pending in a court if the proceeding has matured into decision, writ will not lie.

A writ of prohibition is issued primarily to prevent an inferior court or tribunal from exceeding its jurisdiction in cases pending before it or acting contrary to the rules of natural justice. It is

issued by a superior court to inferior courts from usurping a jurisdiction with which it was not legally vested, or in other words to compel inferior courts to keep within the limits of their jurisdiction. Thus the writ is issued in both cases where there is excess of jurisdiction and where there is absence of jurisdiction

S. Govind Menon vs. union of India³¹

Prohibition is not a continuation of the proceedings to be prohibited. Its object is on the contrary to arrest the inferior tribunal's proceedings. It is a collateral matter progress essentially between the two tribunals, an inferior one and other superior one by which the latter, by virtue its power of superintendence over the former, restrains it within its rightful competence. Its nature is held to depend upon the nature of proceeding to be prohibited. The writ can be issued only when the proceedings are pending in a court if the proceeding has matured into decision, writ will not lie. When the court, before whom the matter is pending, has ceased to exist, in that condition too, the writ of prohibition will not lie because there can be no proceedings upon which it can operate but on the other hand, if the court is functioning, the writ can be issued at any stage of the proceeding before the inferior court or tribunal. It can be issued only against a judicial or legislative functions.

(V) The Writ of Quo-Warranto:

The word Quo-Warranto literally means "by what warrants?" It is a writ issued with a view to restraining a person from acting in a public office to which he is not entitled. The Writ of quo-warranto is used to prevent illegal assumption of any public office or usurpation of any public office by anybody. For example, a person of 62 years has been appointed to fill a public office whereas the retirement age is 60 years. Now, the appropriate High Court has a right to issue a Writ of quo-warranto against the person and declare the office vacant.

³¹ AIR 1967 SC 1274

who can apply

A writ of Qua-Warranto can be claimed by a person if he satisfy the court that—

1. the office in question is public office
2. it is held by a person without legal authority

the writ of Qua Warranto is not issued in respect of an office of a private character. thus in

Jamalpur Arya Samaj Sabha v/s Dr. D. Ram³²

in this case it was held that the high court refused to issue a writ Qua Warranto against the members of the working committee on the Bihar Arya Samaj Sabha, a private association.

The meaning of the term Quo Warranto is ‘by what authority’. The writ of quo warranto may be issued against a person holding a public office or governmental privilege. The issue of summon is followed by legal proceedings, during which an individual’s right to hold an office or governmental privilege is challenged.

The writ requires the concerned person to explain to the Court by what authority he holds the office. If a person has usurped a public office, the Court may direct him not to carry out any activities in the office or may announce the office to be vacant. The writ is issued by the Court after reviewing the circumstances of the case. There are a few conditions which must be fulfilled for the grant of the writ of quo warranto India:

- The concerned office must be a government unit or public office which performs public duties. Examples of such office members are advocate general, university officials, members of a municipal board.
- The public office must have a real existence. It should be permanent and cannot be terminated.
- A person against whom the writ of quo warranto is issued must have the real possession of the public office.

³² AIR 1954 Pat 297

- The writ shall be issued only when the public office is held by a particular person in an illegal manner

A writ of quo-warranto is issued to prevent a continuous exercise of unlawful authority. However, it cannot undo the actions already taken by such authority. It may be to avoid complications arising out of retrospectivity. It cannot jeopardise the lawful rights accrued to individuals in this process. Although a writ of mandamus can also be issued on the grounds of mala fides and arbitrariness, but when the office is filled up, a writ of quo-warranto is preferable. Mandamus is desirable to be issued when the office is vacant.

EXTENSION OF JURISDICTION OF HIGH COURT

Under article 230, Parliament can by law extend or exclude jurisdiction of a high court over any union territory. the legislature of a state cannot increase, restrict or abolish the jurisdiction.³³

³³ www.slideshare.net/altacitglobal/writ-types-of-writ

CHAPTER 7.

WRIT JURISDICTION: THE AMBIT OF COURT'S DISCRETIONARY POWERS

Justice the Ultimate Goal

If to see closely through the philosophy animating Articles 32, 136, 142 and 226 of the Constitution of India, it comes out that the basic purpose of incorporating these provisions in the Constitution was to impart justice under every circumstance. The superior courts of adjudication under these provisions, therefore, while conducting judicial review, have to see the net impact of their order on the final outcome. If substantial justice results from even an erroneous order, the court may restrain itself from undoing such erroneous or illegal order under its discretionary jurisdiction. It is because of the fact that discretion available with the court in such matters is to impart justice and not to snatch it away. The Supreme Court in the case of Employees' State Insurance Corporation' observed:-

