(1963) 03 BOM CK 0005

In the Bombay High Court

Case No : Miscellaneous Application No. 99 of 1962

J.P. Sharma APPELLANT

Vs

Phalton Sugar Works Ltd. RESPONDENT

Date of Decision : 13-03-1963

Acts Referred:
Constitution of India, 1950 — Article 133, 134, 226, 227

Citation : (1963) 50 ITR 72

Hon'ble Judges : Y.S. Tambe, J;V.S. Desai, J

Bench : Division Bench

Advocate : G.N. Joshi, for the Appellant; N.A. Palkhivala and F.N. Kaka, for the Respondent

Judgement

Tambe, J.—By this application, the petitioner, Income Tax Officer, Companies Circle II(3), Bombay, applies for a certificate to file an appeal against the decision of this court in a writ petition under article 226 of the Constitution (Miscellaneous Application No. 99 of 1962, decided on 4th August, 1962). In that application, the Phalton Sugar Works Ltd., a company registered under the Companies Act, now the respondents before us in this application, were assessed to Income Tax for the assessment years 1949-50 and 1950-51. On 5th March, 1958, the Income Tax Officer, Special Circle, Bombay, served on the Phalton Sugar Works Ltd. two notices u/s 34(1)(a) of the Act for the purposes of reassessing their income for the assessment years 1949-50 and 1950-51, on the ground that he had reason to believe that the income for those years had escaped assessment or had been under-assessed. It was those two notices which were challenged by the Phalton Sugar Works Ltd. in the writ petition before this court. In their petition, the Phalton Sugar Works Ltd. prayed for the issue of a writ of certiorari or a writ in the nature of certiorari or other writ, direction or order under article 226 of the Constitution, for quashing or setting aside the said two notices. They also prayed for the issue of a writ in the nature of mandamus or prohibition or any other writ, direction or order, under article 226 of the Constitution, restraining and prohibiting the Income Tax Officer, the respondent to that petition, his servants and agents, from taking any steps and/or proceedings in enforcement, furtherance, pursuance or implementation of any of the said notices. By our order of 4th August, 1962, the writ petition was allowed, and this court made an order, quashing the aforesaid two notices, and also made a further order restraining the respondent (the Income Tax Officer) from taking any steps or proceedings in enforcement, furtherance, pursuance or implementation of any of the said notices. The petitioner before us, namely, the Income Tax Officer, Companies Circle II(3), Bombay, has now applied for a certificate under article 133(1)(a), (b) and (c) of the Constitution of India.

2. The material part of article 133(1)(a), (b) and (c) is in the following terms :

"133. (1) An appeal shall lie to the Supreme Court from any judgment, decree or final order in a civil proceeding of a High Court in the territory of India if the High Court certifies -

(a) that the amount or value of the subject-matter of the dispute in the court of first instance and still in dispute on appeal was and is not less than twenty thousand rupees or such other sum as may be specified in that behalf by Parliament by law; or

(b) that the judgment, decree or final order involves directly or indirectly some claim or question respecting property of the like amount or value; or

(c) that the case is a fit one for appeal to the Supreme Court;

and, where the judgment, decree or final order appealed from affirms the decision of the court immediately below in any case other than a case referred to in sub-clause (c), if the High Court further certifies that the appeal involves some substantial question of law."

3. It would be seen, therefore, that a party that claims a certificate under clause (1) of article 133 under any one or more of the sub-clauses, has to establish that there has been a judgment, decree or final order in a civil proceeding of a High Court. It is not in dispute before us that the order made by this court on 4th August, 1962, would be a judgment, decree or final order within the meaning of clause (1) of article 133. Mr. Palkhivala, appearing for the respondents, however, raises a preliminary objection that the judgment of this court of date 4th August, 1962, is not a judgment in a civil proceeding. His argument is that the relief sought by the respondents in the writ petition was a writ in the nature of certiorari, quashing the notices issued u/s 34(1)(a) of the Income Tax Act, or a writ in the nature of mandamus against the Income Tax Officer, restraining him from acting in pursuance of these notices. The proceedings, therefore, were revenue proceedings and not civil proceedings. Mr Palkhivala has referred us to certain decisions, to which we will presently advert.

