
(1951) 07 CAL CK 0003
In the Calcutta High Court
Case No : A.F.O.O. No. 30 of 1951

Union of India (UOI) and Another	Vs	APPELLANT
Elbridge Watson		RESPONDENT

Date of Decision : 23-07-1951

Acts Referred:

Constitution of India, 1950 — Article 226
Income Tax Act, 1961 — Section 40(2), 46(5A)
Specific Relief Act, 1877 — Section 45

Citation : AIR 1952 Cal 601 : 56 CWN 232 : (1951) 20 ITR 400

Hon'ble Judges : Harries, C.J.; Banerjee, J

Bench : Division Bench

Final Decision : Allowed

Judgement

Banerjee, J.—This is an appeal from an order made by S. R. Das Gupta J., directing that the appellant Income Tax Officer do revise an order which was made by him on March 18, 1949 and make it consistent with the order for instalments which was made by the Certificate Officer, 24-Parganas, on May 25, 1950.

2. In the petition the petitioner who is the respondent before us asked for:

(a) Issue of a writ of mandamus or a writ of a like nature; of an order directing the Income Tax Officer to show cause why the order complained of and dated the 18th March, 1949, should not be set aside;

(b) quashing the said order etc.

3. The Income Tax Officer alone was party to the petition.

4. A Rule Nisi was granted on this petition directing the Income Tax Officer to show cause why the order made by him u/s 46 (5A) of the Indian Income Tax Act and dated 18th March 1949 should not be set aside and/ or quashed.

5. This Rule was served also on the Appellant Union of India and thus it was

made a party to these proceedings.

6. Dr. Radha Binode Pal who appeared on behalf of the petitioner before the learned Judge modified the prayers of the petition by asking the Court to direct the Income Tax Officer either to withdraw or amend his notice so as to make it consistent with the order for payment by instalments of the amount which had been due. The notice here refers to the demand notice issued by the Income Tax Officer to the respondent for payment of the tax due.

7. Article 226 of the Constitution gives power to the High Courts to issue to any person or authority, including in appropriate cases any Government, within the territories in relation to which they exercise jurisdiction directions, orders or writs including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari or any of them, for the enforcement of the fundamental rights assured to the citizens of India by the Constitution and for any other purpose.

8. Prior to the Constitution the power which the High Courts exercised of issuing High Prerogative Writs as these Writs are called, was what was inherited by them from the old Supreme Courts which they superseded and was limited to the limits of their Ordinary Original Civil Jurisdiction. They had no jurisdiction to issue writs to persons who did not reside within these limits or so as to operate on properties situated outside those limits. This defect was pointed out in several cases and has been removed by Article 226 of the Constitution.

9. I must note here that before the Constitution the High Courts here could not issue any writ of mandamus after the Specific Relief Act of 1877 came into force. But the High Courts of Calcutta, Madras, Bombay and Rangoon could make orders u/s 45 of that Act for the enforcement of public duties. But in dealing with an application u/s 45 of the Specific Relief Act, the principles applicable to a writ of mandamus were generally followed.

"The proceedings taken u/s 45, Specific Relief Act, are obviously analogous to "proceedings" for the obtaining of the English writ of mandamus.....The writ of mandamus has been abolished in this country and care must be taken to see that the analogy of the English cases does not lead one out-side the words of the Indian Statute." Per Coutts-Trotter, 3. in "G. A. NATESAN", in the matter of 40 Mad 125 at p. 136).

There are cases of other High Courts which have made similar observations.

10. I do not think that Section 45 has been repealed by Article 226 of the Constitution. That Article has enlarged the jurisdiction of these Courts for the issue of the writs mentioned in that Article. It should be noted that our Constitution has adopted the nomenclature of the English writs and I apprehend the English Law relating to these writs must govern the issue of the writs herein so far as they are not opposed to our Constitution.

11. It is necessary to bear in mind the difference between the several writs & I

would recommend to persons concerned a careful study of the nature of the writs from the English books. It is a matter of regret that though more than a year has passed since the Constitution was made no careful attempt has been made to study the nature of the writs and very often I find prayers in petition couched as follows: "The Court may be pleased to grant such writs as it may think fit within Article 226 of the Constitution". I protest against prayers being couched in such words. The prayers must be specific, the prayers must be precise. Necessarily the prayers must depend on the writs asked for.