"Issuance of a writ of Certiorari is a discretionary remedy. **Champalal Binani v. CIT, West Bengal**³⁴. The High Court and consequently this Court while exercising their extraordinary jurisdiction under Articles 32 or 226 of the Constitution of India may not strike down an illegal order although it would be lawful to do so. In a given case, the High Court or this Court may refuse to extend the benefit of a discretionary relief to the applicant. Furthermore, this Court exercised its discretionary jurisdiction under Article 136 of the Constitution of India which need not be exercised in a case where the impugned judgment is found to be erroneous if by reason thereof substantial justice is being done. **S.O.S. Shipping Pvt. Ltd. v. Jay Container Services Co. Pvt. Ltd**³⁵ Such a relief can be denied, inter alia, when it would be opposed to public policy or in a case where quashing of an illegal order would revive another illegal one. This Court also in exercise of its jurisdiction under Article 142 of the Constitution of India is entitled to pass such order which will do complete justice to the parties."

³⁴ AIR 1970 SC 645J

³⁵ 2003 (4) SCC 44

Procedure for Fling Writs:

Whether Writ can be filed when a party has alternate remedies?

A writ is an extraordinary jurisdiction and normally a party is expected to avail of ordinary remedies. Though a High Court can entertain a writ even if alternate remedies are available, but the High Court will be reluctant except in special circumstances.

Some Situations Originating Discretion: Availability of Alternative Remedy

Coming to the specific situations wherein the High Court has to apply the discretion, one of them could be a situation where alternative remedy is available with the petitioner. It has been a consistent view of the Supreme Court that except as per the requirement of the exceptional circumstances available in a particular matter, writ jurisdiction has not to be resorted to, where alternative remedy is available. However, this remedy should be efficacious, practicable and speedy. It may be as efficacious as the writ jurisdiction itself. While deciding the maintainability of the writ at the time of preliminary examination by the court, the court has to take care of and consider if any such remedy is available. The Supreme Court in this regard held:

"However, while entertaining an objection as to the maintainability of a writ petition under Article 226 of the Constitution of India, the court should bear in mind the fact that the power to issue prerogative writs under Article 226 of the Constitution is plenary in nature and is not limited by any other provisions of the Constitution. The High Court having regard to the facts of the case, has a discretion to entertain or not to entertain a writ petition. The court has imposed upon itself certain restrictions in the exercise of this power'. And this plenary right of the High Court to issue a prerogative writ will not normally be exercised by the court to the exclusion of other available remedies unless such act of the State or its instrumentality is arbitrary and unreasonable so as to violate the constitutional mandate of Article 14 or for other valid and legitimate reasons, for which the court thinks it necessary to exercise the said jurisdiction."?

Thus the writ jurisdiction in normal course has to be exercised to the exclusion of alternative remedies available. However, it is a matter of convenience and keeping in view the nature of jurisdiction, it cannot be a matter of strict law. It is primarily due to the fact that if it is made an absolute rule the sharpness of the system would stand blunted. In such a situation, even inspite of the requirement of the exigency and circumstantial compulsions, the court would be helpless to

exercise the writ jurisdiction which would be absolutely against the soul and spirit of this exceptional provision of the Constitution.

In view of the nature and scope of writ jurisdiction, the Apex Court has laid down certain guidelines to act just as a guide and not as law to be followed for the exercise of the writ jurisdiction by the High Court. A three-judge Bench of the Supreme Court held:

"There are two well-recognized exceptions to the doctrine of exhaustion of statutory remedies. First is when the proceedings are taken before the forum under a provision of law which is ultra-vires, it is open to a party aggrieved thereby to move the High Court for quashing the proceedings on the ground that they are incompetent without a party being obliged to wait until those proceedings run their full course. Secondly, the doctrine has no application when the impugned order has been made in violation of the principles of natural justice. We may add that where the proceedings itself are an abuse of process of law, the High Court in an appropriate case, can entertain a writ petition.

The above observation of the Court clearly settle that in normal course, the High Court should not entertain a writ petition to the exclusion of alternative remedy, but if specific reasons crave for the indulgence of the High Court, the court is duty bound to come out to help the cause of justice and to stamp out the manifest injustice. The grounds mentioned in the above quoted judgment are specific situations but there may be other situations where the High Court may apply the discretionary jurisdiction in the interest of justice, notwithstanding the availability of alternative remedy.

