APPELLATE CIVIL

1952
Aug. 4

Before Mr. M. C. Chagla, Chief Justice, and Mr. Justice Bhagwati.

WALCHANDNAGAR INDUSTRIES, PETITIONER *v.* THE STATE OF BOMBAY AND ANOTHER, RESPONDENTS.*

Constitution of India, art. 226—Powers of the High Court—Discretionary jurisdiction—Principle governing exercise of jurisdiction.

Since 1949 the petitioner had been paying tax to the State of Bombay under the Bombay Sugarcane Cess Act, 1948, without any protest. In 1952 the petitioner applied to the High Court under art. 226 of the Constitution for a writ against the State of Bombay ordering them not to levy and collect the tax. On the question whether it was a proper case for the issue of a writ,

Held, that the jurisdiction under art. 226 of the Constitution is an exceptional and discretionary jurisdiction. Art. 226 is not intended to be a substitute for the ordinary processes of law which are open to a citizen. If a citizen can obtain equally adequate, efficacious and prompt remedy in the ordinary courts of law, the High Court would not exercise its discretion under art. 226.

Held, therefore, that as it was open to the petitioner to pay the tax under protest and file a suit for recovery of the amount paid by him, it was not a proper case for the exercise of the High Court's powers under art. 226 of the Constitution.

Indian Sugar Mills Association v. *Secretary to Government*,[1] and *D. Parraju* v. *General Manager, B. N. Railway*,[2] relied upon.

Sheoshankar v. *M. P. State Government*,[3] *Emperor* v. *Jeshingbhai Ishwarlal*[4] and *Lady Dinbai Petit* v. *M. S. Noronha*,[5] referred to.

Application under art. 226 of the Constitution.

The facts are set out in the judgment.

G. N. Joshi and *R. J. Shah*, with *Desai and Co.* for the petitioner.

M. P. Amin, Advocate General and *M. M. Desai*, with *Little and Co.* for the respondents.

CHAGLA C. J. This is a petition to challenge the constitutionality of the Bombay Sugarcane Cess Act, 1948, being Act LXXXII of 1948. The Act was passed on February 17, 1949, and it came into force on February 23, 1949. The petitioner, which is the Walchandnagar Industries Ltd., has been paying the cess or tax under the Act since 1949, and this petition has

* Civil Application No. 735 of 1952.

[1] [1951] A. I. R. All. 1.
[2] (1952) 56 Cal. W. N. 264.
[3] [1951] A. I. R. Nag. 58.
[4] (1950) 52 Bom. L. R. 544.
[5] (1945) 48 Bom. L. R. 255.

been presented on April 16, 1952, alleging that the tax is illegal and offends against art. 265 of the Constitution, in that it is a tax levied by the State of Bombay otherwise than by authority of law.

The Advocate General has raised certain preliminary objections to the maintainability of this petition. His first objection is that the constitutionality of an Act cannot be challenged by a petition, and in support of that contention he has relied on a judgment of the Nagpur High Court in *Sheoshankar* v. *M. P. State Government.*[1] That judgment was mainly concerned with pointing out that a Court will not grant a merely declaratory decree to a party which was in no way aggrieved by a particular Act. The Court does not exercise an advisory jurisdiction to advise citizens as to whether a particular law is valid or not. It is only a party aggrieved or a party whose rights are affected that can come to the Court and challenge the constitutionality of a law. That decision did not consider, what we have to consider in this case, whether on a petition the constitutionality of an Act can be challenged by a party who is admittedly aggrieved by the operation of that law.

A very interesting and a very able argument has been advanced before us both by the Advocate General and by Mr. Joshi as to the proper construction of art. 226. On the one hand, the Advocate General has contended on the strength of the decision of this Court in *Emperor* v. *Jeshingbhai Ishwarlal*[2] that inasmuch as we are being asked to issue a writ not in support of any fundamental rights under Part III, we must exercise our jurisdiction under art. 226 in conformity with well known judicial precedents accepted by this Court. On the other hand, Mr. Joshi has contended that on a true construction of art. 226 we are not debarred by any judicial restrictions in issuing any order or direction if we are satisfied that justice demands it. It is further pointed out by the Advocate General that if we follow the judicial precedents with regard to the issuing of writs, then in this particular case the writ cannot issue because what the Court is being asked to do is to issue a mandamus upon the State of Bombay prohibiting the State from enforcing a particular law, and the Advocate General relies on *Lady Dinbai Petit's case*[3] for the proposition that when a writ of mandamus is asked for the legality of the statute must be assumed and the officer must be called upon to do or forbear to do some act which is either enforced upon

[1] [1951] A. I. R. Nag. 58.
[2] (1950) 52 Bom. L. R. 544.
[3] (1945) 48 Bom. L. R. 255.

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him or which he is bound not to do under the statute itself. When a writ of mandamus is asked for, the petitioner cannot challenge the constitutionality of the Act. It is on the assumption that the Act is valid and constitutional that the petition for mandamus can be maintained. As against this Mr. Joshi has contended that although the decision in *Emperor* v. *Jeshingbhai Ishwarlal*[1] may have been good law before the Constitution was enacted, now by reason of art. 226 it is open to the petitioner to challenge the constitutionality of the Act and to ask the Court to compel Government to forbear from doing something which is illegal, because what the Government is doing is under a law which is an invalid law. In our opinion it is not necessary to decide these very interesting questions because our decision on the preliminary issue can be restricted to a very narrow compass.

