By Harkirat Singh Ghuman, Advocate

WRIT JURISDICTION OF SUPREME COURT AND THE HIGH COURTS

The fundamental rights contained in Part III of the Constitution are judicially enforceable. The Supreme Court under Article 32 and the High Courts under Article 226 of the Constitution of India can issue order, direction or writ, including the writ in the nature of *habeas corpus*, *mandamus*, *prohibition*, *qua warranto* and *certiorari*, to any person or authority, including in appropriate cases any Government, for the enforcement of the fundamental rights. The inclusion of Article 32 in Part III of the Constitution, containing the fundamental rights, points towards the importance given to it by the framers of our Constitution. In the words of Dr Ambedkar: "If I was asked to name any particular article in this Constitution as the most important – an article without which this Constitution would be nullity – I could not refer to any other article except Article 32. It is the very soul of the Constitution and the very heart of it."

The five writs specifically mentioned in Article 32 and 226 were known as the prerogative writs in English Law. These writs had their origin in the exercise of the King's prerogative power of superintendence over the due observance of law by its officials and were issued by the Court of King's Bench. They were specifically directed to persons or authorities against whom redress was sought and were returnable in the court issuing them and, in case of disobedience, the person or authority was liable to be punished for contempt. In India, before the commencement of the Constitution, the three chartered High Courts of Bombay, Calcutta and Madras alone were competent to issue writs and that too within specified limits – the local limits of their original civil jurisdiction. The power was not exercisable by other High Courts at all. All the High Courts now have power, within the territories in relation to which they exercise jurisdiction, to grant the remedy of the nature obtainable in the Court of the King's Bench in England by means of the prerogative writs.

The intent of the framers of our Constitution for providing extraordinary remedy by way of writ jurisdiction is to ensure quick and inexpensive enforcement of fundamental rights. The fundamental rights provide for certain basic safeguards for the people against the abuse of power by the State and against excesses committed by the State. Therefore, a need was felt for providing extraordinary remedy of approaching the Supreme Court or any of the High Courts, directly, for enforcement of fundamental rights, by filing a writ

petition in exceptional cases in which ordinary legal remedies were considered to be inadequate.

The Supreme Court and the High Courts possess concurrent power to issue orders, directions and writs in the matter of enforcement of fundamental rights and it is no condition for the exercise of the jurisdiction by the Supreme Court that the petitioner must, in the first instance, approach the High Court. In Romesh Thappar versus State of Madras, AIR 1950 SC 124, the Supreme Court held that unlike Article 226 which confers power on the High Courts, Article 32 confers a fundamental right on the individual and an obligation on the Supreme Court which obligation it must discharge when an individual complains of infringement of his fundamental rights. However, in view of the enormous arrears before it, Supreme Court discourages petitions under Article 32 if equally effective remedy can be availed of in the High Court.

The power of the High Court under Article 226 is wider than the power of the Supreme Court under Article 32 because the power of the High Courts under Article 226 is not only limited to issuing order, direction or writ for enforcement of fundamental rights but, can be used “for any other purpose”, i.e. for the enforcement of any other legal right. Primarily the powers under Article 226 have to be exercised against public bodies and rarely against private persons. A few exceptional circumstances, where the courts have used their powers under Article 32 and Article 226 in private disputes are contractual disputes involving public law element, human rights violations, etc. In some cases, even a letter, postcards or telegram addressed to any judge have been entertained in exercise of writ jurisdiction by the courts. Such an exercise of power by the courts is termed as its ‘epistolary jurisdiction’. To facilitate such epistolary proceedings, the Supreme Court of India has opened a separate public interest litigation cell to which all letters addressed to the court or individual judges are forwarded.

The general rule is that writ jurisdiction of the Supreme Court or High Courts under Article 32 or 226 of the Constitution should not be exercised, unless there is no other equally efficacious remedy available. Thus, where the statute provides a right to appeal against a decision of public authority, the petitioner must avail the remedy of appeal. However, the rule requiring the exhaustion of statutory remedies before the writ will be granted is a rule of policy, convenience and discretion rather than a rule of law and there

are instances where courts have issued writs in spite of the fact that the aggrieved party had other adequate legal remedies.

By Clause (1) of Article 226, a twofold territorial limitation has been placed on the power of the High Courts to issue writs. Firstly, the power is to be exercised “throughout the territories in relation to which it exercises jurisdiction, i.e. writs issued by the court cannot run beyond the territories subject to its jurisdiction. Secondly, the person or authority to whom the High Court issues such a writ must be “within those territories”.