4. The expression "civil proceedings" has not been defined in the Constitution. It has now been generally accepted that proceedings involving the assertion or enforcement of a civil right are civil proceedings. The question is whether the

proceedings initiated by the respondents by filing the aforesaid writ petition was a civil proceeding. The question, indeed, is not free from difficulty. The decisions, however, to which reference has been made by Mr. Palkhivala, afford assistance. The earliest decision is a decision of the Full Bench of the Patna High Court, reported in Tobacco Manufacturers (India) Ltd. v. The State. In that case, a certificate under article 133 of the Constitution was asked against the decision of the High Court on a reference by the revenue authorities u/s 21(3) of the Bihar Sales Tax Act, 1944. The Full Bench held that the decision of the High Court on the said reference was not a "judgment" within the meaning of that term as used in article 133 of the Constitution. It was further held that the decision of the High Court also did not arise out of the "civil proceedings" within the meaning of that article. At page 100 of the report it is observed :

"On the other question as to whether the decision from which the petitioner seeks to appeal to the Supreme Court arises out of a ''civil proceeding'' both Reuben and Das JJ. seem to be in agreement that it did not, and the contention of Mr. P. R. Das that a ''civil proceeding'' means and includes all proceedings except those that are criminal does not appear to have found favour with their Lordships. Indeed, as Reuben J. observed, article 132 itself contemplates that the High Court may exercise jurisdiction in ''other proceedings'' besides ''civil proceedings'' and ''criminal proceedings'' and the special jurisdiction of the High Court under the taxing Act may be one instance of such ''other proceedings''. Therefore, it follows that ''civil proceedings'' cannot be held to include all proceedings same ''criminal proceedings''."

5. Later, at page 101, it is observed :

"I agree with Das J., therefore, that the observations made in those cases seem to imply that Income Tax cases and sales tax cases are not ''civil proceedings'' within the meaning of the Constitution Act."

6. The next decision is a Full Bench decision of the Nagpur High Court reported in Sriram Gulabdas v. Board of Revenue. Here, a certificate was sought both under articles 132 and 133 of the Constitution against the decision of the High Court on a reference by the Board of Revenue, u/s 23(3) of the C. P. and Berar Sales Tax Act, 1947, and though there was a difference of opinion between the learned judges as to whether the assessee was entitled to a certificate under article 132 of the Constitution, the learned judges unanimously held that the assessee was not entitled to a certificate under article 133 of the Constitution, inasmuch as the decision of the High Court did not arise out of "civil proceedings" within the meaning of article 133 of the Constitution. At page 344 of the report, Hidayatullah J. observed :

"On the first point I have no doubt that this is not a civil proceeding at all. These proceedings arise out of collection of revenue and are before this court merely for the purpose of advice which the Board of Revenue seeks or which this court enjoins upon the Board, upon certain points of law. The essence of the proceedings is the collection of revenue and not the decision of any dispute of a civil nature in the strict sense."

7. At page 351 of the report, Mr. Justice Deo, who delivered the majority judgment, observed :

"Unlike section 66A(2) of the Indian Income Tax Act, there is no provision in the Act for a regular appeal to the Supreme Court. In the absence of such provision the right of appeal must be traced to clause (29) of the Letters Patent or to the Constitution. It cannot be disputed that the judgment was not passed on appeal or in the exercise of original jurisdiction of this court, or that the proceedings are not civil or criminal proceedings..... The proceedings u/s 23 deal with matters pertaining to liability and assessment of tax and can properly be regarded as revenue proceedings. .... Clause (29) of the Letters Patent and article 133 of the Constitution have therefore no application."

8. These two decisions no doubt relate to a decision of a High Court made in a reference made by the sales tax authorities for the opinion of the High Court on a question of law involved in that case, and were not the decisions of the High Court on an application under article 226 of the Constitution, and, therefore, cannot be termed as direct authorities on the question which we have to decide. But, indeed, these two decisions are authorities in support of the proposition that questions raised as to the liability of the assessee to taxation under the Sales Tax Act are questions arising in revenue proceedings and not in civil proceedings.

9. The next two decisions to which we will now refer relate directly to the question that arises before us. The first decision is reported in Allen Berry & Co. Ltd. v. Income Tax Officer, Patna. Here the facts in brief are : The petitioners were assessed to tax for heavy amounts u/s 23 of the Indian Income Tax Act. Against these assessment orders, the petitioners filed applications for the issue of writs under articles 226 and 227 of the Constitution. These applications were summarily dismissed by the High Court. An application was then made by the assessee for a certificate under article 133(1) of the Constitution. On an objection raised by the Income Tax department it was held that the orders complained of were not orders passed in civil proceedings within the meaning of article 133, and the petitioners were, therefore, not entitled to claim a certificate. The learned Chief Justice at page 76 of the report observed :

"It seems clear to me that every writ application is not necessarily a civil proceeding; it may be a civil proceeding, or a criminal proceeding, or other proceeding, according to the nature of the application and the questions raised and decided in the proceeding. It is well settled that a suit would not have been maintainable by the petitioners in respect of the two assessment orders; and if the petitioners had proceeded under the machinery of the Indian Income Tax Act, the proceeding would not have been anything but a revenue proceeding. The mere fact that the petitioners filed two applications for writs in the High Court against the assessment orders, does not, in my opinion, change the nature of the proceeding."

