

BOMBAY HIGH COURT

Jatashankar Dayaram

Vs.

Commissioner Of Income-Tax

Pauper Petition No. 3 of 1972 (in Income-tax Application No. 65 of 1972)

(Nain, J.)

08.12.1972

JUDGMENT

Nain, J.

1. This petition has been placed before the court by the learned Prothonotary and Senior Master of this court at the instance of the respondents to decide a preliminary question as to whether a pauper petition is maintainable in respect of an application by an assessee under section 256(2) of the Income-tax Act, 1961, for compelling the Income-tax Appellate Tribunal to draw up a statement of the case and refer it to the High Court.

2. Petitioner has filed the above petition in forma pauperis for a direct to the Income-tax Tribunal to draw up a statement of the case and raise and refer to this court certain questions of law specified in the petition under section 256(2) of the Income-tax Act. The amount of tax in dispute is a little over ₹ 20,000 and the amount of court-fees payable under item No. 16 of Schedule I to the Bombay Court Fees Act, 1959, is ₹ 390. The petitioner states that he is not possessed of sufficient means to enable him to pay the fees payable by law and he may, therefore, be granted permission to sue in forma pauperis. This petition is opposed on behalf of the Commissioner of Income-tax.

3. It is contended on behalf of the respondent that the provisions of the Code of Civil Procedure do not apply to proceedings under section 256(2) of the Income-tax Act, and consequently Order 33 of the Code of Civil Procedure has no application to these proceedings and no application can be filed in forma pauperis.

4. My attention has been drawn to section 131 of the Income-tax Act, which confers powers of a court when trying a suit on Income-tax Officers, Appellate Assistant Commissioners, Inspecting

Assistant Commissioners and Commissioners for the purposes of discovery and inspection, enforcing the attendance of any witnesses and issuing commissions. My attention has also been invited to sections 261 and 262 of the Income-tax Act. Section 261 provides for an appeal to the Supreme Court from any judgment of the High Court on a reference under section 256 of the Income-tax Act. Section 262 makes the provisions of the Code of Civil Procedure, 1908, relating to appeals to the Supreme Court applicable in the case of an appeal under section 261. It is contended that there is no provision in the Income-tax Act made to the High Courts. It is, therefore, contended that Order 33 of the Code of Civil Procedure does not apply to such applications and a petition to apply under section 256(2) in forma pauperis is not maintainable.

5. Mr. Shastri for the respondent has invited my attention to three judgments, one of the Andhra Pradesh High Court, one of the Allahabad High Court and one of the Calcutta High Court, wherein it has been held that where an applicant under section 66 of the Indian Income-tax Act, 1922 (which corresponded to section 256 of the Income-tax Act, 1961), died during the pendency of a reference before the High Court, the reference did not abate because the provisions of the Code of Civil Procedure were not applicable to references under the Indian Income-tax Act, 1922.

6. In the case of *Commissioner of Income-tax v. I. D. Varshani*¹ the applicant had died not during the pendency of an application to compel a reference but during the pendency of the reference itself. A Division Bench of the Allahabad High Court held that there was no provision either in the Indian Income-tax Act, 1922, or in the Rules made thereunder for bringing on the record the legal representatives of an assessee and that Order 22 of the Civil Procedure Code, 1908, had not been made applicable to a reference under section 66 of the Income-tax Act and, therefore, the reference did not abate. If the Commissioner had not applied to bring the legal representatives of the deceased assessee on record within 90 days of his death the court was entitled to consider whether it would answer the reference at all. The Judgment does not show that any argument was based on section 141 of the Civil Procedure Code or that the said section was at all considered.

7. In the case of *Commissioner of Income-tax v. Gulam Hyderkhan*² a Division Bench of the Andhra Pradesh High Court took a similar view holding that the provisions of Order 22 would not be attracted to a reference under section 66 of the Indian Income-tax Act, 1922, and the position of an assessee in a reference under section 66 could not be equated to that of a defendant or respondent. In this case also the provisions of section 141 do not appear to have been considered.

8. In the case of *Commissioner of Income-tax v. Gourishankar Lal Singha*³ a Division Bench of the Calcutta High Court took the same view as the Allahabad and Andhra Pradesh High Courts, after referring to the said decisions. In that case, the assessee had died during the pendency of an application for leave to appeal to the Supreme Court against the judgment of the High Court, on a reference under section 66 of the Income-tax Act. In this case also the provisions of section 141

of the Code of Civil Procedure do not appear to have been considered.

9. Reliance was also placed on behalf of the respondent on the judgment of a single judge in *Somanna v. Chinnayya*⁴ holding that no application lay for restoration of a petition under section 73, Madras Village Courts Act, which had been dismissed for default. In that case it was observed that there was no provision in the Civil Procedure Code or the Madras Village Courts Act for restoration of petitions dismissed for default. Order 9, rule 9, Civil Procedure Code, applies in terms only to suits and, therefore, it was not

¹(1952) 23 I.T.R. 163

³(1966) 63 I.T.R. 711

²(1961) 46 I.T.R. 463

⁴[1945] A.I.R. Mad. 107

applicable to the petitioner under section 73, Madras Village Courts Act. It was further held that section 141, Civil Procedure Code, could not be invoked because it only empowered the judge to regulate judicial proceedings by rules of procedure in the Civil Procedure Code and it did not make the Civil Procedure Code, applicable in its entirety including provisions conferring substantive rights. It held that the remedy under Order 9, rule 9, Civil Procedure Code, was not a matter of procedure, but was substantive right. I am afraid, I do not share the views of the learned Judge on this point. However, it is not necessary for me to decide in this matter whether the provisions of Order 9, rule 9 of the Civil Procedure Code or procedural or contained substantive rights. In fact in the case of *Anandrao Keshevroa v. Krishnaji*⁵ Baliram Chandrachud J. took the view that where an application under the Madhya Pradesh Temporary Postponement of Execution of Decrees Act had been dismissed for default, the provisions of Order 9, rule 8 of the Civil Procedure Code would apply by reason of the provisions contained in section 141 of the Civil Procedure Code.

