

(1962) 08 CAL CK 0017
In the Calcutta High Court
Case No : Appeal No. 153 of 1959

Shivaram Poddar

APPELLANT

Vs

Income Tax Officer

RESPONDENT

Date of Decision : 02-08-1962

Acts Referred:

Constitution of India, 1950 — Article 132, 133, 133(1)
Income Tax Act, 1922 — Section 34

Citation : AIR 1963 Cal 281 : (1964) 51 ITR 807

Hon'ble Judges : H.K. Bose, C.J.; Debabrata Mookerjee, J

Bench : Division Bench

Advocate : S. Roy and R.N. Bajoria, for the Appellant; E.R. Meyer and B.L. Pal, for the Respondent

Final Decision : Dismissed

Judgement

Debabrata Mookerjee, J.—This is an application for a certificate under Article 133 of the Constitution in respect of a Division Bench decision whereby an order dismissing a writ application for quashing a notice u/s 34 of the Indian Income Tax Act was affirmed.

2. The facts requiring to be stated for the limited purpose of this application are these: the petitioner was a partner of a firm called Balmukund Radheyshyam which carried on the business of commission agency in sale and purchase of cotton and cotton piece goods at Ratlam and Indore. The firm commenced business sometime in December, 1947, but was dissolved in February, 1950. In August, 1952, one of the partners made a return of income of the said firm showing Rs. 18700/- and odd as net profits of the firm's first year of business, that is, the assessment year 1949-1950. An assessment was made on that basis and the tax assessed was duly paid. In October, 1955, the Income Tax Officer, (Central), Circle II, Calcutta, called upon the ex-partners of the said firm to produce certain books and accounts. This requisition was followed up by a notice on October, 22, issued u/s 34 of the Income Tax Act addressed to the petitioner

informing him that the Officer had reason to believe that his income assessable to tax for the year ending 31st, March, 1950, had been under-assessed and therefore it was proposed to re-assess the income. The petitioner objected to the Income Tax Officer's jurisdiction to proceed in the matter. The objection having been overruled, an application under Article 226 of the Constitution was filed upon which a Rule Nisi was issued by this Court. In due course, it came to be heard by Sinha, J., who made the Rule absolute on January 3, 1957. The Department took an appeal against the decision but the appeal failed and was dismissed. Meanwhile, on March 28, 1958, the Income Tax Officer had issued another notice u/s 34 read with Section 22 (2) of the Act to the petitioner addressed as "partner of the firm of Messrs. Balmukund Radheshyam at the time of its dissolution". The notice stated that the Officer concerned had reason to believe that the income of the firm assessable to tax for the assessment year 1949-1950 had been under-assessed. It proceeded to state:

"Whereas u/s 44 of the Indian Income Tax Act, 1922, you the said Shivaram Poddar and Ram Narayart Ojha (deceased) 33, Netaji Subhas Road, Calcutta, who were partners of the said firm of Messrs. Balmukund Radheyshyam at the time of its dissolution, are jointly and severally liable to assessment in respect of the income, profits and gains of the said firm before its dissolution and for the amount of tax payable thereon..... .."

The notice also recorded the fact that the Commissioner of Income Tax (Central) Calcutta, had been satisfied that this was a fit case for the issue of a notice u/s 34.

3. The petitioner again challenged the jurisdiction of the Income Tax Officer to proceed against the petitioner but the objection was overruled; he moved again this Court under Article 226 and obtained a Rule which was eventually discharged by Sinha, J., by a judgment and order dated April 27, 1959. Against this decision, he took an appeal which was heard by this Bench and dismissed by a judgment and order dated January 11, 1962. It is against this appellate decision that the petitioner proposes to take a further appeal to the Supreme Court.

4. The sole question canvassed in the appeal related to the construction of Section 44 of the Income Tax Act as it stood before its amendment by Finance Act II of 1958. The contention was that a partner of a dissolved firm could not be assessed to tax for its pre-dissolution income. If the contention was right, it would follow that there would be no question of the issue of notice u/s 34 of the Act on the ground that there had occurred underassessment.

