(1965) 03 P&H CK 0029

In the Punjab And Haryana At Chandigarh

Case No : Supreme Court Application No''s. 92 and 107 of 1964

The Assessing Authority, Ludhiana APPELLANT

Vs

Mansa Ram RESPONDENT

Date of Decision : 26-03-1965

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 109
Constitution of India, 1950 — Article 133

Citation : AIR 1965 P&H 459 : (1965) 2 ILR (P&H) 143

Hon'ble Judges : S.S. Dulat, J;P.D. Sharma, J;A.N. Grover, J

Bench : Full Bench

Judgement

Grover and Gurdev Singh, JJ.—The question that has arisen in both these petitions (S. C. As. Nos. 92 of 1964 and 107 of 1964) under Art. 133(c) of the Constitution of India for leave to appeal to the Supreme Court against the orders of a Bench of this Court is whether the proceedings in which the judgments were delivered by this Court are civil proceedings in respect of which alone leave can be granted under Art. 133. There are number of decisions of various High Court s namely,. Allen Berry and Co. Ltd. and Others Vs. Income Tax Officer and Another, , Sriam Gulabdas v. Board of Revenue AIR 1954 Nag. 1 (FB), Income Tax Officer Vs. Joti Prasad Agarwal and Others, First Additional Income Tax Officer Vs. R. Shanmugha Rajeswara Sethupathi, , J.P. Sharma Vs. Phalton Sugar Works Ltd., and State of Madras v. Madurai Mills Co. Ltd. (1964) 15 STC 207 : AIR 1964 Mad 494 in which the view has been expressed that an order of a High Court on a petition under Art. 226 of the Constitution praying for a writ with regard to proceeding arising out of the Income Tax Act and enactments relating to sales tax is not a judgment, decree or order " in a civil proceeding" within the meaning of Art. 133 of the Constitution and the High Court has no power to issue a certificate under that Article that the case is a fit one for appeal to the Supreme Court. There is hardly any other authoritative decision to the contrary but in L. LACHMAN DAS NAYAR AND OTHERS Vs. Income Tax OFFICER, AMRITSAR, AND OTHERS., a Bench of this Court in a short order gave leave in a writ matter arising out of proceedings under the Income Tax Act under S. 109(b) and 109(c) of the Code of Civil Procedure. It may be mentioned that no such objection was raised before that Bench as has been taken before us and the mater does not appear to have been considered at all. In Sardar Kapur Singh Vs. Union of India (UOI), which related to a service matter, some observations were made to the effect that although the Patna Court had drawn a distinction between revenue proceeding arising out of taxation matter and civil proceeding, no such distinction had been raised in the Supreme Court judgment in A. Thangal Kunju Musaliar Vs. M. Venkitachalam Potti and Another, . The Supreme Court decision arose out of a petition which had been filed in the High Court under Article 226 challenging the validity of certain provisions of the Travancore Taxation on Income (Investigation Commission) Act and raising some other points and all that happened was that when the appeals came up before their Lordships under certificates granted by the High Court, they were entertained. Strictly speaking the question in that case was of an entirely different nature and did not arise out of orders or proceedings either under the Income Tax Act or the enactment''s relating to sales tax. It the view of the majority of the High Courts, namely Patna, Nagpur, Bombay and Madras is to be accepted, no leave can be granted in the present cases as the proceedings in which the judgments were given by this Court would be essentially revenue proceedings and not civil proceedings in respect of which alone leave can be granted under Article 133. The question raised is one of importance and should be settled authoritatively by this Court. We are, therefore, of the view that it should be decided by a larger Bench. We refer the following question to the Full Bench is both the cases :--

Whether the order of the High Court on the petition under Article 226 of the Constitution in the present case is a judgment, decree or order "in a civil proceeding " within the meaning of Article 133 of the Constitution and whether the High Court has the power to issue a certificate that the case is a fit one for appeal to the Supreme Court ?

The order of Hon''ble the Chief Justice may be obtained for the constitution of a larger Bench at a very early date.

ORDER OF THE FULL BENCH

Dulat, J.

A petition under Article 226 of the Constitution was filed in this Court questioning the legality of an assessment made under the Punjab General Sales Tax Act, and a Division Bench allowed the petition and quashed the assessment. The Assessing Authority, thereupon, applied for a certificate of fitness for appeal to the Supreme Court and when that matter was considered by the Division Bench, a question arose whether the order of the High Court sought to be appealed against was an order made ''in a civil proceeding in the High Court''. The Division Bench entertained some doubt about the proceedings in the High Court being civil proceedings and therefore, decided to refer the question to a Full bench. A similar question appears to have arisen in other similar cases in the High Court round about the same time (S. C. As. 28 to 33 of 1964 and S. C. A. 107 of 1964), and it is the question with which we are now concerned. The Division Bench has framed the question thus--

"Whether the order of the High Court on the petition under Article 226 of the Constitution in the present case is a judgment, decree or order in a civil proceeding'' within the meaning of Article 133 of the Constitution and whether the High Court has the power to issue a certificate that the case is a fit one for appeal to the Supreme Court ?''''

