PATNA HIGH COURT

Budhi Nath Jha

Vs

Manilal Jadav

Supreme Court Appeal No. 100 of 1958

(V. Ramaswami, C.J., R.K. Choudhary and Kanhaiya Singh, JJ.)

15.10.1958

JUDGMENT

Ramaswami, C.J.

1. This application is made on behalf of the petitioner Budhi Nath Jha for grant of a certificate to appeal to the Supreme Court from a judgment of the High Court in Miscellaneous Judicial Case No. 606 of 1957, dated the 13th February, 1958, by which the order of the Election Tribunal, Santal Parganas, dated the 19th September, 1957, was set aside under the provisions of Article 227 of the Constitution and it was further ordered that the election petition filed by Sri Budhi Nath Jha should be dismissed for non-compliance of the provisions of Section 117 of the Representation of the People Act.

2. It was argued on behalf of the petitioner that leave should be granted under Article 133 of the Constitution because the subject-matter of the dispute is valued at more than Rs. 20,000/-. On behalf of the opposite party it was, however, submitted that the proceeding in the High Court under Article 226 of the Constitution was not a "civil proceeding" within the meaning of Article 133 of the Constitution, and in support of this proposition reliance was placed on the Full Bench decision of this High Court in *Collector of Monghyr v. Pratap Singh Bahadur*[1],

3. It was submitted on behalf of the petitioner that the ratio of the Full Bench decision in AIR 1957 Patna 102, has no application to the present case. It was argued that the Full Bench case dealt with the nature of a proceeding under Article 226 of the Constitution and reached the conclusion that the jurisdiction of the High Court under Article 226 of the Constitution was an extraordinary jurisdiction vested in the High Court not for the purpose of declaring the civil rights of the parties but for the purposes 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. It was pointed out on behalf of the petitioner that in the present case we are concerned with a proceeding under Article 227 of the Constitution, and the nature of jurisdiction under Article 227 is different from the nature of jurisdiction under Article 226 of the Constitution. In my opinion, the argument addressed on behalf of the petitioner must
be accepted as correct. Article 226 of the Constitution states that the High Court shall have power

to issue to any person or authority, including in appropriate cases any Government, directions, orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, for the purposes of enforcing any of the rights conferred by Part III, or for any All these writs are known in English law as prerogative writs, the reason being that they are specially associated with the King's name. These writs were always granted for the protection of public interest and primarily by the Court of the King's Bench. As pointed out by Holdsworth (History of English Law, Volume I, page 212), the power to issue prerogative writs formed no part of the original or the appellate jurisdiction of the Court of King's Bench. As a matter of history, these writs had their origin in the exercise of the King's prerogative power of superintendence over the due observance of the law by his officials and tribunals, and were issued by the Court of King's Bench - habeas corpus, that the King may know whether his subjects were lawfully imprisoned or not; certiorari, that he may know whether any proceedings commenced against them are conformable to the law; mandamus, to ensure that his officials did such acts as they were bound to do under the law, and prohibition, to oblige the inferior tribunals in his realm to function within the limits of their respective jurisdiction. The theory of English law was that the King himself superintended the due course of justice through his own Courts, preventing cases of usurpation of jurisdiction and insisting on vindication of public rights and personal freedom of his subjects. That is the theory of English law, and our Constitution makers have borrowed the conception of prerogative writs from the English law in framing Article 226 of the Constitution.

4. The history of Article 227 of the Constitution is, however, different. There was no power of revision conferred upon the High Courts under the Code of Civil Procedure enacted by the Indian Legislature in 1859. The courts which were then in existence, namely, the Sadar Dewani Adalat and Nizamat Adalat and the Supreme Courts at Calcutta, Bombay and Madras, had no statutory power of revision under that Code. On the 6th of August, 1861, however, the British Parliament passed the High Courts Act (24 and 25 Victoria, Chapter 104), popularly known as the Charter Act. By virtue of this Act, High Courts with Letters Patent were established in 1862. By Section 15 of the Charter Act each of the three High Courts established under the Act was granted the power of superintendence over all courts which were subject to its appellate jurisdiction. Each of the High Courts was further given the power to call for returns and direct the transfer of any suit or appeal from one court to another.

