

ALLAHABAD HIGH COURT

Sheo Prasad

Vs.

State of U.P

Supreme Court Appeal No. 144 of 1963

(S.S. Dhavan and K.B. Asthana, JJ.)

18.12.1963

JUDGMENT

Dhavan,J.

1. This is an application by Seth Sheo Prasad under clauses (a), (b) and (c) of Article 133(1) of the Constitution for a certificate enabling him to appeal to the Supreme Court from a decision of this Court rejecting his appeal from an order of Oak, J. dismissing his petition under Article 226 and refusing to restrain the State of Uttar Pradesh, the Sales Tax Officer, Hathras and the Collector of Aligarh from recovering from him a certain amount of sales tax assessed on the firm of which the petitioner was a partner. The facts are these : Messrs. Lallamal Harden Das Cotton Spinning Mills Company was a partnership firm consisting of the partners including the petitioner Seth Sheo Prasad. It owned a cotton spinning mill in Hathras and carried on the business of producing and selling cotton yarn. In 1944 differences arose between the partners and one of them Raghunath Prasad, filed a suit for the dissolution of the partnership. This suit was dismissed on a preliminary ground and an appeal from it is decision was filed in this Court. During the pendency of this appeal, receivers were appointed for working the mills under the directions of the Court. In 1949 the receiver reported to the Court that the mill could be run only at a loss and thereupon the Court directed that the mill be closed. At this stage the State Government intervened and in 21st July 1949 passed an order under Section 3(f) of the U.P. Industrial Disputes Act, 1947 appointing an authorized controller of the mill. The petitioner was selected for this post. The order of appointment directed him to take possession of the mill to the

exclusion of the partners and run it subject to the general supervision of the District Magistrate of Aligarh. He was allowed a salary of Rs. 1000 per month and commission at the rate of 12 annas per cent on sales. This order was challenged by one of the partners, Seth Shanti Swarup by a petition under Article 226 which was rejected on 19-7-1953. During the pendency of the petition, on 31st October, 1952, the Union of India intervened and passed an order under Section 3(4) of the Essential Supplies (Temporary Powers) Act, 1946 appointing the applicant as authorized controller and directed him to run the mill on the same terms and remunerations as under the previous order of the State Government.

2. The terms of the two orders, which are identical, are important. The authorized controller was to act under the general supervision of the District Magistrate of Aligarh. He was further required to dispose of the funds of the undertaking for (a) payment of all arrears of wages and other dues to the employees, (b) payment of the expenses of the undertaking, and (c) the distribution of profits after meeting all the expenses. He was also required to undertake such essential repairs and renewals of machinery as he might consider necessary for securing the efficient working of the undertaking. The order also restrained all persons having control over the affairs of the undertaking from selling, gifting, transferring, disbursing or disposing of in any manner whatsoever the assets of the undertaking. In effect the order placed the control of the Mill with the authorized Controller and deprived all the partners of their powers of management. The terms of the order must be read with Section 4 of the Central Act which enjoined the authorized Controller appointed under Section 3 to exercise his functions in accordance with any instructions given to him by the Central Government and also directed any person having any functions of management to comply with the directions of the authorized Controller. As subsequently observed by the Supreme Court, the authorized Controller was, under the U.P. Industrial Disputes Act, "practically exempted from all obligations and responsibilities normally attaching to an agent" and the effect of the order of the Central Government was to have deprived the partners of their right of property within the meaning of Article 31 of the Constitution.

3. The applicant Seth Sheo Prasad has alleged in his petition that though the Mill was running at a loss between July 1949 and February 1953, the authorities did not permit him, in spite of repeated requests, to close the Mill and it was only in 1953 that he was permitted to do so on condition that all the arrears of wages due to labour had been

paid in full. The Mill was closed by him on 10th February 1953.

4. In 1954, one Seth Shanti Swamp one of the partners, owning the undertaking, moved the Supreme Court under Article 32 of the Constitution for the quashing of the two orders of the U.P. and Central Government appointing the applicant Seth Sheo Prasad as authorized Controller. This petition was allowed and the orders set aside as illegal. In the concluding paragraph of its judgment the court observed "the petitioner will have the liberty to take such steps as he may be advised to do for cover damages by way of compensation for the loss of such properties or assets in an appropriate civil court". The Supreme Court had no occasion to express an opinion on the question on whose behalf and under whose authority the Controller should be deemed to have made transactions such as the sale of cotton yarn and who was liable to pay the sales tax on them.

5. Meanwhile, the State Sales Tax authorities assessed the firm, Messrs. Lallarnal Hardeo Das Cotton Spinning Mills Company to sales tax in respect of sales made during the assessment years 1949-50, 1950-51, 1951-52, 1952-53 and 1953-54. The total amount so assessed under different orders came to Rs. 1,01,487.16 nP. It is common ground that these orders were not challenged and have become final. The tax was not paid and the Sales Tax Authorities took proceedings for their realization from one of the partners, Seth Shanti Swarup. He resisted the attempt and filed a petition under Article 226 in this Court on the ground that he was not liable as a partner because the sales were made by the authorized Controller, Seth Sheo Prasad (the present petitioner) as a representative of the U.P. and the Central Government. This petition was allowed by Oak, J. on the ground that the actual seller was not a representative of the proprietors or the partners of the firm who had no hand in appointing Seth Sheo Prasad as the Controller and were therefore not liable to pay any sales tax on transactions made by him. The learned Judge quashed the proceedings for the recovery of the sales tax from Seth Shanti Swarup and issued an order restraining the State from proceeding against him. No appeal was filed by the State.

6. The next step of the Sales Tax Authority was to proceed against Seth Sheo Prasad, the partner who had been appointed authorized Controller (the applicant before us). He too filed a petition under Article 226 challenging the right of the State to recover the tax from him, and contended that while acting as authorized Controller he functioned as a salaried servant acting under the orders of the Government and was not liable to

pay any sales tax under the assessment orders made against the firm. This petition was dismissed by the learned Judge who made a distinction between the position of the applicant and that of the other partners of the firm in the following words.