10. Section 141 of the Civil Procedure Code provides that the procedure provided in the Code in regard to suits shall be followed as far as it can be made applicable in all proceedings in any court of civil jurisdiction. I have no doubt that an application under section 256(2) of the Income-tax Act, 1961, made to the High Court is a proceeding in a court of civil jurisdiction. I am unable to accept the argument made on behalf of the respondent that such application is merely a continuation of proceedings before the income-tax authorities or before the Income-tax Appellate Tribunal. In my opinion, it is an independent proceeding before the court of civil jurisdiction. Section 141 would, therefore, apply. One has, however, to see whether the provisions of Order 33, Civil Procedure Code, are procedural provisions or they confer any substantive rights.

11. Order 33, rule 1 of the Code of Civil Procedure provides that any suit may be instituted by a pauper. Rule 2 provides for an application for permission to sue as pauper. Rule 8 states that where application is granted, it shall be numbered and shall be deemed to be the plaint in the suit except that the plaintiff would not be liable to pay the court-fees on such plaint. Rule 10 provides that where the plaintiff succeeds in the suit, the amount of court-fees shall be recoverable by the State Government from the pauper and shall be a first charge on the subject-matter of the suit. Rule 11 provides that where the plaintiff fails in the suit or is disappeared or that the suit is withdrawn or dismissed, the court shall order the plaintiff to pay the court-fees which have been

paid by the plaintiff if he had not been permitted to sue as a pauper. Rule 11(a) provides that where the suit abates by the death of the plaintiff, the amount of court-fees shall be recoverable from the estate of the deceased plaintiff. These provisions show that the payment of court-fees is only postponed to facilitate a poor litigant getting justice before paying the court-fees. As against this, a man of means has to pay the court fees before he seeks justice. In my opinion, the stage at which the State recovers court-fees from a poor litigant has been left to the discretion of the court under the provisions of Order 33 of the Civil Procedure Code. Order 33, Civil Procedure Code, does not confer any substantive right on the litigant. Provisions of Order 33 would, therefore, be applicable to proceedings other than suits in the High Court by virtue of section 141 of the Code of Civil Procedure and they would, therefore, be applicable to an application under section 256(2) of the Income-tax Act.

⁵(1962) 65 Bom. L.R. 417, s.c. [1964] A.I.R. Bom. 232

12. Mr. Thakkar, on behalf of the petitioner, invited my attention to the judgment of the Supreme Court in the case of *Ram Chandra Aggarwal v. State of Uttar Pradesh*⁶ where the provisions of section 24 of the Code of Civil Procedure were made applicable to a reference made by a magistrate to a civil court under section 146(1) of the Code of Criminal Procedure by virtue of section 141 of the Civil Procedure Code. But the cases more in point are two judgments, one of the Bombay High Court and the other of the Madras High Court to which I will refer presently.

13. In *In the matter of the will of Dawubai Haji Khan Hubib Khan* 237. Sterling J. held that where an executor is not in possession of the property of his taster and cannot get possession of it, and where he has not himself the means of paying the necessary fees, he may be allowed to petition for, and if entitled thereto, to obtain probate in forma pauperis. The learned judge held that it was not a suit in the ordinary acceptation of the term, though, if a caveat were entered, it would be changed into a suit. The learned judge was of the opinion that under section 647 (section 141 of the present Civil Procedure Code) which provided that the procedure for suits prescribed by the Civil Procedure Code "shall be followed, so far as it can be made applicable, in all proceedings in any court of civil jurisdiction other than suits and appeals" made the provisions of the Code applicable to all miscellaneous civil proceedings including the one under sections 237 and 261 of the Indian Succession Act. This was followed by Gentle J. in *Palani Gramani v. Manickammal*⁷ The learned The Judge observed :

"I see no reason why an application by a petitioner for grant of probate or letters of administration, which is clearly a proceeding in a court of civil jurisdiction, cannot be subject to the provisions of Order 33, Civil Procedure Code....."

14. The learned judge applied the provisions of section 141 of the Civil Procedure Code to these proceedings.

15. It will thus be seen that the Bombay and the Madras High Courts have made the provisions of Order 33, Civil Procedure Code, applicable to probate and administration proceedings under the

Indian Succession Act, by virtue of section 141. In my opinion, by virtue of section 141 of the Civil Procedure Code, the provisions of Order 33 of the Civil Procedure Code are equally applicable to applications under section 256(2) of the Income-tax Act and the present petition cannot be dismissed on the preliminary point that a pauper petition cannot be dismissed on the preliminary point that a pauper petition is not maintainable.

16. The petition will now go back to the learned Prothonotary & Senior Master for investigation as to whether the petitioner is in fact a pauper. Cost of this reference shall be costs in the pauper petition.

Order accordingly.

⁶[1966] A.I.R. S.C. 1888

⁷[1938] A.I.R. Mad. 486