12. In "income tax COMMISSIONER, BOMBAY PRESIDENCY v. BOMBAY TRUST CORPORATION LTD., 63 Ind App 408 at p. 425 (PC), their Lordships of the Judicial Committee observed:

"it is very necessary that orders made under the Specific Relief Act should specify with exactitude and clarity the specific act which the person holding a public office is being commanded to do."

13. I would like to make the same observation in regard to the prayers asked for. They must be specified with exactitude and clarity.

14. There is a good deal of difference between a writ of mandamus and a writ of certiorari.

"The writ of mandamus is a high prerogative writ of a most extensive remedial nature, and is, in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior court, requiring him or them to do some particular thing therein-specified which appertains to his or their office and is in the nature of a public duty and is consonant to right and justice. Its purpose is to supply defects of justice and accordingly it will issue to the end that justice may be done, in all cases where there is a specific legal right and no specific legal remedy for enforcing such right and it may issue in cases where although there is an alternative legal remedy yet such mode of redress is less convenient, beneficial and effectual." (Halsbury's Laws of England, 2nd Edn. Vol. 9 Article 1269 p. 744.

Whereas

"the writ of certiorari issues out of a superior Court and is directed to the Judge or other officer of an inferior Court of record. It requires that the record of the proceedings in some cause or matter depending before such inferior Court shall be transmitted into the superior Court to be there dealt with in order to ensure that the applicant for the writ may have the more sure and speedy justice."

15. Das J., in "PROVINCE OF BOMBAY v. KHUSHALDAS S. ADVANI, 1950 S C R 621 at p. 698, dealing with this writ observes:

"The writ of certiorari is a very well-known ancient high- prerogative writ that used to be issued by the Court of King's Bench to correct the errors of the inferior Courts strictly so-called. It is with this writ that the Judges of the King's

Bench used to exercise control over Courts of inferior jurisdiction where the latter acted without jurisdiction or in excess of it or in violation of the principles of natural justice. Gradually, the scope of these writs was enlarged so as to exercise control over various bodies which were not strictly speaking, Courts at all, but which were by statute vested with powers and duties that resembled those of the ordinary inferior Courts. These statutory bodies were called quasi-judicial bodies and their decisions were called quasi-judicial acts and the Court of King's Bench freely began to bring up the records of these quasi-judicial bodies examine them and if thought fit, quash them. The real reason for this extension of the scope of the writ of certiorari was the distrust with which the Judges looked upon the numerous statutory bodies that were being brought into existence and vested with large powers of affecting the rights of the subject and this extension was founded on the plausible plea that these statutory bodies exercised quasi-judicial functions. The law is now well settled that a writ of certiorari will lie to control a statutory body if it purports to act without jurisdiction or in excess of it or in violation of the principles of natural justice provided that on a true construction of the statute creating the body it can be said to be a quasi-judicial body entrusted with quasi-judicial functions. It is equally well settled that a certiorari will not lie to correct the errors of a statutory body which is entrusted with purely administrative functions."

16. This observation clearly brings out the difference between a writ of certiorari and a writ of mandamus. A certiorari does not lie to correct the errors of a statutory body which has only administrative functions.

17. Likewise, there is difference between a writ of certiorari and a writ of prohibition. (See the observations of Atkin L. J in "REX v. ELECTRICITY COMMISSIONERS", (1924) 1 K B 171).

18. I have taken these two writs for illustration to show the difference between writs. It is not my intention nor is it possible to discuss in a short judgment like this the nature of the writs and the difference that exists between them.

19. Turning now to the writ of mandamus, in "REX v. LONDON CORPORATION," (1786), 1 Term Rep. 423, Ashhurst J. at p. 425 said that the grant of a writ of mandamus is a matter for the discretion of the Court.

"But that discretion must be governed by certain principles. It is true that in the past the Court has laid down certain rules for future guidance according to which it will or will not grant this writ. It must however, be remembered that it by no means follows that because the Court has in many cases refused to grant the writ it had not power to do so within the rules which govern its action. The Court may well have the power but in a particular case may think that it is not advisable to grant a writ of mandamus which is discretionary."

20. Lord Chelmsford in REG v. ALL SAINTS, WIGAN (CHURCHWARDENS)," (1876) 1 A.C. 611 at p. 620, said:

"So in cases where the right in respect of which a rule for a mandamus has been granted; upon showing cause appears to be doubtful the Court frequently grants a mandamus in order that the right may be tried upon the return; this also is a matter of discretion."