"the liability of the firm can be enforced against the other partners of the firm. It is true that in the previous Writ Petition exempted Seth Shanti Swarup from payment of sales tax, but that decision rested on the ground that Seth Shanti Swarup had no hand in the management of the affairs of the Mill. That consideration does not apply to Seth Sheo Prasad. In the first place, he has been a partner of the firm. Secondly he was in actual management of the affairs of the firm at the material time. There is therefore no equitable ground for exempting the present petitioner from payment of sales tax."

7. The applicant filed a Special Appeal from the order of the learned Judge. This was dismissed by a Division Bench (Desai C.J. and Asthau, J.) on grounds somewhat different from those adopted by Oak, J. The learned Judges observed.

"... .We are clear in our mind that Seth Sheo Prasad (the applicant) as a partner of the Mill was liable to pay the dues of the sales tax. It is not disputed that the sales, proceeds of which were assessed and on which the tax is due, were carried on on behalf of the Mill by Seth Sheo Prasad. Though he had got the control over the Mill by virtue of the order of Government as authorized controller to the exclusion of all other partners, but he never ceased to be a partner of the Mill. The only effect, in our judgment, of the Supreme Court quashing the State Government's and the Central Government's orders, purported to have been passed in exercise of powers under the various enactments taking over the control of the Mill and appointing the appellant as authorized Controller, would be that the capacity of Seth Sheo Prasad as authorized Controller in managing the Mill under the authority of law never came into existence. The result would be as if the Mill continued to be controlled and managed by the partners. The decision of the Supreme Court could not wipe out as such the legal capacity of a partner of the Mill. The transactions which were done by Seth Sheo Prasad in the name of the Mill or on behalf of the Mill would certainly bind him and the Mill as a partner. His position in law would be that of a de facto Manager and his actions would be binding on the Mill. We hold therefore that as a partner of the Mill the dues of

tax were rightly sought to be realized from Seth Sheo Prasad."

8. The applicant wants to appeal to the Supreme Court from this decision and has filed the present application for a certificate under Article 133. The application is resisted by the State on the ground that a certificate under Article 133 cannot be issued for two reasons - first, the decision of the learned Judge was confirmed in appeal and no substantial question of law is involved in this case; secondly, the orders dismissing the Writ Petition were not passed in civil proceedings.

9. The first question is whether the appeal involves any substantial question of law, We think that it does. In fact, counsel for the State did not seriously challenge this view and concentrated his argument on the second question, but we would like to state our reasons for our opinion. The applicant was appointed authorized controller. It is common ground that a Controller appointed by the State or the Central Government must act under the directions of the appointing authority. The concurrent view of the learned Judge in the writ petition and the Bench in appeal was that none of the partners can be held liable for the transactions made by the Authorized Controller, but the position has been complicated in this case by the fact that the order appointing the applicant as Controller was quashed as illegal by the Supreme Court. The appellate Bench held that the legal effect of this decision was as if the Mill continued to be controlled and managed by the partners, and the transactions made by Seth Sheo Prasad on behalf of the Mill would bind him and the Mill as a partner. Accordingly the Bench held that the sales tax due from the Mill was rightly sought to be realized from him.

10. Oak, J. in the earlier writ petition filed by one of the partners, Seth Shanti Swarup, held that the other partners were not liable to pay sales tax with respect to transactions of sale entered into by Seth Sheo Prasad. But in the present case it has been held that the legal effect of the quashing of the appointment of Seth Sheo Prasad as Controller was "as if the Mill continued to be controller and managed by the partners and the transactions made by Sheo Prasad would bind him and the Mill as a partner". Now a partner is an agent of the other partners and his actions are binding on them. Under Section 13 of the Partnership Act he is entitled to be indemnified in respect of payments made and liabilities incurred by him in the ordinary course of the business. Under Section 4 the firm is only a name for the partners collectively, therefore, the right of indemnity is against the other partners collectively. But in Seth Shanti

Swarup's case this Court has held that in making the sale transactions during his period of office as a Controller Sheo Prasad was not acting on behalf of the other partners and they are not liable to pay sales tax. Does it follow that Seth Sheo Prasad after paying the sales tax will have no right to be indemnified by the partners collectively ? In that event the position will be that in one decision he has been held to have acted as a partner, but in the other not to have acted as a partner so as to bind the other partners and claim to be indemnified by them. He contends that the rights and liabilities of a partner are inseparable and this Court cannot hold him liable as a partner after holding in a previous decision that he did not act on behalf of the other partners thus depriving him of his right to be indemnified by them. This raises a substantial question of law.

11. The applicant also contends that as Controller he could not have acted as a partner. The State has the power to appoint any person as an authorized Controller. But in practice some one connected with the undertaking is appointed in the interests of business, as a stranger would not know his way around. In the present case a partner was appointed. But the Act does not provide for a situation where the appointment of a partner is quashed after he has functioned as Controller for a considerable period. Who is liable for the acts done and transactions made by him bona fide as Controller himself, or the partners collectively, or the State which gave orders against the interests of the partners including the applicant ? A Controller must carry out the orders of the appointing authority. The petitioner has alleged that he was required to keep the Mill running even at a loss and to pay the wages of labour before other dues with the result that all the available funds were swallowed up and "no cash ever remained with the Mills after payment of wages which also could be paid in past only, there being losses all the time and no earning." This policy of running the business at a loss and of paying labour before taxes was imposed by Government and the Controller had no option but to execute it. If a person other than a partner were Controller the question will arise whether he would be liable for obeying orders if his appointment is subsequently discovered to be illegal. But is the position different if one of the partners of the firm owning the undertaking is appointed Controller and compelled to carry out directions which may conflict with his own interests as a partner ? If his appointment is not set aside by the Court as illegal, does the State Income tax authority entitled to treat his acts done in carrying out their own orders as the acts of a partner and can the Court hold him liable as a partner for the taxes assessed on the firm while holding the other partners not liable ? These are substantial questions of law which

arise in this case and may arise whenever a partner's appointment as Controller is held illegal and he is sought to be made liable as a partner for acts done by him as a Controller.