5. The Government of India Act, 1915, repealed the Charter Act, and Section 106 of that Act established the High Courts as Courts of Record and gave them authority and power in accordance with their Letters Patent. By Section 107 of the Government of India Act, 1915, each of the High Courts was given the power of superintendence over all courts subject to its appellate jurisdiction. This legal position continued till the Government of India Act, 1935. Section 224 of that Act made a change in Section 107 of the Government of India Act, 1915, by providing that while every High Court would have superintendence over all courts for the time being subject to its appellate jurisdiction, it would have no jurisdiction to question any judgment of any inferior court which was not otherwise subject to appeal or revision. That was the position when the Constituent Assembly enacted Article 227 of the Constitution, which is in the following terms :-

> "227. (1) Every High Court shall have superintendence over all courts and tribunals throughout the territories in relation to which it exercises jurisdiction.

(2) Without prejudice to the generality of the foregoing provision, the High Court may -
(a) call for returns from such courts;
(b) make and issue general rules and prescribe forms for regulating the practice and proceedings of such courts; and
(c) prescribe forms in which books, entries and accounts shall be kept by the officers of any such courts.
(3) The High Court may also settle tables of fees to be allowed to the sheriff and all clerks and officers of such courts and to attorneys, advocates and pleaders practising therein :
Provided that any rules made, forms prescribed or tables settled under clause (2) or clause (3) shall not be inconsistent with the provision of any law for the time being in force, and shall require the previous approval of the Governor.
(4) Nothing in this article shall be deemed to confer on a High Court powers of superintendence over any court or tribunal constituted by or under any law relating to the Armed Forces."

It is manifest that the nature of jurisdiction conferred upon the High Court under Article 227 of the Constitution is different from that conferred under Article 226. The jurisdiction under Article 227 is not original jurisdiction and there are authorities to support the view that an order of the High Court passed under Article 227 of the Constitution is an order made in exercise of the revisional jurisdiction of the High Court and is not appealable under Clause 15 of the Letters Patent. That is the view taken by the Madras High Court in *In re Tirupuliswamy Naidu*[2], and by the Calcutta High Court in *Sukhendu Bikash v. Hare Krishna*[3], It is also apparent that the power of revision conferred upon the High Court under Article 227 of the Constitution is similar in nature to the appellate power of the High Court, though the power under Article 227 is circumscribed by various limitations. These limitations, however, do not affect the intrinsic quality of the power granted under Article 227 of the Constitution, which is the same as appellate power. It has been pointed out by Subramania Ayyar, J. in *Chapman v. Moidin Kutti*[4], that the essential things to constitute appellate jurisdiction are the existence of the relation of superior and inferior courts and the power of the former to review the decisions of the latter. At page 80-81 of the judgment the following passage occurs :

"This has been well put by Story : - 'The essential criterion of appellate jurisdiction is, that it revises and corrects the proceedings in a cause already instituted and does not create that cause. In reference to judicial tribunals an appellate jurisdiction, therefore, necessarily implies that the subject-matter has been already instituted and acted upon by some other court, whose judgment or proceedings are to be revised," (section 1761, Commentaries on the
Constitution of the United States).

It was, however, argued that, except where the superior court is called upon to revise a decision of the inferior court by a party entitled so to set it in motion, the exercise of the power of revision cannot be said to be an exercise of appellate jurisdiction. This argument clearly misses the true point which is intended to be conveyed and is conveyed by the term appellate jurisdiction. That point is the capital distinction between jurisdiction which is original and jurisdiction which is not

original, irrespective of the circumstances and conditions in which the latter is to be exercised. Those circumstances and conditions are important, no doubt. Clearly they do not affect the abstract character of the jurisdiction but relate only to its application and practical working. 'An appellate jurisdiction', as pointed out by Story in the passage immediately following that already quoted, 'may be exercised in a variety of forms and indeed in any form which the Legislature may choose to prescribe.' Such jurisdiction may be exercisable only in certain specified classes of cases. Its exercise may be claimable by a party as a matter of right or only subject to his obtaining the leave of the court which passed the decision to be appealed against. Again, the power to review or revise may be confined to points of law or may extend to matters of fact also. Clearly, legislative provisions as to such matters only lay down some of the limitations under which the jurisdiction is allowed to be exercised. Nor are the conditions, prescribed by Section 622 for the exercise of the power of revision conferred by it, different in essence from the kind of limitations just above referred to and more commonly imposed by Legislatures on the exercise of appellate functions.