21. In "REG v. GARLAND," (1870) 5 Q. B. 269, where the Court rested the refusal of the writ "entirely on the special circumstances of the case" Cockburn C. J. (at p. 272), explained those circumstances to be that:

"the effect of granting the mandamus would be most prejudicial; it would simply be that the trustees would be enabled to evade the discharge of a duty which a court of equity would and must enforce against them."

22. These principles must be borne in mind which have been laid down by great Judges in England who had often to issue these writs.

23. The Court should take great care before it exercises its discretion and grants the writs; the circumstances of the case must be carefully weighed.

24. One of the well-established principles is that no order will be made unless the Court is satisfied that the making of the order is consonant to right and justice.

25. In the case before us the facts are shortly these. The petitioner is an American citizen by birth and claims to be a citizen of India. That claim is disputed and in this application we have not decided that issue of fact and it is not necessary for us to decide it. He has been for about four years and is still the Manager and Director of Messrs. Chrestien Mica Industries Limited. He gets a certain amount of salary and commission.

26. On 22-10-1948 the petitioner was assessed to Income Tax and super-tax, for the accounting year, 1946-47 (assessment year 1947-48) on a total income of Rupees six lacs and odd. The petitioner made certain payments which were credited to him. For the balance demand was made on him and he was asked to pay the amount by 6-11-1948. This demand was not met. Thereupon the Income Tax Officer u/s 46(2) of the Income Tax Act forwarded to the Collector a certificate under his signature specifying the amount of arrears due from the petitioner. A sum of about rupees three lacs and odd had become due from the petitioner. The Collector proceeded to recover from the petitioner the amount specified in the certificate and certificate proceedings under the . Public Demands Recovery Act were taken. Pending these proceedings on the 18th March 1949 the Income Tax Officer issued notice u/s 46 (5A) of the Income Tax Act. The material portion of that Section is as follows:

"The Income Tax Officer may at any time or from time to time by notice in writing (a copy of which shall be forwarded to the assessee at his last address known to the Income Tax Officer) require any person- from whom money is due or may become due to the assessee or any person who holds or may subsequently hold money for or on account of the assessee to pay to the Income Tax Officer, either forthwith upon the money becoming due or being held or at or

within the time specified in the notice (not being before the money becomes due or is held) so much of the money as is sufficient to pay the amount due by the tax-payer in respect of arrears of Income Tax and penalty or the whole of the money when it is equal to or less than that amount.

The Income Tax Officer may at any time or from time to time amend or revoke any such notice or extend the time for making any payment in pursuance of the notice."

27. This is like garnishee proceedings (Civil. P. C.) and a payment in compliance with the notice under this section gives a valid discharge to. the garnishee from his liability to the assessee to the extent of the amount paid.

28. By issuing notice under this section the Income Tax Officer effectually stopped payment by the Company to the petitioner.

29. In these circumstances on December 28, 1949 the petitioner made an application to the Certificate Officer for allowing the petitioner to pay the amount due by monthly instalments, of Rs. 35,00/- . In the petition, he stated what his salary was and what his commission amounted to and added that after deducting the tax and super-tax payable by the petitioner Rs. 70,000/- only was left to him and having regard, to the condition in which he was used to live it would not be possible for him to pay more than Rs. 3500/- a month.

30. The Certificate Officer by his letter dated 10-1-1950 addressed to the Income Tax Officer informed him that a petition praying for instalment had been filed by the certificate debtor, and requested the Income Tax Officer "to be-present on 16-1-1950 on which date the petition will be heard". On 17-1-1950, the Certificate Officer sent a reminder to the Incomes-Tax Officer referring to his letter dated 10-1-1950- apparently nothing had been done by the Income Tax Officer in the meantime and asked him to report by the 30-1-1950 if an instalment as asked for by the petitioner could be granted. On 2nd February, 1950, the Income Tax Officer wrote to the Certificate Officer that as his letter dated the 17-1-1950, was received on 30-1-1950, no report could possibly be sent by that date.

31. As to the certificate debtor's prayer for instalment the Income Tax Officer pointed out that the outstanding demand covered by the certificate was above rupees three lacs and that if the certificate debtor's prayer for instalment was granted it would take a little over nine years for the realisation of the money.