10. With respect, in our opinion, these observations would apply to the facts of the present case with equal force. It is true that what was challenged before us was not assessment orders, but the notices issued by the Income Tax Officer u/s 34(1)(a) of the Income Tax Act to reopen assessment. But that would not make any difference. It has not been contended that the assessee could have filed a civil suit challenging the notices. It is also not in dispute that had the assessee proceeded in a regular way and challenged the notices in the proceedings under the Income Tax Act, those proceedings would not have been civil proceedings but would have been revenue proceedings. The mere fact that the assessee challenged those notices by a writ application under article 226 of the Constitution would not have the effect of changing the nature of the writ application from a revenue to a civil proceeding.

11. The next decision is a decision of the Division Bench of the Allahabad High Court reported in Income Tax Officer v. Joti Prasad Agarwal. The facts of this case are similar to the Patna case to which we have referred. Here also assessment orders were challenged by a writ petition before the High Court. The application was allowed. The Income Tax Officer, therefore, prayed for the issue of a certificate under article 132(1) and article 133(1)(b) & (c) of the Constitution. It was held that the order made by the High Court was not an order made in a civil proceeding within the meaning of article 132 of the Constitution. At page 576 of the report, it is observed :

"Liability to tax is created by the Income Tax Act and is for the purpose of gathering revenues for carrying on the Government of the country. No one can claim it as a civil right that he is not liable to pay the tax. Nor can the State claim that any person is liable to Income Tax under the common law relating to civil rights. A proceeding relating to liability to Income Tax partakes of the nature of a proceeding which has been usually described as a revenue proceeding."

12. The principle that can be deduced from the aforesaid decisions appear to us to be that all proceedings which are not criminal in nature are not necessarily civil proceedings, within the meaning of article 133 of the Constitution. As to whether the proceedings initiated by a writ application under article 226 or article 227 are civil proceedings or not would depend on the nature of those proceedings and the relief sought in those proceedings. The proceedings so initiated could be either civil, criminal or other proceedings. The proceedings relating to liability to pay tax partake the character of a revenue proceeding, irrespective of the fact whether the proceedings are those taken under the taxing statute itself or initiated by a writ application under article 226 or 227 of the Constitution. We have not been shown by Mr. Joshi any decision taking a view contrary to the aforesaid two decisions of the Patna and Allahabad High Courts, which are directly in point. Mr. Joshi has, however, filed a list of eight cases where a certificate has been granted by this court to file an appeal against the decision of this court in a writ application relating to taxation matters. The fact

that leave has been granted in certain cases would not, by itself, be treated as a decision on the question now canvassed before us. At the time the certificates had been issued, no objections or contentions similar to the one raised before us appear to have been raised at that time.

