

(1954) 12 CAL CK 0026

In the Calcutta High Court

Case No : Civil Rules No's. 1145 and 1146 of 1952

Union of India (UOI)

APPELLANT

Vs

Satyendra Nath Banerjee and Others

RESPONDENT

Date of Decision : 09-12-1954

Acts Referred:

Bengal Public Demands Recovery Act, 1913 — Section 38, 39, 51(1)
Bengal Public Demands Recovery Rules — Rule 43
Constitution of India, 1950 — Article 226, 300
Government of India Act, 1935 — Section 176

Citation : AIR 1955 Cal 581 : (1955) 1 CALLT 105 : 59 CWN 531

Hon'ble Judges : Sinha, J

Bench : Single Bench

Advocate : S. Banerjee and Balai Lal Pal, for the Appellant; S.M. Bose, General, A.K. Sen and Smriti Kumar Rai Chaudhuri for Nos. 1 and 3, Prabhat Kumar Sen Gupta, Amiya Kumar Chatterjee and Hemendra Nath Banerjee for No. 2, for the Respondent

Final Decision : Dismissed

Judgement

Sinha, J.—The fact in these two cases are shortly as follows:

One Mewaram Shaw, residing in Calcutta, was assessed to Income Tax for the years 1944-45, 1945-46 & 1946-47. In July 1948, he was assessed for Income Tax to the extent of Rs. 87066/1/-. Proceedings u/s 128, Income Tax Act were also drawn up and he was directed to pay a penalty of Rs. 1,00,000/- in respect of the three assessment years. Mewaram preferred an appeal u/s 31, Income Tax Act and ultimately the Income Tax Appellate Tribunal made certain reductions. He also made an application u/s 66(2) of the said Act to the High Court, but it was unsuccessful.

As Mewaram failed to pay the amount, certificate proceedings were drawn up and in Certificate Cases Nos. 173. 174 and 175 of 1949-50, before the Certificate Officer 24-Parganas certain movable and immovable properties were attached,

obviously on the footing that they belonged to Mewaram. The immovable properties consisted of four houses in Calcutta, being premises Nos. 36, 39A, 39B, Ghosh Lane and 146, Vivekananda Road.

The movable properties were lying at No. 36, Ghosh Lane, where the said Mewaram and his family were residing. After the attachment, four claim petitioners were filed under A. 39 of Schedule 2 Public Demands Recovery Act (3 of 1913). Two of these were by Rajaram Shaw, son of Mewarasn, (respondent 2 in Civil Revn. No. 1145 of 1952) one in respect of the movable properties and the other in respect of premises No. 36, Ghosh Lane, on the plea that the said premises had been gifted to him by his father by a registered deed of gift dated 27-9-1949.

The remaining two applications were made by Sin. Saraswati Debi, (respondent 2 in Civil Revn. No. 1146 of 1952) in respect of the premises 39A. and 39B, Ghosh Lane and 146, Vivekananda Road, alleging that the said properties had been gifted to her by her husband by a deed of gift dated 24-9-1949. There were protracted proceedings before the Certificate Officer, 24-Parganas, in course of which evidence was taken. On 16-8-1950, the Certificate Officer 24-Parganas disallowed the claim petitions.

The Certificate Officer held that Mewaram with his son and wife lived in 36 Ghosh Lane from before the transfer and continued to do so without any change even after the alleged deed of gift in favour of his son. So far as the alleged gift to Sm. Swaraswati Debi was concerned, she adduced no evidence of possession and failed to produce any written receipts issued by her to the tenants.

It appeared that the transfers were made after the service of demand notice in respect of Income Tax, and the Certificate Officer was not satisfied as to the genuineness of the transfers. As stated before the claim petitions were disallowed. On or about 28-8-1950, both Rajaram Shaw and Sm. Swaraswati Debi filed appeals against the said order of the Certificate Officer before the Collector 24-Parganas.

In September 1950, the Collector 24-Parganas dismissed the appeals on the ground that no appeal lay against the order of the Certificate Officer. Against the said--decisions, appeals were preferred before the Commissioner of the Presidency Division, being appeals Nos. 76 and 77 of 1950. These appeals were also dismissed by the Commissioner -of the Presidency Division on the ground that no appeal lay. On or about 7-2-1951 the said Rajaram Shaw and Sm. Swaraswati Debi applied for review to the Member, Board of Revenue.

