

S. A. L. Narayan Row and Another

Vs

Ishwarlal Bhagwandas and Another. N. D.

Mehrotra and Another

Vs

Vrajlal Kewaldas

Civil Appeal Nos. 1003 and 1004 of 1963

(CJI P. B. Gajendragadkar, K. N. Wanchoo, J. C. Shah, S. M. Sikri, J. R. Mudholkar JJ)

07.05.1965

JUDGMENT

SHAH J. –

(Civil Appeal No. 1003 of 1963) - The 1st Income-tax Officer, C-II Ward, Bombay, served a notice under section 18A(1) of the Indian Income-tax Act, 1922, calling upon Bhagwandas Kevaldas - who will hereinafter be called the assessee-to pay in four equal instalments Rs. 25,973-5-0 as advance tax for the assessment year 1948-49. On September 17, 1947, the assessee filed an estimate of his income under section 18A(2) and of the tax payable by him, and on January 10, 1948, he filed a revised estimate. An order under section 23B of the Act provisionally assessing the income was made by the Income-tax Officer and pursuant thereto on August 23, 1950, the assessee paid the tax so assessed. Regular assessment of the income was made on March 31, 1953, by the Income-tax Officer, and it was found that the tax paid on the basis of the estimate of the assessee was less than eighty per cent of tax determined as a result of the regular assessment. But the Income-tax Officer made no charge for interest under sub-se

The departmental auditor raised an objection in auditing accounts of C-II Ward that a mistake was committed by the Income-tax Officer in failing to charge interest in making the order of assessment against the assessee. On September 21, 1956, the Income-tax Officer served a notice upon the assessee requiring him to show cause why the mistake in not levying interest be not rectified and why he should not be directed to pay "penal interest" under section 18A(6). On October 4, 1956, the Income-tax Officer recorded the following order : "During the internal checking of C-II Ward, the auditor has pointed out a mistake is apparent from record the same is rectified under section 35 after giving due notice to the assessee". and served a notice of demand calling upon the assessee to pay Rs. 14,929-10-0 as interest due under section 18A(6) for the period January 1, 1948, to July 22, 1950.

In exercise of his powers under section 33A, by order dated February 1, 1958, the Commissioner of Income-tax confirmed the order of the Income-tax Officer rectifying the original order of assessment and imposing liability to pay interest, subject to the modification that interest be paid only till June 13, 1950.

The assessee then moved the High Court of Judicature at Bombay by a petition under article 226 of the Constitution for issue of a writ of certiorari summoning the record of the case and for an order quashing or setting aside the order passed under section 33A(2) by the Commissioner of Income-tax and the order passed by the Income-tax Officer under section 35 and the notice of demand pursuant to that order. The High Court of Bombay, following its earlier judgment in the case of Shantilal Rawji v. M. C. Nair, IV Income-tax Officer, "E" Ward Bombay, directed that the orders passed by the Income-tax Officer and by the Commissioner of Income-tax be quashed. Against the order passed by the High Court the Commissioner of Income-tax and the Income-tax Officer have, with certificate granted by the High Court, appealed to this court.

At the hearing of this appeal counsel for the assessee raised an objection in limine that the appeal filed by the Commissioner and the Income-tax Officer was incompetent, because the High Court had no power under article 133 of the Constitution to certify a proposed appeal against an order in a proceeding commenced by a petition for the issue of a writ under article 226 of the Constitution. It was urged that the proceeding before the High Court was not a "civil proceeding" within the meaning of article 133. Article 133 of the Constitution, in so far as it is material, by the first clause provides :

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

(a) that the amount or value of the subject-matter of the dispute in the court of first instance and still in dispute on appeal was and is not less than twenty thousand rupees.....; or

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

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

The power to issue a certificate under article 133 may be exercised only in respect of a judgment, decree or final order of a High Court in a civil proceeding, and the order passed by the High Court disposing of the petition filed by the assessee for the issue of a writ under article 226 is a judgment. But Mr. A. V. Viswanatha Sastri for the assessee contended in the first instance that the expression "civil proceeding" in article 133 only means a proceeding in the nature of or triable as a civil suit and a petition for the issue of a high prerogative writ not being such a proceeding, against the order passed by the High Court no appeal lay to this court with certificate under article 133. In the alternative, counsel contended that even if a proceeding for the issue of a writ under article 226 of the Constitution may in certain cases be treated as a civil proceeding, it cannot be so treated when the party aggrieved seeks relief against the levy of tax or revenue claimed to be due to the State.