(2) It is admitted that in this Court, proceedings under Article 226 of the constitution challenging the validity of assessments made or proceedings taken under the Punjab General Sales Tax Act or for that matter under other taxing statutes including the Income Tax Act, have so far been treated as civil proceedings and certificates of fitness have been freely granted. More significant perhaps is the circumstances that numerous such cases have on such certificates gone to the Supreme Court and the appeals have been decided by the Supreme Court on the assumption that the fitness certificates were properly granted without any suggestion having been made that such proceedings in the High Court are not civil proceedings. The Division Bench enter tainted some doubt on this question because of certain decisions of other High Courts in India to which of course. I shall be presently referring.

(3) Before, however, I do that it is, I think, necessary to consider the rules framed by our High Court for dealing with such matters. These rules concerning writ petitions under Article 226 of the Constitution are contained in Volume v, Chapter 4-F, of the Rules and Orders of the High Court, and they fall in two parts. The first part is F (a) and contains rules for writs of habeas corpus under Article 226 of the Constitution read with the Criminal Procedure Code, section 491, and they indicate the manner in which this Court should proceed with such applications. The second part called F (b) is titled ''Civil'' and contains rules for dealing with writs of mandamus, prohibition, quo warrant to and certiorari and for other directions. Applications for writs of habits corpus are criminal proceedings without any doubt and are consequently separately provided for by the rules. All other petitions under Article 226 are provided for in the second part called ''Civil''. The two sets of rules are not identical for obvious reasons. It would, therefore, appear that as far as the rules of this High Court are concerned, petitions under Article 226 of the Constitution fall into only two categories, namely, habeas corpus petitions which are criminal proceedings, and other petitions for certiorari etc., which are civil proceedings. As far as this Court is concerned, therefore, I should think that the rules are sufficiently clear on the point that writ petitions are either criminal proceedings if they are brought for a writ of habeas corpus, or they are civil proceedings it brought with the object of obtaining any other writ or direction and as I have said, the procedure for each category is separately mentioned. It is said in support of the opposite view that

this broad division made by the rules is not decisive and the main point made in support of the submission is that Article 132 of the Constitution Apparently divides proceedings in a high Court not into two but three categories, namely, civil, criminal and other proceedings, and it is sought to be inferred, therefore, that there are, in fact, other proceedings which are neither criminal nor civil, and proceedings like the present would fall in that third category. This argument, which has been used in certain decisions, appears to me to overlook two matters. The first is that Art. 132 of the Constitution is not concerned merely with proceedings under Art. 226 of the Constitution but generally with all proceedings that may happen to be taken in the High Court, and just because Art. 132 envisages a category of proceedings which may be neither criminal nor civil, it does not in any sense follow that there must be proceedings under Art. 226 of the Constitution also which fall neither in the category of criminal proceedings nor that of civil proceedings. The second and equally important fact, which the argument overlooks, is this that a Constitution like ours is not merely intended to provide for a situation which may in fact exist at present but also for situations which may at some future time arise. The assumption in the argument, therefore, that because Art. 132 of the Constitution speaks of proceedings other than civil and criminal and, therefore, there must at present be in existence some such proceedings, is in my opinion unwarranted once it is remembered that a Constitution is an instrument of Government intended to be applicable to all foreseeable contingencies. It might well be that the Constitution-makers though that some proceedings might conceivably arise in the future which may not be appropriate describable as civil of criminal and, therefore, mentioned a possible third category in Art. 132. In any case, this mention of a third category in Art. 132 of the Constitution can hardly be a ground for inferring that writ proceedings under Art. 226 of the Constitution must be divided into not two but three categories. The rules of this Court divide writ petitions under Art. 226 omit two categories and there is no reason why that should not be considered exhaustive. This was the view adopted by the Rajasthan High Court in Naha Singh v. State of Rajasthan AIR 1955 Raj 56, where Wanchoo, C. J., was considering the rules of that High Court which are in terms indentical with the rules of this Court, and he concluded that writ proceedings are under the rules either criminal or civil. I find myself in entire agreement with that view and but for certain decisions of other High Courts it should have been quite unnecessary to say anything more.