The Member, Board of Revenue, pointed out that Section 51, Public Demands Recovery Act (hereinafter referred to as the "Act") gave a statutory right of appeal against any original "order made under the Act by an officer upto the rank of Collector, the only exception being in respect of an order made under. Section 22 of the Act. He held that the statutory right of appeal given in the body of the Act could not be modified by a rule appended to the Act by way of a

schedule.

The result was that the petitions were allowed on a question of law and the records sent back to the Additional Collector with instruction that he should deal with the appeals on merits.

2. It is against this order that these two Rules have been taken nut by the Union of India asking for a writ in the nature of Mandamus, Certiorari and Prohibition. The short point, therefore, in these two applications is as to whether the provisions contained in Rules 39 to 43 of Schedule II of the Act constituted a bar or not against preferring an appeal from the order of the Certificate Officer dismissing the claim petitions preferred by the said respondents.

Arguing on the analogy of Order 21, Rule 63, Civil P.C. the wordings of which are almost similar to those of Rule 43 of the Certificate Rules, it is stated that the only course of action left open to the claimants was to institute a suit in the Civil Court to establish their rights to the properties in dispute, the order of the Certificate Officer in the claim cases being otherwise conclusive.

3. A preliminary point was taken on behalf of the respondents to the effect that the Union of India could not maintain an application of this nature under Article 226 of the Constitution. Firstly, it is said on the authority of a Bench decision of this Court in -- "Re: Banwari Lal Roy", 48 C W.N. 766 at p. 803 (A) that the Union of India is not a legal entity or a body corporate which could sue or be sued in that name.

In that case it was held that the Provincial Government or Government of Bengal" was not a legal entity or a body corporate, which could sue or be sued, in that name. Das, J., pointed out that the only section authorising such a suit or proceeding is Section 176, Government of India Act, 1935, which authorised the use of the name of the Province only in respect of certain suits and proceedings which did not include an application for the issue of a Writ of "Quo Warranto".

Reference was also made to the case of --"Doya Narain v. Secy. of State", 14 Cal 256 (B). It was held there that Section 65 of 21 and 22 Vic. Ch. 106 does not constitute the Secretary of State a body corporate who could be sued in that name. It is next argued that our Constitution does not confer any fundamental rights under Part III, upon the Indian Union as such, and consequently, an application under Article 226 does not lie.

4. Considering the last argument first, I think that this is a wrong interpretation of the scope of Article 226 of the Constitution. That Article is not confined to the enforcement of the fundamental rights conferred under Part III of the Constitution. No doubt the Writs mentioned therein would be available for the enforcement of such rights, but they arc available for the enforcement of other rights which do not come within the scope of Part III of the Constitution.

It is interesting to observe that under Article 32 of the Constitution, proceedings may be instituted before the Supreme Court as a Court of original jurisdiction for

the enforcement of the rights conferred under Part III of the Constitution whereas under Article 226 of the Constitution, the rights of the High Courts are not confined to the fundamental rights only but extend to all cases where the writs mentioned therein might be issued.

See -- *Tata Sons Ltd. Vs. Commissioner of Income Tax, Bombay City*, . The particular Writ that a body like the Union, of India can ask for is of course limited in the very nature of things. It could not for example ask for a Writ in the nature of Habeas Corpus and possibly not for a Writ of Quo Warranto. I do not see however why it cannot ask for a Writ in the nature of Mandamus, Prohibition or Certiorari.

Modern legislation often confers rights and imposes liabilities upon the Government. As such, it cannot be denied the right to come up to this Court for the enforcement thereof. Under Article 300 of the Constitution it is provided that the Government of India may sue or be sued by the name of the Union of India. Under Article 1 of the Constitution, the Union of India has been created as a legal entity.

It is therefore not profitable to investigate as to whether prior to the enactment of the Constitution, the Government of India was a legal entity or whether an application for a high prerogative Writ could be made by it. The petitioner here is asking for the issue of a Writ in the nature of Certiorari. The other reliefs are not pressed. I will therefore confine my observations to the question as to whether it is open to the Union of India to make an application to this Court for the issue of such a Writ or not.

Even in England, a Writ of Certiorari could always be applied for by or on behalf of the Crown. Such right is always demandable by the Attorney General acting on behalf of the Crown. See -- "*R. v. Eaton*", (1787) 2 T.R. 89 (D); -- "*R. v. Thomas*", (1815) 4 M & S 442 (E); -- "*Rex v. Clace*" (1769) 4 Burr 2456 at p. 2458 (F); -- "*Cumberland County (Inhabitants) v. R*", (1803) 3 Bos & P 354 (G).