12. The next question is whether the order was passed in a civil proceeding. Counsel for the respondent advanced the following arguments before us : a petition under Article 226 challenging the validity of an assessment order made under file Sales Tax Act is made in revenue and not civil proceeding, because Article 132 of the Constitution has classified the proceedings before the High Court as "civil, criminal, or other proceedings" and an order under Article 226 rejecting a petition challenging an assessment order under the Sales Tax Act and seeking to restrain the State from realising the tax is passed in revenue proceedings which are proceedings other than civil proceedings; secondly (in the alternative) proceedings under Article 226 are constitutional, not civil proceedings.

13-15. What are civil proceedings within the meaning of Article 132 ? The phrase has not been defined in the Constitution nor by the Supreme Court but has been explained by eminent jurists and in many decisions English, American and Indian. In Stroud's Judicial Dictionary "civil proceeding" is defined as a process for the recovery of individual rights or redress of individual wrong; inclusive in its proper legal sense in suits by the Crown. In *A.G. v. Radloff*¹ the test of a civil proceeding was enunciated thus :

"If the subject-matter be of a personal character, that is, if either money or goods are sought to be recovered by means of the proceeding - that is a civil proceeding. . . ." In American Jurisprudence a civil action is defined as one brought to enforce or vindicate a private or civil right or to redress a private or civil wrong : (Volume 1, Section 41) and the term action has been interpreted to include proceedings other than suits in the law Courts. In the same volume, the term civil action is explained in detail with illustrations thus :

"The term 'civil action' has been said to embrace, from its natural import, every species of suit not of a criminal kind, and to comprehend every conceivable cause of action, whether legal or equitable, except such as are criminal in the usual sense, that the judgment against the defendant may be a fine or imprisonment, or both, and, in case of fine alone, imprisonment until payment. The term, as distinguished from "criminal action," has been held to include

disbarment proceedings; action by the state or government on forfeited bail bonds, and proceedings by sureties therein to be discharged from liability; election contests; actions for the annulment of corporate franchises for violations of the law; juvenile delinquency proceedings; actions to compel the destruction of pictures of persons accused, but not convicted, of crime, taken by police authorities and intended for the rogues gallery; proceedings under the Chinese exclusion acts; proceedings under the Federal Hours of Service Act; and, by the weight of authority, habeas corpus and quo warranto proceeding. Also according to the great weight of authority, a bastardy proceeding is civil in its nature. Proceedings for the removal of public officers are regarded in some jurisdictions as criminal or quasi criminal actions, and in others as civil actions. "Proceedings to enforce forfeitures and to recover statutory penalties are generally considered to be of a civil nature; under a statute involving a particular case, however, the proceeding may be a criminal one or the state of the pleadings may be such as to make it one of a criminal character. An action to recover the value of merchandise forfeited to the United States is not a criminal case.

"A contempt proceeding which has for its object merely the punishment of the offender is generally regarded as a criminal action; but where the purpose in view is the enforcement of a civil right, such as compelling obedience to an injunction, the authorities are in conflict, some viewing the proceeding as civil and others as criminal in its nature." American Jurisprudence V. 1, Section 41, under the title What Actions Are Civil."

These illustrations, which are not exhaustive, indicate that the term 'civil action' - which is treated as virtually synonymous with civil proceedings - has been given the widest possible meaning and includes disbarment proceeding, election contests, and contempt proceedings to enforce an order of a civil Court.

16. Indian Courts have given an equally wide meaning to civil proceeding. In *Province of Bombay v. Khushal Das S. Advani*,² Mahajan, J. observed :

"The expression 'sue' means the enforcement of a claim or a civil right by means of a legal proceeding. 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'. Thus to follow any remedy to enforce a right is to sue." In *Kapur Singh v. Union of India*,³ a Full Bench of the Punjab High Court defined civil proceeding thus :

"A judicial process to enforce that right. It covers any step in an action and is equivalent to an action. It is a prescribed course of action for enforcing a legal action and embraces the requisite step by which judicial action is invoked."

This definition was adopted by a Division Bench of our Court in *Brij Lal Suri v. State of Uttar Pradesh*,⁴ It is not necessary to cite the decisions of the other High Courts. The numerous illustrations of civil action in American Jurisprudence quoted above show that the words civil proceedings have acquired the widest possible meaning today. Rigid definitions of legal concepts are undesirable as they evolve with experience, but broadly speaking, any legal process, be it a suit in the Civil Courts or any kind of proceedings whatsoever held under the authority of the sovereign for the protection, enforcement, or recovery of a civil right or the redress of a civil wrong, is a civil proceeding.

17. The right to hold one's property is a civil right. Property has a very wide meaning and includes a man's worldly goods such as land, stocks and shares, copyright, goodwill in business, actionable claims, cash, and money in all its forms. A person is entitled to resist any encroachment on his property right. An attempt by the State or its officials to deprive a person of his money without the authority of the law is an infringement of his right of property and any judicial proceeding taken by him for the protection of this right is a civil proceeding.

18. In our opinion any action or proceedings to prevent the State from levying a tax which he regards as illegal are civil proceedings. The sovereign has the power to raise revenue by imposing taxes to meet the expenses of government. This power is called taxation and a tax is a compulsory execution or contribution assessed in accordance with law. But it makes all the difference whether the tax imposed is legal or illegal. If legal, it is a levy in the exercise of the sovereign power; if illegal, it is an attempt to deprive a person of his money. In one case the State Acts as the sovereign, in the other as a trespasser. A person complaining of illegal exaction has, unless debarred by statute, several remedies open to him, depending on the nature of the injury sustained and the kind of relief sought.

"The two more important remedies are an action at all to recover back illegal taxes which have been involuntarily paid and a suit in equity for an injunctive relief against the enforcement of a collection of illegal taxes."