13. Mr. Joshi, however, contends that the aforesaid two decisions should not be followed by this court, because the decisions do not consider the scheme contained in articles 132 to 136 of the Constitution, in the context of the enlargement of the jurisdiction of the High Court, effected by articles 225 and 226 of the Constitution. It is the argument of Mr. Joshi that u/s 226 of the Government of India Act, 1935, it was provided that "until otherwise provided by Act of the appropriate Legislature, no High Court shall have any original jurisdiction in any matter concerning the revenue, or concerning any act ordered or done in the collection thereof according to the usage and practice of the country or the law for the time being in force". This bar on the exercise of jurisdiction by the High Court had been lifted by the proviso to article 225 of the Constitution, which provides that the High Court now, after the commencement of the Constitution, in exercise of its original jurisdiction, can exercise such jurisdiction in respect of any matter concerning revenue or concerning any act ordered or done in the collection thereof. Further, by article 227, the Constitution has conferred power on the High Court to issue certain writs mentioned therein. The only articles which confer a right of appeal, as of right, are articles 133 and 134 of the Constitution. Article 132 relates to appeal on constitutional questions only. Article 136 relates to appeals on grant of special leave by the Supreme Court. The only articles which therefore confer a right on a party to appeal are articles 133 and 134 of the Constitution. It would be reasonable to assume that when the Constitution was conferring additional jurisdiction on the High Court and enlarging the jurisdiction of the High Court, the Constitution was also conferring a corresponding right of appeal on the persons affected by the exercise of that jurisdiction. It would, therefore, not be proper to place a narrow construction on the expression "civil proceeding" in article 133. On the other hand, it would be in conformity with the scheme of the Constitution to give a wider meaning to the expression "civil proceeding" in article 133, and construe it to mean all proceedings other than the proceedings mentioned in article 134 of the Constitution. Now, it is not correct to say that the scheme of articles 132 to 136 of the Constitution relating to appeal under the Constitution has not been considered in the two decisions which are directly in point. We also find it difficult to accept the aforesaid argument of Mr. Joshi. It is indeed true that the powers of the High Court have been enlarged by reason of the Constitution and the High Court now has jurisdiction to deal with matters concerning revenue or concerning any act ordered or done in the collection thereof, and it also has power to issue certain writs and orders mentioned in article 226 of the Constitution. But this by itself cannot be taken as conferring a right of appeal on the person who would be affected by the orders made by the High Court, in these matters. The right of appeal is not a common law right, but is a creature of statute. It has therefore to

be seen whether the provisions in the statute relating to appeal confer a right of appeal in any particular matter on persons affected by the order. In our opinion, it would not be open for this court to speculate in this matter. On a perusal of articles 132, 133, 134 and 136, it would be seen that article 132 relates to an appeal from a judgment, decree or final order of the High Court involving substantial questions of law as to the interpretation of the Constitution. Article 133 deals with an appeal from any judgment, decree or final order of a High Court in a civil proceeding on certain conditions mentioned in that article. Article 134 relates to appeals to the Supreme Court from any judgment, final order or sentence in a criminal proceeding of a High Court. Article 136 provides that "notwithstanding anything in this Chapter, the Supreme Court may, in its discretion, 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". Having regard to these provisions, the scheme appears to be that the Constitution contemplates the proceedings before the High Court to be either civil, criminal or other proceedings. In respect of any of these proceedings, the parties would have the right to appeal, if the case involves substantial question of law as to the interpretation of the Constitution. If no question as to the interpretation of the Constitution is involved, then the parties would have, as of right, a right of appeal if the proceedings be either civil or criminal, provided the respective conditions mentioned in articles 133 and 134 are satisfied. In other cases, an appeal can go to the Supreme Court only if the Supreme Court grants special leave under article 136, and the powers of the Supreme Court as envisaged in article 136 are very wide. An appeal would lie, on special leave, to the Supreme Court 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. In short, an appeal would lie to the Supreme Court on grant of special leave in civil cases, criminal cases, Income Tax cases and in a variety of other cases which come before different kinds of tribunals. Having regard to the provisions of these articles, in our opinion, it would be reasonable to assume that though the Constitution makers contemplated the proceedings before the High Court to be either civil, criminal or other proceedings, they conferred on parties affected, as of a right, a right of appeal only in civil and criminal proceedings. It would, therefore, not be possible to accept Mr. Joshi''s contention that we must read in articles 133 and 134 a conferment of right of appeal in respect of all matters relating to which the jurisdiction of the High Court has been enlarged.

14. The next argument of Mr. Joshi is that all proceedings under article 226 are either civil or criminal. When a person asks for a writ of habeas corpus, that is a criminal proceeding. But when a person asks for any writ other than the habeas corpus, the proceedings are necessarily civil proceedings. The proceedings started under article 226 are not proceedings under any Act, but are proceedings to quash the orders made under certain Acts, or for orders restraining the officers to take action under certain Acts. They are, therefore, civil proceedings