5. Upon hearing the parties on the provisions of Section 44 of the Act as it stood before and after its amendment and upon a consideration of the decision rendered by the Supreme Court in the case of C.A. Abraham, Uppotttil, Kottayam Vs. The Income Tax Officer, Kottayam and Another, as well as a decision of the Bombay High Court in the case of Ramniwas Hanumanbux Somani Vs. S. Venkataraman, Income Tax Officer, C-III Ward, Bombay and Another, , this

Bench held that the amendment of 1958 of Section 44 of the Act merely made explicit what was already implicit in the unamended section. The Bench also took into account an earlier decision of a Division Bench of this Court in the case of *R.N. Bose Vs. Manindra Lal Goswami*, , but reached the conclusion that in view of the later decision of the Supreme Court in *C.A. Abraham, Uppotttil, Kottayam Vs. The Income Tax Officer, Kottayam and Another*, it would be right to hold that the discontinuance of business of a partnership firm as a result of dissolution attracted the provisions of Section 44 of the Act. The Bench recorded its agreement with the Bombay view that the amendment of Section 44 did not add much to the section in its unamended state but had merely the effect of making explicit what was implicit in the section before the amendment was introduced. In this view, this Bench held that the notice was a valid notice and that the Income Tax Officer had jurisdiction to proceed u/s 34 of the Act. The present application asks for leave to appeal to the Supreme Court from this judgment and the main ground of the proposed appeal seems to be that this Bench wrongly construed the provisions of Section 44 and erred in holding that an assessment could be made of the income of a dissolved firm and if a dissolved firm could not be assessed in respect of its pre-dissolution income, the present petitioner could not be proceeded against by the issue of a notice u/s 34 of the Act.

6. On behalf of the Department, a preliminary objection has been taken as to the maintainability of this application for a certificate. The objection is two-fold. First, that a certificate under Article 133 cannot be granted even if substantial questions of law are involved since they relate to a proceeding which is not a civil proceeding; secondly, the order of this Bench dismissing the writ appeal is not at final order within the meaning of that Article.

7. We have heard Counsel on both sides at length on the preliminary objection and we think that the objection must succeed, at least, on one of the grounds.

8. On the petitioner's behalf, it has been said that the proceeding to which the application relates is a civil proceeding within, the meaning of the Article and reliance has been placed upon a number of decisions in support of the contention, the most representative of which seems to be the case of *Sardar Kapur Singh Vs. Union of India (UOI)*, . One of the questions there raised related to certain proceedings being taken against the petitioner in that case under the Public Servants Inquiry Act (Act 37 of 1850). The order passed in the enquiry was challenged in a writ petition before a Bench of the Punjab High Court. The matter eventually came to be placed before a Full Bench which held that a Bench of that Court having overruled the objections, it amounted to a determination of the petitioner's civil rights. The view was expressed that if the petitioner had brought a suit and wanted to go on appeal to the Supreme Court, the matter would have been covered by Article 133. There was no reason then why the nature of the proceeding should become different merely because the petitioner had sought a remedy in the High Court by way of an application under Article

226 rather than by way of a suit. It was said that it would not be right to lose sight of the fact that the petitioner in that case had been agitating the question of his right to remain in service and u/s 9 of the CPC a suit in which the right to property or to office is contested is a suit of a civil nature. The application by which that right was sought to be enforced was an attempt to vindicate the petitioner's right to office and must, therefore, be considered to be a civil proceeding even though the final order of dismissal determining his right to office might have been made by the President in the exercise of his administrative and executive powers. Accordingly, the conclusion was reached that any proceeding in a court of law brought to vindicate or enforce a civil right would fall within the word "sue" and if such was the position, it would be difficult to contest that a writ directed against proceedings under Act 37 of 1850 would not come within the meaning of the words, "civil proceeding", occurring in Article 133. Reference was made to the decision reported in *Justices of the Peace for Calcutta v. Oriental Gas Co., Ltd.*, 17 Suth WR 364, in which a mandamus was issued upon the application of the Oriental Gas Company against the Justices of the Peace commanding them to make compensation for damages occasioned by certain drainage works and also commanding them to make a reference to a Judge of the Small Cause Court to ascertain the Compensation. An appeal was taken against the order passed by the trial Judge and the objection taken that this was not a judgment was overruled and it was held that a proceeding by way of mandamus was a proceeding in a civil case. It is noteworthy that a cognate question came to be considered by this Court in the case of *Commr. of Excess Profits Tax, West Bengal Vs. Ruby General Insurance Co. Ltd.*, . While it is true that the question before us was not directly in issue in that case but still it may be useful to note that this Court held that the expression "civil case" was not used in the Federal Court (Enlargement of Jurisdiction) Act, 1947, in the strict sense of cases governed by the Civil Procedure Code, but was used in a sense large enough to comprise proceedings in Income Tax matters. The jurisdiction to hear appeals arising out of Income Tax proceedings came to the Federal Court under the aforesaid Act and has now been conferred on the Supreme Court by Article 135 of the Constitution.