"The certificate debtor is a substantial person and receives a salary of Rs. 2000/- per month from Messrs. Chrestien Mica Industries Ltd.; in addition to the salary he received about: one and a half lac of rupees commission per year from the same Company. The Company in accordance with my requisition u/s 46 (5A) has been paying near about rupees 1650/- per month to the Income Tax department direct. The debtor's claim for instalment payment should therefore be rejected. A specific date not exceeding a fortnight (say up to 20-2-50) should be fixed for

payment for the whole amount for which the certificate stands less payment already made. I would be in a position to suggest further steps if the certificate debtor defaults in paying out the whole dues by 20-2-50. You are requested to communicate the position accordingly."

32. It does not appear that any date was fixed by the Certificate Officer to the knowledge of the Income Tax Officer for the hearing of the latter's objection. Nor was any communication made to the Income Tax Officer as he had suggested in his letter dated the 2-2-1950. It appears that the Income Tax Officer wrote a letter to the Certificate Officer on 21-2-1950, presumably for the purpose of ascertaining the position. This letter is not in the paper book. But there is a reference to it in the Certificate Officer's letter of the 7th June 1950. On 25-5-1950, the Certificate Officer made an order granting the petitioner an instalment of Rs. 5000/- a month. His order is as follows:

"Seen previous orders and heard learned lawyer. I do not understand why a petition for instalments as submitted by the C. D. should have been kept hanging fire at the instance of the Income Tax Officer."

33. The "learned lawyer" is the lawyer of the petitioner. The Income Tax Officer was not heard and was not given any opportunity for making his submission. The above order was made ex parte.

34. On 30-5-1950, the petitioner's advocate informed the Income Tax Officer that the Certificate Officer had granted an instalment to his client of Rs. 5000/- per month.

"I would therefore request you to withdraw all notices u/s 46 (5A), which you have issued for the realisation of the aforesaid amount so that my client abovenamed may be able to make the payments according to the instalments granted and that he may have something to live upon."

35. On receipt of this letter, the Income Tax Officer wrote a letter dated 2-6-1950 to the Certificate Officer requesting him

"to kindly let me know if the certificate-debtor mentioned above has been allowed an instalment of Rs. 5000/- per month as stated by his pleader in his letter dated 30-5-1950."

A copy of the pleader's letter was enclosed with this letter.

36. On 7-6-1950 the Certificate Officer referring to the Income Tax Officer's letter dated 21-2-1950, said that the certificate debtor had been allowed to pay the amount due in monthly instalments of Rs. 5000/-. "You are requested to inform this office the amount which has since been realised by you".

37. It is quite clear from the facts I have recited that though the Income Tax Officer objected to any instalment being given to the petitioner and said to the Certificate Officer that if the petitioner did not pay the amount due by 20-2-1950 he would suggest other steps which might be taken against the petitioner for

realisation of the tax due, the Income Tax Officer was not heard on his objection and the Certificate Officer thought it fit to make the order ex parte for payment of the amount due by instalment. Counsel for the respondent has not been able to place before us any material from which we can come to the conclusion that the Income Tax Officer was given any such opportunity.

38. The question is should a writ of mandamus in these circumstances go against the Income Tax Officer? The Income Tax Officer knows his business. He made the demand. He was trying to realise the revenue due to the State. He was prepared to show to the Certificate Officer that the petitioner had means to pay and that no instalment should be granted. He asked for an opportunity to be heard yet the Certificate Officer chose not to hear him or give him an opportunity to make his submission and thought fit to make an ex parte order. Is the order consistent with justice? We do not think so. The revenues of the State should be protected and the Officers who are engaged in realising the revenues should not be hampered in their duties. If the Income Tax Officer had been heard and the Certificate Officer after hearing him had made the order this Court would have been reluctant to interfere with his order and probably would have held that the Income Tax Officer was bound to take the amount due in terms of the order. But nothing of the kind happened. The Certificate Officer was not willing to hear the Income Tax Officer and did not allow him to put his case before him.

It would be unjust in the circumstances to hold that the Income Tax Officer is bound to take payment in instalment or that the petitioner is entitled to have the benefit of the order, particularly when a very large amount was payable by the Company to the petitioner which was subject to the notice u/s 46 (5A) of the Income Tax Act. The petitioner has left this country. It is said by his counsel that he has gone to France for treatment. But there is no reliable evidence as to that before us. If we make an order on the Income Tax Officer to take the amount by instalment and the petitioner realises his dues from the company where is the security of the State for its revenues? We have not been told that apart from this money the petitioner has any property in this country.