5. In -- *Province of Bombay Vs. Kusaldas S. Advani and Others*, , Mahajan, J., (as he then was) said as follows:

"As regards the second question, I have no hesitation in holding that a Writ of certiorari lies against the Government of Bombay. Section 306, read with Section 176, Government of India Act, 1935, expressly preserves the right to sue in all cases where such a right could be exercised as against the East India Company. The learned Attorney General argued that the section was confined to suits and to actions and did not cover the case of a writ of certiorari.

It was said that there is no power to issue it command to the Sovereign. My simple answer is. that the Provincial Government is not the sovereign , and. that the Government of India Act expressly says that there is a right to sue the Province. The expression "sue" means "the enforcement of a claim or a civil right by means of legal proceedings". When a right is in jeopardy, then any

proceedings that can be adopted to put it out of jeopardy fall within the expression "sue".

Any remedy that can be taken to vindicate the right is included within the expression. A writ of certiorari, therefore, falls within the expression "sue" used in Section 176, Government of India Act, 1935, and the remedy therefore is within the express terms of the statute."

On this point Mukherjea, J., says as follows:

"I am not much impressed by the argument of the learned Attorney General that the expression "sue or to be sued" occurring in Section 176 does not include an application for a writ of certiorari. The expression "sue" in its plain grammatical sense connotes the "enforcement of a claim or civil right by means of legal proceedings". The proceedings may be initiated by a plaint or by a petition of motion, and it cannot be said, that what Section 176 of the Constitution Act contemplates is a proceeding which must begin with a plaint and end in a decree as laid down in C. P. C.

"No argument can also in my opinion be founded upon the fact that there was no express mention of prerogative writs in Clause (13) of the Charter by which the Supreme Court was first established in Bengal. The Supreme Court was invested under Clause (5) of the Charter with all the powers and privileges of the Court of Kings Bench in England and these undoubtedly included the power of issuing certiorari and other prerogative writs. There are reported cases to show that writs of mandamus were issued to the Directors of East India Company by the Court of Kings Bench in England.

Vide -- "The King v. Directors of East India Co.", (1833) 4 B & Ad. 530 (I); -- "The King v. Court of Directors of the East India Co", (1815) 4 M. & Section 279(J)."

Das, J., declined to express his opinion on this point saying that the appeal could be decided on another point. He, however, said as follows:

"In view of the fact that the Government of India Act, 1935, has been repealed and the provisions of our Constitution on this point are different from those of the Government of India- Act, the question has also become. academic for future purposes and I express no opinion on it".

6. The position in brief seems to be as follows: In 1858 the British Crown, assumed Sovereignty over India and took over the Government from the hands of the East India Company. Section 65, Government of India Act, 1858 declared the Secretary of State in Council to be a body corporate for the purpose of suing or being sued. The provision was reproduced in the Government of India Act, 1915.

Section 176(1), Government of India Act, 1935 also reproduced the same provision with two points of differences e.g., instead of the Secretary of State in

Council the Federation of India and/or the Provincial Government were substituted, and the liability was subject to any provision enacted by the respective legislature.

It has now been held, as pointed out above, that the words "sue or be sued" appearing in Section 176, Government of India Act, 1935 included proceeding in certiorari. The question may be raised as to whether Article 300 or the Constitution confers the right to sue or to be sued in all cases or only to such cases where the Dominion of India could previously sue or be sued before the passing of the Constitution.

In my opinion, it is an unfettered right. In any event, the right to apply for certiorari existed in the Dominion of India and can appropriately be invoked by the Indian Union.

7. Coming now to the second point raised in this application. I have to consider the effect of the Act and the Rules appended thereto in the form of a schedule. Under the Act, "Rule" means Rules and Forms contained in Schedule II or made u/s 39. Section 38 runs as follows:

"The rules in Schedule II shall have effect as if enacted in the body of this Act, until altered or annulled in accordance with the provisions of this Part".

Under Section 39, the Board of Revenue has been given the right to make rules regulating the procedure to be followed by Certificate Officers, etc., such rules to be made with the previous sanction of the State Government. By such Rules, it can alter, add to or annul any of the rules in Schedule II.

8. Section 51 lays down that an appeal from any original order made under this Act shall lie:

"(a) if the order was made by an Assistant Collector or a Deputy Collector or by a Certificate Officer not being the Collector, to the Collector-----"

Schedule II contains the Rules, Rules 39 to 43 are under the heading "Investigation of Claims and Objections". The provisions are analogous to the provisions of Order 21, Rules 58 to 63, Civil P. C. It provides that if any claim was preferred to, or any objection was made to the attachment or sale of any property in execution, of a certificate, the claimant was to prefer a claim which was then to be investigated.