9. On behalf of the petitioner, Mr. Roy put the matter a little differently and he argued that the issue of the notice u/s 34 of the Income Tax Act in the present case amounted to a civil wrong inasmuch as the Department had no jurisdiction to issue the notice. The contention has been that the question of want of jurisdiction is a fundamental question which has had the effect of determining the petitioner's right not to be proceeded against under that section. Our attention has been called to a decision of the Supreme Court in the case of *The State of Tripura Vs. The Province of East Bengal*, in aid of the proposition that the issue of an illegal notice is an actionable wrong for which the remedy lay either by way of suit restraining the Department from proceeding with the enquiry commenced u/s 34 or the person affected had the alternative remedy by way of a writ requiring the authorities to refrain from giving effect to the said notice. In

this case the Supreme Court was considering the true effect of certain provisions of the Indian Independence (Rights, Property and Liabilities) Order in connection with an assessment proceeding against the State of Tripura. The contention was that under the Bengal Agricultural Income Tax Act, 1944, no ruler of an Indian State could be taxed under the provisions of that Act. The Supreme Court proceeded on the assumption that the averments in the plaint were correct and held that the words "liability in respect of an actionable wrong" should be given a wide meaning. Patanjali Sastri, J., who spoke for the majority of the Court, observed that there was no reason why the words should be understood in the restricted sense of liability for damages for completed tortious acts. His Lordship went on to say:

"We consider that the words are apt to cover the liability to be restrained by injunction from completing what on the plaintiff's case was an illegal or unauthorised act already commenced. The service of the notice on the plaintiff u/s 24 (2) of the Bengal Act amounts to much more than a mere threat in the abstract to impose an illegal levy. It is the actual initiation of an illegal assessment proceeding which, in the normal course, will in all probability culminate in an illegal levy of tax It is thus plain that the service of a notice requiring a return of income to be furnished for assessment under the Act is a step fraught with serious consequences to the assessee, and if the assessment proposed was illegal and unauthorised by reason of the Act itself being ultra vires in so far as it purported to make the Rulers of Indian States liable to taxation thereunder as contended for by the plaintiff, the service of such notice marked the commencement of a wrongful act against the plaintiff by the Bengal Government under colour of the Act and there can be no doubt that such a wrongful act is actionable in the sense that an action would lie in a civil court for an injunction restraining its completion."

10. In the case cited above, the Supreme Court also considered the effect of the decision of the Privy Council in *Raleigh Investment Co., Ltd. v. Governor-General in Council* 1947 FCR 59 : (AIR 1947 PC 78). The following extract from the judgment of the Privy Council was set out but the case was distinguished on the ground that the suit was not one to set aside or modify an assessment made under the Act since no assessment had yet been made when suit was instituted:

"In form the relief claimed does not profess to modify or set aside the assessment. In substance it does, for repayment of part of the sum due by virtue of the notice of demand could not be ordered so long as the assessment stood. Further, the claim for the declaration cannot be rationally regarded as having any relevance except as leading up to the claim for repayment, and the claim for an injunction is merely verbiage. The cloud of words fails to obscure the point of the suit."