This court is invested by the Constitution with appellate jurisdiction of great amplitude exercisable over all courts and tribunals in India. The jurisdiction may be exercise in respect of any judgment, decree, determination sentence or order in any cause or matter passed by any court or tribunal other than a judgment, determination, sentence or order made or passed by any court or tribunal under any law relating to the Armed Forces : article 136. Exercise of this power depends solely upon the discretion of the court. Appeals lie to this court from orders passed in certain classes of cases when certified by the High Courts. An appeal lies from the judgment, decree or final order of a High

Court in a civil, criminal or other proceeding, if the High Court certifies that the case involves a substantial question of law as to the interpretation of the Constitution : article 132(1). An appeal also lies from any judgment, decree or final order in a civil proceeding of a High Court if the High Court certifies that

Counsel for the assessee said that proceedings instituted in the High Court in exercise of its jurisdiction - original or appellate - may be broadly classified as (i) proceedings civils, (ii) proceedings criminal, and (iii) proceedings revenue, and where the case does not involve a substantial question as to the interpretation of the Constitution, from an order passed in a proceeding civil an appeal lies to this court with certificate granted under article 133 of the Constitution, and from a judgment, final order or sentence in a criminal proceeding an appeal lies with certificate granted under article 134 of the Constitution, but from an order passed in a proceeding relating to revenue the right of appeal may be exercised only with leave of this court. Counsel seeks support for this argument primarily from the phraseology used in article 132 of the Constitution. That article, by its first clause, provides :

"An appeal shall lie to the Supreme Court from any judgment, decree or final order of a High Court in the territory of India, whether in a civil, criminal or other proceeding, if the High Court certifies that the case involves a substantial question of law as to the interpretation of this Constitution."

Counsel relies upon the classification of proceeding made in article 132(1) and seeks to contrast it with the phraseology used in article 133(1) and 134(1). He says that "other proceeding" in article 132(1) falls within the residuary class of proceedings other than civil or criminal, and such a proceeding includes a revenue proceeding. The expression "civil or criminal, and such a proceeding includes a revenue proceeding. The expression "civil proceeding" is not defined in the Constitution, nor in the General Clauses Act. The expression our judgment covers all proceedings in which a party asserts the existence of a civil right conferred by the civil law or by statute, and claims relief for breach thereof. A criminal proceeding on the other hand is ordinarily one in which if carried to its conclusion it may result in the imposition of sentences such as death, imprisonment, fine or forfeiture of property. It also includes proceedings in which in the larger interest of the State, orders to prevent apprehended bre

There is therefore under the Constitution a right of appeal to this court with special leave from the adjudications of all courts and tribunals (except tribunals constituted by or under law relating to Armed Forces). An appeal also lies to this court against all adjudications by a High Court from judgments, decrees and orders in cases in which a substantial question as to the interpretation of the Constitution is involved, whatever the nature of the proceeding. Appeals from criminal proceedings lie as a matter of right in cases falling within clauses (a) and (b) of article 134, and from civil proceedings of the nature certified by the High Court under article 133(1), clause (a), (b) or (c).

For reasons already stated, a proceeding for relief against infringement of civil right of a person is a civil proceeding even if the infringement be incorporated enforcement of a taxing statute. Section 261 of the Income-tax Act, 1961, under which an appeal lies to this court from any judgment delivered on a reference made under section 256 in any case which the High Court certifies to be a fit one for appeal to this court is not an exception to that rule. It is not because the reference is not a civil proceeding that a certificate under article 133 may not be granted : it is because of the advisory character of the jurisdiction exercised by the High Court under section 256 is not a judgment, order or decree within the meaning of article 133. Similarly, the enactment of section 54 of the Land

Acquisition Act which expressly provides for an appeal to this court subject to the provisions contained in section 110 of the Code of Civil Procedure, from an award, or from any part of the award made by the court is easil

