

**(1977) 02 BOM CK 0016**  
**In the Bombay High Court**  
**Case No : Spl. C.A. No. 253 of 1977**

Prabhakar Ramchandra Bhawe

APPELLANT

Vs

State of Maharashtra and others

RESPONDENT

**Date of Decision :** 16-02-1977

**Acts Referred:**

Civil Procedure Code, 1908 (CPC) — Section 9  
Constitution of India, 1950 — Article 226, 226(3)

**Citation :** (1977) MhLj 269

**Hon'ble Judges :** B.A. Masodkar, J; A.A. Ginwala, J

**Bench :** Division Bench

**Advocate :** B.A. Udhoji, for the Appellant;

**Final Decision :** Dismissed

## Judgement

B.A. Masodkar, J.—This petition is placed before us in admission. It purports to have been filed under Article 226 of the Constitution. Few facts which appear in the petition and which prima facie can be taken as established for the eventual decision are that the petitioner was appointed as the Head Master of Shri Saraswati Vidyalaya, Akot. He was detained by the District Magistrate, Akola, on December 12, 1975 and that order was revoked on June 18, 1976. On July 1, 1976 the petitioner claims to have reported back on his duty and has joined the same.

2. For the period of detention the petitioner claims that he is entitled to subsistence allowance. Reliance is placed on the Government Resolutions issued in that regard from time to time. It is not necessary to make a detailed reference to them. It is further asserted that while in detention the petitioner had moved this Court and in Special Civil Application No. 4039 of 1976, along with the petition filed by this petitioner, a pursis was filed on behalf of the State assuring that subsistence allowance during the period of suspension would be paid. This Court's order dated 22-11-1976 is relied upon to show that the petitioner is entitled to subsistence allowance which was conceded in those proceedings, on

behalf of the State. It is further stated that in spite of the Government's decision, coupled with the directions of this Court, the petitioner has not been paid any subsistence allowance.

3. Inter alia, on these facts and other submissions contained in the petitions flowing from these basic facts, it is prayed that a writ in the nature of mandamus or directions to the respondents should issue to pay the petitioner the entire salary to which the petitioner would have been entitled had there been no detention, or at any rate, a writ of mandamus directing the respondents to pay the arrears of subsistence allowance in terms of the Government's decision should issue.

4. Thus, the claim of the petitioner, substantial and in effect, is for the recovery of monetary relief relying upon the contract of employment, the decisions of the Government and the earlier adjudication made in the writ petition. Obviously such a claim could form part of a civil suit if the petitioner had filed such a suit. Thus, it could not be disputed, nor was so disputed at the time of hearing by Mr. Udhoji who appeared in support of this petition, that the petitioner can file a suit and on the basis of the cause of action briefly referred to above the Court could competently make a decree for arrears of salary as well as for arrears of subsistence allowance.

5. To get over the prohibition now contained in clause (3) of Article 226 of the Constitution, the learned submission is that that clause which refers to "remedy" and "redress" available to the petitioner does not contemplate the remedy of a civil suit, nor does it fetter the jurisdiction of this Court to issue a writ of mandamus, particularly when there had been an earlier adjudication. It is urged that if such a strict view upon interpretation is taken, then no cause could at all survive for adjudication under Article 226 of the Constitution and the remedy under that Article itself would be rendered otiose. It is strenuously urged that such a construction should be put which will keep the remedy available to the suitor, particularly when the filing of a suit is a dilatory process, coupled with the formal and substantive requirements involving costs and Court-fees. After all, the Constitution has provided to the citizen a speedy remedy, so that the laws of the country are expeditiously enforced. This primary consideration should weigh with this Court, according to the submission, in upholding the remedy in spite of the fact that the petitioner could have filed a suit. It is submitted that the words "provided for" occurring in clause (i) of Article 226 contemplates special remedies and not a suit.

6. By the very nature of the claim, there can hardly be any doubt that the present petition is substantially for the recovery of and for the relief for money due firstly on the basis of the contract of employment followed by the fact of detention and the resolutions of the Government and earlier adjudication in the writ petition. The totality of all this is pleaded to subserve the need for issue of a writ of mandamus. As stated above, it was not contended before us that such a claim could not be agitated by filing a suit. Now, the limited question, therefore,

is whether in view of the provisions of Article 226 (3) of the Constitution which have been enacted and have become a part of the Constitution by the Constitution (Forty-second Amendment) Act, 1976, such a petition should be admitted for hearing.