and not proceedings under the Act. It is not possible to accept the argument. Mr. Joshi admits that the proceedings for the issue of a writ of habeas corpus is a criminal proceeding. He admits that it is a criminal proceeding because it is a relief asked against the arrest or detention of a person in contravention of the provisions of the criminal law. If that be so, we see no reason why we should hold that even though the relief asked is a relief against an order made under taxation laws or enforcement of the taxation laws against a person, the proceedings should not be revenue in nature. On the other hand, it would be logical to hold that the nature of the relief which is asked for in each case under article 226 should be determinative of the nature of the proceeding. If the relief asked is against the exercise of powers under criminal law, the proceedings would be criminal proceedings. If the relief asked is for enforcement or in exercise of a civil right, or to prevent infringement of a civil right, the proceedings would be civil in nature. Similarly, if the relief is sought in relation to the enforcement of the taxation law, the proceeding would be revenue in nature. It is difficult to accept the contention of Mr. Joshi that proceedings under article 226 are either civil or criminal in nature. On the other hand, we agree, with respect, with the view taken by the Patna High Court that the writ application may be a civil proceeding or a criminal proceeding or other proceeding according to the nature of the application and the questions raised and decided in the proceeding. In the instant case, as already stated, the assessee sought to get quashed the notices issued u/s 34 of the Income Tax Act, and also prayed for an order restraining the Income Tax Officer from taking any action in enforcement of the notices. In other words, in the proceedings, a protection was sought against action being taken under the process issued under the Income Tax Act. The proceedings under the Income Tax Act, as already stated, are revenue in nature. The writ proceedings with which we were dealing, therefore, were revenue in nature.

15. It is next contended by Mr. Joshi that section 66A of the Income Tax Act confers a right of appeal on the assessee as well as on the department against an order made by the High Court on a reference made u/s 66. It will have to be assumed that the provisions of section 66A are in conformity with the provisions of the Constitution, and do not contravene the provisions of the Constitution. Articles 133 and 134 are the only articles which confer a right of appeal on a party. Article 134 relates to a criminal proceeding. Admittedly, the proceedings under the Income Tax Act are not criminal proceedings. It must, therefore, follow that the order made by the High Court in relation to the Income Tax matters u/s 66 of the Income Tax Act are civil proceedings within the meaning of article 133 of the Constitution. Necessarily the writ applications relating to the Income Tax matters would be civil proceedings. We are not inclined to accept this argument of Mr. Joshi. In our opinion, articles 133 and 134 are the articles which confer a right of appeal on a party. Those articles confer on litigants a right of appeal in civil proceedings and criminal proceedings in certain circumstances. That does not mean that it is not open to the legislature to confer on parties a right of

appeal in other proceedings. Articles 132 and 133 have nothing to do with the exercise of the legislative powers. The right of appeal conferred u/s 66A is conferred by the legislature in exercise of its legislative powers. Article 133 or 134 does not place any embargo on the exercise of that power. On the other hand, it would be seen from article 136 that it is open to the legislature, by law, to confer on the Supreme Court such further jurisdiction and powers with respect to any of the matters in the Union List as Parliament may by law confer. All that can be said is that it is not open to the legislature to act in derogation of the provisions of articles 133 and 134 of the Constitution and take away the rights conferred by them on litigants.

16. Lastly, Mr. Joshi drew our attention to rule 631 of the Original Side Rules, and, on the basis of that rule, contended that the proceedings commenced on a writ application are civil proceedings. Rule 631 is in Chapter 31. That Chapter contains rules for issue of writs under article 226 of the Constitution other than habeas corpus. Rule 631 reads : "Every order made under this Chapter shall be executed as if it were a decree made in exercise of the ordinary original civil jurisdiction of this court." Mr. Joshi also referred to rule 16 in Chapter 17 of the Appellate Side Rules, which is in the following terms : "Every order passed on a civil application under article 226 of the Constitution including any order as to costs shall be drawn up as if it were a decree and shall be executable as a decree in the manner provided in the Code of Civil Procedure." The argument is that the orders made in writ applications other than applications for habeas corpus are executed as decrees made by the High Court in exercise of its original jurisdiction. The proceedings, therefore, under article 226 other than habeas corpus must necessarily be civil proceedings. Now, on the language of the Rules themselves, the orders made by this court on applications under article 226 are not decrees. The use of the expression "as if" or "as" in both these rules clearly indicates that both these rules bring into existence a legal fiction, and the fiction created is that though the orders made on applications under article 226 are not in fact decrees in exercise of the ordinary original civil jurisdiction, they be treated, for the purpose of execution of those orders, as decrees made in exercise of the ordinary original jurisdiction. The fiction cannot be carried further than for the purposes it has been enacted. These are all the contentions raised by Mr. Joshi.

17. For the reasons stated above, we are not inclined to take a view different than that taken by the two decisions in Allen Berry & Co. v. Income tax Officer and Income Tax Officer v. Joti Prasad Agarwal. We, therefore, hold that the judgment of this court, against which a certificate is sought under article 133, is not a judgment in a civil proceeding, and, therefore, the petitioner is not entitled to the certificate as prayed for. The rule is, therefore, discharged with costs.