American Jurisprudence Vol. 51 (Taxation) p. 1001. In the same volume it is stated,

"It is now the established and recognized practice of Courts of equity to exercise jurisdiction to enjoin the collection of a tax where the tax is not authorized by law, where it is assessed upon property not subject to taxation, and where property has been fraudulently assessed at too high a rate, except as its powers in this respect may be limited by statute. Even in the case of a state tax, a suit against state officers to enjoin them from enforcing an illegal tax is not objectionable as a suit against a state within the prohibition of the Eleventh Amendment. Equity will not, however, enjoin the collection of a tax where there is a plain and adequate remedy at law, but it may do so if the case falls within one of the recognized head of equity jurisdiction."

19. In *Pollock v. Farmers' Loan and Trust Co.*,⁵ the U.S. Supreme Court held that a Court of equity has jurisdiction to prevent the illegal payment of an unconstitutional tax by a corporation out of its capital or profits. The subsequent notoriety gained by this decision the Constitution had to be amended to overcome its view that the Congress had no power to pass a law imposing an income-tax - does not derogate from the principle enunciated that the subject has the right to take legal proceedings to prevent the State from illegally exacting money from him under the guise of taxation.

20. Learned counsel for the respondent relied on several decisions of other High Courts and one of this Court in which it was held that a petition challenging an assessment of tax is not a civil but revenue proceeding. I shall now consider these decisions and also a few others which were not cited at the bar. It would be convenient to classify them according to the arguments on which they are founded.

21. The first and most important argument is that proceedings for the assessment and recovery of tax are revenue proceedings and not civil proceedings; it is contended that proceedings in the Indian High Courts are not classified as civil or criminal as in English and American jurisprudence, but as civil, criminal and "other proceedings"

This argument is based on the language of Article 132 of our Constitution the material words are

"an appeal shall lie to the Supreme Court - whether in a civil, criminal, or other proceedings. If the High Court certifies that the case involves a substantial question of law as to the interpretation of the Constitution."

The existence of the words "other proceedings" in Article 132 is the foundation of the argument. It has been observed that

"the phrase civil, criminal and other proceedings in Article 132 indicates that Constitution classified the proceedings in the High Court into three kinds-civil, criminal and others."

*Allen Berry and Co. v. I.T. Officer Patna*⁶ see also AIR 1958 Allahabad 621 : *State of Uttar Pradesh v. Mukhtar Singh*,⁷ ("observations of Desai, J."); *Sri Ram Gulabdas v. Board of Revenue*,⁸ *M.K. Krishnaswamy v. Council of the Institute of Chartered Accountants*,⁹ *J.P. Shanna v. Phalton Sugar Works Ltd.*,¹⁰

22. As the view taken in all these decisions is founded entirely on the words 'other proceedings' in Article 132 their purpose must be examined. According to the Full Bench of the Patna High Court the Constitution by using this phrase "classified the proceedings in the High Court into three kinds civil, criminal and of hers". With profound respect, we cannot accept this interpretation though it has appealed to several High Courts.

23. The constitution came into effect on 26th January 1950. It did not create a new legal system, nor a single new Court or Tribunal except the Supreme Court. There already existed a fully developed legal system based on well-recognized principles of jurisprudence and an hierarchy of Courts and tribunals empowered to hear all kinds of proceedings civil and criminal Courts, revenue Courts, income-tax tribunals, sales tax judges, industrial tribunals, and others. Was the phrase 'other proceedings' in Article 132 intended to modify the basic principles on which our legal system was founded and introduce a new class of proceedings which did not exist before ? We cannot infer from the mere use of these two words that the makers of the Constitution intended that after the midnight of 25th January all existing principles of classification of

proceedings would stand automatically modified and a new class of proceedings come into being.

24. It is beyond dispute that in England as in the United States all proceedings are either criminal or civil. In *Corpus Juris Senundum* civil jurisdiction is described as "that which exists when the subject-matter is not of a "criminal nature" (Vol. 21 p. 35). No other jurisdiction is mentioned. In Story's *Constitution of the United States* it is observed.

"The judicial power (of the United States) extends to all cases in law and equity, arising under the Constitution, the laws and treaties of the United States. And by case in this case we are to understand criminal as well as civil cases." (Vol. 2 p. 421).

There is no mention of any third class of cases. Desai, J. in AIR 1957 Allahabad 505 conceded,

"It seems that according to the Revised Statutes a proceeding is either civil or criminal; they do not contemplate a third kind of proceeding."

(The learned Judge, however, added

"Our Constitution contemplates a third kind of proceedings which is neither criminal nor civil. Whereas according to the American Law a proceeding that is not criminal must be civil, it is not so according to our Constitution, because it can be not civil also").

In England too the proceedings are classified into civil and criminal.

25. It is not denied that the Indian judicial system is based on the English, but argued that the Constitution of India classified the proceedings in the High Courts into civil, criminal, and others - in other words an important change was imported into the classification which existed on the 25th January. This argument cannot be accepted, because the classification of proceedings into civil and criminal is founded on a basic principle which flows from the very nature of the judicial power of a sovereign state. A judicial proceeding is one which ends in an award or sentence by an authority which is binding on the parties to a dispute and can be carried out irrespective of their will.

The sanction behind such proceedings is the power of the sovereign. Judicial power is the attributes of sovereignty. It has been interpreted in various ways but in *Bharat Bank Ltd. v. Employees of Bharat Bank Ltd.*,¹¹ Mahajan, J. approved as "best" the definition of Griffith, C.J. of the High Court of Australia :

"The words 'judicial power' as used in Section 71 of the Constitution (of Australia) mean the power which every sovereign authority must of necessity have to decide controversies between its subjects, or between itself and its subjects, whether the rights, relate to life, liberty, or property. The exercise of this power does not begin until some tribunal which has power to give a binding and authoritative decision (whether subject to appeal or not) is called to take action".

Therefore proceedings before any authority - Court or tribunal, vested with the judicial power of the sovereign to decide controversies between its citizens or between itself and citizens are judicial proceedings. The function of the sovereign is to preserve the social order and of legal proceedings to assist the sovereign by settling disputes and punishing or redressing breaches of the law. A breach may take place when a public duty is violated or an individual right infringed. In both cases the public peace is endangered and the sovereign intervenes. All disputes whether between subject and subject or between subject and the state, are either criminal or civil in nature, and proceedings for resolving them, likewise, either criminal or civil. In Municipal law there is no other basis of classification of disputes and proceedings held under the authority of the sovereign to decide them are

"the means of enforcing civil rights, or compelling the performance, either civilly or criminally of public duties on the parts of citizens" Story; Constitution of the United States. Vol. 2 p. 445."