11. The observations of the Supreme Court have been relied upon by Mr. Roy to strengthen his case that the wrongful act consisting of the issue of notice u/s 34 has the effect of subjecting the petitioner to harassment and trouble by

commencing against him an illegal and unauthorised assessment proceeding which may eventually terminate in unlawful imposition and levy of tax. It is on this basis that the argument has been advanced that the petitioner had the right to sue the Department for permanently restraining them from proceeding with the re-assessment u/s 34 of the Act. Viewed in the light of the decision given by the Supreme Court, we think it [^] would perhaps be right to hold that the issue of the notice, which, according to the petitioner, was wholly unauthorised and without jurisdiction, amounted to an actionable wrong which would furnish a cause of action. Instead of bringing a suit, the petitioner had applied to this Court for an appropriate writ under Article 226 but that, according to Mr. Roy, makes no difference in the result and it has been his contention that in view of the pronouncement of the Supreme Court, it must be held that the proceeding to which the present application for certificate relates must be held to be a civil proceeding within the meaning of Article 133 of the Constitution.

12. On behalf of the Department, Mr. Pal did not withdraw his objection but stated that he recognised the force of the contention that since there had been no completed assessment, the rule in *Raleigh Investment* would not be attracted and there would be no question to set aside or modify an assessment under the Act; and if the petitioner had a cause of action to bring a suit against the Department for whatever relief he might have been entitled to, he might as well seek to enforce it by means of an application under Article 226. It seems to us that since no formal assessment has been made, there would be no question of setting it aside or modifying it; only a notice has been issued under section" 34. As at present advised, we think the alleged invalidity of the notice can be made a ground of attack either in a civil proceeding or in a writ application in view of the decision of the Supreme Court to which we have referred. We do not, however, feel called upon to express any definite opinion on this part of the preliminary objection since we think that the objection must prevail on the other ground that the order of this Bench is not a final order within the meaning of Article 133 of the Constitution.

13. Before we leave the point, we might consider Mr. Roy's request that, if necessary, we should revise our view expressed on a former occasion that an application under Article 133 relating to Income Tax proceedings was not a civil proceeding. The question arose in Appeal No. 41 of 1959, *Sm. Benarashi Devi v. T. Bellan*, decided on September 18, 1961, in which this Bench considered the matter. It is true this aspect was canvassed at some length and reference was made to the decision in the case of *Allen Berry and Co. Ltd. and Others Vs. Income Tax Officer and Another*, . In that case *S. K. Das, C. J.*, (as he then was), held that since the applicants wanted to set aside certain assessment orders made by the Income Tax authorities, the matter clearly related to a revenue proceeding. The decision of the Madras High Court in the case of *C. Dhanalakshmi Ammal Vs. Income Tax Officer, II Additional City Circle II, Madras, and Others*, , was referred to and it was argued that *Rajamannar, C. J.*, had held that the proceeding relating to realisation of taxes was a proceeding within the

meaning of Article 133 of the Constitution. This application had been made for a writ of mandamus to restrain the Income Tax officer and Collector from attaching and bringing to sale certain properties which stood in the name of a Hindu lady. The realisation was proposed to be appropriated towards arrears of tax due from her husband. The learned Chief Justice referred to the Patna case and distinguished it but did not dissent from it. He held that the applicant had no doubt, asked for the Court's assistance to quash a certain order which had reference to an Income Tax proceeding but the relief sought by her did not relate to setting aside or quashing the order of assessment itself. Indeed, the learned Chief Justice pointed out that there was no quarrel with the assessment made and the petitioner's only complaint was that her own property was being attached and sold to realise the amount of tax due from her husband. In such circumstance, it was held that shAIRE had only been asserting her right to the property standing in her own name and seeking relief against interference with that right. Accordingly, the application was held not to relate to a revenue proceeding. The case of Income Tax Officer Vs. Joti Prasad Agarwal and Others, was also one of the decisions cited in that context and our attention was drawn to the observation that a proceeding relating to liability to income tax partakes of the nature of a revenue proceeding and there existed no provision similar to Articles 133 and 134 of the Constitution for grant of certificate by the High Court in respect of such revenue matters. These decisions were relied upon by the party contending before us in that application that the proceeding in question could not be called "civil proceedings". This Bench did not find it necessary in that case to express any definite opinion. It was only observed that the contention had "considerable force" and the Bench chose in that case to rest its decision to refuse the certificate asked for under Article 133 on the sole ground that it did not satisfy the test that the order was a final order. In such circumstance, there can be no occasion for revising the view which this Bench might have expressed on a previous occasion.