By a petition for writ under article 226 of the Constitution, extraordinary jurisdiction of the High Court to issue high prerogative writs granting relief in special cases to persons aggrieved by the exercise of authority statutory to otherwise by public officer or authorities is invoked. This jurisdiction is undoubtedly special and exclusive, but on that account the nature of the proceeding in which it is exercised is not altered. Where a revenue authority seeks to levy tax or threatens action in purported exercise of powers conferred by an Act relating to revenue, the primary impact of such an act or threat is on the civil rights of the party aggrieved and when relief is claimed in that behalf it is a civil proceeding, even if relief is claimed not in a suit but by resort to the extraordinary jurisdiction of the High Court to issue writs.

It is not easy to attribute to the expression "revenue proceeding" any precise connotation, and in interpreting articles 132(1) and 133 it would be difficult to project the somewhat anomalous provision contained in section 226 of the Government of India Act, 1935, under which for historical reasons, it was enacted that unless otherwise provided by the appropriate legislature, no High Court shall have any act ordered or done in the collection thereof according to the usage and practice of the country or the law for the time being in force. This section barred the High Court from exercising original jurisdiction in matters concerning revenue. There was no such bar against subordinate courts, nor against the exercise of appellate jurisdiction by the High Court in matters concerning revenue instituted in subordinate courts. No provision has been made in the constitution similar to section 226 of the Government of India Act, and there is no reason to think that it was intended to deprive the High Court of its pow

We have already set out our reason for holding that a proceeding taken for recovery of tax is not "other proceeding" under article 132(1) : such a proceedings is a civil proceeding with the meaning of article 132(1). The object of referring to "other proceeding" in that clause is merely to emphasize that adjudications made in proceedings which are not included in the description civil or criminal would still attract the provisions of article 132(1) in case they raise a substantial question of law as to the interpretation of the Constitution. A proceeding in which relief is claimed against action of revenue authorities is included in the civil proceeding and not in "other proceeding" within the meaning of article 132(1), and an aggrieved party's right to appeal to his court from orders in those proceedings is exercisable in the same manner as it would be in the case of a decree, order or judgment in any other civil proceeding.

A large number of cases have arisen before the High Courts in India in which conflicting views about the meaning of the expression "civil proceeding" were expressed. In some cases it was held that the expression "civil proceeding" excludes a proceeding instituted in the High Court for the issue of a writ whatever may be the nature of the right infringed and the relief claimed : in other cases it has been held that a proceeding resulting from an application for a writ under it has been held that a proceeding resulting from an application for a writ under article 226 of the Constitution may in certain cases be deemed to be a civil proceeding if the claim made, the right infringed and the relief sought warrant that inference : in still another set of cases it has been held that even if a proceeding commenced by a petition for a writ be generally categorised as a civil proceeding where the jurisdiction which the High Court exercises relates to revenue, the proceeding is not civil. A persual of the reasons given

We do not think that any useful purpose will be served by entering upon a detailed analysis of the cases to which our attention was invited in which the view has been expressed that in a petition under article 226 of the Constitution where reliefs is claimed in respect of action sought to be taken by the revenue authorities, the High Court has no power to issue a certificate under article 133 of the Constitution. Express prescription of two independent conditions by the Constitution on the existence of which alone the jurisdiction of the High Court may be invoked, has in some cases been obliterated, and the ground that from an order in a reference in a case concerning revenue for opinion, a certificate may not be granted under article 133, because there is no judgment, decree or final order has been projected into a ground for denying that proceeding the character of a civil proceeding.

On a careful review of the provisions of the Constitution, we are of the opinion that there is no ground for restricting the expression civil proceeding only to those proceedings which arise out of civil suits or proceedings which are tried as civil suits, nor is there any rational basis for excluding from its purview proceedings instituted and tried in the High Court in exercise of its jurisdiction under article 226, where the aggrieved party seeks relief against infringement civil rights by authorities purporting to act in exercise of the powers conferred upon them by revenue statutes. The preliminary objection raised by counsel for the assessee must therefore fail.