26. But in AIR 1957 Allahabad 505 Desai, J. observed :

"It is laid down in Section 112(2) of the C.P.C. that it will not apply to any matter of criminal or admiralty jurisdiction. This provision recognizes the existence of admiralty jurisdiction as distinct from criminal and civil jurisdiction. The Letters Patent also recognized testamentary, intestate, and matrimonial jurisdictions as distinct from civil and criminal jurisdictions. Much

confusion has resulted from the assumption, for which there is no warrant at all that jurisdiction is either civil or criminal."

Earlier he observed,

"Testamentary, intestate, and matrimonial jurisdictions were provided for separately in clause 25 (of the Letters Patent) because they were not included in the civil jurisdiction provided for in clauses 9, 10, 11.... the jurisdiction that was exercised by this Court under the Letters Patent was preserved by clause 7 of the Amalgamation Order."

With great respect, the learned judge overlooked that clauses 9, 10 and 11 of the Letters Patent conferred appellate jurisdiction but Clause 25 original jurisdiction in testamentary, intestate, and matrimonial matters. It particular matters were selected for the original jurisdiction of the High Court they had to be specified in a separate clause, but did not for that reason cease to be civil or criminal. Admiralty, Probate, and so on, are historical labels burrowed from the English law, but the proceedings under these heads are not regarded in England as other than civil or criminal Marriage in England creates civil rights and obligations which are enforceable in the Matrimonial Court; similarly the right to dispose of or inherit property by or under" a will is a civil right. Admiralty jurisdiction is of ancient origin but now exercised by the Probate and Admiralty Division of the High Court, the proceedings being either civil or criminal. Holdsworth has described in detail the criminal and civil jurisdiction of the Court of Admiralty. The former included such matters as suppression of piracy on the high seas and the latter disputes over property found upon the sea and stranded upon the shore, and prizes captured at sea. Whatever its historical origin, today

"its judge has been given the powers possessed by the judges of the superior Courts of Common Law." Holdsworth, a History of English Law, Vol. 1 p. 559. It is inconceivable that the Crown while issuing the Letters Patent establishing High Courts in India as courts of record on the English model departed from the fundamental principle of classification of legal proceedings. There is no reason why it should have. Under American Law too there is admiralty jurisdiction. Art. III, Section 2 of the American Constitution provides that "the judicial power (of the United States) shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties

made, or which shall be made under their authority; - to all cases affecting ambassadors, other public ministers and consuls; - to all cases of admiralty and maritime jurisdiction - to controversies between two or more states; between a state and citizens of another states - between citizens of different states. - between citizens of the same state claiming lands under grants of different states, and between a state, or the citizens thereof, and foreign states, citizens or subjects. (S. 2).

The inclusion of Admiralty jurisdiction in the judicial power of the United States has not affected the classification of proceedings in American juris prudence as civil or criminal.

27. In AIR 1957 Allahabad 505 Beg, J. did not agree with the view of his learned brother Desai and observed that jurisdiction in these matters did not cease to be civil because the Letters Patent conferred original jurisdiction on the High Court.

28. I shall now consider the view expressed in several decisions in which it was observed that proceedings for the assessment of tax are not civil but revenue proceedings. The cases have been cited above. But with great respect, it is not possible to agree that the proceedings for the assessment and recovery of income and sales tax are outside the classification, civil and criminal. In England tribunals for the assessment of income-tax have been created by statutes which also provide for the forcible recovery of tax. The assessment and collection of revenue was formerly within the jurisdiction of the Court of Exchequer. In due course,

"there was separation between the final and judicial sides of this department" Hoklsworth, *ibid*, p. 231. "This Court gradually became assimilated to the other two Courts of common law, this process of assimilation took a long time to accomplish". Holdsworth has described in detail "the process by which the jurisdiction of the Court (of Exchequer) came to be limited almost entirely to revenue cases." Finally, by the judicature Act of 1873.

"the Court of Chancery, the Court of King's Bench, Common Pleas, and Exchequer, the Court of Admiralty, the Court of Probate, the Divorce Court, and the London Court of Bankruptcy were consolidated and formed into one Supreme Court of Judicature in England" (*ibid*). "To the High Court was assigned the jurisdiction of the following Courts; (1) The High Court of Chancery; (2) The Court of Kings Bench; (3) The Court of Exchequer as a

Court of Revenue as 'well as a Common law Court; (4) The High Court of Admiralty; (5) The Court of Probate; (6) The Court for Divorce and Matrimonial Causes; (7) The London Court of Bankruptcy; (8) The Court of Common Picas at Lancaster; (9) The Court of Pleas at Durham; (10) The Court created by Commissions of Assize, of Oyer and Terminer, and of goal delivery, or of any such Commissions" - Holdsworth *ibid* pp. 638-639.

29. Today under the English Income-tax Act assessments are made by Commissioner, Additional and Special, and the assessee has a right to be heard. There is a right of appeal to the General or Special Commissioners, and there is a further right to take the matter to the High Court by means of a case stated and challenge the determination as erroneous in law.

"The High Court hears and determines any question of law arising on the case, and may reverse affirm, or amend the determination or remit the case to the Commissioner with the Court's opinion thereon, or may make any such order in relation to the matter as to the Court may seem fit" - Halsbury's Laws of England, Edition p. 693. "An appeal lies from a decision of the High Court to the Court of appeal and thence, with the leave of the Court of appeal or the House of Lords to the House of Lords".