7. The provision of clause (3) of Article 226 of the Constitution is as under:

No petition for the redress of any injury referred to in sub-clause (b) or sub-clause (c) of clause (1) shall be entertained if any other remedy for such redress is provided for by or under any other law for the time being in force.

(Italics ours so as to emphasize the terms debated before us)

Now, the interpretation of this clause necessarily calls for a closer look at the other clauses of the newly structured provisions of Article 226 itself. A comparison of the different clauses now obtainable in the Article and the particular purpose of enacting clause (3) with which we are concerned and considering the same along with clause (1) cannot but be emphasised.

8. Clause (1) of Article 226 confers power on the High Court of the State to exercise extraordinary jurisdiction enabling it to issue high prerogative writs, pithily known as the writ jurisdiction. Under the Constitution, the High Courts are the Courts of record and it was always recognised from the inception that such Courts possessed the power to issue high prerogative writs. Some distinction does exist and is always made in legal thought between the recognition of "judicial power" as different and better comprehensive than the "judicial jurisdiction," the former being identified with the sovereign authority of the State to render and administer justice, while the latter being a derivative authority having origins in some statute to make application adjudications between parties and upon causes made cognizable. Where power exists, jurisdiction always inheres. The term "jurisdiction" has a distinct connotation and its total conspectus contains the meaning of the power or the authority to hear and determine the issues of law and fact that arise between the parties : see *Official Trustee, West Bengal and Others Vs. Sachindra Nath Chatterjee and Another*, ; *Smt. Ujjam Bai Vs. State of Uttar Pradesh*, ; *Chaube Jagdish Prasad and Another Vs. Ganga Prasad Chaturvedi*, ; *Rai Brij Raj Krishna and Another Vs. S.K. Shaw and Brothers*, ; *Amritrav v. Balkrishna* ILR 11 Bombay 488; and *Nathu v. Kamlabai* 1974 Mh LJ 721.

9. In this context, a closer scrutiny of the provisions of clause (1) of Article 226 in the present form brings forth the clear recognition and conferment of power and it is not a provision of merely creating a jurisdiction in the High Court so as to enable it, as and when the conditions for exercise of that power are fulfilled, to issue the well-recognised high prerogative writs. It is not necessary to dilate upon and look back to the history of the writ jurisdiction. Suffice it to observe that the constitutional terms as are now engraved in sub-clauses (a), (b) and (c) of clause (1) afford a full and complete definition of the content of that power. Simply and broadly stated, this constitutional power exists in the High Court for

twin purposes in that the High Court is enabled to enforce the fundamental rights as enshrined and guaranteed by the Constitution [clause (a)] and to uphold and enforce the Constitution, the laws made by the legislature and instruments having the force of law and legal rights thereunder by avoiding transgression thereof [clauses (b) and (c)]. Institution of proceedings invoking these powers are matters that arise and lie in the extraordinary jurisdiction of the High Court. It was always so even before the present amendment, and unfailingly the Courts did recognise the same and applied the well-settled principles attending upon such exercise of jurisdiction.

10. It appears to us that the present provisions, of clause (1) of Article 226 are more or less definitive in character. By omitting wide ample somewhat elastic and ever-unfolding term giving rise to contentious debates that was available in the earlier Article that contained the phrase. "for any other purpose", and in its place, introducing specific sub-clauses, there has been a clear and better departure in favour of definiteness and certainty, Granting the power of amendment, this is a welcome improvement.

11. Life under the Constitution and its amendatory process partake of and is akin to the processes available in any pulsating systems. The system of constitutional law is to be conceived as a developing organism, full of change, growth and along with it, growing complexity. The phenomenon of development normally leads to the built occurrence of differentiation and integration. With dynamic motivations the developing system tends to clear the areas of the thickets so as to better synthesize the principles. Change and growth inevitably lead into situations involving rustling contradictions that necessitate action on the basis of selection and synthesis. Amendments to as organic document like the constitution of a country should and often evince such realization and must be approached in this spirit. The present enactment of clause (1) of Article 226, along with clause (3) and other clauses evidence such considerations to restructure the field of writ jurisdiction available to High court. Effort should be to find out the operative principles upon which the system styles to achieve synthesis of pre-existing and available principles.