14. We have also been pressed to consider whether, in view of the importance of the question raised, we should not think of referring it for the decision of a larger Bench. The question is no doubt important but it has been debated and discussed at great length not only before this Court but also before many other High Courts. It may be that on this aspect of the matter there is no decision of the Supreme Court; but we do not think there is any occasion for reserving the question for consideration of a larger Bench, particularly in view of the fact that the prevailing view in this as well as in other Courts is that unless an order is a final order no certificate can be granted under Article 133 of the Constitution.

15. Mr. Roy has relied on the Full Bench decision of the Punjab High Court already cited *Sardar Kapur Singh Vs. Union of India (UOI)*, in support of his contention that the order in the present case is a final order within the meaning of the Article. This argument proceeds on the basis that the order sought to be appealed from has determined a question of right or liability. It has been said that by reason of the appellate decision, the petitioner's liability to be proceeded

against u/s 34 of the Income) Tax Act has been finally determined. He cannot any longer re-agitate the question relating to the legality or the validity of the notice before the Income Tax authorities. That question having been finally decided cannot be re-opened. Even if the petitioner, it is said, desired to bring a suit to restrain the Income Tax Officer from proceeding with the assessment, he will be met with the objection that the question having once been decided by this Court cannot again be re-agitated in the suit. The decision of the matter in a suit would thus be barred by the principles of *res judicata*. We do not doubt the position that the petitioner is not entitled any more to reopen the question of legality or validity of the notice u/s 34 on the ground he challenged it in the writ proceedings. That he should be so precluded is a matter entirely of his own seeking. It may be that he had a right of suit; but the choice of forum was his, and he preferred to attack the notice in a writ application. If he had raised the objection as to the validity of the notice before the Income Tax Officer and if that objection was overruled, he would have the right to appeal from the decision under the Income Tax Act, just as when his writ application was dismissed by this Court, he availed himself of the right of appeal and took the chance of a judgment against him. In such circumstance, we do not think that the plea of a final determination of his right to challenge the validity of the notice can be of any assistance to the petitioner in inducing the Court to hold that the order of this Court proposed to be appealed against must be regarded as a final order.

16. The view of the Punjab High Court as expressed in the Full Bench decision does not appear to us to depart in any way from the accepted view that in order to be appealable, an order must be final in the sense that it must finally decide the rights of the parties and the order cannot be regarded as final if it decides just an issue even if a vital issue in the case. Mr. Roy seized upon a casual observation in that judgment that the Court has to see in every case whether the rights of the parties are finally determined by the decision and this will depend upon the facts and circumstances and the nature of the decision. The contention has been that in the present case the question of legality of the notice having been finally determined by this Court, the present application falls within the dictum of the Punjab rule that it requires to be decided as to whether the order amounts to a final order. We are unable to take this view. Indeed, it has been held consistently that when rights of parties remain to be determined, the decision is not final even though it might involve determination of a vital issue between them. Indeed, the question is an old one. In the case of *Firm Ramchand Manjimal v. Firm Goverdhandas Vishandas Ratanchand*, 47 Ind App 124 : (AIR 1920 PC 86), Lord Cave expressed the view on the relevant sections of the CPC relating to appeals to the Judicial Committee, that an order is not final if it does not finally dispose of the rights of the parties but leaves them to be determined by the Courts in the ordinary way. This dictum was followed by Sir George Lowndes in AIR 1933 58 (Privy Council) , where it was held that the question really was whether a decision finally disposed of the rights of the parties. It would not make any difference in the result even if the decision went to the root

of the matter and decided a vital issue. Finality must be finality in relation to the suit. It is only right to recall the exact words of the Judicial Committee:

"Lord Cave in delivering the judgment of the Board laid down, as the result of an examination of certain cases decided in the English Courts, that the test of finality is whether the order "finally disposes of the rights of the parties", and he held that the order then under appeal did not finally dispose of those rights, but left them "to be determined by the Courts in the Ordinary way." It should be noted that the Appellate Court in India was of opinion that the order it had made "went to the root of the suit, namely the jurisdiction of the Court to entertain it," and it was for this reason that the order was thought to be final and the certificate granted. But this was not sufficient. The finality must be a finality in relation to the suit. If, after the order, the suit is still a live suit in which the rights of the parties have still to be determined, no appeal lies against it u/s 109 of the Code It no doubt decided an important, and even a vital, issue in the case, but it left the suit alive, and provided for its trial in the ordinary way."