While dealing with an alternative remedy in the process of writ jurisdiction, it is settled that agreement in contract qua contract are not covered under the writ jurisdiction of the High Court. But even in such cases, if a particular action is not covered under the express terms and conditions of the contract or agreement, the same may be challenged by way of writ petition. Because in such a situation the remedy provided under the statute would not cover such action and the same will not be available under the contract. However, the Supreme Court says: "but while entertaining a writ petition even in such a case, the court may not lose sight of the fact that if a serious disputed question of fact is involved arising out of the contract qua contract, ordinarily a writ petition would not be entertained. A writ petition however, will be entertained

when it involves a public law character or involves a question arising out of public law functions on the part of the respondent.'

U.P. State Spinning Company Ltd. Vs. R.S. Pandey and Another³⁶

A workmen filed a writ petition challenging the termination order. The writ petition was allowed on the ground that services were terminated in violation of the principles of natural justice. Before the Apex Court the Company submitted that the High Court ought not to have entertained the writ petition when there being alternate remedy available.

It was noted by this Court in **L. Hirday Narain v. ITO**³⁷ that if the High Court had entertained a petition despite availability of alternative remedy and heard the parties on merits it would be ordinarily unjustifiable for the High Court to dismiss the same on the ground of non-exhaustion of statutory remedies, unless the High Court finds that factual disputes are involved and it would not desirable to deal with them in a writ petition.

In a catena of decisions it has been held that writ petition under Article 226 of the Constitution should not be entertained when the statutory remedy is available under the Act, unless exceptional circumstances are made out.”

Rashid Ahmed v. Municipal Board, Kairana³⁸ laid down that existence of an adequate legal remedy was a factor to be taken into consideration in the matter of granting writs. This was followed by another Rashid case, namely, **K.S. Rashid & Son v. Income Tax Investigation Commission**³⁹ which reiterated the above proposition and held that where alternative remedy existed, it would be a sound exercise of discretion to refuse to interfere in a petition under Article 226. This proposition was, however, qualified by the significant words, “*unless there are good grounds therefore*”, which indicated that alternative remedy would not operate as an absolute bar and that writ petition under Article 226 could still be entertained in exceptional circumstances

As a matter of fact, the logic and reasoning behind this is the extraordinary nature of the writ jurisdiction. No doubt writ jurisdiction is to cure the manifest miscarriage of justice wherever it

³⁶ 2005) 8 SCC 264.,

³⁷ AIR 1971 SC 33

³⁸ AIR 1950 SC 163

³⁹ AIR 1954 SC 207

is. But it is also a fact that the High Court cannot afford to be omnipresent. Therefore, except where the High Court under its discretionary power feel it necessary to intervene keeping in view the nature and circumstances of the matter, adequate relief available elsewhere may be utilized. The High Court under such a situation, when adequate relief is available, may refuse to entertain the writ. This issue has already been settled by the Supreme Court in a number of decisions.' The Supreme Court held that Article 226 of the Constitution confer wide discretionary powers on all High Courts. However, it is an absolutely discretionary remedy and the High Court has always the discretion to refuse to grant any writ if it is satisfied that the aggrieved party can have an adequate remedy in the form of suitable relief elsewhere.

The Dignity of the Writ Courts

One more factor in this respect is the dignity of the writ Courts which is one of the very strong reasons for not prescribing the procedures for writ jurisdiction. The writ jurisdiction has been entrusted to the Supreme Court and the High Court's, which are the superior Courts of record in their respective fields of jurisdiction. The status and dignity of these Courts make them the embodiments of justice. The constitutional forefathers, while entrusting the writ jurisdiction to these courts had full faith, confidence and respect in the capability and potentiality of these courts that they would be wise and competent enough to evolve their own procedures. Therefore, under writ jurisdiction, the constitution simply lays down the motive and purpose and leaves everything to the writ court to decide everything as per their personal wisdom and requirement of the situation. Thus for the sake of justice, the courts have full discretion to adopt any procedure as per requirement and there is no constitutional check on the procedure to be adopted under writ jurisdiction.

Interest of Justice, High Traditions & Judicious Discretion

However, the important thing under the unwritten law is the interest of justice, judicious discretion and the high traditions. The Constitution has no doubt given an open leverage to the writ Courts in the matter of procedure. However, the same has been done with high expectations. The prime responsibility on the Courts is to impart justice in every circumstance. Therefore, when an open discretion has been left with the writ Court, the same has been done with the noble cause i.e. the cause of justice. There has to be a judicious discretion. Any such discretion leading

to a procedure which delays or debars justice would not be as per the spirit of magnanimity, the Constitution has extended to the writ Courts. One instance may be quoted in this regard e.g., the admission of writs for an indefinite period without fixing the next date of hearing. The Courts do it out of pure discretion but such discretion goes against the spirit of the Constitution.