12. It was suggested that suit is not remedy provided for by any other law and the use of the phrase "provided for" in clause (3) of Article 226 make the difference and indicates that what is only contemplated is to cover the remedies provided for by special laws. In a simple vein, it was submitted that suit may a remedy available at a general law but it is not a remedy provides for by the enactments or other instruments mentioned in clauses (b) and (c) of clause (1) of Article 226 and that the words "remedy" and "redress" should receive an interpretation as making reference to the Constitution, enactments and other instruments referred to in sub clause (b) of clause (1) of Article 226.

13. It is difficult to follow this line of reasoning. When we speak of the "remedy" and the "redress" it is implicit that there is an assertion of right and its transgression; Ubi jus ibi remedium it is on the foot of a right and its assertion

that a remedy is taken and redress is sought. Right without remedy is hardly a possibility. To be a right it must possess enforceability, and to be enforced must mean by the modality, available at law. A special statute may create special rights and special remedies but rights which are several in species are not merely the creation of statutes. Pre-existing rights are sometimes recognised, and take the shape of statutory rights. Even without recognition by express terms of the statute, legal system, retains, rights possessed by the persons or attached to property and permits enforcement. The nature of the jurisdiction of the civil Court is universal in the sense that but for any express implied bar of jurisdiction, upon all civil causes and disputes it has power of cognizance.

14. Section 9 of the CPC is declaratory in terms in that the Courts established would possess jurisdiction, power or authority to try the suits of civil nature excepting those the cognizance of which is expressly barred. It is the jurisdiction that is dealt with by section 9 of the Code Civil Procedure and not the right of a party, and it indicates that if the cause of the suit of a civil nature, the civil Court would possess power or authority to tender applicative judgments. By approaching the Court for civil causes, the party is entitled to claim redress if there is transgression of right resulting in injury or otherwise either by reason of the contravention of the provisions of the Constitution or the provisions of the contravention of the provision bye-law or other instrument made thereon. It is difficult to see why such a cause of action based on the injury suffered by a party and complained of because of such contravention be not a civil cause capable of being adjudicated upon.

15. We make it clear that we are considering the claim of the petitioner with regard to the relief sought for by the present petition which can be effectively if proved, take the shape of a decree that can be made by the civil Court. We are not called upon to consider whether the jurisdiction conferred by section 9 of the CPC would be available for the purpose of issue of directions, orders or writs Contemplated by the complaints filed under sub-clauses (b) and (c) of clause (1) of Article 226.

16. We have made these observations to indicate and emphasise that as far as judicial power in favour of the High Court is concerned, it is well engrafted and well recognised and remains fully and potentially entrenched in the very terms of clause (1) of Article 226, and there is hardly any erosion effected of that judicial power the amendment. We must not forget that matters of exercise of jurisdiction are distinct and different from the power and Jurisdiction itself, and further that it is always a part of salutary exercise of granted jurisdiction to find out the conditions, formal or substantive that operate either by express terms of implication involved, in the constitution statute upon the exercise of such Jurisdiction. As we see clause (3) of Article 226 does not deal with the power which is contained in clause (1) and it is independent of the latter It deals with the matter of exercise of the extraordinary jurisdiction by the High Court: It is in the nature of a fetter or limitation raising more or less an obligation upon the