Now, it is not disputed by Mr. Joshi, as indeed he cannot, that whatever may be the interpretation of Article 226 and however wide our jurisdiction may be under that Article, the jurisdiction that we exercise is an exceptional jurisdiction and a discretionary jurisdiction. It is not suggested—and I do not think it can be suggested—that art. 226 was intended to be a substitute for the ordinary process of law which are open to a citizen. It was never the intention of our Constitution makers that art. 226 should supplant the ordinary remedies open to a citizen. If that had been the case, then it would have been left to the option of a party aggrieved whether to file a suit in the ordinary Court of law or to approach us to exercise our jurisdiction under art. 226. Surely that could not be the interpretation of art. 226. Once it is conceded, as it is conceded by Mr. Joshi, that the exercises of our jurisdiction under art. 226 is discretionary, certain principles must be laid down for the exercise of that discretionary jurisdiction, and one of the most important principles is that if a citizen can obtain equally adequate, equally efficacious, equally prompt remedy in the ordinary Courts of law, ordinarily this Court would not exercise its discretion in his favour under art. 226. It may be that there may be cases where even though an alternative adequate remedy may exist, this Court under special circumstances may issue a writ or order or direction under art. 226. But, as I shall presently point out this is not an exceptional case which requires an exceptional remedy.

(1) (1950) 52 Bom. L. R. 544.

Now, several High Courts have considered the discretionary nature of the jurisdiction conferred upon the High Court under art. 226. The Allahabad High Court in *Indian Sugar Mills Association* v. *Secretary to Government*,[1] has emphasized the fact that:

"Art. 226 of the Constitution is not intended to provide an alternative method of redress to the normal process of a decision in an action brought in the usual Courts established by law. The powers under this Article should be sparingly used and only in those clear cases where the rights of a person have been seriously infringed and he has no other adequate and specific remedy available to him. The Calcutta High Court has taken the same view in *D. Parraju* v. *General Manager, B. N. Railway*,[2] and it is pointed out by Mr. Justice Das at p. 269, that

"In spite of the wide words of Article 226, one must remember that the object of art. 32 or art. 226 was not to supplant the ordinary right of action or the remedy provided for by the ordinary law of the land. If a suitor can get an adequate and convenient and beneficial remedy by the normal process of a suit or by the remedy provided for by a statute, the High Court will not, in my opinion, ordinarily exercise its powers under art. 226."

Therefore, emphasis has been put by these High Courts upon the fact that however wide the jurisdiction, however great the power conferred upon the High Court, however necessary its exercise may be, this power and this jurisdiction must be sparingly used, and therefore the question we have to address ourselves in this case is whether this is a proper case for exercising our discretion. As pointed out, the Act came into force on February 23, 1949. From 1949 to 1952 the petitioner unquestionably has been paying the tax under that Act. It was open to the petitioner to pay the tax under protest and to file a suit for recovery of the amount paid by him. He has not chosen to do so. Mr. Joshi says that the petitioner might have realized that the Act was unconstitutional only in 1952 and therefore he has come to us by way of this petition. Even if he realized that the Act was unconstitutional in 1952, there was nothing to prevent him, after paying the tax under protest, to file a suit for the recovery of the amount paid by him. It is not suggested that the petitioner is not in a position to pay the tax imposed by the Act. No prejudice is pointed out by the delay that might take place by the matter being decided by ordinary procedure rather than under art. 226. Therefore this is a case frankly where the petitioner has chosen to come for a writ under art. 226 rather than to go to the ordinary Court and get his rights

[1] [1951] A. I. R. All. 1.

[2] (1951-52) 56 Cal. W. N. 264.

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decided by ordinary litigation. We cannot accept the position that it is left to the petitioner's choice and option to decide which remedy he will adopt. This is clearly a case where an alternative adequate and efficacious remedy is open to the petitioner. This is clearly a case where the decision of the petitioner's right by the ordinary procedure in the Courts of law will in no way prejudice him, and therefore we do not think that we should exercise our special jurisdiction under art. 226 to issue a writ, even assuming that the petitioner's contention is right that the Act is unconstitutional.

The result is that the petition fails and is dismissed with costs.

Rule discharged.

K. B. S.

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MALLIKARJUN BHAVANI TIRUMALE *v.* SATYANARAYAN LAXMINARAYAN HEGDE AND OTHERS.*

Bombay Tenancy and Agricultural Lands Act (Bom. LXVII of 1948), ss. 24, 25, 29—Tenant committing default in payment of rent—Application by landlord for recovery of possession—No provision in Act for notice of termination of tenancy before making application—Bombay Revenue Tribunal taking contrary view—Error in decision apparent on face of record—Jurisdiction of High Court to correct error by writ of certiorari.

Where the decision of a Tribunal is merely erroneous, the High Court cannot interfere however erroneous that decision may be; but if its decision is vitiated by an error apparent on the face of the record, then the High Court would correct it by a writ of *certiorari*.

Perry and Co. Ltd. v. *Commercial Employee's Association, Madras*,[1] referred to.

There is no provision in the Bombay Tenancy and Agricultural Lands Act, 1948, which makes it incumbent upon the landlord to give notice of termination of the tenancy when the tenant fails to pay rent. If, therefore, the Tribunal, importing into the Act its own ideas of what is reasonable, holds such notice to be necessary to enable the landlord to make an application to the Mamlatdar under s. 29 of the Act, its decision is manifestly wrong and the error is patent inasmuch as the Tribunal acts in conscious violation of the Tenancy Act and its provisions.

* Special Civil Application No. 319 of 1952.

[1] (1952) 3 S. C. R. 519.