The Dignity of Writ Courts Allows no Bounds

In the same sequence, it may be said that the dignity and status attached to the higher judiciary does not require codified law for procedures and conduct. The Judges of the Supreme Court and the High Courts are expected to be the persons of extraordinary learning and calibre. Their intelligence and wisdom have to react and respond as per the high judicial traditions. The elegance and grandeur attached to their status does not require external control or regulations. The ideal situation demands that they should deftly apply self-discipline and restrain which may come up to high judicial traditions set up by their great predecessors both inside and outside the country. This is necessary in the interest of the independence of the judiciary and faith of the people. It has to be remembered that we are living in a democratic set up and not in the monarchical middle age. The beauty of the democratic set up is the community appraisal and appreciation. The fundamental freedoms given under the democratic federalism have opened the gates of transparency. Every activity of each and every public functionary is being closely watched by the people. It is also a fact that higher the status, higher is the expectations and closer is the public scrutiny. Therefore, any procedure adopted by the writ Court under wide discretion must be justice oriented. Any deviation from this path would prove to be detrimental to the credibility of the judicial system.

However, where a writ petition under Article 226 of the Constitution is disposed of on merits and the order of dismissal of the petition is speaking order that would amount to res-judicata and would bar a petition under Article 32 of the Constitution on the same facts irrespective of whether notice was issued to the other side or not before such a decision were given.

A Rule of Discretion not Rule of Law

It may be seen that in the field of writ jurisdiction the High Court has been given wider discretion in exercising the powers under Article 226 than the Supreme Court has got under

Article 32. In fact the right to move the High Court under Article 226 is a constitutional right and there is no constitutional guarantee attached to it like Article 32. Therefore, as far as the entertainability of writs under Article 226 is concerned, the High Court in its discretion may refuse the writ on various grounds as already discussed. But it is not that open to the High Court so as to allow the court to use this discretion without any justification. This discretion has an attached responsibility under the provisions of the constitution. Article 226 has not been provided in isolation but it stands fitted in a wholesome scheme of the constitution. This scheme mandates the court to impart justice in a speedy and efficacious manner. Thus while exercising the discretion under Article 226, the court has to see all the facts and circumstances of the case. As the highest judicial body of the state, the High Court may always be conscious of the responsibility attached to such open discretion confided in it by the framers of the constitution. Therefore such discretion, irrespective of its open ends, has to be exercised in a most judicious manner. Gajender gadkar, J. had rightly observed in Makhan Singh's case (infra) that such discretion had to be judicially exercised. The Hon'ble Judge held that under the Scheme of Article 226(1) it could not be said that citizen has no right to move High Court for invoking jurisdiction under Article 226(1). Again, **Pasayat j** observed in this context:

From the analysis of the legal position in view of the law laid down by the apex court from time to time, it may be concluded that the exclusion of writ jurisdiction in case of availability of alternative remedy is a rule of discretion with the High Court and it is not a rule of law. But definitely it has to be applied keeping in view the pros and cons of the case. The Supreme Court has clearly held! that the rule for exclusion of writ jurisdiction by availability of alternative remedy is a rule of discretion and not one of compulsion and the court must consider the pros and cons of the case and then may interfere if it comes to the conclusion that the petitioner seeks enforcement of the fundamental rights; where there is failure of principles of natural Justice or where the orders or proceedings are wholly without jurisdiction or the vires of an Act is challenged. Hence as already explained because of very exceptional circumstances if the writ jurisdiction has to be applied, there is no justifiable reasons for the High Court not/to entertain the petitions on the ground of alternative remedy provided under the statute.

CONCLUSION AND SUGGESTION

The constitution of India has given a wide powers under article 32 and 226 to the public in general for the enforcement of rights. Under the Indian legal system, jurisdiction to issue 'prerogative writs' is given to the Supreme Court, and to the High Courts of Judicature of all Indian states. Parts of the law relating to writs are set forth in the Constitution of India. The Supreme Court, the highest in the country, may issue writs under Article 32 of the Constitution for enforcement of Fundamental Rights and under Articles 139 for enforcement of rights other than Fundamental Rights, while High Courts, the superior courts of the States, may issue writs under Articles 226.

The Indian judiciary has dispensed with the traditional doctrine of locus standi, so that if a detained person is not in a position to file a petition, it can be moved on his behalf by any other person. The scope of habeas relief has expanded in recent times by actions of the Indian judiciary.

"The language of Article 226 does not admit of any limitation on the powers of the High Court for exercise of jurisdiction, hereunder, though by various decisions of the Apex Court with varying and divergent views it has been held that jurisdiction under Article 226 can be exercised only when body or authority, decision of which is complained was exercising its powers in discharge or public duty and that writ is a public law remedy.

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