We may now turn to the question which is raised on the merits in this appeal. Section 18A which was added by the Indian Income-tax (Amendment) Act II of 1944, for imposing liability for advance payment of tax enacts by the first sub-section, in so far as it is material, that where there is no provision made for deduction of income-tax at the time of payment, the Income-tax Officer may or after the commencement of any financial year, by order in writing, require an assessee to pay quarterly to the credit of the Central Government the income-tax payable on so much of such income as is included in his total income of the latest previous year in respect of which he has been assessed. Contrary to the two basic concepts of the scheme of the Indian Income-tax Act under which tax is charged upon the income of the previous year and not the income of the assessment year and liability does not arise until the annual Finance Act is passed charging income to tax, section 18A introduces within the scheme of the Act the pr

"Provided further that in such case and under such circumstances as may be prescribed the Income-tax Officer may reduce or waive the interest payable by the assessee."

The amendment authorised the Income-tax Officer to reduce or waive the interest payable by the assessee in such cases and under such circumstances as may be prescribed. It was given retrospective operation from April 1, 1952, and the discretion conferred upon the Income-tax Officer became, by fiction of law, exercisable as from April 1, 1952, even though the Act came into force from the discretion was to be exercised were prescribed by the Central Government by rule 48 in December, 1953.

The Income-tax Officer in present case, on the language used in the statute as it stood on the date of making the order of assessment was bound to impose liability for payment of interest under sub-section (6). But for some reason which cannot be ascertained from the record he did not impose that liability. It was only when in the course of audit this lacuna was pointed out that the Income-tax Officer commenced proceeding under section 35 of the Income-tax Act for rectification of the order of assessment. There was at the date of the original assessment an absolute obligation imposed upon the assessee to pay interest under section 18A(6), but by reason of the retrospective given to the

fifth proviso added to sub-section (6) by Act 25 of 1953, the Income-tax Officer was invested with the discretion to reduce or waive interest payable by the assessee, this power the Income-tax Officer must, in view of the retrospective amendment, be deemed in law to have possessed on the date on which the order of assessment was

The Attorney-General appearing on behalf of the Commissioner contended that to the fifth proviso to section 18A(6) no retrospective operation could effectively be given, because the rules, which alone could render the discretion operative, were framed for the first time in December, 1953. We are unable to agree with that view. The legislature has expressly given operation to the fifth proviso to section 18A(6), from April 1, 1952. It is true that the proviso operates only in respect of cases and under circumstances as may be prescribed, but as soon as rules were framed, which effectuate the purposes for which the proviso was enacted, the proviso and the rules became effective retrospectively from April 1, 1952.

Mr. Sastri appearing on behalf of the assessee contended that this court has laid down in *T. Cajee v. U. Jormanik Siem* that where power is conferred upon an authority and it is made exercisable in the manner provided by subsidiary legislative, failure to enact such subsidiary legislation will not defeat the power : the power will be exercisable without the restrictions which may be, but are not imposed, and therefore once the power of the Income-tax Officer came into being that power became exercisable immediately without restrictions or limitations until the Central Government chose to frame rules defining those restrictions. We do not think that the case to frame rules defining those restrictions. We do not think that the case cited by counsel for the assessee has any application. That was a case in which a District Council was constituted for the Jaintia Hill District under the Sixth Schedule to the Constitution. Under the Sixth Schedule, the District Council was empowered to make laws, inter alia, for

This court in *M. K. Venkatachalam v. Bombay Dyeing and Manufacturing Co. Ltd.* held in dealing with the case arising under the second proviso to section 18A(5) (which was also inserted by Act 25 of 1953 with retrospective operation from April 1, 1952) that the Income-tax Officer has power under section 35 of the Act to rectify a mistake in the assessment, even though the mistake was the result of a legal fiction arising from the retrospective operations given to the amending Act. In Venkatachalam's case on October 9, 1952, the Income-tax Officer assessed the taxpayer for the assessment year 1952-53 and gave him credit from certain amount as representing interest on tax paid in advance under section 18A(5). Thereafter, on May 24, 1953, the Indian Income-tax (Amendment) Act (25 of 1953) came into force which added a proviso to section 18A(5) that the assessee was entitled to interest not on the whole of the advance tax paid by him, but only on the difference between the payment made and the amount assessed. This is the face of the order. In the present case the position is reversed, but on that account the principle is not any the less applicable. By virtue of the retrospective amendment in section 18A(6) the order which was made by the Income-tax Officer on the date of assessment and which was plainly inconsistent with the terms of the section as it then stood became one which he was competent to pass in exercise of his power.