In the cases cited above no reason was given why proceedings for the assessment in recovery of tax are neither civil nor criminal beyond a bare statement that these are revenue proceedings. But there is nothing in the Constitution to indicate that revenue proceedings are distinct from civil or criminal proceedings. Our Income-tax Act is similar to the English, though not in *pari materia*. There is a similar right of appeal to the Income-tax Commissioner and then to the Income-tax (Appellate) Tribunal, and to have a case stated before the High Court. The important point to note is that in spite of the existence of an Income-tax Act establishing tribunals for the assessment and collection of revenue. English jurisprudence has classified all proceedings into criminal or civil. Our legal system is based on the English and our Income-tax Act and Sales Tax Act existed on 25th January 1950 when the Constitution came into force. It is not possible to agree that the two words in Article 132 "other proceedings," inserted for the purpose of extending the Appellate jurisdiction of the Supreme Court in certain doubtful matters, had the effect of creating a difference between the two legal systems by setting up new categories of proceedings under the label "revenue proceeding", and

so on.

30. In this context the words of the proviso to Article 225 of the Constitution which removed the restrictions on the High Court jurisdiction in revenue matters are significant :

"Provided that any restriction to which the exercise of original jurisdiction by any of the High Courts with respect to any matter concerning the revenue or concerning any act ordered or done in the collection thereof was subject immediately before the commencement of this Constitution shall no longer apply to the exercise of such jurisdiction." In restoring the jurisdiction of the High Court, the makers of the Constitution did not use the words "revenue jurisdiction" or "revenue proceedings" but "any matter concerning the revenue or concerning any act ordered or done in the collection thereof. It was understood that these orders or acts would be passed or done in the same proceedings as before. It is instructive to recall the warning of Fazl Ali, J. not to be misled by "mere labels" but "to look further and see what are the main functions of the tribunal and how it proceeds to discharge them." AIR 1950 Supreme Court 188. The learned judge was investigating the true content of proceedings before an industrial tribunal but his advice may be followed with advantage in ascertaining the nature of any proceedings.

31. The phrases revenue proceedings, industrial proceedings, election proceedings, and so on are labels which are convenient in practice but misleading if interpreted as creating new classifications of proceedings which are neither civil nor criminal but sui generis.

32. In AIR 1956 Patna 175 the Patna High Court relied upon some observations of the Privy Council in *Raleigh Investment Co Ltd. v. Governor General*,¹² in support of their view that income-tax and sales tax cases are not civil proceedings within the meaning of the Constitution Act". The Privy Council in the Raleigh case, AIR 1947 PC 78 had held that the Income-tax Act.

"contains machinery which enables an assessee effectively to raise the question whether any provision of the Act bearing on the assessment made on him is ultra vires" and therefore

"jurisdiction to question the assessment otherwise than by the use of the machinery expressly provided by the Act would appear to be inconsistent with the statutory obligation under Section 45 to pay the tax arising by virtue of the assessment."

The Patna High Court thought that these observations implied that in the view of the Privy Council income-tax and sales tax cases are not civil proceedings. With great respect, no such implication is permissible; on the contrary the observations clearly imply that the Privy Council regarded income-tax proceedings as civil. Their Lordships were considering the limited question whether the jurisdiction of the Civil Court was barred by implication or an express provision was necessary, and it was observed;

"The only doubt indeed in their Lordships' mind is whether an express provision was necessary in order to exclude the jurisdiction in a civil Court to set aside or modify an assessment.

" This doubt in their mind makes it clear that their Lordships regard income-tax proceedings as civil in nature, for an express provision excluding the jurisdiction of the civil Courts is required only in the case of civil proceedings Section 9 of the C.P.C. provides that

"the Courts shall have jurisdiction to try suits of a civil nature excepting suits of which their cognizance is either expressly or impliedly barred." A civil suit may be excluded from the jurisdiction on the civil Court by a statute conferring exclusive jurisdiction on another tribunal to try it; but though the forum is changed the proceedings remain civil. The Privy Council thought that an express provision in the Income-tax Act might be necessary for barring the jurisdiction of the civil Court, but they could not have thought so unless they were clear in their minds that proceedings under the Income-tax Act are civil in nature. Indeed, they could not have thought otherwise, as in English jurisprudence all proceedings are either civil or criminal. This classification is based on fundamental principles and there is nothing in our Constitution to suggest that they stood modified after 26th January, 1950.

33. In *Income-tax Officer v. Jay Prasad*.¹³ Bhargava, J. gave reasons why revenue proceedings were not civil proceedings. The learned judge observed :

"Liability to tax is created by the Income-tax Act and is for the purpose of gathering revenues for carrying on the government of the country. No one can claim it as a civil right that he is not liable to pay the tax. Nor can the State claim that any one is liable to income-tax under the common law relating to civil rights. A proceeding relating to liability in income-tax partakes of the nature of a proceeding which has been usually described as a revenue proceeding."

34. With respect, every citizen has a right to insist that no tax shall be imposed on him except according to law. Article 265 of the Constitution gives a guarantee that

"no tax shall be levied or collected except by authority of law."

The State has the power to pass laws imposing taxes, prescribing the conditions of liability, mode of assessment, and the manner of recovery of taxes, but the citizen has the right to contend that he is not liable, or that the statute imposing the tax does not apply to him, or that the assessed tax is not recoverable from him, or that the assessment should be lower than what is claimed by the assessing authority. He has a right of appeal in which the correctness of the assessment is judicially determined. He has a right to plead that the assessment is excessive that is, his liability should be less; and he can even challenge by means of a case stated that the entire proceedings are ultra vires - in other words the state is attempting to take money illegally from him in the guise of taxation and thus vindicating his right of property. This result of the assessment is to impose a civil liability on the assessee, and any proceedings for the recovery of tax may result in his being deprived of his property or personal freedom. If all the attributes of a civil proceedings are present, the fact that they are for the collection of revenue cannot change their essential nature.

35. Therefore these proceedings cannot but be regarded as civil proceedings. In England they are so regarded, and there is no reason why they should lie regarded differently in this country, in spite of the words "or other proceedings" in Article 132.