petitioner who invokes the power or the extraordinary jurisdiction of the High Court to satisfy at the threshold that he has no other remedy for the redress sought by his petition provided for by or under any law in force. The whole clause which is couched in a negative form is a prohibition against and is meant to indicate a bar upon entertainment of the petition when the extraordinary jurisdiction of the High Court is invoked for redress of any injury referred to and contemplated in sub clause (b) of (c) of clause (1) of Article 226. Like any other prohibition before that bar is upheld the conditions therefor will have to be naturally satisfied. The prohibition operates once it is shown that the petitioner has any other legal remedy by report to Which he can have the redress for the injury contemplated by sub-clause (b) or (c) of clause (1) of Article 226. Existence of such alternative legal remedy along with other limitations upon the exercise of the high extraordinary jurisdiction by the High Courts in the matters of granting writs had always been recognised. In fact, this salutary consideration of existence of other legal remedy and its consideration was the very condition of exercise of the writ jurisdiction not only in India but also in England. Courts consistently insisted upon the petitioner discharge the burden to show before the writ was issued that he was not possessed of any other remedy at law. Further, it was always understood that the term "remedy" which is a term of art signifying the existence of a right and the forum for its enforcement included within its scope and contemplation the filing of a suit. Plethora of precedents have grown under the applicative constitutional law upon this premise: (see cases collected and relied in paras. 16.115 and 16.116, page 864 Seervai-Constitutional Law of India, Volume II). Courts have now and often strained to find out whether the petition filed under Article 226 should be entertained or not when the filing of the suit for the cause in issue and its redress would offer an adequate and efficacious remedy.. It is too late futile to structure and to submit that in the contemplation of clause (3) which refers to the term "remedy", the suit is not included but that what is provided by special Acts is only intended to include so as to disentitle the petitioner to invoke the writ jurisdiction of the High Court. We cannot conceive such a limitation in the term "remedy" itself, nor such restrictive connotation is necessary. The term "remedy" means and has always meant the legal means and modality redress or reparation. To read restrictively that term in clause (3) as only referring to the special laws conferring rights and the remedy provided thereunder would be to rob the term "remedy" of all its meaning. Section of the CPC undoubtedly deals with the jurisdiction of the civil Court so as to enable it to enable it to cognise and decide matters of civil nature provided the same are presented in a formal way by filing a suit. Institution of the suit by presenting a plaint is merely a matter of form, though essential for the purpose of invoking the authority of the civil Court, but nonetheless it is a remedy provided by the law in force, whereunder redress in civil causes based upon an injury can be complained of and upon proof, redress is effectively available. As we have stated above, upon exercise of the extraordinary power the limitation of existence of and alternative legal remedy including a suit always operated. No doubt, that was treated to be a law of self-imposition flowing from the history of

the writs in England and the necessity of its application to the similar jurisdiction created and conferred in favour of the High Court in India. But in spite of that limitation and in spite of the availability of other legal remedy, Courts effectively exercised the power in discretion if the remedy was shown to be illusory, inadequate and inefficacious. While an alternative and equally efficacious remedy is open the litigant must be required to pursue the same: see Baburam Prakash Chandra Maheshwari Vs. Antarim Zila Parishad now Zila Parishad, Muzaffarnagar, and cases relied and discussed therein being Rashid Ahmed Vs. The Municipal Board, Kairana, , State of U.P. v. Mohammad Booh AIR 1958 SC 86 and for exceptions stated by relying on Carl Still v. State of Bihar AIR 1961 SC 1951 and Bengal Immunity Co. v. State of Bihar AIR 1966 SC 661. The benevolence available to the petitioner under an inquiry in discretion operated upon the field by reference to principles of efficaciousness circumstances of each case. Presently enacted provision hardly would permit such considerations once existence of legal remedy is established.

17. Thus, what was then the normative self-imposition is now clearly a negative statutory injunction; what was then a vital rule of exercise of discretion is now a Vigorous rigour requiring application; what was, then debatable matter of limitation is a determinative measure of law. Its verve cannot be avoided, nor its effect. Once satisfied, the terms of clause (3) operate and have to be applied. There is no let-up conceived, nor any let-off. Like any other mandate of the Constitution, Courts cannot but apply and enforce the negative mandates contained therein.

18. The terms of clause (3) of Article 226 are couched in the manner of prohibition for the purpose of entertainment of the petition. However, that does not do away with the need in each case to find out the legal remedy available to the petitioner and whether in reality the petitioner can be said to be possessed thereof, The words "provided for" are used merely to indicate the stipulation of the law and are not intended to be restrictive in connotation. Remedy may be stipulated or provided for either by a special law or by a general law. Nonetheless, it is a provision of remedy. There is no such distinction implicit in the term "provision" to read that it merely means a special provision and not the general provision. This clause in substance and in effect has now recognised all this and enacted the injunction against the entertainment of petitions. Once it is shown that there is legal remedy available, it will operate by its own force. Rare and exceptional occasions, will still arise calling for resolving the issues about the existence of the remedy itself. The petitioner in a given set of facts maybe able to satisfy the Court, that, a given remedy is not at all available to him. That would raise a different issue for determination. Such issues are not uncommon and have been the matters, of decision when there are pre-conceived or mala fide actions brought before the Court seeking relief of certiorari or mandamus, where referring the petitioner to the same said authority would be a matter of mere formality or a matter of ritual. We are observing all this only with a view to indicate the need and emphasised the necessity that each and every case, will