It is true that this decision was rendered under the CPC but the ruling consideration under the Constitution as well as under the Code appears to be the same. The Federal Court also took the same view in AIR 1943 24 (Federal Court) , where a final order was held to mean a final decision on the merits. In AIR 1949 1 (Federal Court) , the position was emphasised as to whether the decision in question finally decided the dispute or left the rights to be determined. In the case of Mohammad Amin Bros. Ltd. v. Dominion of India, 1949 FCR 842 : (AIR 1950 FC 77), Mukherjea J., (as he then was), referred to the decisions of the Judicial Committee in Ramchand Manjimull's case, 47 I A 124 : (AIR 1920 PC 86) and AIR 1933 58 (Privy Council) and to the decision of the Federal Court itself in AIR 1949 1 (Federal Court) and observed that the test for determining the finality of an order is whether the order finally disposed of the rights of the parties. The learned Judge proceeded to say:

"To quote the language of Sir George Lowndes in AIR 1933 58 (Privy Council) "the finality must be a finality in relation to the suit. If after the order the suit is still a live suit in which the rights of the parties have still to be determined, no appeal lies against it." The fact that the order decides an important and even a vital issue is by itself not material. If the decision on an issue puts an end to the suit, the order will undoubtedly be a final one, but if the suit is still left alive and has got to be tried in the ordinary way, no finality could attach to the order."

17. Mr. Roy has relied upon the decision of the Supreme Court in case of Shiromani Gurdwara Parbandhak Committee and Others Vs. Raja Shiv Rattan Dev Singh and Others, , in support of his contention that to all intents and purposes the order proposed to be appealed from in the present case falls within the rule laid down in that case. There the contention was that the order appealed from was not a final order within the meaning of Article 133 since it related to an order of remand. On this question Jagannadhadas J., who spoke for the Court referred with approval to certain, observations of the High Court on the point

which were as follows:

"It was finally decided that the building in dispute was merely a private property and it was neither a Gurdwara nor a Sikh Gurdwara and that no claim could be made by the 56 worshippers merely because it was a Gurdwara and that the notification of 1929 was inconsistent with the notification u/s 3. The decision on these three points finally determines the rights of the parties in regard to the ownership of the property.

If it is private property, as it has been held by this Court, then a declaration must be given as prayed for by the plaintiff and as a consequence the injunction will follow."

After having set out this passage, the learned Judge proceeded to say that upon remand the trial court, out of deference to the views expressed, did nothing except passing a decree in terms of the order. So it seems clear that nothing at all was done except recording a decree in terms of the direction. Accordingly, the Supreme Court held that on the facts of that case the judgment of the High Court appealed from did amount to a final order. In our view, this decision, is distinguishable from the facts of the present case. It must be recalled that nothing whatever has been done in the proceeding commenced by Section 34 of the Income Tax Act. Only a notice had been issued, the validity of which was challenged by the petitioner. Both before the Income Tax Officer and before this Court his contention has been negated. The effect of the writ proceedings merely is that it is no longer open to the petitioner to challenge the notice on the grounds on which he challenged it before this Court. But nothing more has been done. It is still open to the petitioner to convince the Income Tax Officer that there has been no under-assessment and it would be perfectly open to him to take any step in aid of his contention before that Officer and, if need be, before the Appellate Officer to establish that no re-assessment is called for. Indeed, the entire proceedings by way of re-assessment remain to be gone through. There has been no consideration at all of the merits of the matter. The merits cannot possibly be affected by reason of the decision of this Court in the writ appeal that the proceedings u/s 34 have been validly initiated.