But none of such limitations, however much it may circumscribe the exercise of the power, touches, as already remarked, the intrinsic quality of the power itself. Now, as Section 622 in question gives in terms to this Court the power to revise decisions of courts subordinate to it, it follows that the essential criterion of appellate jurisdiction, enunciated in the above quotation, is present in the case of proceedings held by this Court under that section and that the power exercised in such proceedings is therefore a part of the Court's appellate jurisdiction." It was held in this case by the Madras High Court that an appeal lies against an order made by a Single Judge of the High Court in civil revision under Clause 15 of the Letters Patent when such an order amounts to a judgment. This decision was followed by the Calcutta High Court in *Secretary of State v. British India Steam Navigation Co*[5]*.,* It was held in that case that an order passed by the High Court in exercise of its revisional jurisdiction under Section 115 of the Code of Civil Procedure of 1908 or its power of superintendence under Section 15 of the High Courts Act of 1861, is an order made or passed on appeal within the meaning of Section 39 of the Letters Patent.

6. It is manifest therefore that the history of jurisdiction under Article 227 is different from that of Article 226, and the nature of jurisdiction under Article 227 is also different from the nature of jurisdiction under Article 226 of the Constitution. It follows, that the decision of the Full Bench of this High Court in AIR 1957 Patna 102, does not govern the present case. The question still remains to be answered - whether a proceeding under Article 227 of the Constitution is a "civil proceeding" within the meaning of Article 133 of the Constitution and whether the petitioner has a right of appeal to the Supreme Court under the provisions of Article 133 of the Constitution from an order made by the High Court under Article 227 of the Constitution. I do not propose in this case to determine the larger question, namely, whether every proceeding in the High Court under Article 227 of the Constitution is a "civil proceeding" within the meaning of Article 133 of the Constitution. I shall confine myself to the shorter question, namely, whether the proceeding under Article 227 of the Constitution in the present case with regard to the order of the Election Tribunal of Santal Parganas, dated the 19th September, 1957, is a "civil proceeding" within the meaning of Article 133 of the Constitution. On this point the contention on behalf of the opposite party is that the dispute between the parties relates to an election of the opposite party as a member of the State Legislature and that a dispute of this character was not a "civil proceeding" within the meaning of Article 133 of the Constitution. In support of this argument counsel on behalf of the opposite party referred to the decision of the Supreme Court in *Jagan Nath v.*

Jaswant Singh[6], where Mahajan, C. J. has pointed out that

> "an election contest is not an action at law or a suit in equity but is a purely statutory proceeding unknown to the common law and that the court possesses no common law power." Counsel on behalf of the opposite party referred to similar passages in the judgments of the Supreme Court in two recent cases, namely, *Inamati Mallappa v. Basavaraj Ayyappa*[7], and *Kamaraja Nadar v. Kunju Thevar*[8], I do not, however, accept the argument addressed on behalf of the opposite party as right. In my opinion, the right of a person to stand for election is a civil right, and an election petition challenging the election of a successful candidate raises an issue relating to a civil right between the parties.

The passage from the judgment of the Supreme Court in AIR 1954 SC 210 at p. 212, upon which counsel for the opposite party relied, only emphasises the nature of the remedy and not the quality of the right. That case has no bearing on the question whether the right to stand for election or the right to challenge the election of a successful candidate is a civil right of the aggrieved party. My opinion that such a right is a civil right is borne out by the decision in *Sriramarao v. Suryanarayanamurthi*[9], in which Venkatarama Aiyar, J. held that the Registrar functioning under the Madras Co-operative Societies Act was a civil court within the meaning of that expression in Section 25 of the Madras Debt Conciliation Act. In the course of his judgment it was pointed out by the learned Judge that the courts which decided disputed rights between subjects or between a subject and the State would be civil courts as opposed to criminal courts where the State vindicated wrongs committed against the public, and that courts constituted for deciding on purely civil questions between persons seeking their civil rights must be considered to be civil courts, notwithstanding that they are created by a special statute and are mentioned in that statute as distinct from civil courts. At page 344 of the report the following passage occurs :

> "A civil proceeding is defined in Stroud's Judicial Dictionary as a 'process for the recovery of individual right or redress of individual wrong; inclusive in its proper legal sense of suits by the crown'. Therefore courts which decide
> disputed rights between subjects or between a subject and the State would be civil courts as opposed to criminal courts where the State vindicates wrongs committed against the public. It is in this sense that the words 'civil courts' have been interpreted by the Privy Council in *Nilmoney Singh Deo v. Taranath Mukerjee*[10], That case arose under the Bengal Rent Act 10 of 1859 under which certain classes of rent suits were made exclusively triable by Revenue Officers in accordance with the procedure laid down therein.