The Attorney-General contended that in any event there was nothing to show that the Income-tax Officer had purported to exercise his discretion when he passed the order of assessment and did not impose any liability for payment of interest under section 18A(6). That may be so. But the case of the assessee did fall within the terms of rule 48(1) and the Income-tax Officer must in law be bound to consider whether he was entitled to reduction or waiver of interest under the fifth proviso. The amendment and the rules which came into operation later must in view of the retrospective operation be deemed to be then extant, and the fact that the Income-tax Officer could not in making

the assessment have adjusted his approach to the problem before him in the light of those provisions is irrelevant in considering the legality of his order. The order of the Income-tax Officer which did not take note of the law deemed to be in force must be regarded as defective. The matter was brought before the Commissioner of Income-t

The Attorney-General contended that the petition filed by the assessee did not expressly seek to plead the case which was ultimately made out by the High Court. It is true that the petition is somewhat vague in setting out the material particulars which have a bearing on the plea which appealed to the High Court. But it cannot be said, having regard specially to paragraph 6, clause (iii), of the petition that in granting relief to the assessee a new case was made out by the High Court.

The appeal fails and is dismissed with costs. There will be one hearing fee in Civil Appeals Nos. 1003 of 1963 and 1004 of 1963.

Civil Appeal No. 1004 of 1963. - The facts in this case are substantially the same as in the companion Civil Appeal No. 1003 of 1963, and for reasons set out in the judgment in that case this appeal also fails and is dismissed. The appellants will pay the costs of the assessee.

MUDHOLKAR J. –

I agree with my learned brother Shah J. that the expression "civil proceedings" in article 133(1) of the Constitution cannot be restricted to proceedings which arise out of civil suits or proceedings. A proceeding before the High Court under article 226 or article 227 in which relief is sought in respect of liability to pay tax or penalty levied by a revenue authority would, accordingly, be a civil proceeding. The High Court was, therefore, competent to grant a certificate in this case under article 133(1).

On the merits my learned brother has held that the High Court was right in quashing the order of the Income-tax Commissioner, Bombay, by which he confirmed the order of the First Income-tax Officer, C-II Ward, Bombay dated October 4, 1958, rectifying under section 35 of the Income-tax Act, 1922, the regular assessment made by him on March 31, 1953. The sequence of the relevant events which have occurred is as follows : On September 17, 1947, the respondents filed under section 18A(2) an estimate of their income and on September 27, 1947, they made an advance payment of tax on its basis. On January 10, 1948, they filed a revised estimate in pursuance of which they made a further advance payments towards the tax on January 17, 1948. On August 23, 1950 they paid the tax in pursuance of the provisional assessment made on July 22, 1950, under section 23B. All this was with respect to the assessment year 1948-49. While making the regular assessment on March 31, 1953, the Income-tax Officer omitted to charge penal

"Provided further that in such cases and under such circumstances as may be prescribed, the Income-tax Officer may reduce or waive the interest payable by the assessee".

In order to give effect to the proviso the Central Board of Revenue framed rule 48 in the cases and under the circumstances mentioned below, namely :-

(1) Where the relevant assessment is completed more than one year after submission of the return, the delay in assessment not being attributable to the assessee.

- (2) Where a person is under section 43 deemed to be an agent of another person and is assessed upon the r income.
- (3) Where the assessee has income from an unregistered firm to which the provisions of clause (b) of sub-section (5) of section 23 are applied.
- (4) Where the 'previous year' is the financial year or any year ending near about the close of the financial year and large profits are made after the 15th of March in circumstances which could not be foreseen.
- (5) Any case in which the Inspecting Assistant Commissioner considers that the circumstances are such that a reduction or waiver of the interest payable under section 18A(6) is justified."

On October 4, 1956, the Income-tax Officer made the following order under section 35 of the Act :

"During the interest checking of C-II Ward, the auditor has pointed out a mistake in not charging penal interest under section 18A(6). As this mistake is apparent from record the same is rectified under section 35 after giving due notice to the assessee.