36. We shall now consider the meaning and significance of these two words. They occur only in Article 132 and nowhere else in the Constitution. This Article provides for an appeal from every decision of the High Court which raises a substantial question of law as to the interpretation of the Constitution. The first question is : why

were they inserted in this Article ? There are two rival interpretations. The first is that the words were intended to classify proceedings into three types - civil, criminal, and others; the other is that they were considered necessary in view of doubts created by the decisions of several High Courts refusing to recognize certain proceedings as civil and also in view of the anomalous nature of contempt proceedings. We do not think that the first interpretation is sound. If a third class of proceedings was created or recognized, one would have expected a separate article providing a right of appeal to the Supreme Court in these proceedings, similar to Article 133 for civil and 134 for criminal proceedings. But there is no such article. These so-called other proceedings are supposed to include petitions under Article 226, revenue, probate and matrimonial cases, and other important matters which affect the rights of the citizens no less than those covered by Article 133. It could not have been intended, without any valid reason, that in these "other proceedings" the litigant would have no right of appeal unless a constitutional question of law was involved. In the majority of matrimonial, probate, or revenue cases and in many proceedings under Article 226 no question of interpretation of the Constitution is involved. There was no person for discriminating between such cases and civil proceedings in which a right of appeal was conferred without the condition of a constitutional question being involved. We must, therefore, infer that the words "other proceeding" were not intended to create a third kind of proceedings with no right of appeal to the Supreme Court.

37. The second interpretation is sounder. As stated above these words "other proceedings" occur only in Article 132. What was the purpose inserting them here ? In our opinion, the explanation is that the Founders were anxious that the Supreme Court should be the final authority in every proceeding in the High Court involving a constitutional question. They were anxious not to leave any loophole nor exclude any proceeding. Then how was this article to be worded ? The words "civil or criminal" would have left large gaps in view of the decisions of several High Courts about the nature of certain proceedings - as for example for disciplinary action. This Court had held such proceedings to lie civil and covered by Section 109, C.P.C. for purpose of appeal to the Privy Council, - *S. An Advocate v. Judges of the Allahabad High Court*,¹⁴ *P., a Pleader v. Judges of the Allahabad High Court*,¹⁵ But the Bombay, Patna, Lahore, and Madras High Courts had regarded these proceedings as neither civil nor criminal - *Ganesh S. Dandvate v. Govt. Pleader*¹⁶ *Bir Kishore v. Emperor*,¹⁷ In the Matter of *Ram Lal Anand, Advocate*,¹⁸ In the Matter of *E. Raghava Reddi*,¹⁹ The words 'other proceedings' prevent any High Court from refusing a certificate under

Article 132 on the ground that the Court had always regarded these proceedings as neither civil nor criminal.

38. Another instance of proceedings which have been described as lying in "a no man's land" between civil and criminal are contempt proceedings. In some cases they are held to be civil, in others quasi-criminal. The words 'other proceedings' prevent a certificate being refused on the basis of a fine distinction between quasi-criminal and criminal.

39. To sum up, the words 'other proceeding' were inserted very likely to include proceedings excluded from the category of civil or criminal by several decisions of different High Courts, but not to introduce a new classification or category of proceedings which did not exist before the Constitution. The classification of proceedings into civil or criminal proceeds from the sovereign power of the State and transcends such labels or subdivisions of historical origin as revenue, exchequer, admiralty, probate, divorce, industrial, contempt, and so on which are sub-divisions of civil or criminal. If the sub-divisions are regarded as separate categories, there will be no end to the classification of proceedings. As civilisation grows more complex and the State becomes a welfare State, new kinds of disputes must arise between subjects or between the subjects and the State, but every dispute is essentially criminal or civil and proceedings for the resolution of disputes are likewise criminal or civil.

40. Finally it was argued that a petition under Article 226 is not civil but constitutional proceeding. Learned counsel cited a decision of the Patna High Court in *Collector of Monghyr v. Maharaja Pratap Singh Bahadur*²⁰ in which it was observed.

"the jurisdiction of the High Court under Article 226 is an extraordinary jurisdiction vested in the High Court not for the purpose of declaring the civil rights of the parties but for the purpose of ensuring that the law of the land is implicitly obeyed and that the various Tribunals and public authorities are kept within the limits of their jurisdiction. In other words the jurisdiction of the High Court under Article 226 is a supervisory jurisdiction - a jurisdiction meant to supervise the work of the tribunals and public authorities and to see that they act within the limits of their respective jurisdiction. In a proceeding under Article 226 the High Court is not concerned with the determination of the civil rights of the parties; the only object of such a proceeding under Article 226 is to

ensure that the law of the land is implicitly obeyed and that various authorities and tribunals act within the limits of their respective jurisdiction."

A similar view was expressed in *Shriram Hanuman Bux v. State of Madhya Pradesh*,²¹ With respect, the purpose of Article 226 is stated in the Article itself "for the enforcement of fundamental rights and other purposes." The words "and other purposes" are ejusdem generis and the existence of a right is the foundation of the jurisdiction under Article 226 : *State of Orissa v. Madan Copal*,²² The learned judges based their arguments on the historical origin of the English writs, and thought that Article 226 was intended to confer powers of superintendence on the High Courts, but the purpose of this Article is the protection of fundamental and other rights and superintendence of tribunals and state authorities is incidental to this purpose. The powers of superintendence are conferred by Article 227.

41. It was then argued that the proceedings under Article 226 are not civil or criminal but constitutional, because the power to issue writs and orders is conferred by the Constitution. We cannot agree. The conferment of an additional power on existing Courts or even the creation of a new Court by the Constitution does not of itself create a new jurisdiction to be called constitutional jurisdiction. The Court of Queen's Bench originated from the prerogative of the Crown under the unwritten British Constitution, but its jurisdiction is criminal and civil. The U.S. Supreme Court was created by Article of the American Constitution but its jurisdiction is criminal and civil. Our Supreme Court was created by Article 124 of the Constitution and its appellate powers were conferred by Articles 132 to 136. But it cannot be argued that when the Supreme Court hears an appeal from a decree of a High Court in a civil suit, the proceedings are converted into constitutional proceedings. If new Courts are created or additional powers are conferred on the existing Courts by the Constitution it does not mean that a new kind of jurisdiction is created but merely that the Courts cannot be abolished nor the power restricted without amending the Constitution.