The question was whether the Revenue officials exercising the powers under the Act were acting as civil courts. The Act contained several provisions making a distinction between the revenue courts and the civil courts. On the strength of these provisions it was contended that the rent courts were not civil courts. In repelling this contention, Lord Hobhouse observed :

> 'It must be allowed that in those sections there is a certain distinction between the civil courts there spoken of and the rent courts established by the Act, and that the civil courts

> referred in Section 77 and the kindred sections, means civil courts exercising all the powers of civil courts as distinguished from the rent courts which only exercised powers over suits of a limited class.

In that sense there is a distinction between the terms; but it is entirely another question whether the rent court does not remain a civil court in the sense that it is deciding on purely civil questions between persons seeking their civil rights, and whether being a civil court in that sense, it does not fall within the provisions of Act 8 of 1859'."

7. These observations show that courts constituted for 'deciding on purely civil questions between persons seeking their civil rights' must be considered to be civil courts, notwithstanding that they are created by a special statute and are mentioned in that statute as distinct from civil courts. The true import of such a distinction is that while special courts have jurisdiction over a limited class of suits specified in the statute the jurisdiction of the civil courts is not limited to any class of suits. To this extent there is a distinction between the two classes of courts but in respect of the class of suits actually entrusted to the jurisdiction of special courts they perform in relation to them functions which but for the special Act would have been performed by civil courts and to that extent the special courts can be said to be civil courts in a different attire.' The same view has been expressed by Cornelius, J. in *Sultan Ali v. Nur Hussain*[11], and by the Patna High Court in *Abdul Razaq v. Kuldeep Narain*[12], A similar view has been expressed by the Madras High Court in *Mahabaleswarappa v. M. Gopalaswami Mudaliar*[13], the learned Judges have stated as follows :

> "To summarise the effect of these decisions, it would seem that we have to look, not to the source of a tribunal's authority, or to any peculiarity in the method adopted of creating it, (though it is undoubtedly a consideration that it derives its powers mediately or immediately from the Crown) but to the general character of its powers and activities. If it has power to regulate legal
> rights by the delivery of definite judgments, and to enforce its orders by legal sanctions, and if its procedure is judicial in character, in such matters as the taking of evidence and the administration of the oath, then it is a 'Court'. Not only do the powers and procedure of an Election Commissioner respond to these tests, but there is no other test applicable to an undoubted Court which they fail to satisfy."

On the question whether an Election Commissioner was a civil court, the learned Judges stated at page 678 as follows :

> "If an Election Commissioner is a court at all, it would seem indisputable that he must be a 'civil court', because he settles disputes which, but for the existence of this special jurisdiction, would Fall to be decided by the ordinary civil court." It was also pointed out on behalf of the petitioner that under Section 90(1) of the Representation of the People Act the Code of Civil Procedure was made applicable to the trial of election petitions and there is a provision of appeal to the High Court under Section 116A of the Act, which states that the High Court shall follow the same procedure with respect to an appeal as if

the appeal were an appeal from an original decree passed by a civil court situated within the local limits of its civil appellate jurisdiction.

8. For the reasons I have already given, I hold that the proceeding under Article 227 in the present case involves a dispute with regard to the civil rights of the parties and so the proceeding is a civil proceeding before the High Court within the meaning of Article 133 of the Constitution, and the petitioner has accordingly the right of appeal to the Supreme Court from the order of the High Court made in Miscellaneous Judicial Case No. 606 of 1957, dated the 13th February, 1958.

9. I would accordingly allow this application and order that a certificate should be granted to the petitioner for appeal to the Supreme Court under Article 133 (1) (a) of the Constitution.

10. I would accordingly allow this application with costs. Hearing fee Rs. 100/-.

Choudhary, J.

11. I agree.

Kanhaiya Singh, J.

12. I agree.

Application allowed.

Cases Referred.

[1] AIR 1957 Pat 102
[2] AIR 1955 Mad 287
[3] AIR 1953 Cal 636
[4] ILR 22 Mad 68
[5] 13 Cal LJ 90
[6] AIR 1954 SC 210 at p. 212
[7] AIR 1958 SC 698 at p. 701
[8] AIR 1958 SC 687 at p. 693
[9] AIR 1954 Mad 340
[10] 9 Cal 295 (PC)
[11] AIR 1949 Lah 131 at p. 148
[12] AIR 1944 Pat 147
[13] AIR 1935 Mad 673, and at page 677