have to be considered on the basis of the cause set up the existence or non-existence of any other legal forum and its real availability in law. This would have to be done at the time the petition comes for issue of rule nisi. As we have stated, cases and causes are not wanting in precedents, particularly, under, the special statutes when those statutes had made provision for the remedy, but by course of events in the proceeding the same was found to be, not available or being emaciated or completely eclipsed in law. Exceptional though such results may be, the matter would always retire determination. Once, however, proper availability of the remedy is found, the petitioner must, because of the constitutional injunction, be referred to that remedy for redress. Any other course would be impermissible in petitions invoking the power of the High Court under sub-clauses (b) and (c) of clause (1) of Article 226, considerations of adequacy and the usual argument of efficaciousness being irrelevant. Of necessity, at the threshold such debate must be raised and would affect, such admission of the petition itself and issue of rule nisi. Only when a finding is possible that though there exists a remedy in law, it cannot be said to be available because of the particular facts of the case, rule nisi may be issued subject to its being vacated upon contrary proof.

19. Surely, therefore, clause (3) of Article 226 calls for Compelling inquiry so as to find out whether the petitioner has legal remedy for redress. If the conclusion be against the petitioner, there is no option to the Court but to adjudge the petition as unentertainable.

20. The term "entertain" does not mean nor affect the judicial power, nor prohibits institution of petitions in the High Court. It properly in the context for which clause (3) is enacted and particularly in the context of "the petition" signifies "hearing and granting of relief" upon the petition. The word "entertain" has different connotations including the one of filing and receiving by the Court in its widest amplitude : see *Lala Ram Vs. Hari Ram*, . Looking to the provisions of section 58 (2) of the Constitution (Forty-second Amendment) Act, 1976, and the history of the writ jurisdiction and the prohibition enacted by clause (3), entertainment, of the petition could only mean hearing upon merits and grant of redress when other legal remedy is not available. Section 58 (2) of the Constitution (Forty-second Amendment) Act, 1976, is indicative that at the stage of admission, the prohibition will have to be applied and the party referred to other legal remedy if available and in pending petitions computation of the period of limitation during which such a petition was pending is clearly made available. The provision for permitting computation of limitation clearly aids the construction to which we have reached in that the legal remedy contemplated by clause (3) includes a suit which is to be filed within the limitation provided by the Limitation Act and further that the requirement of satisfaction by the petitioner that he is not possessed of any other legal remedy arises at the initial stage of the admission of the petition itself.

21. What appears to us in consequence underlying clause (3) of Article 226 of



the Constitution is a constitutional fetter upon entertainment of petitions which under clause (1), as stated in sub-clauses (b) and (c) thereof, would otherwise be entertainable by the High Court. No doubt, we are expounding the Constitution and a pedantic approach is not warranted. Nonetheless, it is a salutary rule of construction of constitutional documents to give effect to the express terms of prohibitions. The language used being the sole guide to find out the intention of the Constitution, there is hardly any scope to suppose that clause (3) was enacted only as a guiding principle in exercise of the jurisdiction under clause (1) and not as a prohibition for exercising jurisdiction in the matters of hearing. This limitation so enacted by clause (3) superimposes itself upon the matters that arise under sub-clauses (b) and (c) of clause and once there exists any remedy for the redress of any injury which is complained of and which arises by reason of the complaint regarding the contravention of any other provision of the Constitution or any provisions of an enactment, ordinance, order, rule, regulation, bye-law or other instrument, or by reason of any illegality in the proceedings by or before any authority under the provisions of the Constitution or enactments etc spoken therein, then the cause and the grievance must be left to be adjudicated by recourse to that remedy alone.

22. Having come to this conclusion that the petitioner is possessed of the remedy of suit so as to recover the monetary claim set up, we have no other option than to dismiss this petition because of the bar under Article 226 (3) of the Constitution. The petition shall stand dismissed.