42. Article 226 provides that the High Court shall have the power to issue directions, orders, or writs. But it is silent about the manner of exercise of this power. It is elementary that a Court can make rules governing the exercise of its power and such rules have been framed by every High Court. Under the existing rules of this Court the power is exercised in summary proceedings on a petition by an aggrieved person. But there is nothing in Article 226 to prevent a High Court to frame new rules providing

that the power of issuing orders, directions and writs shall also be exercised in all proceedings before the High Court. It is unlikely that any High Court will amend the existing procedure which provides a remedy which is convenient and expeditious. But the point to note is that the Court has absolute discretion to prescribe the manner of the exercise of the power under Article 226 and the Constitution does not prevent it from assuming this power in ordinary cases.

43. Again, clause (3) of Article 32 provides that Parliament may by law empower any other Court to exercise all or any of the powers conferred on the Supreme Court under that article, of Parliament does pass a law enabling the ordinary courts to issue all the directions or orders or writs enumerated in Article 32, the additional power will not convert the proceedings before these Courts into constitutional proceedings.

44. It was then argued that the proceedings under Article 226 and Article 32 must be regarded as neither civil nor criminal but extraordinary because their purpose is the enforcement of fundamental rights conferred for the first time under the Constitution. The flaw in this argument is that the rights conferred under Part III of the Constitution are ordinary civil rights which were enjoyed by the citizens before 1959. The Constitution merely raised them to the status of fundamental rights - which means that the State cannot infringe them. In England the proceedings for the enforcement of these rights are civil in nature, and the position in India is not different.

45. In AIR 1957 Allahabad 505 Beg, J. after an exhaustive review of the authorities disagreed with Desai, J. and took the view that legal proceedings are civil or criminal and the words "other proceedings" in Article 132 were added in view of a few decisions of some High Courts which denied the civil nature of certain proceedings, and were intended to make the jurisdiction of the Supreme Court all embracing in matters involving an interpretation of the Constitution to leave no loop-hole.

46. In AIR 1957 Punjab 173 a Full Bench of Punjab High Court after an exhaustive review of the authorities, defined a civil proceeding thus : "a judicial process to enforce; a right and includes any remedy employed to vindicate that right. It includes every step in an action and is equivalent to an action, it is a prescribed course of action for enforcing a legal action and embraces the requisite steps by which judicial action is invoked." This definition was adopted by a Bench of this Court in AIR 1958

Allahabad 621 and is very similar to into own given above.

"any judicial process, be it n suit in the civil courts or any kind of proceeding, whatsoever for the protection, enforcement, or recovery of a civil right or the redress of a civil wrong *** a civil proceeding."

Applying this test to the present case the State has commenced proceeding under Section 275 of the Zamindari Abolition and Land Reforms Act for the realization of a sum of Rs. 101487.60 nP. as sales tax from the applicant Seth Sheo Prasad by the same corrective process as in recovery of arrears of land revenue. There is a threat that failure to pay will lead to other steps which includes the arrest of his person or attachment of his property or both. He filed a petition under Article 226 to enjoin the authorities from proceeding against him. He challenges the right of the State to recover this amount from him and contends that the alleged tax is not recoverable from him under the law. He asked for an order restraining the State from proceeding with the recovery proceeding. This relief has been refused, but if his contentions are sound the state is seeking to deprive him of a large sum of money without the authority of the law, and his personal freedom is in jeopardy. In these circumstances, his petition under Article 226 is for the enforcement of his right of property and protection of his personal freedom and therefore the order of this Court was passed in civil proceedings.

47. Counsel for the State contends that the view of the Division Bench in AIR 1960 Allahabad 84,

"that a proceeding relating to liability to income-tax partakes of the nature of a proceeding which has been usually described as a revenue proceeding."

is binding on us, and as we have expressed our dissent from it, the matter should be referred to a larger Bench. Ordinarily we should have made a reference, but the learned Judges themselves made a distinction between assessment proceedings and those for the recovery of the tax, and held that a petition filed not for the purpose of questioning the assessment but resisting any proceeding for attachment against property of the petitioner was for the enforcement of civil rights. They agreed with the two decisions of the *Madras High Court Dhan Lakshmi Ammal v. Income Tax Officer*,²³ and *Dhan Lakshmi Ammal v. Income Tax Officer*,²⁴ The petitioner in the case before

us challenges the attempt of the State to recover the tax from the petitioner. His case is not hit by the decision in AIR 1960 Allahabad 84. Therefore, while expressing our respectful dissent from the view expressed in that decision, we do not think it necessary to refer the matter to a larger Bench.

48. The amount in dispute is Rs. 1,01,487.60 nP. We are satisfied that the appeal involves a substantial question of law and the case is a fit one to appeal to the Supreme Court. We, therefore, direct the issue of a certificate under Article 133(1)(a) and (c) to enable the petitioner to appeal to the Supreme Court. He shall have his costs of this application from the respondents.

Leave to appeal granted.

Cases Referred.

1. (1854) 10 Ex 84 at p. 101
2. AIR 1950 SC 222
3. AIR 1957 Pun 173
4. AIR 1958 All 621
5. (1895) 157 US 42: 39 Law Ed 759
6. AIR 1956 Pat 175
7. AIR 1957 All 505
8. AIR 1954 Nag 1 (FB)
9. AIR 1953 Mad 79
10. (1963) 50 ITR 72: AIR 1964 Bom116
11. AIR 1950 SC 188 at p. 195
12. AIR 1947 PC 78
13. AIR 1960 All 84
14. AIR 1934 All 898
15. AIR 1937 All 167
16. , ILR 32 Bom 106
17. AIR 1919 Pat 279
18. AIR 1949 Lah 83 (FB)
19. AIR 1922 Mad 440 (FB)
20. AIR 1957 Pat 102 (FB)
21. AIR 1955 Nag 257

22. AIR 1952 SC 12
23. AIR 1957 Mad 376
24. AIR 1958 Mad 151