(4) The earliest decision adopting the contrary view brought to our notice is AIR 1954 Nag 1 . That was not, however, a case concerning a writ petition but arose out of a reference made under the Sales Tax Act of Madhya Pradesh. The High Court decided certain questions of law and against the High Court''s decision an appeal was sought to be taken to the Supreme Court. The question was whether an appeal lay to the Supreme Court. The Nagpur High Court held that it did not, and it so held on two grounds--(1) that the decision of the High Court was not a '' judgment, decree of final order'', as the final order had actually to be made

later by the sales tax authorities, and (2) that the proceedings in the High Court were not ''Civil'' but ''revenue'' proceedings. The first question was discussed at considerable length and the view of the High Court, that the decision appealed against was not a final order of the High Court, was of course sufficient to dispose of the matter. In passing, if I may say so, and very briefly the High Court touched on the second question and expressed the view that the proceedings were not civil proceedings because they arose out of collection of revenuer and the essence of the proceedings was the collection of revenue'' and ''not the decision of any dispute of a civil nature in the strict sense. There was no further discussion of the matter. It is likely that the High Court thought that the proceedings institution the High Court were a continuation of the proceedings before the Board of Revenue, as they had gone to the High Court on a reference by that Board. The situation in a writ petition is, however, entirely different, as a writ petition filed in a High Court can in no sense be called a continuation of the proceedings which it impugns. Such proceedings, which commence with a petition under Art. 226 of the Constitution, are entirely separate from the proceedings before the tribunal whose decision may be in dispute. The Allen Berry and Co. Ltd. and Others Vs. Income Tax Officer and Another, , is more to the point, for the proceedings in the High Court started with a writ petition. The view adopted by the Patna High Court was that because the writ petition challenged the validity of certain assessments made by the Income Tax authorities, it was not in the nature of a civil proceeding, and the High Court inferred this from the fact that there was no right of suit against the impugned assessment order. The opinion of the High Court is expressed thus :

"In the cases before us, the nature of the proceeding was that it called into question certain assessment orders made by the Income Tax authorities. The proceeding was not a civil proceeding as there was no right of suit, and I do not think it can be said to be a civil proceeding within the meaning of Art. 133 of the Constitution".

Considerable reliance was placed by the High Court on the decision of the Privy Council in Raleigh investment Court. Ltd. v. Governor-General in Council AIR 1947 PC 78 holding that no civil suit was competent to set aside an assessment of Income Tax. In our High Court a question akin to the question arising in the present cases was considered by a Full Bench in Sardar Kapur Singh Vs. Union of India (UOI), . S. Kapur Singh was a member of the Indian Civil Service who had after a department enquiry been removed from service. He brought a writ petition to this Court questioning the legality of the order and after that writ petition was dismissed S. Kapur Singh applied for leave to appeal to the Supreme Court. One of the questions arising in the case was whether the decision of the High Court was an order made in a civil proceeding and it was in a general form referred to a Full Bench. It was urged before the Full Bench that the proceedings against S. Kapur Singh were executive proceedings arising out of a service matter and the writ petition in the High Court brought by him therefore was not a civil proceeding. The Full Bench did not accept that view. In the course of arguments Kapur, J., who delivered the main judgment, considered the question whether the test of the competency of a civil suit was a good test of the competency of a civil suit was a good test and in that connection the decision of the Patna High Court I have referred to Allen Berry and Co. Ltd. and Others Vs. Income Tax Officer and Another, , was cited, Kapur, J. however, said:--

"The test laid down by the High Court of Patna that if a suit could be brought the proceeding would be civil and if it could not, then it would not be civil, is a good test qua the first part, i.e., where a suit could be brought and the petitioner seeks his remedy by way of a prerogative writ, the proceeding would be civil, but I would not go as far as to say that if the suit could not be brought, the proceeding would not be civil in nature".