Revised notice of demand to be issued."

Thereafter, a notice demanding Rs. 14,929-10-0 was issued to the respondents. The respondents challenged this order before the Commissioner of Income-tax Bombay. The main contention raised before him was that the commission to charge penal interest at the time of regular assessment cannot be considered to be a mistake apparent from the record in view of proviso to section 18A(6) and the rules made thereunder and therefore the Income-tax Officer could not rectify the regular assessment by resort to section 35 of the Act. His contention was not accepted by the Income-tax Commissioner. He however, directed that in the circumstances of the case the respondents would be liable to pay penal interest only for the period between January 1, 1948, and June 13, 1950. Being dissatisfied with this decision the respondent moved the High Court for a writ under article 226 of the Constitution and succeeded in having the notice of demand quashed.

The ground upon which the High Court granted relief to the respondents was that the Amending Act of 1953 which enacted the last proviso to section 18A(6) was made retrospective from April 1, 1952; that, therefore, the proviso must be regarded as being on the statute book on the date on which the regular assessment was made, that, according to the High Court, being the position the conclusion to the reached was that the Income-tax Officer had vested in him a discretion to reduce or waive the interest payable by the assessee notwithstanding the fact that the proviso was not there on the statute book when the assessment order was made. After referring to the earlier decision of the High Court in *Shantilal Rawji v. M. C. Nair*, IV Income-tax Officer, E Ward, Bombay, the learned judges observed :

"In our judgment in the case we referred to the decision of the Supreme Court in *State of Bombay v. Pandurang Vinayak* where their Lordships of the inserted in any statute and being given retrospective operation. We also referred to a passage from the judgment of Lord Asquith in *East End Dwellings Co. Ltd. v. Finsbury Borough Council*, in which the learned law Lord very forcibly brought out the full effect of the legal fiction. The view which we ultimately took of the matter was that the Income-tax Officer had no jurisdiction to pass the order of rectification. By operation of the

deeming provision, which was retrospective in its operation, it was to be assumed and taken that on the date on which he made the assessment order he had jurisdiction and power to reduce or waive the amount of interest payable by the assessee. The Income-tax Officer not having done so,.... the only inference possible was that he had decided to waive the amount of interest and in those circumstances he had no jurisdiction subsequently

There is no doubt that by making the proviso in question retrospective as from April 1, 1952, the legislature has created a fiction and because of that fiction we must proceed on the footing that the proviso was in existence when the regular assessment was made. The learned Attorney-General however, contended before us that though that was the position the proviso could not be given effect to till the Central Board of Revenue prescribed the class of cases and circumstances in which an income-tax authority could exercise the discretion conferred by the proviso. He pointed out that the rule 48 framed by the Central Board of Revenue which prescribes these matters does not make it retrospective and therefore, it should be deemed to be only prospective in its application. I find it difficult to accept this argument. The proviso was itself made retrospective as from April 1, 1952. Rule 48 as soon as it was framed was to be read along with the proviso and as the proviso is retrospective the rule must also be deemed

Even though the proviso and the rule must be deemed to have been in force on April 1, 1952, I find it difficult to agree with the High Court that commission to charge penal interest at the time of making the regular assessment must be ascribed to the exercise of discretion by the Income-tax Officer. Let it not be forgotten that when he made that assessment, in point of fact, he possessed no discretion and, therefore, he was bound by law to charge penal interest. His commission to do so must, therefore, be ascribed to an oversight and not to deliberateness. An omission to do what he was bound by law to do (sic) the Income-tax Officer committed an error and that error appears on the face of the record. He was, therefore, competent to rectify under section 35. Indeed, if instead on March 31, 1953, the Income-tax Officer had made the regular assessment on March 31, 1952, could there have been any scope for the surmise that his omission to charge penal interest was attributable to the exercise of any discretion

I would therefore, allow the appeals and quash the order of the High Court but in the circumstances of the case would make no order as to costs.

ORDER. –

Civil Appeals Nos. 1003 and 1004 of 1963. - In accordance with the opinion of the majority, these appeals are dismissed with costs. One hearing fee.

Appeals dismissed.

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