Such investigations avoid going into complicated questions of title and decide the question on evidence of possession. Rule 43, like Rule 63 of Order 21, Civil P. C., states as follows:

"Where a claim or an objection is preferred, the party against whom an order is made may institute a suit in a Civil Court to establish the right which he claims to the property in dispute; but, subject to the result of such suit (if any), the order shall be conclusive".

Under the Civil Procedure Code, if a claim is dismissed, no appeal is allowed, but the unsuccessful party is relegated to a suit. This is consonant with good sense because the adjudication of complicated question of title is best left to a full-fledged legal action rather than a summary trial which a proceeding like an investigation of claim is intended to be.

It will be observed that under the CPC there is no general right of appeal in every case. The right of appeal is only given in respect of certain class of orders enumerated in Section 104 of the Code. Before I go further, it is necessary to state a very important fact which has a direct bearing on the determination of the issue.

The original Act as it was promulgated in 1913 by the Legislature did not contain the Rules in question. The original Schedule II has been practically replaced by a new set of Rules promulgated by the Board of Revenue acting u/s 59 of the Act (Revenue Notification dated 21-12-1914 published in the Calcutta "Gazette of 23-12-1914 Part I page 2351). The result is that Section 51 enacted in the body of the Act is an act of the Legislature but Rules 39 to 43 in Schedule II are made by the Board of Revenue.

There is no doubt on the face of that Rule 43 as it stands is inconsistent with the provisions of Section 51. Mr. Banerjee appearing on behalf of the petitioner argued that investigation of claims which is in the nature of a third party procedure was not dealt with, in the body of the Act but was a matter not covered by it. From one point of view, this is correct, namely, that in the body of the Act there is no express provision for the purpose of dealing with third party applications.

Nevertheless, it is impossible to say that the order made by the Certificate Officer was not an order made under the Act. By Section 38 of the Act, the Rules in Schedule II are stated to have the same effect as if enacted in the body of the Act. -It is clear therefore that an order made by the Certificate Officer even in a claim proceeding is an order under the Act.

9. It is next argued that u/s 38 of the Act, the Rules are to be considered as enacted in the body of the Act and therefore we have two provisions in an Act which are inconsistent, so that the latter provision should prevail. In fact Mr. Banerjee drew my attention to an observation in Craies on Statutes, Edn. 5, p. 208, stating that if a schedule was appended to an Act, the provisions of such a schedule should prevail.

I think the confusion arises from not bearing in mind the fact that the Rules in Schedule II are no longer the original body of rules which passed through the hands of the legislature. It is a body of rules which has been made by a non-legislative body, under powers granted to it u/s 39 of the Act. Section 38 lays down that the rules in Schedule II are to have the same effect as if enacted in the body of the Act, "until altered or annulled in accordance with the provisions of this Part".

Under Section 39, it is laid down that such rules are not to be inconsistent with the provisions of the body of the Act. Such Rules made by the Board of Revenue were thus not to be inconsistent with the provisions of the body of the Act. Section 40 states that Rules made and sanctioned by the State Government u/s 39 are to be published in the official gazette and shall have the same force and effect as if they have been contained in Schedule II.

The result is that the original Schedule II has gone and we have now procedural rules framed by the Board of Revenue. What then is the legal position?

10. The first case to be considered is -- "R. v. Bird; Ex parte Needes;", (1898) 2 Q. B. 340 (K). By the Licensing Act 1872 the County Licensing Committee was to confirm a license issued by the licensing justices. Persons who had opposed the grant of a new license before the Licensing Justices were empowered to appear before the County Licensing Committee.

A Court of Quarter sessions, acting u/s 43, which enables rule to be framed, framed a rule that any person intending to oppose the confirmation of any provisional license before the licensing committee must, within 7, days after the grant of the provisional license, give notice to the applicant and to the clerk of the peace of his intention to oppose the confirmation.

It was held that the rule was ultra vires, as imposing a condition upon the statutory rights to oppose the confirmation of the license which was not to be found in the Statute. Wills, J., stated as follows:

"I desire in my judgment to adopt a broad principle which is too clear to need cases to be cited for its justification the principle that where a power to make regulations is given to a public body by statute, no regulations made under it can, abridge a right conferred by the statute itself".