18. Mr. Roy has asked us to notice an observation made by the Supreme Court in the case of *Jethanand and Sons Vs. The State of Uttar Pradesh*, . The passage in question reads:

"An order is final if it amounts to a final decision relating to the rights of the parties in dispute in the civil proceeding."

We respectfully agree and we do not think that this observation at all helps the petitioner in any way. Indeed, the passage taken as a whole quite clearly indicates that the Supreme Court has taken the same view as was taken by the Judicial Committee so far as the question of finality of orders is concerned. In this case *Shah, J.*, who spoke for the Court observed:

"By its order, the High Court did not decide any question relating to the rights of the parties to the dispute. The High Court merely remanded the cases for retrial holding that there was no proper trial of the petitions filed by the appellants for setting aside the awards. Such an order remanding the cases for retrial is not a final order within the meaning of Article 133(i)(c)."

Then follows the excerpt which we have quoted which, in its turn, is followed up by these words:

"If after the order the civil proceeding still remains to be tried and the rights in dispute between the parties have to be determined, the order is not a final order within the meaning of Article 133."

AIR 1933 58 (Privy Council) decided by the Judicial Committee was thereafter approvingly referred to.

19. Another decision of the Supreme Court reported in *The State of Orissa Vs. Madan Gopal Rungta*, , was relied upon on behalf of the petitioner in aid of his contention that the question of finality has to be studied in relation to the facts of each case. The following observation of Kania, C. J., was referred to to persuade us to hold that the decision of this Bench which is proposed to be appealed from is a final order within the meaning of the Article:

"A preliminary objection was raised about the maintainability of the appeals on the ground that no final orders were passed on the petitions. That objection must fail in view of the fact that with these orders the petitions were disposed of finally and nothing further remained to be done in respect of the petitions. The fact that the operation of the order is limited to three months or a week after the filing of the intended suit does not prevent the order from being final."

Looked at in a detached manner and divorced from the facts of the case, this passage might be held to imply that whenever an appeal is disposed of, it decides the matter finally within the meaning of Article 133. What happened in *The State of Orissa Vs. Madan Gopal Rungta*, was that the High Court at Orissa had granted a certain interim relief while dismissing a writ petition under Article 226. Relief was granted pending the institution of a suit by directing that the order made by the Court dismissing the petition would not take effect until such time as was indicated in the order. The obvious purpose was to enable the applicant to institute a suit upon notice u/s 80 of the Civil Procedure Code. Indeed, the learned Judges of the High Court made it plain that they had made the interim order for the purpose of protecting the applicant from irreparable loss. Kania C. J., observed that an interim relief can be granted only in aid of and as ancillary to the main relief which might be available to a party on final determination of his rights in a suit or proceeding. In that case the writ petition was dismissed and yet the operation of the order of dismissal was stayed for a time. This could not be done and in the context of these facts, the Supreme Court observed that when the writ petition failed, it must be taken to have been finally disposed of. It was in this sense that the order was described as a final

order. It is to be observed that the writ petition was the only proceeding then pending. When therefore the writ proceeding terminated, there remained nothing which might be called subsisting. In that view, the Supreme Court took the order of dismissal of the writ petition as a final order in the somewhat peculiar circumstances of that case. In the present case, the position is entirely different. It is true the writ appeal has failed but there still remains the proceeding before the Income Tax Officer to be gone through. One cannot ignore the fact that the writ petition and the appeal therefrom were in connection with and arose out of the proceeding still pending before the Income Tax Officer. With the dismissal of the writ appeal, the matter is not at an end. It is very much alive and it will continue to be alive until the proceedings terminate either in the petitioner's favour of against him. Surely, it cannot be said by any means that the order proposed to be appealed from, terminated the proceeding before the Income Tax Officer.