39. I have stated fully the prayers in the petition, the form in which the rule nisi was granted and the prayer which was made on behalf of the petitioner before the learned Judge. It is quite clear that counsel who appeared before S. R. Das Gupta J., on behalf of the petitioner did not press the prayers in terms of the petition. He modified them. Probably he felt that they were not appropriate reliefs which could be granted in a writ of mandamus.

40. Then again it is a well settled principle that in a petition for mandamus the petitioner must state his rights in the matter in question, his demand of justice and the denial thereof. (See Section 46 of the Specific Relief Act). In Halsbury's Laws of England 2nd Ed. Vol. 9, Article| 1307 at p. 770, we find the following statement of law:

"As a general rule, the writ will not be granted unless the party complained of

has known what it was he was required to do so that he had the means of considering whether or not he should comply and it must be shown by evidence that there was a distinct demand of that which the party seeking the mandamus desires to enforce, and that such demand was met by a refusal. But the requirement that before the Court will issue a mandamus there must be a demand to perform the act sought to be enforced and a refusal to perform it cannot be applicable in all possible cases, and does not apply where a person has by inadvertence omitted to do some act which he was under a duty to do and where the time within which he can do it has passed."

41. The petitioner in this case does not come within the exception. In this, case he never asked the Income Tax Officer to do what he prayed for before the learned Judge. His demand as stated in his pleader's letter to the Income Tax Officer was to withdraw the notice u/s 46(5A). It was not to accept payment by instalment.

42. What the pleader was asking the Income Tax Officer to do was to withdraw the notice, not to keep the notice intact and take the money by instalment. Assuming that in the circumstances of the case we hold that the Income Tax Officer refused to withdraw the notice that is not the right which the petitioner in this case sought to enforce by the writ of mandamus. He was asking not for an order on the Income Tax Officer to withdraw the notice but to take the money by instalment.

43. After an exhaustive review of authorities Das J., lays down tests for judicial and quasi-judicial acts in the following words (pp. 725-6):

"What are the principles to be deduced from the two lines of cases I have referred to? The principles as I apprehend them are:

(i) that if a statute empowers an authority not being a Court in the ordinary sense to decide disputes arising out of a claim made by one party under the statute which claim is opposed by another party and to determine the respective rights of the contesting parties who are opposed to each other there is a *lis* and *prima facie* and in the absence of anything in the statute to the contrary it is the duty of the authority to act judicially and the decision of the authority is a quasi-judicial act and

(ii) that if a statutory authority has power to do any act which will prejudicially affect the subject then although there are not two parties apart from the authority and the contest is between the authority proposing to do the act and the subject opposing it the final determination of the authority will yet be a quasi-judicial act provided the authority is required by the statute to act judicially."

In other words while the presence of two parties besides the deciding authority will *prima facie* and in the absence of any other factor impose upon the authority the duty to act judicially the absence of two such parties is not decisive in taking the act of the authority out of the category of quasi-judicial act if the authority is

nevertheless required by the statute to act judicially.

44. Testing in the light of the principles stated above the notice u/s 46 (5A) of the Income Tax Act was not a judicial or a quasi-judicial act. It was an administrative Act. Therefore, if the circumstances warranted it, the proper writ would be a writ of mandamus. The prayers in the petition are not in order. However treating this application as an application for a writ of mandamus which we do with great reluctance-we hold there was no previous demand or refusal of the right which the petitioner sought to enforce before the learned Judge. This is not merely a technical point. This is a point of substance which must be taken into consideration when the Court, issues a writ of mandamus. But having regard to our views on the other point we need not say anything further on this point.

45. We do not think it would be consistent with justice in the circumstances of this case to issue the writ of mandamus. The granting of this writ as I have already said is a matter for discretion with the Court and the Court must take into consideration all the circumstances of the case before it exercises its discretion. In this case, the learned Judge has overlooked the vital point in the case, namely, that the instalment order was made without giving a hearing to the Income Tax Officer. We do not think, therefore, that that Officer should be required to amend or modify the notice u/s 46(5A) or to accept payment of the arrears due from the petitioner by instalment.

46. The learned Judge in the circumstances of the case did not properly exercise his discretion. We therefore set aside the order of the learned Judge. The appeal is allowed with costs here and below. Certified for two counsel.

Harries, C.J.

47. I agree.