The proceedings under Article 226 are of a summary nature and are not suitable for agitating disputes in which the facts are disputed. Therefore, the High Court, in proceedings under Article 226, does not enter into disputed questions of fact. A lis involving disputed questions of fact are left to subordinate courts, to adjudicate them on the basis of appreciation of evidence led by the parties, during trial.

Res-judicata – The general principle of res-judicata applies to writ petitions filed under Article 32 or 226 of the Constitution. Where the same question has been decided by the High Court in a petition under Article 226 and the court comes to the conclusion that no relief can be granted to the petitioner, such a decision operates as res-judicata in subsequent petition for the same relief. However, for the operation of res-judicata, a petition must have been decided on merits and not dismissed in limine, without going into the merits. The principle of res-judicata is not applicable to a petition for a writ of habeas corpus under Article 32, although a writ on the same grounds has been dismissed by the High Court. It may however, be emphasised that in the same High Court, successive applications of habeas corpus cannot be filed.

The five prerogative writs can be issued in order to grant the following reliefs to the petitioner:-

1. The writ of **certiorari** is issued to an inferior court, tribunal or authority to transmit to it the record of proceedings pending with it for scrutiny and, if necessary, for quashing the same. The writ of certiorari can be issued to a judicial or quasi-judicial body on any of the following three grounds:- 1) Want or excess use of jurisdiction 2) Violation of procedure or disregard of principles of natural justice 3) Error of law apparent on the face of the record.

2. A writ of **prohibition** commands the court or tribunal to whom it is issued to refrain from doing something which it has no authority to do. It prevents a tribunal possessing judicial or quasi judicial powers from assuming or threatening to assume jurisdiction which it does not possess. Thus, the writ lies both for excess use of jurisdiction and absence of jurisdiction. In some respects, both writ of certiorari and prohibition overlap each other. However, the fundamental difference between the two is that they are issued at different stages of proceedings. 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, forbidding the inferior court from continuing the proceedings. On the other hand, if the court hears that case or matter and gives a decision, the party aggrieved will 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. Sometimes the two writs may overlap. Thus, it may happen that in a proceedings before an inferior court a decision might have been passed which does not completely dispose of the matter, in which case it might be necessary to apply both for certiorari and prohibition – certiorari for quashing what has been decided and prohibition for arresting the further continuance of the proceedings.
3. **Mandamus** is a judicial remedy which is in the form of an order from a superior court to any government, court, corporation or public authority to do or to forbear from doing some specific act which that body is obliged under law to do or refrain from doing, as the case may be, and which is in the nature of a public duty and in certain cases of a statutory duty. The writ of mandamus is by far the writ of most extensive remedial nature. No one can ask for a mandamus without a legal right. There must be a judicially enforceable as well as legally protected right before one suffering a legal grievance can ask for a mandamus.
4. Writ of **Qua Warranto** – The object of this writ is to prevent a person who has usurped a public office from continuing in that office. The writ calls upon the holder of the office to show to the court under what authority he holds the office. If the court determines that the incumbent is holding the public office in question illegally, it would pass the order of ouster which must be obeyed by him. A public office means an office in which the public has an interest. A petition for the writ of qua warranto

challenging the legality of an appointment to an office of a public nature is maintainable at the instance of any private person, although he is not personally aggrieved or interested in the matter.

5. Writ of **Habeas Corpus** – This writ is often called as 'bulwark of liberties and personal freedom'. It is issued to free the body of a person who has been illegally detained. The writ is, in form, an order issued by the High Court calling upon the person by whom another person has been illegally detained to bring such detained person before the court and to let the court know on what ground he or she has been confined/ detained. If there is no legal justification for the detention, the person is ordered to be released. Subject to Rules made by various High Courts, an application for habeas corpus can be made by the person in confinement or by any other person on his behalf. Detention is considered to be illegal if it is not in accordance with the 'procedure established by law'. The expression 'procedure established by law' means that there must be a valid law permitting the detention of the person and the procedure laid down by that law should have been strictly followed. Also the procedure should be reasonable, just and fair as required by Article 21 and 22 of the Constitution.

   A writ of habeas corpus is not to be issued as a matter of course, particularly when the writ is sought against a parent for the custody of a child. Clear grounds must be made out. But this does not mean that the writ cannot and will not be issued against a parent who with impunity snatches away a child from the lawful custody of the other parent to whom the court has given such custody.

   The writ of habeas corpus cannot be used to prevent illegal detention. It can be issued only after a person has been detained.

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