20. The question of finality was considered by a Full Bench of the Nagpur High Court in the case of AIR 1952 305 (Nagpur) . In that case there was an assessment made by an Assistant Commissioner of Sales Tax. The assessee being dissatisfied with the assessment, preferred an appeal to the Commissions but the appeal was not admitted since they had not deposited the amount of tax as required by Section 22 (1) of the Central Provinces and Berar Sales Tax Act, 1947. The assessee then applied to the High Court under Article 226 for a direction on the Commissioner to admit the appeal without deposit. That application was rejected. The question arose whether the order of the High Court was a final order within the meaning of Article 133. The Court held that the order was not a final order and it was observed :

"..... a final order to be appealable to the Supreme Court must affect the merits of the case between the parties by determining some right or liability. In the present case, the order of this Court is not an order on merits, that is, with regard to the applicant's liability to pay tax, and does not determine any right except the one to prosecute the appeal before the Commissioner of Sales Tax without paying the tax assessed on it. The right to continue the appeal without paying the tax has nothing to do with the merits of the appeal and therefore the decision of this Court negating the applicant's contention cannot be regarded as a "judgment" or a "final order"."

21. Turning to the facts of the present case, it must be held that the decision of this Court proposed to be appealed from only touches the fringe of the case now pending before the Income Tax Officer. It is true the question of the validity of the notice has been decided but that is very different from saying that the question of liability to pay enhanced tax has been determined. As we have said, it will still be open to the petitioner to prove to the satisfaction of the Department that it is not a case of under-assessment. If he succeeds in establishing that, the proceedings will be dropped. The question of validity of the notice which has been decided is certainly not the whole of the question. It has hardly anything to

do with the merits of the matter. The proceedings are quite alive before the Income Tax Officer awaiting his decision. It may be that one out of several issues has been disposed of by the appellate decision. It may even be a vital decision on a cardinal point but no more than a decision on just an issue which does not affect the merits of the proceeding.

22. The Allahabad High Court in the case of Savitri Devi Vs. Rajul Devi and Others, had occasion to examine the question as to whether an order of the High Court in appeal reversing the order of the trial court recording a compromise was a judgment or final order within the meaning of Article 133. It was held by a Full Bench of that Court that the order was merely interlocutory. The learned Judges pointed out that an order to be final must finally dispose of the rights of the parties; that the finality must be determined in relation to the suit or proceeding and an order cannot be treated as a final order if the suit was still left alive for the purpose of determining the rights and liabilities of the parties in the ordinary way.

23. Our own Court has had occasion to consider the question a number" of times. It would suffice to notice one or two of these decisions. In the case of Mukunda Das Nandy and Others Vs. Bidhan Chandra Roy, , an application under Article 133 was directed against an order of this Court refusing to entertain an appeal on the ground that it lay to the District Judge and directing return of the memorandum of appeal for presentation to the proper Court. The contention was that the decision was a judgment or final order within the meaning of Article 133. The contention was negatived and it was held that the decision involved no determination of the merits of the matter.

24. In the case of West Jamuria Coal Co. Vs. Bholanath Roy and Others, ,Chakravartty C. J. considered the question and held that there was internal indication in the Constitution itself that the decision on an issue, even a vital issue, would not necessarily make it a final order appealable under Article 133. In this context Article 132 becomes instructive; it contains an Explanation: "For the purpose of this Article, the expression "final order" includes an order deciding an issue which, if decided in favour of the appellant, would be sufficient for the final disposal of the case." It is remarkable that this Explanation is conspicuously absent from Article 133. Where constitutional questions are involved, there appears to be a deliberate relaxation as regards the question of appealability of an order. In such matters, even though an order might not finally dispose of a case on the merits it will be appealable provided the other conditions of the Article are satisfied. Even if the decision is confined to an issue which, if decided in favour of the appellant, would be sufficient for the final disposal of the case, such decision would be liable to appeal under the provisions of Article 132. Thus, there is a marked difference in approach between the two Articles; Article 132 permits a decision on a vital issue to be agitated before the Supreme Court even if it is a decision on just an issue whereas Article 133 does not permit an appeal to be taken unless the order proposed to be appealed from is a complete

adjudication determining the rights of the parties. It seems to us that the absence of an explanation like the one attached to Article 132 is an indication that unless an order proposed to be appealed from under Article 133 completely disposes of and determines the rights of the parties, no appeal was intended to be permitted under that Article.

25. For these reasons, we are of the opinion that the decision proposed to be appealed from is not a final order within the meaning of Article 133 of the Constitution.

26. We accordingly allow the preliminary objection taken on behalf of the respondents and dismiss this application with costs.

Bose, C.J.

27. I agree.