For this opinion the Full Bench depended on an observation of Mahajan, J., in Province of Bombay Vs. Kusaldas S. Advani and Others, that the word ''sue'' includes any remedy that can be taken to vindicate a matter of right and therefore an application for certiorari is included in the word ''sue''. There seems no reason why we would depart from that opinion. I am not, therefore, persuaded that just because a suit is not competent to establish a particular right or to avoid, a particular decision made by a tribunal, a writ petition brought for the purpose of avoiding such a decision cannot be called a civil proceeding. In a later case in the Patna High Court, Collector of Monghyr and Others Vs. Maharaja Pratap Singh Bahadur and Others, , as Full Bench appears to have gone further and held that a proceeding started with a writ petition under Art. 226 of the Constitution can never be a civil proceeding because the High Court is in connection with such a petition exercising its extraordinary jurisdiction and is not deciding the parties'' rights of civil nature at all, and the learned Judges of the Full Bench overruled a previous decision of the Court and also disapproved of the view adopted in Allen Berry and Co. Ltd. and Others Vs. Income Tax Officer and Another, , although holding that the particular decision was correct. Before us this extreme position, that in no circumstances can a writ petition under Art. 226 of the Constitution be called a civil proceeding, has not been seriously pressed for acceptance. One consequence of the adoption of that view would be that in no case, where the High Court decides a writ petition one way or the other, would an appeal be competent to the Supreme Court--a consequence which I cannot but view with grave apprehension. In the Allahabad High Court this question was considered in Income Tax Officer Vs. Joti Prasad Agarwal and Others, A writ petition was there brought to quash an assessment under the Income Tax Act and the petitioner succeeded in the High Court. A certificate of fitness was then applied for, and a Division Bench considered the matter. The decision of the Patna High Court Collector of Monghyr and Others Vs. Maharaja Pratap Singh Bahadur and Others, , was placed before the learned Judges,. but it does not appear that they were inclined to accept that extreme position. They held, however, that the particular proceedings in the High Court were not Civil because the order quashed by the High Court was an order of assessment and that was in a proceeding for the assessment of Income Tax not relating to a civil right, as the liability to pay Income Tax was not a civil right but the creation of a statute. The learned Judges also depended on the circumstance that Art.. 132 of the Constitution mentions not only civil and criminal proceedings but also other proceedings. The assertion, that liability to pay Income Tax and the converse presumably, that is, freedom from Income Tax, is not a civil right, is found in more than one decision, but none of them makes it clear in what sense a person, who claims that he is not liable to pay a particular tax, is not asserting a civil right. I should have thought that a civil right means a right vesting in a person in his capacity as the citizen of a State, and it does not seem to matter, to my mind, whether that right arises out of a statute or otherwise, and, to my way of thinking, when a tax is imposed on a citizens and he claims that he is not liable and goes to Court to establish that right, he is asserting a civil right. If have already dealt with the consideration arising out of the language of Art. 132 of the Constitution which as I read it, classifies proceedings in the High Court in general and not proceedings under Art. 226 of the Constitution. I am in the circumstances, not convinced by the reasoning of the Allahabad High Court is Income Tax Officer Vs. Joti Prasad Agarwal and Others, . Very much the same reasoning was employed in the decision of the Madras High Court First Additional Income Tax Officer Vs. R. Shanmugha Rajeswara Sethupathi, , where Srinivasan, J. quoted with approval the view of the Allahabad High Court I have referred to and went on to and went on to conclude that a judgment in a writ petition seeking relief against the taxing authorities does not come within the expression ''Civil proceeding''. This decision of the Madras High Court was again considered in M. Chettiappan and Another Vs. Income Tax Officer, Karaikudi and Another, , because, in the meantime, a Full Bench decision of the same High Court had made certain observations and it was suggested that the basis of the decision in First Additional Income Tax Officer Vs. R. Shanmugha Rajeswara Sethupathi, , was shaken. The Full Bench said in Southern Roadways (P.), Ltd. Vs. Madurai Veeraswami Nadar (died) and Others, that the subject-matter of a petition under Art. 226 of the Constitution is entirely different from the matters in controversy agitated before a tribunal whose decision may be in question and that the controversy in the proceedings under Art. 226 cannot be equated to the controversy regarding the rights and privileges asserted or claimed before the tribunal whose order is sought to be quashed. The Division Bench, however, thought in spite of these observations that the decision in First Additional Income Tax Officer Vs. R. Shanmugha Rajeswara Sethupathi, , needed no reconsideration and affirmed the previous view that a decision of a writ petition challenging the validity of an assessment is not a decision in a civil proceeding. The Bombay High Court in J.P. Sharma Vs. Phalton Sugar Works Ltd., , adopted other view of the Madras High Court following the decisions in Allen Berry and Co. Ltd. and Others Vs. Income Tax Officer and Another, and AIR 1954 Nag 1.

(5) There are thus the opinions of five High Courts in support of the view that a writ petition challenging the correctness of an order of a taxing authority is not a civil proceeding but should be described as a revenue proceeding or as a

proceeding other than a civil or criminal. In spite of the weight of this judicial opinion, I remain unconvinced of its validity. I am far more impressed by the simple argument in AIR 1955 Raj 56 that, in accordance with the rules of the High Court, proceedings under Art. 226 of the Constitution are either civil proceedings or criminal proceedings. I am no more persuaded that such proceedings can be more properly described as revenue proceeding than the learned Judges of the Full bench of this Court were in Sardar Kapur Singh Vs. Union of India (UOI), , persuaded that the proceedings in that case could be described as executive or administrative proceedings. Nothing at all, in my opinion, is to be gained by introducing new categories into writ proceedings in the High Court, and the only result would be that a large number of important cases will be denied ready access to the Supreme Court--a result which I cannot view with satisfaction.

(6) For these reasons I would answer the question, framed by the Division Bench, in the affirmative.

Grover, J.

(7) I agree.

Sharma, J.

(8) I agree.

(9) Answer in the affirmative.