11. The next important case is -- "Institute of Patent Agents v. Lockwood", 1894 AC 347" (L). That case arose under the Patents, Designs and Trade Marks Act. By that Act, the Board of Trade is empowered to pass general rules, as it thought expedient, for the purposes of the Act. Such rules were "subject as hereinafter prescribed" to be of the same effect as if they were contained in the Act and were to be judicially noticed. "As hereinafter prescribed" meant that the rules were to be framed for 40 days. If within 40 days either House of Parliament disapproved of any rule, it was to have no effect.

The Board of Trade made certain rules which were laid before Parliament within 40 days and were not objected to. The House of Lords held that the provision as to the rules being of like effect as if they had been enacted in the Act precluded any enquiry as to whether the rules were ultra vires or not.

12. This case is to be read in contradistinction to the case of -- "Minister of Health v. The King; Ex Parte Yaffe", 1931 AC 494 (M). Section 40 of the Housing Act empowered the Minister of Health to make an order confirming, with or without modifications, an improvement scheme made under the Act, and

provided that "the order of the Minister when made shall have effect as if enacted in the Act". It was held that this provision did not preclude the Court from calling in question the order of the Minister where the scheme presented to him for confirmation was inconsistent with the provisions of the Act.

Viscount Dunedin pointed out that there was an obvious distinction between this case and that of -- "Institute of Patent Agents v. Lockwood (L)", (Supra), because in the earlier case the Parliament itself was in control of the rules for forty days after they were passed, and could have annulled them if motion were made to that effect, whereas here there was no parliamentary manner of dealing with the confirmation of the scheme by the Minister of Health. The learned Judge proceeds to say as follows:

"I think the real clue to the solution of the problem is to be found in the opinion of Herschell L.C., who says this; "No doubt there might be some conflict between a rule and a provision of the Act. Well there is a conflict sometimes between two sections to be found in the same Act. You have to try and reconcile them as best as you may. If you cannot, you have to determine which is the leading provision and which the sub-ordinate provision and which must give way to the other.

That would be so with regard to the enactment, and with regard to rules which are to be treated as if within the enactment. In that case, probably the enactment itself would be treated as the governing consideration and the rule as subordinate to it". -- "(1894) AC 347 at p. 360 (L).

"What that comes to is this: The confirmation makes the scheme speak as if it was contained in an Act of Parliament, but the Act of Parliament in which it is contained is the Act which provides for the framing of the scheme, not a subsequent Act. If therefore the scheme, as made, conflicts with the Act, it will have to give way to the Act. The mere confirmation will not save it. It would otherwise if the scheme had been, per se, embodied in a subsequent Act, for then the maxim to be applied would have been "posteriora derogant prioribus".

But as it is, if one can find that the scheme is inconsistent with the provisions of the Act. which authorises the scheme, the scheme will be bad, and that only can be gone into by way of proceedings in certiorari".

13. I think we have now a complete picture of what the law should be. If the Rules concerned were in the original schedule, then, they were part of a legislative enactment in every sense of the word and in such a case the principle might have to be applied, namely, that the later provision shall be effective. Here, however, the provision in the rules has been effected by a non-legislative body under rule-making power. Therefore, the principle applied that by rule or regulation you cannot affect a provision of the Act, even though it is to be considered as embodied in the Act and forming part of it.

As a rule it must give way to the provisions in the Act. In the present case we

find that u/s 51, a clear right of appeal has been given in respect of every order made under the Act by a Certificate Officer. This right could not be taken away or modified by any rule or regulation made under rule making power by a non-legislative body. I must hold, therefore, that an appeal lay against the order of a Certificate Officer and that the learned Member of the Board of Revenue is perfectly correct in holding so.

Further I think that his conclusion that it is possible to give effect to both the Act and the Rules is also sound. As I have said before, investigation of claims are only concerned with possession and not title. If, therefore, it is desired to have the title investigated, a suit is the more appropriate remedy. It is possible to construe the Act and the Rules as laying down that the person who is unsuccessful in an investigation of claim will have the right to appeal but at the same time he has another remedy, namely, filing a suit.

In other words, if he is content to continue proceedings on the footing of possession, he is welcome to prefer his appeal and get on with it. On the other hand, if he considers that it is not profitable to proceed on the footing of mere possession and intends to have the question of title investigated, the rules give him the power to institute a suit. Or, to put it in another way, the rules make it clear that his power of suit is not taken away whether he prefers an appeal or not.

Reading it in this fashion, one can reconcile between the apparent inconsistency of the Act and the Rule.

14. The result is that I find the decision of the learned Member, Board of Revenue, to be correct and this application therefore fails and must be dismissed. As it involves an important question of law, I make no order as to costs.